FEDERAL REGISTER

Vol. 87 Wednesday
No. 196 October 12, 2022

Pages 61441–61948

OFFICE OF THE FEDERAL REGISTER

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

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How To Cite This Publication: Use the volume number and the page number. Example: 87 FR 12345.

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Presidential Documents

Title 3—

The President

Proclamation 10467 of October 6, 2022

Granting Pardon for the Offense of Simple Possession of Marijuana

By the President of the United States of America

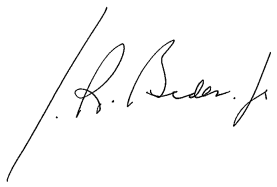
A Proclamation

Acting pursuant to the grant of authority in Article II, Section 2, of the Constitution of the United States, I, Joseph R. Biden Jr., do hereby grant a full, complete, and unconditional pardon to (1) all current United States citizens and lawful permanent residents who committed the offense of simple possession of marijuana in violation of the Controlled Substances Act, as currently codified at 21 U.S.C. 844 and as previously codified elsewhere in the United States Code, or in violation of D.C. Code 48–904.01(d)(1), on or before the date of this proclamation, regardless of whether they have been charged with or prosecuted for this offense on or before the date of this proclamation; and (2) all current United States citizens and lawful permanent residents who have been convicted of the offense of simple possession of marijuana in violation of the Controlled Substances Act, as currently codified at 21 U.S.C. 844 and as previously codified elsewhere in the United States Code, or in violation of D.C. Code 48–904.01(d)(1); which pardon shall restore to them full political, civil, and other rights.

My intent by this proclamation is to pardon only the offense of simple possession of marijuana in violation of Federal law or in violation of D.C. Code 48–904.01(d)(1), and not any other offenses related to marijuana or other controlled substances. No language herein shall be construed to pardon any person for any other offense, including possession of other controlled substances, whether committed prior, subsequent, or contemporaneous to the pardoned offense of simple possession of marijuana. This pardon does not apply to individuals who were non-citizens not lawfully present in the United States at the time of their offense.

Pursuant to this proclamation, the Attorney General, acting through the Pardon Attorney, shall administer and effectuate the issuance of certificates of pardon to eligible applicants who have been charged or convicted for the offense of simple possession of marijuana in violation of the Controlled Substances Act, as currently codified at 21 U.S.C. 844 and as previously codified elsewhere in the United States Code, or in violation of D.C. Code 48–904.01(d)(1). The Attorney General, acting through the Pardon Attorney, is directed to develop and announce application procedures for certificates of pardon and to begin accepting applications in accordance with such procedures as soon as reasonably practicable. The Attorney General, acting through the Pardon Attorney, shall review all properly submitted applications and shall issue certificates of pardon to eligible applicants in due course.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of October, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-seventh.



[FR Doc. 2022–22262
Filed 10–11–22; 8:45 am]
Billing code 3395–F3–P

Presidential Documents

Proclamation 10468 of October 6, 2022

National Manufacturing Day, 2022

By the President of the United States of America

A Proclamation

Manufacturing is the backbone of America, powering our economy and building our middle class. Over the past year and a half, we have been making ''Buy American'' a reality, not just a slogan, and bringing jobs and companies home. This year's National Manufacturing Day comes in the midst of an American manufacturing boom, as we celebrate the strength and resilience of the American worker and recommit to the investments and innovation that will ensure the future is Made in America.

Throughout the pandemic, even as factories closed and supply chains stalled, American workers showed incredible ingenuity and resolve to keep our country moving forward. Today, we are experiencing the strongest manufacturing rebound at this point in a presidency in 3 decades, adding 668,000 manufacturing jobs since my Administration began. Employers have announced $200 billion in new manufacturing investments here since 2021, and manufacturing construction has more than doubled as companies are betting on America again. But to really guarantee our economic strength and national security, we have to do more by investing in infrastructure, innovation, and our own supply chains to bring prices down and good-paying union jobs home.

That is why last fall, I signed the Bipartisan Infrastructure Law, a once-in-a-generation investment in America's roads, bridges, railways, and ports, which will boost demand for American iron, steel, and construction materials. It is why we are helping to train the workforce of the future—supporting STEM education and tech hubs across the country, pushing companies to partner with community colleges and technical schools, and bolstering Registered Apprenticeships and pre-apprenticeship programs funded by the American Rescue Plan. It is why we are using the Government's purchasing power to grow the market for American-made goods. One of the first things I did as President was tighten Federal ''Buy American'' provisions, raising the amount of required domestic content from 55 percent to 75 percent. When the Federal Government spends taxpayer dollars, it should spend them on American-made products.

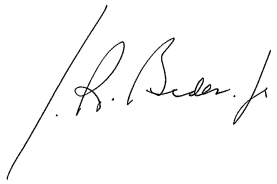
Meanwhile, we are investing in tomorrow's biggest industries—clean energy; advanced biotechnology; quantum computing; and semiconductors, the computer chips that power everything from smartphones to dishwashers and cars. In August, I signed the CHIPS and Science Act, securing significant funding for domestic manufacturing and research and development. America invented the semiconductor; this law brings it back home—and it is already drawing tens of billions of dollars in private-sector investment and will create tens of thousands of jobs. I also recently signed the game-changing Inflation Reduction Act, which allocates a record $369 billion to fight climate change, boosting demand for energy-efficient appliances, homes, and cars and creating millions of good-paying clean-energy and clean-manufacturing jobs.

America is the only Nation in the world that can be defined in a single word: possibilities. American manufacturing makes those possibilities real. Today, on National Manufacturing Day, thousands of manufacturers across

the country are opening their doors to give a new generation of students, teachers, and builders a glimpse of the opportunities that a career in modern manufacturing offers. We stand with them and commit to winning not just the jobs of today but the jobs and industries of tomorrow. The United States is in a position to outcompete the world once again.

NOW, THEREFORE, I, JOSEPH R. BIDEN JR., President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim October 7, 2022, as National Manufacturing Day. I encourage all Americans to look for ways to get involved in your community and join me in participating in National Manufacturing Day, and, most importantly, buy American.

IN WITNESS WHEREOF, I have hereunto set my hand this sixth day of October, in the year of our Lord two thousand twenty-two, and of the Independence of the United States of America the two hundred and forty-seventh.



[FR Doc. 2022–22263
Filed 10–11–22; 8:45 am]
Billing code 3395–F3–P

Rules and Regulations

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0467; Project Identifier AD–2022–00174–E; Amendment 39–22196; AD 2022–20–12]

RIN 2120–AA64

Airworthiness Directives; General Electric Company Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain General Electric Company (GE) GEnx–1B and GEnx–2B model turbofan engines. This AD was prompted by the detection of melt-related freckles in the forgings and billets, which may reduce the life of certain compressor discharge pressure (CDP) seals, interstage seals, high-pressure turbine (HPT) rotor stage 2 disks, and stages 6–10 compressor rotor spools. This AD requires revising the airworthiness limitations section (ALS) of the applicable GEnx–1B and GEnx–2B Engine Manual (EM) and the operator's existing approved maintenance program or inspection program, as applicable, to incorporate reduced life limits for these parts. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 16, 2022.

ADDRESSES:

AD Docket: You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2022–0467; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Alexei Marqueen, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7178; email: *Alexei.T.Marqueen@faa.gov*.

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain GE GEnx–1B54/P2, GEnx–1B58/P2, GEnx–1B64/P2, GEnx–1B67/P2, GEnx–1B70/P2, GEnx–1B70C/P2, GEnx–1B70/72/P2, GEnx–1B70/75/P2, GEnx–1B74/75/P2, GEnx–1B75/P2, GEnx–1B76/P2, GEnx–1B76A/P2, and GEnx–1B78/P2 (GEnx–1B) and GEnx–2B67, GEnx–2B67B, and GEnx–2B67/P (GEnx–2B) model turbofan engines. The NPRM published in the **Federal Register** on June 1, 2022 (87 FR 33071). The NPRM was prompted by the engine manufacturer notifying the FAA of the detection of melt-related freckles in the forgings and billets, which may reduce the life of certain CDP seals, interstage seals, HPT rotor stage 2 disks, and stages 6–10 compressor rotor spools (life-limited parts (LLPs)). The manufacturer's investigation determined that, as a result of such freckles forming in the forgings and billets, certain LLPs may have undetected subsurface anomalies that developed during the manufacturing process, resulting in reduced material properties and a lower fatigue life capability. Reduced material properties may cause premature LLP fracture, which could result in uncontained debris release. As a result of its investigation, the manufacturer determined the need to reduce the life limits of certain LLPs. To reflect these reduced life limits, the manufacturer revised the ALS of the affected GEnx–1B and GEnx–2B EMs. In the NPRM, the FAA proposed to require operators to update the ALS of the applicable GEnx–1B and GEnx–2B EM and the operator's existing approved maintenance program or inspection program, as applicable, to incorporate reduced life limits for certain LLPs. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from seven commenters. The commenters were Air China, Air Line Pilots Association, International (ALPA), American Airlines (AAL), GE, The Boeing Company (Boeing), TUI Airways, and United Airlines Powerplant Engineering (United Airlines). ALPA, Boeing, and United Airlines supported the proposed AD without change. AAL supported the proposed AD, with one comment relating to the service information. Three commenters, Air China, GE, and TUI Airways, requested changes to the proposed AD. The following presents the comments received on the NPRM and the FAA's response to each comment.

Request To Update Service Information

AAL and GE noted that the preamble of the NPRM refers to service information that has been superseded. GE published GE GEnx–1B Service Bulletin (SB) 72–0484 R01, dated March 17, 2022 (GE GEnx–1B SB 72–0484 R01), and GE GEnx–2B SB 72–0423 R01, dated March 17, 2022 (GE GEnx–2B SB 72–0423 R01). The revisions contain corrections to serial number errors published in the original service information. GE requested that the FAA update the service information to reflect the current revisions to avoid confusion among the operators.

The FAA agrees and updated the Related Service Information paragraph in the preamble of this final rule to reference GE GEnx–1B SB 72–0484 R01 and GE GEnx–2B SB 72–0423 R01. This change places no additional burden on operators who are required to comply with this AD.

Requests To Modify the Tables to Paragraph (g)

Air China noted that there is a revision to the service information in tables 5 through 8 to paragraph (g)(2) of the proposed AD. The commenter requested that the FAA modify the service information in the tables from ''GEnx–2B SB 72–0423, latest revision'' to ''GEnx–2B SB 72–0423 R01 revision.''

The FAA disagrees. Paragraph (g)(2) of this AD requires the operator to revise the ALS of the applicable GEnx–2B EM and the operator's existing approved maintenance program or inspection

program, as applicable, by inserting the information in the tables to paragraph (g)(2) into the applicable table for their respective part numbers. The description of the service information in the tables to paragraph (g) of this AD is consistent with the description of the service information in the applicable tables in the ALS. The FAA did not change this AD as a result of this comment.

GE requested that the FAA clarify the wording in the proposed AD regarding parts not affected or listed in GE GEnx–1B SB 72–0484 R01 and GE GEnx–2B SB 72–0423 R01. The commenter noted that the proposed AD includes updating the ALS language for parts not affected by the population listed in GE GEnx–1B SB 72–0484 and GE GEnx–2B SB 72–0423. GE requested that the FAA modify the tables to paragraph (g) of this AD to remove the life cycles for part serial numbers not listed in GE GEnx–1B SB 72–0484 and GE GEnx–2B SB 72–0423. If such modifications cannot be done, GE requested that the FAA add language to clarify that future LLP life extensions on part serial numbers not listed in the SB populations would not require an alternative method of compliance (AMOC).

The FAA agrees with the modification. The FAA revised the tables to paragraph (g) of this AD to remove the entries for life cycles for part serial numbers not listed in the service information. This change places no additional burden on operators who are required to comply with this AD.

Responsibility for Revising the EM

Air China commented that paragraph (g)(2) of the proposed AD states to ''revise the ALS of the existing GEnx–2B EM.'' The commenter stated that the responsibility for revising the EM belongs to the manufacturer, not the operator.

The FAA disagrees. While the manufacturer does revise the engine manuals, this AD requires the operator to revise the ALS of the existing GEnx–2B EM and the operator's existing approved maintenance program or inspection program, as applicable. This includes revising the operator's copies of the EM to incorporate the reduced life limits for certain LLPs. The FAA did not change this AD as a result of this comment.

Request To Confirm Compliance With Previous Actions

Air China stated that it performed certain required actions proposed in paragraph (g)(2) of the NPRM using GE GEnx–2B SB 72–0423 before the NPRM was issued:

1. For the affected LLPs that had already been installed on GEnx–2B67/P engines of Air China, Air China listed the LLPs' time limits in the continuous airworthiness maintenance program.

2. For the affected LLPs that were not installed on GEnx–2B67/P engines of Air China, Air China issued engineering order documents that prohibit the installation of affected LLPs on the Air China GEnx–2B67/P fleet.

Air China asked if the FAA would consider these actions as being in compliance with the proposed requirements in paragraph (g)(2) of the proposed AD.

In response to this comment, the FAA notes that paragraph (g)(2) of this AD requires the operator to revise the ALS of the existing GEnx–1B EM and the operator's existing approved maintenance program or inspection program, as applicable, by inserting the information in the tables to paragraph (g)(2) into the applicable table for their respective part numbers. This AD requires revising the life limits with the entirety of the information provided in the tables to paragraph (g)(2) of this AD, regardless of the installation of affected parts. Additionally, this AD does not contain an installation prohibition.

Request To Allow for Pro-Rated Life Calculations

TUI Airways requested that the FAA add an allowance for pro-rated life calculations to this AD. TUI Airways noted that paragraph (g)(3) of the proposed AD states, ''After performing the actions required by paragraphs (g)(1) and (2) of this AD, except as provided in paragraph (h) of this AD, no alternative life limits may be approved for the affected parts.'' TUI Airways suggested that this statement does not consider parts that have or could operate at different engine ratings or are common to two or more engine models. The commenter reasoned that a part common to multiple engine ratings or models could have different life cycle limits depending on the engine application, and therefore, a pro-rated calculation (per GE EM 05–11–00) could be made to determine the remaining cycles of the given part.

The FAA does not agree. The intent of this AD is to revise the ALS of the existing GEnx–1B and GEnx–2B EMs and the operator's existing approved maintenance or inspection program with the updated life limits provided in paragraph (g) of this AD. This AD does not prohibit pro-rated life limit calculations, but the FAA cautions that such calculations performed prior to the effective date of this AD may need to be re-evaluated using the new life limits provided in paragraph (g) of this AD. The FAA did not change this AD as a result of this comment.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information

The FAA reviewed GE GEnx–1B SB 72–0484 R01, dated March 17, 2022, and GE GEnx–2B SB 72–0423 R01, dated March 17, 2022. These SBs, differentiated by engine model, provide the reduced life limits for certain LLPs.

Costs of Compliance

The FAA estimates that this AD affects 390 engines installed on airplanes of U.S. registry.

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

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Revise ALS of EM and the operator's existing approved maintenance or inspection program.	1 work-hour × $85 per hour = $85.	$0	$85	$33,150

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2022–20–12 General Electric Company: Amendment 39–22196; Docket No. FAA–2022–0467; Project Identifier AD–2022–00174–E.

(a) Effective Date

This airworthiness directive (AD) is effective November 16, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to General Electric Company (GE) GEnx–1B54/P2, GEnx–1B58/P2, GEnx–1B64/P2, GEnx–1B67/P2, GEnx–1B70/P2, GEnx–1B70C/P2, GEnx–1B70/72/P2, GEnx–1B70/75/P2, GEnx–1B74/75/P2, GEnx–1B75/P2, GEnx–1B76/P2, GEnx–1B76A/P2, GEnx–1B78/P2, GEnx–2B67, GEnx–2B67B, and GEnx–2B67/P model turbofan engines.

(d) Subject

Joint Aircraft System Component Code 7230, Turbine Engine Compressor Section; 7250, Turbine Section.

(e) Unsafe Condition

This AD was prompted by the detection of melt-related freckles in the forgings and billets, which may reduce the life of certain compressor discharge pressure (CDP) seals, interstage seals, high-pressure turbine (HPT) rotor stage 2 disks, and stages 6–10 compressor rotor spools. The FAA is issuing this AD to prevent failure of the CDP seal, interstage seal, HPT rotor stage 2 disk, and stages 6–10 compressor rotor spool. The unsafe condition, if not addressed, could result in uncontained debris release, damage to the engine, and damage to the airplane.

(f) Compliance

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

(g) Required Actions

(1) For all affected GEnx–1B model turbofan engines, within 90 days after the effective date of this AD, revise the airworthiness limitations section (ALS) of the existing GEnx–1B Engine Manual (EM) and the operator's existing approved maintenance program or inspection program, as applicable, by inserting the following information into the applicable table for their respective part numbers:

(i) For stages 6–10 compressor rotor spool, part number (P/N) 2628M56G01, insert the information in Table 1 to paragraph (g)(1)(i) of this AD.

TABLE 1 TO PARAGRAPH (g)(1)(i)—STAGES 6–10 COMPRESSOR ROTOR SPOOL, P/N 2628M56G01

Part name	Part No.	Life cycles –1B54/P2	Life cycles –1B58/P2 –1B64/P2 –1B67/P2 –1B70/P2	Life cycles –1B70C/P2	Life cycles –1B70/72/P2 –1B70/75/P2 –1B74/75/P2 –1B75/P2	Life cycles –1B76/P2	Life cycles –1B76A/P2	Life cycles –1B78/P2
Spool, Stage 6–10.	2628M56G01 For part serial numbers listed in Table 1 of GEnx–1B SB 72–0484, latest revision.	10,300	10,300	10,300	10,300	8,500	8,500	8,500
Spool, Stage 6–10.	2628M56G01 For part serial numbers listed in Table 2 of GEnx–1B SB 72–0484, latest revision.	5,700	5,700	5,700	5,700	4,800	4,800	4,800

(ii) For CDP seal, P/N 2383M82P03, insert the information in Table 2 to paragraph (g)(1)(ii) of this AD.

TABLE 2 TO PARAGRAPH (g)(1)(ii)—CDP SEAL, P/N 2383M82P03

Part name	Part No.	Life cycles –1B54/P2	Life cycles –1B58/P2 –1B64/P2 –1B67/P2 –1B70/P2	Life cycles –1B70C/P2	Life cycles –1B70/72/P2 –1B70/75/P2 –1B74/75/P2 –1B75/P2	Life cycles –1B76/P2	Life cycles –1B76A/P2	Life cycles –1B78/P2
Seal, CDP.	2383M82P03 For part serial numbers listed in Table 3 of GEnx–1B SB 72–0484, latest revision.	6,100	6,100	6,100	6,100	5,300	5,300	5,300
Seal, CDP.	2383M82P03 For part serial numbers listed in Table 4 of GEnx–1B SB 72–0484, latest revision.	13,400	13,400	13,400	13,400	9,300	9,300	9,300
Seal, CDP.	2383M82P03 For part serial numbers listed in Table 5 of GEnx–1B SB 72–0484, latest revision.	3,600	3,600	3,600	3,600	2,900	2,900	2,900

(iii) For interstage seal, P/N 2383M85P04, insert the information in Table 3 to paragraph (g)(1)(iii) of this AD.

TABLE 3 TO PARAGRAPH (g)(1)(iii)—INTERSTAGE SEAL, P/N 2383M85P04

Part name	Part No.	Life cycles –1B54/P2	Life cycles –1B58/P2 –1B64/P2 –1B67/P2 –1B70/P2	Life cycles –1B70C/P2	Life cycles –1B70/72/P2 –1B70/75/P2 –1B74/75/P2 –1B75/P2	Life cycles –1B76/P2	Life cycles –1B76A/P2	Life cycles –1B78/P2
Seal, Interstage.	2383M85P04 For part serial numbers listed in Table 6 of GEnx–1B SB 72–0484, latest revision.	10,500	10,500	10,500	10,500	6,400	6,400	6,400
Seal, Interstage.	2383M85P04 For part serial numbers listed in Table 7 of GEnx–1B SB 72–0484, latest revision.	15,000	15,000	15,000	15,000	10,500	10,500	10,500
Seal, Interstage.	2383M85P04 For part serial numbers listed in Table 8 of GEnx–1B SB 72–0484, latest revision.	5,500	5,500	5,500	5,500	2,800	2,800	2,800

(iv) For HPT rotor stage 2 disk, P/N 2383M86P02, insert the information in Table 4 to paragraph (g)(1)(iv) of this AD.

TABLE 4 TO PARAGRAPH (g)(1)(iv)—HPT ROTOR STAGE 2 DISK, P/N 2383M86P02

Part name	Part No.	Life cycles –1B54/P2	Life cycles –1B58/P2 –1B64/P2 –1B67/P2 –1B70/P2	Life cycles –1B70C/P2	Life cycles –1B70/72/P2 –1B70/75/P2 –1B74/75/P2 –1B75/P2	Life cycles –1B76/P2	Life cycles –1B76A/P2	Life cycles –1B78/P2
Disk, Stage 2.	2383M86P02 For part serial numbers listed in Table 9 of GEnx–1B SB 72–0484, latest revision.	6,900	6,900	6,900	6,900	5,100	5,100	5,100
Disk, Stage 2.	2383M86P02 For part serial numbers listed in Table 10 of GEnx–1B SB 72–0484, latest revision.	10,400	10,400	10,400	10,400	7,500	6,800	7,500
Disk, Stage 2.	2383M86P02 For part serial numbers listed in Table 11 of GEnx–1B SB 72–0484, latest revision.	3,800	3,800	3,800	3,800	3,000	3,000	3,000

(2) For all affected GEnx–2B model turbofan engines, within 90 days after the effective date of this AD, revise the ALS of the existing GEnx–2B EM and the operator's existing approved maintenance program or inspection program, as applicable, by inserting the following information into the applicable table for their respective part numbers:

(i) For stages 6–10 compressor rotor spool, P/N 2628M56G01, insert the information in Table 5 to paragraph (g)(2)(i) of this AD.

TABLE 5 TO PARAGRAPH (g)(2)(i)—STAGES 6–10 COMPRESSOR ROTOR SPOOL, P/N 2628M56G01

Part name	Part No.	Life cycles –2B67	Life cycles –2B67B	Life cycles –2B67/P
Spool, Stage 6–10.	2628M56G01 For part serial numbers listed in Table 1 of GEnx–2B SB 72–0423, latest revision.	.....	.....	10,300
Spool, Stage 6–10.	2628M56G01 For part serial numbers listed in Table 2 of GEnx–2B SB 72–0423, latest revision.	.....	.....	5,700

(ii) For CDP seal, P/N 2383M82P03, insert the information in Table 6 to paragraph (g)(2)(ii) of this AD.

TABLE 6 TO PARAGRAPH (g)(2)(ii)—CDP SEAL, P/N 2383M82P03

Part name	Part No.	Life cycles –2B67	Life cycles –2B67B	Life cycles –2B67/P
Seal, CDP	2383M82P03 For part serial numbers listed in Table 3 of GEnx–2B SB 72–0423, latest revision.	.....	.....	6,100
Seal, CDP	2383M82P03 For part serial numbers listed in Table 4 of GEnx–2B SB 72–0423, latest revision.	.....	.....	13,400
Seal, CDP	2383M82P03 For part serial numbers listed in Table 5 of GEnx–2B SB 72–0423, latest revision.	.....	.....	3,600

(iii) For interstage seal, P/N 2383M85P04, insert the information in Table 7 to paragraph (g)(2)(iii) of this AD.

TABLE 7 TO PARAGRAPH (g)(2)(iii)—INTERSTAGE SEAL, P/N 2383M85P04

Part name	Part No.	Life cycles –2B67	Life cycles –2B67B	Life cycles –2B67/P
Seal, Interstage ...	2383M85P04 For part serial numbers listed in Table 6 of GEnx–2B SB 72–0423, latest revision.	.....	.....	10,500
Seal, Interstage ...	2383M85P04 For part serial numbers listed in Table 7 of GEnx–2B SB 72–0423, latest revision.	.....	.....	15,000
Seal, Interstage ...	2383M85P04 For part serial numbers listed in Table 8 of GEnx–2B SB 72–0423, latest revision.	.....	.....	5,500

(iv) For HPT rotor stage 2 disk, P/N 2383M86P02, insert the information in Table 8 to paragraph (g)(2)(iv) of this AD.

TABLE 8 TO PARAGRAPH (g)(2)(iv)—HPT ROTOR STAGE 2 DISK P/N, 2383M86P02

Part name	Part No.	Life cycles –2B67	Life cycles –2B67B	Life cycles –2B67/P
Disk, Stage 2	2383M86P02 For part serial numbers listed in Table 9 of GEnx–2B SB 72–0423, latest revision.	.....	.....	6,900
Disk, Stage 2	2383M86P02 For part serial numbers listed in Table 10 of GEnx–2B SB 72–0423, latest revision.	.....	.....	10,400
Disk, Stage 2	2383M86P02 For part serial numbers listed in Table 11 of GEnx–2B SB 72–0423, latest revision.	.....	.....	3,800

(h) Alternative Methods of Compliance (AMOCs)

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

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

(i) Related Information

For more information about this AD, contact Alexei Marqueen, Aviation Safety Engineer, ECO Branch, FAA, 1200 District Avenue, Burlington, MA 01803; phone: (781) 238–7178; email: *Alexei.T.Marqueen@faa.gov*.

(j) Material Incorporated by Reference

None.

Issued on September 19, 2022.

Christina Underwood,

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

[FR Doc. 2022–22061 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2022–0802; Project Identifier AD–2021–01094–R; Amendment 39–22210; AD 2022–21–11]

RIN 2120–AA64

Airworthiness Directives; Bell Textron Inc. Helicopters and Various Restricted Category Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: The FAA is adopting a new airworthiness directive (AD) for certain Bell Textron Inc. Model 204B, 205A, and 205A–1 helicopters and various restricted category helicopters. This AD was prompted by a report of cracked main rotor blades (MRBs). This AD requires repetitive inspections of each MRB and removing any cracked MRB from service. The FAA is issuing this AD to address the unsafe condition on these products.

DATES: This AD is effective November 16, 2022.

ADDRESSES: For service information identified in this final rule, contact Bell Textron, Inc., P.O. Box 482, Fort Worth, TX, 76101, United States; phone: (800) 363–8023; website: *bellflight.com/support/*. You may view this service information at the FAA, Office of the Regional Counsel, Southwest Region, 10101 Hillwood Pkwy., Room 6N–321, Fort Worth, TX 76177. For information on the availability of this material at the FAA, call (817) 222–5110.

Examining the AD Docket

You may examine the AD docket at *regulations.gov* by searching for and locating Docket No. FAA–2022–0802; or in person at Docket Operations between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The AD docket contains this final rule, any comments received, and other information. The address for Docket Operations is U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Hye Yoon Jang, Aerospace Engineer, Delegation Oversight Section, DSCO Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5190; email *hye.yoon.jang@faa.gov.*

SUPPLEMENTARY INFORMATION:

Background

The FAA issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 by adding an AD that would apply to certain serial-numbered Bell Textron Inc. Model 204B, 205A, and 205A–1 helicopters, and all restricted category Model HH–1K, SW205A–1, TH–1F, TH–1L, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and UH–1P helicopters, with MRB part number (P/N) 204–011–250–001, –005, –009, –113, or –117 installed.

The NPRM published in the **Federal Register** on June 29, 2022 (87 FR 38686). The NPRM was prompted by reports of chordwise cracks in MRB P/N 204–011–250–113. The cracks originated from the extreme trailing edge between blade station 190 and 210; this area is currently not inspected during routine maintenance. In the NPRM, the FAA proposed to require cleaning certain areas of the upper and lower skin surfaces of each MRB with a cheesecloth. If the cheesecloth is snagged or frayed while cleaning an MRB, removing paint from the area that caused the snagging and then either visually or eddy current inspecting the area for a crack would be required. The NPRM also proposed to require wiping each MRB with isopropyl alcohol and immediately after the blade dries, inspecting the area for a dark line, which is an indication that excess alcohol is bleeding out of a crack or edge void. If there is a dark line, removing paint from the area where there is a dark line and inspecting for a crack in the skin would be required. Finally, the NPRM proposed to require removing any cracked MRB from service. The FAA is issuing this AD to address the unsafe condition on these products.

Discussion of Final Airworthiness Directive

Comments

The FAA received comments from one commenter, Salmon River Helicopters (SRH). SRH commented about allowing a pilot to accomplish the daily (before first flight of each day) inspection. The following presents the comment received on the NPRM and the FAA's response.

Comment Regarding the Before the First Flight of Each Day Inspection

SRH asked whether a pilot may accomplish the daily (before the first flight of each day) inspection. SRH stated that it has never had an issue with blade cracking between blade stations 190 and 210, and is unaware of reported accidents due to blade cracking within those stations. SRH further stated that many operators, like SRH, do not staff a mechanic every day of flight and it would be a significant disadvantage to do so.

The FAA partially agrees. The FAA agrees to allow the owner/operator (pilot) to accomplish the actions required by paragraph (g)(1)(i) of this AD because it only involves cleaning with a cheesecloth and visually checking for unsmooth areas and surfaces that snag the cheesecloth or cause it to fray. These actions could be performed equally well by a pilot or a mechanic, and is an exception to the FAA's standard maintenance regulations. The FAA disagrees with a pilot accomplishing the remaining required actions because those actions must be accomplished by a mechanic that meets the requirements of 14 CFR part 65 subpart D.

Conclusion

The FAA reviewed the relevant data, considered any comments received, and determined that air safety requires adopting this AD as proposed. Accordingly, the FAA is issuing this AD to address the unsafe condition on these products. Except for minor editorial changes, and any other changes described previously, this AD is adopted as proposed in the NPRM. None of the changes will increase the economic burden on any operator.

Related Service Information

The FAA reviewed the following Bell Alert Service Bulletins (ASBs), each Revision A and dated October 12, 2018, and for helicopters with MRB P/N 204–011–250–001, –005, –009, –113, or –117:

- Bell ASB 204–96–49 for Model 204B helicopters, serial numbers (S/N) 2001 through 2070 and 2196 through 2199 and
- Bell ASB 205–96–67 for Model 205A and 205A–1 helicopters, S/N 30001 through 30332.

The FAA also reviewed Bell ASB UH–1H–18–20, dated October 23, 2018, for all Model UH–IH helicopters with MRB P/N 204–011–250–113 installed.

These service bulletins specify procedures for daily wipe down inspections and 25-hour inspections of the MRBs for cracks.

Costs of Compliance

The FAA estimates that this AD affects 682 helicopters of U.S. registry. Labor rates are estimated at $85 per work-hour. Based on these numbers, the FAA estimates the following costs to comply with this AD.

Each MRB inspection takes about .5 work-hour and parts cost $50 for an estimated cost of $93 per helicopter and $63,426 for the U.S. fleet, per inspection cycle.

Replacing an MRB, if required, takes about 10 work-hours and parts cost about $157,815 per blade for an estimated cost of $158,665 per MRB replacement.

Authority for This Rulemaking

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

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

Regulatory Findings

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

The Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2022–21–11 Bell Textron Inc., and Various Restricted Category Helicopters: Amendment 39–22210; Docket No. FAA–2022–0802; Project Identifier AD–2021–01094–R.

(a) Effective Date

This airworthiness directive (AD) is effective November 16, 2022.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the following helicopters with main rotor blade (MRB) part number 204–011–250–001, –005, –009, –113, or –117 installed:

(1) Bell Textron Inc. Model 204B helicopters, serial numbers (S/N) 2001 through 2070 and 2196 through 2199, inclusive, certificated in any category;

(2) Bell Textron Inc. Model 205A, and 205A–1 helicopters, S/N 30001 through 30332, inclusive, certificated in any category; and

(3) Various restricted category helicopters:

(i) Model HH–1K helicopters; current type certificate holders include, but are not limited to, Rotorcraft Development Corporation;

(ii) Southwest Florida Aviation International, Inc., Model SW205A–1 helicopters;

(iii) Model TH–1F helicopters; current type certificate holders include, but are not limited to, Robinson Air Crane Inc.; Rotorcraft Development Corporation; and Tamarack Helicopters, Inc.;

(iv) Model TH–1L helicopters; current type certificate holders include, but are not limited to, Bell Textron Inc.; Overseas Aircraft Support, Inc.; and Rotorcraft Development Corporation;

(v) Model UH–1A helicopters; current type certificate holders include, but are not limited to, Richards Heavylift Helo, Inc.;

(vi) Model UH–1B helicopters; current type certificate holders include, but are not limited to, International Helicopters, Inc.; Overseas Aircraft Support, Inc.; Red Tail Flying Services, LLC; Richards Heavylift Helo, Inc.; Rotorcraft Development Corporation; Southwest Florida Aviation International, Inc.; and WSH, LLC (type certificate previously held by San Joaquin Helicopters);

Note 1 to paragraph (c)(3)(vi): Helicopters with an SW204 or SW204HP designation are Southwest Florida Aviation International, Inc., Model UH–1B helicopters.

(vii) Model UH–1E helicopters; current type certificate holders include, but are not limited to, Bell Textron Inc.; Overseas Aircraft Support, Inc.; Rotorcraft Development Corporation; Smith Helicopters; and West Coast Fabrications;

(viii) Model UH–1F helicopters; current type certificate holders include, but are not limited to, AST, Inc.; California Department of Forestry; Robinson Air Crane, Inc.; Rotorcraft Development Corporation; and Tamarack Helicopters, Inc.;

(ix) Model UH–1H helicopters; current type certificate holders include, but are not limited to, Arrow Falcon Exporters, Inc.; Global Helicopter Technology, Inc.; Hagglund Helicopters, LLC; JJASPP Engineering Services LLC; Northwest Rotorcraft, LLC; Overseas Aircraft Support, Inc.; Richards Heavylift Helo, Inc.; Rotorcraft Development Corporation; Southwest Florida Aviation International, Inc.; and Tamarack Helicopters, Inc.;

Note 2 to paragraph (c)(3)(ix): Helicopters with an SW205 designation are Southwest Florida Aviation International, Inc., Model UH–1H helicopters.

(x) Model UH–1L helicopters; current type certificate holders include, but are not limited to, Bell Textron Inc.; Overseas Aircraft Support, Inc.; and Rotorcraft Development Corporation; and

(xi) Model UH–1P helicopters; current type certificate holders include, but are not limited to, Robinson Air Crane, Inc.; and Rotorcraft Development Corporation.

(d) Subject

Joint Aircraft System Component (JASC) Code: 6210, Main rotor blades.

(e) Unsafe Condition

This AD was prompted by a report of cracks on the MRBs outside of the current inspection area. The FAA is issuing this AD to prevent a failure of an MRB. The unsafe condition, if not addressed, could result in loss of an MRB and subsequent loss of control of the helicopter.

(f) Compliance

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

(g) Required Actions

(1) As of the effective date of this AD, before the first flight of each day:

(i) Using cheesecloth, clean the upper and lower skin surfaces of each MRB in the area between blade stations 100 through 215, noting any unsmooth areas and paying attention to the trailing edge and any MRB surface which snag the cheesecloth or cause it to fray, as this may by an indication of a crack or paint chip that could lead to corrosion.

(ii) The actions required by paragraph (g)(1)(i) of this AD may be performed by the owner/operator (pilot) holding at least a private pilot certificate, and must be entered into the aircraft records showing compliance with this AD in accordance with 14 CFR

43.9(a) and 14 CFR 91.417(a)(2)(v). The record must be maintained as required by 14 CFR 91.417, 121.380, or 135.439.

(iii) If there is any unsmooth area or the cheesecloth used to clean the MRB is snagged or frayed, remove paint from the area that is unsmooth or caused the snagging or fraying (affected area) by hand sanding in a spanwise direction with an abrasive cloth or sandpaper 220 or smoother grit and either:

(A) Visually inspect the affected area for any crack using a 10X or higher power magnifying glass with a flashlight applied at an oblique angle and perpendicular to the crack orientation; or

(B) Eddy current inspect the affected area for any crack using a surface probe.

(iv) If there is any crack, before further flight, remove the MRB from service.

(2) As of the effective date of this AD, at intervals not to exceed 25 hours time-in-service, prepare the upper and lower skin surfaces of each MRB for inspection by wiping the last 4 inches of the trailing edge between blade station 100 and 215 with an isopropyl alcohol-soaked cloth and then drying the area with a clean cloth. Immediately after drying the area, using a flashlight at an oblique angle, inspect the surface for a dark line, as this is an indication that excess isopropyl alcohol is bleeding out of a crack or edge void. If there is a dark line, remove paint from the area where there is a dark line by hand sanding in a spanwise direction with an abrasive cloth or sandpaper 220 or smoother grit and inspect for a crack in the skin. If there is any crack, before further flight, remove the MRB from service.

(h) Alternative Methods of Compliance (AMOCs)

(1) The Manager, DSCO Branch, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. In accordance with 14 CFR 39.19, send your request to your principal inspector or local Flight Standards District Office, as appropriate. If sending information directly to the manager of the certification office, send it to the attention of the person identified in paragraph (i) of this AD. Information may be emailed to: *9-ASW-190-COS@faa.gov*.

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

(i) Related Information

For more information about this AD, contact Hye Yoon Jang, Aerospace Engineer, Delegation Oversight Section, DSCO Branch, Compliance & Airworthiness Division, FAA, 10101 Hillwood Pkwy., Fort Worth, TX 76177; telephone (817) 222–5190; email *hye.yoon.jang@faa.gov*.

(j) Material Incorporated by Reference

None.

Issued on October 4, 2022.

Christina Underwood,

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

[FR Doc. 2022–22014 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 121

[Docket No. FAA–2019–0770; Amdt. No. 121–386]

RIN 2120–AL41

Flight Attendant Duty Period Limitations and Rest Requirements

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

ACTION: Final rule.

SUMMARY: This action arises out of a statutory mandate in the FAA Reauthorization Act of 2018, which requires rulemaking to increase the minimum rest period for flight attendants in domestic, flag, and supplemental operations who are scheduled for a duty period of 14 hours or less. The statute also requires rulemaking to prohibit reduction of the rest period under any circumstances. Consistent with the statutory mandate, the FAA is amending its regulations to ensure that flight attendants scheduled to a duty period of 14 hours or less are given a scheduled rest period of at least 10 consecutive hours and that the rest period is not reduced under any circumstances.

DATES:

Effective date: This rule is effective November 14, 2022.

Compliance date: Compliance is required on January 10, 2023.

FOR FURTHER INFORMATION CONTACT: Daniel T. Ronneberg, Implementation and Integration Group, Air Transportation Division, AFS–260, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; telephone (202) 267–1216; email *Dan.Ronneberg@faa.gov*.

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I. Executive Summary

This final rule addresses the requirement of section 335(a) of the FAA Reauthorization Act of 2018 (Pub. L. 115–254, 132 Stat. 3186 (Oct. 5, 2018) (the FAARA 2018), codified at 49 U.S.C. 44701 note. Section 335(a) requires the FAA to conduct rulemaking to increase the minimum rest period to 10 hours for flight attendants in domestic, flag, and supplemental operations who are scheduled for a duty period [1] of 14 hours or less; and to prohibit the reduction of the rest period under any circumstances. The FAA's existing regulations require only a nine-hour rest period [2] for these flight attendants, which can be reduced to eight hours in certain circumstances. Consistent with the requirement of section 335(a) of the FAARA 2018, the FAA amends § 121.467(b)(2) and (b)(3) to require 10 hours of consecutive rest, remove the existing allowance for a reduction in rest time, and prohibit reduction of the 10 hours of consecutive rest time under any circumstances.

II. Authority for This Rulemaking

The FAA's authority to issue rules on aviation safety is found in Title 49 of the United States Code (U.S.C.). Subtitle I, Section 106 describes the authority of the FAA Administrator. Section 106(f) vests final authority in the Administrator for carrying out all functions, powers, and duties of the

[1] Duty Period: A period of elapsed time between reporting for an assignment involving flight time and release from that assignment by the certificate holder conducting domestic, flag, or supplemental operations. The time is calculated using either Coordinated Universal Time or local time to reflect the total elapsed time. See 14 CFR 121.467(a).

[2] Rest Period: A period free of all restraint or duty for a certificate holder conducting domestic, flag, or supplemental operations and free of all responsibility for work or duty should the occasion arise. See 14 CFR 121.467(a).

administration relating to the promulgation of regulations and rules.

Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. Section 44701(a)(4) requires the Administrator to promulgate regulations in the interest of safety for the ''maximum hours or periods of service of airmen and other employees of air carriers.'' Section 44701(a)(5) requires the Administrator to promulgate ''regulations and minimum standards for other practices, methods, and procedure that the Administrator finds necessary for safety in air commerce and national security.'' In addition, 49 U.S.C. 44701(d)(1)(A) specifically states that the Administrator, when prescribing safety regulations, must consider the duty of an air carrier to provide service with the highest possible degree of safety in the public interest. Such authority applies to the oversight the FAA exercises to ensure safety of air carrier operations, including crewmember flight, duty, and rest requirements.

Section 335(a) of the FAARA 2018 requires the FAA to amend the flight attendant duty period limitations and rest regulation to increase to 10 hours the minimum rest period for flight attendants in domestic, flag, and supplemental operations who are scheduled for a duty period of 14 hours or less. Section 335(a) also prohibits reduction of the rest period for those flight attendants under any circumstances.

III. Background

Currently, certificate holders conducting domestic, flag, and supplemental operations are required to give flight attendants scheduled to a duty period of 14 hours or less a scheduled rest period of at least nine consecutive hours.[3] This rest period is required to occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.[4] Under these regulations, the certificate holder is able to schedule or reduce the rest period to eight consecutive hours if the certificate holder provides a subsequent rest period of at least 10 consecutive hours that is scheduled to begin no later than 24 hours after the beginning of the reduced rest period.[5]

Section 335(a) of the FAARA 2018 requires ''[modification of] the final rule'' relating to flight attendant duty period limitations and rest requirements to ''ensure that—(A) a flight attendant scheduled to a duty period of 14 hours or less is given a scheduled rest period of at least 10 consecutive hours; and (B) the rest period is not reduced under any circumstances.'' Consistent with the requirement of section 335(a) of the FAARA 2018, the FAA is amending § 121.467(b)(2) and (b)(3) to require certificate holders operating under part 121 to provide at least 10 hours of consecutive rest for flight attendants scheduled to a duty period of 14 hours or less, remove the allowance for a reduction in rest, and explicitly prohibit a reduction in the 10 hours of rest. For the reasons described in the FAA's response to NPRM comments on implementation, the final rule is effective November 14, 2022 and certificate holders are required to comply with the final rule on January 10, 2023.

A. Flight Attendant Requirements

Section 121.467(a) of 14 CFR defines a flight attendant serving in part 121 operations as an individual, other than a flightcrew member,[6] who is assigned by a certificate holder to duty in an aircraft during flight time and whose duties include activities related to ensuring cabin safety.[7] Section 121.391 specifies the minimum number of flight attendants required on board a flight, based on maximum payload capacity and seating capacity, for certificate holders conducting passenger-carrying operations under part 121.[8]

Any person serving as a flight attendant in part 121 operations must complete the training and qualification requirements of part 121 subparts N and O.[9] The training and qualification requirements for flight attendants include specific programmed hours,[10] as well as airplane type specific knowledge and skill requirements.

Flight attendants are responsible for taking action during emergencies, including administering first aid, conducting aircraft evacuations, responding to inflight fires, managing medical emergencies, and handling passengers who threaten the safety of other passengers or might be unruly or disruptive. They must also be prepared to respond to situations that could threaten the safety of the passengers and the flight, including turbulent air, airplane decompression, and hijackings. Flight attendants must know the location of emergency exits, fire extinguishers, first aid kits, flotation devices, oxygen masks, and emergency slides, and check emergency equipment before flight. Additionally, they must assess and verify the suitability of passengers that occupy exit seating, brief passengers on safety equipment and evacuation and emergency landing procedures, and ensure compliance with applicable safety and security regulations.[11]

B. Advance Notice of Proposed Rulemaking (ANPRM)

On September 25, 2019, the FAA published an advance notice of proposed rulemaking (ANPRM), *Flight Attendant Duty Period Limitations and Rest Requirements*.[12] The FAA determined that soliciting public input on the regulatory impact of the changes to flight attendant duty and rest requirements codified in section 335(a) of the FAARA 2018 was appropriate. The FAA also intended for the ANPRM to provide additional avenues for public participation and to inform the FAA's analysis and future development of the rule.

The FAA received 216 comments on the ANPRM. Commenters included various trade groups, labor unions, and airlines, as well as numerous individuals. The commenters raised three principal issues: increased rest period, costs, and implementation. Two commenters provided information indicating the increased rest period would increase costs to certificate holders. Several trade groups, labor unions, and many individuals supported the increased rest period, emphasizing the roles and responsibilities of flight attendants with regard to aviation safety and commenting that flight attendants' duties are fatigue-inducing and that flight attendants would benefit from increased rest. These commenters also stated that the increased rest would not always result in increased costs.

[3] Prior to adoption of this final rule, 14 CFR 121.467(b)(2) read ''Except as provided in paragraph (b)(3) of this section, a flight attendant scheduled to a duty period of 14 hours or less as provided under paragraph (b)(1) of this section must be given a scheduled rest period of at least 9 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.'' See 59 FR at 42992.

[4] 14 CFR 121.467(b)(2). See 59 FR at 42992.

[5] 14 CFR 121.467(b)(3). See 59 FR at 42992.

[6] A ''flightcrew member'' is a pilot, flight engineer, or flight navigator assigned to duty in an aircraft during flight time. 14 CFR 1.1.

[7] 14 CFR 121.467(a).

[8] 14 CFR 121.391 provides that a certificate holder may, however, use more than the required number of flight attendants.

[9] 14 CFR 121.392.

[10] Under 14 CFR 121.421, ''programmed hours'' refers to hours of training or instruction in specific subjects, in a flight attendant training program.

[11] For more information on flight attendant duties and training, see FAA Order 8900.1, Vol. 3, Ch. 23, secs. 1–4.

[12] 84 FR 50349.

C. Notice of Proposed Rulemaking (NPRM)

On November 2, 2021, the FAA published a notice of proposed rulemaking (NPRM), *Flight Attendant Duty Period Limitations and Rest Requirements.*[13] The FAA utilized public comments on the ANPRM to inform the FAA's analysis for the NPRM. The FAA solicited public comments on the NPRM for a period of 60 days.

The FAA received 812 comments to the proposed rule; of those 812 comments, 291 were submitted as part of a Transport Workers Union of America (TWU) form letter campaign. Two comments were received and accepted after the comment period closed.

Commenters included Airlines for America (A4A), Association of Flight Attendants-CWA (AFA–CWA), Association of Professional Flight Attendants (APFA), International Association of Machinists and Aerospace Workers (IAM), International Brotherhood of Teamsters (IBT), American Federation of Labor & Congress of Industrial Organizations (AFL–CIO), American Academy of Sleep Medicine (AASM), Regional Airline Association (RAA), and United Airlines, as well as numerous individuals. The commenters raised three overarching issues: implementation, rest period requirements, and certificate holder impact.

IV. Discussion of Public Comments and the Final Rule

A. General Support for the Proposal

The FAA received 631 comments expressing support for the rule as proposed. These commenters made no requests for changes or additional provisions. These commenters included United Airlines and AASM, as well as individuals including airline pilots, flight attendants, and TWU members, among others.

United Airlines commented that it supports the proposed rule to comply with the statutory requirement of 10 hours of rest in section 335 of the FAARA 2018, noting that safety is United's top priority. United also stated that it voluntarily adopted a 10-hour rest requirement for its flight attendants in 2016, though United allows its flight attendants to voluntarily accept trips with a shorter rest period during irregular operations. United noted that assuming that the final rule does not allow for reduction in rest, as the FAA proposed in the NPRM, then United will advise its crewmembers that these voluntary extensions are no longer permissible.

AASM also expressed its support for the proposed rule. In particular, AASM voiced support for the proposed prohibition on any reduction in the minimum 10 hours of rest. AASM stated that reducing the rest period can prevent individuals from reaping the restorative benefits of sleep, leading to both immediate and long-term health impacts. To reinforce their support for the rule, AASM cited a study of flightcrew members that showed early and longer duty times were associated with increased fatigue.[14] AASM reiterated its position that sleep is essential to health and to safety and therefore they support an irreducible 10-hour rest period for flight attendants.

The FAA received 291 comments from TWU members as part of a form letter campaign. The members commented that, as frontline aviation workers, they know firsthand how important adequate rest is to be effective on the job. The members stated that a 10-hour rest period will enable flight attendants to remain focused and responsive to any event that may arise inflight. The members concluded that this is a matter of safety, as flight attendants need adequate rest in order to perform their duties.

Many individuals, including those identifying as pilots and flight attendants, commented in support of the rule. These commenters provided myriad reasons for supporting the proposed rule, including having a healthier workforce; ensuring flight attendants have sufficient rest to perform their duties; improving overall safety; providing flight attendants with acceptable working conditions; and improving reaction times, cognitive abilities, and the ability to fight illness. Commenters also pointed out that flight attendants in today's climate are now facing ''COVID exposure'' and unruly passengers. Several flight attendants commented that, under the current rest period rules, their employers treat them as ''robots'' or ''machines.'' Additionally, commenters noted that it is in the public's best interest that flight attendants are well-rested and alert, as flight attendants are first responders and need sufficient rest to be focused and remain alert for medical emergencies and possible evacuations. Commenters emphasized that the safety of crewmembers and the flying public is important and that the 10-hour minimum rest period is critical for flight attendant health. These individuals commented with overwhelming support for the rule as proposed.

Several commenters noted that they had either experienced or observed flight attendant fatigue. Multiple commenters shared their concerns about mistakes being made by flight attendants, including mistakes on duty, such as accidentally deploying slides, and after finishing work, such as driving drowsy and causing traffic accidents. Two commenters stated that the public would be uncomfortable flying if they knew how fatigued flight attendants are. One commenter noted that, because flight crews are often on the same schedules, all of the flight attendants on a flight could be fatigued. Another commenter argued that working while fatigued is comparable to working while under the influence of alcohol or drugs. Commenters specifically pointed to the length of rest periods as the reason for flight attendant fatigue.

The FAA has constructed the final rule with very few departures from the NPRM. A discussion of comments requesting specific provisions or changes to the NPRM and the FAA's responses to these requests follows.

B. General Opposition to the Proposal

Five individuals opposed the proposal. One commenter, who identified as an airplane pilot, believed the 10-hour minimum rest requirement would make schedules less efficient for certificate holders and flight attendants, especially with the inability to reduce the 10-hour rest period under any circumstances. This commenter explained that aircraft often only have a nine- or ten-hour turnover at smaller airports, and not having the flexibility to use the same crewmembers will result in more delays and cancellations. One commenter stated that the rule would not improve safety.

Two individuals, both of whom identified as flight attendants, opposed the proposal because it would result in flight attendants working more days out of the month. One individual explained that this would occur due to certificate holders building less productive trips under the new rule. The other individual explained that working more days out of the month would cause flight attendants to lose focus and responsiveness during events that may arise in flight.

One commenter disagreed with increasing rest requirements for flight

[13] 86 FR 60424.

[14] Fatigue: A physiological state of reduced mental or physical performance capability resulting from sleep loss or extended wakefulness, circadian phase, or workload (mental and/or physical activity) that can impair a person's alertness and ability to perform safety related operational duties. See ICAO Manual of Civil Aviation Medicine, 3rd Ed., Chap. 1, § 1.4.

attendants because, while there were benefits to changing the rest requirements for pilots in part 117, those rule changes were cumbersome to operations and unnecessary. This individual stated that flight attendants have plenty of opportunities to rest.

One commenter recommended the FAA not amend the rest requirements for persons who serve as flight attendants on one-day trips because these persons want productivity and increasing the rest period requirement will take that away. This individual asserted that FAA should increase the rest period only for flight attendants who do layovers and experience longer commutes to the hotel.

One commenter was indifferent to the proposed rule change. This individual stated that the current minimum rest requirements were sufficient because the individual's contract (*i.e.,* collective bargaining agreement) covers the individual's minimum rest. Lastly, one individual expressed concern that the increased rest period will affect flight attendants' pay.

The FAA promulgates this final rule in response to a specific statutory mandate, which means that the existing rest requirements in § 121.467(b)(2) and (b)(3) cannot be retained and that flight attendants affected by this rule cannot receive less than 10 hours of required rest. With regard to the comment asking FAA not to amend the rest requirements for flight attendants on day trips, the FAA lacks any evidence that a series of day trips is any more or less fatiguing than a series of layovers. The FAA also recognizes that there are flight attendants who have long distance commutes. This subset of flight attendants may find their day trip commutes to be just as, or more, fatiguing as layovers. Finally, section 335(a) of the FAARA 2018 does not make an exception for this category of flight attendants, and therefore, neither can this rulemaking.

C. Implementation Period for the Final Rule

In the NPRM, the FAA proposed a 30-day effective date, which means the final rule would have been effective 30 days after publication in the **Federal Register**. The FAA explained that certificate holders would have been required to comply with the new rule upon the effective date. The FAA received numerous comments concerning the implementation period for the final rule. These commenters fell into two categories: (1) those that wanted the FAA to implement the final rule immediately, and (2) those that wanted the FAA to delay implementation of the final rule.

1. Implement the Final Rule Immediately

Over fifty commenters, including flight attendants and labor groups, encouraged the FAA to implement the final rule immediately. Flight attendants cited safety, personal experiences with fatigue, and serving as first responders in their comments requesting that the final rule be implemented either ''immediately'' or ''as soon as possible.'' In a joint comment submitted by several labor unions (AFA–CWA, APFA, IAM, IBT, TWU, and the AFL–CIO), the unions requested that the FAA ''act urgently to issue the final rule.'' [15] Additionally, several commenters noted that the statutory language directed the FAA to implement the regulatory changes within 30 days of enactment.

One commenter specifically asked why the FAA had not yet implemented this final rule when the statute, which required the FAA to amend the rules within 30 days of enactment, was passed in 2018. This commenter also questioned the FAA's actions to gather additional information on costs and benefits because the statute did not require these actions.

The APA requires the FAA to publish a final rule not less than 30 days before the rule's effective date unless the agency finds good cause.[16] In this instance, the FAA has not found good cause to waive the 30-day effective date. Rather, for the reasons discussed below in response to requests for longer implementation, the FAA has determined that a 30-day effective date is appropriate and is adding a 90-day compliance date. The extended compliance date is to ensure that certificate holders have at least two full calendar months to implement schedule changes and they can initiate those changes on the date that is most efficient for their operation.

The commenter was correct that section 335 of the FAARA 2018 did not expressly require the FAA to gather information concerning the costs and benefits of the changes to § 121.467(b). However, changes to Federal regulations must undergo economic analyses. The FAA completes such analyses in accordance with Executive Order 12866,[17] Office of Management and Budget (OMB) Circular A–4,[18] and the Regulatory Flexibility Act of 1980.[19]

2. Delay Implementation

The FAA received comments from RAA and A4A seeking to extend the implementation period for the final rule beyond 30 days. RAA requested an implementation period of 60 days because of the varying scheduling procedures at individual airlines. A4A requested a six-month implementation period because of the substantial amount of work required by air carriers to facilitate a smooth, efficient and equitable implementation. A4A noted that the FAA's 1994 final rule relating to flight attendant duty period limitations and rest requirements allowed over five months for operators to come into compliance.[20]

A4A explained that 30 days is an insufficient amount of time for carriers to implement changes to cabin crew scheduling software, hire and onboard additional flight attendants, and train persons that use crew-scheduling software on the rest rule changes and on changes to day-of-operations flexibility that most carriers permit today. With respect to training, A4A stated that the FAA Certificate Management Offices may require carriers to provide new or reworked training materials as part of ensuring compliance with the final rule, which will take time. A4A also asserted that the flight attendant schedule planning and bidding process supports a six-month implementation period to protect the schedule process and avoid potential errors that will negatively affect flight attendant scheduling. A4A noted that a particular area of focus for carriers and schedulers will be flight attendant assignments or pairings that begin under existing flight attendant rest rules and end under the new flight attendant rest rules. Additionally, if the final rule takes effect during the middle of a carrier schedule, A4A stated that the carrier must build two separate schedules for that bidding period—one schedule under existing flight attendant rest rules and another schedule under the new rules.

Upon consideration of the implementation periods recommended by RAA and A4A, the FAA agrees that certificate holders need more than 30 days to achieve compliance with the final rule. However, a six-month implementation period is unreasonable. Section 335(a) required the FAA, in a narrow timeframe, to modify the

[15] Comment from Aviation Unions' Joint Comment. FAA–2019–0770–1024.

[16] 5 U.S.C. 553(d).

[17] 58 FR 51735.

[18] *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.*

[19] 5 U.S.C. 601, *et seq.*

[20] 50 FR 42074, 42984.

regulations in accordance with the statute. As such, industry stakeholders have been on notice of the statutory mandate since Congress enacted it in 2018. Many certificate holders have already voluntarily implemented the longer rest period, either unilaterally or through contract negotiations with their flight attendants or flight attendant unions. Furthermore, the 1994 final rule cited by A4A, which adopted a delayed compliance date greater than five months, does not support a delayed implementation period for this final rule. Unlike the 1994 final rule, which adopted flight attendant duty period limitations and rest requirements across multiple CFR parts, this final rule contains only two discrete amendments to § 121.467(b)(2) and (b)(3).

The FAA recognizes that certificate holders will need to implement changes to crew-scheduling software upon publication of this final rule. Additionally, certificate holders will need to either generate schedules to be bid upon or modify pairing rules with preferential bidding software. The FAA has determined that 30 days is an insufficient amount of time to conduct these implementation activities. Therefore, consistent with RAA's recommendation, the FAA is adopting an effective date of 30 days with a compliance date of 90 days. This ensures certificate holders have at least two full calendar months to implement schedule changes and they can initiate those changes on the date that is most efficient for their operation. This marks a change from the NPRM, which proposed only a 30-day effective date.

D. Duty and Rest Period Requirements

1. Adopt a Minimum Rest Period Longer Than 10 Hours

Many commenters supported the rule, but requested that the FAA require a minimum rest period longer than 10 hours for flight attendants. One commenter who identified as a flight attendant stated that flight attendants are sometimes so fatigued that they struggle to perform their duties as required and that a 10-hour rest period is not enough. Several flight attendants commented that after accounting for activities such as traveling to the hotel, checking in, showering, eating, winding down, getting ready for the next duty period, traveling back to the airport, and getting through security, 10 hours is not enough. Several commenters noted that the amount of rest is reduced significantly after accounting for deplaning and transportation to a place of rest. Many flight attendants shared anecdotes of rest periods where, because of factors beyond their control, they ended up only getting four or five hours of sleep. One flight attendant noted that flight attendants have irregular sleep schedules, which can make it difficult to fall asleep immediately upon reaching the hotel room. Another commenter noted that rest periods can begin at unusual times, which makes falling asleep difficult. Several commenters pointed out that eight hours of sleep is generally considered by the public to be a necessary amount of rest.

One flight attendant stated that a 10-hour rest period is not enough to allow flight attendants to be fully cognizant for their duties. Twenty-three commenters requested a 12-hour rest period. Three commenters requested a 14-hour rest period. Two commenters suggested that the rest period be the same length of time as the preceding duty period. One commenter requested a 19-hour rest period. Another commenter suggested that the rest period be a minimum of 12 hours at base and 10 hours for layovers. One commenter requested a 12-hour minimum rest period that could be reduced to 10 hours if there were unforeseen circumstances. One commenter noted that their employer already has 10 hours as the standard rest period and the flight attendants find it insufficient. One commenter suggested that the FAA follow what other countries do for minimum rest period durations.

Section 335(a) of the FAARA 2018 required the FAA to amend the regulation to ensure that a flight attendant scheduled to a duty period of 14 hours or less is given a scheduled rest period of at least 10 consecutive hours; and the rest period is not reduced under any circumstances. The FAA initiated this rulemaking in response to the statutory mandate, which the FAA interprets as direction to amend § 121.467 by changing the minimum rest requirement described in paragraph (b)(2) of that section from 9 hours to 10 hours; and by eliminating the reduced rest provision described in paragraph (b)(3) of that section.

The FAA currently lacks data and supporting research or studies on flight attendant fatigue that would support an increased rest period beyond 10 hours. The 10-consecutive-hour rest requirement provided in this rulemaking is a minimum rest requirement. Nothing in this final rule would preclude a certificate holder from increasing the rest period. Accordingly, in promulgating this final rule, the FAA is amending § 121.467(b)(2) and (b)(3), as proposed.

2. Require 10 Consecutive Hours of Rest at the Hotel

In addition, many commenters recommended that the rest period should begin at hotel check-in in order to maximize rest. Myriad commenters noted that their rest periods currently start when the aircraft reaches the gate and end when the flight attendant checks in for their next duty period. Many commenters stated that the rest period should be 10 hours behind the hotel door at a minimum, after taking into account transportation to and from lodging, time spent checking in, and getting food. Other commenters noted that the rest period should start at the hotel because the deplaning process and transportation to the hotel are not rest. One commenter suggested that rest start behind the door (at the place of lodging) or otherwise allow 45 minutes for transportation before the rest period commences. Another commenter suggested that the rest period should begin after the flight attendants leave the airport. Several commenters requested equal rest to that of flightcrew members, stating that there are differences between when the flight attendant rest period starts and the requirements for pilots. One commenter shared that, following a recent canceled flight, the flightcrew members were given hotel rooms, but the flight attendants had to sleep on the aircraft. Another commenter suggested that the rest period include a requirement for eight hours of prone rest, while some suggested either 8 or 12 hours behind the door. Other commenters noted that it often takes a long time to get from the airport to the hotel and vice versa, which cuts into the flight attendants' rest period. Several commenters stated that the hotels they stay in are located far from the airports, requiring long transport times. One commenter also noted that hotel shuttles are ''notoriously late,'' while another noted that hotel shuttles are often infrequent and require long waits. Another commenter shared that delays can result in hotels giving away their rooms, leading flight attendants to sleep in hotel lobbies or on airport floors. One commenter suggested that the rest period should not be reduced because of transport delays to the hotel or check-in delays at the hotel itself, a suggestion which was echoed by another flight attendant who commented that airlines do not provide additional rest time if there are delays in hotel transportation. Another commenter shared an example of a time when there were no hotels provided for flight attendants, so they

ended up spending their rest periods on the floors of the airport.

In 14 CFR 121.467(a), the FAA defines ''rest period'' as a time when a flight attendant is free of all restraint, duty, or responsibility upon release from an assignment. The FAA understands that the time available for sleep during a rest period may vary depending on the amount of time a flight attendant spends on other activities during the rest period, such as transportation to the hotel. However, at this time, FAA lacks data and supporting research or studies on flight attendant fatigue that would support changing the nature of the minimum required flight attendant rest period. The FAA also notes that section 335(a) of the FAARA 2018 does not require it to change the nature of the flight attendant rest period, but merely to increase it to 10 hours. Therefore, the FAA is amending § 121.467(b)(2) and (b)(3) as proposed.

3. Prohibiting the Reduction of Rest

In the NPRM, the FAA proposed to amend § 121.467(b)(3) by expressly prohibiting certificate holders from reducing the rest period to less than 10 consecutive hours.

One individual generally supported the proposal to increase the minimum rest period to 10 consecutive hours but asserted that the FAA should permit a flight attendant to waive the 10-hour rest period when doing so would be beneficial for the flight attendant. Another commenter suggested that flight attendants should have the ability to opt out of the new requirement if they have had nine hours of rest. Several commenters disagreed and stated that the rest period for flight attendants should never be less than 10 hours. Two commenters stated that the rest period should not be reduced in the case of irregular operations. Two commenters noted that, under the current rules, airlines frequently reduce rest to accommodate schedules. Another commenter suggested that airlines use flight attendant rest as a bargaining chip.

In accordance with the statutory requirement in section 335(a)(2)(B), the final rule must ensure that the rest period, which must be at least 10 consecutive hours, is not reduced under any circumstances and there are no exceptions given permitting flight attendants to waive the minimum rest period requirement and accept a reduced rest period that is less than 10 consecutive hours. Accordingly, section 121.467(b)(3) remains unchanged from the proposal.

4. Miscellaneous Comments on the Rest Period Requirements

In this section, the FAA responds to various miscellaneous comments concerning the FAA's proposed amendments to the rest period requirements.

One commenter noted that the FAA included a table in the ''original'' rulemaking for § 121.467 that summarized the flight attendant rest periods.[21] This commenter recommended the FAA include a similar table in this final rule to facilitate understanding of the regulations.

When the FAA adopted § 121.467 in 1994, the FAA included a chart in the preamble to the final rule that depicted the new scheduled duty period, rest period, and augmented flight attendant crew requirements. The FAA finds it unnecessary to include a similar table in this final rule because the amendments to § 121.467(b)(2) and (b)(3) are minimal, uncomplicated, and easy to understand.

One commenter stated that the flight attendant rest requirements should be the same as the rest requirements in 14 CFR 91.1059. This individual recommended the FAA withdraw the proposed rule and simply add flight attendants to § 91.1059.

The commenter's recommendation would not work under the structure of the Federal regulations. Section 91.1059 applies only to part 91, subpart K operators. Therefore, expanding the scope of § 91.1059 to include flight attendants would not result in an increased rest period for flight attendants operating under Part 121 regulations. The FAA is amending § 121.467(b) as proposed.

One individual asked why the FAA was seeking input from the general public on the proposed rule rather than solely the airline employees. Another commenter stated that getting feedback from airline employees was important. Two commenters suggested that the people drafting the final rule should spend time working as a flight attendant in order to fully understand flight attendant fatigue.

The Administrative Procedure Act, which contains the procedural requirements for notice-and-comment rulemaking, requires an agency to issue a general notice of proposed rulemaking in the **Federal Register**.[22] The APA also requires an agency to give interested persons an opportunity to participate in the rulemaking through the submission of written data, views, or arguments. Therefore, pursuant to the statutory requirements set forth in the APA, the FAA published the proposed rule in the **Federal Register** and gave interested members of the public, including flight attendants, an opportunity to submit comments.

Several commenters also suggested that time zones should be taken into account when determining how long a rest period is. The commenters noted that switching time zones has an impact on flight attendant fatigue. One commenter noted that it is especially important that the rule be mandatory for flight attendants on international flights. Another commenter requested that there be different standards for domestic and international travel.

The FAA is not addressing the effect of time zones on flight attendant fatigue at this time because it lacks the data on flight attendant fatigue that would be necessary for this type of a regulatory change. The FAA is retaining this regulatory regime and amending the rules consistent with the statutory mandate in section 335(a)(2). The final rule will apply to all certificate holders conducting domestic, flag, or supplemental operations.

Two comments discussed deadhead transportation. One commenter described carrier scheduling practices such as deadhead transportation as being used to circumvent rest requirements and contributing to fatigue. In the *Flight Attendant Duty Period Limitations and Rest Requirements* final rule, published in 1994, the FAA defined deadhead transportation as ''time spent in transportation, not local in character, that a certificate holder requires of a flight attendant and provides to transport the flight attendant to an airport at which that flight attendant is to serve on a flight as a crewmember, or from an airport at which the flight attendant was relieved from duty to return to the flight attendants home base.'' [23] As the FAA stated previously in the preamble to the final rule found at 59 FR 42974, for the purpose of determining duty period limitations and rest requirements, deadhead

[21] The commenter referenced a table in ''the original NPRM document for § 121.467 (1996).'' The FAA did not propose to adopt § 121.467 in 1996. Rather, the FAA published the NPRM that proposed flight attendant duty period limitations and rest requirements on March 31, 1993, and issued the final rule that adopted § 121.467 on August 19, 1994. 58 FR 17024; 59 FR 42974. The 1993 NPRM does not contain a table that summarizes the flight attendant rest requirements. However, the commenter may be referring to a chart in the preamble to the 1994 final rule, which depicted the scheduled duty period, rest period, and augmented flight attendant crew requirements that were adopted in that final rule. 59 FR at 42986.

[22] 5 U.S.C. 553(b).

[23] 59 FR 42974, 42983.

transportation is not considered an assignment involving flight time and is not part of a duty period, and is not considered rest.[24] The use of deadhead transportation in relation to flight attendant duty period limitations and rest requirements is consistent with the application of flightcrew member flight time limitations and rest requirements. In addition, a flight attendant scheduled for deadhead transportation is not assigned duty in an aircraft and is not considered a working flightcrew member. This final rule does not alter the definition of deadhead transportation, nor does it change how § 121.467(b)(2) is applied with regard to deadhead transportation.

Several individual commenters expressed concern that airlines have, and will continue to look for, ways to circumvent the minimum rest period requirement. One commenter noted that flight attendants have been told to report for duty at a certain time, but to not step on the aircraft until the minimum rest period time was met. Another commenter echoed this experience, sharing an experience where the airline had flight attendants wait to close the aircraft door in order to have the rest period duration meet the requirement. One flight attendant shared a story of a colleague who was asked to stay on duty because there were no hotels available, recounting that the colleague did not want to inform the airline of their fatigue because they were afraid of punitive action. One flight attendant stated that their job has become more difficult because the airline they work for will often try to avoid scheduling rest periods. Several commenters noted that crew scheduling and coordination can result in shortened rest periods. A flight attendant noted in their comment that airlines will contact flight attendants during their rest periods and inform them that, due to rerouting, the flight attendant has a shorter rest period than anticipated. One commenter suggested that the rest period should be undisturbed and that flight attendants should not be required to answer company communications during the rest period. Another commenter noted that flight attendants are considered to be on call 24 hours a day.

Under this final rule, all certificate holders conducting domestic, flag, or supplemental operations will be required to give scheduled rest periods of at least 10 consecutive hours to flight attendants scheduled to a duty period of 14 hours or less. The FAA is not addressing company communications during rest periods or changes to the duration of rest periods, so long as the rest period is at least 10 consecutive hours.

E. Costs and Benefits

1. Benefits

Several commenters noted the benefits of increased rest, including preventing fatigue, performing safety related tasks without error, offsetting stress and burnout, improving reaction times and cognitive abilities, decreasing illnesses, improving alertness and focus, and being better prepared for medical emergencies and flight evacuations.

The FAA agrees that increasing the minimum flight attendant rest period may improve health and lead to a reduction in performance errors; however, the FAA did not receive new information or data to provide a quantitative analysis. Therefore, the FAA continues to analyze benefits qualitatively.

2. Costs

AFA–CWA, APFA, IAM, IBT, TWU, and AFL–CIO commented in a joint comment that the concerns raised during the ANPRM comment period over the cost of implementation are grossly exaggerated. The comment provided information on airlines that have already implemented a 10-hour rest policy and stated that there is no evidence of significant costs. However, they asserted that there is extensive evidence of the problems associated with flight attendant fatigue and that these issues are heightened in the wake of scheduling during the coronavirus public health emergency, along with the stresses on the job including unruly, disruptive, and violent passenger events.

Conversely, A4A commented that the FAA has understated the costs to major carriers because the FAA's information indicates that only one major carrier has implemented a 10-hour flight attendant rest period without an opportunity for reduced rest. A4A stated that the FAA should therefore increase the ''existing practices'' baseline to state that three major carriers will be impacted by the final rule and increase the number of flight attendants impacted accordingly. They also requested that the FAA amend the Regulatory Impact Analysis to include a 10-year analysis because the requirement to provide flight attendants 10 hours of rest will not sunset in 5 years and the impacts of the final rule will continue to 10 years and beyond.

With respect to the comment submitted by A4A, the FAA disagrees and determined that the information provided would not impact the analysis of costs. The FAA determined that it has categorized the major carriers appropriately in the analysis, as those that have implemented the 10-hour rest period already need to have sufficient staffing and resources. The FAA also found that the 5-year timeframe for the analysis is reasonable, given that there is a high rate of change in the industry. The estimated annualized costs are the same for a 5-year or a 10-year period, however, uncertainty over the future baseline increases beyond the 5-year period.

Several individual commenters noted that any costs to airlines that result from the 10-hour minimum rest period would be outweighed by the benefits for flight attendants. One commenter stated that increased productivity should not come at the expense of safety. Another commenter argued that a decrease in profits would be worth the improvement in quality of life for flight attendants. A commenter also pointed out that, in the long term, airlines could see improvements to productivity and profitability because employees are more productive when they have a better work environment. Additionally, one commenter noted that airlines could minimize any disruption because they have scheduling flexibility, while another commenter argued that airlines can use crew pairing to minimize effects. One commenter stated that airlines have had ''plenty of time'' to implement necessary changes. Another commenter also pointed out that flight attendants who are concerned about a decrease in pay could choose to work longer duty periods or more frequently in order to make up for the longer rest periods.

The FAA agrees that increasing the minimum flight attendant rest period may have benefits for flight attendants. However, the FAA does not currently have the information or data to conduct a quantitative analysis of the benefits. While it is possible that there could be benefits for airlines as a result of a more productive workforce, the FAA does not have sufficient data to reach a conclusion on that point. The FAA notes that airlines can create schedules that both comply with this final rule and minimize disruption. As the FAA Reauthorization Act was signed into law in 2018, the FAA agrees that this final rule should not surprise any airlines.

F. Out of Scope

The FAA received several comments to the NPRM that were outside the scope of this rulemaking. One commenter stated that to be consistent

[24] See 59 FR 42983.

with international standards and other FAA regulations, the FAA should add two new provisions to § 121.467. One provision would prescribe requirements for a fatigue risk management system (FRMS), including a requirement for the FRMS to include an education and awareness training program. The second provision would prescribe specific requirements for the fatigue education and training program.

Some commenters stated that the rule needs strong language that will preclude a certificate holder from interpreting the rule to mean the certificate holder may reduce rest.

One commenter suggested the FAA adopt a mandatory retirement age for flight attendants. Another individual recommended the FAA require flight attendants to undergo annual medical examinations. One commenter suggested that the FAA research the effects of turbulence on flight attendants. One commenter noted that flight attendants need healthy meals, while another raised the issue of regular breaks for food. Another commenter expressed concern over how airlines pay for duty periods that cover two calendar days.

One commenter noted that fatigue reports are long and monotonous, which discourages fatigued flight attendants from filling out the report and asked the FAA to limits barriers when filling out such reports. One commenter suggested that the FAA take action if an airline receives a high number of fatigue reports. Also, several commenters suggested that duty periods should be limited, with two suggesting a 16-hour limit and four suggesting a 12-hour limit. One commenter stated that 14 hour duty periods are too long. Two commenters suggested that the FAA adopt a duty period limit similar to the hours of service rules for the rail and trucking industries. Several commenters noted that airlines will schedule flight attendants to the longest duty periods possible, something that has become more prevalent during the coronavirus public health emergency and subsequent staffing issues. Several commenters noted that flight attendants feel discouraged from using sick leave or paid time off and fear punitive measures if they report being fatigued, with one noting that their employer categorizes fatigue as a ''negative attendance occurrence'' and another explaining that they felt ''bullied'' by their employer into not reporting fatigue. One commenter shared that, in order to take sick leave, the airline they work for requires flight attendants to have their requests verified by a company doctor.

The NPRM also received comments relating to the Federal face mask mandate and no-fly lists for unruly passengers. One commenter suggested that low-cost flights are the reason for increased violence on aircraft. Another commenter suggested that commercial airlines not be allowed to sell alcoholic beverages and that passengers and employees should not be allowed to fly if showing any signs of illness. Another commenter was concerned about the radiation levels flight attendants are exposed to. Two commenters expressed their frustration with the FAA regulating things like flight attendant rest breaks.

These comments are all outside the scope of this rulemaking.

V. Regulatory Notices and Analyses

Federal agencies consider impacts of regulatory actions under a variety of executive orders and other requirements. First, Executive Order 12866 and Executive Order 13563 direct that each Federal agency shall propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify the costs. Second, the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) requires agencies to analyze the economic impact of regulatory changes on small entities. Third, the Trade Agreements Act (Pub. L. 96–39) prohibits agencies from setting standards that create unnecessary obstacles to the foreign commerce of the United States. Fourth, the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any one year. The current threshold after adjustment for inflation is $165,000,000, using the most current (2021) Implicit Price Deflator for the Gross Domestic Product. The FAA has provided a detailed Regulatory Impact Analysis (RIA) in the docket for this rulemaking. This portion of the preamble summarizes the FAA's analysis of the economic impacts of this rule.

In conducting these analyses, the FAA has determined that this rule: is a ''significant regulatory action'' as defined in section 3(f) of Executive Order 12866; may have a significant economic impact on a substantial number of small entities; will not create unnecessary obstacles to the foreign commerce of the United States; and will not impose an unfunded mandate on State, local, or tribal governments, or on the private sector.

A. Regulatory Impact Analysis

This section provides a summary of the FAA's regulatory impact analysis (RIA). Please see the RIA available in the docket for the rulemaking for more details.

1. Baseline for the Analysis

The baseline for analysis of the incremental benefits and costs of the final rule includes the regulations regarding flight attendant rest and existing practices, the affected entities and flight attendants, and potential safety and health risks. Prior to the adoption of this final rule, certificate holders conducting domestic, flag, or supplemental operations under 14 CFR part 121 needed to provide a flight attendant scheduled to a duty period of 14 hours or less a scheduled rest period of at least 9 consecutive hours. The certificate holder could schedule or reduce the rest period to eight consecutive hours if the certificate holder provided a subsequent rest period of at least 10 consecutive hours that was scheduled to begin no later than 24 hours after the beginning of the reduced rest period. In response to the FAARA 2018 and other circumstances (including that some airlines schedule flight attendants to be synchronized with those for pilots), 12 certificate holders already schedule flight attendants for 10 hours of rest. The provision may be reflected in a certificate holder's collective bargaining agreement with the flight attendant union.

The FAA's Safety Performance Analysis System (SPAS) contains information on certificate holders conducting operations under part 121 and the number of flight attendants. Table 1 provides a summary by category of carriers.[25]

[25] SPAS categories are as follows: Majors: Fleet does not contain any ''Cargo Only'' configured aircraft; and greater than 25 percent of fleet are aircraft configured with maximum passenger capacity greater than or equal to 100 seats, and fleet size is greater than or equal to 400. Nationals: Fleet does not contain any ''Cargo Only'' configured aircraft, and greater than 25 percent of fleet are aircraft configured with maximum passenger capacity greater than or equal to 100 seats, and fleet size is less than 400. Regionals: Fleet does not contain any ''Cargo Only'' configured aircraft, and greater than or equal to 75 percent of fleet are aircraft configured with maximum passenger capacity less than 100 seats. Passenger and Cargo Only: Fleet includes ''Passenger configured'' aircraft and ''Cargo Only'' configured aircraft.

TABLE 1—UNIVERSE OF AFFECTED ENTITIES AND FLIGHT ATTENDANTS

Category	Number of certificate holders	Total number of flight attendants	Average number of flight attendants per certificate holder
Major	4	91,420	22,855
National	13	21,805	1,677
Passenger and Cargo	5	703	141
Regional	21	14,196	676
Total	43	128,124	2,980

NVIS = National Vital Information System.
SPAS = Safety Performance Analysis System.
Source: FAA Safety Performance Analysis System (SPAS), SPAS NVIS Air Operator—12/05/2019.

Bureau of Transportation Statistics data indicate that flight attendants serve hundreds of millions of passengers on close to 10 million flights annually in the United States.[26] Flight attendants perform safety and security functions while on duty in addition to serving customers. Voluntary reports submitted by flight attendants to the Aviation Safety Reporting System indicate the potential for fatigue to be associated with poor performance of safety and security related tasks. For example, in 2017, a flight attendant reported almost causing the gate agent to deploy a slide, which they attributed to, among other causes, fatigue.[27] Other reports included poor response to a passenger incident and feeling pressure to work despite being fatigued. Additional examples of voluntary reports regarding flight attendant fatigue are included in the RIA.

2. Benefits

The benefits of the regulation will include reductions in safety risks and any improvements in flight attendant health that may be associated with the increase in flight attendant minimum rest periods. Flight attendants must be prepared to respond quickly to emergencies including evacuations, crash impacts, post-crash or inflight fires, ditching,[28] runway over runs, security events, and similar situations. Benefits of increasing the minimum flight attendant rest period may accrue through reduced safety risks. However, as discussed in additional detail in the RIA, any reductions in safety risk are likely to be small since they will also depend on the frequency with which safety-oriented tasks occur, and currently U.S. air carriers experience very few accidents resulting in death or serious injury. Additionally, given the potential impact of fatigue on health, the final rule could also result in health benefits for flight attendants.

The FAA does not have sufficient data to estimate a baseline level of safety risk associated with flight attendant fatigue. In addition, it is also difficult to estimate (and the FAA does not have data on) the impact of the final rule in reducing flight attendant fatigue-related performance errors (*i.e.,* how outcomes will differ compared to under the current rest period). Similarly, because multiple factors affect flight attendant health, it is difficult to identify health risks specifically attributable to rest period-related fatigue and the impact of the rest requirement in reducing that risk.

3. Costs

The FAA used data that it collects from certificate holders conducting operations under part 121 and information submitted in response to the ANPRM, as supplemented or verified through additional outreach, to estimate the costs that may be associated with the final rule.[29] To better understand the ANPRM responses, the FAA conducted additional outreach to three major certificate holders, three national certificate holders, and three regional certificate holders in January and February 2020. This outreach assisted the FAA in applying the ANPRM comment responses to estimate costs.

The FAA used this data and information to estimate incremental costs, including new hires of flight attendants, onboarding, training, travel, and modifying crew scheduling software. As some of these certificate holders implemented the rest requirement around the time the FAARA 2018 was enacted or shortly thereafter, uncertainty exists regarding whether implementation occurred due to anticipation of the required rule change or other business reasons independent of regulatory action. Therefore, the FAA measures the costs of the final rule from two baselines to capture the different levels of incremental effects attributable to the rule, consistent with the Office of Management and Budget's (OMB) guidelines: [30]

- Existing practices baseline—certificate holder practices at the time of the final rule.
- Pre-statutory baseline—certificate holder practices at the time of the FAARA 2018.[31]

Table 2 shows the affected entities by category in each baseline scenario and the current number of flight attendants.

[26] Bureau of Transportation Statistics T–100 Segment (flights) and Market (passengers) data. Available online at *www.BTS.gov.*

[27] See Aviation Safety Reporting System Database Online (*https://asrs.arc.nasa.gov/search/database.html*) report 1452656 from May 2017.

[28] Refers to crash-landing into water an aircraft not designed for the purpose.

[29] The FAA sought further comment as part of the NPRM however it did not receive comments that provided new or additional data on which to base estimates.

[30] The OMB's 2003 guidance on regulatory analysis, Circular A–4, is available online at: *https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4/.*

[31] OMB Circular A–4 requires agencies to use a pre-statutory baseline for regulatory analysis of statutory requirements (pp. 15 and 16): ''In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you [the agency] should use a pre-statute baseline.''

TABLE 2—POTENTIALLY AFFECTED ENTITIES

Category	Number of certificate holders with incremental costs	Number of flight attendants
Existing Practices Baseline:		
Major	2	41,217
National	11	19,458
Passenger and Cargo	4	437
Regional	14	6,152
Total	31	67,264
Pre-statutory Baseline:		
Major	4	91,420
National	12	21,674
Passenger and Cargo	5	739
Regional	15	6,208
Total	36	120,041

[1] The number of affected certificate holders does not equal the universe (total number) of certificate holders under both baselines because some carriers have implemented the rest for other reasons (*e.g.,* regional carriers scheduling flight attendants with pilots).

Table 3 provides the estimates of annualized and present value costs using both baselines. The key factor influencing the magnitude of the costs is the selection of the relevant baseline for the analysis. Note that uncertainties exist regarding the characterization of both baselines, as the FAA does not have complete information on existing practices or recent changes that carriers have made as a result of the FAARA 2018 or in anticipation of the rule. In addition, with respect to hires, it can be difficult to differentiate impacts due to a requirement to provide 10 consecutive hours of rest that cannot be reduced from other factors including growth or other trends. The outreach effort confirmed that the type of operations, which are specific to each certificate holder, affect the impacts.

TABLE 3—SUMMARY OF ESTIMATED COSTS

[Millions]

Discount rate	Annualized cost	5-year present value
Existing Practices Baseline:		
7%	$67.5	$277.0
3%	67.3	308.3
Pre-statutory Baseline:		
7%	117.9	483.5
3%	117.7	538.9

Table 4 provides a breakout by category of certificate holder (for the seven percent discount rate scenario). The FAA modeled costs per certificate holder as a function of the certificate holder's size (as measured by the number of flight attendants). Table 5 shows the estimated increases in flight attendants across categories by baseline scenario. These results are based on the hiring needs identified by commenters to the ANPRM. However, the FAA acknowledges that the input values may not be sufficiently representative of the different certificate holders in each category.

TABLE 4—ANNUALIZED COSTS BY CATEGORY OF CERTIFICATE HOLDER

[Millions, 7% discount rate]

Category	Number of certificate holders	Annualized cost	Average annualized cost per certificate holder
Existing Practices Baseline:			
Major	2	$45.3	$22.7
National	11	17.6	1.6
Passenger and Cargo	4	0.3	0.1
Regional	14	4.2	0.3
Total	31	67.5	2.2
Pre-statutory Baseline:			
Major	4	93.6	23.4

TABLE 4—ANNUALIZED COSTS BY CATEGORY OF CERTIFICATE HOLDER—Continued

[Millions, 7% discount rate]

Category	Number of certificate holders	Annualized cost	Average annualized cost per certificate holder
National	12	19.6	1.5
Passenger and Cargo	5	0.5	0.1
Regional	15	4.2	0.2
Total	36	117.9	2.7

TABLE 5—ESTIMATED HIRING BY CATEGORY OF CERTIFICATE HOLDER

Category	Number of certificate holder	Increase in flight attendants
Existing Practices Baseline:		
Major	2	377
National	11	149
Passenger and Cargo	4	3
Regional	14	36
Total	31	565
Pre-statutory Baseline:		
Major	4	836
National	12	166
Passenger and Cargo	5	4
Regional	15	36
Total	36	1,043

4. Uncertainty

There are a number of uncertainties in the analysis. The hiring response by major certificate holders has potentially the largest impact on costs. The FAA did not receive information in response to this request during the NPRM comment period. For example, reducing the hiring assumption for these certificate holders by half reduces estimated costs by over 30 percent. A key uncertainty exists regarding any lingering or lasting changes to the industry following the coronavirus public health emergency and the impact on benefits and costs.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 (Pub. L. 96–354, codified at 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121) and the Small Business Jobs Act of 2010 (Pub. L. 111–240), requires Federal agencies to consider the effects of the regulatory action on small entities and to minimize any significant economic impact. The term ''small entities'' includes 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 FAA published an Initial Regulatory Flexibility Analysis (IRFA) in the proposed rule to aid the public in commenting on the potential impacts to small entities. The FAA considered the public comments in developing the final rule and this Final Regulatory Flexibility Analysis (FRFA). A FRFA must contain the following:

(1) A statement of the need for, and objectives of, the rule;

(2) A statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments;

(3) The response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments;

(4) A description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available;

(5) A description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(6) A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

Need for and Objectives of the Rule

Section 335(a) of the FAARA 2018 requires modification of the flight attendant duty period limitations and rest requirements to set the minimum rest period to at least 10 consecutive hours for a flight attendant scheduled for a duty period of 14 hours or less and to prohibit the reduction of the rest period under any circumstances. This final rule modifies the flight attendant duty period limitations and rest requirements in 14 CFR 121.467 consistent with the requirements of the FAARA 2018. As such, the minimum

rest period for a flight attendant scheduled for a duty period of 14 hours will increase from at least 9 consecutive hours to at least 10 consecutive hours. The FAA will also remove the ability of the certificate holder to reduce the rest period that current regulations allow. This final rule fulfills the statutory requirement to provide flight attendants additional rest, which certificate holders will not be permitted to reduce.

Significant Issues Raised in the Public Comments

The FAA did not receive any comments on the IRFA.

Response to SBA Comments

The FAA did not receive comments from the SBA.

Small Entities to Which the Rule Will Apply

The FAA used the RFA definition of small entities for this analysis. The RFA defines small entities as small businesses, small governmental jurisdictions, or small organizations. In 5 U.S.C. 601(3), the RFA defines ''small business'' to have the same meaning as ''small business concern'' under section 3 of the Small Business Act. The Small Business Act authorizes the SBA to define ''small business'' by issuing regulations.

The SBA established size standards for various types of economic activities, or industries, under the North American Industry Classification System (NAICS).[32] These size standards generally define small businesses based on the number of employees or annual receipts. Table 6 shows the SBA size standards for certificate holders as an example. Note that the SBA definition of a small business applies to the parent company and all affiliates as a single entity.

TABLE 6—SMALL BUSINESS SIZE STANDARDS: AIR TRANSPORTATION

NAICS code	Description	SBA size standard
481111	Scheduled Passenger Air Transportation	1,500 employees.
481112	Scheduled Freight Air Transportation	1,500 employees.
481211	Nonscheduled Chartered Passenger Air Transportation	1,500 employees.
481212	Nonscheduled Chartered Freight Air Transportation	1,500 employees.
481219	Other Nonscheduled Air Transportation	$16.5 million in annual receipts.

Certificate holders affected by the requirements for flight attendant rest are those authorized to conduct operations under 14 CFR part 121. To identify small entities, the FAA first identified the primary NAICS of the certificate holder or parent company, and then used data from different sources (*e.g.,* company annual reports, Bureau of Transportation Statistics) to determine whether the certificate holder meets the applicable size standard. Table 7 provides a summary of the estimated number of small entities to which this final rule will apply.

TABLE 7—ESTIMATED NUMBER OF SMALL ENTITIES

Category	Number of entities	Number small entities	Percent small entities
Major	4	0	0
National	13	4	31
Passenger and Cargo	5	2	40
Regional	21	4	19
Total	43	10	23

Projected Reporting, Recordkeeping, and Other Compliance Requirements

No new recordkeeping or reporting requirements are associated with the final rule. Small entity compliance with the final rule might entail hiring additional flight attendants, providing initial and recurring training, travel and per diem costs, and modifying software. In addition, costs might result from updating procedural manuals.

Table 8 shows the estimated annualized compliance costs by category and the number of small entities in each category. Based on average compliance costs, impacts do not appear disproportionate to small entities. Also, regional certificate holders, which account for four of the identified small entities, may be less likely affected by the final rule due to scheduling flight attendants with pilots.[33] To the extent that small entities provide more unique services or serve markets with less competition, these entities might be able to pass on costs in the form of price increases.

TABLE 8—AVERAGE COST OF COMPLIANCE AND SMALL ENTITIES

Category	Number of small entities	Average annualized cost per certificate holder (millions) [1]
Major	0	$22.7

[32] Small Business Administration Table of Size Standards. Effective August 12, 2019. *https://www.sba.gov/document/support--table-size-standards.*

[33] In their comment on the ANPRM, the Association of Flight Attendants noted that most regional certificate holders are bidding schedules with 10 hour rest because the certificate holder schedules flight attendants with pilots to avoid operational issues.

TABLE 8—AVERAGE COST OF COMPLIANCE AND SMALL ENTITIES—Continued

Category	Number of small entities	Average annualized cost per certificate holder (millions) [1]
National	4	1.6
Passenger and Cargo	2	0.1
Regional	4	0.3

[1] Based on a baseline of existing practices and using a 7% discount rate.

Significant Alternatives Considered

One alternative the FAA considered was conducting a comprehensive review and revision of the flight attendant duty and rest regulations, similar to revisions the FAA made in the *Flightcrew Member Duty and Rest Requirements* rule.[34] The FAA rejected this alternative because of the narrow scope of the statutory mandate for rulemaking. Also, increased comprehensive or stringent requirements could add burden rather than reduce burden on small entities.

Section 335(a) contains instruction on specific, prescriptive amendments to the existing rest requirement. Any lower-cost alternatives will contravene the statute. Therefore, the FAA did not identify or consider any lower-cost alternatives to the statutory mandate.

C. International Trade Impact Assessment

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. Pursuant to these Acts, the establishment of standards is not considered an unnecessary obstacle to the foreign commerce of the United States, so long as the standard has a legitimate domestic objective, such as the protection of safety and does not operate in a manner that excludes imports that meet this objective. The statute also requires consideration of international standards and, where appropriate, that those international standards be the basis for U.S. standards. The requirements of this final rule will not create an obstacle to foreign commerce because they will apply only to flight attendants serving in operations conducted by U.S.-certificate holders conducting operations under part 121.

[34] 77 FR 330.

D. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (in 1995 dollars) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector; such a mandate is deemed to be a ''significant regulatory action.'' The FAA currently uses an inflation-adjusted value of $165 million in lieu of $100 million. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal government having first provided the funds to pay those costs. The FAA determined that the final rule will not result in the expenditure of $165,000,000 or more by State, local, or tribal governments in the aggregate, or the private sector, in any one year.[35] Therefore, the requirements of Title II of the Unfunded Mandates Reform Act of 1995 do not apply.

E. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* 5 CFR 1320.8(d) requires that the FAA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. This action does not impose new information collection requirements as defined in 5 CFR part 1320.

F. International Compatibility

In keeping with U.S. obligations under the Convention on International Civil Aviation, it is FAA policy to conform to ICAO Standards and Recommended Practices to the maximum extent practicable. The FAA has reviewed the corresponding ICAO Standards and Recommended Practices and has identified no differences with these regulations.

G. Environmental Analysis

FAA Order 1050.1F identifies FAA actions that are categorically excluded from preparation of an environmental assessment or environmental impact statement under NEPA in the absence of extraordinary circumstances. The FAA has determined this rulemaking action qualifies for the categorical exclusion identified in paragraph 5–6.6f for regulations and that no extraordinary circumstances exist.

VI. Executive Order Determinations

A. Executive Order 13132, Federalism

Executive Order 13132, ''Federalism,'' 64 FR 43255 (Aug. 10, 1999), requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' The Agency has determined that this action will not have a substantial direct effect on the States, or the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government, and, therefore, will not have Federalism implications.

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

Consistent with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' and FAA Order 1210.20, ''American Indian and Alaska Native Tribal Consultation Policy and Procedures,'' the FAA ensures that Federally Recognized

[35] The Unfunded Mandates Reform Act of 1995 defines ''Federal private sector mandate'' as ''any provision in legislation, statute, or regulation that . . . would impose an enforceable duty upon the private sector . . . or would reduce or eliminate the amount of authorization of appropriations for Federal financial assistance that will be provided to the private sector for the purposes of ensuring compliance with such duty.'' Public Law 104–4, section 658 (1995).

Tribes (Tribes) are given the opportunity to provide meaningful and timely input regarding Federal actions that have the potential to uniquely or significantly affect their respective Tribes. At this point, the FAA has not identified any unique or significant effects, environmental or otherwise, on tribes resulting from this final rule.

C. Executive Order 13211, Regulations That Significantly Affect Energy Supply, Distribution, or Use

The FAA analyzed this final rule under E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use. The FAA has determined that it would not be a ''significant energy action'' under the executive order and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

D. Executive Order 13609, Promoting International Regulatory Cooperation and International Trade Analysis

Under Executive Order 13609, ''Promoting International Regulatory Cooperation,'' 77 FR 26413 (May 4, 2012), agencies must consider whether the impacts associated with significant variations between domestic and international regulatory approaches are unnecessary or may impair the ability of American businesses to export and compete internationally. In meeting shared challenges involving health, safety, labor, security, environmental, and other issues, regulatory approaches developed through international cooperation can provide equivalent protection to standards developed independently while also minimizing unnecessary differences.

VII. Additional Information

A. Electronic Access and Filing

A copy of the ANPRM, NPRM, all comments received, the final rule, and all background material may be viewed online at *https://www.regulations.gov* using the docket number listed above. A copy of this rule will be placed in the docket. Electronic retrieval help and guidelines are available on the website. It is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded from the Office of the Federal Register's website at *https://www.federalregister.gov* and the Government Publishing Office's website at *https://www.govinfo.gov.* A copy may also be found at the FAA's Regulations and Policies website at *https://www.faa.gov/regulations_policies.*

Copies may also be obtained by sending a request to the Federal Aviation Administration, Office of Rulemaking, ARM–1, 800 Independence Avenue SW, Washington, DC 20591, or by calling (202) 267–9677.

All documents the FAA considered in developing this final rule, including economic analyses and technical reports, may be accessed in the electronic docket for this rulemaking.

B. Small Business Regulatory Enforcement Fairness Act

The Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA) requires FAA to comply with small entity requests for information or advice about compliance with statutes and regulations within its jurisdiction. A small entity with questions regarding this document may contact its local FAA official, or the person listed under the **FOR FURTHER INFORMATION CONTACT** heading at the beginning of the preamble. To find out more about SBREFA on the internet, visit *http://www.faa.gov/regulations_policies/rulemaking/sbre_act/.*

List of Subjects in 14 CFR Part 121

Air carriers, Aviation safety, Safety, Transportation.

The Amendment

For the reasons set forth in the preamble, the Federal Aviation Administration amends chapter I of title 14, Code of Federal Regulations as follows:

PART 121—OPERATING REQUIREMENTS: DOMESTIC, FLAG, AND SUPPLEMENTAL OPERATIONS

■ 1. The authority citation for part 121 is revised to read as follows:

Authority: 49 U.S.C. 106(f), 106(g), 40103, 40113, 40119, 41706, 42301 preceding note added by Pub. L. 112–95, sec. 412, 126 Stat. 89, 44101, 44701–44702, 44705, 44709–44711, 44713, 44716–44717, 44722, 44729, 44732; 46105; Pub. L. 111–216, 124 Stat. 2348 (49 U.S.C. 44701 note); Pub. L. 112–95, 126 Stat. 62 (49 U.S.C. 44732 note); Pub. L. 115–254, 132 Stat. 3186 (49 U.S.C. 44701 note).

■ 2. Amend § 121.467 by revising paragraphs (b)(2) and (3) to read as follows:

§ 121.467 Flight attendant duty period limitations and rest requirements: Domestic, flag, and supplemental operations.

* * * * *

(b) * * *

(2) A flight attendant scheduled to a duty period of 14 hours or less as provided under paragraph (b)(1) of this section must be given a scheduled rest period of at least 10 consecutive hours. This rest period must occur between the completion of the scheduled duty period and the commencement of the subsequent duty period.

(3) The rest period required under paragraph (b)(2) of this section may not be reduced to less than 10 consecutive hours.

* * * * *

Issued in Washington, DC, under authority provided by 49 U.S.C. 106(f), 44701(a)(5) and sec. 335(a) of Public Law 115–254 on or about October 4, 2022.

Billy Nolen,

Acting Administrator, Federal Aviation Administration.

[FR Doc. 2022–21963 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Part 305

RIN 3084–AB15

Energy Labeling Rule

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission (''FTC'' or ''Commission'') issues routine updates to comparability range information on EnergyGuide labels for refrigerators and freezers, dishwashers, water heaters, room air conditioners (ranges only), clothes washers, furnaces, and pool heaters in the Energy Labeling Rule (''Rule''). The Commission also makes a minor, clarifying change to requirements for determining room air conditioner capacity.

DATES: The amendments are effective January 10, 2023, with the exception of amendatory instructions 9 (appendix E1) and 15 (appendix L), which are effective on October 1, 2023.

ADDRESSES: Relevant portions of the record of this proceeding, including this document, are available at *https://www.ftc.gov.*

FOR FURTHER INFORMATION CONTACT: Hampton Newsome (202–326–2889), Attorney, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Room CC–9528, 600 Pennsylvania Avenue NW, Washington, DC 20580.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission issued the Energy Labeling Rule (''Rule'') in 1979,[1] pursuant to the Energy Policy and Conservation Act of 1975 (''EPCA'').[2] The Rule requires energy labeling for major home appliances and other consumer products to help consumers compare competing models. It also contains labeling requirements for refrigerators, refrigerator-freezers, freezers, dishwashers, water heaters, clothes washers, room air conditioners, furnaces, central air conditioners, heat pumps, plumbing products, lighting products, ceiling fans, and televisions.

The Rule requires manufacturers to attach yellow EnergyGuide labels to many covered products and prohibits retailers from removing these labels or rendering them illegible. In addition, it directs sellers, including retailers, to post label information on websites and in paper catalogs from which consumers can order products. EnergyGuide labels for most covered products contain three key disclosures: estimated annual energy cost, a product's energy consumption or energy efficiency rating as determined by Department of Energy (''DOE'') test procedures, and a comparability range displaying the highest and lowest energy costs or efficiency ratings for all similar models. For cost calculations, the Rule specifies national average costs for applicable energy sources (*e.g.,* electricity, natural gas, oil) based on DOE estimates. Under the Rule, the Commission periodically updates comparability range and annual energy cost information based on manufacturer data submitted pursuant to the Rule's reporting requirements. The Rule sets a five-year schedule for updating range of comparability and annual energy cost information.[3] Pursuant to that schedule, the Commission announces the following amendments.

II. Notice of Proposed Rulemaking

Consistent with the Rule's five-year schedule, on May 25, 2022 (87 FR 31754), the Commission proposed routine updates to comparability ranges and national average energy cost figures (appendices K1 and K2) for several product categories. The proposed amendments also updated § 305.10 to clarify that manufacturers must determine capacity for room air conditioners using current DOE requirements. In response, the Commission received nine comments, several of which raised specific issues with the proposed amendments.[4] We discuss these issues below.

III. Final Amendments

As discussed below, the Commission updates comparability ranges and national average energy cost figures (appendices K1 and K2) for several product categories consistent with the Rule's five-year schedule. The amendments also update § 305.10 to clarify that manufacturers must determine capacity for room air conditioners using current DOE requirements.[5]

A. Comparability Range and Energy Cost Revisions

In accordance with the Rule's five-year schedule (§ 305.12), the Commission revises the comparability range and energy cost information for refrigerators and freezers, dishwashers, water heaters, room air conditioners (ranges only), clothes washers, furnaces, and pool heaters.[6] In addition, the Commission updates the average energy cost figures manufacturers must use to calculate a model's estimated energy cost.[7] Specifically, the Commission now updates the energy cost tables in appendices K1 and K2.[8]

Television Ranges: In response to comments, the Commission will wait to update television ranges until DOE completes proposed test procedure changes for those products. Comments from the Association of Home Appliance Manufacturers (AHAM) (#008) and American Council for an Energy-Efficient Economy (ACEEE) (#010) explained DOE is currently finalizing changes to the television test procedure that will make substantive changes to the measured energy use for these products.[9] To avoid multiple updates to the television label within a short period of time, the FTC, in coordination with DOE, will publish updated ranges after data derived from the upcoming test procedure becomes available.

Clothes Washer Ranges: In response to AHAM's comment (#008), the final amendments correct the proposed clothes washer ranges to reflect only the annual energy consumption of the tested model. The proposed ranges in the NPRM were inadvertently derived from energy consumption figures that reflected DOE's Integrated Modified Energy Factor, an efficiency rating that does not appear on the label and accounts for expected dryer use associated with the washer.

Timing of Updates: Consistent with § 305.12, manufacturers must begin using this information on new product labels within 90 days after publication of a final notification announcing updated ranges for specific products. Manufacturers do not have to relabel products labeled prior to the effective date of the changes. For room air conditioners, however, the final notification sets a compliance date of October 1, 2023.

In the NPRM, the Commission proposed setting an October 1, 2022, effective date for those ranges because this label must appear on product boxes, and such package changes can require additional planning and coordination. The proposed October date coincides with the annual production cycle (*i.e.,* the cooling season) for those products.

However, in its comments, AHAM (#008) stressed that, given the likely timing of the final range publication, manufacturers will be unable to change labels on packaging to reflect the new labels for this year's production cycle. Therefore, AHAM recommended a compliance date for the new room air conditioner ranges coinciding with next year's production cycle. In response, this document sets the compliance date for 2023. Adjusting the compliance date should have minimal impact on the

[1] 44 FR 66466 (Nov. 19, 1979).

[2] 42 U.S.C. 6294. EPCA also requires the Department of Energy (DOE) to develop test procedures that measure how much energy appliances use, and to determine the representative average cost a consumer pays for different types of energy.

[3] 16 CFR 305.12.

[4] The comments are available at *www.regulations.gov.* Several comments also discussed broad issues unrelated to the notice of proposed rulemaking's (''NPRM'') proposed range updates, including full fuel cycle label disclosures (NPGA) (#007), EnergyGuide label design and content (Consumer Technology Association (CTA) (#009); Electrolux (#006); ACEEE (#010); and Anonymous (#003)), clothes dryer labeling (Electrolux (#006)), and the implementation of electronic labeling in lieu of physical labels (CTA) (#009). These issues fall outside the scope of the current proceeding, but the Commission may address them in a future review of the Rule.

[5] The final amendments also insert the term ''water heaters'' to § 305.27(a)(1)(i) to correct an inadvertent omission from a previous proceeding. *See* 77 FR 15298 (Mar. 15, 2012) and 78 FR 2200 (Jan. 10, 2013) (no intent expressed to exclude water heaters from the group of products covered by the website requirement). Given the inadvertent nature of this omission, the Commission finds good cause to make this correction without additional comment. Finally, the amendments revise the next scheduled range update in § 305.12 from 2022 to 2027.

[6] This document also contains conforming changes to the sample labels in the Rule's appendices to reflect the new range and cost information.

[7] 87 FR 12681 (Mar. 7, 2022) (DOE notice for ''Representative Average Unit Costs of Energy''). Fuel costs in the FTC tables in appendices K1 and K2 are rounded to the nearest cent.

[8] In response to AHAM's comments (#008), the final amendments consistently use the term ''Energy Costs'' in the appendix headings, instead of ''Operating Costs.''

[9] 87 FR 11892 (March 2, 2022).

label's usefulness in the interim because the old and new ranges are not substantially different for many model categories, and the label's primary feature—the model-specific cost number—will not change because of these amendments. Additionally, extending the compliance date will promote consistency in labels and otherwise foster an orderly transition over the next year by setting a compliance date that all manufacturers will be able to meet.

Cost Figures for Room and Portable Air Conditioners: As explained in the NPRM, the amendments do not change the range and cost information for central air conditioner and portable air conditioner labels because the Commission recently updated those ranges.[10] Additionally, the amendments do not change the cost figure for room air conditioner labels because such a change would make room air conditioner labels inconsistent with cost information on portable air conditioners, a similar product category. This inconsistency could cause consumer confusion and make comparison shopping more difficult. Accordingly, the electricity cost figure ($0.13/kWh) for those two categories appears in appendix K2 and in the calculations for the room air conditioner cost ranges (appendix E) in the amendments. No comments opposed this change.

B. Capacity Determinations for Room Air Conditioners and Portable Air Conditioners

The amendments also update § 305.10 to clarify that manufacturers must determine capacity for room air conditioners using current DOE requirements. Specifically, the amendment eliminates obsolete text related to rounding and updates references to existing DOE requirements for capacity determinations.[11] No comments opposed this change.

[10] *See* 86 FR 9274 (Feb. 12, 2021) (portable air conditioners); 86 FR 57985 (Oct. 20, 2021) (central air conditioners).

[11] 86 FR 9274 (Feb. 12, 2022). In its comments, AHAM (#008) also sought FTC guidance regarding the content, including the capacity measurements, for the new portable air conditioner labels announced in an earlier proceeding. Manufacturers should use the seasonally adjusted cooling capacity for these products on the labels. The FTC will address the issue further should pending DOE test procedure changes (87 FR 34934 (June 8, 2022)) necessitate an alteration in that guidance. In addition, the FTC staff has added a sample label template for portable air conditioners to the FTC website to aid manufacturers in creating their own labels. *See https://www.ftc.gov/business-guidance/resources/energyguide-labels-templates-manufacturers.*

IV. 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) regulations that implement the Paperwork Reduction Act. OMB has approved the Rule's existing information collection requirements through February 29, 2024 (OMB Control No. 3084–0069). The amendments do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements and, therefore, do not require further OMB clearance.

V. 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 by the Energy Labeling Rule. As explained elsewhere in this document, the amendments do not change the substance or frequency of the recordkeeping, disclosure, or reporting requirements. Thus, the amendments will not have a ''significant economic impact on a substantial number of small entities.'' 5 U.S.C. 605. 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 will not have a significant economic impact on a substantial number of small entities.

VI. Other Matters

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

List of Subjects in 16 CFR Part 305

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

For the reasons stated above, the Commission amends part 305 of title 16 of the Code of Federal Regulations as follows:

PART 305—ENERGY AND WATER USE LABELING FOR CONSUMER PRODUCTS UNDER THE ENERGY POLICY AND CONSERVATION ACT (''ENERGY LABELING RULE'')

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

Authority: 42 U.S.C. 6294.

■ 2. Amend § 305.10 by revising paragraph (f) to read as follows:

§ 305.10 Determinations of capacity.

* * * * *

(f) *Room air conditioners and portable air conditioners.* The capacity for room air conditioners and portable air conditioners shall be determined according to 10 CFR part 430, subpart B, with rounding determined in accordance with 10 CFR part 430.

* * * * *

■ 3. Amend § 305.12 by revising paragraphs (a) and (b) to read as follows:

§ 305.12 Ranges of comparability on the required labels.

(a) *Range of estimated annual energy costs or energy efficiency ratings.* The range of estimated annual operating costs or energy efficiency ratings for each covered product (except televisions, ceiling fans, fluorescent lamp ballasts, lamps, metal halide lamp fixtures, showerheads, faucets, water closets, and urinals) shall be taken from the appropriate appendix to this part in effect at the time the labels are affixed to the product. The Commission shall publish revised ranges in the **Federal Register** in 2027. When the ranges are revised, all information disseminated after 90 days following the publication of the revision shall conform to the revised ranges. Products that have been labeled prior to the effective date of a modification under this section need not be relabeled.

(b) *Representative average unit energy cost.* The Representative Average Unit Energy Cost to be used on labels as required by §§ 305.14 through 305.19 and disclosures as required by § 305.27 are listed in appendices K1 and K2 to this part. The Commission shall publish revised Representative Average Unit Energy Cost figures in the **Federal Register** in 2027. 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. Amend § 305.27 by revising paragraph (a)(1)(i) to read as follows:

§ 305.27 Paper catalogs and websites.

(a) * * *

(1) * * *

(i) *Products required to bear EnergyGuide or Lighting Facts labels.* All websites advertising covered refrigerators, refrigerator-freezers, freezers, room air conditioners, portable air conditioners, clothes washers, dishwashers, ceiling fans, pool heaters, water heaters, central air conditioners, heat pumps, furnaces, general service lamps, specialty consumer lamps (for products offered for sale after May 2, 2018), and televisions must display, for each model, a recognizable and legible image of the label required for that product by this part. The website may hyperlink to the image of the label using the sample EnergyGuide and Lighting Facts icons depicted in appendix L of this part. The website must hyperlink the image in a way that does not require consumers to save the hyperlinked image to view it.

* * * * *

■ 5. Revise appendices A1 through A9 to read as follows:

Appendix A1 to Part 305—Refrigerators With Automatic Defrost

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$20	45
10.5 to 12.4	28	40
12.5 to 14.4	33	47
14.5 to 16.4	33	46
16.5 to 18.4	38	52
18.5 to 20.4	42	50
20.5 to 22.4	35	57
22.5 to 24.4	51	59
24.5 to 26.4	(*)	(*)
26.5 to 28.4	(*)	(*)
28.5 and over	(*)	(*)

(*) No data.

Appendix A2 to Part 305—Refrigerators and Refrigerator-Freezers With Manual Defrost

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$11	$46
10.5 to 12.4	(*)	(*)
12.5 to 14.4	(*)	(*)
14.5 to 16.4	(*)	(*)
16.5 to 18.4	(*)	(*)
18.5 to 20.4	(*)	(*)
20.5 to 22.4	(*)	(*)
22.5 to 24.4	(*)	(*)
24.5 to 26.4	(*)	(*)
26.5 to 28.4	(*)	(*)
28.5 and over	(*)	(*)

(*) No data.

Appendix A3 to Part 305—Refrigerator-Freezers With Partial Automatic Defrost

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$27	$55
10.5 to 12.4	(*)	(*)
12.5 to 14.4	(*)	(*)

RANGE INFORMATION—Continued

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
14.5 to 16.4	(*)	(*)
16.5 to 18.4	53	53
18.5 to 20.4	48	55
20.5 to 22.4	(*)	(*)
22.5 to 24.4	(*)	(*)
24.5 to 26.4	(*)	(*)
26.5 to 28.4	(*)	(*)
28.5 and over	(*)	(*)

(*) No data.

Appendix A4 to Part 305—Refrigerator-Freezers With Automatic Defrost With Top-Mounted Freezer No Through-The-Door Ice

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$40	$62
10.5 to 12.4	43	61
12.5 to 14.4	44	64
14.5 to 16.4	45	66
16.5 to 18.4	49	70
18.5 to 20.4	48	72
20.5 to 22.4	51	76
22.5 to 24.4	58	78
24.5 to 26.4	66	81
26.5 to 28.4	(*)	(*)
28.5 and over	(*)	(*)

(*) No data.

Appendix A5 to Part 305—Refrigerator-Freezers With Automated Defrost With Side-Mounted Freezer No Through-The-Door Ice

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$54	$82
10.5 to 12.4	(*)	(*)
12.5 to 14.4	39	40
14.5 to 16.4	49	65
16.5 to 18.4	69	70
18.5 to 20.4	66	70
20.5 to 22.4	70	101
22.5 to 24.4	78	105
24.5 to 26.4	80	109
26.5 to 28.4	91	113
28.5 and over	84	118

(*) No data.

Appendix A6 to Part 305—Refrigerator-Freezers With Automatic Defrost With Bottom-Mounted Freezer No Through-The-Door Ice

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$42	$73
10.5 to 12.4	47	79
12.5 to 14.4	50	77
14.5 to 16.4	53	85
16.5 to 18.4	60	86
18.5 to 20.4	60	91
20.5 to 22.4	62	94
22.5 to 24.4	65	98
24.5 to 26.4	74	96
26.5 to 28.4	67	95
28.5 and over	91	101

(*) No data.

Appendix A7 to Part 305—Refrigerator-Freezers With Automatic Defrost With Bottom-Mounted Freezer With Through-The-Door Ice Service

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	(*)	(*)
10.5 to 12.4	(*)	(*)
12.5 to 14.4	(*)	(*)
14.5 to 16.4	(*)	(*)
16.5 to 18.4	$80	$90
18.5 to 20.4	83	98
20.5 to 22.4	91	103
22.5 to 24.4	77	106
24.5 to 26.4	89	109
26.5 to 28.4	83	112
28.5 and over	90	113

(*) No data.

Appendix A8 to Part 305—Refrigerator-Freezers With Automatic Defrost With Side-Mounted Freezer With Through-The-Door Ice Service

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	(*)	(*)
10.5 to 12.4	(*)	(*)
12.5 to 14.4	(*)	(*)
14.5 to 16.4	(*)	(*)
16.5 to 18.4	$87	$88
18.5 to 20.4	78	110
20.5 to 22.4	72	109

RANGE INFORMATION—Continued

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
22.5 to 24.4	76	115
24.5 to 26.4	81	116
26.5 to 28.4	89	122
28.5 and over	104	124

(*) No data.

Appendix A9 to Part 305—All Refrigerators and Refrigerator-Freezers

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 10.5	$11	$82
10.5 to 12.4	28	79
12.5 to 14.4	33	77
14.5 to 16.4	33	84
16.5 to 18.4	38	90
18.5 to 20.4	42	110
20.5 to 22.4	35	109
22.5 to 24.4	51	115
24.5 to 26.4	66	116
26.5 to 28.4	67	122
28.5 and over	84	124

(*) No data.

6. Revise appendices B1 through B3 to read as follows:

Appendix B1 to Part 305—Upright Freezers With Manual Defrost

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 5.5	$18	$43
5.5 to 7.4	35	47
	34	40
7.5 to 9.4	36	36
9.5 to 11.4	(*)	(*)
11.5 to 13.4	42	47
13.5 to 15.4	49	51
15.5 to 17.4	(*)	(*)
17.5 to 19.4	49	56
19.5 to 21.4	(*)	(*)
21.5 to 23.4	(*)	(*)
23.5 to 25.4	(*)	(*)
25.5 to 27.4	(*)	(*)
27.5 to 29.4	(*)	(*)
29.5 and over		

(*) No data.

Appendix B2 to Part 305—Upright Freezers With Automatic Defrost

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 5.5	$37	$63
5.5 to 7.4	(*)	(*)
	44	69
7.5 to 9.4	44	68
9.5 to 11.4	54	79
11.5 to 13.4	54	85
13.5 to 15.4	58	89
15.5 to 17.4	62	84
17.5 to 19.4	63	91
19.5 to 21.4	101	104
21.5 to 23.4	(*)	(*)
23.5 to 25.4	(*)	(*)
25.5 to 27.4	(*)	(*)
27.5 to 29.4	(*)	(*)
29.5 and over		

(*) No data.

Appendix B3 to Part 305—Chest Freezers and All Other Freezers

RANGE INFORMATION

Manufacturer's rated total refrigerated volume in cubic feet	Range of estimated annual energy costs (dollars/year)	
	Low	High
Less than 5.5	$19	$32
5.5 to 7.4	31	36
	27	37
7.5 to 9.4	28	35
9.5 to 11.4	35	$38
11.5 to 13.4	39	42
13.5 to 15.4	38	46
15.5 to 17.4	46	47
17.5 to 19.4	50	53
19.5 to 21.4	48	55
21.5 to 23.4	59	59
23.5 to 25.4	(*)	(*)
25.5 to 27.4	(*)	(*)
27.5 to 29.4	(*)	(*)
29.5 and over		

(*) No data.

■ 7. Revise appendices C1 and C2 to read as follows:

Appendix C1 to Part 305—Compact Dishwashers

Range Information

''Compact'' includes countertop dishwasher models with a capacity of fewer than eight (8) place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Compact	$14	$32

Appendix C2 to Part 305—Standard Dishwashers

Range Information

''Standard'' includes dishwasher models with a capacity of eight (8) or more place settings. Place settings shall be in accordance with appendix C to 10 CFR part 430, subpart B. Load patterns shall conform to the operating normal for the model being tested.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Standard	$28	$43

■ 8. Revise appendices D1 through D5 to read as follows:

Appendix D1 to Part 305—Water Heaters—Gas

RANGE INFORMATION

Capacity (first hour rating in gallons)	Range of estimated annual energy costs (dollars/year)			
	Natural gas ($/year)		Propane ($/year)	
	Low	High	Low	High
''Very Small''—less than 18	(*)	(*)	(*)	(*)
''Low''—18 to 50.9	$162	$172	(*)	(*)
''Medium''—51 to 74.9	227	300	460	606
''High''—over 75	227	336	460	679

(*) No data.

Appendix D2 to Part 305—Water Heaters—Electric

RANGE INFORMATION

Capacity	Range of estimated annual energy costs (dollars/year)	
First hour rating	Low	High
''Very Small''—less than 18	(*)	(*)
''Low''—18 to 50.9	$90	$357
''Medium''—51 to 74.9	154	630
''High''—over 75	173	747

(*) No data.

Appendix D3 to Part 305—Water Heaters—Oil

RANGE INFORMATION

Capacity	Range of estimated annual energy costs (dollars/year)	
First hour rating	Low	High
''Very Small''—less than 18	(*)	(*)
''Low''—18 to 50.9	(*)	(*)
''Medium''—51 to 74.9	(*)	(*)
''High''—over 75	$625	$686

(*) No data.

Appendix D4 to Part 305—Water Heaters—Instantaneous—Gas

RANGE INFORMATION

Capacity	Range of estimated annual energy costs (dollars/year)			
Capacity (maximum flow rate); gallons per minute (gpm)	Natural gas ($/year)		Propane ($/year)	
	Low	High	Low	High
"Very Small"—less than 1.6	$24	$30	$50	$61
"Low"—1.7 to 2.7	(*)	(*)	(*)	(*)
"Medium"—2.8 to 3.9	183	216	370	437
"High"—over 4.0	210	253	427	511

(*) No data.

Appendix D5 to Part 305—Water Heaters—Instantaneous—Electric

RANGE INFORMATION

Capacity	Range of estimated annual energy costs (dollars/year)	
Capacity (maximum flow rate); gallons per minute (gpm)	Low	High
"Very Small"—less than 1.6	$82	$90
"Low"—1.7 to 2.7	(*)	(*)
"Medium"—2.8 to 3.9	(*)	(*)
"High"—over 4.0	(*)	(*)

(*) No data.

■ 9. Effective October 1, 2023, revise appendix E1 to read as follows:

Appendix E1 to Part 305—Room Air Conditioners

RANGE INFORMATION

Manufacturer's rated cooling capacity in Btu/hr	Range of estimated annual energy costs (dollars/year)	
	Low	High
Without Reverse Cycle and with Louvered Sides:		
Less than 6,000 Btu	$40	$46
6,000 to 7,999 Btu	47	69
8,000 to 13,999 Btu	49	121
14,000 to 19,999 Btu	91	169
20,000 to 27,999 Btu	147	287
28,000 and more Btu	275	380
Without Reverse Cycle and without Louvered Sides:		
Less than 8,000 Btu	(*)	(*)
8,000 to 10,999 Btu	73	102
11,000 to 13,999 Btu	107	140
14,000 to 19,999 Btu	144	162
20,000 or more Btu	(*)	(*)
With Reverse Cycle and with Louvered Sides	79	230
With Reverse Cycle, without Louvered Sides	81	117

(*) No data.

■ 10. Revise appendices F1 and F2 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.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Standard	$4	$48

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.

Capacity	Range of estimated annual energy costs (dollars/year)	
	Low	High
Compact	$2	$14

(*) No data.

■ 11. Revise appendices G1 through G8 to read as follows:

Appendix G1 to Part 305—Furnaces—Gas

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Gas Furnaces—All Capacities	80.0	99.0
Weatherized Gas Furnaces—All Capacities	81.0	95.0

Appendix G2 to Part 305—Furnaces—Electric

Furnace type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Furnaces—All Capacities	100.0	100.0

Appendix G3 to Part 305—Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Non-Weatherized Oil Furnaces—All Capacities	83.0	96.7
Weatherized Oil Furnaces—All Capacities	(*)	(*)

(*) No data.

Appendix G4 to Part 305—Mobile Home Furnaces—Gas

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Gas Furnaces—All Capacities	80.0	97.3

Appendix G5 to Part 305—Mobile Home Furnaces—Oil

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Mobile Home Oil Furnaces—All Capacities	80.0	87.0

Appendix G6 to Part 305—Boilers (Gas)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Gas Boilers (except steam)—All Capacities	84	96.4
Gas Boilers (steam)—All Capacities	82	83.4

Appendix G7 to Part 305—Boilers (Oil)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Oil Boilers—All Capacities	85	88.2

Appendix G8 to Part 305—Boilers (Electric)

Type	Range of annual fuel utilization efficiencies (AFUEs)	
	Low	High
Electric Boilers—All Capacities	100	100

■ 12. Revise appendices J1 and J2 to read as follows:

Appendix J1 to Part 305—Pool Heaters—Gas

RANGE INFORMATION

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)			
	Natural gas		Propane	
	Low	High	Low	High
All capacities	82.0	95.0	82.0	95.0

Appendix J2 to Part 305—Pool Heaters—Oil

RANGE INFORMATION

Manufacturer's rated heating capacities	Range of thermal efficiencies (percent)	
	Low	High
All capacities	(*)	(*)

(*) No data.

■ 13. Revise appendices K1 and K2 to read as follows:

Appendix K1 to Part 305—Representative Average Unit Energy Costs for Refrigerators, Refrigerator-Freezers, Freezers, Clothes Washers, Dishwashers, and Water Heater Labels

This table contains the representative unit energy costs that must be utilized to calculate estimated annual energy cost disclosures required under this part for refrigerators, refrigerator-freezers, freezers, clothes washers, dishwashers, and water heaters. This table is based on information published by the U.S. Department of Energy in 2022.

Type of energy	In commonly used terms	As required by DOE test procedure
Electricity	¢14/kWh [1] [2]	$.1400/kWh.
Natural Gas	$1.21/therm [3]	$0.00001209/Btu.[4]
	$12.6/MCF [5] [6]	
No. 2 Heating Oil	$3.45/gallon [7]	$0.00002511/Btu.
Propane	$223/gallon [8]	$0.00002446/Btu.
Kerosene	$4.01/gallon [9]	$ 0.00002973/Btu.

[1] kWh stands for kiloWatt hour.
[2] 1 kWh = 3,412 Btu.
[3] 1 therm = 100,000 Btu. Natural gas prices include taxes.
[4] Btu stands for British thermal unit.
[5] MCF stands for 1,000 cubic feet.
[6] For the purposes of this table, 1 cubic foot of natural gas has an energy equivalence of 1,039 Btu.
[7] For the purposes of this table, one gallon of No. 2 heating oil has an energy equivalence of 13,738 Btu.
[8] For the purposes of this table, one gallon of liquid propane has an energy equivalence of 91,333 Btu.
[9] For the purposes of this table, one gallon of kerosene has an energy equivalence of 135,000 Btu.

Appendix K2 to Part 305—Representative Average Unit Energy Costs for Room Air Conditioner and Portable Air Conditioner Labels

This table contains the representative unit energy costs that must be utilized to calculate estimated annual energy cost disclosures required under this part for room air conditioners and portable air conditioners. This table is based on information published by the U.S. Department of Energy in 2017.

Type of energy	In commonly used terms	As required by DOE test procedure
Electricity	¢13/kWh [1]	$.1300/kWh.

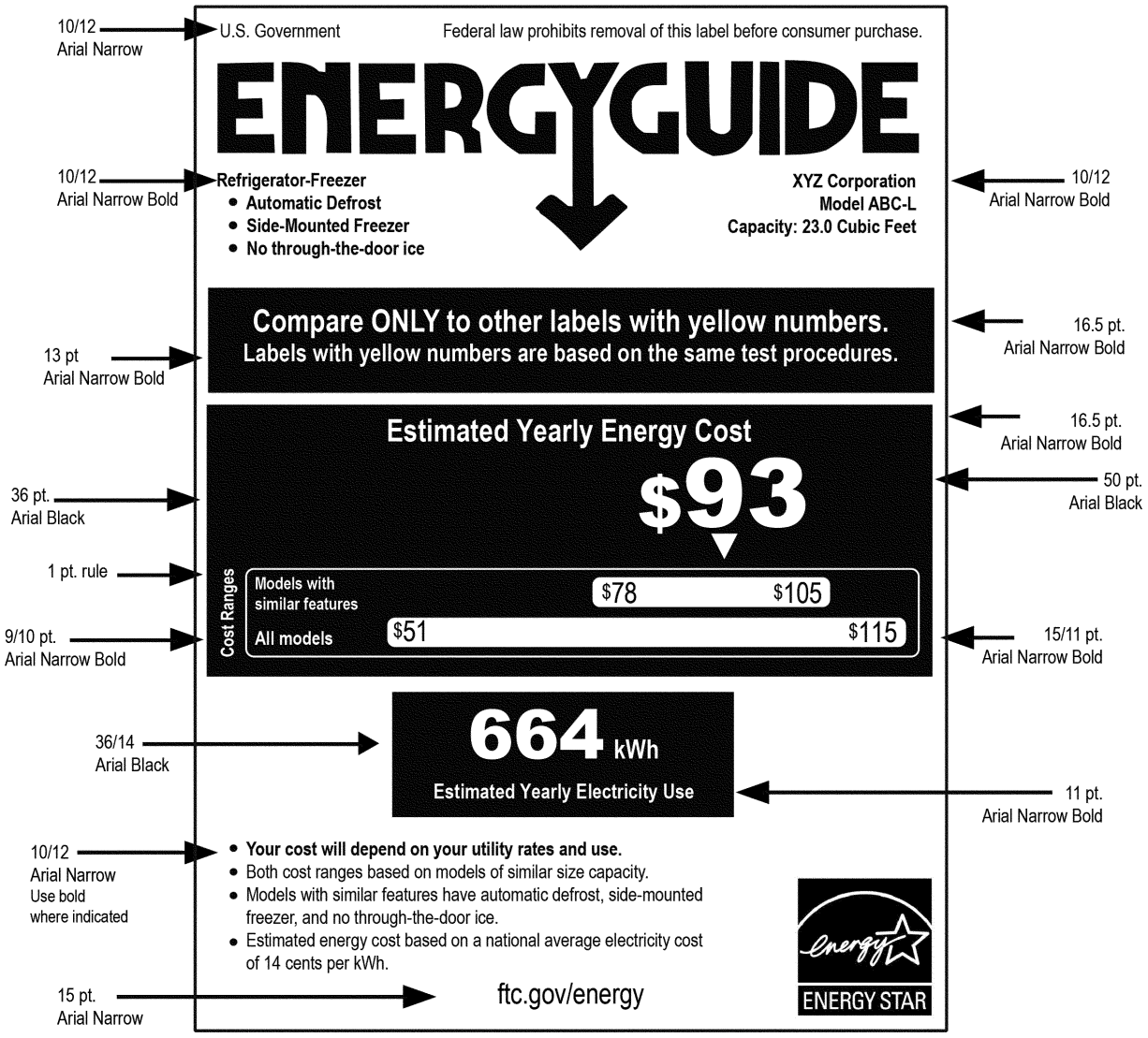
[1] kWh stands for kilowatt hour.

■ 14. Amend appendix L by revising prototype labels 1 and 2 and sample labels 1, 2, 3, 5, 6, 9, and 9A to read as follows:

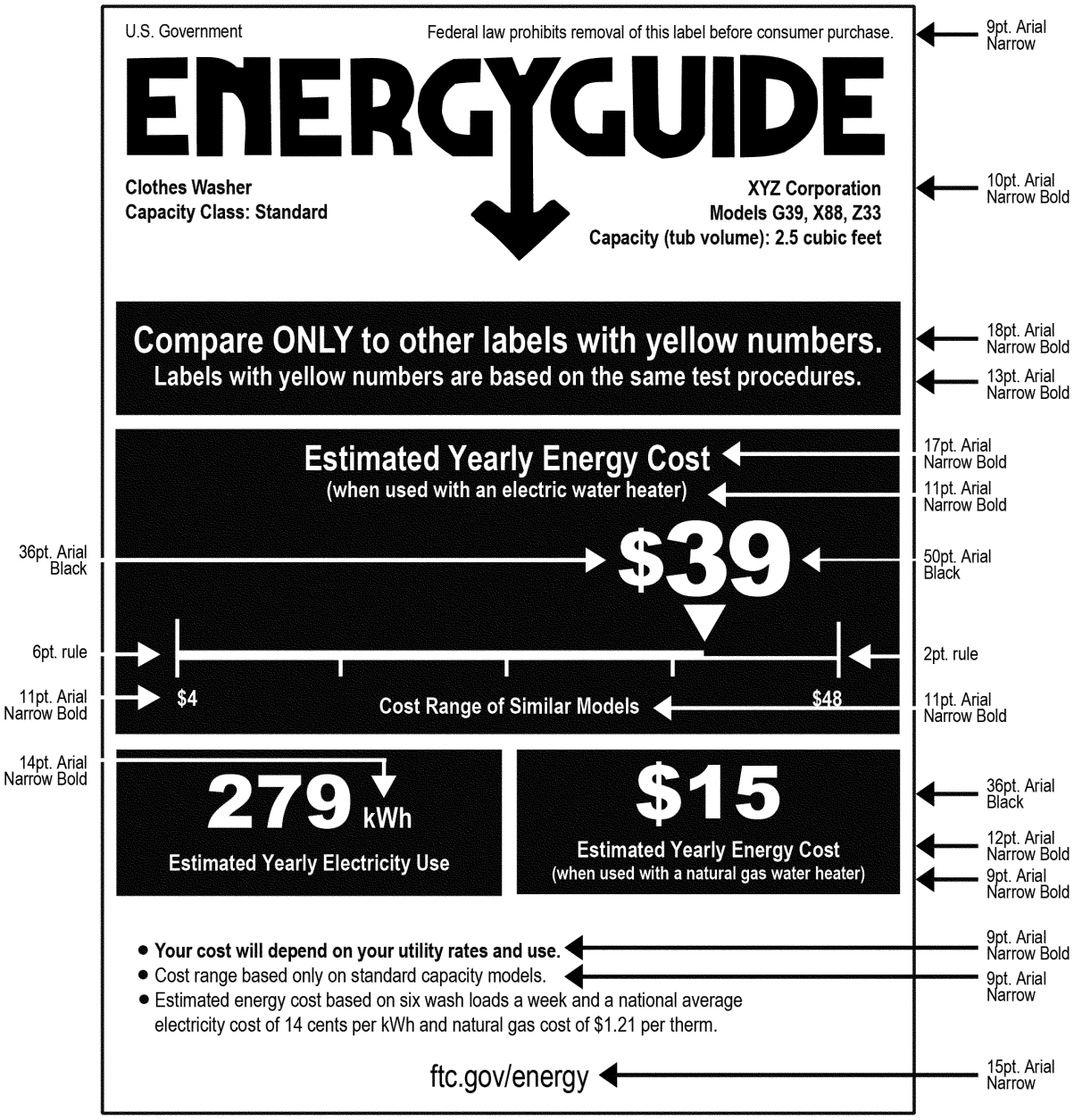
Appendix L to Part 305—Sample Labels

BILLING CODE 6750–01–P

Prototype Label 1 – Refrigerator-Freezer

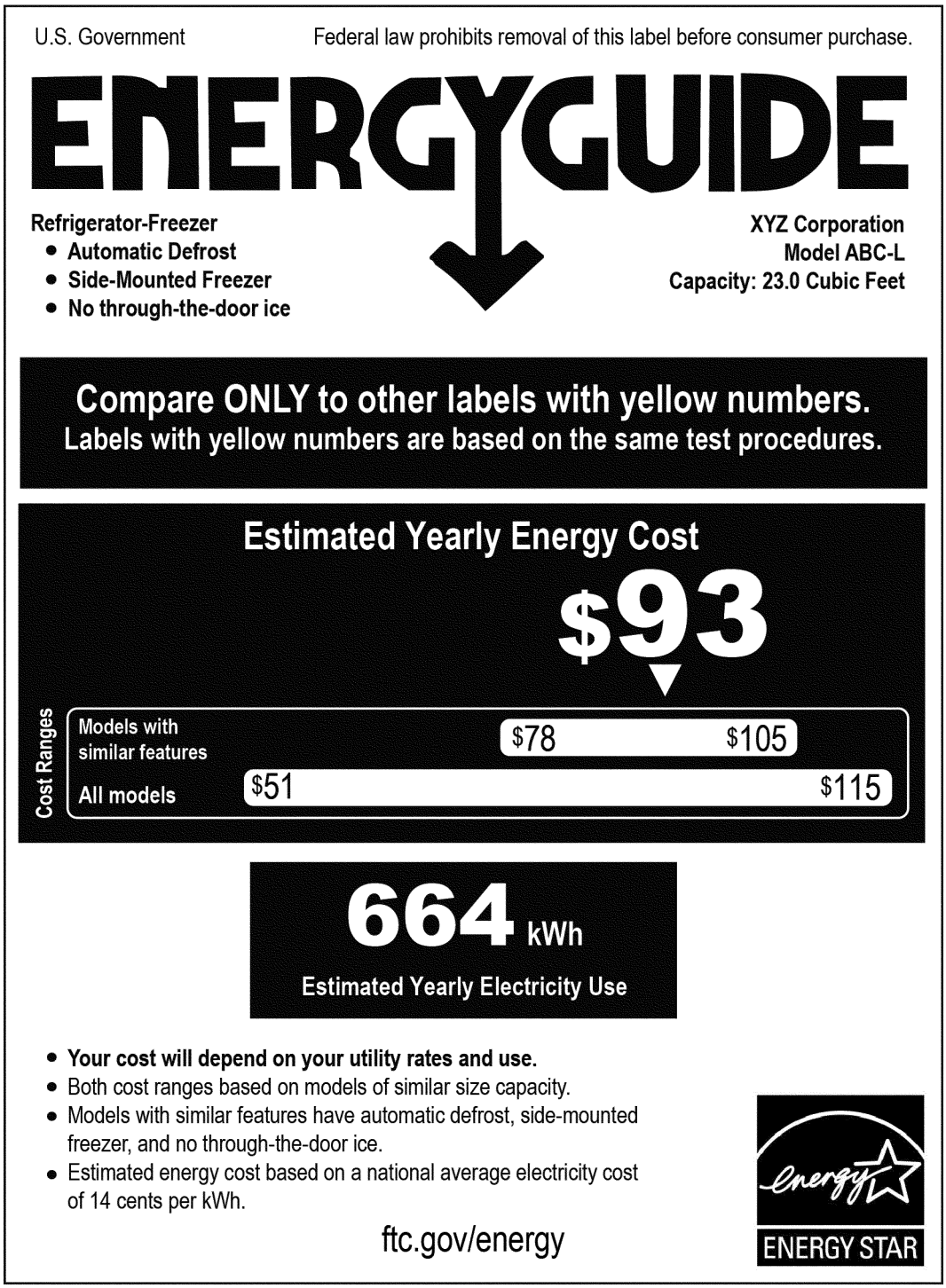


Prototype Label 2 – Clothes Washer

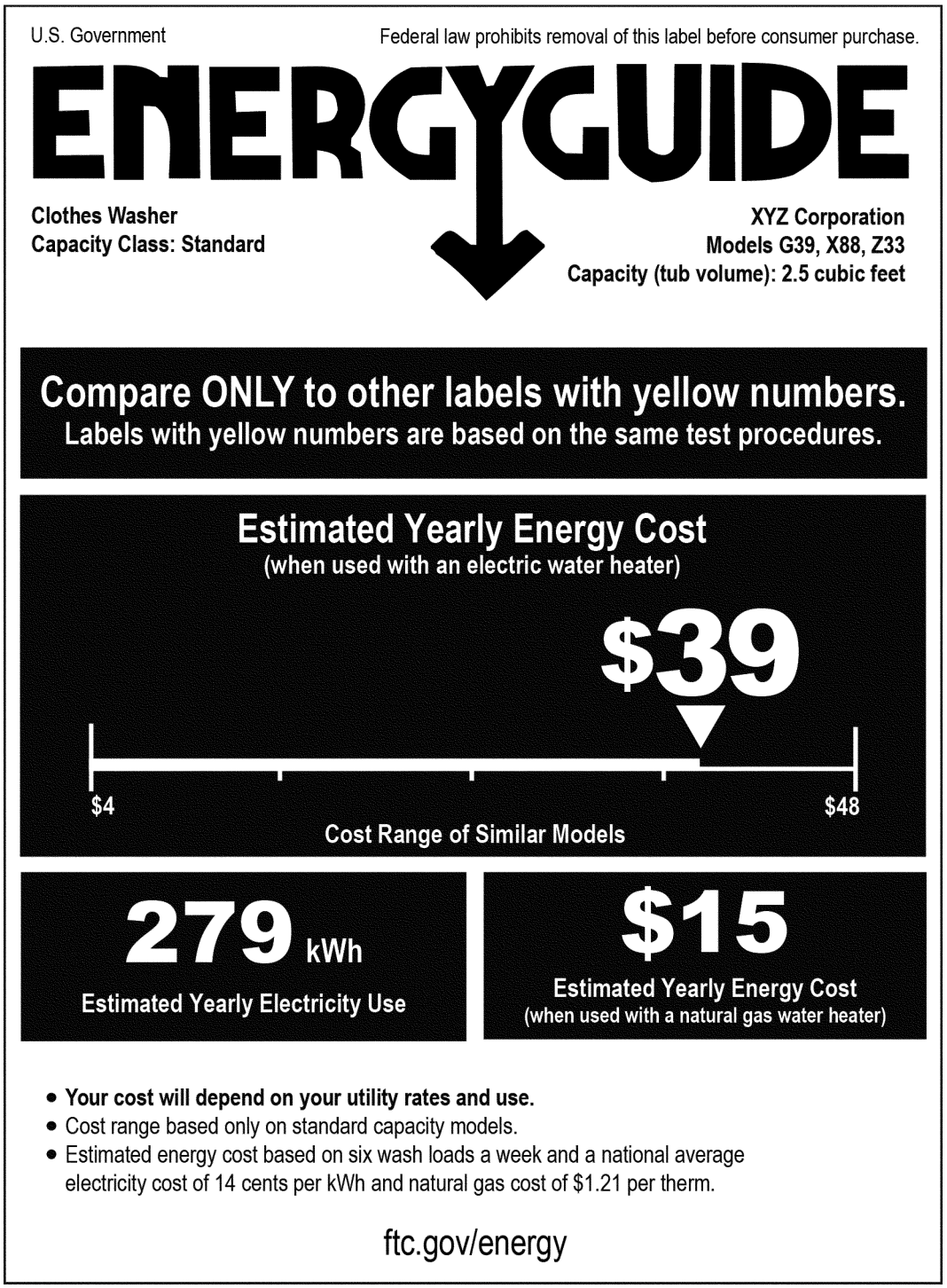


* * * * *

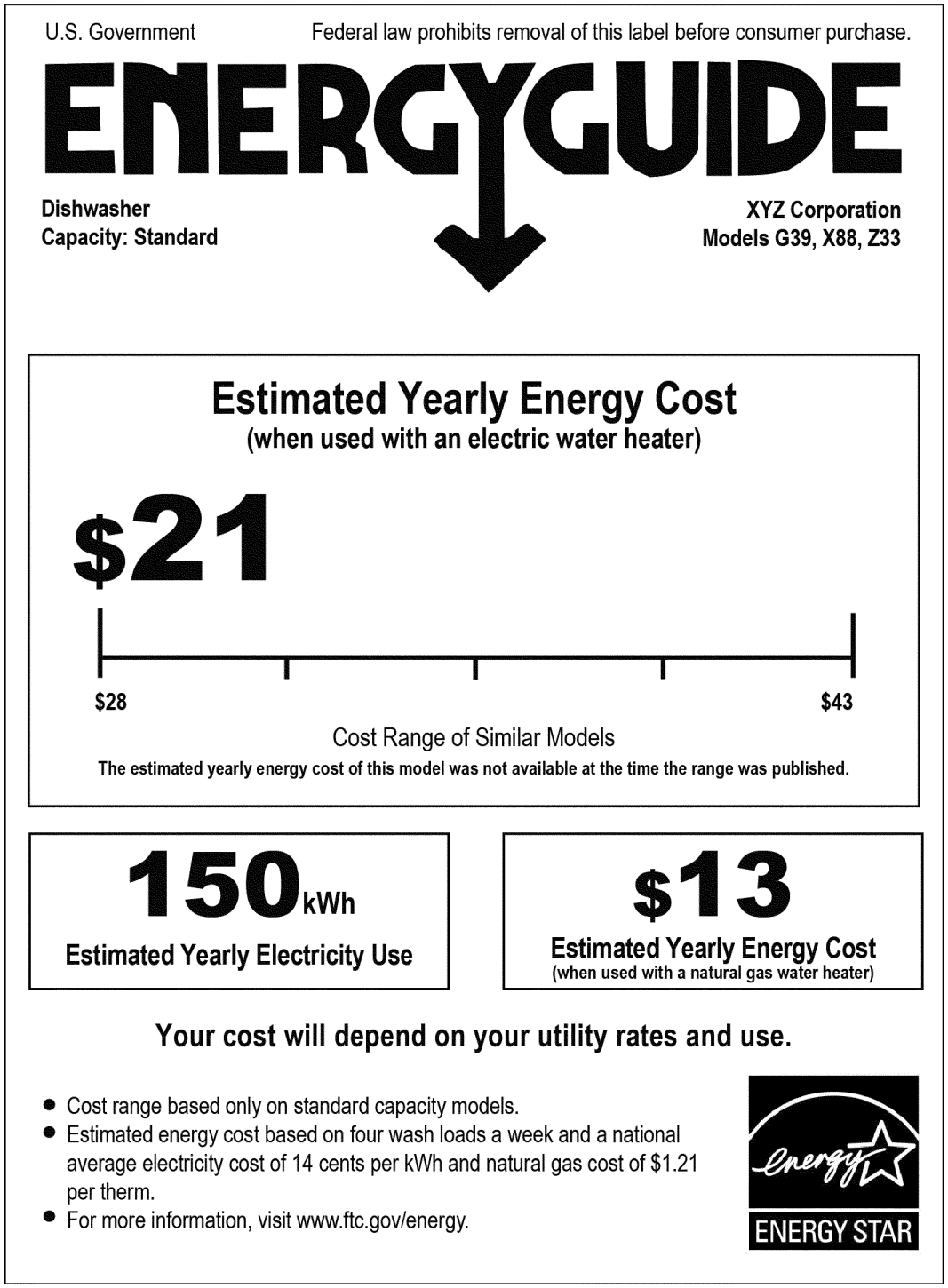
Sample Label 1 – Refrigerator-Freezer



Sample Label 2 – Clothes Washer

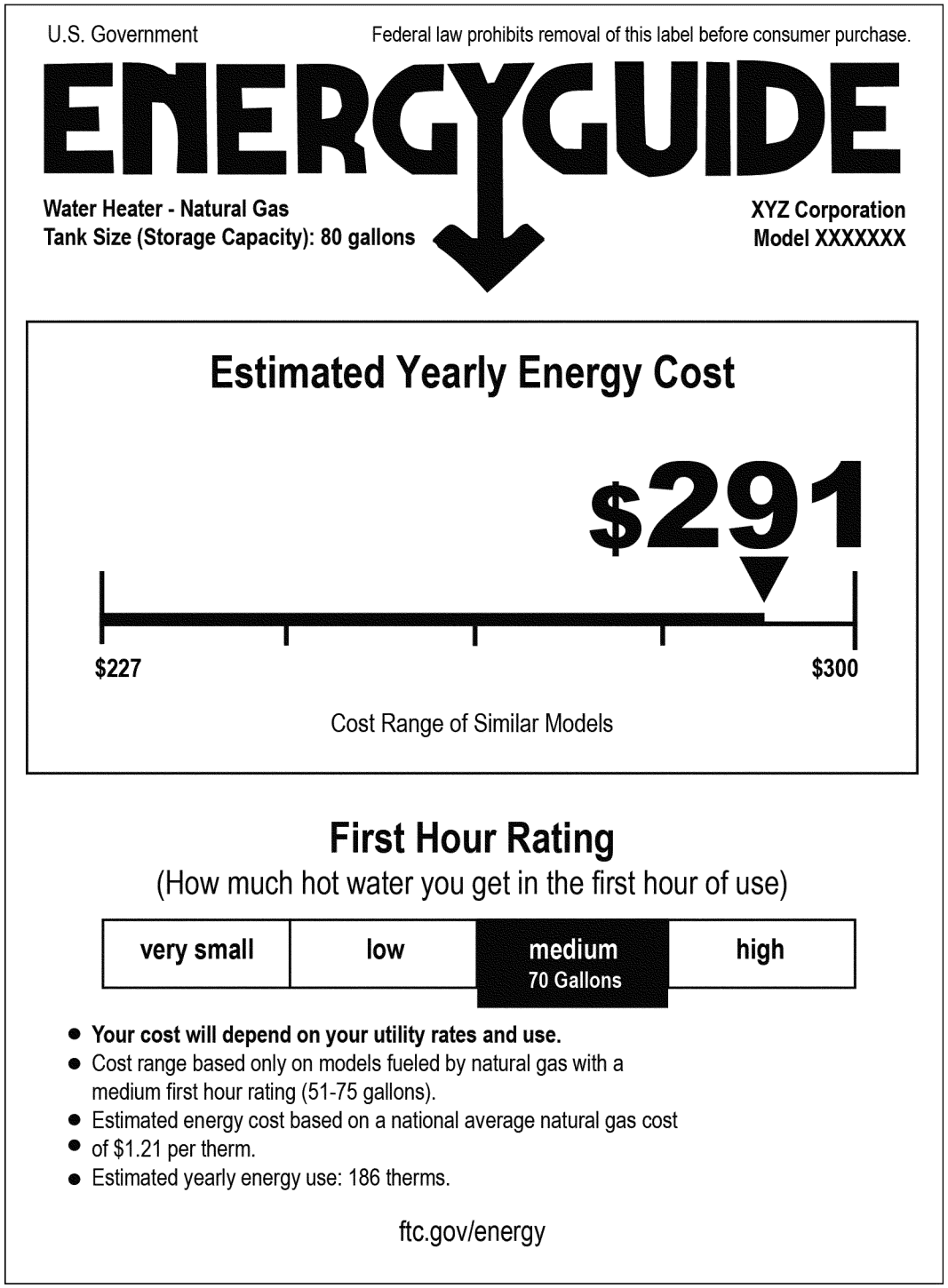


Sample Label 3 – Dishwasher

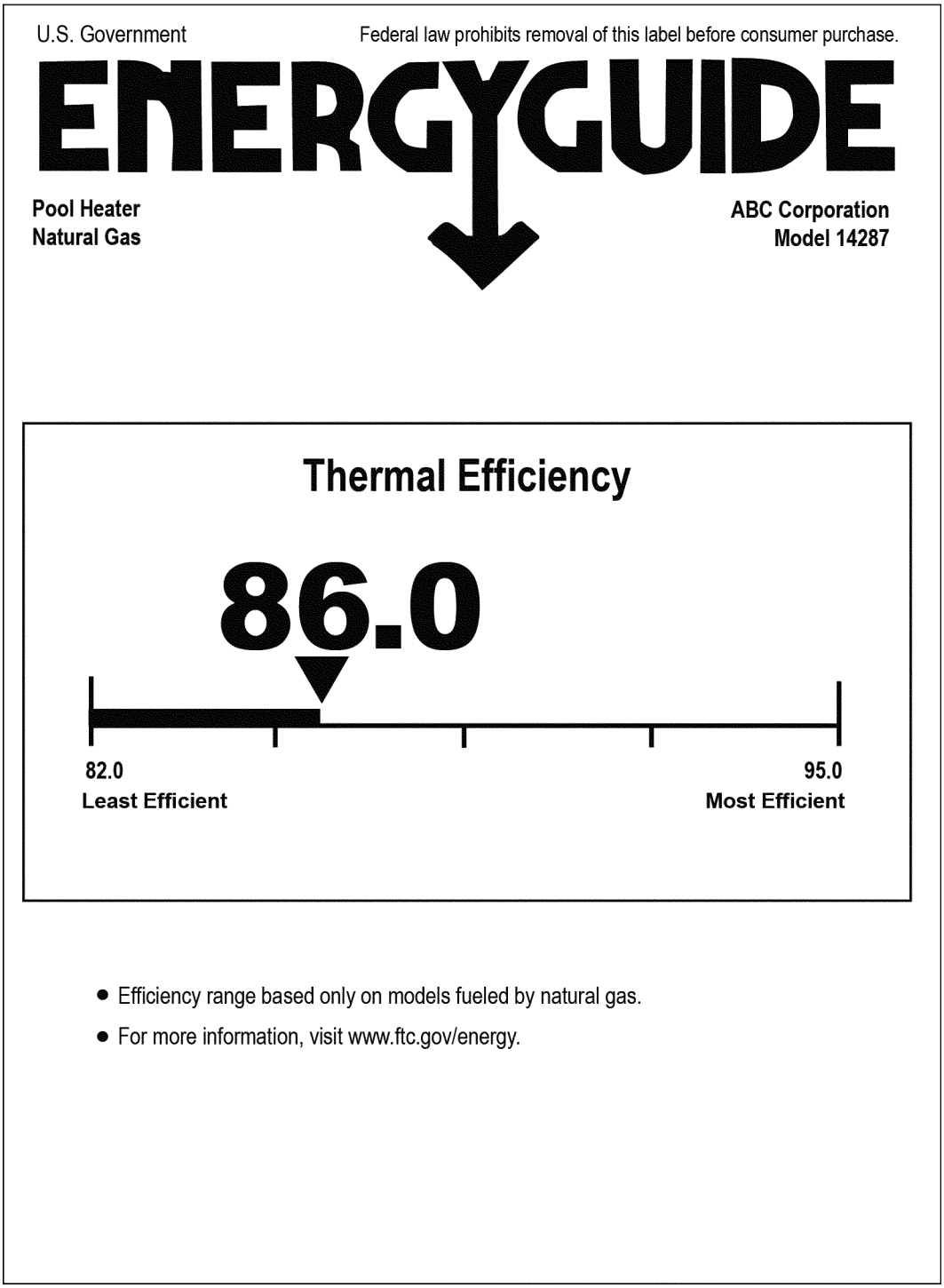


* * * * *

Sample Label 5 – Water Heater

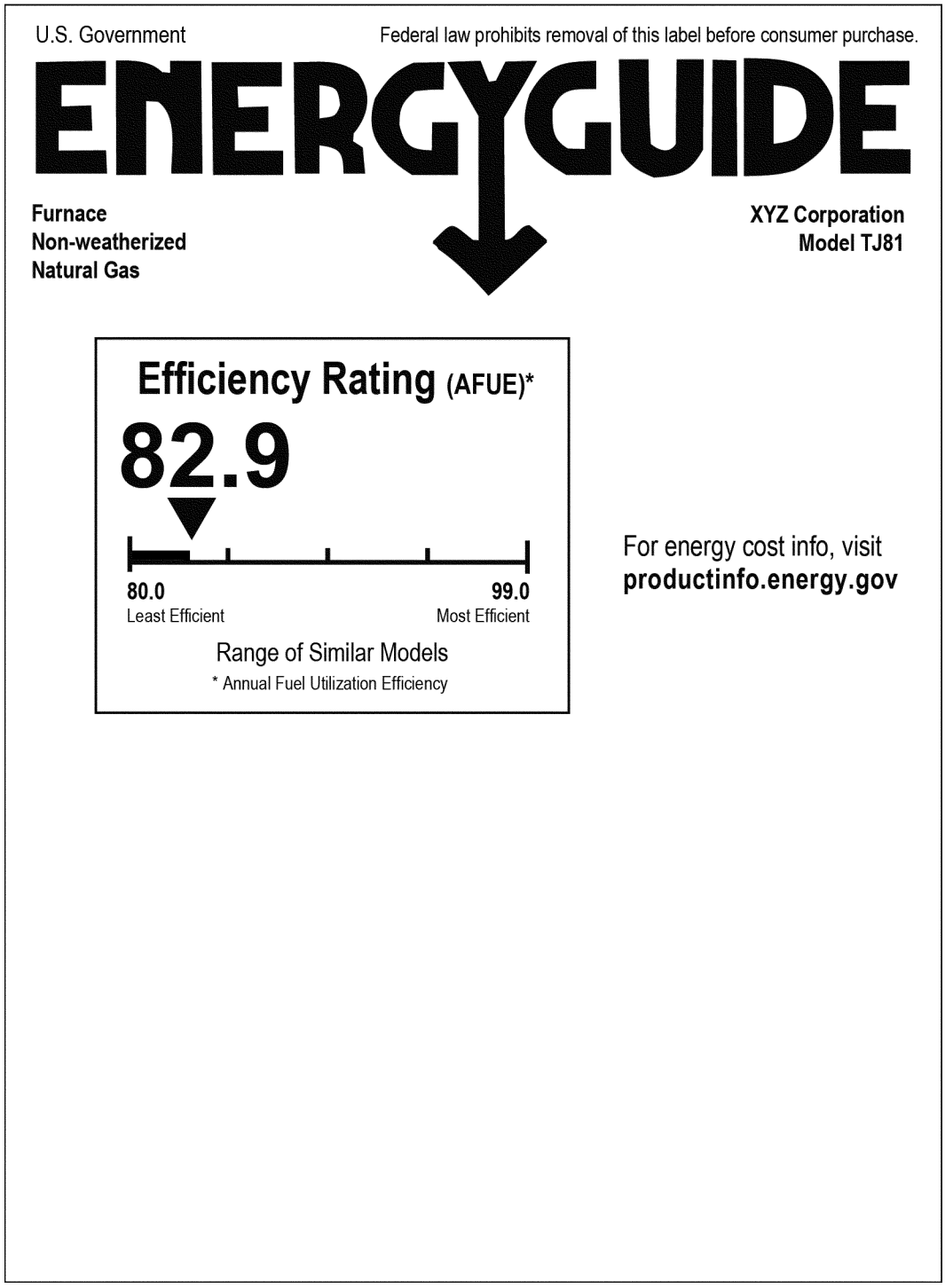


Sample Label 6 – Pool Heater

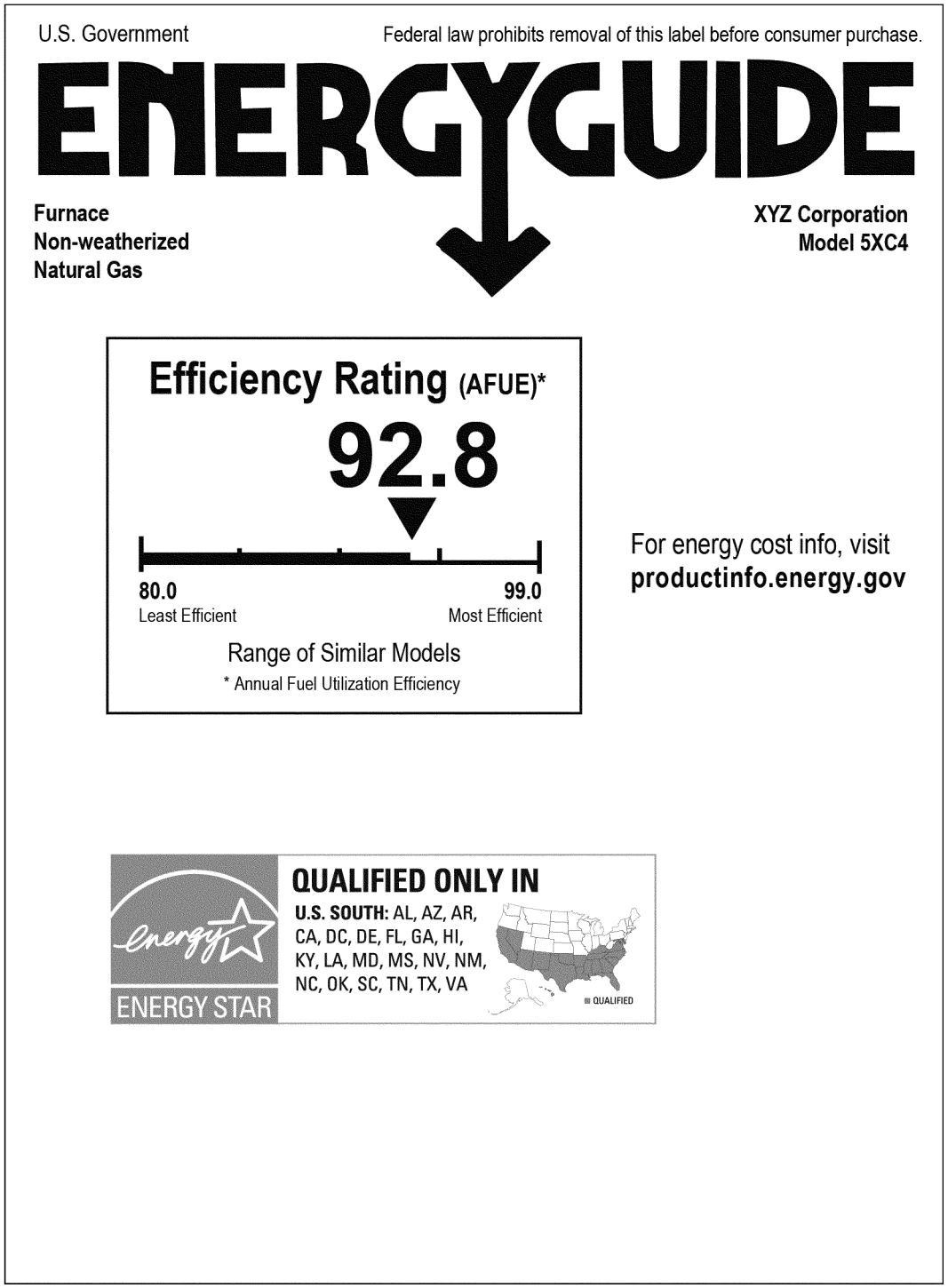


* * * * *

Sample Label 9 – Non-weatherized Gas Furnace



Sample Label 9A – Non-weatherized Gas Furnace (ENERGY STAR certified)



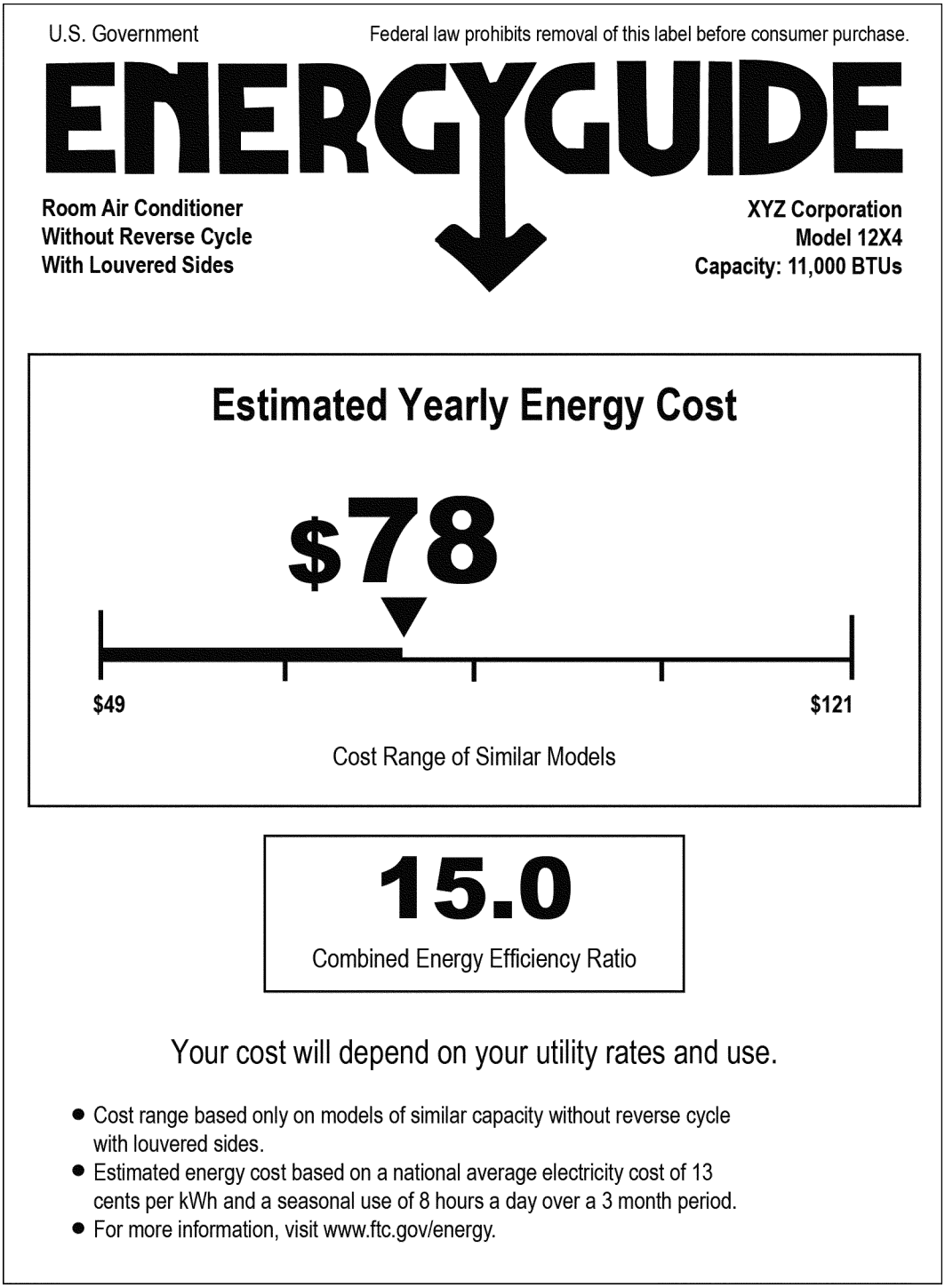
* * * * *

15. Effective October 1, 2023, appendix L is further amended by revising sample label 4 to read as follows:

Appendix L to Part 305—Sample Labels

* * * * *

Sample Label 4 – Room Air Conditioner



* * * * *

By direction of the Commission, Commissioner Wilson dissenting.

April J. Tabor,

Secretary.

[FR Doc. 2022–22036 Filed 10–11–22; 8:45 am]

BILLING CODE 6750–01–C

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

19 CFR Chapter I

Arrival Restrictions Applicable to Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Announcement of arrival restrictions.

SUMMARY: This document announces the decision of the Secretary of the Department of Homeland Security (DHS) to direct all flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Uganda to arrive at one of the United States airports where the United States government is focusing public health resources to implement enhanced public health measures. For purposes of this document, a person has recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days of the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.,* no passengers or non-crew), are excluded from the measures herein.

DATES: The arrival restrictions apply to flights departing after 11:59 p.m. Eastern Daylight Time on October 10, 2022. Arrival restrictions continue until cancelled or modified by the Secretary of DHS and notice of such cancellation or modification is published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations, U.S. Customs and Border Protection at 202–255–7018.

SUPPLEMENTARY INFORMATION:

Background

Ebola disease, caused by the virus genus *Ebolavirus,* is a severe and often fatal disease that can affect humans and non-human primates. Disease transmission occurs via direct contact with bodily fluids (*e.g.,* blood, mucus, vomit, urine). The first known Ebola disease outbreak occurred in 1976. From 2013–2016, the largest recorded Ebola disease outbreak occurred in West Africa, primarily affecting Guinea, Liberia, and Sierra Leone, with cases exported to seven additional countries across three continents, including the United States. The epidemic demonstrated the potential for Ebola disease to become an international crisis in the absence of early intervention. Further, Ebola disease can have substantial medical, public health, and economic consequences if it spreads to densely populated areas. As such, Ebola disease may present a threat to United States health security given the unpredictable nature of outbreaks and the interconnectedness of countries through global travel.

On September 19, 2022, Uganda reported a single, fatal case of Ebola disease due to the Sudan virus (species *Sudan ebolavirus*). Earlier in September 2022, community reports had described occurrences of strange illness and sudden deaths in the affected area. Some of these unexplained deaths were in persons who had known contact with the index patient. As of October 4, 2022, a total of 43 confirmed cases with 10 confirmed deaths have been reported from five districts within Uganda Centers for Disease Control and Prevention (CDC) has issued an Alert—Level 2, Practice Enhanced Precautions advising against non-essential travel to several regions in Uganda where the Ministry of Health in Uganda has declared an Ebola virus outbreak.[1] The Centers for Disease Control and Prevention (CDC) is closely monitoring an outbreak of Ebola virus in five districts within Uganda. In order to assist in preventing or limiting the introduction and spread of this communicable disease into the United States, the Departments of Homeland Security and Health and Human Services, including CDC, and other agencies charged with protecting the homeland and the American public, are currently implementing enhanced public health measures at five United States. airports that receive the largest number of travelers originating from Uganda. To ensure that all travelers with recent presence in Uganda arrive at one of these airports, DHS is directing all flights to the United States carrying such persons to arrive at airports where enhanced public health measures are being implemented. While DHS, in coordination with other applicable federal agencies, anticipates working with the operators of aircraft in an endeavor to identify potential travelers who have recently traveled from, or were otherwise present within, Uganda prior to boarding, operators of aircraft will remain obligated to comply with the requirements of this notice. Department of Defense (DoD) flights, via either military aircraft or contract flights, will be managed by DoD in accordance with HHS guidelines.

[1] CDC, Ebola in Uganda Alert—Level 2, Practice Enhanced Precautions, CDC (Oct. 4, 2022), *https://wwwnc.cdc.gov/travel/notices/alert/ebola-in-uganda.*

Notice of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Uganda

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, DHS has the authority to limit the locations where all flights entering the United States from abroad may land. Under this authority and effective for flights departing after 11:59 p.m. Eastern Daylight Time on October 10, 2022, I hereby direct all operators of aircraft to ensure that all flights (with the exception of those operated or contracted by DoD) carrying persons who have recently traveled from, or were otherwise present within, Uganda only land at one of the following airports:

- Hartsfield-Jackson Atlanta International Airport (ATL), Georgia;
- Chicago O'Hare International Airport (ORD), Illinois;
- Newark Liberty International Airport (EWR), New Jersey;
- John F. Kennedy International Airport (JFK), New York;
- Washington-Dulles International Airport (IAD), Virginia;

This direction considers a person to have recently traveled from Uganda if that person departed from, or was otherwise present within, Uganda within 21 days before the date of the person's entry or attempted entry into the United States. Also, for purposes of this document, crew and flights carrying only cargo (*i.e.,* no passengers or non-crew), are excluded from the applicable measures set forth in this notification. This direction is subject to any changes to the airport landing destination that may be required for aircraft and/or airspace safety, as directed by the Federal Aviation Administration.

This list of designated airports may be modified by the Secretary of Homeland Security in consultation with the Secretary of Health and Human Services and the Secretary of Transportation. This list of designated airports may be modified by an updated publication in

the **Federal Register** or by posting an advisory to follow at *www.cbp.gov.* The restrictions will remain in effect until superseded, modified, or revoked by publication in the **Federal Register**.

For purposes of this **Federal Register** document, ''United States'' means the territory of the several States, the District of Columbia, and Puerto Rico.

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

[FR Doc. 2022–22264 Filed 10–7–22; 4:15 pm]

BILLING CODE 9111–14–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9967]

RIN 1545–BO92

Section 42, Low-Income Housing Credit Average Income Test Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final and temporary regulations.

SUMMARY: This document contains final and temporary regulations setting forth guidance on the average income test for purposes of the low-income housing credit. If a building is part of a residential rental project that satisfies this test, the building may be eligible to earn low-income housing credits. These final and temporary regulations affect owners of low-income housing projects, tenants in those projects, and State or local housing credit agencies that monitor compliance with the requirements for low-income housing credits.

DATES:

Effective date: These regulations are effective on October 12, 2022.

Applicability date: For the applicability date of the temporary regulations, see § 1.42–19T(f).

FOR FURTHER INFORMATION CONTACT: Dillon Taylor at (202) 317–4137.

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 42 of the Internal Revenue Code (the Code).

The Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085 (1986 Act), created the low-income housing credit under section 42 of the Code.

Section 42(a) provides that the amount of the low-income housing credit for any taxable year in the credit period is an amount equal to the applicable percentage (effectively, a credit rate) of the qualified basis of each qualified low-income building.

Section 42(c)(1)(A) provides that the qualified basis of any qualified low-income building for any taxable year is an amount equal to (i) the applicable fraction (determined as of the close of the taxable year) of (ii) the eligible basis of the building (determined under section 42(d)). Section 42(c)(1)(B) defines applicable fraction as the smaller of the unit fraction or floor space fraction. The unit fraction is the number of low-income units in the building over the number of residential rental units (whether or not occupied) in the building. The floor space fraction is the total floor space of low-income units in the building over the total floor space of residential rental units (whether or not occupied) in the building. Subject to certain exceptions set forth in section 42(i)(3)(B), a low-income unit is defined in section 42(i)(3) as any unit in a building if the unit is rent-restricted and the individuals occupying the unit meet the income limitation under section 42(g)(1) that applies to the project of which the building is a part. Section 42(d)(1) and (2) define the eligible basis of a new building or an existing building, respectively.

Section 42(c)(2) defines a qualified low-income building as any building which is part of a qualified low-income housing project at all times during the compliance period (the period of 15 taxable years beginning with the first taxable year of the credit period). To qualify as a low-income housing project, one of the section 42(g) minimum set-aside tests, as elected by the taxpayer, must be satisfied.

Prior to the enactment of the Consolidated Appropriations Act of 2018, Public Law 115–141, 132 Stat. 348 (2018 Act), section 42(g) set forth two minimum set-aside tests, known as the 20–50 test and the 40–60 test. If a taxpayer elects to apply the 20–50 test, at least 20 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 50 percent or less of the area median gross income (AMGI). If a taxpayer elects to apply the 40–60 test, at least 40 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 60 percent or less of AMGI.

The 2018 Act added section 42(g)(1)(C), which contains a third minimum set-aside test option—the average income test. If a taxpayer elects to apply the average income test, a project meets the minimum requirements of the average income test if 40 percent or more of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the specific unit. (In the case of a project described in section 142(d)(6)), ''40 percent'' in the preceding sentence is replaced with 25 percent.) Section 42(g)(1)(C)(ii)(I)–(III) provides special rules relating to the income limitation for the average income test. Specifically, unlike the 20–50 and 40–60 tests, section 42(g)(1)(C)(ii)(I) requires the taxpayer to designate each unit's imputed income limitation that is taken into account for purposes of the average income test. Section 42(g)(1)(C)(ii)(II) requires the average of the imputed income limitations designated under section 42(g)(1)(C)(ii)(I) not to exceed 60 percent of AMGI. Finally, section 42(g)(1)(C)(ii)(III) requires the imputed income limitation designated for any unit to be 20, 30, 40, 50, 60, 70, or 80 percent of AMGI.

Generally, under section 42(g)(2)(D)(i), if the income for the occupant of a low-income unit rises above the relevant income limitation, the unit continues to be treated as a low-income unit if the income of the occupant had initially met the income limitation and the unit continues to be rent-restricted. Section 42(g)(2)(D)(ii), however, provides an exception to the general rule in the case of the 20–50 test or the 40–60 test. Under this exception, the unit ceases to be treated as a low-income unit if two disqualifying conditions occur.

- The first condition is that the occupant's income increases above 140 percent of the income limitation applicable under section 42(g)(1) (applicable income limitation).
- The second condition is that a new occupant whose income exceeds the applicable income limitation occupies any residential rental unit in the building of a comparable or smaller size.

In the case of a deep rent skewed project described in section 142(d)(4)(B) of the Code ''170 percent'' is substituted for ''140 percent'' in applying the applicable income limitation under section 42(g)(1), and the second condition is that any low-income unit in the building is occupied by a new resident whose income exceeds 40 percent of AMGI.

The exception contained in section 42(g)(2)(D)(ii) is referred to as the next

available unit rule. *See also* § 1.42–15 of the Income Tax Regulations.

The 2018 Act added a new next available unit rule in section 42(g)(2)(D)(iii), (iv), and (v) for situations in which the taxpayer has elected the average income test. Under this new rule, a unit ceases to be a low-income unit if two slightly different disqualifying conditions are met:

- First, the income of an occupant of a low-income unit increases above 140 percent of the greater of (i) 60 percent of AMGI, or (ii) the imputed income limitation designated by the taxpayer with respect to the unit; and
- Second, a new occupant whose income exceeds the applicable imputed income limitation occupies any other residential rental unit in the building that is of a comparable or smaller size. The applicable imputed income limitation for this purpose depends upon whether the unit being occupied was a low-income unit before becoming vacant.

○ If the new tenant occupies a unit that was taken into account as a low-income unit prior to becoming vacant, section 42(g)(2)(D)(v)(I) provides that the applicable imputed income limitation is the limitation designated with respect to the unit.

○ If the new tenant occupies a market-rate unit, section 42(g)(2)(D)(v)(II) provides that the applicable imputed income limitation is ''the imputed income limitation which would have to be designated with respect to such unit under [section 42(g)(1)(C)(ii)(I)] in order for the project to continue to meet the requirements of [section 42(g)(1)(C)(ii)(II)].'' (Those requirements mandate that the ''average of the imputed income limitations designated under [section 42(g)(1)(C)(ii)(I)] shall not exceed 60 percent of'' AMGI.)

Section 42(g)(2)(D)(iv) also provides a next available unit rule for deep rent skewed projects that elect the average income test.

Under section 42(g), once a taxpayer elects to use a particular set-aside test for a project, that election is irrevocable. Thus, if a taxpayer had previously elected to use the 20–50 test or the 40–60 test, the taxpayer may not subsequently elect to use the average income test. Under section 42(g)(4), the rules of sections 142(d)(2)(B) through (E), 142(d)(3) through (7), and 6652(j) of the Code apply to determine whether any project is a qualified low-income housing project and whether any unit is a low-income unit.

Section 42(m)(1) provides that the owners of an otherwise-qualifying building are not entitled to the housing credit dollar amount that is allocated to the building unless, among other requirements, the allocation is pursuant to a qualified allocation plan (QAP). A QAP provides standards by which a State or local housing credit agency (Agency) is to make these allocations. Under section 42(m)(1)(B)(iii), a QAP must contain a procedure that the Agency or its agent will follow in monitoring noncompliance with low-income housing credit requirements and in notifying the IRS of any such noncompliance. See § 1.42–5 of the Income Tax Regulations for rules implementing this requirement.

On October 30, 2020, the Department of Treasury (Treasury Department) and the IRS published a notice of proposed rulemaking (NPRM) (REG- 119890–18) in the **Federal Register** (85 FR 68816) proposing regulations setting forth guidance on the average income test under section 42(g)(1)(C). The Treasury Department and the IRS received 98 comments, including requests to testify at a public hearing on the proposed regulations and written testimony for the public hearing.

On March 24, 2021, the Treasury Department and the IRS held a public hearing on the proposed regulations. Fifteen taxpayers provided testimony at the hearing.

After consideration of the comments received and the testimony provided, the proposed regulations are adopted as modified by this Treasury Decision. The major areas of comment and the revisions to the proposed regulations are discussed in the following Summary of Comments and Explanation of Revisions. The comments are available for public inspection at *www.regulations.gov* or upon request. Other minor, non-substantive modifications that were made to the proposed regulations and adopted in these final regulations are not discussed in the Summary of Comments and Explanation of Revisions. In addition, the Treasury Department and the IRS are publishing in this Treasury Decision temporary regulations containing recordkeeping and reporting requirements that are needed to facilitate administrability of, and compliance with, changes made in the final regulations. Those changes were based on comments received on the proposed rule. These requirements are described in this preamble along with the substantive rules contained in the final regulations. The text of these temporary regulations also serves as the text of the proposed regulations (REG–113068–22) set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the **Federal Register**.

Summary of Comments and Explanation of Revisions

These final regulations and temporary regulations set forth guidance on the average income test under section 42(g)(1)(C).

I. Section 1.42–15, Next Available Unit Rule for the Average Income Test

The proposed regulations updated the next available unit provisions in § 1.42–15 to reflect the new set-aside based on the average income test and to take into account section 42(g)(2)(D)(iii), (iv), and (v). One commentator recommended that no changes be made to the proposed regulations concerning the next available unit rule when the proposed regulations are finalized. No other comments were received on the next available unit rule.

While no comments requested changes, the final regulations for the next available unit rule were revised to be consistent with changes made to the provisions in § 1.42–19, which are described in section II of this Summary of Comments and Explanation of Revisions. The final regulations include revisions to the two limitations in § 1.42–15(c)(2)(iv) related to the imputed income designation of the next available unit, which relate to the limitations described in section 42(g)(2)(D)(v). The final regulations provide taxpayers with administrable rules and objective standards to apply when determining the designation of the next available unit. The first limitation in § 1.42–15(c)(2)(iv)(A) applies to units that met all of the requirements in § 1.42–19(b)(1)(i) through (iii) prior to becoming vacant. In other words, the unit was rent-restricted, the occupants satisfied the imputed income limitation for the unit (or the unit's low-income status continued under section 42(g)(2)(D)), and no other provision in section 42 or the regulations thereunder denied low-income status to the unit. For those units, which would have had a designated imputed income limitation prior to vacancy, the limitation is the unit's designated imputed income limitation. This rule is equivalent to the rule in the proposed regulations, which interpreted the definition of low-income unit as including only the requirements in § 1.42–19(b)(1)(i) through (iii). The second limitation in § 1.42–15(c)(2)(iv)(B) requires a taxpayer, in the case of any other unit (such as a market rate unit), to limit the imputed income limitation to a designation that will not cause the average of all imputed income designations of residential units in the

project to exceed 60 percent of AMGI. This ensures that the next available unit is designated in such a way that maintains compliance with the averaging requirement in section 42(g)(2)(C)(ii)(II). This revision to the second limitation was necessary because the proposed regulations relied on a reference to the mitigating action provisions, which were removed from the final regulations as explained in section II.B. of this Summary of Comments and Explanation of Revisions.

Additionally, these final regulations provide that, if multiple units are over-income at the same time in a project that has elected the average income set-aside (average income project) and that has a mix of low-income and market-rate units, then the taxpayer need not comply with the next available unit rule in a specific order with respect to occupancy. Instead, renting any available comparable or smaller vacant unit to a qualified tenant maintains all over-income units' status as low-income units until the next comparable or smaller unit becomes available (or, in the case of a deep rent skewed project, the next low-income unit becomes available). The final regulations include an example illustrating the application of this rule. Note, the order in which units are designated, however, may affect the qualified group that is used for computing the applicable fraction. See further discussion in section II.B of this Summary of Comments and Explanation of Revisions.

II. § 1.42–19, Average Income Test

A. Requirements To Satisfy the Average Income Test

1. Proposed Regulations Approach to the Average Income Test

The proposed regulations provided that a project for residential rental property meets the requirements of the average income test under section 42(g)(1)(C) if (1) 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit; (2) the taxpayer designated the imputed income limitations in the manner provided in § 1.42–19(b) of the proposed regulations; and (3) the average of the designated imputed income limitations of the low-income units in the project does not exceed 60 percent of AMGI. The proposed regulations would have required taxpayers to complete, not later than the close of the first taxable year of the credit period, the initial designation of imputed income limitations for all of the units taken into account for the average income test.

Under the proposed regulations, the 60 percent of AMGI limit on the average of designated imputed income limitations applied to all of the low-income units in the project. The requirement as so interpreted did not take into account whether fewer than all of those units could constitute a group of at least 40 percent of the residential units in the project such that the average of the limitations of the units in that group averaged to no more than 60 percent of AMGI.

In some cases, this interpretation magnified the adverse consequences of a single unit's failure to maintain low-income status. For example, under the proposed regulations, a unit losing low-income status would remove that unit's imputed income limitation from the computation of the average, but not impact the low-income status of any other units. If that unit's limitation was less than 60 percent of AMGI, the loss of the unit could cause the average of the remaining low-income units to rise above 60 percent of AMGI. That noncompliant average would cause the entire project to fail the average income test and therefore fail to be a qualified low-income housing project. In light of the potential adverse consequences of the rule, the proposed regulations provided for mitigating actions the taxpayer could take within 60 days of the close of the year for which the average income test might be violated.

2. Comments on the Proposed Set-Aside Rule

Many commenters disagreed with the adequacy of the proposed mitigation actions and with the correctness of the underlying interpretation of the average income test, which required testing of *all* low-income units.

i. Inadequacy of the Proposed Mitigation Actions

Commenters noted that the mitigation possibilities in the proposed regulations depended on the taxpayer both appreciating that the entire project might be jeopardized by a problem with a particular unit and knowing how to deploy the mitigation actions. Commenters also suggested that the mitigation proposal incorporated such a rigid deadline that even alert and well-advised taxpayers might be unable to timely take mitigating actions to be eligible to receive credits for their projects.

ii. Invalidity of the Underlying Interpretation

Commenters' central concern was the invalidity, as they saw it, of the underlying interpretation of the average income test. Under the interpretation in the proposed regulations, a single unit's falling out of compliance could result in the complete loss of tax credits for the entire project, or at least loss of credits for an entire year. Commenters noted that this result flowing from the interpretation in the proposed regulations suggested the invalidity of the interpretation. Several commenters observed that the proposed regulations imposed on projects electing the average income test a higher standard than that required for satisfying the other set-aside elections. Under the 20–50 test and 40–60 test, one noncompliant unit could not cause an entire project to fail the set-aside test if, without taking the noncompliant unit into account, there remained a sufficient number of compliant units to meet the statutory minimum percentage of all residential units. The commenters, therefore, concluded that the interpretation in the proposed regulations regarding the average income test could not have been the intent of Congress.

Most commenters recommended that the average income test be satisfied if any group of 40 percent of the units in the project have designations whose average does not exceed 60 percent of AMGI. In general, these commenters correctly asserted that the average income test is a minimum set-aside test, and, therefore, a project should meet the test if the minimum requirements of the test are satisfied, even if low-income units not necessary for the minimum are noncompliant.

Other commenters noted that even though the project should additionally meet an overall average test of no more than 60 percent of AMGI across all low-income units (as required by the proposed regulations), relief should nevertheless be built into the requirement. Thus, if a unit is out of compliance, causing the project-wide average to go above 60 percent of AMGI, the failure should be considered noncompliance for that unit only, and only that non-compliant unit should be subject to credit adjustment and recapture. They urged that this noncompliance should not be a violation of the minimum set-aside, provided that at least 40 percent of the units' designations still meet the 60 percent average.

This suggested approach, however, could create problems similar to those in the proposed regulations because one

unit's noncompliance could cause the overall average of the remaining low-income units to rise above 60 percent of AMGI. For this reason, the comment was not adopted, but it was considered in connection with developing the final regulations' rules for determining low-income units and a building's applicable fraction, as is discussed later.

Some commenters believed that the average income test is satisfied as long as the original imputed income limitations of designated low-income units average to 60 percent, and 40 percent or more of those units continue to be rent-restricted and meet their respective imputed income limitations. Thus, the average must be met initially, but subsequently, the requirement is permanently satisfied, regardless of any changes in circumstances related to occupancy. Commenters suggested that a general anti-abuse rule could be adopted to allow the IRS to disregard designations made in bad faith.

The Treasury Department and the IRS do not agree that the averaging requirement of section 42(g)(1)(C)(ii)(II) is concerned only with the original designations. Like the other minimum set-aside tests, the average income test is an ongoing requirement for a project to maintain its status as a qualified low-income housing project. A project failing to maintain an average of 60 percent or less of AMGI across at least 40 percent of its residential units that qualify as low-income units violates the requirement. This is consistent with a plain reading of the statute, as the imputed income limitations of the units taken into account (meaning, counted for purposes of meeting the average income test) must not exceed 60 percent of AMGI. Section 42(g)(1)(C)(ii)(I) and (II). The rejected suggestion would allow an original imputed income limit designation of a subsequently disqualified unit to satisfy compliance with the minimum set-aside test throughout the entire compliance period. Treating such a situation as compliant would effectively waive the rule that a project consistently maintain its level of affordability—a central requirement of the low-income housing credit. Moreover, adoption of a general anti-abuse rule would miss many non-compliant situations, would increase administrative complexity for the IRS and the Agencies and would potentially create uncertainty for taxpayers.

A separate comment recommended that an out-of-compliance unit should maintain its designation if the owner can demonstrate due diligence when completing the initial income certification. The Treasury Department and IRS disagree with the suggestion that an out-of-compliance unit should not lose its designation if the owner can demonstrate due diligence when completing the initial income certification. Demonstrating due diligence upon initial income certification is not sufficient to satisfy ongoing compliance requirements. Further, similar to a general anti-abuse rule proposed by another commenter, this approach would increase administrative complexity for the IRS and Agencies and could potentially create uncertainty for taxpayers.

3. The Final Regulations' Interpretation of the Average Income Test

In response to the comments received, the Treasury Department and the IRS have revised their interpretation of the set-aside rule and incorporated the revised interpretation in the final regulations. In making these revisions, the Treasury Department and the IRS considered the plain language of section 42(g)(1)(C) as well as the definition of low-income unit for projects electing the average income test. When section 42(g)(1)(C)(i) and the special rules in section 42(g)(1)(C)(ii)(I) and (II) are read together, the taxpayer satisfies the average income test if at least 40 percent of the building's residential units are eligible to be low-income units and have designated imputed income limitations that collectively average 60 percent or less of AMGI. A project satisfying this minimum requirement satisfies the average income test. Thus, the final regulations have been revised so that it is no longer necessary to consider all low-income units in a project for residential rental property when determining whether the average income test is met.

While making this change, the Treasury Department and the IRS also considered the definition of ''low-income unit'' in a project electing the average income test, and the final regulations provide a clarifying definition of this term. As the final regulations no longer require a taxpayer to consider all of the low-income units in a project in order to satisfy the minimum set-aside requirement, the issue for consideration is whether a project's election of the average income test has any impact on whether a unit that is rent-restricted and whose occupants satisfy the imputed income limitation designated for the unit qualifies as a low-income unit as that term is defined in section 42(i)(3). This determination is relevant for the average income test as well as for purposes of the other provisions of the low-income housing credit, including a building's applicable fraction as explained later.

In defining the term ''low-income unit,'' section 42(i)(3)(A)(ii) requires that the individuals occupying the unit meet the income limitation applicable under section 42(g)(1) to the project of which the building is a part. With respect to the 20–50 and the 40–60 minimum set-asides, there is no difficulty in applying this language to specific units. Every unit in the project has an identical income limitation, namely the income limitation embodied in the set-aside test that the taxpayer elected for that project. If the taxpayer elects the 20–50 test, then the income limitation for each unit is 50% of AMGI. If the taxpayer elects the 40–60 test, the income limitation for each unit is 60% of AMGI.

For a project electing the average income test, however, the reference to ''the income limitation applicable . . . to the project'' poses a challenge because income limitations will typically vary among the units in the project. In addition, pursuant to section 42(g)(1)(C)(ii)(II), the average of the designated imputed income limitations for the units taken into account for meeting the minimum set-side test must not exceed 60% of AMGI. As a result, for purposes of the average income test, the fact that the occupants of a unit satisfy the imputed income limitation designated for that unit does not by itself establish that the unit satisfies the requirements in section 42(i)(3)(A).

The Treasury Department and the IRS considered interpreting the language in section 42(i)(3)(A)(ii) as referring only to the income limitation designated for a specific unit. Such an interpretation would be consistent with the approach under the 20–50 and 40–60 tests where a single unit's noncompliance does not impact the low-income status of any other low-income units in the project. It would also be in accord with many comments that argue the low-income status of one unit should not impact the status of other units if those other units meet their respective income limitations.

In a project electing the average income test, however, it is insufficient to read ''the income limitation applicable under [section 42(g)(1)] to the project'' as referring only to the designated imputed income limitation appliable to a unit. Under the average income test, a unit's status as a low-income unit for purposes of the set-aside and the applicable fraction depends not only on its own attributes but also on the income limitations of other units that are taken into account for these purposes. In contrast, under the historic set-asides, knowing that a unit satisfies the income limitation

applicable to the unit is sufficient to know that the unit meets the project's income limitation for purposes of the minimum set-aside test and a building's applicable fraction.

This interpretation means that to qualify as a low-income unit in a project electing the average income test, a residential unit, in addition to meeting the other requirements to be a low-income unit under section 42(i)(3), must be part of a group of units such that the average of the imputed income limitations of the units in the group does not exceed 60 percent of AMGI. Thus, to provide clarity on the definition of low-income unit for a project electing the average income test, the final regulations include a definition of low-income unit that takes into account whether the unit is a member of a group of units with a compliant average limitation.

This definition of low-income unit in the final regulations is in accord with the definition of low-income unit as originally described in the Conference Report for the Tax Reform Act of 1986 (1986 Conference Report):

> A low-income unit includes any unit in a qualified low-income building if the individuals occupying such unit meet the income limitation elected for the project for purposes of the minimum set-aside requirement and if the unit meets the gross rent requirement, as well as all other requirements applicable to units satisfying the minimum set-aside requirement.

2 H.R. Conf. Rep. 99–841, 99th Cong., 2d Sess., II–94–95.

In that explanation, it is required that a low-income unit meet ''all other requirements applicable to units satisfying the minimum set-aside test.'' Although the average income test was not in existence at the time of the 1986 Conference Report, it is apparent that Congress wanted to avoid creating one standard for low-income units that qualified their projects as part of the 20–50 and 40–60 minimum set-asides and a different standard for any other low-income units that played some other role in the same project. Thus, it is consistent with how low-income units are defined under the 20–50 and 40–60 minimum set-aside tests for these final regulations to require all low-income units in an average income project to satisfy a consistent and equal set of standards—standards that, in the average income context, incorporate the average income limitations of the group of which the units are a part.

Accordingly, under the final regulations, a project for residential rental property meets the requirements of the average income test if the taxpayer's project contains a qualified group of units that constitutes 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in the project. Section 1.42–19(b)(2)(i) requires the units in a qualified group to, first, individually satisfy the criteria that would qualify each unit as a low-income unit under the 20–50 or 40–60 set-asides. Specifically, the rules in § 1.42–19(b)(1)(i) through (iii) require that each unit be rent-restricted, occupants of the unit meet the income limitation for the unit, and no other provision in section 42 or the regulations thereunder denies low-income status to the unit (including section 42(i)(3)(B)–(E)). In addition, § 1.42–19(b)(2)(ii) requires that the average of the designated imputed income limitations of the units in the group not exceed 60 percent of AMGI. The group of units must be identified as required in § 1.42–19(b)(3)(i). A taxpayer identifies the units in the group by recording the units in the taxpayer's books and records, and the taxpayer must communicate that annual identification to the applicable Agency as required in §§ 1.42–19(b)(3)(iii) and 1.42–19T(c)(1) of the associated temporary regulations. See further description in section II.C of this Summary of Comments and Explanation of Revisions.

These revisions provide more flexibility for meeting the average income test than had been available under the proposed regulations. Most importantly, the revised rules limit the impact of one unit's noncompliance on the ability of a project to satisfy the average income test. The status of additional units beyond the minimum number of units needed to satisfy the test does not impair satisfaction of the average income test as discussed in section II.B of this Summary of Comments and Explanation of Revisions. By removing the proposed requirement applicable to *all* low-income units and thus allowing a project to satisfy the average income test if it contains a qualified group of units meeting the minimum requirements, the final regulations generally avoid the outsized impact that one unit's loss of low-income status could have under the proposed regulations. The interpretation of the average income set-aside in the final regulations is consistent with the majority of comments on this issue.

In addition, this interpretation creates more parallels between the average income test and the 20–50 and 40–60 tests. Under either of those latter tests, when there are more than the minimum number of low-income units, one unit going out of compliance would not cause a project to fail the minimum set-aside test. Similarly, under the final regulations, one unit's loss of low-income status will not jeopardize the entire project's status as a qualified low-income housing project subject to the average income test if there are a sufficient number of remaining units that comprise a qualified group of units that satisfy the minimum set-aside.

B. Determining Qualified Groups of Units for Use in Applicable Fraction Determinations

1. Role of the Applicable Fraction Under Section 42

As mentioned earlier, the amount of low-income housing credits earned by a building in a taxable year depends on a computation that includes a number called the building's ''applicable fraction'' for that year. This fraction is based on the number and size of the low-income and non-low-income units in the building and can be thought of as an indicator of the extent to which the building is dedicated to affordable housing. Thus, the applicable fraction plays a role both in determining credits during the credit period and in demonstrating continued dedication to affordable housing during the extended use period. *See* section 42(h)(6)(B)(i).

2. The Proposed Regulations' Resolution of Issues Posed by Computation of the Applicable Fraction in an Average Income Project

The proposed regulations provided an approach to addressing continuous compliance with the average income requirement by using the same group of low-income units for both satisfying the minimum set-aside requirement and determining the applicable fraction. The proposed regulations also provided for a removed unit, which was a low-income unit identified by the taxpayer that was not taken into account for purposes of the set-aside test or the applicable fraction but was taken into account for purposes of reducing recapture. As described earlier in this Summary of Comments and Explanation of Revisions, taxpayers strongly criticized the set-aside rule. In response, the final regulations both allow the minimum set-aside test to be satisfied by any qualified group of units that is no smaller than the statutory minimum (40 percent) and also add a clarifying definition of ''low-income unit'' for projects electing the average income test. To implement the statutory requirement regarding the average of the imputed income limitations of residential units in a project, this clarifying definition is sensitive to the

imputed income limitations of the other residential units in the same group.

The approach in the final regulations for the average income test differs from the other two set-asides in that the final regulations allow for a distinction between the group of low-income units taken into account for satisfying the minimum set-aside and the (usually larger) group of units taken into account for computing credits. However, under the final regulations, the units included in both groups are subject to the same standards.

Congress acknowledged the absence of such a distinction in the 20–50 and 40–60 tests in its discussion of the low-income housing credit in the 1986 Conference Report:

> Qualified residential rental projects must remain as rental property and must satisfy the minimum set-aside requirement, described above, throughout a prescribed compliance period. Low-income units comprising the qualified basis on which additional credits are based are required to comply continuously with all requirements in the same manner as units satisfying the minimum set-aside requirements. Units in addition to those meeting the minimum set-aside requirement on which a credit is allowable also must continuously comply with the income requirement.

2 H.R. Conf. Rep. 99–841, 99th Cong., 2d Sess., II–95.

Thus, under the 20–50 and 40–60 tests, units included in qualified basis in addition to those needed to satisfy the minimum set-aside must meet the same requirements as the units used to satisfy the minimum set-aside. This application under the 20–50 and 40–60 tests is straightforward, however, because all low-income units have to be at or less than a single elected AMGI standard, either 50 percent or 60 percent of AMGI (assuming other requirements are met). Under either test, the minimum set-aside units and any additional low-income units are effectively interchangeable, so there was no need to clarify treatment between the groups.

For the average income test, however, units are not interchangeable because they have a range of imputed income limitations and cannot be evaluated in isolation because there is an income averaging requirement in section 42(g)(1)(C)(ii)(II). By stating that additional units beyond those meeting the minimum set-aside test must continuously comply with the income requirement, the 1986 Conference Report identified the necessity of developing a common standard for all residential units in projects electing the 20–50 and 40–60 tests. As discussed in section II.A.3 of this Summary of Comments and Explanation of Revisions, this principle is reflected in the final regulations' definition of low-income units, and it impacts the treatment of units that may be taken into account for computing a building's applicable fraction.

3. Comments on Determining the Applicable Fraction

In the context of the 20–50 or 40–60 minimum set-asides, commenters noted, non-compliance by one or more units (for example, not being suitable for occupancy) reduces a building's applicable fraction only with respect to the units that are non-compliant as of the taxpayer's year end. These commenters recommended similar treatment in the average income context. They advocated evaluating eligibility of units for inclusion in the applicable fraction on a unit-by-unit basis (that is, taking into account only facts about the particular unit, without taking into account the designated imputed income limitation of other units).

In the context of removed units, some comments argued that the proposed applicable fraction treatment of these units amounted to ''double counting.'' Not only did the proposed regulations exclude the noncompliant unit from the computation of the applicable fraction of the building containing the unit, but by taking into account the average of the group's income limitations, they could force a taxpayer to exclude one or more compliant units from the applicable fraction(s) of the building(s) containing the compliant unit(s).

The Treasury Department and the IRS considered the proposal to include units in applicable fraction computations on a unit-by-unit basis but did not adopt it. To be sure, that proposal would preserve the requirement that units satisfying the set-aside requirement must have income limitations whose average does not exceed 60 percent of AMGI. The proposal, however, would not apply this average requirement to the units that are taken into account for the project's applicable fractions. The proposed approach would thus be inconsistent with the language of section 42(c)(1)(c)(i), which provides that the numerator of the applicable fraction is number of ''low-income units'' in the building. As explained earlier in the discussion of the average income test, the definition of low-income unit for a project electing the average income test necessarily includes the requirement that the average of the designated income limitations of the units taken into account as low-income units includes that the average designated income limitations of the units not exceed 60% of AMGI.

In addition, the failure to apply the average income limitation in determining the applicable fraction would allow a taxpayer to include units in the qualified basis even if they are a majority of the units in a project and their average limitation greatly exceeds 60 percent of AMGI. If accepted, the proposal would have allowed a taxpayer to give appropriate income limitations to 40 percent of a project's units but to designate limitations of 80 percent of AMGI for all the remaining low-income units in the project and receive credits for all of these units.

In the context of determining what units to include in the applicable fraction, another commenter recommended revising the proposed regulations to include an exception for units that are not habitable due to a casualty loss, such as from a fire in the unit. The commenter asserted that because the noncompliance was not the fault of taxpayer, the regulations should not require the taxpayer to remove another unit from an applicable fraction to offset the noncompliance associated with the casualty loss. The Treasury Department and the IRS did not adopt this suggestion. An approach that requires a determination of fault would create additional complexity for taxpayers, Agencies, and the IRS. In addition, while the 20–50 and 40–60 set-asides do not have the same issue, adopting rules allowing for special treatment in the case of casualties would necessitate a broader section 42 regulatory project.

4. Determination of the Applicable Fraction in the Final Regulations

Under the final regulations, the determination of a group of units to be taken into account in the applicable fractions for the buildings in a project follows the same approach as determining a group of units to be taken into account for purposes of the set-aside test. Essentially, a taxpayer can determine this group of units by including the low-income units identified for the average income test, and any other residential units that can qualify as low-income units if they are part of a group of units such that the average of the imputed income limitations of all of the units in the group does not exceed 60 percent of AMGI. If the average exceeds 60 percent of AMGI, then the group is not a qualified group. For example, if a unit was designated at 80 percent of AMGI and if including that unit in an otherwise qualified group of units causes the average of the imputed

income limitations of the group to exceed 60 percent of AMGI, then the taxpayer cannot include the 80 percent unit in the otherwise qualified group. Only the otherwise qualified group of units, without the 80 percent unit, is a qualified group of units used to determine the project's buildings' applicable fractions.

Once a qualified group of units in a project has been identified for a taxable year, the applicable fraction for each building in the project is computed using the units that are in both the qualified group and the building at issue. (Although the qualified group of units for a project must have an average limitation no greater than 60 percent of AMGI, this is not true of the average limitation of the units used to compute the applicable fraction of individual buildings in the project.) This method of determining a building's applicable fraction applies both for ascertaining low-income housing credits earned for a year in the credit period and for complying with the extended use requirement in section 42(h)(6)(B)(i).

The Treasury Department and the IRS determined that the approach to determining the applicable fraction in the final regulations better aligns with the 20–50 and 40–60 set-aside tests than the approach in the proposed regulations in that it creates parallel requirements for both ''minimum set-aside units'' and any ''additional units'' that may contribute to earning low-income housing credits. This rule in the final regulations is also consistent with the description of the low-income units and the principle regarding set-aside units and additional units in the other set-aside tests that is described in the 1986 Conference Report discussion quoted earlier. The rule is also consistent with comments stating that the low-income units in a project should have an overall average that does not exceed 60 percent of AMGI.

The potential downside of this approach to an owner is that if one unit loses low-income status, then it is possible that other units' status as low-income units may be impacted. Specifically, an owner may have to exclude one or more otherwise qualifying units from the qualified group of units for use in applicable fraction determinations for the group to retain an average income limitation that does not exceed 60% of AMGI. This, however, will not always be the case. For example, if a unit designated at 60, 70, or 80 percent of AMGI loses low-income status and no other changes occurred, then the owner could maintain the required average limitation of the qualified group of units without excluding any of the other units from the qualified group of units that had been taken into account in the previous year. Also, as is discussed later, in some cases a unit may be included in the qualified group of units after its income limitation has been designated or redesignated to a lower income limitation.

5. Proposed Regulations' Special Rule for Determining the Applicable Fraction for Purposes of Recapture

The proposed regulations, in some cases, would have caused a compliant low-income unit with a relatively high-income limitation not to have been taken into account in computing low-income housing credits earned for a year in the credit period. The mechanisms for achieving this result were called ''mitigating actions'' and ''removed units''. To minimize recapture, the proposed regulations would have included these units in the computations underlying section 42(j) so that the units' inclusion avoided having their absence contribute to recapture of credits. As described in section II.B.6. of this Summary of Comments and Explanation of Revisions, however, the Treasury Department and the IRS deleted the mitigating actions concept from the final regulations. For this reason, the final regulations do not include the proposed regulations' rule related to recapture.

6. Deletion of Mitigating Actions From Final Regulations

As described previously, the proposed regulations would have created a risk that, in some situations, one unit losing its low-income status could have caused an entire project to fail the average income test. To reduce that risk, the proposed regulations described two possible mitigating actions that a taxpayer could have taken to avoid disqualifying the project. Because the final regulations differ from the proposed regulations in a way that avoids that risk, there is no longer a need for mitigating actions. For this reason, the final regulations do not include rules related to mitigating actions.

C. Recordkeeping and Reporting Requirements

In response to comments on the proposed rule, the final rule provides significant flexibility regarding the qualified group of units used to satisfy the average income set-aside and the qualified group of units used for purposes of computing the applicable fraction. Providing the requested flexibility necessitates that the taxpayer have the discretion and responsibility to make these identifications and that the contemporary identification of the units be unambiguous.

Specifically, to implement the changes made in response to the comments on the proposal rule, § 1.42–19(b)(3) of the final regulations provides that a taxpayer separately identifies (i) units in the qualified group of units used for satisfying the average income set-aside and (ii) units in the qualified group for purposes of the applicable fractions. Section 1.42–19T(c)(1) of the temporary regulations requires that this be done by recording these identifications in the taxpayer's books and records (where the identification must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2)) and by communicating that identification annually to the applicable Agency. These rules promote certainty and administrability. The rules, in conjunction with the other procedures provided in § 1.42–19T(c)(3), will allow taxpayers, Agencies, and the IRS to more easily verify the status, including the average imputed income limitation, of the qualified group of units used for purposes of satisfying the average income set-aside and the qualified group of units used for purposes of determining the applicable fraction(s).

In addition, taxpayers are required to report specified information to Agencies and to maintain records in sufficient detail to establish the accuracy of the project's applicable fractions, the satisfaction of the average income set-aside, and compliance with requirements in section 42 and the applicable regulations. Section 1.6001–1 requires the keeping of records ''sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.'' *See* §§ 1.6001–1 and 1.42–5.

D. Designation of Imputed Income Limitations and Identification of Units

Section 42(g)(1)(C)(ii) contains substantive requirements for income limitations applicable in the average income test. Specifically, the taxpayer must designate the imputed income limitation for each unit taken into account under the average income test; the average of those imputed income limitations cannot exceed 60 percent of AMGI; and the designated imputed income limitation of any unit must be 20, 30, 40, 50, 60, 70, or 80 percent of AMGI. That statutory provision, however, does not contain procedural requirements to specify the manner in

which taxpayers must designate the imputed income limitation of units.

Filling this gap, the proposed regulations added procedural requirements that a taxpayer must designate each imputed income limitation in accordance with: (1) any procedures established by the IRS in forms, instructions, or publications or in other guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*); and (2) any procedures established by the Agency that has jurisdiction over the low-income housing project that contains the units to be designated, to the extent that those Agency procedures are consistent with IRS guidance and the governing regulations.

No negative comments were submitted regarding these provisions, but, on review, and in conjunction with other revisions made based on comments received, the Treasury Department and the IRS determined that more detailed designation rules were needed to promote certainty and administrability. Section 1.42–19T(c)(3)(iv) of the temporary regulations provides that a taxpayer designates a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The final regulations require the initial designation of a unit to be made no later than when a unit is first occupied as a low-income unit. *See* § 1.42–19(c)(3)(i). Under § 1.42–19T(c)(3)(iv) of the temporary regulations, the designation must also be communicated annually to the applicable Agency, and the applicable Agency may establish the time and manner in which information is provided to it. *See* § 1.42–19T(c)(2)(i).

In the context of the final regulations' provision of significant flexibility with respect to satisfying the average income test and identifying a qualified group of units, these designation and identification rules will facilitate taxpayer access to this additional flexibility. Providing a specific method of designation will give taxpayers more certainty than the proposed regulations as to how to meet the statutory requirement of designation. The rule will also benefit administration by ensuring a contemporaneous record of designation, without creating a significant burden on taxpayers. The final regulations also revise timing of the designation so that it is no longer required by the end of the first year of the credit period, and instead is based on when a unit is first occupied as a low-income unit. This rule better aligns the timing of designation with the rental of low-income units and should allow a taxpayer to make designations after having a chance to evaluate the market for a particular unit. Finally, requiring annual communication of the information to the applicable Agency will help the Agency determine whether a project is in compliance with the requirements of section 42. The temporary regulations give flexibility to Agencies to determine the best time and manner for taxpayers to communicate the information so each Agency can ensure the system best serves that particular Agency with minimal burden.

Importantly, the temporary regulations also provide Agencies with the discretion, on a case-by-case basis, to waive in writing any failure to comply with the temporary regulations' recordkeeping and reporting requirements. *See* § 1.42–19T(c)(4). The waiver may be done up to 180 days after discovery of the failure, whether by taxpayer or Agency. At the discretion of the applicable Agency, this waiver may treat the relevant requirements as having been satisfied.

In providing Agencies with the ability to waive and the timeline for waiving, the Treasury Department and the IRS considered comments made in response to the proposed regulations regarding the rules for ''removed units'' and the timing for completing ''mitigating actions.'' In response to the proposed regulations' rules on removed units, Agencies commented that they do not have authority to determine the tax consequences of noncompliance with respect to the requirements of section 42, and, instead, Agencies are only responsible for determining the existence of noncompliance itself. The ability of Agencies to waive the failure to comply with the procedural requirements provided by the final regulations is not inconsistent with the scope of Agency responsibility, and the IRS itself will ultimately determine the tax consequences of noncompliance.

With respect to timing, many commenters suggested that a 60-day period in which to take mitigating actions beginning on the first day after the year of noncompliance was too short and began before the noncompliance may be known. Commenters recommended various time periods, and also suggested that the time period run from the time of discovery of the noncompliance. Although the Agency waiver rule in the temporary regulations involves a different situation, commenters' recommendations provide valuable information regarding Agencies' need for a sufficient period of time to consider whether to grant the waiver and that this time period should begin when the failure to comply is discovered. Thus, the temporary regulations provide that the period to provide a waiver is the 180-day period after discovery of the failure to comply by taxpayer or Agency.

E. Timing of Designation of Income Limitations

One commenter expressed concern that, in some situations, a multiple-building project claims the section 42 credit beginning in two different years depending on when the different buildings in the project are fully leased, and thus, the credit period for one building in the project may begin in one taxable year and the credit period for a second building in the same project may begin during the subsequent taxable year. In such a situation, the commenter requested, the regulations should permit the taxpayer to make unit designations at the end of the respective taxable years in which the credit period begins for each building in the same project.

The final regulations require a designation of the imputed income limitation for a unit by the time the unit is first occupied as a low-income unit, which could take place in different taxable years for different units. This rule also allows conversion of a market-rate unit to low-income status, with designation of an income limitation occurring any time before it is first occupied as a low-income unit. Thus, the final regulations provide the flexibility that may be needed by multiple-building projects. In addition, as described later, the final regulations permit the changing of a unit's imputed income limitation in certain circumstances. For an unoccupied unit that is subject to a change in imputed income limitation, the final regulations provide that the taxpayer must designate the unit's changed imputed income limitation prior to occupancy of that unit. For an occupied unit that is subject to a change in imputed income limitation, the taxpayer must designate the unit's changed imputed income limitation prior to the end of the taxable year in which the change occurs.

F. Changing a Unit's Imputed Income Designation

1. The Proposed Regulations on Changes to Income Designations

In general, the proposed regulations did not allow income limitations to be changed after they had been designated.

The preamble to the proposed regulations, however, requested comments on an alternative mitigating approach for situations in which a unit

losing status as a low-income unit had caused the average of unit limitations to rise above 60 percent of AMGI as of the close of a taxable year. The mitigating approach would have allowed the taxpayer to redesignate the imputed income limitation of a low-income unit to return the average of unit limitations to 60 percent of AMGI or lower.

2. Comments Seeking Ability To Change Designations

Numerous commenters disagreed with the proposed regulations' disallowance of modifying the designated imputed income limitation of a unit. In general, these commenters stressed that greater flexibility to change unit designations would align with what multiple Agencies had been pursuing to implement existing State and local policies. Some commentators observed that the proposed regulations may conflict with other Federal or State laws or programs that, in certain cases, require rental housing to accommodate a tenant's need to move to another unit. Additionally, some commentators noted that after enactment of section 42(g)(1)(C), some Agencies adopted their own guidance with which the subsequently published proposed regulations were in conflict.

Multiple commenters recommended that the final regulations allow taxpayers to modify unit designations if the Agency with jurisdiction over the project at issue allows for that in its policies and the Agency consents to the change. A different commenter suggested that the final regulations should allow taxpayers to adjust imputed income limitation designations over time, provided that the taxpayer's adjusted designations continue to satisfy the requirements of the average income test (that is, at all times 40 percent of the units remain rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the owner, and the average of the imputed income limitation designations does not exceed 60 percent of AMGI in any given year).

3. Final Regulations on Changing Designations of Income Limitations

The Treasury Department and the IRS agree with taxpayers that the final regulations should allow greater flexibility in changes in unit designations than the proposed regulations did. Because not all Agencies may want the exact same standards for permitting redesignations, the final regulations address these taxpayer concerns by providing Agencies significant flexibility in determining procedures.

Under the final regulations, a taxpayer may change the imputed income limitation designation of a previously designated low-income unit in any of the following circumstances:

(1) In accordance with any procedures established by the IRS in forms, instructions, or guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*) of this chapter.

(2) In accordance with an Agency's publicly available written procedures, if those procedures are available to all of the Agency's projects that have elected the average income test.

(3) To enhance protections set forth in the Americans With Disabilities Act of 1990 (ADA), Public Law 101–336, 104 Stat. 328; the Fair Housing Amendments Act of 1988, Public Law 100–430, 102 Stat. 1619; the Violence Against Women Act of 1994, Public Law 103–322, 108 Stat. 1902; the Rehabilitation Act of 1973, Public Law 93–112, 87 Stat. 394; or any other State, Federal, or local law or program that protects tenants and that is identified by the IRS or an Agency in a manner described in (1) or (2) above. The tenant protections that apply to an average-income project and that redesignation may enhance do not necessarily have any specific connection to section 42. For example, the protections may be ones that apply to all multifamily rental housing, or they may apply to the project at issue because some congressionally authorized spending supported the project with Federal financial assistance. Even if a tenant protection does not legally apply to a particular average-income project but does apply to analogous multifamily rental housing, the owner of the project may redesignate income limitations to implement the protection for the project's residents.

(4) To enable a current income-qualified tenant to move to a different unit within a project keeping the same income limitation (and thus the same maximum gross rent), with the newly occupied unit and the vacated unit exchanging income limitations.

(5) To restore the required average income limitation for purposes of identifying a qualified group of units either for purposes of satisfying the average income set-aside or for purposes of identifying the units to be used in computing applicable fraction(s). This rule is limited to newly designated, or redesignated, units that are vacant or are occupied by a tenant that would satisfy the new, lower imputed income limitation.

Also, the temporary regulations provide that a taxpayer effects a change in a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). *See* § 1.42–19T(d)(2). The new designation must also be communicated to the applicable Agency in the time and manner required by the applicable Agency and must become part of the annual report to the Agency of income designations. As part of its discretion to specify the manner of communicating the new designation, the Agency may, if it wishes, require identification of the justification for the redesignation. The prior designation must be retained in the books and records for the period specified in § 1.42–19T(c)(3)(iv). These requirements for redesignations are consistent with those for initial designation of a unit's imputed income limitation and, similarly, are intended to increase both certainty and administrability with respect to redesignations.

G. Applicability Dates

Three commenters recommended that the final regulations should provide relief for projects that have elected the average income minimum set-aside prior to the publication of the final rule. These commenters suggested that taxpayers that elected the average income test before the finalization of the regulations did so based on a set of expectations that may be in conflict with how the final regulations actually work. For example, one commenter stated that the final regulations should provide taxpayers the opportunity to choose a different minimum set-aside.

Section 42 provides that an election of a minimum set-aside is irrevocable. Therefore, these final regulations do not permit taxpayers to change a minimum set-aside election.

In general, the final regulations apply to taxable years beginning after December 31, 2022. Section 1.42–19(f)(2) provides rules for residential units in projects that were already occupied prior to the applicability date of the regulations. The final regulations in both §§ 1.42–15(i)(2) and 1.42–19(f)(3) also contain provisions that makes them more broadly available for taxpayers that desire their application. For taxable years prior to the first taxable year to which these regulations apply, taxpayers may rely on a reasonable interpretation of the statute in implementing the average income test for taxable years to which these regulations do not apply.

H. Good Cause

For the reasons discussed above, the Treasury Department and the IRS consider the recordkeeping and

reporting requirements contained in the temporary regulations to be a logical outgrowth of the proposed rule. In any event, the Treasury Department and the IRS determine that there would be good cause to issue the temporary regulations contained in this Treasury Decision without additional notice and the opportunity for public comment. This action may be taken pursuant to section 553(b)(3)(B) of the Administrative Procedure Act, which provides that advance notice and the opportunity for public comment are not required with respect to a rulemaking when an ''agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Under the ''public interest'' prong of 5 U.S.C. 553(b)(3)(B), the good cause exception appropriately applies where notice-and-comment would harm, defeat, or frustrate the public interest, rather than serving it.

It would frustrate the public interest to delay the applicability date of the regulations until the recordkeeping and reporting requirements have received additional notice and comment. Taxpayers are seeking to rely on the substantive final regulations as soon as possible, and taxpayers cannot do so prior to the applicability date of the requirements in the temporary regulations. In general, these substantive final regulations provide significant flexibility with respect to satisfying the average income test, identifying a qualified group of units for use in the average income set-aside test and applicable fraction determinations, and changing the imputed income limitation designations of residential units. This increased flexibility was in response to taxpayer comments on the proposed regulations, including taxpayer complaints about burdens in the proposed regulations. The increased regulatory flexibility, in turn, necessitates these recordkeeping and reporting requirements to enhance administrability and certainty for the taxpayers and Agencies that will be taking advantage of the flexibility. In addition, these requirements are minimally burdensome. The recordkeeping requirements are similar to existing recordkeeping requirements for low-income housing projects, and Agencies may specify the time and manner of communication of regulatorily required information and may waive any failure to comply.

There is also good cause to find notice is ''unnecessary'' within the meaning of 5 U.S.C. 553(b)(3)(B). The Treasury Department and the IRS are responding to commenters by providing the flexibility they sought, which requires enhanced tracking to prevent abuse. The recordkeeping additions do not alter the substance of the basic rule provisions, which are a logical outgrowth of the NPRM. And because the recordkeeping requirements provide what is minimally necessary to ensure compliance and oversight, soliciting further comment would not alter these minimal recordkeeping requirements.

Accordingly, the Treasury Department and IRS have determined that notice is unnecessary and that it is in the public interest to allow expedited reliance on the recordkeeping and reporting requirements contained in the temporary regulations. At the same time, as set forth above, the Treasury Department and IRS are soliciting comments on the recordkeeping and reporting requirements in the notice of proposed rulemaking published contemporaneously with this final rule. At the time of publication, the Office of Management and Budget (OMB) has considered and approved these recordkeeping and reporting requirements under the Paperwork Reduction Act so that taxpayers can rapidly access the flexibility provided in these final regulations regarding the average income test.

Special Analyses

Regulatory Planning and Review—Economic Analysis

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

These final regulations have been designated as subject to review under Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) (MOA) between the Treasury Department and the Office of Management and Budget (OMB) regarding review of tax regulations. The Office of Information and Regulatory Affairs has designated these final regulations as significant under section 1(b) of the MOA.

A. Background

The Tax Reform Act of 1986, Public Law 99–514, 100 Stat. 2085, created the low-income housing credit under section 42 of the Code. Section 42(a) provides that the credit amount earned by a qualified low-income building depends on the number of low-income units in the building, among other factors. Among other requirements, a low-income unit as defined in section 42(i)(3) must be rent-restricted, and the individuals occupying the unit must meet the income limitation applicable to the project of which the building is a part.

To qualify as a low-income housing project, one of the section 42(g) minimum set-aside tests, as elected by the taxpayer, must be satisfied. Prior to the enactment of the Consolidated Appropriations Act of 2018, Public Law 115–141, 132 Stat. 348 (2018 Act), section 42(g) set forth two minimum set-aside tests, known as the 20–50 test and the 40–60 test. Under the 20–50 test, at least 20 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 50 percent or less of AMGI. Under the 40–60 test, at least 40 percent of the residential units in the project must be both rent-restricted and occupied by tenants whose gross income is 60 percent or less of AMGI. To be rent restricted, a unit must have maximum gross rent no more than 30 percent of the unit's income limitation.

The 2018 Act added section 42(g)(1)(C), which contains a third minimum set-aside test—the average income test. A project meets the minimum requirements of the average income test if 40 percent or more of the residential units in the project are both rent-restricted and occupied by tenants whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the specific unit. (In the case of a project described in section 142(d)(6), 40 percent in the preceding sentence is replaced by 25 percent.) For a project to meet the average income test, among other criteria, the average of the imputed income limitations must not exceed 60 percent of AMGI.

B. Baseline

The Treasury Department and the IRS have assessed the benefits and costs of these final regulations relative to a no-action baseline reflecting anticipated Federal income tax-related behavior in the absence of these regulations.

C. Economic Analysis

These final regulations provide guidance on the average income test

under section 42(g)(1)(C). Despite the absence of this guidance, between 2018 and 2022 approximately 200 taxpayers elected the average income test for projects containing, in the aggregate, just over 2,000 buildings. With the benefit of this guidance, we project that an additional 100 taxpayers will elect the average income test annually, for around 1,000 buildings in aggregate, relative to a baseline scenario of no guidance.

These final regulations are expected to increase election of the average income test because the regulations will reduce uncertainty regarding the interpretation of 42(g)(1)(C). Absent these regulations, some taxpayers might shy away from the average income test, fearing adverse tax consequences if their interpretation of the statute is determined to be incorrect as well as lost time and expense for litigation, even if their interpretation is eventually confirmed. Instead, these or other taxpayers would elect either the 20–50 test or the 40–60 test.

Projects electing the average income test may be more financially stable and more likely to be mixed income than if they had to rely on the 20–50 or 40–60 tests; however, in aggregate, the final regulations are expected to have essentially no immediate effect on the number of affordable housing units produced. The pool of potential low-income housing credits allocated by state housing agencies is capped annually and is generally oversubscribed. Thus any increase in allocated credits flowing to projects electing the average income test is expected to be offset by a concomitant reduction in credits flowing to projects electing one of the other two set-aside tests.

Despite having no measurable impact on the stock of affordable housing, these final regulations will likely have some economic effect. First, there will likely be a minor efficiency gain to taxpayers electing the average income set-aside compared to the situation of taxpayers that, in the absence of this guidance, would experience uncertainty interpreting section 42(g)(1)(C). These taxpayers may save on consulting fees or hours of effort. Second, there may be a minor efficiency gain from avoiding time spent in litigation regarding the interpretation of section 42(g)(1)(C). These are unambiguous benefits of providing the final regulations, even if quantitatively small. Third, there may be costs associated with the record-keeping requirements of these final regulations. In Section II of these Special Analyses, we estimate that the annual paperwork burden for this regulation is $676,712 in aggregate. These costs fall upon low-income housing tax credit (LIHTC) building owners who choose to incur them when electing the average income test.

Less directly, the final regulations will likely result in a marginal geographic redistribution in the location of LIHTC-supported housing, away from densely populated areas and towards more sparsely populated ones. Absent an option to elect the average income test, property owners seeking LIHTCs must rely on either the 20–50 or 40–60 tests. These tests set a single income standard for all LIHTC-generating units in a building. For a building to be financially feasible, its owners must be confident that there is a sufficiently large pool of potential renters having incomes in these relatively narrow ranges (just under 50 or 60 percent of AMGI). These conditions are more easily met in densely populated areas.

In contrast, with income averaging, developers have leeway to establish a variety of income limitations in a building. Thus, in a sparsely populated area where there are not enough people in the relatively narrow required range of incomes to support a 20–50 or 40–60 building, an average income building may be financially feasible. Despite the low population density, the wider range of potential tenant incomes may enable the building owner to fill the low-income units with qualifying tenants from that vicinity. That ability could make the difference in whether or not the project is feasible.

To be sure, most of the effect of the average income test on the geographic distribution of affordable housing is a direct consequence of statutory amendments to section 42 made by the 2018 Act, independent of this regulatory guidance. However, to the extent that the final regulations encourage some taxpayers to use the average income test who otherwise would not, the regulations reinforce the statutory effect. The end result is a marginal transfer of economic well-being from renters and LIHTC property developers in densely populated areas towards renters and LIHTC property developers in sparsely populated areas.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) requires that a Federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collections of information contained in these regulations has been approved by OMB under control number 1545–0988.

The collections of information that are needed for certainty and administrability of the final regulations are included in § 1.42–19T of the temporary regulations. Section 1.42–19T(c)(1) provides recordkeeping and reporting requirements related to the identification of a qualified group of units for each of (i) satisfaction of the average income set-aside test and (ii) applicable fraction determinations. Section 1.42–19T(c)(2) provides reporting requirements to the Agency with jurisdiction over a project. Section 1.42–19T(c)(3)(iv) provides recordkeeping and reporting requirements related to designations of the imputed income limitations for residential units. Section 1.42–19T(d)(2) provides recordkeeping and reporting requirements related to changing a unit's designated imputed income limitation.

This information in the collections of information will generally be used by the IRS and Agencies for tax compliance purposes and by taxpayers to facilitate proper reporting and compliance. Specifically, the collections of information in § 1.42–19T apply to taxpayer owners of projects that receive the low-income housing credit and elect the average income set-aside. With respect to the recordkeeping requirements in § 1.42–19T(c)(3)(iv) and (d)(2) and section 42(g)(1)(C)(ii)(I) requires that the taxpayer designate the imputed income limitations of the units taken into account for purposes of the average income test. Thus, the recordkeeping requirements that are provided allow for a process of designation that will result in a reliable record of both the original designations of the imputed income limitations of low-income units and any redesignations of units' limitations within a project.

The recordkeeping rules in § 1.42–19T(c)(1) with respect to a qualified group of units are similarly needed to ensure there is a reliable record to show that the units used for purposes of the average income set-aside test, and for determining a building's applicable fraction were part of a group of units within the project whose average designated imputed income limitations do not exceed 60 percent of AMGI. This limitation is consistent with the requirement in section 42(g)(1)(C)(ii)(II). The annual reporting requirements in § 1.42–19T(c)(1) and (3) and (d)(2) are also similar in substance to other annual certifications required of taxpayers. For example, minimum certifications by taxpayers are required in qualified

allocation plans as provided in § 1.42–5(c). The reporting requirements in these final regulations also provide added flexibility by allowing the applicable Agency to determine the time and manner that the reporting is made under § 1.42–19T(c)(2)(i). Also, § 1.42–19T(c)(4) gives Agencies the ability to waive any failure of reporting on a case-by-case basis.

A summary of paperwork burden estimates follows:

Estimated number of respondents: Approximately 200 taxpayers elected the average income test for just over 2,000 buildings between 2018 and 2022. When viewed annually, we project that approximately 100 additional taxpayers will have eligible buildings and 1,000 additional buildings will be eligible under the average income test.

Estimated burden per response: We estimate that identifying which units are for use in the average income set-aside test and applicable fraction determinations and designating a unit's imputed income limitation takes an average of 15 minutes per unit. Based on an estimated average of 15 units per building and an average 15 minutes of time per unit, an impacted taxpayer will incur an average of 225 minutes per building to record the additional designations due to the flexibility under the regulations for the average income test. Total average annual burden for recording the designations per building is 11,250 hours (15 units × 15 minutes × 3,000 buildings).

Taxpayers are also required to report redesignation of units, and why they are required to redesignate units during the year. For purposes of this analysis, we assume that an average of 4 units per building will be redesignated annually. We estimate each redesignation will take an average of 10 minutes. Thus, we estimate the average number of minutes per year to record redesignations for an impacted taxpayer to be 40 minutes per building for a total average annual burden of 2,000 hours (40 minutes × 3,000 buildings).

In addition, we estimate an annual reporting burden related to the expanded flexibility rules to average 20 minutes per impacted taxpayer for a total burden of 100 hours (20 minutes × 300 taxpayers).

Estimated frequency of response: Annual.

Estimated total burden hours: The annual burden hours for this regulation is estimated to be 13,350 hours. Using a monetization rate of $50.69 per hour (2020 dollars), the burden for this regulation is $676,712 for impacted taxpayers.

A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

III. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (RFA) (5 U.S.C. chapter 6), it is hereby certified that this final regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that, prior to the publication of this final regulation and before the enactment of the 2018 Act, taxpayers were already required to satisfy either the 20–50 test or the 40–60 test, as elected by the taxpayer, in order to qualify as a low-income housing project. The 2018 Act added a third minimum set-aside test (the average income test) that taxpayers may elect. This final regulation sets forth requirements for the average income test, and the costs associated with the average income test are similar to the costs associated with the 20–50 test and 40–60 test. In addition, affected taxpayers, including some who end up not electing the average income test) will incur minimal costs in reading and understanding the regulations. The Treasury Department and the IRS estimate that the burden involved in reading and understanding the regulations will be approximately 3 to 5 hours and largely will be borne by advisors and trade media. A portion of the cost to such advisors and trade media will be passed on to taxpayers.

As described in more detail in the Paperwork Reduction Act section of this preamble, approximately 200 taxpayers elected the average income test between 2018 and 2022. When that figure is viewed annually, the Treasury Department and the IRS project that approximately 100 additional taxpayers will elect the average income test due to the final regulations. For the 300 taxpayers affected, the annual burden hours for this regulation is estimated in the Paperwork Reduction Act analysis to be 13,350 hours. Thus, the average annual burden hours amount to 44.5 hours per affected small entity. This estimate reflects all recordkeeping and reporting requirements associated with the final regulations, including (i) identifying which units are for use in the average income set-aside test, (ii) identifying which units are for use in applicable fraction determinations, (iii) designating a unit's imputed income limitation, (iv) reporting redesignation of units, (v) reporting reasons why units are redesignated, and (v) the reporting burden related to the expanded flexibility rules.

Monetized at $50.69 per hour (2020 dollars), the average annual burden hours represent a cost of $2,256 per affected small entity. This amount is likely quite small relative to the entity's revenue. A precise estimate of typical revenue is not possible with the data available to the Treasury Department and the IRS. However, the Treasury Department and the IRS estimate that the typical annual LIHTC allocation to an affected entity is between $125,000 and $1,450,000. Relative to these sums, the $2,256 annual cost of the regulations is not a significant economic impact.

Accordingly, it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities within the meaning of section 601(6) of the RFA.

For the applicability of the RFA to the temporary regulations, refer to the Special Analyses section of the preamble to the notice of proposed rulemaking published in the Proposed Rules section in this issue of the **Federal Register**.

IV. Section 7805(f)

Pursuant to section 7805(f), the proposed regulation was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received. The Treasury Department and the IRS also requested comments from the public.

V. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This final rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or by the private sector in excess of that threshold.

VI. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These regulations do

not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a ''major rule,'' as defined by 5 U.S.C 804(2).

Drafting Information

The principal authors of these regulations are Dillon Taylor, Office of the Associate Chief Counsel (Passthroughs and Special Industries), and Michael J. Torruella Costa, formerly at Office of the Associate Chief Counsel (Passthroughs and Special Industries). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAXES

■ Paragraph 1. The authority citation for part 1 is amended by adding in numerical order entries for §§ 1.42–19 and 1.42–19T to read, in part, as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.42–15 also issued under 26 U.S.C. 42(n);

* * * * *

Section 1.42–19 also issued under 26 U.S.C. 42(n);

Section 1.42–19T also issued under 26 U.S.C. 42(n);

* * * * *

■ Par. 2. Section 1.42–0 is amended by:
■ 1. In the introductory text, removing ''1.42–18'' and adding ''1.42–19'' in its place.
■ 2. In § 1.42–15:
■ i. Revising paragraph (c).
■ ii. Adding paragraphs (c)(1) and (2) and (c)(2)(i) through (iv).
■ iii. Revising paragraph (i).
■ iv. Adding paragraphs (i)(1) and (2).
■ 3. Adding a heading and entries for § 1.42–19.

The additions and revisions read as follows:

§ 1.42–0 Table of contents.

* * * * *

§ 1.42–15 Available unit rule.

* * * * *

(c) Exceptions.

(1) In general.

(2) Rental of next available unit in case of the average income test.

(i) Basic rule.

(ii) No requirement to comply with the next available unit rule in a specific order.

(iii) Deep rent skewed projects.

(iv) Limitation.

* * * * *

(i) Applicability dates.

(1) In general.

(2) Applicability dates under the average income test.

* * * * *

§ 1.42–19 Average income test.

(a) Average income set-aside.

(b) Definition of low-income unit and qualified group of units.

(1) Definition of low-income unit.

(2) Definition of qualified group of units.

(3) Identification of qualified groups of units.

(i) Average income set-aside test.

(ii) Applicable fraction determinations.

(iii) Identification of units.

(c) Procedures.

(1) [Reserved]

(2) [Reserved]

(3) Designation of imputed income limitations.

(i) Timing of designation.

(ii) 10-percent increments.

(iii) Continuity.

(iv) [Reserved]

(4) [Reserved]

(d) Changing a unit's designated imputed income limitation.

(1) Permitted changes.

(i) Federally permitted changes.

(ii) *Housing credit agency* (Agency)-permitted changes.

(iii) Certain laws.

(iv) Tenant movement.

(v) Restoring compliance with average income requirements.

(2) [Reserved]

(e) Examples.

(f) Applicability dates.

(1) General rule.

(2) Designations of occupied units.

(3) Applicability of this section to taxable years beginning before January 1, 2023.

■ Par. 3. Section 1.42–15 is amended by:
■ 1. Revising the definition of *Over-income unit* in paragraph (a).
■ 2. In paragraph (c):
■ i. Revising the heading.
■ ii. Designating the text as paragraph (c)(1) and adding a heading for newly designated paragraph (c)(1).
■ 3. Adding paragraph (c)(2).
■ 4. In paragraph (i):
■ i. Revising the heading.
■ ii. Designating the text as paragraph (i)(1).
■ 5. In newly designated paragraph (i)(1):
■ i. Adding a heading.
■ ii. Removing ''This section'' and adding ''Except for paragraph (c)(2) of this section, this section'' in its place.
■ 6. Adding paragraph (i)(2).

The revisions and additions read as follows:

§ 1.42–15 Available unit rule.

(a) * * *

Over-income unit means, in the case of a project with respect to which the taxpayer elects the requirements of section 42(g)(1)(A) or (B) (that is, the 20–50 or 40–60 tests), a low-income unit in which the aggregate income of the occupants of the unit increases above 140 percent of the applicable income limitation under section 42(g)(1)(A) and (B), or above 170 percent of the applicable income limitation for deep rent skewed projects described in section 142(d)(4)(B). In the case of a project with respect to which the taxpayer elects the requirements of section 42(g)(1)(C) (that is, the average income test), *over-income unit* means a residential unit described in § 1.42–19(b)(1)(i) through (iii) in which the aggregate income of the occupants of the unit increases above 140 percent (170 percent in case of deep rent skewed projects described in section 142(d)(4)(B)) of the greater of 60 percent of area median gross income or the imputed income limitation designated with respect to the unit under § 1.42–19(b).

* * * * *

(c) *Exceptions*—(1) *In general.* * * *

(2) *Rental of next available unit in case of the average income test*—(i) *Basic rule.* In the case of a project with respect to which the taxpayer elects the average income test, if a unit becomes an over-income unit within the meaning of paragraph (a) of this section, that unit ceases to be described in § 1.42–19(b)(1)(ii) if—

(A) Any residential rental unit (of a size comparable to, or smaller than, the over-income unit) is available, or subsequently becomes available, in the same low-income building; and

(B) That available unit is occupied by a new resident whose income exceeds the limitation described in paragraph (c)(2)(iv) of this section.

(ii) *No requirement to comply with the next available unit rule in a specific order.* Where multiple units in a building are over-income units at the same time—

(A) The order in which available units are occupied makes no difference for

purposes of complying with the rules in this section (next available unit rule); and

(B) In making imputed income limitation designations, the taxpayer must take into account the limitations described in paragraphs (c)(2)(iii) and (iv) of this section.

(iii) *Deep rent skewed projects.* In the case of a project described in section 142(d)(4)(B) with respect to which the taxpayer elects the average income test, if a unit becomes an over-income unit within the meaning of paragraph (a) of this section, that unit ceases to be a unit described in § 1.42–19(b)(1)(ii) if—

(A) Any residential unit described in § 1.42–19(b)(1)(i) through (iii) is available, or subsequently becomes available, in the same low-income building; and

(B) That unit is occupied by a new resident whose income exceeds the lesser of 40 percent of area median gross income or the imputed income limitation designated with respect to that unit.

(iv) *Limitation.* The limitation described in this paragraph (c)(2)(iv) is—

(A) In the case of a unit that was described in § 1.42–19(b)(1)(i) through (iii) prior to becoming vacant, the imputed income limitation designated with respect to the available unit for the average income test under § 1.42–19(b); and

(B) In the case of any other unit, the highest imputed income limitation that could be designated (consistent with section 42(g)(1)(C)(ii)(III)) for that available unit under § 1.42–19(c) such that the average of all imputed income designations of residential units in the project does not exceed 60 percent of area median gross income (AMGI).

(v) *Example.* The operation of paragraph (c)(2) of this section (that is, the next available unit rule for the average income test) is illustrated by the following example.

(A) *Facts.* (*1*) A single-building housing project received an allocation of housing credit dollar amount for 10 low-income units. The taxpayer who owns the project constructs the building with 10 identically sized units and elects the average income test. In the first year, the taxpayer intended to have 8 units that will qualify as low-income units (within the meaning of § 1.42–19(b)(1)), and 2 units that are market-rate units. The taxpayer properly and timely designates the imputed income limitations for the 8 units as follows: 4 units at 80 percent of AMGI; and 4 units at 40 percent of AMGI.

TABLE 1 TO PARAGRAPH (c)(2)(v)(A)(*1*)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	Market Rate.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	Market Rate.

(*2*) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied by income-qualified residents in Units ##1–4 and 6–9. In Year 2, Unit #1 and Unit #6 become over-income. The tenant residing in Unit #5 vacated that unit. Taxpayer then designated an imputed income limitation of 40 percent of AMGI for Unit #5. Later in Year 2, the tenant residing in Unit #10 vacated that unit. Taxpayer designated an imputed income limitation of 80 percent of AMGI for Unit #10. After those designations, Unit #10 was occupied by a new income-qualified tenant, and then later, Unit #5 was occupied by a new income-qualified resident.

(B) *Analysis.* Taxpayer sought to maintain the status of the over-income units (Unit #1 and Unit #6) as units described in § 1.42–19(b)(1)(ii). As the then-market rate units (Units ##5 and 10) became available to rent, Taxpayer designated imputed income limitations for them at 40 percent and 80 percent of AMGI, respectively. Immediately after each designation, the average of the designations in the project does not exceed 60 percent AMGI. Pursuant to the rule in paragraph (c)(2)(ii) of this section, when there are multiple over-income units, Taxpayer is not required to rent the next-available units in a specific order, even though they may have different imputed income limitations. Thus, Taxpayer complied with the rules of the next available unit rule, and Unit #1 and Unit #6 maintain status as units described in § 1.42–19(b)(1)(ii).

* * * * *

(i) *Applicability dates*—(1) *In general.*

* * *

(2) *Applicability dates under the average income test.* The requirements of the second sentence of the definition of *over-income unit* in paragraph (a) of this section and paragraph (c)(2) of this section apply to taxable years beginning after December 31, 2022. A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–19 to the same taxable year.

■ Par. 4. Section 1.42–19 is added to read as follows:

§ 1.42–19 Average income test.

(a) *Average income set-aside.* A project for residential rental property satisfies the average income test in section 42(g)(1)(C) for a taxable year if the project contains a qualified group of units (within the meaning of paragraph (b)(2) of this section) that constitutes 40 percent or more of the residential units in the project. (In the case of a project described in section 142(d)(6), ''40 percent'' in the preceding sentence is replaced with ''25 percent.'')

(b) *Definition of low-income unit and qualified group of units*—(1) *Definition of low-income unit.* For purposes of this section, a residential unit is a low-income unit if and only if –

(i) Such unit is rent-restricted (as defined in section 42(g)(2));

(ii) The individuals occupying such unit satisfy the imputed income limitation of that unit designated by the taxpayer in accordance with paragraphs (c)(3) and (d) of this section and with § 1.42–19T(c) and (d), or the unit meets the requirements under section 42(g)(2)(D);

(iii) No provision in section 42 (including section 42(i)(3)(B)–(E)) or in the regulations under section 42 denies low-income status to that unit; and

(iv) The unit is part of a qualified group of units under paragraph (b)(2) of this section.

(2) *Definition of qualified group of units.* A group of residential units is a qualified group of units for a taxable year if and only if—

(i) Each unit in the group satisfies the requirements of paragraphs (b)(1)(i) through (iii) of this section; and

(ii) The average of the imputed income limitations of all of the units in the group does not exceed 60 percent of area median gross income (AMGI).

(3) *Identification of qualified groups of units*—(i) *Average income set-aside test.* For each taxable year in the extended use period, the taxpayer must identify a qualified group of units that constitute 40 percent or more of the residential units in the project. The requirements in paragraph (b)(3)(iii) of this section apply to these identifications.

(ii) *Applicable fraction determinations.* For each taxable year in the extended use period, the taxpayer must identify a qualified group of units to be used in determining the applicable fractions for the buildings in the project.

(A) *Identification of the units in the qualified group of units used for determining applicable fractions.* The residential units that are identified for purposes of this paragraph (b)(3)(ii) include the units that, under paragraph (b)(3)(i) of this section, are included in the qualified group of units identified for purposes of the set-aside qualification of the project. The taxpayer may identify additional units for inclusion in the group of units used in determining the applicable fractions for buildings in the project provided that the resulting group is a qualified group of units within the meaning of paragraph (b)(2) of this section.

(B) *Computing applicable fractions of buildings.* For a taxable year, the applicable fraction of a building in a project is computed using the units that are in the particular building and that are also in the qualified group of units for the project identified for purposes of this paragraph (b)(3)(ii). The units included in the applicable fraction of a building do not have to be a qualified group of units on their own. *See Example 4* of paragraph (e) of this section.

(iii) *Identification of units.* The recordkeeping and reporting requirements in § 1.42–19T(c)(1) apply both to the identification of units that is required by paragraph (b)(3)(i) of this section and the identification of units that is described in paragraph (b)(3)(ii) of this section.

(c) *Procedures.* (1)–(2) [Reserved]

(3) *Designation of imputed income limitations*—(i) *Timing of designation.* (A) Before a unit is first occupied as a low-income unit, or, except as provided in paragraph (c)(3)(i)(B) of this section, is first occupied under a changed income limit, the taxpayer must designate the unit's imputed income limitation or changed imputed income limitation.

(B) For an occupied unit that is subject to a change in imputed income limitation pursuant to paragraph (d) of this section, the taxpayer must designate the unit's changed imputed income limitation not later than the end of the taxable year in which the change occurs.

(ii) *10-percent increments.* Under section 42(g)(1)(C)(ii)(III), a designation is valid only if it is one of the following: 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of AMGI.

(iii) *Continuity.* Except as provided in paragraph (d) of this section, the imputed income limitation of a residential unit does not change.

(iv) [Reserved]

(4) [Reserved]

(d) *Changing a unit's designated imputed income limitation*—(1) *Permitted changes.* Notwithstanding paragraph (c)(3)(iii) of this section, the taxpayer may change the imputed income limitation of a unit in the following circumstances subject to the timing of designation requirement in paragraph (c)(3)(i)(B) of this section.

(i) *Federally permitted changes.* Permission for the change is contained in IRS forms, instructions, or guidance published in the Internal Revenue Bulletin pursuant to § 601.601(d)(2)(ii)(*b*) of this chapter.

(ii) *Housing credit agency (Agency)-permitted changes.* The Agency with jurisdiction of the project has issued public written guidance that provides conditions for a permitted change and that applies to all average income test projects under the jurisdiction of the Agency.

(iii) *Certain laws.* The change in designation is required or appropriate to enhance protections contained in the following, as amended—

(A) The Americans with Disabilities Act of 1990 (ADA), Pub. L. 101–336, 104 Stat. 328, 42 U.S.C. 12101, *et seq.;*

(B) The Fair Housing Amendments Act of 1988, Pub. L. 100–430, 102 Stat.1619, 42 U.S.C. 3601, et. seq.;

(C) The Violence Against Women Act of 1994, Pub. L. 103–322, 108 Stat. 1902, 34 U.S.C. 12291, et. seq.;

(D) The Rehabilitation Act of 1973, Pub. L. 93–112, 87 Stat. 394, 29 U.S.C. 701, *et seq.;* or

(E) Any other State, Federal, or local law or program that protects tenants and that is identified pursuant to paragraph (d)(1)(i) or (ii) of this section.

(iv) *Tenant movement.* If a current income-qualified tenant moves to a different unit in the project—

(A) The unit to which the tenant moves has its imputed income designation, if any, changed to the limitation of the unit from which the tenant is moving; and

(B) The vacated unit takes on the prior limitation, if any, of the tenant's new unit.

(v) *Restoring compliance with average income requirements.* If one or more units lose low-income status or if there is a change in the imputed income limitation of some unit and if either event would cause a previously qualifying group of units to cease to be described in paragraph (b)(2)(ii) of this section, then the taxpayer may designate an imputed income limitation for a market rate unit or may reduce the existing imputed income limitations of one or more other units in the project in order to restore compliance with the average income requirement. The rule in this paragraph (d)(1)(v) may be applied to market-rate, vacant, or low-income units, but, in the case of occupied units, the current tenants must qualify under the new, lower imputed income limitation.

(2) [Reserved]

(e) *Examples.* The operation of this section is illustrated by the following examples.

(1) *Example 1*—(i) *Facts.* (A) A single-building housing project received an allocation of housing credit dollar amount. The taxpayer who owns the project elects the average income test, intending for the 10-unit building to have 100 percent low-income occupancy. The taxpayer properly and timely designates the imputed income limitations for the 10 units as follows: 5 units at 80 percent of AMGI; and 5 units at 40 percent of AMGI. Also, for the first credit year, the taxpayer follows proper procedure in identifying 4 units as the qualified group of units that are to be used for qualifying under the average income set-aside (Units ##1, 2, 6, and 7). Additionally, for the first credit year, the taxpayer follows proper procedure in identifying all 10 units as the qualified group of units that are to be used for the applicable fraction determination. All of the units in the project are described in paragraphs (b)(1)(i) through (iii) of this section.

TABLE 1 TO PARAGRAPH (e)(1)(i)(A)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	80 percent of AMGI.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	40 percent of AMGI.

(B) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied.

(ii) *Analysis.* The identified groups are qualified groups under paragraph (b)(2) of this section. All units in both of the groups are described in paragraphs (b)(1)(i) through (iii) of this section, and the averages of the imputed income limitations of both the 4-unit group (Units ##1, 2, 6, and 7) and the 10-unit group do not exceed 60 percent of AMGI.

(A) *Average income set-aside.* The project qualifies under the average income set-aside because the identified group of 4 units (Units ##1, 2, 6, and 7) is a qualified group of units that

comprise at least 40% of the residential units in the project.

(B) *Qualified basis.* All 10 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a).

(2) *Example 2*—(i) *Facts.* Assume the same facts as *Example 1* of paragraph (e)(1) of this section. In Year 2, Unit #6 (which has a designated imputed income limitation of 40 percent of AMGI) becomes uninhabitable. Repair work on Unit #6 is completed in Year 3. For Year 2, Taxpayer identifies the following as a qualified group of units that are to be used for both the set-aside requirement and the applicable fraction determination: Units ##1–4 and 7–10. For Year 3, Taxpayer identifies all 10 units as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination.

(ii) *Analysis.* For Year 2, the identified group is a qualified group under paragraph (b)(2) of this section. All 8 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 8 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income set-aside.* For Year 2, the project qualifies for the average income set-aside because the project contains a qualified group of units that comprises at least 40% of the residential units in the project.

(B) *Qualified basis.* To determine qualified basis in Year 2, the 8 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a). Unit #6 could not have been identified in the qualified group of units for use in the applicable fraction determination because its lack of habitability prevents it from being a low-income unit. Further, Taxpayer could not have identified all 9 of the habitable units to be used in the qualified group of units for the applicable fraction determination because the average of imputed income limitations of those 9 exceeds 60 percent of AMGI. Taxpayer had a choice of which of Units ##1–5 it was going to not identify for use in the applicable fraction determination. Omitting any one of them reduces the average limitation of the remaining group of 8 units to an amount that does not exceed 60 percent of AMGI. Given taxpayer's decision to leave out Unit #5, Units ##1, 2, 3, 4, 7, 8, 9, and 10 are taken into account in the applicable fraction.

(C) *Recapture.* At the close of Year 2, Unit #6's unsuitability for occupancy precludes it from being described in paragraph (b)(1)(iii) of this section. Unit #6's resulting failure to be a low-income unit prevents it from being in a qualified group for purposes of computing the applicable fraction. The decline in the applicable fraction yields a decline in qualified basis, which results in credit recapture under section 42(j) for Year 2. Additionally, Unit #5 is not a low-income unit because the taxpayer did not include it in the qualified group of units identified for determining the building's applicable fraction. The exclusion of Unit #5 from the qualified group of units further reduces the applicable fraction for Year 2 and so reduces qualified basis for that year as well. Thus, this exclusion increases the credit recapture amount under section 42(j).

(D) *Restoration of habitability and of qualified basis.* As described in the facts in paragraph (e)(2)(i) of this section, in Year 3, after repair work is complete, the formerly uninhabitable Unit #6 is again occupied by a qualified tenant at the same imputed income limitation, and the Taxpayer identifies all 10 units as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination. The identified group is a qualified group under paragraph (b)(2) of this section. All 10 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 10 units in the group of units does not exceed 60 percent of AMGI. For Year 3, all 10 units are included in the qualified group of units for purposes of the average income set-aside test and are a qualified group of units for the applicable fraction determination.

(3) *Example 3*—(i) *Facts.* Assume the same facts as *Example 2* of paragraph (e)(2) of this section, except that the income for the tenant residing in Unit #5 has declined so that tenant's income does not exceed 60 percent of AMGI. For Year 2, taxpayer timely redesignates Unit #5 pursuant to the rule in paragraph (d)(1)(v) of this section so that the imputed income limitation is 60 percent of AMGI instead of 80 percent of AMGI. Taxpayer also makes revisions so that Unit #5 is rent-restricted under the redesignated imputed income limitation. Taxpayer identifies 9 units (Units ##1–5 and 7–10) as the qualified group of units that are to be used for the set-aside requirement and the applicable fraction determination.

TABLE 2 TO PARAGRAPH (e)(3)(i)

Unit No.	Imputed income limitation of the unit
1	80 percent of AMGI.
2	80 percent of AMGI.
3	80 percent of AMGI.
4	80 percent of AMGI.
5	60 percent of AMGI.
6	40 percent of AMGI.
7	40 percent of AMGI.
8	40 percent of AMGI.
9	40 percent of AMGI.
10	40 percent of AMGI.

(ii) *Analysis.* For Year 2, the identified group is a qualified group under paragraph (b)(2) of this section. All 9 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 9 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income set-aside.* For Year 2, project contains a qualified group of units that comprises at least 40% of the residential units in the project.

(B) *Qualified basis.* To determine qualified basis, all 9 units in the identified qualified group of units are used in the applicable fraction determination when calculating qualified basis for purposes of determining the annual credit amount under section 42(a). Unit #6 could not have been identified in the qualified group of units for use in the applicable fraction determination because its lack of habitability prevents it from being a low-income unit. Thus, Units ##1, 2, 3, 4, 5, 7, 8, 9, and 10 are taken into account in the applicable fraction determination.

(C) *Recapture.* At the close of Year 2, the amount of the qualified basis is less than the amount of the qualified basis at the close of Year 1, because Unit #6's unsuitability for occupancy prohibits it from being a low-income unit. Unit #6's failure to be a low-income unit results in a credit recapture amount under section 42(j) for Year 2 related to Unit #6. Because Units ##1–5 and 7–10 are all included in the qualified group of units for use in the applicable fraction determination, Units ##1–5 and 7–10 are included in qualified basis for Year 2 when determining the recapture amount.

(4) *Example 4*—(i) *Facts.* (A) A multiple-building housing project consisting of two buildings received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. The taxpayer intends for the buildings (each containing 5 units) to have 100

percent low-income occupancy. The taxpayer properly and timely designates the imputed income limitations for the 10 units in Buildings 1 and 2 as follows: Building A contains 2 units at 80 percent of AMGI and 3 units at 40 percent of AMGI; and Building B contains 2 units at 40 percent of AMGI and 3 units at 80 percent of AMGI.

TABLE 3 TO PARAGRAPH (e)(4)(i)(A)

Building A, Unit No.	Imputed income limitation of the unit
A1	80 percent of AMGI.
A2	80 percent of AMGI.
A3	40 percent of AMGI.
A4	40 percent of AMGI.
A5	40 percent of AMGI.
Building B, Unit No.	
B1	40 percent of AMGI.
B2	40 percent of AMGI.
B3	80 percent of AMGI.
B4	80 percent of AMGI.
B5	80 percent of AMGI.

(B) In the first taxable year of the credit period (Year 1), the project is fully leased and occupied. Also, for the first credit year, the taxpayer follows proper procedure in identifying all 10 units as a qualified group of units for the minimum set-aside and the applicable fraction determination.

(ii) *Analysis.* For Year 1, the identified group is a qualified group under paragraph (b)(2) of this section. All 10 units in the group are described in paragraphs (b)(1)(i) through (iii) of this section, and the average of the imputed income limitations of the 10 units in the group of units does not exceed 60 percent of AMGI.

(A) *Average income test.* The multiple-building project meets the average income test as the project contains a qualified group of units that comprises at least 40% of the residential units in the project. The fact that the average of the income limitations of the units in Building B exceeds 60 percent of AMGI does not impact this result.

(B) *Qualified basis.* To determine qualified basis, all 10 units in the identified qualified group of units across Building A and Building B are used in the applicable fraction determination when calculating qualified basis of each building for purposes of determining the annual credit amount under section 42(a). The fact that the average of the units in Building B exceeds 60 percent of AMGI does not impact the applicable fraction of Building B because the average of the identified group of units across both buildings does not exceed 60 percent of AMGI.

(5) *Example 5*—(i) *Facts.* A single-building housing project received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. During Year 2 of the credit period, the tenant residing in a unit with a designated imputed income limitation of 40 percent of AMGI moves to a market-rate unit within the same project. The tenant's income continues to be at or below 40 percent of AMGI.

(ii) *Analysis.* Under the rule in paragraph (d)(1)(iv) of this section, when the current income-qualified tenant moves to a different unit in the project, the unit to which the tenant moves is eligible for the taxpayer to designate as a unit with a designated imputed income limitation of 40 percent of AMGI. If the taxpayer makes those designations, the unit vacated by the tenant takes on the prior limitation, if any, of the tenant's new unit. In this situation, the vacated unit formerly occupied by the tenant is now a market-rate unit.

(6) *Example 6*—(i) *Facts.* A single-building housing project received an allocation of housing credit dollar amount, and the taxpayer who owns the project elects the average income test. During Year 2 of the credit period, the disability status under the ADA of a tenant changes, and therefore under the provisions of the ADA, the tenant now needs to reside in a different unit with different accommodations. The tenant currently resides in a unit with a designated imputed income limitation of 40 percent of AMGI. A unit that would meet the tenant's needs is available on the first-floor of the building, but it was previously a low-income unit with a designated imputed income limitation of 70 percent of AMGI and thus a higher maximum gross rent than the tenant's current unit. The tenant moves to the first-floor unit.

(ii) *Analysis.* The tenant's move was required under the ADA. Accordingly, the taxpayer is permitted to change the designation of the imputed income limitation of the first-floor unit so that the unit's designation is 40 percent of AMGI. Under paragraph (d)(1)(iv) of this section, the vacated unit takes on the prior limitation of 70 percent of AMGI of the tenant's new unit.

(f) *Applicability dates*–(1) *In general.* Except as provided in paragraph (f)(3) of this section, this section applies to taxable years beginning after December 31, 2022.

(2) *Designations of occupied units.* (i) If a residential unit is occupied at the end of the most recent taxable year ending before the first taxable year to which this section applies and if the unit is to be taken into account as a low-income unit under this section as of the beginning of the first taxable year to which this section applies, then not later than the first day of such first taxable year, the taxpayer must designate an imputed income limitation for the unit. The first taxable year to which this section applies means the first taxable year beginning after December 31, 2022, if paragraph (f)(1) of this section applies, or the taxable year described in paragraph (f)(3) of this section if the taxpayer chooses to apply paragraph (f)(3) of this section.

(ii) The designation required by paragraph (f)(2)(i) of this section must comply with paragraph (c)(3)(ii) of this section and § 1.42–19T(c)(3)(iv), without taking into account § 1.42–19T(c)(4). Section 1.42–19T(c)(2) applies to these designations, except that the Agency may allow the notification to be made along with any other notifications for the first taxable year beginning after December 31, 2022.

(iii) The designated imputed income limitation for the unit may not be less than the income that the current occupant of the unit had when that occupancy began.

(3) *Applicability of this section to taxable years beginning before January 1, 2023.* A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–15 to the same taxable year.

■ Par. 5. Section 1.42–19T is added to read as follows:

§ 1.42–19T Average income test (temporary).

(a)–(b) [Reserved]

(c) *Procedures*—(1) *Identification of low-income units for use in the average income set-aside test or the applicable fraction determination*—(i) *In general.* For a taxable year, a taxpayer must follow the procedures described in paragraph (c)(1)(ii) of this section to identify—

(A) A qualified group of units that satisfy the average income set-aside test; and

(B) A qualified group of units used to determine the applicable fraction.

(ii) *Recording and communicating.* The procedures described in this paragraph (c)(1)(ii) are—

(A) Recording the identification in its books and records, where the identification must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2); and

(B) Communicating the annual identifications to the applicable *housing*

credit agency (Agency) as provided in paragraph (c)(2) of this section.

(2) *Notifications to the Agency with jurisdiction over a project*—(i) *Agency flexibility.* An Agency may establish the time and manner in which information is annually provided to it.

(ii) *Example.* An Agency may allow a taxpayer to describe a current year's information by reporting differences from the previous year's information or by reporting that there are no such differences. Various Agencies may choose to apply this manner of reporting to the identity of a qualified group of units for use in the average income set-aside or applicable fraction determination, or the imputed income limits designated for the various units in a project.

(3) *Designation of imputed income limitations.* (i)–(iii) [Reserved]

(iv) *Recording, retention, and annual communications related to designations.* A taxpayer designates a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The preceding sentence applies both to units whose first occupancy is as a low-income unit and to previously market-rate units that are converted to low-income status. The designation must also be communicated annually to the applicable Agency as provided in paragraph (c)(2) of this section.

(4) *Waiver for failure to comply with procedural requirements.* On a case-by-case basis, the Agency has the discretion to waive in writing any failure to comply with the requirements of paragraph (c)(1) or (2) or (c)(3)(iv) of this section up to 180 days after discovery of the failure, whether by taxpayer or Agency. If an Agency exercises this discretion, then the relevant requirements are treated as having been satisfied. In such a case, the tax consequences under this section correspond to that deemed satisfaction.

(d) *Changing a unit's designated imputed income limitation.* (1) [Reserved]

(2) *Process for changing a unit's designated imputed income limitation.* The taxpayer effects a change in a unit's imputed income limitation by recording the limitation in its books and records, where it must be retained for a period not shorter than the record retention requirement under § 1.42–5(b)(2). The new designation must also be communicated to the applicable Agency as provided in paragraph (c)(2) of this section and must become part of the annual report to the Agency of income designations. The prior designation must be retained in the books and records for the period specified in paragraph (c)(3)(iv) of this section. A designation under this paragraph (d)(2) is considered to be made in a manner consistent with paragraph (c)(3) of this section.

(e) [Reserved]

(f) *Applicability dates*—(1) *In general.* Except as provided in paragraph (f)(3) of this section, this section applies to taxable years beginning after December 31, 2022.

(2) *Designations of occupied units.* (i) If a residential unit is occupied at the end of the most recent taxable year ending before the first taxable year to which this section applies and if the unit is to be taken into account as a low-income unit under this section as of the beginning of the first taxable year to which this section applies, then not later than the first day of such first taxable year, the taxpayer must designate an imputed income limitation for the unit. The first taxable year to which this section applies means the first taxable year beginning after December 31, 2022, if paragraph (f)(1) of this section applies, or the taxable year described in paragraph (f)(3) of this section if the taxpayer chooses to apply paragraph (f)(3) of this section.

(ii) The designation required by paragraph (f)(2)(i) of this section must comply with § 1.42–19(c)(3)(ii) and paragraph (c)(3)(iv) of this section, without taking into account paragraph (c)(4) of this section. Paragraph (c)(2) of this section applies to these designations, except that the Agency may allow the notification to be made along with any other notifications for the first taxable year beginning after December 31, 2022.

(iii) The designated imputed income limitation for the unit may not be less than the income that the current occupant of the unit had when that occupancy began.

(3) *Applicability of this section to taxable years beginning before January 1, 2023.* A taxpayer may choose to apply this section to a taxable year beginning after October 12, 2022, and before January 1, 2023, provided that the taxpayer chooses to apply § 1.42–15 to the same taxable year.

(4) *Expiration date.* The applicability of this section expires on October 7, 2025.

Paul J. Mamo,

Assistant Deputy Commissioner for Services and Enforcement.

Approved: September 30, 2022.

Lily L. Batchelder,

Assistant Secretary (Tax Policy).

[FR Doc. 2022–22070 Filed 10–7–22; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–0819]

RIN 1625–AA00

Safety Zone; Atchafalaya River—Berwick Bay, Morgan City, LA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone of 100-meters from the western side of the channel in the Atchafalaya River through Berwick Bay between mile marker (MM) 119 and MM 121. This temporary safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by the recreational paddling race, Tour Du Teche 135. Entry of vessels into this zone is prohibited unless specifically authorized the Captain of the Port Houma or a designated Patrol Commander.

DATES: This rule is effective from 10 a.m. through 5 p.m. on October 9, 2022.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2022–0819 in the search box and click ''search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this action, call or email Lieutenant Jenelle Piché, MSU Morgan City, LA, U.S. Coast Guard; telephone (985) 855–0724, email *D08-SMB-MSUMorganCity-WWM@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Houma

DHS Department of Homeland Security
FR Federal Register
MSU Marine Safety Unit
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(3)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable and contrary to the public interest. It is impracticable to publish an NPRM because we must establish this safety zone by October 9, 2022 and lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule is contrary to public interest because it would delay the safety measures necessary to respond to potential hazards associated with the Tour Du Teche 135 paddle race. Immediate action is needed to protect vessels, event participants, and mariners from the safety hazards associated with the race.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port Houma (COTP) has determined that potential hazards associated with the Tour Du Teche 135 paddle race will be a safety concern to vessels and persons. This rule is needed to protect the public, mariners, event participants, and vessels from the potential hazards associated with the Tour Du Teche 135 paddle race.

IV. Discussion of the Rule

The Coast Guard is establishing a temporary safety zone from 10 a.m. through 5 p.m. on October 9, 2022. The temporary safety zone encompasses the Berwick Bay lock and dam (in the proximity of MM 119) and extends 100-meters from the western shore outwards of the Atchafalaya River through Berwick Bay, ending at the Southwest ''Red'' Reef Lighthouse, near the I–90 Bridge (in the proximity of MM 121). This temporary safety zone will not interfere with navigable waterway. No person or vessel will be permitted to enter or transit within the safety zone, unless specifically authorized by the COTP or a designated Patrol Commander. Public notifications will be made to the local maritime community through Broadcast Notice to Mariners (BNM). Mariners and other members of the public may contact the Waterways Management Division at MSU Morgan City, to inquire about the safety zone by telephone at (985) 855–0724.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive Orders related to rulemaking. Below we summarize our analysis based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protectors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget. This regulatory determination is based on the size, location, and duration, of the safety zone.

This temporary safety zone will not restrict navigation on the Atchafalaya River thought Berwick Bay. Moreover, the Coast Guard will issue a Local Notice to Mariners (LNM) about the zone, and the rule will allow vessels to seek permission to enter the zone.

B. Impact Small Entities

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

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A. above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule will 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.

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

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 rule will not result in such expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1., associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that will not prohibit mariners and the public to transit through the navigational channel in the Atchafalaya River through Berwick Bay. It is categorically excluded from further review under paragraph L60 (a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 01. A Record of Environmental Consideration (REC) supporting this determination is available in the docket where indicated under the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

List of Subjects 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 amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: US U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

■ 2. Add § 165.T08–0819 to read as follows:

§ 165.T08–0819 Safety Zone; Atchafalaya River—Berwick Bay, Morgan City, LA.

(a) *Location.* The following area is a safety zone: 100-meters from the shore from the opening of Berwick Bay Lock approximately near MM 119 along the western side of the channel in the Atchafalaya River through Berwick Bay to MM 121. This safety zone does not include the navigational channel.

(b) *Definitions.* As used in this section, *Patrol Commander* means a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the Captain of the Port Houma (COTP) in the enforcement of the regulations in this section.

(c) *Enforcement period.* This section will be enforced from 10 a.m. until 5 p.m. on October 9, 2022.

(d) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the safety zone described in paragraph (a) of this section unless authorized by the COTP or a Patrol Commander.

(2) Entry into this zone is prohibited unless authorized by the COTP or a Patrol Commander

(3) Persons or vessels seeking to enter into or transit through the zone must request permission from the COTP or a Patrol Commander. They may be contacted on VHF–FM channels 15 and 16 or by telephone at (985) 855–0724.

(4) If permission is granted, all persons and vessels must comply with the instructions of the COTP or a Patrol Commander.

(e) *Informational broadcasts.* The COTP or a Patrol Commander will inform the public through broadcast notices to mariners of the enforcement period for the safety zone as appropriate.

Dated: October 3, 2022.

L.T. O'Brien,

Captain, U.S. Coast Guard, Captain of the Port Houma.

[FR Doc. 2022–22093 Filed 10–7–22; 2:00 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2022–0840]

RIN 1625–AA00

Safety Zones; Pensacola, Panama City, and Tallahassee, Florida

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: This temporary final rule would implement a special activities provision of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. The Coast Guard is establishing three temporary safety zones for the safe splashdown and recovery of reentry vehicles launched by Space Exploration Technologies Corporation (SpaceX) in support of the National Aeronautics and Space Administration (NASA) from October 12, 2022 until November 10, 2022. These three temporary safety zones are located within the Captain of the Port Sector Mobile area of responsibility offshore of Pensacola, Panama City, and Tallahassee, Florida. This rule would prohibit U.S. flagged vessels from entering any of the temporary safety zones unless authorized by the Captain of the Port Sector Mobile or a designated representative. Foreign-flagged vessels would be encouraged to remain outside the safety zones. This action is necessary to protect vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations in the U.S. Exclusive Economic Zone (EEZ). It is also necessary to provide for the safe recovery of reentry vehicles, and any personnel involved in reentry services, after the splashdown.

DATES: This rule is effective from October 12, 2022 through November 10, 2022.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2022–0840 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Andrew Anderson, Sector Mobile Chief of Waterways (spw), U.S. Coast Guard; telephone (251) 441–5768, email *Andrew.S.Anderson@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port
DHS Department of Homeland Security
EEZ Exclusive Economic Zone
FR Federal Register
NASA National Aeronautics and Space Administration
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code
SpaceX Space Exploration Technologies Corporation

II. Background, Purpose, and Legal Basis

On January 1, 2021, the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Pub. L. 116–283) (Authorization Act) was enacted. Section 8343 (134 Stat. 4710) calls for the Coast Guard to conduct a two-year pilot program to establish and implement a process to establish safety zones to address special activities in the U.S. Exclusive Economic Zone (EEZ).[1] These special activities include space activities[2] carried out by United States (U.S.) citizens. Terms used to describe space activities, including *launch, reentry site, and reentry vehicle,* are defined in 51 U.S.C. 50902, and in this document.

The Coast Guard has long monitored space activities impacting the maritime domain and taken actions to ensure the safety of vessels and the public as needed during space launch[3] operations. In conducting this activity, the Coast Guard engages with other government agencies, including the Federal Aviation Administration (FAA) and National Aeronautics and Space Administration (NASA), and private space operators, including Space Exploration Technologies Corporation (SpaceX). This engagement is necessary to ensure statutory and regulatory obligations are met to ensure the safety of launch operations and waterway users.

During this engagement, the Coast Guard was informed of space reentry vehicles and recovery operations in the U.S. EEZ. In accordance with 51 U.S.C. Section 50902, ''reentry vehicle'' is defined as a vehicle designed to return from Earth orbit or outer space to Earth, substantially intact. SpaceX, a U.S. company, has identified three reentry sites[4] within the U.S. EEZ of the Captain of the Port Sector Mobile area of responsibility (AOR) expected to be used for the splashdown[5] and recovery of reentry vehicles. All of these sites are located in the Gulf of Mexico off the Coast of Florida (FL).

On August 22, 2022, we published a temporary final rule in the **Federal Register** (87 FR 51253) for an anticipated reentry vehicle recovery missions within the Captain of the Port Sector Mobile AOR offshore of Panama City, Pensacola, and Tallahassee, FL, from August 22, 2022, through September 30, 2022. Based on the date the Coast Guard was informed of the reentry, and the immediate need to establish the safety zone, the Coast Guard did not have sufficient time to publish a notice of proposed rulemaking (NPRM) for that rule. We also previously published a temporary final rule in the **Federal Register** (87 FR 51253) for anticipated reentry vehicle recovery missions from April 17, 2022 through May 15, 2022.

The purpose of this rule is to ensure the protection of vessels and waterway users in the U.S. EEZ from the potential hazards created by reentry vehicle splashdowns and recovery operations, and the safe recovery of reentry vehicles and personnel involved in reentry services.[6] The Coast Guard is proposing this rule under authority of section 8343 of the Authorization Act.

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing an NPRM with respect to this rule because it is impracticable and contrary to the public interest. The National Aeronautics and Space Administration (NASA) Crew-4 capsule recovery mission was approved and scheduled less than 30 days before the need for the three safety zones to be in place starting on October 12, 2022. Publishing an NPRM would be impracticable and contrary to the public interest since the missions would begin before completion of the rulemaking process, thereby inhibiting the Coast Guard's ability to protect against the hazards associated with the recovery missions.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable and contrary to the public interest because the temporary safety zones must be established by October 12, 2022, to mitigate safety concerns during the capsule recovery missions.

III. Discussion of Proposed Rule

The Coast Guard is establishing three temporary safety zones in the U.S. EEZ for the safe reentry vehicle splashdown and recovery of reentry vehicles launched by SpaceX in support of NASA missions between October 12, 2022 and November 10, 2022, with one vehicle recovery taking place in the month of October and one vehicle recovery taking place in the month of November.

The temporary safety zones are located within the Captain of the Port Sector Mobile AOR offshore of Panama City, Pensacola, and Tallahassee, FL in the Gulf of Mexico. The temporary final rule prohibits U.S.-flagged vessels from entering any of the safety zones unless authorized by the Captain of the Port Sector Mobile or a designated representative. Because the safety zones are within the U.S. EEZ, only U.S.-flagged vessels would be subject to enforcement. However, all foreign-flagged vessels are encouraged to remain outside the safety zones.

The three temporary safety zones are located off the coast of FL in the Gulf of Mexico in the following areas:

(1) *Pensacola site:* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2, thence to Point 3, and thence to point 4, connecting back to Point 1:

Point 1	29.991° N	−087.500° W
Point 2	29.800° N	−087.281° W
Point 3	29.609° N	−087.500° W
Point 4	29.800° N	−087.500° W

(2) *Panama City site:* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2,

[1] The Coast Guard defines the U.S. *exclusive economic zone* in 33 CFR 2.30(a). *Territorial sea* is defined in 33 CFR 2.22.

[2] *Space Activities* means space activities, including launch and reentry, as such terms are defined in section 50902 of Title 51, United States Code, carried out by United States citizens.

[3] The term *launch* is defined in 51 U.S.C. 50902.

[4] *Reentry site* means the location on Earth to which a reentry vehicle is intended to return (as defined in a license the FAA Administrator issues or transfers under this chapter).

[5] *Splashdown* refers to the landing of a reentry vehicle into a body of water.

[6] *Reentry Services* means (1) activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), government astronaut, or space flight participant, if any, for reentry; and (2) the conduct of a reentry.

thence to Point 3, and thence to point 4, connecting back to Point 1:

Point 1	29.907° N	−086.183° W
Point 2	29.716° N	−085.964° W
Point 3	29.525° N	−086.183° W
Point 4	29.716° N	−086.402° W

(3) *Tallahassee site:* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2, thence to Point 3, and thence to point 4, connecting back to Point 1:

Point 1	29.474° N	−084.200° W
Point 2	29.283° N	−083.982° W
Point 3	29.092° N	−084.200° W
Point 4	29.283° N	−084.418° W

The coordinates for the safety zones are based on the furthest north, east, south, and west points of the reentry vehicles splashdown and are determined from data and modeling by SpaceX and NASA. The coordinates take into account the trajectories of the reentry vehicles coming out of orbit, the potential risk to the public, and the proximity to medical facilities that meet NASA requirements. The specific coordinates for the three temporary safety zones are presented in the regulatory text at the end of this document.

To the extent feasible, the Captain of the Port Sector Mobile or a designated representative will inform the public of the activation of the three temporary safety zones by Broadcast Notice to Mariners (BNM) on VHF–FM channel 16 and/or Marine Safety Information Bulletin (MSIB) (as appropriate) at least two days before the reentry vehicle splashdown. These broadcasts will identify the approximate date(s) during which a reentry vehicle splashdown and recovery operations would occur.

To the extent possible, twenty-four hours before a reentry vehicle splashdown and recovery operations, the Captain of the Port Sector Mobile or designated representative will inform the public that only one of the three safety zones would remain activated (subject to enforcement) until announced by BNM on VHF–FM channel 16, and/or MSIB (as appropriate) that the safety zone is no longer subject to enforcement. The specific temporary safety zone to be enforced will be based on varying mission and environmental factors, including atmospheric conditions, sea state, weather, and orbital calculations.

The MSIB will include the geographic coordinates of the activated safety zone, a map identifying the location of the activated safety zone, and information related to potential hazards associated with a reentry vehicle splashdown and recovery operations associated with space activities, including marine environmental and public health hazards, such the release of hydrazine and other potential oil or hazardous substances.

When the safety zone is activated, the Captain of the Port Sector Mobile or a designated representative will be able to restrict U.S.-flagged vessel movement including but not limited to transiting, anchoring, or mooring within the safety zone to protect vessels from hazards associated with space activities. The activated safety zone will ensure the protection of vessels and waterway users from the potential hazards created by reentry vehicle splashdowns and recovery operations. This includes protection during the recovery of a reentry vehicle, and the protection of personnel involved in reentry services and space support vessels.[7]

After a reentry vehicle splashdown, the Captain of the Port Sector Mobile or a designated representative will grant general permission to come no closer than three nautical miles within the activated safety zone from any reentry vehicle or space support vessel engaged in the recovery operations. The recovery operations are expected to last approximately one hour. That should allow for sufficient time to let any potential toxic materials clear the reentry vehicle, recovery of the reentry vehicle by the space support vessel, and address any potential medical evacuations for any personnel involved in reentry services that were onboard the reentry vehicle.

Once a reentry vehicle and any personnel involved in reentry services are removed from the water and secured onboard a space support vessel, the Captain of the Port Sector Mobile or designated representative would issue a BNM on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement. A photograph of a reentry vehicle and space support vessel expected to use the reentry sites are available in the docket.

IV. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

[7] *Space Support Vessel* means any vessel engaged in the support of space activities. These vessels are typically approximately 170 feet in length, have a forward wheelhouse, and are equipped with a helicopter pad and lifting crane.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action'' under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, duration, and scope of the safety zones. The safety zones are limited in size and location to only those areas where capsule re-entry is reasonably occurs. The safety zones are limited in scope, as vessel traffic will be able to safely transit around the safety zones which will impact a small part of the United States exclusive economic zone (EEZ) within the Gulf of Mexico.

B. Impact on Small Entities

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

The safety zone activation and thus restriction to the public is expected to be approximately two hours per capsule recovery, and we anticipate one splash down during the effective period of this rule. Vessels would be able to transit around the activated safety zone location during this recovery. We do not anticipate any significant economic impact resulting from activation of the safety zones.

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

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine

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

C. Collection of Information

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

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

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

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

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishing of three temporary safety zones, one of which may be activated on one occasion for approximately two hours between October 12, 2022 and November 10, 2022 for a SpaceX and NASA mission. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places or vessels.

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 amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 46 U.S.C. 70034, 70051; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.2.

■ 2. Add § 165.T08–0840 to read as follows:

§ 165.T08–0840 Safety Zones; Pensacola, Panama City, and Tallahassee, Florida.

(a) *Location.* The coordinates used in this paragraph are based on the World Geodetic System (WGS) 1984. The following areas are safety zones:

(1) *Pensacola site.* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2, thence to Point 3, and thence to point 4, connecting back to Point 1:

TABLE 1 TO PARAGRAPH (a)(1)

Point 1	29.991° N	−087.500° W
Point 2	29.800° N	−087.281° W
Point 3	29.609° N	−087.500° W
Point 4	29.800° N	−087.500° W

(2) *Panama City site.* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2, thence to Point 3, and thence to point 4, connecting back to Point 1:

TABLE 2 TO PARAGRAPH (a)(2)

Point 1	29.907° N	−086.183° W
Point 2	29.716° N	−085.964° W
Point 3	29.525° N	−086.183° W
Point 4	29.716° N	−086.402° W

(3) *Tallahassee site.* All waters from surface to bottom encompassed within the following coordinates connecting a line from Point 1, thence to Point 2, thence to Point 3, and thence to point 4, connecting back to Point 1:

TABLE 3 TO PARAGRAPH (a)(3)

Point 1	29.474° N	−084.200° W
Point 2	29.283° N	−083.982° W
Point 3	29.092° N	−084.200° W
Point 4	29.283° N	−084.418° W

(b) *Definitions.* As used in this section—

Designated representative means a Coast Guard Captain of the Port Sector Mobile; Coast Guard Patrol Commanders including Coast Guard coxswains, petty officers and other officers operating a Coast Guard vessel; Coast Guard Representatives in the Merrill Operations Center; and other officers designated by the Captain of the Port Sector Mobile or assisting the Captain of the Port Sector Mobile in the enforcement of the safety zones.

Reentry Services means:

(1) Activities involved in the preparation of a reentry vehicle and payload, crew (including crew training), government astronaut, or space flight participant, if any, for reentry; and

(2) The conduct of a reentry.

Reentry Vehicle means a vehicle designed to return from Earth orbit or outer space to Earth, or a reusable launch vehicle designed to return from Earth orbit or outer space to Earth, substantially intact.

Space Support Vessel means any vessel engaged in the support of space activities. These vessels are typically approximately 170 feet in length, have a forward wheelhouse, and are

equipped with a helicopter pad and lifting crane.

Splashdown means the landing of a reentry vehicle into a body of water.

(c) *Regulations.* (1) Because the safety zones described in paragraph (a) of this section are within the U.S. Exclusive Economic Zone, only U.S. flagged vessels are subject to enforcement. All foreign-flagged vessels are encouraged to remain outside the safety zones.

(2) In accordance with the general regulations in subpart C of this part, no U.S. flagged vessel may enter the safety zones described in paragraph (a) of this section unless authorized by the Captain of the Port Sector Mobile or a designated representative, except as provided in paragraph (d)(3) of this section.

(d) *Enforcement periods.* (1) To the extent possible, at least two days before a reentry vehicle splashdown, the Captain of the Port Sector Mobile or designated representative will inform the public of the activation of the three safety zones described in paragraph (a) of this section by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) for at least two days before the splashdown.

(2) To the extent possible, twenty-four hours before a reentry vehicle splashdown, the Captain of the Port Sector Mobile or designated representative will inform the public that only one of the three safety zones described in paragraph (a) will remain activated until announced by Broadcast Notice to Mariners on VHF–FM channel 16, and/or Marine Safety Information Bulletin (as appropriate) that the safety zone is no longer subject to enforcement.

(3) After a reentry vehicle splashdown, the Captain of the Port Sector Mobile or a designated representative will grant general permission to come no closer than three nautical miles of any reentry vehicle or space support vessel engaged in the recovery operations, within the activated safety zone described in paragraph (a) of this section.

(4) Once a reentry vehicle, and any personnel involved in reentry service, are removed from the water and secured onboard a space support vessel, the Captain of the Port Sector Mobile or designated representative will issue a Broadcast Notice to Mariners on VHF–FM channel 16 announcing the activated safety zone is no longer subject to enforcement.

(e) *Effective period.* This rule is subject to enforcement from October 12, 2022 until November 10, 2022.

Dated: October 6, 2022.

Ulysses S. Mullins,

Captain Commander, Coast Guard Sector Mobile, Captain of the Port Mobile.

[FR Doc. 2022–22235 Filed 10–7–22; 4:15 pm]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Parts 674, 682, and 685

Federal Student Aid Programs (Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Waivers and modifications of statutory and regulatory provisions.

SUMMARY: The Secretary of Education (Secretary) is issuing updated waivers and modifications of statutory and regulatory provisions governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act or Act). The waivers and modifications in this document apply only to the national emergency concerning the coronavirus disease 2019 (COVID–19 pandemic).

DATES: The waivers and modifications of statutory and regulatory provisions are effective October 12, 2022. Unless specifically noted within a waiver or modification identified below, a waiver or modification identified in this document expires at the end of the award year in which the COVID–19 national emergency expires, unless the waiver or modification is otherwise extended by the Secretary in a document published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Richard Blasen, by telephone: (202) 987–0315 or by email: *Richard.Blasen@ed.gov.*

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

SUPPLEMENTARY INFORMATION: On December 11, 2020, the Secretary published a document in the **Federal Register** announcing waivers and modifications of statutory and regulatory requirements governing the Federal student financial aid programs under the authority of the HEROES Act, as codified at 20 U.S.C. 1098aa–1098ee. 85 FR 79856 (Dec. 11, 2020). On January 19, 2021, the Secretary published corrections to those updated waivers and modifications. 86 FR 5008 (Jan. 19, 2021). The Secretary is issuing this document to provide certain updated waivers and modifications under the HEROES Act.

The HEROES Act authorizes the Secretary to waive or modify any statutory or regulatory provision applicable to the Federal student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. 1070 *et seq.,* as the Secretary deems necessary in connection with a war or other military operation or national emergency to fulfill certain purposes enumerated in the statute. 20 U.S.C. 1098bb(a). Such waivers or modifications may be provided to affected individuals who are recipients of Federal student financial assistance under title IV of the HEA; and to institutions of higher education (IHEs), eligible lenders, guaranty agencies (GAs), and other entities participating in the Federal student financial assistance programs under title IV of the HEA that are located in areas declared disaster areas by any Federal, State, or local official in connection with a national emergency, whose operations are significantly affected by such a disaster (affected entities). *Id.* 1098bb(a)(2)(A), (E). Affected individuals include, among others, any individual who ''resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency'' or any individual who ''suffered direct economic hardship as a direct result of a . . . national emergency, as determined by the Secretary.'' *Id.* 1098ee(2)(C), (D). The Secretary may issue waivers and modifications ''as may be necessary to ensure that'' such individuals ''are not placed in a worse position financially in relation to [their] financial assistance because of their status as affected individuals.'' *Id.* 1098bb(a)(2)(A). Affected entities ''may be granted temporary relief from requirements that are rendered infeasible or unreasonable by a national emergency, including due diligence requirements and reporting deadlines.'' *Id.* 1098bb(a)(2)(E).

In 20 U.S.C. 1098bb(b)(1), the HEROES Act further provides that section 437 of the General Education Provisions Act (20 U.S.C. 1232) and section 553 of the Administrative Procedure Act (5 U.S.C. 553) do not apply to this waiver or modification of student financial assistance program provisions.

The Department recently published a memorandum outlining its interpretation of the HEROES Act. *See* Notice of Debt Cancellation Legal

Memorandum, 87 FR 52943 (Aug. 30, 2022). That memorandum explained why a January 2021 memorandum authored by a former Principal Deputy General Counsel was substantively and procedurally deficient. *See id.* at 52944–45 & n.5.

On March 13, 2020, by Proclamation 9994, 85 FR 15337, the President declared a national emergency concerning the COVID–19 pandemic, which was extended on February 24, 2021 (86 FR 11599), and February 18, 2022 (87 FR 10289). The waivers and modifications provided in this document apply only to the declared national emergency due to the COVID–19 pandemic. Prior waivers granted by the Secretary under this Act remain in effect for affected individuals and affected entities, as defined in those waivers.

In 20 U.S.C. 1098ee, the HEROES Act provides definitions critical to determining whether a person is an ''affected individual'' under the Act and, if so, which waivers and modifications apply to the affected individual. As noted above, the term ''affected individual'' includes any individual who ''resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency'' or ''any individual who ''suffered direct economic hardship as a direct result of a national emergency, as determined by the Secretary.'' 20 U.S.C. 1098ee(2)(C), (D). Because the COVID–19 pandemic has been declared and continues to be a national emergency, and because the Federal Government has declared every State, the District of Columbia, and all five permanently populated United States territories to be disaster areas due to COVID–19, the ''affected individuals'' for purposes of the waivers and modifications described in this document include any person with a Federal student loan under title IV of the HEA.

Next, the Act describes in 20 U.S.C. 1098bb(a)(2) the purposes for which the Secretary may grant relief to ''affected individuals.'' As relevant here, the Secretary may waive or modify statutory and regulatory provisions ''as may be necessary to ensure'' that ''recipients of student financial assistance under title IV of the [HEA] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals.'' 20 U.S.C. 1098bb(a)(2)(A). The statute also authorizes the Secretary to minimize administrative requirements placed on affected individuals who are recipients of student financial assistance to the extent possible without impairing the integrity of the student financial assistance programs, to ease the burden on such individuals and avoid inadvertent technical violations or defaults. *Id.* 1098bb(a)(2)(B).

The Secretary determined that the financial harm caused by the COVID–19 pandemic has made the waivers and modifications described in this document necessary to ensure that affected individuals are not placed in a worse position financially with respect to their student loans because of that harm.[1] The Secretary further determined that the modifications and waivers as described in this document will help minimize the administrative burdens placed on affected individuals. The Secretary is publishing this document in the **Federal Register** in accordance with 20 U.S.C. 1098bb(b)(1). The waivers and modifications are discussed further below:

- The automatic suspension of payment and application of a zero percent interest rate for affected individuals with federally held Direct Loans, federally held Federal Family Education Loans (FFEL), federally held Perkins Loans, federally held Health Education Assistance Loans (HEAL), and defaulted FFEL loans subject to collection by a guaranty agency are further extended until December 31, 2022. The automatic suspension of payment and the application of a zero percent interest rate on loans held by the Department were extended to October 1, 2020, under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.[2] The Secretary previously extended those benefits through August 31, 2022, and on August 24, 2022, the Secretary announced the extension of those benefits through December 31, 2022. Affected individuals will be required to make payments on their loans beginning in January 2023.
- On August 24, 2022, the Secretary announced that he intended to discharge loans to address the financial hardship arising out of the COVID–19 pandemic on individuals who owe student loans. Specifically, the Department announced it intended to discharge certain amounts of Federal Direct Loans and FFEL loans held by the Department or subject to collection by a guaranty agency and Federal Perkins Loans held by the Department (covered loans). The Department announced that, subject to certain income limitations, it intended to discharge up to a total of $20,000 in covered loans for affected individuals who received Pell Grants and up to a total of $10,000 in covered loans for affected individuals who did not receive a Pell Grant. Granting relief on a class-wide basis in this manner will also minimize administrative burdens and thus ''ease the burden'' on students who are affected individuals. 20 U.S.C. 1098bb(a)(2)(B); *see also id.* 1098bb(b)(3) (authorizing class-wide relief).

Prior waivers granted by the Secretary under the HEROES Act that are not otherwise mentioned in this document remain in effect for affected individuals, as defined in those waivers. *See* 85 FR 79856; 86 FR 5008.

Waiver Granted Under the Heroes Act in Response to the COVID–19 Pandemic

Suspension of Payments Under Section 3513 of the CARES Act

Section 3513 of the CARES Act directs the Secretary to: (1) suspend all payments due, (2) cease interest accrual, and (3) suspend involuntary collections for loans that are held by the Department and made under parts D and B of title IV of the HEA through September 30, 2020. The section also directs the Secretary to deem each month for which a loan payment was suspended as if the borrower of the loan had made a payment for the purpose of any loan forgiveness program or loan rehabilitation program authorized under parts D or B for which the borrower would have otherwise qualified. Lastly, this section directs the Secretary to ensure that, for the purpose of reporting information about the loan to a consumer reporting agency, any payment that has been suspended is treated as if it were a regularly scheduled payment made by a borrower.

On August 8, 2020, President Donald J. Trump issued a memorandum directing the Secretary to continue to waive interest and payments on such loans until December 31, 2020. On December 4, 2020, at the direction of President Trump, the Department further extended the payment pause to January 31, 2021. On January 21, 2021, at the direction of President Joseph R. Biden, the Department further extended the pause through September 30, 2021. On August 6, 2021, the President authorized the Secretary to use his authority under the HEROES Act to extend the benefits provided under section 3513 of the CARES Act until January 31, 2022, for borrowers with federally held Perkins, HEAL, Direct, and FFEL loans. President Biden announced on December 22, 2021, that the Secretary would extend the waiver

[1] *https://studentaid.gov/debt-relief-announcement.*

[2] *https://www.congress.gov/bill/116th-congress/house-bill/748/text.*

on interest and payments on such loans through May 1, 2022, and the Secretary further extended the benefits until August 31, 2022. Following these prior announcements, on August 24, 2022, the Secretary announced he was using his authority under the HEROES Act to modify the terms of the CARES Act to extend the waiver on interest and payments on such loans through December 31, 2022.[3]

The Secretary extends those waivers and modifications specified in the December 11, 2020, **Federal Register** document (85 FR 79856), that relate to the payment and collection of, and accumulation of interest on, Federal student loans, through December 31, 2022. The Department further extends the corresponding pause for FFEL loans held by guaranty agencies, as discussed in Dear Colleague Letter GEN–21–03, through December 31, 2022.

Debt Discharge

Pursuant to the HEROES Act, 20 U.S.C. 1098bb(a)(1), the Secretary modifies the provisions of: 20 U.S.C. 1087, which applies to the Direct Loan Program under 20 U.S.C. 1087a and 1087e; 20 U.S.C. 1087dd(g); and 34 CFR part 674, subpart D, and 34 CFR 682.402 and 685.212 to provide that, notwithstanding any other statutory or regulatory provision, the Department will discharge the balance of a borrower's eligible loans up to a maximum of: (a) $20,000 for borrowers who received a Pell Grant and had an Adjusted Gross Income (AGI) below $125,000 for an individual taxpayer or below $250,000 for borrowers filing jointly or as a Head of Household, or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year; or (b) $10,000 for borrowers who did not receive a Pell Grant and had an AGI on a Federal tax return below $125,000 if filed as an individual or below $250,000 if filed as a joint return or as a Head of Household,[4] or as a qualifying widow(er) in either the 2020 or 2021 Federal tax year. This waiver is applicable to borrowers with eligible loans who apply by the deadline established by the Secretary (to the extent an application is required) and who are determined to be eligible by the Department. Borrowers who are eligible for relief without applying will have the option to opt out of the program. Eligible loans include the following categories of loans, provided they were disbursed by June 30, 2022: Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department.

Direct Consolidation loans disbursed after June 30, 2022, and for which the repaid loans were loans described in the paragraph above, are also eligible for relief. However, Direct Consolidation loans disbursed after June 30, 2022, and for which the repaid loans include a FFEL loan not held by ED, are only eligible for relief if the borrower submitted an application to consolidate such loans prior to September 29, 2022.

Accessible Format: On request to Robin Moss, by telephone: (202) 453–7106 or by email: *robin.moss@ed.gov,* individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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

(Assistance Listing Numbers: 84.032 Federal Family Education Loan Program; 84.038 Federal Perkins Loan Program; 84.063 and 84.268 William D. Ford Federal Direct Loan Program.)

Program Authority: 20 U.S.C. 1071, 1082, 1087a, 1087aa, Part F–1.

Nasser H. Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2022–22205 Filed 10–11–22; 8:45 am]

BILLING CODE 4000–01–P

[3] *https://studentaid.gov/debt-relief-announcement.*

[4] Adjusted Gross Income is defined as in 26 Internal Revenue Code (I.R.C.) 61–62. Head of Household is defined in 26 I.R.C. 2.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2021–0536; FRL–9802–02–R5]

Approval and Promulgation of Air Quality Implementation Plans; Michigan; Federal Implementation Plan for the Detroit Sulfur Dioxide Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is promulgating a Federal Implementation Plan (FIP) for attaining the 2010 sulfur dioxide (SO_2) primary national ambient air quality standard (NAAQS) for the Detroit SO_2 nonattainment area. The FIP includes an attainment demonstration and other elements required under the Clean Air Act (CAA). In addition to an attainment demonstration, the FIP addresses the requirement for meeting reasonable further progress (RFP) toward attainment of the NAAQS, reasonably available control measures and reasonably available control technology (RACM/RACT), enforceable emission limitations and control measures to provide for NAAQS attainment, and contingency measures. This action supplements a prior action which found that Michigan had satisfied emission inventory and nonattainment new source review (NSR) requirements for this area but had not met requirements for the elements addressed in the FIP. The FIP provides for attainment of the 2010 primary SO_2 NAAQS in the Detroit SO_2 nonattainment area and meets the other applicable requirements under the CAA.

DATES: This final rule is effective on November 14, 2022.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R05–OAR–2021–0536. All documents in the docket are listed on the *www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available either through *www.regulations.gov* or at the Environmental Protection Agency, Region 5, Air and Radiation Division, 77

West Jackson Boulevard, Chicago, Illinois 60604. This facility is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding Federal holidays and facility closures due to COVID–19. We recommend that you telephone Abigail Teener, Environmental Engineer, at (312) 353–7314 before visiting the Region 5 office.

FOR FURTHER INFORMATION CONTACT: Abigail Teener, Environmental Engineer, Attainment Planning and Maintenance Section, Air Programs Branch (AR18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, telephone number: (312) 353–7314, email address: *teener.abigail@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

Following the promulgation in 2010 of a 1-hour primary SO_2 NAAQS, on August 5, 2013, EPA designated the Detroit area within the State of Michigan as nonattainment for this NAAQS, in conjunction with designating multiple areas in other states as nonattainment (78 FR 47191).

For a number of nonattainment areas, including the Detroit area, EPA published an action on March 18, 2016, effective April 18, 2016, finding that Michigan and other pertinent states had failed to submit the required SO_2 nonattainment plan by the submittal deadline (81 FR 14736). This finding initiated a deadline under CAA section 179(a) for the potential imposition of 2-to-1 NSR offset and Federal highway funding sanctions. Additionally, under CAA section 110(c), the finding triggered a requirement that EPA promulgate a FIP within two years of the finding unless, by that time, (a) the state had made the necessary complete submittal, and (b) EPA had approved the submittal as meeting applicable requirements.

Michigan submitted the Detroit SO_2 attainment plan on May 31, 2016, and submitted associated final enforceable measures on June 30, 2016. Michigan's submission of a complete attainment plan terminated the deadlines for imposing the 2-to-1 NSR offset sanctions and Federal highway funds sanctions, pursuant to 40 CFR 52.31(d)(5), but it did not terminate EPA's FIP obligation. On March 19, 2021, EPA partially approved and partially disapproved Michigan's SO_2 plan as submitted in 2016 (86 FR 14827). EPA approved the base-year emissions inventory and affirmed that the NSR requirements for the area had previously been met on December 16, 2013 (78 FR 76064). EPA also approved the enforceable control measures for two facilities. At that time, EPA disapproved the attainment demonstration, as well as the requirements for meeting RFP toward attainment of the NAAQS, RACM/RACT, and contingency measures. Additionally, EPA disapproved the plan's control measures for two facilities as insufficient to demonstrate attainment. These disapprovals triggered new sanctions clocks under CAA section 179(a).

As Michigan has not submitted an approvable plan for the Detroit nonattainment area, EPA published a notice of proposed rulemaking on June 1, 2022, proposing a FIP for the Detroit nonattainment area (87 FR 33095). EPA proposed limits and associated requirements for U.S. Steel (Ecorse and Zug Island), EES Coke, Cleveland-Cliffs Steel Corporation (formerly AK or Severstal Steel), and Dearborn Industrial Generation (DIG). EPA also proposed to include in its analysis the Carmeuse Lime emission limits specified in Permit to Install 193–14A and the DTE Energy (DTE) Trenton Channel emission limits specified in Permit to Install 125–11C, which had already been incorporated into Michigan's SIP.

EPA proposed to conclude that the FIP meets the requirements set forth in the CAA to provide for the Detroit area to attain the SO_2 NAAQS. Finally, EPA proposed to conclude that the FIP satisfies the other applicable requirements for nonattainment areas, including requirements for RACM/RACT, RFP, and contingency measures. The proposal supplemented the previous action in which EPA concluded that Michigan had met the requirements for a suitable emissions inventory and nonattainment NSR program.

II. Public Comments

The comment period on the proposed action described above closed on July 18, 2022. EPA held a virtual public hearing on June 16, 2022. The transcript of the public hearing is available in the docket for this action. EPA received 14 written comments, seven of which were supportive and seven of which were adverse. EPA also received verbal comments from four individuals at the public hearing, all of which were adverse or partially adverse comments. The adverse comments are summarized below along with EPA's responses.

Comment: The commenters contend that EPA's modeling demonstration has not correctly accounted for all the SO_2 sources in the area as well as short-term spikes in emissions. In particular, the commenters suggest that EPA did not sufficiently account for the Marathon Refinery emissions, as they were calculated using maximum heat input multiplied by emissions factors. The commenters stated that emission factors, particularly AP–42 emission factors, are intended to calculate average emission levels and are not appropriate for calculating modeling inputs to address the short-term SO_2 NAAQS. The commenters recommend EPA use another method for calculating Marathon Refinery emissions, such as continuous emissions monitoring, stack testing, vendor guarantees and stack testing data from similar facilities, material balance calculations, or optical remote sensing.

Response: Section 8.2.2.b of EPA's *Guideline on Air Quality Models* (appendix W to 40 CFR part 51) (appendix W) requires regulatory modeling of inert pollutants such as SO_2 to use the emission input data given in Table 8–1 of appendix W. For stationary point sources subject to SIP emission limit evaluation for compliance with short-term standards such as the 1-hour SO_2 NAAQS, the modeled emission rate is required to be based on the maximum allowable emission limit or federally enforceable permit limit, on actual or design capacity of the point source (whichever is greater) or federally enforceable permit conditions, and on continuous operation for all hours of each time period under consideration.

As stated in the technical support document (included in the docket for this action), Marathon Refinery's emission units were modeled based on maximum uncontrolled emissions—a rate that is higher, and consequently more conservative in avoiding underestimation of emissions, than would be a limited emission rate. The maximum uncontrolled emission rates for Marathon Refinery were determined based on the maximum heat input of each modeled point source and emission factors derived from the hydrogen sulfide (H_2S) and total reduced sulfur (TRS) concentration of the refinery fuel gas combusted in each emission unit. The H_2S/TRS concentration of the fuel gas is a representative source-specific concentration that was used to determine a source-specific emission factor as opposed to an AP–42 emission factor that may be determined based on average emissions across different facilities.

Additionally, the commenters recommend different methods for estimating short-term emissions instead of using the source-specific emission factor used in the modeling, including continuous emissions monitoring, stack

testing, vendor guarantees and stack testing data from similar facilities, material balance calculations, or optical remote sensing. All of these methods would be suitable for determining actual emissions. However, EPA's modeling instead accounts for maximum uncontrolled emissions, which are higher and more conservative than actual emissions, based on each emission unit's maximum capacity and combusted fuel gas. Therefore, EPA believes it has appropriately modeled the emissions for Marathon Refinery.

Comment: Five commenters commented on the background concentration used in the model. Three commenters believe that the background concentration used in EPA's modeling analysis may be underestimated. To avoid double-counting concentrations associated with sources explicitly modeled in the demonstration, EPA's background concentration calculation was derived by removing wind directions between 40 and 205 degrees, which the commenters contend is overly broad and eliminates the highest concentrations that come from the easterly winds. In particular, a commenter states that Michigan's original background concentration calculation approach excluded wind directions between 40 and 180 degrees, and then Michigan later changed its approach, which EPA adopted, to removing wind directions between 40 and 205 degrees without adequate justification. A commenter suggests that sources in Ohio, western Pennsylvania, Indiana, Kentucky, Illinois, eastern Michigan, and Canada, some of which are relatively close and emit much more SO_2 than the background sources that EPA considers, should be included in the background concentration. The commenter states that although SO_2 concentrations decline with distance, they can still remain significant with respect to the difference between the maximum modeled concentration and the NAAQS.

One commenter contends that the FIP does not adequately justify the approach for the Detroit SO_2 nonattainment area given the large number of SO_2 sources. Additionally, the commenter points out that EPA based its approach for calculating background concentrations on EPA guidance for calculating NO_X background concentrations, which may not be appropriate for SO_2.

The commenters also state that the uncertainty of the background estimate was not provided, and the fact that the approach depends on the meteorological and monitoring data used, the definition of the wind sector, the wind sector width, and year and seasons considered adds to this uncertainty. The commenters also state that the error is higher at lower concentrations, which should be considered. The commenters note that an accurate background concentration calculation is critical given that the maximum modeled concentration is very close to the NAAQS.

Additionally, one commenter alleges that the meteorological data at the Allen Park site is not representative due to trees near the site that shelter the tower because they exceed its height. The commenter states that the wind directions at Allen Park diverge from other Michigan sites and recommend that EPA use airport data instead.

The commenters recommend that EPA perform trajectory analyses to eliminate the possibility that concentrations at the endpoints of the exclusion are due to extreme meteorology instead of stationary sources, analyze different exclusion ranges, and make conservative assumptions to minimize modeling uncertainties. One commenter recommends that EPA model background estimates using the largest sources within 500 kilometers, use other monitoring sites, which may include using sites classified as ''source'' or ''population'' instead of ''background'' and/or deploying additional monitoring sites, and use a meaningful margin of error to account for model uncertainty in the background concentration analysis.

However, two commenters contend that the background concentration that EPA used was overly conservative and reflects an overestimate of background concentrations, as the maximum background concentration used in the model (11.9 parts per billion (ppb)) occurs around the 33-degree wind direction, which is directly over a source that was explicitly modeled in the demonstration and near other sources. One commenter points out that the Trinity monitor, which is upstream of these sources, recorded a concentration of 0.7 ppb for the same hour that was used for the maximum background concentration.

Response: Sections 8.3.1.a and 8.3.3 of appendix W discusses that background air quality should not include the ambient impacts of the project source under consideration. Appendix W further states that nearby sources that cause a significant concentration gradient in the vicinity of the source(s) under consideration for emissions should not be included in the background monitoring data and should be explicitly modeled. The portion of the background attributable to natural sources, other unidentified sources near the project, and regional transport from distant sources, both domestic and international, can be represented by air quality monitoring data. Per Table 8–1 of appendix W, these other sources include both minor sources and distant major sources. Section 8.3.2.b of appendix W states that EPA recommends the use of data from the monitor closest to and upwind of the project area. Section 8.3.2.c of appendix W also discusses that there are cases in which the current design value may not be appropriate for use as a background concentration, including situations with a modifying source where the existing facility is determined to impact the ambient monitor. In these cases, the background concentration can be determined by excluding values when the source in question is impacting the monitor.

In the case of the analysis for the Detroit SO_2 nonattainment area, monitor values from the Allen Park monitor (AQS 26–163–0001) that occurred when the wind directions were between 40 and 205 degrees were removed from the calculations for the background concentration. The Allen Park monitor is on the western boundary of the Detroit SO_2 nonattainment area and is upwind of the explicitly modeled sources in the analysis due to predominant southwesterly winds. The directions between 40 and 205 were chosen as concentrations from these directions would be double counting the impacts from the explicitly modeled sources within the analysis. This excludes all modeled sources to the northeast (U.S. Steel, EES Coke, Carmeuse Lime, Marathon Refinery, Cleveland-Cliffs Steel Corporation, and DIG) and modeled sources to the south (DTE Trenton Channel and DTE Monroe). Examining the meteorological data collected from the Allen Park monitor, the highest concentrations measured at the monitor occur when the winds are from the northeast, which suggests that the monitor is being impacted by SO_2 emission sources from the Detroit area that are already included in the modeling analysis. Section 8.3.2.c.i of appendix W discusses that a 90-degree sector downwind of the source(s) may be used to determine the area of impact. In the case of the Detroit nonattainment area, EPA did not exclude 45 degrees to the west of the northernmost sources. EPA did exclude 45 degrees west of the southern source that is farther from the monitor and for which there would be more plume spread by the time SO_2 reaches the Allen Park monitor.

SO_2 is a localized, source-oriented pollutant, as described in section III of EPA's final rule revising the SO_2 NAAQS (75 FR 35520) and section 4.2.3.3 of appendix W. Section 8.3.3.d of appendix W states that portions of the background attributable to all other sources (*e.g.,* natural sources, minor and distant major sources) should be accounted for through use of ambient monitoring data and determined by the procedures found in section 8.3.2 in keeping with eliminating or reducing the source-oriented impacts from nearby sources to avoid potential double-counting of modeled and monitored contributions. As section 8.3.3.d of appendix W describes, background concentrations inherently account for the impacts of minor and distant major sources with the use of appropriate monitoring data. Due to the localized nature of SO_2, impacts from localized sources are accounted for by either explicitly modeling these as nearby sources in the modeling analysis or through ambient air monitoring data. As localized sources were explicitly modeled as nearby sources in the analysis, and the referred guidance above was followed, EPA disagrees with the commenter that sources outside of the nonattainment area should be explicitly included in the background concentration as these would already be accounted for in the background concentration.

EPA disagrees with the commenter that the FIP does not adequately justify the approach for the Detroit SO_2 nonattainment area given the large number of SO_2 sources and that the background calculations relied on EPA guidance. Section 8.1 of EPA's *SO_2 NAAQS Designations Modeling Technical Assistance Document* (TAD), which was most recently updated in August 2016, discusses how the methodology for calculating NO_X background concentrations applies to SO_2. The TAD explains that the same methodology for NO_X is applicable to SO_2 designations modeling based on use of the 99th percentile by hour of day and season for background concentration excluding periods when the dominant source(s) are influencing the monitored concentration.[1]

EPA agrees that an accurate background concentration is critical. EPA has accurately calculated background concentrations from the hourly monitoring data collected at the Allen Park ambient air monitoring station based on guidance from EPA's TAD and appendix W. An uncertainty analysis for background estimates is not required for regulatory air dispersion modeling analyses and therefore, was not provided in the technical support document for this action.

EPA disagrees that the meteorological data at the Allen Park site is not representative and that meteorological data from the airport should be used instead. The Allen Park monitoring site is an NCore monitoring site for the state of Michigan that also collects meteorological data. When comparing the wind roses of the Detroit Metropolitan Wayne County Airport (DTW) 2016–2020 wind data and the Allen Park 2018–2020 wind data, the wind roses are very similar in wind direction frequency and wind speed classes. One difference between the two sites is the prevalence of winds from the south/southwest (SSW), in which DTW experiences more frequent SSW winds than the Allen Park site. However, the sites experience similar easterly winds. As such, the trees near the Allen Park monitoring site are not causing the wind directions to diverge from the airport site; therefore, the wind measurements from the DTW airport should not be used instead. EPA also verified with Michigan that all monitors and meteorological instruments at the Allen Park monitoring site meet EPA's siting criteria. This monitoring site is subject to EPA audits and siting criteria are frequently checked and confirmed.

EPA disagrees that trajectory analyses need to be performed and that different exclusion ranges need to be examined. Pollution roses from the Allen Park monitor were examined by Michigan in the development of the background concentration. Pollution roses consider hourly meteorological conditions and ranges of wind directions in which SO_2 concentrations impact the monitor site. As was demonstrated by Michigan, the range of exclusion used in the FIP modeling analysis is acceptable as the pollution rose demonstrates that the Allen Park monitor was impacted by explicitly modeled nearby sources in this wind direction range. Therefore, trajectory analyses are not required for this analysis.

EPA disagrees with the commenter that modeled background estimates should be used to determine the background concentrations for the modeling analysis. Section 8.3.2.b of appendix W states that in most cases, EPA recommends using data from the monitor closest to and upwind of the project area. If several monitors are available, preference should be given to the monitor with characteristics that are most similar to the project area. The Allen Park monitor was chosen as a representative monitor for background concentrations for the Detroit nonattinment area due its location within the SO_2 nonattainment boundary and prevailing southwest winds that make the monitor upwind of Detroit.

EPA disagrees that the background concentrations are overly conservative; as explained above, EPA has followed relevant EPA guidance in determining background concentrations. EPA did exclude SO_2 concentrations from northeast of the Allen Park monitor based on data from the SO_2 pollution roses for the Allen Park monitor. These excluded impacts from explicitly modeled nearby sources in the modeling analysis to prevent double-counting impacts. EPA did not exclude 45 degrees to the west of the northernmost sources for the background concentration as plume spread from these sources would not have as great of an impact as more distant emission sources. Therefore, the exclusion range sufficiently excludes nearby sources in the area.

Comment: Four commenters commented on EPA's usage of rural dispersion coefficients as part of the modeling analysis. EPA used rural dispersion coefficients to characterize three tall stacks in the modeling analysis to better correlate the modeled concentrations with modeling concentrations at two monitors in the Detroit nonattainment area. The commenters state that the heat island effect can cause higher concentrations during the night, which is shown with the urban coefficient option. The commenters recommend additional analysis to determine whether the SO_2 temporal distribution at the monitors can be extrapolated to the area of maximum SO_2 concentration near DTE Trenton Channel.

The commenters raise concern that the use of a rural dispersion coefficient for stacks at EES Coke, DTE Monroe, DTE River Rouge, and DTE Trenton Channel leads to significantly lowered predicted concentrations. The commenters claim that EPA did not properly document its model performance evaluation to support the claim that applying a rural dispersion coefficient to the listed sources was the most appropriate way to run the model. The commenters state that if EPA had properly applied an urban dispersion coefficient to the sources, the area could not model attainment.

Response: EPA agrees that the urban heat island effect can in some cases cause higher concentrations during the night. However, as was demonstrated in

[1] *See* TAD, page 30. The TAD can be found at *https://www.epa.gov/so2-pollution/technical-assistance-documents-implementing-2010-sulfur-dioxide-standard.*

the document entitled ''Analysis of Michigan Dispersion Coefficient Use'' and the technical support document, both included in the docket for this action, this was not the case when examining monitoring data in the Detroit nonattainment area for the Southwest High School and West Windsor monitors. Monitoring data from these monitors demonstrated that peak monitored impacts occurred during the daytime (between 12:00 p.m.–3:00 p.m.) instead of at night. As described in the AERMOD Implementation Guide,[2] plumes from tall buoyant stacks, transported over the urban boundary layer at night, may be unaffected by the urban enhanced dispersion and may require special consideration on a case-by-case basis. The urban dispersion option in AERMOD only applies to nighttime and morning transition hours. Nighttime hours would normally be stable if not for the urban heat island effect, and the morning transition hours right after sunrise, when the atmosphere would transition from stable to convective conditions in a rural setting, might be more convective in urban conditions. Both monitored data at the Southwest High School and West Windsor sites, as well as modeled concentrations using the rural option for these stacks, showed peak concentrations outside of the nighttime and morning transition hours, which indicate the rural dispersion option is more appropriate for this set of stacks in this analysis.

EPA disagrees with the commenters that EPA did not properly document the model performance evaluation. Section 7.2.1.1.e of appendix W states that model users should consult with the appropriate reviewing authority and the latest version of the AERMOD Implementation Guide when evaluating this situation. Further, Section 5.1 of the AERMOD Implementation Guide states that a more thorough case-specific justification will be needed to support excluding elevated sources from application of the urban option.[3] As these guidance documents state, a case-specific justification needs to be provided to support the exclusion of these stacks from the urban option, and the case-specific justification was provided within the technical support document as well as the document ''Analysis of Michigan Dispersion Coefficient Use,'' which are both in the docket for this action. These documents demonstrated that the application of the urban option to the tall stacks at EES Coke, DTE Monroe, DTE River Rouge, and DTE Trenton Channel resulted in anomalously high concentrations due to plume height limitations in the model. As such, additional analysis is also not warranted to determine if the temporal distribution can be extrapolated to the DTE Trenton facility.

Comment: The commenter raises concern that the 50 kilometer distance from the nonattainment area is an inadequate cutoff for including major point sources. The commenter states that there are a number of large sources just beyond this distance that are not included in the background concentration.

Response: EPA disagrees that the 50 kilometer distance from the nonattainment area is an inadequate cutoff for including major point sources. EPA used the maximum distance (50 kilometers) from the nonattainment area in its modeling analysis. Section 4.1.c of appendix W explains that due to the steady-state assumption, Gaussian plume models are generally considered applicable to distances less than 50 kilometers, beyond which, modeled predictions of plume impact are likely conservative. As such, AERMOD is not recommended for use in far-field (greater than 50 kilometers) dispersion applications. Since SO_2 is a source-oriented pollutant and not considered a regional pollutant for regulatory purposes, it is not appropriate to model beyond 50 kilometers. In this case, EPA explicitly modeled DTE Monroe, a source outside of the nonattainment area, in addition to the sources within the nonattainment area as a conservative measure. Please also refer to the responses above regarding background concentrations, specifically the response to comments about sources beyond 50 kilometers being included in the modeling analysis and background concentration.

Comment: The commenter states that EPA's modeling lacks transparency and detail, as EPA did not provide sufficient maps and tabular data, SO_2 levels throughout the nonattainment area, and information pertaining to understanding spatial and temporal exposure variation, locations of impacts, critical meteorological factors, culpable sources, background levels, etc.

Response: EPA's modeling analysis is available in the technical support document, which is included in the docket for this action. In the technical support document, EPA provided maps of the areas of maximum concentration, as well as the modeling parameters used in the area of analysis, including background concentrations. As the focus of this action is to demonstrate attainment of the NAAQS, and the technical support document demonstrates that the areas of maximum concentration are below the NAAQS, EPA did not provide maps of SO_2 concentrations throughout the nonattainment area. However, EPA's modeling files are available to the public upon request. The maximum modeled concentration, including background concentrations, was 73.6 ppb and occurred approximately 4 kilometers to the northwest of DTE Trenton Channel's facility. Other modeled concentrations that were less than the maximum modeled design value at receptors in the nonattainment area were 71.5 ppb to the northeast of Cleveland-Cliffs Steel Corporation and DIG, 73.2 ppb on the northern fenceline of Zug Island (when U.S. Steel's Zug Island sources are in operation), and 68.7 ppb to the northeast of Carmeuse Lime.

Comment: EPA received three comments regarding the FIP's margin of safety and the health effects of SO_2, particularly for children in Detroit. The commenters state that the FIP does not provide an uncertainty analysis. The commenters contend that as the maximum modeled concentration is so close to the NAAQS (73.4 ppb compared to 75 ppb), the FIP does not provide any margin of safety. The commenters state that the model cannot be considered conservative due to likely background concentration underprediction, the use of rural dispersion coefficients, and longer-term average emission rates. The commenters recommend that EPA either validate the model using the monitoring data from the SO_2 monitoring sites in the Detroit nonattainment area or set limits that produce modeled SO_2 concentrations well below the NAAQS.

The commenters argue that the NAAQS itself is not protective, as a health study of children in Detroit shows that 1-hour maximum SO_2 exposures were associated with increased odds of respiratory symptoms, even though the levels of SO_2 that the children were exposed to were generally below the NAAQS. One commenter states that children in Detroit have breathing issues due to pollution that cause them to miss school and cited a study that shows Southwest Detroit has some of the worst air pollution in the country. The commenters note that Detroit communities experience asthma rates that are 1.5–3 times the national average along with low rates of asthma

[2] *See* AERMOD Implementation Guide, pages 19–20, which can be found at *https://gaftp.epa.gov/Air/aqmg/SCRAM/models/preferred/aermod/aermod_implementation_guide.pdf.*

[3] *See* the AERMOD Implementation Guide, page 20, which can be found at *https://gaftp.epa.gov/Air/aqmg/SCRAM/models/preferred/aermod/aermod_implementation_guide.pdf.*

controller utilization due to health care access, poverty, and caregiver issues.

Response: As described further in comment responses below, under section 109 of the CAA, EPA sets primary, or health-based, NAAQS for all criteria pollutants to provide requisite protection of public health, including the health of at-risk populations, with an adequate margin of safety. The health effects information provided by the commenters, which was addressed in EPA's promulgation of the 2010 SO_2 NAAQS, is not in dispute in this rulemaking, and EPA in this action is not reopening the NAAQS itself which was established to protect public health with an adequate margin of safety. This rulemaking instead addresses the requirements needed for the Detroit area to meet the NAAQS. However, EPA is aware of the demographic data for the Detroit nonattainment area, and that the Detroit nonattainment area includes communities that are pollution-burdened and underserved, and environmental justice concerns are addressed in comment responses below.

EPA disagrees that the model cannot be considered conservative. In its modeling analysis, EPA used the maximum uncontrolled or maximum allowable emission rates for all sources in the Detroit nonattainment area. In reality, it is extremely unlikely that all sources would be operating at maximum emission rates simultaneously. Additionally, EPA's method of background concentration calculation, use of rural dispersion coefficients, and reliance on longer-term average emission rates follow EPA guidance and are appropriate for demonstrating attainment of the NAAQS, as explained in comment responses above and below.

Comment: Three commenters state that a taller combined stack at U.S. Steel will not significantly decrease SO_2 concentrations that affect public health in residential areas downwind of the facility.

Response: While EPA acknowledges that combining and raising the U.S. Steel Boilerhouse 2 stack will only decrease near-field SO_2 concentrations where current ambient concentrations threaten the NAAQS, EPA is requiring this stack construction in combination with new limits at U.S. Steel, a facility that has not previously had hourly SO_2 limits. Both of these control mechanisms are needed to ensure that the SO_2 concentrations in the Detroit area, including those in residential areas downwind of the facility, stay permanently below the NAAQS and result in protection of public health with an adequate margin of safety.

Comment: The commenters contend that long-term average limits alone do not provide for attainment of the one-hour SO_2 NAAQS, as 30-day average limits allow sources to operate at higher levels before and after shutdowns and remove incentives for sources to avoid malfunctions. The commenters believe that a long-term average limit should have supplemental limits governing the magnitude and frequency of short-term periods of emissions above the emission rate at which the longer-term average limit is set. Additionally, the commenters contend that EPA's use of national average adjustment factors for the DIG and Cleveland-Cliffs Steel Corporation 24-hour average limits is not justified.

Response: EPA disagrees with the commenter's statement that longer-term average limits alone do not provide for attainment of the 1-hour SO_2 NAAQS. EPA believes as a general matter that properly set, longer-term average limits are comparably effective in providing for attainment of the 1-hour SO_2 standard as are 1-hour limits. On April 23, 2014, EPA issued recommended guidance for meeting the statutory requirements in SO_2 nonattainment plans, in a document entitled, ''Guidance for 1-Hour SO_2 Nonattainment Area SIP Submissions'' (2014 SO_2 Guidance).[4] EPA's 2014 SO_2 Guidance sets forth in detail the reasoning supporting its conclusion that the distribution of emissions that can be expected in compliance with a properly set longer-term average limit is likely to yield overall air quality protection that is as good as a corresponding hourly emissions limit set at a level that provides for attainment. EPA's 2014 SO_2 Guidance specifically addressed this issue as it pertains to requirements for attainment demonstrations for SO_2 nonattainment areas under the 2010 NAAQS, especially with regard to the use of appropriately set comparably stringent limitations based on averaging times as long as 30 days. EPA found that a longer-term average limit which is comparably stringent to a short-term average limit is likely to yield comparable air quality; and that the net effect of allowing emissions variability over time but requiring a lower average emission level is that the resulting worst-case air quality is likely to be comparable to the worst-case air quality resulting from the corresponding higher short-term emission limit without variability. *See* 2014 SO_2 Guidance.

Any accounting of whether a 30-day average limit provides for attainment must consider factors reducing the likelihood of hourly exceedances as well as factors creating a risk of additional exceedances. To facilitate this analysis, EPA used the concept of a critical emission value (CEV) for the SO_2-emitting facilities which are being addressed in a nonattainment plan. The CEV is the continuous 1-hour emission rate which is expected to provide for the average annual 99th percentile maximum daily 1-hour concentration to be at or below 75 ppb, which in a typical year means that fewer than four days have maximum hourly ambient SO_2 concentrations exceeding 75 ppb. *See* 2014 SO_2 Guidance. EPA recognizes that a 30-day limit can allow occasions in which emissions exceed the CEV, and such occasions yield the possibility of hourly exceedances occurring that would not be expected if emissions were always at the CEV. At the same time, the establishment of the 30-day average limit at a level below the CEV means that emissions must routinely be lower than they would be required to be with a 1-hour emission limit at the CEV.

The proposed FIP provides an illustrative example of the effect that application of a limit with an averaging time longer than one hour can have on air quality.[5] This example illustrates both (1) the possibility of elevated emissions (emissions above the CEV) causing exceedances not expected with emissions at or below the CEV and (2) the possibility that the requirement for routinely lower emissions would result in avoiding exceedances that would be expected with emissions at the CEV. In this example, moving from a 1-hour limit to a 30-day average limit results in one day that exceeds 75 ppb that would otherwise be below 75 ppb, one day that is below 75 ppb that would otherwise be above 75 ppb, and one day that is below 75 ppb that would otherwise be at 75 ppb. In net, the 99th percentile of the 30-day average limit scenario is lower than that of the 1-hour limit scenario, with a design value of 67.5 ppb rather than 75 ppb. Stated more generally, this example illustrates several points: (1) The variations in emissions that are accounted for with a longer-term average limit can yield higher concentrations on some days and lower concentrations on other days, as determined by the factors influencing dispersion on each day, (2) one must

[4] *See https://www.epa.gov/sites/production/files/2016-06/documents/20140423guidance_nonattainment_sip.pdf.*

[5] For the full discussion of the hypothetical example, *see* the proposed FIP, June 1, 2022 (87 FR 33095) at page 33100 at *https://www.regulations.gov,* Docket ID Number EPA–R05–OAR–2021–0536.

account for both possibilities, and (3) accounting for both effects can yield the conclusion that a properly set longer-term average limit can provide as good or better air quality than allowing constant emissions at a higher level. As noted in the proposed FIP, and as described in appendix B of the 2014 SO_2 guidance, EPA expects that an emission profile with a comparably stringent 30-day average limit is likely to have a net effect of having a lower number of exceedances and better air quality than an emissions profile with maximum allowable emissions under a 1-hour emission limit at the critical emission value. Thus, EPA continues to assert that appropriately set 30-day emission limits can be protective of the 1-hour SO_2 standard.

The long-term average limits included in the FIP are for a period of 30 days for DTE Trenton Channel and 24 hours for DIG and Cleveland-Cliffs Steel Corporation. As stated above, EPA posits that limits based on periods of as long as 30 days (720 hours), determined in accordance with EPA's April 2014 guidance, can, in many cases, be reasonably considered to provide for attainment of the 2010 SO_2 NAAQS. Since 30 days for DTE Trenton Channel and 24 hours for DIG and Cleveland-Cliffs Steel Corporation are equal to or well within, respectively, the period of 30 days, EPA has concluded that a limit based on a period of 30 days for DTE Trenton Channel and limits based on a period of 24 hours for DIG and Cleveland-Cliffs Steel Corporation determined in accordance with EPA's April 2014 guidance can be reasonably considered to provide for attainment. While the longer-term averaging limits allow occasions in which emissions may be higher than the level that would be allowed with the 1-hour limit, the limits compensate by requiring average emissions to be adequately lower than the level that would otherwise have been required by a 1-hour average limit.

As noted by the commenters, EPA's April 2014 guidance addresses the use of supplemental short-term limits. While supplemental limits can further strengthen the justification for the use of longer-term limits, they are not necessary to provide for attainment of the 2010 SO_2 NAAQS. In this case, as discussed further below, DTE Trenton Channel has been permanently shut down during the comment period for this action, and DIG and Cleveland-Cliffs Steel Corporation are not the primary contributors to the areas of maximum modeled concentrations. Therefore, EPA is not considering supplemental limits for DTE Trenton Channel, DIG, or Cleveland-Cliffs at this time.

Regarding the adjustment factors used for the daily DIG and Cleveland-Cliffs limits, EPA believes that the appendix D ratios are acceptable adjustment factors in this specific situation for use in calculating a long-term average emission limit when hourly SO_2 emissions data are not available for use in calculating source-specific emission ratios. Although these daily limits are included in the FIP, EPA is not relying on emission reductions from either DIG or Cleveland-Cliffs Steel Corporation to demonstrate attainment of the 2010 SO_2 NAAQS. Rather, EPA has included these limits in the FIP to ensure that SO_2 concentrations in the Detroit area stay permanently below the NAAQS. Since these sources are not the controlling sources with respect to the attainment demonstration, reliance on the default adjustment factors to account for the emissions variability provides a suitable estimate in this instance where no other data is available.

For the reasons stated above and in the proposed rule, EPA concludes that the use of long-term average emission limits for DTE Trenton Channel, DIG, and Cleveland-Cliffs Steel Corporation is consistent with recommendations discussed in EPA's April 2014 guidance and adequately protects against violations of the 1-hour SO_2 NAAQS.

Comment: The commenters disagree with EPA's interpretation of RACT for SO_2 as the control technology necessary to achieve the NAAQS and point out that RACT has been defined for other pollutants as the lowest emission limit that is reasonably available considering technological and economic feasibility. The commenters contend that the U.S. Steel emission limits do not achieve a reduction in SO_2, as the maximum allowable annual emissions, assuming maximum operation for every hour in a year, are higher than U.S. Steel's past annual emissions. The commenters believe that EPA should consider alternatives to the requirement for combining and raising the U.S. Steel Boilerhouse 2 stacks as well as complete a RACT analysis considering technological and economic feasibility for U.S. Steel, DIG, Cleveland-Cliffs, and EES Coke.

Response: Section 172 (c)(1) of the CAA provides that ''such plan shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.'' EPA has long defined RACT for SO_2 as that control technology which will achieve the NAAQS within statutory timeframes. *See State Implementation Plans; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990; Proposed Rule,* 57 FR 13498, 13547 (April 16, 1992) (General Preamble); *see also,* SO_2 Guideline Document, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711, EPA–452/R–94–008, February 1994 (SO_2 Guideline), at 6–39. For most criteria pollutants, RACT is control technology that is reasonably available considering technological and economic feasibility. The definition of RACT for SO_2 is that control technology which is necessary to achieve the NAAQS (40 CFR 51.100(o)). Since SO_2 RACT is already defined as the technology necessary to achieve the SO_2 NAAQS, control technology which failed to achieve the NAAQS would fail to be SO_2 RACT. EPA intends to continue defining RACT for SO_2 as that control technology which will achieve the NAAQS, as it has in numerous SIP actions since promulgating the 2010 NAAQS. Here, the emission limits in the FIP and previously approved into the SIP provide for such NAAQS attainment, as demonstrated by the modeling. Consequently, under EPA's longstanding approach to SO_2 RACT, the CAA section 172(c)(1) RACM/RACT requirement is met. CAA section 172(c)(6) also requires plans to include enforceable emission limits and control measures as may be necessary or appropriate to provide for attainment. The emission limits and associated requirements included as part of the FIP analysis show attainment of the 2010 SO_2 NAAQS of 75 ppb, as the modeling analysis, which is detailed in the technical support document for this action, shows a maximum concentration of 73.6 ppb. Thus, further controls are not necessary to satisfy the requirement for RACT.[6]

As determined through air dispersion modeling, emission limits and associated requirements at the U.S. Steel, EES Coke, DIG, Cleveland-Cliffs Steel Corporation, DTE Trenton

[6] *See* SO_2 Guideline Document, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, EPA–452/R–94–008, February 1994. *See also* EPA's 2014 SO_2 Nonattainment Guidance; General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 at 57 FR 13498 (April 16, 1992).

Channel, and Carmeuse Lime facilities are needed to reach attainment in the Detroit area. While EPA recognizes the commenters' concern that the annual maximum emissions allowed under the U.S. Steel limits set forth in the FIP are larger than actual emissions in previous years, EPA believes that setting limits at U.S. Steel, a facility that has not previously had hourly SO_2 emission limits, is critically important to ensuring that SO_2 concentrations in the Detroit area stay permanently below the NAAQS.

Comment: The commenters point out that the FIP does not require monitoring, recordkeeping, or reporting from U.S. Steel No. 2 Baghouse or DIG Flares 1 and 2.

Response: EPA notes that U.S. Steel No. 2 Baghouse was mistakenly omitted from 40 CFR 52.1189(b)(3)(ii) in the proposed regulatory text and EPA has updated 40 CFR 52.1189(b)(3)(ii) to include U.S. Steel No. 2 Baghouse. Recordkeeping and reporting for U.S. Steel No. 2 Baghouse are required under 40 CFR 52.1189(b)(5)(ii) and 40 CFR 52.1189(b)(6)(ii), respectively. Regarding compliance for DIG Flares 1 and 2, EPA has added the requirement to 40 CFR 52.1189(e)(2) that the owner or operator verify compliance with the limit for Boilers 1, 2, 3 and Flares 1 and 2 (combined) by following the procedures and methodologies contained in the document entitled ''Protocol for Demonstrating Continuous Compliance with the Emission Limitations of ROP MI–ROP–N6631–2004'' as set forth in its operating permit (Permit MI–ROP–N6631–2012a, modified June 28, 2016).

Comment: EPA received seven comments regarding emissions monitoring requirements. The commenters believe that the FIP should require all units, particularly at U.S. Steel and DIG, to install a Continuous Emission Monitoring System (CEMS) on all units to monitor SO_2 emissions directly, which the commenters state would be a much more accurate and transparent way to monitor emissions than what the proposed FIP requires. The commenters state that it is unclear as to why the FIP would require CEMS to be installed at U.S. Steel Boilerhouse 2 but not at U.S. Steel Boilerhouse 1 and why the FIP would require CEMS for the Cleveland-Cliffs Steel Corporation blast furnaces but not the U.S. Steel blast furnaces. The commenters also state that it is unclear as to why a Predictive Emissions Monitoring System (PEMS) is allowed in lieu of CEMS to monitor DIG emissions. A commenter states that CEMS are available and commonly used and that it is particularly important that SO_2 emissions are monitored closely as the maximum modeled SO_2 concentration is very close to the NAAQS. The commenters recommend that EPA require CEMS to be installed at each U.S. Steel and DIG unit, and that EPA explain the choice of monitoring technique if CEMS is not deemed appropriate, considering regulatory needs, monitoring technology costs, and relative benefits of the monitoring technique.

Response: With regard to DIG units, the FIP requires compliance as set forth in its operating permit (Permit MI–ROP–N6631–2012a, modified June 28, 2016). As described in the response above regarding DIG Flares 1 and 2 compliance, EPA added additional compliance language to 40 CFR 52.1189(e)(2). These compliance mechanisms are currently in place and work to sufficiently monitor hourly SO_2 emissions at the DIG facility; therefore, EPA is not requiring CEMS on the DIG units at this time.

With regard to U.S. Steel units, the FIP requires CEMS on Boilerhouse 2, the highest-emitting unit at the facility, as part of the new stack construction. For the remaining U.S. Steel units, the FIP requires the owner or operator to calculate hourly SO_2 emissions using all raw material sulfur charged into each affected emission unit and assumes 100 percent conversion of total sulfur to SO_2 to be conservative. Aside from the U.S. Steel boilerhouses, blast furnaces, and the associated furnace flares, the other emission limits for other U.S. Steel units are very small (all less than 5 pounds per hour (lbs/hr) and only one over 1 lbs/hr). Many large SO_2 sources, such as blast furnace stoves, blast furnace flares, and (reheat) furnaces, combust blast furnace gas and/or coke oven gas. These gases are considered fuel for those units. EPA believes that frequent fuel sampling will provide sufficiently accurate measurement of SO_2 emissions. Fuel sampling has historically been used to determine emissions, and EPA believes this method is acceptable here. The FIP requires the owner or operator of each applicable U.S. Steel unit to submit a Compliance Assurance Plan (CAP) for the unit that specifies calculation methodology, procedures, and inputs used in these calculations. EPA expects that the procedures shall include a fuel sampling schedule at a frequency that captures any variation in fuel sulfur content. Additionally, while Boilerhouse 1 is not currently operating, U.S. Steel has committed not to combust coke oven gas at Boilerhouse 1 upon restart, which is reflected in the Boilerhouse 1 limit set forth in the FIP. EPA concludes that the required CAPs, as well as the quarterly requirement to submit calculated hourly SO_2 emissions to EPA, are sufficient for determining compliance with the emission limits set forth in the FIP. However, the requirement of CAPs does not preclude future requirements or installation of CEMS on these units.

Comment: The commenters believe that the requirement that U.S. Steel submit a CAP for units that do not require CEMS detailing the calculation methodology, procedures, and inputs that will be used for monitoring SO_2 emissions is insufficient. The commenters believe that U.S. Steel's CAPs should undergo public notice and comment, but point out that this is not possible as the plans are required to be submitted after the effective date of the FIP. Additionally, the commenters pointed out that the FIP does not allow EPA the authority to review, modify, or reject a CAP, and that the CAP does not require continuous monitoring.

Response: EPA disagrees with the commenters' position that the requirement for U.S. Steel to submit CAPs is insufficient. The public is not an approving authority for CAPs, and therefore, there is no requirement that the owner or operator submit the CAPs for public review and approval. However, for transparency and ease in accessibility, EPA will post the CAPs to the Detroit SO_2 FIP website at *https://www.epa.gov/mi/detroit-so2-federal-implementation-plan.* Although the FIP does not require EPA's explicit approval of CAPs, EPA has authority to enforce the requirement to submit CAPs that meet the requirements set forth in the FIP. Failure to submit a CAP or submission of a CAP that does not meet the requirements set forth in the FIP would be a violation of the FIP. The owner or operator of the U.S. Steel facility is required to maintain records of hourly emissions calculated in accordance with the CAP under 40 CFR 52.1189(b)(5)(ii) and to report these hourly mass balance calculations, as well as excess emissions, quarterly, and no later than the 30th day following each quarter under 40 CFR 52.1189(b)(6)(ii) and 40 CFR 52.1189(b)(6)(iv), respectively.

Comment: EPA received three comments about idled units at U.S. Steel. The commenters contend that although the FIP requires that a CAP be submitted for each idled U.S. Steel unit under 40 CFR 52.1189(b)(4), the FIP does not require U.S. Steel to comply with emission limits or monitoring requirements for idled units. One commenter states that the community is very concerned with the reopening of

U.S. Steel and believes the FIP should include limits for idled units.

Response: The FIP includes limits for all units, regardless of operating status. The idled units referenced in 40 CFR 52.1189(b)(4) each have limits under 40 CFR 52.1189(b)(1)(i). Additionally, emissions from these units are required to be monitored and reported under 40 CFR 52.1189(b)(3)(ii) and 40 CFR 52.1189(b)(6)(ii), respectively.

Comment: EPA received three comments about contingency measures in the FIP. The commenters disagree with EPA's interpretation of contingency measures for SO_2 to mean that the State, or EPA in the case of a FIP, has a comprehensive enforcement program. The commenters suggest that under CAA section 172(c)(9), contingency measures must take effect without further action by the State or EPA, which would exclude enforcement actions because an enforcement action is further action. Additionally, the commenters state that enforcement actions are not ''measures'' as defined in CAA section 110(a)(2), and that a comprehensive enforcement program is already required separately under CAA section 110(a)(2). The commenters also note that enforcement actions are not reviewable under the Administrative Procedure Act (APA), so citizens are not able to enforce EPA's proposed contingency measures, and that EPA's reliance on enforcement actions is contrary to the history of the CAA due to their discretionary nature.

Additionally, the commenters allege that authority to enforce the FIP does not equate to a comprehensive enforcement program, which the commenters suggest would mean having a schedule for determining whether violations occurred and a binding mechanism requiring EPA to take action if they did occur. The commenters suggest that a comprehensive enforcement program could not be called aggressive unless it went beyond the basic enforcement requirements, for example, increasing the basic mandatory penalty scheme.

The commenters also point out that contingency measures are intended to address situations that cause an area to fail to attain despite a valid attainment demonstration and that there is no specific measure in the proposed FIP that would be activated in the case that EPA's analysis that the FIP will bring the Detroit area into attainment is incorrect. The commenters contend that it is more likely that violations of the 1-hour standard will occur with longer-term average limits in the FIP due to short-term spikes in emissions at sources that are still complying with their long-term average limits. The commenters state that the fact that EPA does not require a new SIP submittal for determining whether an area has attained the standard, even though modeling parameters such as source characteristics and background concentrations could have changed, is an additional issue if contingency measures do not address failures to attain despite valid attainment demonstrations.

The commenters state that EPA failed to include contingency measures in the FIP regulatory text and recommend that EPA incorporate alternative contingency measures into the FIP, such as switching to low-sulfur fuel, limiting operation until the SIP is revised, limits that automatically scale to adjust for background concentrations, and supplementary short-term limits for longer-term average limits. The commenters state that these suggested contingency measures could be promulgated as rules to take effect without further action from EPA. The commenters disagree that the contingency measures language as written in CAA section 172(c)(9) does not apply to SO_2 plans and was directed at other pollutants such as ozone, as Congress added specific contingency measures language in the ozone provisions but did not change the general contingency measures provisions in CAA section 172(c)(9). The commenters argue that without implementing alternative contingency measures, EPA fails to make a good-faith effort to comply with the terms of the September 30, 2020, consent decree to promulgate a FIP that complies with the CAA.

Response: EPA disagrees with the commenter that the contingency measures are inadequate. Section 172(c)(9) of the CAA defines contingency measures as such measures in a nonattainment plan that are to be implemented in the event that an area fails to make RFP, or fails to attain the NAAQS, by the applicable attainment date. Contingency measures are to become effective without further action by the State or EPA, where the area has failed to (1) achieve RFP or, (2) attain the NAAQS by the statutory attainment date for the affected area. These control measures are to consist of other available control measures that are not included in the control strategy for the attainment plan SIP for the affected area.

However, EPA has long interpreted the contingency measures requirement for SO_2 in light of the fact that SO_2 presents special considerations. *See,* General Preamble at 13547; *see also,* SO_2 Guideline at 6–40—6–41, 2014 Guidance at 41–42. EPA interprets the contingency measure provisions as primarily directed at NAAQS implementation which can be undertaken on an areawide basis, such as for ozone or particulate matter. EPA's policy for SO_2 is different because, first, for some of the other criteria pollutants, the analytical tools for quantifying the relationship between reductions in precursor emissions and resulting air quality improvements remain subject to significant uncertainties, in contrast with procedures for directly-emitted pollutants such as SO_2. Second, emissions estimates and attainment analyses for other criteria pollutants can be strongly influenced by overly optimistic assumptions about control efficiency and rates of compliance for many small sources. This is not the case for SO_2.

In contrast, the control efficiencies for SO_2 control measures are well understood and are far less prone to uncertainty. Since SO_2 control measures are by definition based on what is directly and quantifiably necessary to attain the SO_2 NAAQS, it would be unlikely for an area to implement the necessary emission controls yet fail to attain the NAAQS. Therefore, for SO_2 programs, EPA has long explained that ''contingency measures'' can mean that the air agency has a comprehensive program to identify sources of violations of the SO_2 NAAQS and to undertake an aggressive follow-up for compliance and enforcement, including expedited procedures for establishing enforceable consent agreements pending the adoption of a revised SIP. EPA believes that this approach continues to be valid for the implementation of contingency measures to address the 2010 SO_2 NAAQS, and consequently reiterated its view in the preamble to the final 2010 NAAQS and has followed it in several actions on SIPs implementing the 2010 NAAQS. *See, e.g.,* Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule, 75 FR 35520, 35576 (June 22, 2010); Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Attainment Plan for the Warren County, Pennsylvania Nonattainment Area for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard; Final Rule, 83 FR 51629, 51632–33; Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Attainment Plan for the Beaver, Pennsylvania Nonattainment Area for the 2010 Sulfur Dioxide Primary National Ambient Air Quality Standard; Final Rule, 84 FR 51988,

51994–95. EPA therefore concludes that EPA's comprehensive enforcement program, as discussed below, satisfies the SO_2 contingency measure requirement.

The commenters listed several options for specific contingency measures. EPA acknowledges that one or more of these options may be appropriate in a specific situation, and for a specific source, if the area fails to achieve RFP or fails to attain the NAAQS by the statutory attainment date. However, in this situation, as Detroit is a multisource area with several emission units per facility, requiring one or more of these measures also may not be appropriate depending on the cause of the potential violation, which would need to be evaluated at the time of occurrence. For example, triggering a fuel-switch at one facility may not bring the area into attainment if the issue is caused by another facility violating its limit. Similarly, limiting operation of one facility may be appropriate if EPA determines that the subject facility is the cause of the problem, but requiring additional measures at other facilities may not be warranted where the cause of the NAAQS violation was non-compliance by a different facility and where the NAAQS violation can be most efficiently remedied by bringing that source into compliance with its established emission limits. Likewise, limiting operations at all SO_2 facilities in the area may not appropriately address the issue due to the localized nature of SO_2 emissions and direct link to a specific facility. Changing the limits at all facilities from a longer-term limit to a shorter-term limit similarly may appropriately address the problem, but this action also may not, and EPA would evaluate appropriate measures if and when an issue arises. These are illustrative examples, and while not exhaustive, highlight the need for EPA to be able to respond appropriately in a particular scenario due to the localized nature of SO_2 impacts. In any case where the Detroit area fails to achieve RFP or attain the NAAQS, EPA would consider all viable solutions to address the actual issue at a specific facility or facilities and take appropriate responsive action.

In accordance with longstanding policy, EPA deems investigation and enforcement authority for aggressive follow-up for ensuring source compliance an appropriate and expeditious solution to any potential violations.

As noted in the proposed rule, EPA's 2014 SO_2 guidance describes special features of SO_2 planning that influence the suitability of alternative means of addressing the requirement in CAA section 172(c)(9) for contingency measures including a comprehensive enforcement program. EPA has a comprehensive enforcement program as specified in section 113(a) of the CAA. Under this program, EPA is authorized to take enforcement actions to ensure compliance with the CAA and the rules and regulations promulgated under the CAA. Such actions include the issuance of an administrative order requiring compliance with the applicable implementation plan; the issuance of an administrative order requiring the payment of a civil penalty for past violations; and the commencement of a civil judicial action. Orders issued under CAA section 113(a) require subject entities to comply with the requirements set forth in the order as expeditiously as practicable, but in no event longer than one year after the date the order was issued. Issuance of any such order does not prohibit EPA from assessing any penalties. Under CAA section 113(b), civil judicial enforcement may require assessment of penalties of up to $109,024 per day for each violation.[7] Additionally, under CAA section 113(c), any person who knowingly violates any requirement or prohibition of an implementation plan may be subject to criminal enforcement, with penalties including fines and imprisonment.

EPA's enforcement program is capable of prompt action to remedy compliance issues. Additionally, enforcement in communities with environmental justice concerns is a priority for EPA. EPA's steps to advance environmental justice through enforcement include increasing the number of facility inspections in overburdened communities, resolving noncompliance through remedies with tangible benefits, and increasing engagement with communities about enforcement cases that most directly impact them.[8] EPA also notes that under CAA section 304, citizens may also commence civil enforcement actions against any person who is in violation of an emission standard. *See* 42 U.S.C. 7604(a)(1), (f). Therefore, EPA believes that EPA's enforcement program by itself suffices to meet CAA section 172(c)(9) requirements for SO_2 as interpreted in the 1992 General Preamble, the SO_2 Guideline, the 2010 SO_2 NAAQS promulgation, the 2014 SO_2 guidance, and in numerous subsequent SIP actions. Finally, EPA disagrees with the assertion that without implementing alternative contingency measures, EPA fails to make a good-faith effort to comply with the terms of the September 30, 2020, consent decree to take final action to promulgate a FIP. The consent decree properly imposes only a September 30, 2022, deadline for EPA to sign a notice of final rulemaking to approve a revised SIP submission, to promulgate a FIP, or to approve in part a revised SIP submission and promulgate a partial FIP for the Detroit area addressing the elements of CAA sections 172(c) and 192, but does not (as it could not) impose any requirements for how EPA might meet the statutory elements.

Comment: EPA received eight comments about environmental justice. The commenters contend that while EPA recognized that communities are located in the Detroit nonattainment area with environmental justice concerns, EPA did not conduct a meaningful analysis or adequately use its discretionary authority to consider environmental justice in development of the FIP. The commenters state that EPA did not follow Executive Order 12898, which directs EPA to achieve environmental justice to the greatest extent practicable and permitted by law. The commenters contend that EPA should have considered alternatives to its proposed plan and how the FIP could provide the most benefit to Detroit populations given the history of industrial pollution and nonattainment for multiple pollutants and the environmental justice communities in the Detroit nonattainment area, which are demonstrated by EPA's EJScreen as well as other screening tools such as the draft Climate and Economic Justice Screening Tool and the Michigan EJ screen map. The commenters also believe that EPA should consider actions that can be taken to acknowledge and address the impacts of the delay in bringing the Detroit area into attainment, and ensure that any future nonattainment is addressed promptly, as well as more fully acknowledge the burden that Detroit community members of different populations have faced due to nonattainment. One commenter points out that EPA's conclusion that the FIP will decrease pollution levels, which will be beneficial to the environmental justice populations in Detroit, does not address the fact that it will not be more beneficial to environmental justice populations than others in the area nor acknowledge the harm that previous emissions in the area have caused the

[7] Pursuant to the Civil Monetary Penalty Adjustment Rule, 87 FR 1676 (Jan. 12, 2022), codified at 40 CFR 19.4.

[8] *See https://www.epa.gov/sites/default/files/2021-04/documents/strengtheningenforcementincommunitieswithejconcerns.pdf.*

community. The commenters believe that EPA only took steps to promulgate a FIP as a result of a consent decree arising from a 2021 civil action, as EPA's deadline to promulgate a FIP was April 18, 2018, so the commenters request that EPA explain the delay in promulgating a FIP.

The commenters recommend that EPA's environmental justice analysis address the presence of vulnerable populations in the nonattainment area and include an analysis of the FIP's impact on these vulnerable populations, such as individuals with asthma, particularly with respect to long-term average emission limits. The commenters note that the presence of asthma in Detroit is extremely high as compared to the rest of the state and point to studies showing that vulnerable populations may experience health effects associated with SO_2 concentrations below the NAAQS. The commenters state that affected populations of the nonattainment area need assurance on plans for access to healthcare, asthma treatment, and air filtration. The commenters also request a more detailed description of aggressive enforcement measures EPA will use and recommend that EPA require all sources to install CEMS.

Response: While EPA appreciates the commenters' concerns and the issues facing communities in the greater Detroit area, in general EPA disagrees with the commenters' characterization of EPA's consideration of environmental justice as it regards this action. EPA is aware of the demographic data for the Detroit nonattainment area, and that the Detroit nonattainment area includes communities that are pollution-burdened and underserved. In part for this reason, EPA conducted outreach beyond its obligations of notice-and-comment rulemaking as discussed in the response to comments on EPA's outreach and comment process below.

Under section 109 of the CAA, EPA sets primary, or health-based, NAAQS for all criteria pollutants to provide requisite protection of public health, including the health of at-risk populations, with an adequate margin of safety. In EPA's June 22, 2010, rulemaking strengthening the SO_2 NAAQS to the level of 75 ppb, EPA provided a detailed rationale for the Administrator's determination that the 2010 SO_2 NAAQS would be protective of public health (75 FR 35520). This rationale included explicit consideration of protection for people, including children, with asthma. Specifically, the standard was based on direct evidence of SO_2-related effects in controlled human exposure studies of exercising individuals with asthma, as well as epidemiologic evidence of associations between SO_2 concentrations in ambient air and respiratory-related emergency department visits and hospitalizations.

Commenters reference Executive Order 12898 (59 FR 7629, February 16, 1994), which directs Federal agencies, to the greatest extent practicable and permitted by law, to identify and address disproportionately high and adverse human health or environmental effects of their actions on minority and low-income populations. Executive Order 12898 is addressed in the executive order section of this action. With regard to environmental justice considerations, to identify environmental burdens and susceptible populations in communities in the Detroit nonattainment area, EPA performed a screening-level analysis using EPA's EJ screening and mapping tool (''EJScreen'').[9] EPA prepared two EJScreen reports covering buffer areas of 1- and 6-mile diameters around U.S. Steel, which is the main facility impacted by the FIP. Our screening-level analysis of the area strongly suggests that communities within the selected buffer areas bear a high overall pollution burden as indicated by high percentile values for particulate matter and other environmental indicators, as well as high percentiles of low income and people of color. Specifically, the 6-mile buffer included in the docket of this rulemaking showed that the percentage of low-income individuals is almost twice the U.S. average. These results highlight commenters' concerns of the pollution burdens that Detroit community members of different populations have faced.

Considering these results, EPA further considered emission reductions expected from the FIP and forthcoming emission reduction measures that may help to mitigate existing pollution issues in the area. As explained in the proposal, the proposed FIP regulatory language includes new SO_2 emission limits throughout the U.S. Steel facility. Additionally, the FIP includes several new requirements for U.S. Steel's Boilerhouse 2, including the requirement to combine and raise its stacks to increase dispersion away from the area, new limits, and installation of a new CEMS. Further, EPA included the DTE Trenton Channel permit as part of the FIP analysis, which was scheduled to retire [10] [11] at the time the proposed FIP was published and has since shut down as of June 19, 2022. Hence, the FIP analysis included the permitted (Permit to Install 125–11C) enforceable SO_2 limit of 5,907 lbs/hr on a 30-day average basis applicable to DTE Trenton Channel as a precautionary measure. Actual emissions at DTE Trenton Channel in recent years were 3,114, 3,754, and 885 tons per year (tpy) in 2018, 2019 and 2020, respectively. In Wayne County (the partial county containing in the Detroit SO_2 Nonattainment area), these reductions would account for 25.2, 31.9 and 14.8 percent of SO_2 emissions in 2018, 2019 and 2020, respectively. While EPA recognizes the importance of assessing impacts of our actions on potentially overburdened communities, we believe that the promulgation of the FIP will not adversely affect disproportionally impacted populations in the Detroit nonattainment area. The purpose of the FIP is to ensure attainment and maintenance of the NAAQS, so promulgation of this FIP is expected to have a positive impact on the Detroit nonattainment area as a whole, for all populations in the Detroit nonattainment area.

With regard to the delay in bringing the area into attainment, Michigan and EPA have faced several obstacles during the attainment planning process, beginning with the invalidation of Michigan Administrative Code (MAC) 336.1430 (''Rule 430'') by the Michigan Court of Claims on October 4, 2017. The court held that, because Rule 430 contained enforceable limits for U.S. Steel and the limits applied to a single facility, Rule 430 failed the ''general applicability'' requirement of Michigan's Administrative Procedures Act, Michigan Compiled Laws (MCL) 24.201 *et seq.* The court expressly declined to advise how the State could properly impose emission limits on the source at issue via other means but noted elsewhere in the decision that the state and other sources ''agreed to revise pertinent DEQ permits.'' Since the time of the designation, Michigan and EPA have been working on an approvable attainment plan and emission reductions in the area. In addition, to the extent that the State prefers to proceed via generally applicable state regulations rather than permits, EPA expects that Michigan will draft future rules to avoid the concerns raised by the

[9] *See* documentation on EPA's Environmental Justice Screening and Mapping Tool at *https://www.epa.gov/ejscreen.*

[10] *See https://earthjustice.org/news/press/2022/coal-plants-retiring-with-millions-of-dollars-flowing-to-environmental-justice-communities.*

[11] *See https://earthjustice.org/sites/default/files/files/267-1_-_sierra_club_-_dte_separate_agreement.pdf.*

court which resulted in invalid SO_2 limits to avoid this issue going forward.

In 2016, Michigan submitted an SO_2 attainment plan for the Detroit nonattainment area, which included limits for DTE Trenton Channel, DTE River Rouge, Carmeuse Lime, and U.S. Steel. While EPA was unable to approve the 2016 attainment plan as a whole, EPA did approve the limits for DTE Trenton Channel and Carmeuse Lime into Michigan's SIP on March 19, 2021. The compliance dates for DTE Trenton Channel and Carmeuse Lime permits were January 1, 2017, and October 1, 2018, respectively, and both facilities have been in compliance since their respective dates. In March 2020, a more stringent interim limit for DTE River Rouge became effective, and in May 2021 the facility shut down.

Although the FIP is based on maximum allowable or uncontrolled emissions, EPA also completed a model run using actual emissions from 2015–2017, which was used in EPA's January 28, 2022, action to determine whether the area attained the standard by the attainment date (87 FR 4501). The modeling was based on guidelines from appendix W of 40 CFR part 51 and EPA's TAD that contained an assessment of the air quality impacts from the following sources: U.S. Steel Ecorse, U.S. Steel Zug Island, EES Coke, DTE River Rouge, DTE Trenton Channel, Carmeuse Lime, DTE Monroe, Cleveland-Cliffs Steel Corporation, DIG, and Marathon Refinery. The modeling demonstration included actual emissions for DTE River Rouge, Trenton Channel, and U.S. Steel, the source that was determined to have the most significant contribution to the maximum NAAQS violations in the area. EPA found that the areas with modeled SO_2 concentrations above the NAAQS were on and surrounding Zug Island in areas that are not residential, while all the monitors in the Detroit nonattainment area showed values below the NAAQS. The updated FIP analysis modeled attainment of the NAAQS in the Detroit nonattainment area after inclusion of the new U.S. Steel emission limits proposed in this FIP and the emission reduction measures that have already occurred since the finding of failure to attain, including the previously approved DTE Trenton Channel and Carmeuse Lime emission limits and the shutdown of DTE River Rouge. The implementation of the FIP makes these reductions, as well as the existing emission limits at EES Coke, Cleveland-Cliffs Steel Corporation, and DIG, permanent and enforceable and provides protection for future attainment. Further, as previously discussed, these reductions will be even greater with the shutdown of DTE Trenton Channel.

With regard to the enforcement measures that EPA will use, as stated in the proposed rule, options include the issuance of an administrative order requiring compliance with the applicable implementation plan; the issuance of an administrative order requiring the payment of a civil penalty for past violations; and the commencement of a civil judicial action. These options are explained further in the response to the comment above regarding contingency measures. While the FIP does not require CEMS on all units, as explained in the response to comments about CEMS above, EPA is confident that the FIP provides adequate means of determining whether a violation has occurred in order to take appropriate enforcement action.

Comment: EPA received four comments on EPA's outreach and comment process. The commenters contend that the timeline between the proposed rule publication date and the public hearing and public hearing registration deadline was not sufficient and should have been closer to 30 or 45 days, similar to other EPA comment periods. The commenters state that while EPA is facing a tight deadline to finalize the FIP, the tight timeline is due, in part, to EPA's delay in responding to Michigan's SIP.

The commenters also state that while EPA held a meeting with various Detroit environmental organizations and community groups in March 2022, the FIP was not the main focus of the meeting and a more robust approach to community outreach was needed, particularly due to the high levels of limited English proficiency (LEP) persons living in the area. The commenters give examples of ways that EPA could have improved its public outreach, including holding a community meeting before the proposed FIP was published, working with community groups in the area to distribute information, and providing handouts about the FIP surrounding the public hearing. One commenter believes that EPA should engage with the public as soon as new NAAQS are set and EPA knows which areas area likely to fall into nonattainment about the causes and impacts of the nonattainment designation and solutions being sought, as well as after each delay to explain why the delay occurred and how it will be avoided in the future.

Additionally, the commenters state that EPA only provided notice of the hearing in the proposed rule published in the **Federal Register** and did not provide notice that was sufficiently accessible on widely disseminated platforms or reach out directly to the community. In particular, the commenters note that the proposed rule was published in English with no translation services available and that translation services were not made available for the public hearing, which is of particular concern due to the Spanish and Arabic speaking communities in and surrounding the nonattainment area. The commenters note that while EPA did solicit requests for translation services in the proposed rule, this solicitation did not give LEP persons meaningful access to translation services as it was published in an English-only document with a tight deadline for submitting requests. Therefore, the commenters suggest that EPA should have proactively provided Arabic and Spanish translation services at the public hearing.

The commenters contend that EPA did not meet its obligations under Executive Order 13166 and EPA's FY 2022–2026 Strategic Plan and has subjected individuals to discrimination by failing to proactively reach out to LEP persons in and around the nonattainment area due to the high percentages of LEP persons in the area, as shown in EJScreen analyses completed by both commenters and EPA. Additionally, the commenters mention the Informal Resolution Agreement that EPA entered with Michigan, under which Michigan developed an LEP Plan. The commenters believe that EPA should have followed the guidelines set forward in this plan, which include providing solicitations for translation services in other languages besides English and developing a strategy to best engage with LEP individuals. The commenters note that while EPA has since translated a fact sheet into Arabic and Spanish, these fact sheets were not available at the beginning of the comment period and EPA did not release a plan on how to ensure the documents would reach LEP persons.

Response: EPA appreciates the commenters' suggestions on how EPA can improve its outreach and comment process and will consider, as appropriate, in future actions the suggestions to extend the time between proposal publication and public hearing, engage earlier with the public, and reach out to LEP communities before the comment period. However, EPA would like to highlight the additional outreach efforts that EPA made surrounding the FIP proposal publication beyond its obligations of notice-and-comment rulemaking.

As the commenters note, EPA held a meeting with representatives from the City of Detroit, Michigan Environmental Council, Great Lakes Environmental Law Center (GLELC), Southwest Detroit Environmental Vision, and the Ecology Center regarding the FIP, including a presentation by EPA and a roundtable discussion with these stakeholders. EPA disagrees that the FIP was not the main topic of the meeting and has posted the presentation and attendance list to the docket for this action. Specifically, after outlining a summary of the FIP proposal, EPA requested feedback on structuring future engagement with stakeholders in Detroit.

In addition to communicating directly with stakeholders, EPA issued a press release on the day the proposed FIP was published in the **Federal Register**.[12] The press release noted that EPA would be accepting public comments on the proposed FIP. EPA also created a website for the FIP containing a summary of the rule, as well as information about how to register for the public hearing or submit written comments. The FIP was also highlighted on EPA's Region 5 web page.

With regard to translation services for the public hearing, EPA solicited requests in both the **Federal Register** document as well as on the registration web page for the public hearing. EPA proactively arranged for interpretation services to be available at the public hearing in case the services were requested by registered attendees; however, no registered attendees requested these services or any other translation services.

During the public comment period, EPA received a request from GLELC to delay the public hearing, as GLELC stated that EPA had not provided adequate outreach to LEP communities. Per the email exchange posted in the docket for this action, EPA was unable to delay the public hearing, but did what was possible during the comment period to address this request. As the commenters note, EPA created a fact sheet, which included information about how to submit written comments, during the comment period and translated it into Spanish and Arabic. EPA posted the fact sheets in the docket for this action, on the FIP web page, and on the general Spanish and Arabic EPA web pages. EPA appreciates the suggestions on how to reach out to LEP communities more proactively for future rulemakings.

[12] *https://www.epa.gov/newsreleases/epa-opens-public-comment-period-proposed-federal-plan-reduce-sulfur-dioxide-air.*

Comment: Two commenters argue that EPA should develop maps and other analyses that represent SO_2 exposure within and outside of the nonattainment area in conjunction with maps illustrating cumulative impacts of social, economic, and physical environmental factors to show how SO_2 concentrations add to cumulative pollution impacts and to evaluate environmental justice concerns.

Response: The focus of this action is to ensure attainment of the SO_2 NAAQS within the nonattainment area. EPA has no information suggesting that SO_2 concentrations outside of the nonattainment area boundary are above the SO_2 NAAQS, and EPA does not believe that exposure maps within and beyond the nonattainment are pertinent to demonstrating how the control measures and emissions limits in the FIP provide for attainment of the SO_2 NAAQS in the Detroit area.

Comment: The FIP includes two separate limits for U.S. Steel Boilerhouse 2 based on two different operating scenarios. Two commenters note that the FIP incorrectly states that Boilerhouse 2 is the only U.S. Steel unit operating under the scenario in which Boilerhouse 2 has a limit of 750.00 lbs/hr. The commenters point out that the modeling analysis for this scenario includes operation of the U.S. Steel Ecorse sources, which include the Hot Strip Mill, No. 2 Baghouse, Main Plant Boiler No. 8, and Main Plant Boiler No. 9, in addition to Boilerhouse 2.

Response: EPA notes that the U.S. Steel Ecorse sources were included in the modeling analysis for the scenario in which Boilerhouse 2 has a limit of 750 lbs/hr and were incorrectly excluded from the scenario in the proposed rule. EPA has updated 40 CFR 52.1189(b)(1)(ii) accordingly. The limits for the U.S. Steel Ecorse sources are shown in Table 1 below.

TABLE 1—U.S. STEEL ECORSE LIMITS

Unit	SO_2 emission limit (lbs/hr)
Hot Strip Mill—Slab Reheat Furnace 1	0.31
Hot Strip Mill—Slab Reheat Furnace 2	0.31
Hot Strip Mill—Slab Reheat Furnace 3	0.31
Hot Strip Mill—Slab Reheat Furnace 4	0.31
Hot Strip Mill—Slab Reheat Furnace 5	0.31
No. 2 Baghouse	3.30
Main Plant Boiler No. 8	0.07
Main Plant Boiler No. 9	0.07

Comment: The proposed FIP includes a requirement for the owner or operator of the U.S. Steel facility to combine and raise all five stacks from each corresponding boiler at U.S. Steel Boilerhouse 2 into a single larger stack. Two commenters state that all five Boilerhouse 2 boilers are not currently in operation. The commenters request that only stacks from the operating boilers be required to be included in the combined stack in order to reduce capital, operating, and maintenance costs. The commenters assert that if a boiler begins operation at a later date, it can be included in the stack at that time.

Response: EPA agrees that not requiring any idled boiler stacks to be added to the combined Boilerhouse 2 stack, so long as no SO_2 is emitted from Boilerhouse 2 except from the new stack after the new stack construction is required to be completed, would not affect attainment of the NAAQS in the Detroit area. Therefore, EPA is not explicitly requiring that all Boilerhouse 2 boilers be added to the combined stack, and EPA has updated 40 CFR 52.1189(b)(2)(i) accordingly. As set forth in 40 CFR 52.1189(b)(2)(ii), beginning two years after the effective date of the FIP, no owner or operator shall emit SO_2 from Boilerhouse 2, except from the stack point at least 170 feet above ground level.

Comment: EPA received two comments about the U.S. Steel Boilerhouse 2 stack construction timeline. The commenters contend that the two years allotted for construction of the stack is not sufficient, as construction cannot begin until Michigan issues the construction permit. The commenters state that at least 15 months are needed to procure materials and complete stack construction, which would leave 9 months for Michigan to issue the permit. The commenters allege that the timeline is aggressive, given that the completion is dependent on Michigan acting quickly to issue the permit.

Response: EPA disagrees that the U.S. Steel Boilerhouse 2 stack construction timeline is insufficient. The construction permit process was considered as part of this timeline. Michigan is aware of the construction timeline, and the construction permit for the Boilerhouse 2 stack construction is a high priority for the State. Additionally, Michigan is statutorily required to process permit applications within 240 days if public comment is required and 180 days if public comment is not required.[13] This

[13] *See* correspondence between EPA and Michigan included in the docket for this action.

comment did not provide any new information on the project timeline, so therefore, EPA is not extending the timeline for the Boilerhouse 2 stack construction.

Comment: The commenter states that the community would like to know if they will be notified if facilities reopen, how they would be affected if facilities have ownership changes, what kind of assurance there is that Michigan will not permit new sources in the area, and EPA's future commitment to the Detroit area.

Response: The focus of this action is to ensure attainment of the SO_2 NAAQS in the Detroit area. The requirements of the FIP will continue to apply regardless of any facility ownership change. If there are changes to the Michigan SIP, which includes the emission limits and requirements set forth in the FIP, those changes will be subject to public notice and comment.

Comment: The commenter requests that EPA explain how it will guarantee that the FIP will attain and maintain the SO_2 NAAQS in light of the June 30, 2022, *West Virginia* v. *EPA* Supreme Court ruling regarding EPA's ability to regulate carbon emissions.

Response: The attainment planning requirements that the FIP addresses are set forth in the CAA, and the June 30, 2022, Supreme Court ruling does not affect this action. This action regulates SO_2 emissions, which the CAA explicitly requires, and does not regulate carbon emissions as such or impose limits on greenhouse gas emissions.

Comment: The commenter states that industry should be held accountable for the pollution that it emits, and that industry and government do not provide sufficiently transparent air quality data.

Response: This nonattainment plan provides emission limits and requirements for facilities in the Detroit area and is protective of the SO_2 NAAQS. A variety of air quality data sources are available for the Detroit area, including but not limited to design value reports,[14] ECHO,[15] and AirNow.[16]

Comment: The commenter requests that EPA minimize the cost and time required to implement the FIP, as the commenter states that a facility that is not economically viable is less likely to comply with limits.

Response: The FIP includes limits and associated requirements needed to meet the NAAQS in the Detroit area. Compliance with the requirements of the FIP is not optional and is not dependent on a facility's economic viability. As discussed further above in the response to comments regarding continency measures, EPA has a comprehensive enforcement program as specified in section 113 of the CAA. Under this program, EPA is authorized to take any action it deems necessary or proper for the effective enforcement of the CAA and the rules and regulations promulgated under the CAA, including the requirements set forth in the FIP.

Comment: The commenter states that alleged deficiencies in the model cannot be addressed by assuming DTE Trenton Channel will be shut down, as there are several model receptors with concentrations that exceed 70 ppb.

Response: EPA's FIP modeling analysis does not assume the shutdown of DTE Trenton Channel. Instead, the FIP analysis includes the permitted (Permit to Install 125–11C) enforceable SO_2 limit of 5,907 lbs/hr on a 30-day average basis as a precautionary measure. As described above, particularly in the response to comments regarding background concentrations and dispersion coefficients, EPA concludes that its modeling analysis sufficiently demonstrates attainment of the SO_2 NAAQS of 75 ppb, even assuming continued operation of DTE Trenton Channel (which will not in fact operate).

Comment: The commenter points out that the emission rate used for DTE Trenton Channel in the model is higher than the emission rate specified in the proposed FIP (7,834 lbs/hr versus 7,661 lbs/hr).

Response: EPA notes the discrepancy between the DTE Trenton Channel emission rates in the proposed FIP and in the model. As no other changes were made to the model, EPA did not remodel based on this error alone, since the error resulted in a more conservative design value. EPA believes that this discrepancy has minimal impact on the maximum modeled concentration, and as it results in an overestimate, it does not have any negative impact on human health.

III. What action is EPA taking?

EPA is promulgating a FIP for attaining the 2010 SO_2 NAAQS for the Detroit area and for meeting other nonattainment area planning requirements. In accordance with section 172 of the CAA, this FIP includes an attainment demonstration for the Detroit area and addresses requirements for RFP, RACT/RACM, enforceable emission limitations and control measures, and contingency measures. EPA has previously concluded that Michigan has addressed the requirements for emissions inventories for the Detroit area and nonattainment area NSR.

The FIP is based on the Carmeuse Lime emission limits specified in Permit to Install 193–14A, the DTE Trenton Channel emission limits specified in Permit to Install 125–11C, and the U.S. Steel, EES Coke, Cleveland-Cliffs Steel Corporation, and DIG emission limits specified in the regulatory language of this FIP. The Carmeuse Lime and DTE Trenton Channel permits have already been approved into Michigan's SIP that is incorporated into 40 CFR part 52, so EPA is not re-incorporating them into 40 CFR part 52 here.

EPA made changes to the regulatory text that was included in the proposed FIP under 40 CFR 52.1189 paragraphs (b)(1)(ii), (b)(2)(i), (b)(3)(ii), and (e)(2) due to public comments received. These changes include updating the list of sources that may operate under the scenario in which U.S. Steel Boilerhouse 2 has a limit of 750.00 lbs/hr to include U.S. Steel Ecorse sources, as included in EPA's modeling analysis; not explicitly requiring all Boilerhouse 2 boiler stacks to be merged and raised, so long as no SO_2 is emitted except from the new stack beginning two years after the effective date of the FIP; adding U.S. Steel No. 2 Baghouse to the list of units subject to monitoring requirements, which previously was incorrectly omitted; and adding language regarding compliance for DIG Flares 1 and 2. Additionally, EPA corrected a citation error in the proposed regulatory text under CFR 52.1189(b)(3)(iii).

This FIP satisfies EPA's duty to promulgate a FIP for the area under CAA section 110(c) that resulted from the previous finding of failure to submit. However, it does not affect the sanctions clock started under CAA section 179 resulting from EPA's partial disapproval of the prior SIP, which would be terminated by an EPA rulemaking approving a revised SIP. *See* 40 CFR 52.31.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563

This action is exempt from review by the Office of Management and Budget (OMB), as it is not a rule of general applicability. This action specifically regulates four facilities in Detroit, Michigan.

[14] *See https://www.epa.gov/air-trends/air-quality-design-values#:~:text=A%20design%20value%20is%20a,50Exit%20Exit%20EPA%20website.*

[15] *See https://echo.epa.gov/resources/echo-data/about-the-data.*

[16] *See https://gispub.epa.gov/airnow.*

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* Under the Paperwork Reduction Act, a ''collection of information'' is defined as a requirement for ''answers to . . . identical reporting or recordkeeping requirements imposed on ten or more persons . . .'' 44 U.S.C. 3502(3)(A). Because the FIP applies to just four facilities, the Paperwork Reduction Act does not apply. *See* 5 CFR 1320(c).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. The OMB control numbers for our regulations in 40 CFR are listed in 40 CFR part 9.

C. Regulatory Flexibility Act

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This action adds additional controls to certain sources. None of these sources are owned by small entities, and therefore are not small entities.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. To the extent this action will limit SO_2 emissions, the rule will have a beneficial effect on children's health by reducing air pollution.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

This final rule will improve local air quality by reducing SO_2 emissions in a part of the Detroit metropolitan area that includes a higher proportion of minority and low-income populations compared to the State or US averages. Socioeconomic indicators such as low income, unemployment rate and percentage of people of color[17] were all at levels at least two times that of the state-wide averages (in some cases two to five times higher), within one to six miles from facilities affected by this action (*see* EJScreen analyses provided in the docket for this action). These populations, as well as all affected populations in this area, will stand to benefit from the increased level of environmental protection with the implementation of this rule.

[17] See *https://www.epa.gov/ejscreen/overview-demographic-indicators-ejscreen* for the definition of each demographic indicator.

K. Determination Under Section 307(d)

Pursuant to CAA section 307(d)(1)(B), this action is subject to the requirements of CAA section 307(d), as it promulgates a FIP under CAA section 110(c).

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability.

M. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by December 12, 2022. 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, does not extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. *See* CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

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

Michael Regan,

Administrator.

For the reasons stated in the preamble, 40 CFR part 52 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.*

■ 2. Add § 52.1189 to subpart X to read as follows:

§ 52.1189 Control strategy: Sulfur dioxide (SO_2).

(a) The plan submitted by the State on May 31, 2016 to attain the 2010 1-hour primary sulfur dioxide (SO_2) national

ambient air quality standard for the Detroit SO_2 nonattainment area does not meet the requirements of Clean Air Act (CAA) section 172 with respect to SO_2 emissions from the U.S. Steel (Ecorse and Zug Island), EES Coke, Cleveland-Cliffs Steel Corporation (formerly AK or Severstal Steel), and Dearborn Industrial Generation (DIG) facilities in the Detroit, Michigan area. These requirements for these four facilities are satisfied by paragraphs (b)through(e) of this section, respectively.

(b) This section addresses and satisfies CAA section 172 requirements for the Detroit SO_2 nonattainment area by specifying the necessary emission limits and other control measures applicable to the U.S. Steel Ecorse and Zug Island facilities. This section applies to the owner(s) and operator(s) of the facilities located at 1 Quality Drive and 1300 Zug Island Road in Detroit, Michigan. The requirements in this section for the Hot Strip Mill Slab Reheat Furnaces 1–5, No. 2 Baghouse, Main Plant Boiler No. 8, and Main Plant Boiler No. 9 apply to the owner and operator of the U.S. Steel Ecorse facility, and the requirements in this section for Boilerhouse 1, Boilerhouse 2, A1 Blast Furnace, B2 Blast Furnace, D4 Blast Furnace, A/B Blast Furnace Flares, and D Furnace Flare apply to the owner and operator of the U.S. Steel Zug Island facility.

(1) *SO_2 emission limits.* (i) Beginning on the effective date of the FIP, no owner or operator shall emit SO_2 from the following units in excess of the following limits:

TABLE 1 TO PARAGRAPH (b)(1)(i)

Unit	SO_2 emission limit (lbs/hr)
Boilerhouse 1 (all stacks combined)	55.00
Hot Strip Mill—Slab Reheat Furnace 1	0.31
Hot Strip Mill—Slab Reheat Furnace 2	0.31
Hot Strip Mill—Slab Reheat Furnace 3	0.31
Hot Strip Mill—Slab Reheat Furnace 4	0.31
Hot Strip Mill—Slab Reheat Furnace 5	0.31
No. 2 Baghouse	3.30
Main Plant Boiler No. 8	0.07
Main Plant Boiler No. 9	0.07
A1 Blast Furnace	0.00
B2 Blast Furnace	40.18
D4 Blast Furnace	40.18
A/B Blast Furnace Flares	60.19
D Furnace Flare	60.19

(ii) Beginning two years after the effective date of the FIP, no owner or operator shall emit SO_2 from Boilerhouse 2 in excess of the following limits:

(A) Boilerhouse 2 shall emit less than 750.00 lbs/hr unless Boilerhouse 1, A1 Blast Furnace, B2 Blast Furnace, D4 Blast Furnace, A/B Blast Furnace Flares, or D Furnace Flare is operating, in which case it shall emit less than 81.00 lbs/hr.

(B) [Reserved]

(2) *Stack restrictions and permit requirements.* (i) The owner or operator shall construct a stack for Boilerhouse 2. The stack emission point must be at least 170 feet above ground level. The owner or operator shall submit a construction permit application for the stack to the State of Michigan within 90 days of the effective date of the FIP. Where any compliance obligation under this section requires any other state or local permits or approvals, the owner or operator shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

(ii) Beginning two years after the effective date of the FIP, no owner or operator shall emit SO_2 from Boilerhouse 2, except from the stack emission point at least 170 feet above ground level.

(3) *Monitoring requirements.* (i) Not later than two years after the effective date of the FIP, the owner or operator shall install and continuously operate an SO_2 continuous emission monitoring system (CEMS) to measure SO_2 emissions from Boilerhouse 2 in conformance with 40 CFR part 60, appendix F procedure 1.

(ii) The owner or operator shall determine SO_2 emissions from Boilerhouse 1, Hot Strip Mill Slab Reheat Furnaces 1–5, No. 2 Baghouse, Main Plant Boiler No. 8, Main Plan Boiler No. 9, A1 Blast Furnace, B2 Blast Furnace, D4 Blast Furnace, A/B Blast Furnace Flares, and D Furnace Flare using mass balance calculations as described in paragraph (b)(4) of this section.

(iii) Within 180 days of the installation of the CEMS specified in paragraph (b)(3)(i) of this section, the owner or operator shall perform an initial compliance test for SO_2 emissions from Boilerhouse 2 while the boilerhouse is operating in accordance with the applicable emission limit during the period of testing identified in paragraph (b)(1)(ii) of this section. The initial compliance test shall be performed using EPA Test Method 6 at 40 CFR part 60, appendix A–4.

(4) *Compliance assurance plan.* To determine compliance with the limits in paragraph (b)(1)(i) of this section, the owner or operator shall calculate hourly SO_2 emissions using all raw material sulfur charged into each affected emission unit and assume 100 percent conversion of total sulfur to SO_2. The owner or operator shall implement a compliance assurance plan (CAP) for all units except Boilerhouse 2 and any idled units that shall specify the calculation methodology, procedures, and inputs used in these calculations and submit the plan to EPA within 30 days after the effective date of the FIP. The owner or operator must submit a list of idled units to EPA within 30 days of the effective date of the FIP. The owner or operator must submit a CAP for any idled units prior to resuming operations.

(5) *Recordkeeping.* The owner/operator shall maintain the following records continuously for five years beginning on the effective date of the FIP:

(i) All records of production for each affected emission unit.

(ii) All records of hourly emissions calculated in accordance with the CAP.

(iii) In accordance with paragraphs (b)(3) of this section, all CEMS data, including the date, place, and time of sampling or measurement; parameters sampled or measured; and results.

(iv) Records of quality assurance and quality control activities for emission monitoring systems including, but not limited to, any records required by 40 CFR part 60, appendix F Procedure 1.

(v) Records of all major maintenance activities performed on emission units, air pollution control equipment, CEMS, and other production measurement devices.

(vi) Any other records required by the Quality Assurance Requirements for Gas Continuous Emission Monitoring Systems Used for Compliance Determination rule at 40 CFR part 60, appendix F Procedure 1 or the National Emission Standards for Hazardous Air Pollutants for Integrated Iron and Steel Manufacturing Facilities rule at 40 CFR part 63, subpart FFFFF.

(6) *Reporting.* Beginning on the effective date of the FIP, all reports under this section shall be submitted quarterly to Compliance Tracker, Air Enforcement and Compliance Assurance Branch, U.S. Environmental Protection Agency, Region 5, Mail Code AE–17J, 77 W. Jackson Blvd., Chicago, IL 60604–3590.

(i) The owner or operator shall submit a CAP in accordance with paragraph (b)(4) of this section within 30 days of the effective date of the FIP.

(ii) The owner or operator shall report CEMS data and hourly mass balance calculations quarterly in accordance

with CEMS requirements in paragraph (b)(3) of this section and the CAP requirements set forth in paragraph (b)(4) of this section no later than the 30th day following the end of each calendar quarter.

(iii) The owner or operator shall report the results of the initial compliance test for the Boilerhouse 2 stack within 60 days of conducting the test.

(iv) The owner or operator shall submit quarterly excess emissions reports for all units identified in paragraphs (b)(1)(i) and (ii) of this section no later than the 30th day following the end of each calendar quarter. Excess emissions means emissions that exceed the emission limits specified in paragraph (b)(1) of this section. The reports shall include the magnitude, date(s), and duration of each period of excess emissions, specific identification of each period of excess emissions that occurs during all periods of operation including startups, shutdowns, and malfunctions of the unit, the nature and cause of any malfunction (if known), and the corrective action taken, or preventative measures adopted.

(v) The owner or operator of each unit shall submit quarterly CEMS performance reports, to include dates and duration of each period during which the CEMS was inoperative (except for zero and span adjustments and calibration checks), reason(s) why the CEMS was inoperative and steps taken to prevent recurrence, and any CEMS repairs or adjustments no later than the 30th day following the end of each calendar quarter.

(vi) The owner or operator shall also submit results of any CEMS performance tests required by 40 CFR part 60, appendix F, Procedure 1 (*e.g.,* Relative Accuracy Test Audits, Relative Accuracy Audits, and Cylinder Gas Audits) no later than 30 days after the test is performed.

(vii) When no excess emissions have occurred or the CEMS has not been inoperative, repaired, or adjusted during the reporting period, such information shall be stated in the quarterly reports required by paragraphs (b)(6) of this section.

(c) This section addresses and satisfies CAA section 172 requirements for the Detroit SO_2 nonattainment area by specifying the necessary emission limits and other control measures applicable to the EES Coke facility. This section applies to the owner and operator of the facility located at 1400 Zug Island Road in Detroit, Michigan.

(1) *SO_2 emission limits.* Beginning on the effective date of the FIP, no owner or operator shall emit SO_2 from the Underfire Combustion Stack EUCoke-Battery in excess of 544.6 lbs/hr, as a 3-hour average, and 2071 tons per year, on a 12-month rolling basis as determined at the end of each calendar month, and 0.702 pounds per 1000 standard cubic feet of coke oven gas, as a 1-hour average.

(2) *Monitoring requirements.* The owner or operator shall maintain and operate in a satisfactory manner a device to monitor and record the SO_2 emissions from the Underfire Combustion Stack EUCoke-Battery on a continuous basis. The owner or operator shall use Continuous Emission Rate Monitoring (CERM) data for determining compliance with the hourly limit in paragraph (c)(1) of this section. The owner or operator shall operate the CERM system in conformance with 40 CFR part 60, appendix F.

(d) This section addresses and satisfies CAA section 172 requirements for the Detroit SO_2 nonattainment area by specifying the necessary emission limits and other control measures applicable to the Cleveland-Cliffs Steel Corporation (formerly AK or Severstal Steel) facility. This section applies to the owner and operator of the facility located at 4001 Miller Road in Dearborn, Michigan.

(1) *SO_2 emission limits.* Beginning on the effective date of the FIP, no owner or operator shall emit SO_2 from the following units in excess of the following limits:

TABLE 2 TO PARAGRAPH (d)(1)

Unit	SO_2 emission limit	Time period/operating scenario
"B" Blast Furnace Baghouse Stack	71.9 lbs/hr	Calendar day average.
"B" Blast Furnace Stove Stack	38.75 lbs/hr	Calendar day average.
"B" Blast Furnace Baghouse and Stove Stacks (combined)	77.8 lbs/hr	Calendar day average.
"B" Blast Furnace Baghouse and Stove Stacks (combined)	340 tons per year	12-month rolling time period as determined at the end of each calendar month.
"C" Blast Furnace Baghouse Stack	179.65 lbs/hr	Calendar day average.
"C" Blast Furnace Stove Stack	193.6 lbs/hr	Calendar day average.
"C" Blast Furnace Baghouse and Stove Stacks (combined)	271.4 lbs/hr	Calendar day average.
"C" Blast Furnace Baghouse and Stove Stacks (combined)	1188 tons per year	12-month rolling time period as determined at the end of each calendar month.

(2) *Monitoring requirements.* The owner or operator shall maintain and operate in a satisfactory manner a device to monitor and record the SO_2 emissions and flow from ''B'' Blast Furnace and ''C'' Blast Furnace Baghouse and Stove Stacks on a continuous basis. The owner or operator shall use CERM data for determining compliance with the hourly limits in paragraph (d)(1) of this section. The owner or operator shall operate the CERM system in conformance with 40 CFR part 60, appendix F.

(e) This section addresses and satisfies CAA section 172 requirements for the Detroit SO_2 nonattainment area by specifying the necessary emission limits and other control measures applicable to the Dearborn Industrial Generation (DIG) facility. This section applies to the owner and operator of the facility located at 2400 Miller Road in Dearborn, Michigan.

(1) *SO_2 emission limits.* (i) Beginning on the effective date of the FIP, no owner or operator shall emit SO_2 from the following units in excess of the following limits:

TABLE 3 TO PARAGRAPH (e)(1)(i)

Unit	SO_2 emission limit	Time period/operating scenario
Boilers 1, 2, and 3 (combined)	420 lbs/hr	Daily average.
Boilers 1, 2, and 3 (combined)	1839.6 tons per year	12-month rolling time period.
Boilers 1, 2, and 3 and Flares 1 and 2 (combined)	840 lbs/hr	Daily average.
Boilers 1, 2, and 3 and Flares 1 and 2 (combined)	2947.7 tons per year	12-month rolling time period as determined at the end of each calendar month.

(ii) [Reserved]

(2) *Monitoring requirements.* (i) The owner or operator shall maintain and operate in a satisfactory manner a device to monitor and record the SO_2 emissions from Boilers 1, 2, and 3 on a continuous basis. Installation and operation of each CEMS shall meet the timelines, requirements and reporting detailed in 40 CFR part 60, appendix F. If the owner or operator chooses to use a Predictive Emissions Monitoring System (PEMS) in lieu of a CEMS to monitor SO_2 emissions, the permittee shall follow the protocol delineated in Performance Specification 16 in appendix B of 40 CFR part 60.

(ii) The owner or operator shall verify compliance with the emission limits for Boilers 1, 2 and 3 and Flares 1 and 2 (combined) by following the procedures and methodologies contained in the document entitled ''Protocol for Demonstrating Continuous Compliance with the Emission Limitations of ROP MI–ROP–N6631–2004'' dated May 31, 2011, or subsequent revisions to this document approved by EPA.

[FR Doc. 2022–21662 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2021–0774; FRL–10239–01–OCSPP]

Dimethyl Sulfoxide; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of dimethyl sulfoxide (CAS Reg. No. 67–68–5) when used as an inert ingredient (solvent, co-solvent), in pesticide formulations for pre-harvest applications, including post-emergence use. Exponent, Inc., on behalf of Gaylord Chemical Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an amendment to an existing tolerance exemption. This regulation eliminates the need to establish a maximum permissible level for residues of dimethyl sulfoxide for pre-harvest applications.

DATES: This regulation is effective October 12, 2022. Objections and requests for hearings must be received on or before December 12, 2022, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0774, is available at *https://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 and OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services, docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0774 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before December 12, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b), although the Office of the Administrative Law Judges, which houses the Hearing Clerk, encourages parties to file objections and hearing requests electronically. *See https://www.epa.gov/sites/default/files/2020-05/documents/2020-04-10_-_order_urging_electronic_service_and_filing.pdf.*

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–

2021–0774, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 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 *https://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Petition for Exemption

In the **Federal Register** of February 25, 2022 (87 FR 10760) (FRL–9410–01), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the filing of a pesticide petition (PP IN–11603) by Exponent, Inc., 1150 Connecticut Ave., Suite 1100, Washington, DC 20036, on behalf of Gaylord Chemical Company, LLC, 106 Galeria Boulevard, Slidell, LA 70458. The petition requested that 40 CFR 180.920 be amended by modifying an exemption from the requirement of a tolerance for residues of dimethyl sulfoxide (CAS Reg. No. 67–68–5) by allowing its use as an inert ingredient (solvent, co-solvent) in pesticide formulations applied for pre-harvest applications, including post-emergence use. That document referenced a summary of the petition prepared by Exponent, Inc. on behalf of Gaylord Chemical Company, the petitioner, which is available in the docket, *https://www.regulations.gov.* There were no comments received in response to the notice of filing.

III. Inert Ingredient Definition

Inert ingredients are all ingredients that are not active ingredients as defined in 40 CFR 153.125 and include, but are not limited to, the following types of ingredients (except when they have a pesticidal efficacy of their own): Solvents such as alcohols and hydrocarbons; surfactants such as polyoxyethylene polymers and fatty acids; carriers such as clay and diatomaceous earth; thickeners such as carrageenan and modified cellulose; wetting, spreading, and dispersing agents; propellants in aerosol dispensers; microencapsulating agents; and emulsifiers. The term ''inert'' is not intended to imply nontoxicity; the ingredient may or may not be chemically active. Generally, EPA has exempted inert ingredients from the requirement of a tolerance based on the low toxicity of the individual inert ingredients.

IV. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the tolerance is ''safe.'' Section 408(b)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. In order to determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for dimethyl sulfoxide including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with dimethyl sulfoxide follows.

A. Toxicological Profile

The toxicological profile of dimethyl sulfoxide remains unchanged from the Toxicological Profile in Unit IV.A. of the October 9, 2015, rulemaking (80 FR 61125) (FRL–9934–17). Refer to that section for a discussion of the toxicological profile of dimethyl sulfoxide.

B. Toxicological Points of Departure/Levels of Concern

The toxicological points of departure/levels of concern of dimethyl sulfoxide remains unchanged from the Toxicological Points of Departure/Levels of Concern discussion in Unit IV.B. of the October 9, 2015, rulemaking (80 FR 61125) (FRL–9934–17). No endpoints of concern were identified. Refer to that section for a discussion of the toxicological points of departure/levels of concern of dimethyl sulfoxide.

C. Exposure Assessment

The exposure assessment for dimethyl sulfoxide remains unchanged from the discussion in Unit IV.C. of the October 9, 2015, rulemaking and supporting human health risk assessment (September 11, 2015). Refer to that section for a discussion of the exposure assessment for dimethyl sulfoxide.

Cumulative effects from substances with a common mechanism of toxicity. Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

Based on the lack of toxicity in the available database, EPA has not found dimethyl sulfoxide to share a common mechanism of toxicity with any other substances, and dimethyl sulfoxide does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance exemption, therefore, EPA has assumed that dimethyl sulfoxide does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticide-science-and-*

assessing-pesticide-risks/cumulative-assessment-risk-pesticides.

D. Safety Factor for Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the Food Quality Protection Act (FQPA) Safety Factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor.

Because there are no threshold effects associated with dimethyl sulfoxide, EPA conducted a qualitative assessment. As part of that assessment, the Agency did not use safety factors for assessing risk, and no additional safety factor is needed for assessing risk to infants and children. Based on an assessment of dimethyl sulfoxide EPA has concluded that there are no toxicological endpoints of concern for the U.S. population, including infants and children.

E. Aggregate Risks and Determination of Safety

The aggregate exposure assessment for dimethyl sulfoxide remains unchanged from the discussion in Unit IV.E. of the October 9, 2015, rulemaking and supporting human health risk assessment. Refer to that section for a detailed discussion of the aggregate assessment for dimethyl sulfoxide (these documents can be found at *https://www.regulations.gov* under docket ID numbers EPA–HQ–OPP–2014–0630 and EPA–HQ–OPP–2021–00774). In summary, qualitative dietary, residential and aggregate assessments were performed due to the lack of toxicity endpoints of concern. There was no dietary, residential or aggregate risks of concern for the U.S. population and all subpopulations. Based on this human health risk assessment, an exemption from the requirement of a tolerance was established for residues of dimethyl sulfoxide under 40 CFR 180.920 for use before crop emerges from soil or prior to formation of edible parts of food plants; for pesticide formulations used after crop emerges but before harvest. This limitation was based on concerns regarding the chemical properties of dimethyl sulfoxide that could result in increased active ingredient residues. However, the petitioner submitted a comparative field trial residue study showing that dimethyl sulfoxide as an inert ingredient in pesticide formulations does not increase active ingredient residues. EPA has concluded that the use of dimethyl sulfoxide as an inert ingredient in pesticide formulations does not increase active ingredient residues; nor is it expected to result in active ingredient residue levels that exceed established tolerances. Therefore, since there is no concern for increased active ingredient residues on treated crops due to dimethyl sulfoxide and there are no endpoints of concern for dimethyl sulfoxide, the qualitative dietary, non-dietary risk, and aggregate assessments performed in 2015 are appropriate and remain unchanged. As a result, the Agency has determined that a tolerance is not necessary to protect public health.

Therefore, based on the risk assessments and information described above, EPA concludes there is a reasonable certainty that no harm will result to the general population, or to infants and children, from aggregate exposure to dimethyl sulfoxide.

V. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

VI. Conclusions

Therefore, an exemption from the requirement of a tolerance is established under 40 CFR 180.920 for dimethyl sulfoxide (CAS Reg. No. 67–68–5) when used as an inert ingredient (solvent, co-solvent) in pesticide formulations pre-harvest applications, including post-emergence use.

VII. Statutory and Executive Order Reviews

This action establishes a tolerance exemption under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance exemption in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or Tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 5, 2022.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR part 180 as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.920, amend table 1 by:

■ a. Removing the entry for ''Dimethyl sulfoxide''; and

■ b. Revising the entry ''Dimethyl sulfoxide (CAS Reg. No. 67–68–5)''.

The revision reads as follows:

§ 180.920 Inert ingredients used pre-harvest; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO 180.920

Inert ingredients	Limits	Uses
* * * * * * *		
Dimethyl sulfoxide (CAS Reg. No. 67–68–5)		Solvent/co-solvent.
* * * * * * *		

[FR Doc. 2022–22129 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2021–0422; FRL–9994–01–OCSPP]

Lysate of Willaertia magna C2c Maky; Exemption From the Requirement of a Tolerance

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of Lysate of *Willaertia magna* C2c Maky in or on raw agricultural commodities and processed food, when used in accordance with label directions and good agricultural practices. The Amoéba SA, 38 ave des Frères Montgolfier, F–69680 Chassieu, France, submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of Lysate of *Willaertia magna* C2c Maky when used in accordance with this exemption.

DATES: This regulation is effective October 12, 2022. Objections and requests for hearings must be received on or before December 12, 2022, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2021–0422, is available at *https://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 and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services, docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Charles Smith, Biopesticides and Pollution Prevention Division (7511M), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1400; email address: *BPPDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, greenhouse owner, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. How can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a(g), any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2021–0422 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before December 12, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please

submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2021–0422, by one of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 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 *https://www.epa.gov/dockets/contacts.html.*

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of April 28, 2022 (87 FR 25178 (FRL–8792–03–OCSPP), EPA issued a document pursuant to FFDCA section 408(d)(3), 21 U.S.C. 346a(d)(3), announcing the filing of a pesticide tolerance petition (PP 0F8873) by Amoéba SA, 38 ave des Frères Montgolfier, F–69680 Chassieu, France. The petition requested that 40 CFR part 180 be amended to establish an exemption from the requirement of a tolerance for residues of the pesticide, when used as a fungicide and systemic resistance inducer for various food crops in fields and greenhouses, in accordance with label directions and good agricultural practices. That document referenced a summary of the petition prepared by the petitioner, Amoéba SA, which is available in the docket, *https://www.regulations.gov.* There were no relevant comments received in response to the notice of filing.

Based upon review of the data supporting the petition and in accordance with its authority under FFDCA section 408(d)(4)(A)(i), EPA is establishing a tolerance exemption that varies from what the petitioner sought. The reason for the change is explained in full detail in Unit V.B.

III. Aggregate Risk Assessment and Determination of Safety

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and in residential settings but does not include occupational exposure. Pursuant to FFDCA section 408(c)(2)(B), in establishing or maintaining in effect an exemption from the requirement of a tolerance, EPA must take into account the factors set forth in FFDCA section 408(b)(2)(C), which require EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue. . . .'' Additionally, FFDCA section 408(b)(2)(D) requires that the Agency consider ''available information concerning the cumulative effects of a particular pesticide's residues'' and ''other substances that have a common mechanism of toxicity.''

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be clearly demonstrated that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no harm to human health. If EPA is able to determine that a tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(c)(2)(A), and the factors specified in FFDCA section 408(c)(2)(B), EPA has reviewed the available scientific data and other relevant information in support of this action. EPA has sufficient data to assess the hazards of and to make a determination on aggregate exposure for Lysate of *Willaertia magna* C2c Maky including exposure resulting from the exemption established by this action. EPA's assessment of exposures and risks associated with Lysate of *Willaertia magna* C2c Maky follows.

A. Toxicological Profile

Willaertia magna C2c Maky is a non-genetically modified microorganism isolated from the thermal baths of Aix-les-Bains (France). It is a thermophilic free-living amoeba strain that belongs to the protozoan order, among eukaryotic unicellular mobile microorganisms (with flagella). It is a natural predator of bacteria, including *Legionella,* and other smaller amoebas. The lack of pathogenicity of this amoeba in human endothelial cells was demonstrated by cell culture.

With regard to the overall toxicological profile, *Willaertia magna* C2c Maky is of low toxicity. Based on acute studies, *Willaertia magna* C2c Maky is of low acute oral toxicity and acute inhalation toxicity (Toxicity Category III), low acute dermal toxicity (Toxicity Category III) and is non-irritating to the skin and eye (Toxicity Category IV). The chemical is not a skin sensitizer. Subchronic 90-day oral toxicity, developmental toxicity, reproductive toxicity and mutagenicity data requirements were satisfied by guideline studies. There were no adverse subchronic effects for any oral routes of exposure. The active ingredient was determined to be non-mutagenic, and no adverse effects were identified relative to either developmental toxicity or reproductive toxicity. EPA granted waivers for the 90-day dermal and 90-day inhalation data requirements based on a weight of the evidence approach (WOE) due to: (1) significant volatilization not being expected, (2) low overall acute toxicity (Toxicity Category III for inhalation), (3) its components are naturally-occurring and are similar to substances already present in mammalian cells, (4) the lysate of Willaertia magna C2c Maky being non-irritating to the skin and non-sensitizing to the skin and its physical/chemical properties indicate it is unlikely to be dermally absorbed, and (5) no adverse effects were seen in neither the 90-day oral toxicity study up to the limit dose nor the prenatal developmental toxicity study up to the limit dose.

B. Toxicological Points of Departure/Levels of Concern

EPA did not identify any toxicological endpoints of concern for *Willaertia magna* C2c Maky.

C. Exposure Assessment

1. *Dietary exposure from food, feed uses, and drinking water.* As part of its qualitative risk assessment for lysate of

Willaertia magna C2c Maky, the Agency considered the potential for dietary exposure to residues of lysate of *Willaertia magna* C2c Maky. EPA concludes that dietary (food and drinking water) exposures are possible. However, no toxicological endpoint of concern was identified for lysate of *Willaertia magna* C2c Maky, and therefore, a quantitative assessment of dietary exposure is not necessary.

2. *From non-dietary exposure.* The term ''residential exposure'' is used in this document to refer to non-occupational, non-dietary exposure (*e.g.,* textiles (clothing and diapers), carpets, swimming pools, and hard surface disinfection on walls, floors, tables). There are currently no proposed residential uses for this active ingredient; therefore, a residential exposure assessment is not necessary.

3. *Cumulative effects from substances with a common mechanism of toxicity.* Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.'' EPA has not found that lysate of *Willaertia magna* C2c Maky shares a common mechanism of toxicity with any other substances, and it does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed lysate of *Willaertia magna* C2c Maky does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticides/cumulative.*

D. Safety Factor for Infants and Children

FFDCA Section 408(b)(2)(C) provides that EPA shall retain an additional tenfold (10X) margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the database on toxicity and exposure unless EPA determines based on reliable data that a different margin of safety will be safe for infants and children. This additional margin of safety is commonly referred to as the FQPA safety factor (SF). In applying this provision, EPA either retains the default value of 10X, or uses a different additional safety factor when reliable data available to EPA support the choice of a different factor. An FQPA safety factor is not required at this time for lysate of *Willaertia magna* C2c Maky because no dietary endpoints have been selected based on the lack of human-relevant adverse effects at limit doses in the 90-day oral toxicity study and prenatal developmental toxicity study.

E. Aggregate Risk

Based on the available data and information, the EPA has concluded that a qualitative aggregate risk assessment is appropriate to support the pesticidal use of lysate of *Willaertia magna* C2c Maky, and that risks of concern are not anticipated from aggregate exposure to the substance. This conclusion is based on the low toxicity of the active ingredient.

A full explanation of the data upon which EPA relied and its risk assessment based on those data can be found within the January 13, 2022, document entitled ''BPPD Risk Assessment 91283–I, 91283–O and Tolerance Petition.'' This document, as well as other relevant information, is available in the docket for this action as described under **ADDRESSES**.

IV. Determination of Safety for U.S. Population, Infants and Children

Based on the Agency's assessment, EPA concludes that there is reasonable certainty that no harm will result to the U.S. population, including infants and children, from aggregate exposure to residues of lysate of *Willaertia magna* C2c Maky.

V. Other Considerations

A. Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

B. Revisions to Petitioned-For Tolerance Exemption

The petitioned-for tolerance exemption for lysate of *Willaertia magna* C2c Maky is different from that being established by EPA. EPA determined that based on the low toxicity of lysate of *Willaertia magna* C2c Maky, any possible residues from the use of this active ingredient as a pesticide are not expected to result in any risks of concern to humans. Therefore, EPA has determined that the broad exemption for all food commodities, when used in accordance with label directions, is appropriate.

VI. Conclusions

Therefore, EPA is establishing an exemption for residues of lysate of *Willaertia magna* C2c Maky in or on all food commodities, when used in accordance with label directions and good agricultural practices.

VII. Statutory and Executive Order Reviews

This action amends an exemption from the requirement of a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has

determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 5, 2022.

Edward Messina,

Director, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. Add § 180.1394 to subpart D to read as follows:

§ 180.1394 Lysate of Willaertia magna C2c Maky; Exemption from the Requirement of a Tolerance.

An exemption from the requirement of a tolerance is established for residues of the pesticide, lysate of *Willaertia magna* C2c Maky, in or on all food commodities, when used in accordance with label directions.

[FR Doc. 2022–22045 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[EPA–HQ–OPP–2022–0507; FRL–10196–01–OCSPP]

Siloxanes and Silicones, di-Me, Me Hydrogen; Tolerance Exemption

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: This regulation establishes an exemption from the requirement of a tolerance for residues of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes (CAS Reg. No. 156065–02–0), when used as an inert ingredient in a pesticide chemical formulation. The Dow Chemical Company submitted a petition to EPA under the Federal Food, Drug, and Cosmetic Act (FFDCA), requesting an exemption from the requirement of a tolerance. This regulation eliminates the need to establish a maximum permissible level for residues of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes on food or feed commodities.

DATES: This regulation is effective October 12, 2022. Objections and requests for hearings must be received on or before December 12, 2022, and must be filed in accordance with the instructions provided in 40 CFR part 178 (see also Unit I.C. of the **SUPPLEMENTARY INFORMATION**).

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2022–0507, is available at *https://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 and the OPP Docket is (202) 566–1744. For the latest status information on EPA/DC services, docket access, visit *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Marietta Echeverria, Registration Division (7505T), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; main telephone number: (202) 566–1030; email address: *RDFRNotices@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or pesticide manufacturer. The following list of North American Industrial Classification System (NAICS) codes is not intended to be exhaustive, but rather provides a guide to help readers determine whether this document applies to them. Potentially affected entities may include:

- Crop production (NAICS code 111).
- Animal production (NAICS code 112).
- Food manufacturing (NAICS code 311).
- Pesticide manufacturing (NAICS code 32532).

B. How can I get electronic access to other related information?

You may access a frequently updated electronic version of 40 CFR part 180 through the Office of the Federal Register's e-CFR site at *https://www.ecfr.gov/current/title-40.*

C. Can I file an objection or hearing request?

Under FFDCA section 408(g), 21 U.S.C. 346a, any person may file an objection to any aspect of this regulation and may also request a hearing on those objections. You must file your objection or request a hearing on this regulation in accordance with the instructions provided in 40 CFR part 178. To ensure proper receipt by EPA, you must identify docket ID number EPA–HQ–OPP–2022–0507 in the subject line on the first page of your submission. All objections and requests for a hearing must be in writing and must be received by the Hearing Clerk on or before December 12, 2022. Addresses for mail and hand delivery of objections and hearing requests are provided in 40 CFR 178.25(b).

In addition to filing an objection or hearing request with the Hearing Clerk as described in 40 CFR part 178, please submit a copy of the filing (excluding any Confidential Business Information (CBI)) for inclusion in the public docket. Information not marked confidential pursuant to 40 CFR part 2 may be disclosed publicly by EPA without prior notice. Submit the non-CBI copy of your objection or hearing request, identified by docket ID number EPA–HQ–OPP–2022–0507, by one of the following methods.

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the

online instructions for submitting comments. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 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 *https://www.epa.gov/dockets/contacts.html.* Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

II. Background and Statutory Findings

In the **Federal Register** of July 20, 2022 (87 FR 43232) (FRL–9410–03–OCSPP), EPA issued a document pursuant to FFDCA section 408, 21 U.S.C. 346a, announcing the receipt of a pesticide petition (PP IN–11697) filed by Dow Chemical Company, 715 E Main Street, Midland, MI 48640. The petition requested that 40 CFR 180.960 be amended by establishing an exemption from the requirement of a tolerance for residues of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes (CAS Reg. No. 156065–02–0), with a minimum number average molecular weight of 10,600 Daltons. That document included a summary of the petition prepared by the petitioner and solicited comments on the petitioner's request. The Agency did not receive any public comments.

Section 408(c)(2)(A)(i) of FFDCA allows EPA to establish an exemption from the requirement for a tolerance (the legal limit for a pesticide chemical residue in or on a food) only if EPA determines that the exemption is ''safe.'' Section 408(c)(2)(A)(ii) of FFDCA defines ''safe'' to mean that ''there is a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.'' This includes exposure through drinking water and use in residential settings but does not include occupational exposure. Section 408(b)(2)(C) of FFDCA requires EPA to give special consideration to exposure of infants and children to the pesticide chemical residue in establishing an exemption from the requirement of a tolerance and to ''ensure that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to the pesticide chemical residue.'' and specifies factors EPA is to consider in establishing an exemption.

III. Risk Assessment and Statutory Findings

EPA establishes exemptions from the requirement of a tolerance only in those cases where it can be shown that the risks from aggregate exposure to pesticide chemical residues under reasonably foreseeable circumstances will pose no appreciable risks to human health. To determine the risks from aggregate exposure to pesticide inert ingredients, the Agency considers the toxicity of the inert in conjunction with possible exposure to residues of the inert ingredient through food, drinking water, and through other exposures that occur as a result of pesticide use in residential settings. If EPA is able to determine that a finite tolerance is not necessary to ensure that there is a reasonable certainty that no harm will result from aggregate exposure to the inert ingredient, an exemption from the requirement of a tolerance may be established.

Consistent with FFDCA section 408(b)(2)(D), EPA has reviewed the available scientific data and other relevant information in support of this action and considered its validity, completeness and reliability and the relationship of this information to human risk. EPA has also considered available information concerning the variability of the sensitivities of major identifiable subgroups of consumers, including infants and children. In the case of certain chemical substances that are defined as polymers, the Agency has established a set of criteria to identify categories of polymers expected to present minimal or no risk. The definition of a polymer is given in 40 CFR 723.250(b) and the exclusion criteria for identifying these low-risk polymers are described in 40 CFR 723.250(d). Siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes with a minimum number average molecular weight 10,600 Daltons, conforms to the definition of a polymer given in 40 CFR 723.250(b) and meets the following criteria that are used to identify low-risk polymers.

1. The polymer is not a cationic polymer nor is it reasonably anticipated to become a cationic polymer in a natural aquatic environment.

2. The polymer does contain as an integral part of its composition at least two of the atomic elements carbon, hydrogen, nitrogen, oxygen, silicon, and sulfur.

3. The polymer does not contain as an integral part of its composition, except as impurities, any element other than those listed in 40 CFR 723.250(d)(2)(ii).

4. The polymer is neither designed nor can it be reasonably anticipated to substantially degrade, decompose, or depolymerize: Adequate biodegradation studies (MRID 51816203) were submitted for siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes, with a minimum number average molecular weight 10,600 Daltons, showing lack of biodegradation.

5. The polymer is manufactured or imported from monomers and/or reactants that are already included on the Toxic Substances Control Act (TSCA) Chemical Substance Inventory or manufactured under an applicable TSCA section 5 exemption.

6. The polymer is not a water absorbing polymer with a number average molecular weight (MW) greater than or equal to 10,000 Daltons.

7. The polymer does not contain certain perfluoroalkyl moieties consisting of a CF_3- or longer chain length as listed in 40 CFR 723.250(d)(6).

Additionally, the polymer also meets as required the following exemption criteria specified in 40 CFR 723.250(e).

The polymer's number average molecular weight (MW) of 10,600 Daltons is greater than 10,000 Daltons. However, the polymer contains less than 2% oligomeric material below MW 500 and less than 5% oligomeric material below MW 1,000.

Thus, siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes meets the criteria for a polymer to be considered low risk under 40 CFR 723.250. Based on its conformance to the criteria in this unit, no mammalian toxicity is anticipated from dietary, inhalation, or dermal exposure to siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes.

IV. Aggregate Exposures

For the purposes of assessing potential exposure under this exemption, EPA considered that Siloxanes and Silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes could be present in all raw and processed agricultural commodities and drinking water, and that non-occupational non-dietary exposure was possible. The minimum number average MW of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes is

10,600 Daltons. Generally, a polymer of this size would be poorly absorbed through the intact gastrointestinal tract or through intact human skin. Since siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes conforms to the criteria that identify a low-risk polymer, there are no concerns for risks associated with any potential exposure scenarios that are reasonably foreseeable. The Agency has determined that a tolerance is not necessary to protect the public health.

V. Cumulative Effects From Substances With a Common Mechanism of Toxicity

Section 408(b)(2)(D)(v) of FFDCA requires that, when considering whether to establish, modify, or revoke a tolerance, the Agency consider ''available information'' concerning the cumulative effects of a particular pesticide's residues and ''other substances that have a common mechanism of toxicity.''

EPA has not found siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes to share a common mechanism of toxicity with any other substances, and siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes does not appear to produce a toxic metabolite produced by other substances. For the purposes of this tolerance action, therefore, EPA has assumed that siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes does not have a common mechanism of toxicity with other substances. For information regarding EPA's efforts to determine which chemicals have a common mechanism of toxicity and to evaluate the cumulative effects of such chemicals, see EPA's website at *https://www.epa.gov/pesticide-science-and-assessing-pesticide-risks/cumulative-assessment-risk-pesticides.*

VI. Additional Safety Factor for the Protection of Infants and Children

Section 408(b)(2)(C) of FFDCA provides that EPA shall apply an additional tenfold margin of safety for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base unless EPA concludes that a different margin of safety will be safe for infants and children. Due to the expected low toxicity of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes, EPA has not used a safety factor analysis to assess the risk. For the same reasons the additional tenfold safety factor is unnecessary.

VII. Determination of Safety

Based on the conformance to the criteria used to identify a low-risk polymer, EPA concludes that there is a reasonable certainty of no harm to the U.S. population, including infants and children, from aggregate exposure to residues of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes.

VIII. Other Considerations

Analytical Enforcement Methodology

An analytical method is not required for enforcement purposes since the Agency is establishing an exemption from the requirement of a tolerance without any numerical limitation.

IX. Conclusion

Accordingly, EPA finds that exempting residues of siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes from the requirement of a tolerance will be safe.

X. Statutory and Executive Order Reviews

This action establishes a tolerance under FFDCA section 408(d) in response to a petition submitted to the Agency. The Office of Management and Budget (OMB) has exempted these types of actions from review under Executive Order 12866, entitled ''Regulatory Planning and Review'' (58 FR 51735, October 4, 1993). Because this action has been exempted from review under Executive Order 12866, this action is not subject to Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001) or Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997). This action does not contain any information collections subject to OMB approval under the Paperwork Reduction Act (PRA) (44 U.S.C. 3501 *et seq.*), nor does it require any special considerations under Executive Order 12898, entitled ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations'' (59 FR 7629, February 16, 1994).

Since tolerances and exemptions that are established on the basis of a petition under FFDCA section 408(d), such as the tolerance in this final rule, do not require the issuance of a proposed rule, the requirements of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), do not apply.

This action directly regulates growers, food processors, food handlers, and food retailers, not States or tribes, nor does this action alter the relationships or distribution of power and responsibilities established by Congress in the preemption provisions of FFDCA section 408(n)(4). As such, the Agency has determined that this action will not have a substantial direct effect on States or Tribal Governments, on the relationship between the National Government and the States or Tribal Governments, or on the distribution of power and responsibilities among the various levels of government or between the Federal Government and Indian Tribes. Thus, the Agency has determined that Executive Order 13132, entitled ''Federalism'' (64 FR 43255, August 10, 1999) and Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000) do not apply to this action. In addition, this action does not impose any enforceable duty or contain any unfunded mandate as described under Title II of the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1501 *et seq.*).

This action does not involve any technical standards that would require Agency consideration of voluntary consensus standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note).

XI. Congressional Review Act (CRA)

Pursuant to the CRA (5 U.S.C. 801 *et seq.*), EPA will submit a report containing this rule 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**. This action is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 180

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: October 4, 2022.

Marietta Echeverria,

Acting Director, Registration Division, Office of Pesticide Programs.

Therefore, for the reasons stated in the preamble, EPA is amending 40 CFR chapter I as follows:

PART 180—TOLERANCES AND EXEMPTIONS FOR PESTICIDE CHEMICAL RESIDUES IN FOOD

■ 1. The authority citation for part 180 continues to read as follows:

Authority: 21 U.S.C. 321(q), 346a and 371.

■ 2. In § 180.960, amend table 1 by adding, in alphabetical order, the polymer ''Siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes, minimum number average molecular weight (in amu) 10,600'' to read as follows:

§ 180.960 Polymers; exemptions from the requirement of a tolerance.

* * * * *

TABLE 1 TO § 180.960

Polymer	CAS No.
* * * * * * *	
Siloxanes and silicones, di-Me, Me hydrogen, reaction products with vinyl group-terminated di-Me siloxanes, minimum number average molecular weight (in amu) 10,600''	156065–02–0
* * * * * * *	

[FR Doc. 2022–22145 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket Nos. 090206140–91081–03, 120405260–4258–02, 200706–0181, and 200127–0032]

RTID 0648–XC448

Revised Reporting Requirements Due to Catastrophic Conditions for Federal Seafood Dealers, Individual Fishing Quota Dealers, and Charter Vessels and Headboats in Portions of Florida and South Carolina

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

ACTION: Temporary rule; determination of catastrophic conditions.

SUMMARY: In accordance with the regulations implementing the individual fishing quota (IFQ), Federal dealer reporting, and Federal charter vessel and headboat (for-hire vessel) reporting programs specific to the reef fish fishery in the Gulf of Mexico (Gulf) and the coastal migratory pelagic (CMP) fisheries in the Gulf and Atlantic, the snapper-grouper fishery in the South Atlantic, and the dolphin and wahoo fishery in the Atlantic, the Regional Administrator (RA), Southeast Region, NMFS, has determined that Hurricane Ian has caused catastrophic conditions in certain Florida and South Carolina counties. This temporary rule authorizes any dealer in the affected area described in this temporary rule who does not have access to electronic reporting to delay reporting of trip tickets to NMFS and authorizes IFQ participants within the affected area to use paper-based forms, if necessary, for basic required administrative functions, *e.g.,* landing transactions. This rule also authorizes any Federal for-hire owner or operator in the affected area described in this temporary rule who does not have access to electronic reporting to delay reporting of logbook and South Atlantic ''Did Not Fish'' records to NMFS. This temporary rule is intended to facilitate continuation of IFQ, dealer, and Federal for-hire reporting operations during the period of catastrophic conditions.

DATES: The RA is authorizing Federal dealers, IFQ participants, and Federal for-hire operators in the affected areas to use revised reporting methods from October 6, 2022, through November 7, 2022.

FOR FURTHER INFORMATION CONTACT: IFQ Customer Service, telephone: 866–425–7627, email: *nmfs.ser.catchshare@noaa.gov.* For Federal dealer reporting, Fisheries Monitoring Branch, telephone: 305–361–4581. For Federal for-hire reporting, Southeast For-Hire Integrated Electronic Reporting program, telephone: 833–707–1632, email: *ser.electronicreporting@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf is managed under the Fishery Management Plan (FMP) for Reef Fish Resources of the Gulf of Mexico (Reef Fish FMP), prepared by the Gulf of Mexico Fishery Management Council (Gulf Council). The CMP fishery is managed under the FMP for CMP Resources in the Gulf of Mexico and Atlantic Region (CMP FMP), prepared by the Gulf Council and South Atlantic Fishery Management Council (South Atlantic Council). The snapper-grouper fishery in the South Atlantic is managed under the FMP for the Snapper-Grouper Fishery of the South Atlantic Region, prepared by the South Atlantic Council. The dolphin and wahoo fishery in the Atlantic is managed under the FMP for the Dolphin and Wahoo Fishery of the Atlantic, prepared by the South Atlantic Council. These FMPs are implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

Amendment 26 to the Reef Fish FMP established an IFQ program for the commercial red snapper component of the Gulf reef fish fishery (71 FR 67447, November 22, 2006). Amendment 29 to the Reef Fish FMP established an IFQ program for the commercial grouper and tilefish components of the Gulf reef fish fishery (74 FR 44732, August 31, 2009). Regulations implementing these IFQ programs (50 CFR 622.21 and 622.22) require that IFQ participants have access to a computer and the internet and that they conduct administrative functions associated with the IFQ program, *e.g.,* landing transactions, online. However, these regulations also specify that during catastrophic conditions, as determined by the RA, the RA may authorize IFQ participants to use paper-based forms to complete administrative functions for the duration of the catastrophic conditions. The RA must determine that catastrophic conditions exist, specify the duration of the catastrophic conditions, and specify which participants or geographic areas are deemed affected.

The Generic Dealer Amendment established Federal dealer reporting requirements for federally permitted dealers in the Gulf and South Atlantic (79 FR 19490, April 9, 2014). The Gulf For-Hire Reporting Amendment implemented reporting requirements for Gulf reef fish and CMP owners and operators of Gulf for-hire vessels (85 FR 44005, July 21, 2020). The South

Atlantic For-Hire Reporting Amendment implemented reporting requirements for South Atlantic snapper-grouper, Atlantic dolphin and wahoo, and CMP owners and operators of South Atlantic and applicable Atlantic for-hire vessels (85 FR 10331, February 24, 2020). Regulations implementing these Gulf and South Atlantic dealer reporting requirements (50 CFR 622.5) and for-hire vessel reporting requirements (50 CFR 622.26, 622.176, 622.271, and 622.374) state that dealers must submit electronic reports and that Gulf reef fish, CMP, South Atlantic snapper-grouper, and Atlantic dolphin and wahoo, and vessels with the applicable charter vessel/headboat permit must submit electronic fishing reports of all fish harvested and discarded. A reporting requirement in the South Atlantic amendment was also established for a ''Did Not Fish'' report (South Atlantic permits only). However, these regulations also specify that during catastrophic conditions, as determined by the RA, the RA may waive or modify the reporting time requirements for dealers and for-hire vessels for the duration of the catastrophic conditions.

Hurricane Ian made landfall in the U.S. near Cayo Costa, Florida, in the Gulf as a Category 4 hurricane on September 28, 2022, then moved across the Florida peninsula into the South Atlantic and made another U.S. landfall as a Category 1 hurricane near Georgetown, South Carolina, on September 30, 2022. Strong winds and flooding from this hurricane impacted communities throughout coastal Florida and coastal South Carolina. This resulted in power outages and damage to homes, businesses, and infrastructure. As a result, the RA has determined that catastrophic conditions exist in the Gulf for the Florida counties of Pinellas, Hillsborough, Polk, Orange, Osceola, Manatee, Hardee, Highlands, Sarasota, DeSoto, Charlotte, Glades, Lee, Hendry, Collier, Volusia, Seminole, Flagler, Saint Johns, Duval, and Nassau. For the South Atlantic the RA has determined that catastrophic conditions also exist for Horry County in South Carolina.

Through this temporary rule, the RA is authorizing Federal dealers and Federal for-hire operators in these affected areas to delay reporting of trip tickets and for-hire logbooks to NMFS, and authorizing IFQ participants in this affected area to use paper-based forms, from October 6, 2022, through November 7, 2022. NMFS will provide additional notification to affected dealers via NOAA Weather Radio, Fishery Bulletins, and other appropriate means. NMFS will continue to monitor and re-evaluate the areas and duration of the catastrophic conditions, as necessary.

Dealers may delay electronic reporting of trip tickets to NMFS during catastrophic conditions. Dealers are to report all landings to NMFS as soon as possible. Assistance for Federal dealers in affected area is available from the NMFS Fisheries Monitoring Branch at 1–305–361–4581. NMFS previously provided IFQ dealers with the necessary paper forms and instructions for submission in the event of catastrophic conditions. Paper forms are also available from the RA upon request. The electronic systems for submitting information to NMFS will continue to be available to all dealers, and dealers in the affected area are encouraged to continue using these systems, if accessible.

Federal for-hire operators may delay electronic reporting of logbooks and South Atlantic's Did Not Fish reports to NMFS during catastrophic conditions. Federal for-hire operators are to report all landings or Did Not Fish reports to NMFS as soon as possible. Assistance for Federal for-hire operators in affected area is available from the NMFS Southeast For-Hire Integrated Electronic Reporting Program at 1–833–707–1632, Monday through Friday, between 8 a.m. and 4:30 p.m., Eastern Time. The electronic systems for submitting information to NMFS will continue to be available to all Federal for-hire operators, and for-hire operators are encouraged to continue using the these systems, if accessible.

The administrative program functions available to IFQ participants in the area affected by catastrophic conditions will be limited under the paper-based system. There will be no mechanism for transfers of IFQ shares or allocation under the paper-based system in effect during catastrophic conditions. Assistance in complying with the requirements of the paper-based system will be available via the NMFS Catch Share Support line, 1–866–425–7627 Monday through Friday, between 8 a.m. and 4:30 p.m., Eastern Time.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is consistent with the regulations in 50 CFR 622.5(c)(1)(iii), 622.21(a)(3)(iii), and 622.22(a)(3)(iii), which were issued pursuant to section 304(b) of the Magnuson-Stevens Act, and are exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment are unnecessary and contrary to the public interest. Such procedures are unnecessary because the final rules implementing the Gulf IFQ programs, the Gulf and South Atlantic Federal dealer reporting requirements, and Gulf and South Atlantic for-hire vessel reporting requirements have already been subject to notice and public comment. These rules authorize the RA to determine when catastrophic conditions exist, and which participants or geographic areas are deemed affected by catastrophic conditions. The final rules also authorize the RA to provide timely notice to affected participants via publication of notification in the **Federal Register**, NOAA Weather Radio, Fishery Bulletins, and other appropriate means. All that remains is to notify the public that catastrophic conditions exist, that IFQ participants may use paper forms, and that Federal dealers and Gulf and South Atlantic for-hire permit holders may submit delayed reports. Such procedures are also contrary to the public interest because of the need to immediately implement this action because affected dealers continue to receive these species in the affected area and need a means of completing their landing transactions. With the power outages and damages to infrastructure that have occurred in the affected area due to Hurricane Ian, numerous businesses are unable to complete landings transactions, fishing reports, and dealer reports electronically. In order to continue with their businesses, IFQ participants need to be aware they can report using the paper forms, and Federal dealers and Gulf for-permit holders need to be aware that they can delay reporting.

For the aforementioned reasons, there is good cause to waive the 30-day delay in the effectiveness of this action under 5 U.S.C. 553(d)(3).

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

Dated: October 6, 2022.

Jennifer M. Wallace,

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

[FR Doc. 2022–22159 Filed 10–6–22; 4:15 pm]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 220223–0054]

RTID 0648–XC277

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod in the Bering Sea Subarea of the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod, except for the Community Development Quota program (CDQ), in the Bering Sea subarea of the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the non-CDQ allocation of the 2022 Pacific cod total allowable catch (TAC) in the Bering Sea subarea of the BSAI.

DATES: Effective 1200 hrs, Alaska local time (A.l.t.), October 7, 2022, through 2400 hrs, A.l.t., December 31, 2022.

FOR FURTHER INFORMATION CONTACT: Krista Milani, 907–581–2062.

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

The non-CDQ allocation of the 2022 Pacific cod TAC in the Bering Sea subarea of the BSAI is 121,864 metric tons (mt) as established by the final 2022 and 2023 harvest specifications for groundfish in the BSAI (87 FR 11626, March 2, 2022). In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS, has determined that the non-CDQ allocation of the 2022 Pacific cod TAC in the Bering Sea subarea of the BSAI will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 118,664 mt, and is setting aside the remaining 3,200 mt as incidental catch in directed fishing for other species. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod in the Bering Sea subarea of the BSAI.

While this closure is effective, the maximum retainable amounts at 50 CFR 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the directed fishing closure of non-CDQ Pacific cod in the Bering Sea subarea of the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of October 5, 2022.

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

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

Dated: October 6, 2022.

Jennifer M. Wallace,

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

[FR Doc. 2022–22139 Filed 10–6–22; 4:15 pm]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 87, No. 196
Wednesday, October 12, 2022

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 THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–113068–22]

RIN 1545–BQ47

Section 42, Low-Income Housing Credit Average Income Test Regulations

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations concerning recordkeeping and reporting requirements for the average income test for purposes of the low-income housing credit. If a building is part of a residential rental project that satisfies this test, the building may be eligible to earn low-income housing credits. These proposed regulations affect owners of low-income housing projects and State or local housing credit agencies that monitor compliance with the requirements for low-income housing credits. In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations concerning the recordkeeping and reporting requirements for the average income test. The text of the temporary regulations also serves as the text of these proposed regulations.

DATES: Written (including electronic) comments must be received by December 12, 2022.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–113068–22) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and on paper, to its public docket.

FOR FURTHER INFORMATION CONTACT: Concerning these proposed regulations, Dillon Taylor at (202) 317–4137; concerning submissions of comments, Regina L. Johnson at (202) 317–6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background and Explanation of Provisions

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** add § 1.42–19T to the temporary Income Tax Regulations (26 CFR part 1) that relate to the average income test under section 42 of the Internal Revenue Code. These new temporary regulations set forth certain recordkeeping and reporting requirements that relate to the rules in § 1.42–19. The text of the temporary regulations also serves as the text of these proposed regulations. The preamble to the temporary regulations explains the amendments. These proposed regulations would integrate the text of the temporary regulations into portions of § 1.42–19 that are currently reserved.

Special Analyses

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Department of the Treasury and the Office of Management and Budget regarding review of tax regulations.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. The basis for this certification can be found in the Special Analyses section of the temporary regulations.

Pursuant to section 7805(f) of the Internal Revenue Code, these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and a Request for Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, 2020–17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal author of these proposed regulations is Dillon Taylor, Office of Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 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 * * *

Section 1.42–19 also issued under 26 U.S.C. 42(n);

* * * * *

■ **Par. 2.** Section 1.42–19 is amended by adding paragraphs (c)(1) and (2), (c)(3)(iv), (c)(4), and (d)(2) and revising paragraph (f) to read as follows:

§ 1.42–19 Average income test.

* * * * *

(c) * * *

(1) [The text of proposed § 1.42–19(c)(1) is the same as the text of § 1.42–19T(c)(1) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

(2) [The text of proposed § 1.42–19(c)(2) is the same as the text of § 1.42–19T(c)(2) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

(3) * * *

(iv) [The text of proposed § 1.42–19(c)(3)(iv) is the same as the text of § 1.42–19T(c)(3)(iv) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

(4) [The text of proposed § 1.42–19(c)(4) is the same as the text of § 1.42–19T(c)(4) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

(d) * * *

(2) [The text of proposed § 1.42–19(d)(2) is the same as the text of § 1.42–19T(d)(2) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

* * * * *

(f) [The text of proposed § 1.42–19(f) is the same as the text of § 1.42–19T(f) in the final and temporary rule published elsewhere in this issue of the **Federal Register**].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2022–22100 Filed 10–7–22; 11:15 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–125693–19]

RIN 1545–BP72

Resolution of Federal Tax Controversies by the Independent Office of Appeals; Correction

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Correction to a notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains a correction to a notice of proposed rulemaking and notice of public hearing (REG–125693–19) that were published in the **Federal Register** on Tuesday, September 13, 2022. The proposed regulations are related to the IRS Independent Office of Appeals' resolution of Federal tax controversies without litigation and related to requests for referral to that office following the issuance of a notice of deficiency to a taxpayer by the IRS.

DATES: Written or electronic comments are still being accepted and must be received by November 14, 2022. Requests to speak and outlines of topics to be discussed at the public hearing scheduled for November 29, 2022, at 10 a.m. EST must be received by November 14, 2022.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–125693–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG–125693–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning this correction, Keith L. Brau at (202) 317–5437; concerning submissions of comments and outlines of topics for the public hearing, Regina Johnson, (202) 317–6901 (not toll-free numbers) or *publichearings@irs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking and notice of public hearing that are the subject of this document are under section 7803(e) of the Internal Revenue Code.

Correction of Publication

Accordingly, the notice of proposed rulemaking and notice of hearing (REG–125693–19), which were the subject of FR Doc. 2022–19662, published September 13, 2022, at 87 FR 55934, are corrected as follows:

On page 55951, in § 301.7803–2, the third column, the third and fourth lines of paragraph (h) are corrected to read ''by Appeals made on or after [Date 30 days after a Treasury Decision finalizing these rules is published in the **Federal Register**].

Oluwafunmilayo A. Taylor,

Branch Chief, Publications and Regulations Branch, Legal Processing Division, Associate Chief Counsel, (Procedure and Administration).

[FR Doc. 2022–21826 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 21

RIN 2900–AR56

85/15 Rule Calculations, Waiver Criteria, and Reports

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) is proposing to amend its educational assistance regulations by eliminating the four 85/15 rule calculation exemptions for students in receipt of certain types of institutional aid. Currently, VA regulations provide exceptions that allow certain categories of students to be considered ''non-supported'' for purposes of the 85/15 rule notwithstanding their receipt of institutional aid. VA is proposing to eliminate these exceptions, thus clarifying the types of scholarships that educational institutions must include in their calculations of ''supported'' students. Also, VA is proposing to revise the criteria that shall be considered by the Director of Education Service when granting an 85/15 rule compliance waiver. Lastly, VA is proposing to amend the timeline for certain educational institutions' submission of 85/15 compliance reports.

DATES: Comments must be received on or before December 12, 2022.

ADDRESSES: Comments may be submitted through *www.Regulations.gov,* Comments should indicate that they are submitted in response to ''RIN 2900–AR56(P)—Amendments to 85/15 Rule Calculations, Waiver Criteria, and Reports. Comments received will be available at regulations.gov for public viewing, inspection, or copies.

FOR FURTHER INFORMATION CONTACT: Cheryl Amitay, Chief, Policy and Regulation Development Staff (225B), Chief of Policy & Regulations, Education Service, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (202) 461–9800. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The 85/15 rule (38 U.S.C. 3680A(d); 38 CFR 21.4201(a)) prohibits the Department of Veterans Affairs (VA) from paying educational assistance benefits to any new students once ''more than 85 percent of the students enrolled in the [program of education] are having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' 38

U.S.C. 3680A(d)(1). ''Institutional aid'' refers to the financial assistance that is provided by the educational institution to the student that includes any scholarship, aid, waiver, or assistance, *but does not include loans and funds provided under section 401(b) of the Higher Education Act of 1965* or financial assistance from a third-party. ''VA aid'' refers to financial benefits paid under Chapters 30, 31, 33, 35 and 36 of Title 38 and Chapter 1606 of Title 10. VA refers to students who receive such institutional or VA aid as ''supported students.'' Conversely, no less than 15 percent of the students enrolled in the program must be attending without having any of their tuition, fees, or other charges paid to or for them by the educational institution or VA (referred to as ''non-supported students''). The 85/15 rule is a market validation tool designed to prevent schools from inflating tuition charges for VA education beneficiaries. The rule functions by requiring a school to enroll no less than 15 percent of its students paying the full tuition charge without institutional or VA aid. If a school fails to enroll enough non-supported students, the cost of the program is presumed to be out of step with the competitive market and thus too expensive for VA to continue to support due to the burden on taxpayers.

Currently, in accordance with 38 CFR 21.4201, educational institutions are required to track the percentage of supported and non-supported students enrolled in each of their approved programs and to confirm their compliance with the required 85/15 percent ratio. 38 CFR 21.4201(e)–(f). During the time that the ratio of supported to non-supported students exceeds 85 percent, no new students can be certified to receive VA education benefits for that program. 38 CFR 21.4201(g)(2). ''New students'' include students returning after a break in enrollment unless the break is wholly due to circumstances beyond the student's control. 38 CFR 21.4201(g)(6). The 85/15 rule does allow VA to continue to pay benefits for students already enrolled in the program and receiving benefits prior to the ratio of supported students exceeding 85 percent of the total population enrolled in the program. 38 CFR 21.4201(g)(2). Further, although students receiving Veteran Readiness and Employment (38 U.S.C. chapter 31) or Survivors' and Dependents' Educational Assistance (38 U.S.C. chapter 35) benefits must be counted as supported students when calculating 85/15 rule compliance, we note that the rule does not prohibit the enrollment of new chapter 31 and chapter 35 students while the 85 percent ratio is exceeded. The rules regarding reporting requirements and how individual students must be assessed based on their program of education and campus location are detailed in 38 CFR 21.4201. Specifically, paragraph (e) details the rules regarding how to compute the 85/15 percent ratio, and paragraph (e)(2) provides special rules by which some students, even though they are in receipt of institutional aid, are nonetheless counted as ''non-supported students.''

VA proposes to amend 38 CFR 21.4201(e)(2) to define ''non-supported students'' and ''supported students'' and remove paragraphs (e)(2)(i) through (e)(2)(iv), which diminish the effectiveness of the market validation mechanism of the rule. Although 38 U.S.C. 3680A(d)(1) explicitly states that the 85 percent side of the ratio (*i.e.,* the supported student count) should include all students ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs,'' current VA regulations at § 21.4201(e)(2) create tension with this essential goal of the 85/15 rule by providing four categories of students who are considered ''non-supported'' students notwithstanding their receipt of institutional aid. Currently, the four categories of such ''non-supported'' students are as follows: (1) non-Veteran students not in receipt of institutional aid; (2) all graduate students receiving institutional aid; (3) students in receipt of any Federal aid (other than VA benefits); and (4) undergraduate and non-college degree students receiving any assistance provided by the educational institution, if the institutional policy for granting this aid is the same for Veterans and non-Veterans alike. VA is proposing to remove all four categories.

Removal of the first and third categories would have no impact because these students are already ''non-supported,'' as they are not receiving institutional or VA aid. Consequently, their inclusion is non-substantive since their numbers would remain on the 15-percent side of the ratio calculation. The practical impact would be in the removal of the second and fourth categories, which provide that students can be in receipt of institutional aid and still be considered non-supported. These two categories (and particularly the fourth category) have created loopholes that educational institutions have exploited since the inception of the Post-9/11 GI Bill (PGIB). The problem stems from the fact that the PGIB pays up to the full amount of tuition and fees directly to educational institutions. This is unlike prior VA educational benefits implemented since 1952, from the Korean War GI Bill through the Montgomery GI Bill, for which VA pays a one-size-fits-all stipend amount directly to the beneficiary, and the beneficiary then pays tuition, fees, or other approved education-related expenses to the school using the stipend and/or other means. Under the prior model, if the tuition and fees exceed the stipend amount, then the beneficiary incurs out-of-pocket costs. By the same token, if the tuition and fees are less than the stipend amount, then the beneficiary may apply the funds towards other education costs. When beneficiary payments are structured this way, there is no incentive for an educational institution to inflate costs, as such a tactic might drive VA beneficiaries away in a competitive free market. Conversely, since tuition and fees under the PGIB are paid directly to the educational institution, often in an amount equal to the net charges for tuition and fees (subject to statutory caps for certain types of educational institutions), PGIB beneficiaries are not similarly incentivized to bargain shop. Consequently, the only students who can serve to validate the cost effectiveness of the program are those non-supported students who are counted on the 15-percent side of the 85/15 rule. However, given that the provisions in §§ 21.4201(e)(2)(ii) and (iv) stipulate that certain scholarship recipients are to be considered ''non-supported,'' a school can meet its 15-percent non-supported requirement while providing scholarships to some number of students so long as the students are graduate level, or the terms of the scholarship are such that Veterans and non-Veterans alike may qualify. These students are likewise not motivated by competitive free market forces to bargain shop, as their actual charges for tuition and fees are reduced. Because these students are allowed, through §§ 21.4201(e)(2)(ii) and (iv), to be considered ''non-supported,'' they serve as a false-positive market validation for the tuition and fee charges levied on VA. This undermines the operative mechanism of the 85/15 rule by allowing schools to inflate their tuition and fees since there is no longer an effective counterweight.

The original GI Bill (for Veterans of World War II, in effect from 1944 to 1948) also paid tuition and fees directly to schools and was fraught with abuses

and overcharges by schools. After investigating the abuses of the original GI Bill, Congress, when designing the successor Korean War GI Bill, took steps to eliminate such abuses by making payments directly to students and by instituting the 85/15 rule. Now that PGIB once again pays tuition and fees directly to schools and having witnessed the same abuses seen under the original GI Bill, VA needs to restructure its implementation of the 85/15 rule to give the rule the force it was originally intended to have when payments are being made directly to schools. As this presents an immediate threat to taxpayers' investment in Veterans' education and training, VA must emphasize the fundamental objective of the rule and strictly adhere to the requirement that students counted on the 15 percent side of the 85/15 rule are not ''having all or part of their tuition, fees, or other charges paid to or for them by the educational institution or by the Department of Veterans Affairs.'' We propose to do this by removing all exceptions listed in § 21.4201(e)(2), thus ensuring that every student who receives institutional or VA aid would be counted as a ''supported student.''

These proposed changes would also clarify requirements for schools, thereby making it easier for schools operating in good faith to remain in compliance. The current various classifications of students are difficult for the School Certifying Officials at educational institutions to follow, which can lead to improper payments and overpayments. Currently, when school officials have questions about making accurate student count calculations, they must individually reach out to their state Education Liaison Representative or VA staff in Washington, DC. As a result, the guidance they receive may be delayed or vary slightly depending upon the source of guidance. Further, some schools may opt not to make this effort and just guess on which side of the ratio certain students should be reported. All these scenarios have resulted in unsupported calculations by schools which do not reflect the intent of the current regulation's underlying statute. The proposed removal of all four current exceptions to the ''non-supported'' side of the 85/15 ratio would simplify the calculation of the 85/15 ratio—meaning, any student receiving any funding from either VA, or the school will be considered ''supported.'' Further, these proposed amendments would resolve related compliance process issues by removing ambiguity about the appropriate classification of students in receipt of aid. In sum, these regulatory amendments would both simplify and promote consistency in calculating and reporting 85/15 counts and would better align the regulation with its underlying statute.

There may be instances where certain schools have a large percentage of their students (both Veteran and non-Veteran alike) in receipt of institutional aid, even if the amount of the aid is insignificant. In these situations, it is unlikely that the school's institutional aid program is a subterfuge to disguise tuition inflation while complying with the 85/15 rule. In response to any concerns that such schools would be unfairly placed in noncompliance with the 85/15 rule by operation of this proposed rule, VA notes that whenever an educational institution exceeds the 85-percent limit, it may apply for a waiver of the 85/15 rule under 38 CFR 21.4201(h). Accordingly, VA proposes to amend § 21.4201(h) to allow an education institution to demonstrate that although its program is in violation of 85/15, its non-VA scholarship recipients are effectively serving as market validation, and, therefore, continued enrollment of new VA education beneficiaries is nonetheless in the best interests of the student and the Federal government. Consequently, the proposed elimination of § 21.4201(e)(2) does not mean that all generous schools would be eliminated from the GI Bill. It merely means that, on a case-by-case basis, a well-intentioned generous school could be granted a waiver while simultaneously limiting the potential for miscalculations and misapplication of scholarship information, whether intentional or unintentional.

Regarding the current 85/15 waiver criteria, VA further proposes to amend the criteria found at 38 CFR 21.4201(h) by removing paragraphs (2) and (3) while leaving paragraph (1) in place and modifying paragraph (4). This is necessary because, while current regulations list four criteria to be considered, only paragraphs (1) and (4) (the availability of comparable education facilities effectively open to Veterans in the vicinity of the school requesting a waiver; and the general effectiveness of the school's program in providing educational and employment opportunities to the Veteran population it serves) are cogent indicators of a program's qualifications to obtain a waiver.

Paragraph (2) only applies to schools in receipt of a Strengthening Institutions Program grant or a Special Needs Program grant administered by the Department of Education. The Strengthening Institutions Program grant is only available to accredited institutions of higher learning. However, many GI Bill-approved institutions are non-degree granting and thus ineligible for these programs. Therefore, this criterion is irrelevant when considering waiver requests for such programs. Furthermore, the ''Special Needs Program'' grants referenced in paragraph (2) as being located in title 34, parts 624–626, of the Code of Federal Regulations no longer exist at that reference. VA rarely receives waiver requests from schools in receipt of either of these grants, so the criterion in paragraph (2) rarely is satisfied. This absence of qualifying schools therefore is not dispositive in the adjudication of waiver requests. Paragraph (3)—previous compliance history of the school—is of no independent value to VA's decision-making because if a school has failed to satisfy the criterion in paragraph (3), then the program's approval would be suspended or withdrawn by the State Approving Agency. Consequently, by default, the Director of Education Service bases decisions on waiver requests exclusively on a school's performance relative to the criteria in paragraphs (1) and (4). However, because paragraphs (2) and (3) are included in this regulation, schools must expend resources to address these criteria in their requests. Likewise, the Director must expend resources to respond to these criteria in his or her decision. Therefore, VA proposes to remove paragraphs (2) and (3) to conserve both school and VA resources. It is important to note that because these criteria have been functionally irrelevant in the adjudication of waiver requests, such a removal would have no substantive effect on the likely outcome of any future waiver request decisions.

Additionally, we propose to amend the list of factors to be considered in paragraph (4) because the current list is not particularly helpful to the decision maker. The list contains only two criteria, and one of them—ratio of educational and general expenditures to full-time equivalency enrollment—is difficult to ascertain and verify while also being of questionable utility. Therefore, there is only one practical and pertinent factor—the percentage of Veteran-students completing the entire course—generally left to consider. Accordingly, VA proposes to amend the list to provide a broader range of factors that may be considered (although the list would not be all inclusive). VA proposes to maintain the current graduation rate factor but add other factors of graduate employment

statistics, graduate salary statistics, satisfaction of Department of Education rules regarding gainful employment (where applicable), other Department of Education metrics (such as student loan default rate), student complaints, industry endorsements, participation in and compliance with the Principles of Excellence program, which was established by Executive Order 13607 on April 27, 2012, (published in the **Federal Register** on May 2), to ensure that student Veterans, Servicemembers, and family members have information, support, and protections while using Federal education benefits. (where applicable), etc. This list is not exhaustive. The Director could, on a case-by-case basis, consider other factors not listed, which provide an indication of the program's general effectiveness. In addition, the Director may consider whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

Lastly, for educational institutions organized on a term, quarter, or semester basis, the 85/15 calculations must currently be submitted to VA no later than 30 days after the beginning of each regular school term (excluding summer sessions) or before the beginning of the following term, whichever occurs first. 38 CFR 21.4201(f)(2)(i). Educational institutions *not* organized on a standard term, quarter, or semester basis must also submit their 85/15 calculations to VA, however, no later than 30 days after the beginning of each calendar quarter to which the waiver applies. 38 CFR 21.4201(f)(2)(ii). Consequently, educational institutions with short, non-standard terms that begin and end more frequently than once per calendar quarter may have several terms that begin before VA is notified of failure to comply with the 85/15 rule. To remedy this shortcoming, VA proposes to amend 38 CFR 21.4201(f)(1) and (f)(2)(ii) to require that educational institutions with non-standard terms submit their exemption justification reports and 85/15 percent calculations to VA no later than 30 days after the beginning of each non-standard term. This would provide VA with the opportunity to review compliance reports submitted by educational institutions before approving additional enrollments that impact compliance with the 85/15 rule. This proposed amendment would promote accurate and up to date 85/15 calculations, ensure that reporting is done on a fair and consistent basis, and enable VA to base consideration of 85/15 waiver requests on relevant criteria.

In summary, the 85/15 rule was created to prevent training institutions from developing courses solely for GI Bill students and then inflating tuition charges. The 85/15 rule serves as a market validation tool by which the cost of the program is validated by demonstrating that a sufficient number of students (15 percent of the total program enrollment) are willing to pay the full cost of tuition out of pocket. These proposed changes would strengthen the existing 85/15 rule by addressing the regulatory provisions that, over time, have been shown to be ineffective with regard to the rule's intent.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. The Office of Information and Regulatory Affairs has determined that this rule is a significant regulatory action under Executive Order 12866. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). Notwithstanding data collection limitations regarding the number of schools that are classified as small entities, VA's certification is based on the fact that students would continue to provide revenue to schools regardless of whether they were classified as supported or non-supported. Should a school already at or near the statutory 85/15 ratio limit find that a reclassification of students from ''non-supported'' to ''supported'' would alter its ratio to the point where it would fall out of compliance with the 85/15 rule, the school could recruit additional non-supported students to restore that ratio. While needing to recruit more non-supported students would be an effect on schools, it does not qualify as a significant economic impact. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply. Nonetheless, VA acknowledges that the provisions in this rulemaking may create some uncertainty and reactive behavior from both Veteran students and personnel within institutions of higher learning. Therefore, VA welcomes input and comment about whether the provisions of this rulemaking would have an adverse impact or significant impact on a substantial number of small entities, including lost revenue or other costs.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This proposed rule would have no such effect on State, local, and tribal governments, or on the private sector.

Paperwork Reduction Act

Although this proposed rule contains collections of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521), there are no provisions associated with this rulemaking constituting any new collection of information or any revisions to the existing collections of information. The collections of information for 38 CFR 38 CFR 21.4201 are currently approved by the Office of Management and Budget (OMB) and have been assigned OMB control numbers 2900–0896 and 2900–0897.

Assistance Listing

The Assistance Listing numbers and titles for the programs affected by this document are 64.027, Post-9/11 Veterans Educational Assistance; 64.028, Post-9/11 Veterans Educational Assistance; 64.032, Montgomery GI Bill Selected Reserve; Reserve Educational Assistance Program; 64.117, Survivors and Dependents Educational Assistance; 64.120, Post-Vietnam Era Veterans' Educational Assistance; 64.124, All-Volunteer Force Educational Assistance.

List of Subjects in 38 CFR Part 21

Administrative practice and procedure, Armed forces claims, Colleges and universities, Education, Employment, Reporting and

recordkeeping requirements, Schools, Veterans, Vocational education.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on September 7, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR part 21 as set forth below:

PART 21—VETERAN READINESS AND EMPLOYMENT AND EDUCATION

Subpart D—Administration of Educational Assistance Programs

■ 1. The authority citation for part 21, subpart D continues to read as follows:

Authority: 10 U.S.C. 2141 note, ch. 1606; 38 U.S.C. 501(a), chs. 30, 32, 33, 34, 35, 36, and as noted in specific sections.

■ 2. Amend § 21.4201 by revising paragraphs (e)(2), (f)(1) introductory text, (f)(2)(ii), and (h) to read as follows:

§ 21.4201 Restrictions on enrollment; percentage of students receiving financial support.

* * * * *

(e) * * *

(2) *Assigning students to each part of the ratio.* In accordance with the provisions of paragraph (a) of this section, *non-supported students* are those students enrolled in the course who are having none of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C., while *supported students* are those students enrolled in the course who are having all or part of their tuition, fees or other charges paid for them by the educational institution, or by VA under title 38, U.S.C., or under title 10, U.S.C.

* * * * *

(f) * * * (1) Schools must submit to VA all calculations (those needed to support the exemption found in paragraph (c)(4) of this section as well as those made under paragraph (e)(3) of this section). If the school is organized on a term, quarter, or semester basis, it shall make that submission no later than 30 days after the beginning of the first term for which the school wants the exemption to apply. If the school is organized on a non-standard term basis, it shall make its submission no later than 30 days after the beginning of the first non-standard term for which the school wishes the exemption to apply. A school having received an exemption found in paragraph (c)(4) of this section shall not be required to certify that 85 percent or less of the total student enrollment in any course is receiving Department of Veterans Affairs assistance:

* * * * *

(2) * * *

(ii) If a school is organized on a non-standard term basis, reports must be received by the Department of Veterans Affairs no later than 30 days after the end of each non-standard term.

* * * * *

(h) *Waivers.* Schools which desire a waiver of the provisions of paragraph (a) of this section for a course where the number of full-time equivalent supported students receiving VA education benefits equals or exceeds 85 percent of the total full-time equivalent enrollment in the course may apply for a waiver to the Director, Education Service. When applying, a school must submit sufficient information to allow the Director, Education Service, to judge the merits of the request against the criteria shown in this paragraph. This information and any other pertinent information available to VA shall be considered in relation to these criteria:

(1) Availability of comparable alternative educational facilities effectively open to veterans in the vicinity of the school requesting a waiver.

(2) General effectiveness of the school's program in providing educational and employment opportunities to the particular veteran population it serves. Factors to be considered should include, but are not limited to: percentage of veteran-students completing the entire course, graduate employment statistics, graduate salary statistics, satisfaction of Department of Education requirements regarding gainful employment (where applicable), other Department of Education metrics (such as student loan default rate), student complaints, industry endorsements, participation in and compliance with the Principles of Excellence program, established by Executive Order 13607 (where applicable), etc.

(3) Whether the educational institution's aid program appears to be consistent with or appears to undermine the 85/15 rule's tuition and fee costs market validation mechanism.

[FR Doc. 2022–22107 Filed 10–11–22; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R04–OAR–2022–0782; FRL–10215–01–R4]

Air Plan Approval; NC; Miscellaneous NSR Revisions and Updates; Updates to References to Appendix W Modeling Guideline

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision, submitted by North Carolina on April 13, 2021. Specifically, EPA is proposing to approve updates to the incorporation by reference of federal new source review (NSR) regulations and federal guidelines on air quality modeling in the North Carolina SIP. Based on its proposal to approve this revision, EPA is also proposing to convert the previous conditional approval regarding infrastructure SIP prevention of significant deterioration (PSD) elements for the 2015 Ozone National Ambient Air Quality Standard (NAAQS) for North Carolina to a full approval. EPA is also proposing to approve additional updates to North Carolina's NSR regulations to better align them with the federal rules. EPA is proposing to approve these changes pursuant to the Clean Air Act (CAA or Act).

DATES: Comments must be received on or before November 14, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2022–0782 at *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 *www2.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Josue Ortiz Borrero, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. The telephone number is (404) 562–8085. Mr. Ortiz Borrero can also be reached via electronic mail at staff email *ortizborrero.josue@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 1, 2015, EPA promulgated a revised primary and secondary NAAQS for ozone, revising the 8-hour ozone standards from 0.075 parts per million (ppm) to a new more protective level of 0.070 ppm. *See* 80 FR 65292 (October 26, 2015). Pursuant to section 110(a)(1) of the CAA, states are required to submit SIP revisions 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. This particular type of SIP is commonly referred to as an ''infrastructure SIP or iSIP.'' States were required to submit such SIP revisions for the 2015 8-hour ozone NAAQS to EPA no later than October 1, 2018.[1]

On September 27, 2018, North Carolina met the requirement to submit an iSIP for the 2015 8-hour ozone NAAQS by the October 1, 2018, deadline. Through previous rulemakings, EPA approved most of the infrastructure SIP elements for the 2015 Ozone NAAQS for North Carolina.[2] However, regarding the PSD elements of section 110(a)(2)(C), (D)(i)(II) (prong 3), and (J) (herein referred to as element C, Prong 3, and element J, respectively), EPA conditionally approved[3] these portions of North Carolina's iSIP submission because of outdated references to the federal guideline on air quality modeling found in Appendix W of 40 CFR part 51.[4]

For elements C and J to be approved for PSD, a state needs to demonstrate that its SIP meets the PSD-related infrastructure requirements of these sections. These requirements are met if the state's implementation plan includes a PSD program that meets current federal requirements. Element D(i)(II) (prong 3) is also approvable when a state's implementation plan contains a fully approved, up-to-date PSD program. EPA's PSD regulations at 40 CFR 51.166(l) require that modeling be conducted in accordance with Appendix W, *Guideline on Air Quality Models.* EPA promulgated the most current version of Appendix W on January 17, 2017 (82 FR 5182). Therefore, in order to approve the iSIP PSD elements for the 2015 8-hour ozone NAAQS, PSD regulations in SIPs are required to reference the most current version of Appendix W.

As discussed in the conditional approval for the 2015 ozone iSIP PSD elements, North Carolina's SIP contains outdated references to Appendix W and the State committed to update the outdated references and submit a SIP revision within one year of EPA's final rule conditionally approving these PSD elements. Accordingly, North Carolina was required to make its submission by April 15, 2021. North Carolina met its commitment by submitting SIP revisions to correct the deficiencies on or before the deadline. Through this Notice of Proposed Rulemaking (NPRM), EPA is now proposing to approve the changes to the North Carolina SIP and to convert the conditional approval to full approvals for North Carolina, regarding element C, Prong 3, and element J, for the 2015 8-hour ozone NAAQS infrastructure SIP.

II. What is EPA's approach to the review of infrastructure SIP submissions?

As discussed above, whenever EPA promulgates a new or revised NAAQS, CAA section 110(a)(1) requires states to submit infrastructure SIPs that meet the various requirements of CAA section 110(a)(2), as applicable. Due to ambiguity in some of the language of CAA section 110(a)(2), EPA believes that it is appropriate to interpret these provisions in the specific context of acting on infrastructure SIP submissions. EPA has previously provided comprehensive guidance on the application of these provisions through a guidance document for infrastructure SIP submissions and through regional actions on infrastructure submissions.[5] Unless otherwise noted below, EPA is following that existing approach in acting on this submission. In addition, in the context of acting on such infrastructure submissions, EPA evaluates the submitting state's implementation plan for facial compliance with statutory and regulatory requirements, not for the state's implementation of its SIP.[6] EPA has other authority to address any issues concerning a state's implementation of the rules, regulations, consent orders, etc. that comprise its SIP.

III. EPA's Analysis of North Carolina's April 13, 2021, Submittal

On April 13, 2021, North Carolina submitted a SIP revision to address the readoption of several state air quality rules.[7] Part of that submission contains updates to the State's major NSR regulations, including updates to the version of 40 CFR part 51, Appendix W, incorporated by reference into North Carolina's PSD rules in order to meet the PSD Infrastructure SIP requirements for the 2015 8-hour ozone NAAQS and to satisfy the April 15, 2020, conditional approval of element C, Prong 3, and

[1] In infrastructure SIP submissions, states generally certify evidence of compliance with sections 110(a)(1) and (2) of the CAA through a combination of state regulations and statutes, some of which have been incorporated into the SIP. In addition, certain federally-approved, non-SIP regulations may also be appropriate for demonstrating compliance with sections 110(a)(1) and (2).

[2] EPA approved most elements for North Carolina, except for the Interstate Transport provisions (Prongs 1 & 2) and the PSD provisions (elements C, Prong 3, and J), on March 11, 2020. *See* 85 FR 14147. EPA approved the interstate transport provisions (Prongs 1 & 2) for North Carolina on December 2, 2021. *See* 86 FR 68413.

[3] Under CAA section 110(k)(4), EPA may conditionally approve a SIP revision based on a commitment from a state to adopt specific enforceable measures by a date certain, but not later than one year from the date of approval. If the state fails to meet the commitment within one year of the final conditional approval, the conditional approval will be treated as a disapproval and EPA will issue a finding of disapproval.

[4] *See* 85 FR 20836 (April 15, 2020).

[5] EPA explains and elaborates on these ambiguities and its approach to address them in its September 13, 2013 Infrastructure SIP Guidance (available at *https://www3.epa.gov/airquality/urbanair/sipstatus/docs/Guidance_on_Infrastructure_SIP_Elements_Multipollutant_FINAL_Sept_2013.pdf*), as well as in numerous agency actions, including EPA's prior action on the North Carolina infrastructure SIP to address the 2010 Nitrogen Dioxide NAAQS. *See* 81 FR 47115 (July 20, 2016).

[6] *See Mont. Envtl. Info. Ctr.* v. *Thomas,* 902 F.3d 971 (9th Cir. 2018).

[7] The April 13, 2021, submission included many North Carolina rules which the State requested EPA approve into the SIP. This NPRM only proposes approval of changes to 15A NCAC 02D .0530 and .0544. All other portions of the April 13, 2021, submission will be or have been addressed in separate rulemakings.

element J of North Carolina's 2015 8-hour ozone NAAQS infrastructure SIP. Specifically, the April 13, 2021, SIP revision makes changes to North Carolina Rules 15A NCAC 02D .0530, *Prevention of Significant Deterioration,* and .0544, *Prevention of Significant Deterioration Requirements for Greenhouse Gases.*

As explained in Sections III.A and III.B of this preamble, EPA is proposing to approve the changes to these regulations into the North Carolina SIP, and to convert the conditional approval of element C, Prong 3, and element J, of North Carolina's 2015 8-hour ozone NAAQS infrastructure SIP to a full approval.

A. 15A NCAC 02D .0530, Prevention of Significant Deterioration

1. Revisions to the North Carolina PSD Rule

The proposed changes to Rule 02D .0530 in North Carolina's April 13, 2021, submission include changes to better align with language found in the federal PSD regulations at 40 CFR 51.166, as well updating the incorporation by reference date to the federal rule.

In paragraph .0530(a), North Carolina moves the applicability provisions that clarify the rule's connection to the federal PSD rules found at 40 CFR 51.166, from paragraph .0530(g) to .0530(a). There are no substantive changes to the language of the paragraph.

In paragraph .0530(b), the State rewords prefatory language for existing exceptions to the definitions incorporated from the federal PSD rules but does not change the meaning of the provision. Next, in subparagraph .0530(b)(4), North Carolina deletes ''ammonia'' from the PSD provision stating that volatile organic compounds and ammonia are not significant precursors to fine particulate matter ($PM_{2.5}$). Removing ammonia from the list of constituents that are not significant precursors to $PM_{2.5}$ aligns with the PSD definition of ''regulated NSR pollutant,'' at 40 CFR 51.166(b)(49)(i)(b), which the State already incorporates by reference. EPA does not specifically address ammonia in the PSD regulations, so the SIP revision does not change how ammonia is treated with respect to attainment or unclassifiable areas. The SIP revision also makes other minor changes to subparagraph (b)(4) such as changing formatting and minor wording changes.

The revision adds subparagraph .0530(b)(5) to specify different language from 40 CFR 51.166(b)(49)(i)(a). The federal regulation states that as of January 1, 2011, condensable coarse PM (PM_{10}) and $PM_{2.5}$ ''shall be accounted for in applicability determinations and in establishing emissions limitations for $PM_{2.5}$ and PM_{10} in PSD permits.'' The version of subparagraph .0530(b)(5) in the SIP revision provides instead that, ''starting January 1, 2011, in addition to PM_{10} and $PM_{2.5}$, for particulate matter (PM), condensable particulate matter shall be accounted for in applicability determinations and in establishing emissions limitations for each of these regulated NSR pollutants in PSD permits.'' In this case, NCDAQ requirements are more stringent by requiring that total PM be accounted for, including total condensable PM, whereas the federal provisions only account for condensable PM_{10} and $PM_{2.5}$. *See* 77 FR 65107 (October 25, 2012).

Next, North Carolina clarifies the compliance requirements for major stationary sources and major modifications at paragraph .0530(g). Paragraph .0530(g) previously stated that major sources and major modifications had to comply with requirements in 40 CFR 51.166(a)(7) and (i) and in 40 CFR 51.166(j) through (o) and (w). North Carolina modifies this sentence to read that these projects shall comply with requirements in 51.166(a)(7) and (i) and in 51.166(j) through (r) and (w), which now includes paragraphs (p)–(r).

The North Carolina SIP already covered the provisions of subparagraph 51.166(p)(1), (p)(3), and (p)(4)–(7) regarding impacts to federal Class I areas at paragraph .0530(q). The existing SIP does not include a reference to subparagraph 51.166(p)(2) because this provision is a general statement affirming the federal land manager's responsibility to manage Class I areas and to ''consider, in consultation with the Administrator, whether a proposed source or modification would have an adverse impact on'' air quality related values such as visibility. States are not required to include this provision in SIPs. This provision merely describes responsibilities of federal land managers and is true whether or not North Carolina specifically includes it in the SIP. However, the SIP would now include subparagraph (p)(2) with the update to paragraph .0530(g). Additionally, 40 CFR 51.166(r)(1) is already covered by paragraph .0530(s), and 40 CFR 51.166(r)(2) is already covered by paragraph .0530(k). Moreover, paragraph .0530(u) covered the requirements of 40 CFR 51.166(r)(6) and (r)(7) in a different, but more stringent manner, and this paragraph continues to outline different and more stringent requirements than the federal minimum requirements. Paragraph .0530(u) is discussed in more detail below. Finally, paragraph .0530(r) provides procedures and requirements for processing permit applications and covers 40 CFR 51.166(q) and continues to do so.

Next, North Carolina revises its monitoring and recordkeeping requirements in subparagraph .0530(u) for projects which do not trigger PSD requirements, but which make use of ''projected actual emissions'' for determining applicability. For sources that rely on ''projected actual emissions'' to determine PSD applicably, the federal NSR rules require recordkeeping and reporting for a modification that does not trigger major NSR when there could be a ''reasonable possibility'' that a project may result in a significant emissions increase of a regulated NSR pollutant.

Specifically, 40 CFR 51.166(r)(6)(vi)(*a*) provides that a ''reasonable possibility'' under paragraph (r)(6) occurs when a projected actual emissions increase is at least 50 percent of the amount that is a ''significant emissions increase,'' without reference to the amount that is a significant net emissions increase, for the regulated NSR pollutant. If a ''reasonable possibility'' occurs only as defined by paragraph (r)(6)(vi)(*a*), then the documentation of the project and ongoing recordkeeping and reporting requirements at (r)(6)(i)–(v) apply. Alternatively, 40 CFR 51.166(r)(6)(vi)(*b*) provides that a reasonable possibility occurs when a projected actual emissions increase that, added to the amount of emissions excluded under paragraph (b)(40)(ii)(*c*), sums to at least 50 percent of the amount that is a ''significant emissions increase,'' without reference to the amount that is a significant net emissions increase, for the regulated NSR pollutant. The amount of emissions excluded at 40 CFR 51.166(b)(40)(ii)(*c*) is ''that portion of the unit's emissions following the project that an existing unit could have accommodated during the consecutive 24-month period used to establish the baseline actual emissions.'' If a ''reasonable possibility'' occurs only as defined by (r)(6)(vi)(*b*), then the documentation and recordkeeping requirements of 40 CFR 51.166(r)(6)(i) apply, but the recordkeeping and reporting requirements at (r)(6)(ii)–(v) do not apply.

When North Carolina adopted NSR reform provisions, the State did not adopt the federal ''reasonable possibility'' standard. Instead, the State

adopted recordkeeping and reporting requirements in Rule .0530(u) that apply to all modifications that use ''projected actual emissions'' to determine applicability.[8] The SIP-approved version of this rule requires the owner or operator of a source with such a modification to submit a notification to NCDAQ before beginning construction that contains the information in .0530(u)(1)–(5), which is analogous to the information in 40 CFR 51.166(r)(6)(i). EPA incorporated this rule into North Carolina's SIP on August 10, 2011. *See* 76 FR 49313. The federal regulations only require the owner or operator to submit documentation under 40 CFR 51.166(r)(6)(i) to the permitting authority pursuant to 40 CFR 51.166(r)(6)(ii) for projects at existing electric generating units that present a ''reasonable possibility'' pursuant to 40 CFR 51.166(r)(6)(vi)(*a*). Therefore, the universe of projects which must provide the notification information to the NCDAQ Director is greater than that covered by 40 CFR 51.166(r)(6)(vi)(*b*).

The modified rule, however, narrows the universe of projects which must comply with the ongoing recordkeeping and reporting requirements in paragraph .0530(u) by including a 50 percent or greater threshold similar to the federal reasonable possibility rule at 51.166(r)(6)(vi)(*a*). Under the SIP-approved version of the paragraph, owners or operators using projected actual emissions are subject to ongoing recordkeeping and reporting requirements if a permit revision is not required. North Carolina's rule revision requires the owner or operator of projects that would meet the reasonable possibility criteria of rule 51.166(r)(6)(vi)(*a*) to submit a permit application to NCDAQ to include a permit condition with specific monitoring, recordkeeping, and reporting of annual emissions for 10 years if the project involves increasing the emissions unit's design capacity or its potential to emit for the regulated NSR pollutant, which is not expressly required under the federal reasonable possibility rule.

Although these changes would reduce the number of sources covered by the ongoing recordkeeping and reporting requirements in paragraph .0530(u), the sources subject to these requirements would now match those in the federal reasonable possibility rule under 51.166(r)(6)(vi)(*a*), and when adopting the federal rule, EPA concluded that the 50 percent threshold would capture most if not all projects that have a higher probability of variability or error in projected emissions and provided certainty for the regulated community and reviewing authorities. *See* 72 FR 72610, December 21, 2007. Furthermore, revised paragraph .0530(u) still requires a greater universe of projects to undertake the initial documentation and recordkeeping than the federal regulations, and still goes a step further to require that the initial documentation is provided to the NCDAQ Director instead of only being maintained on site. The revised rule also now requires permit conditions to provide for ongoing monitoring, recordkeeping, and reporting for sources that meet North Carolina's reasonable possibility threshold. For these reasons, EPA proposes to find that the changes to paragraph .0530(u) would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement.

Next, North Carolina updates the incorporation by reference date of 40 CFR 51.166 in paragraph .0530(v) from July 1, 2014, to July 1, 2019, for portions of the CFR that are referred to in Rule .0530 and revises the direct link to the new CFR version at 02D .0530(v).[9] [10] [11] [12] [13] Additionally, the State adds a sentence to paragraph .0530(v) stating that ''[f]ederal regulations referenced in 40 CFR 51.166 shall include subsequent amendments and editions.'' This addition ensures that North Carolina's PSD rule will automatically incorporate updates to rules cross-referenced in 40 CFR 51.166.

2. Revisions Based on the IBR Update

With the change to the IBR date, there are several provisions of 40 CFR 51.166 referenced in the State's PSD program that have changed, which are discussed herein.

NCDAQ's updated IBR date would change the definition of ''building, structure, facility, or installation'' at Rule 02D .0530(b) based on EPA's updated definition.[14] Specifically, EPA updated 40 CFR 51.166(b)(6), containing the definition of a ''building, structure, facility, or installation,'' to address onshore oil and gas extraction activities in a June 3, 2016, final rulemaking. *See* 81 FR 35622. EPA added paragraph (b)(6)(ii), which allows SIPs to include a different provision for what is considered a ''building, structure,

[8] The revised rule clarifies that .0530(u) applies in lieu of the requirements of 40 CFR 51.166(r)(6) and (7).

[9] In this NPRM, EPA is not proposing to incorporate language to implement the equipment replacement provision under routine maintenance repair and replacement, as provided in EPA's October 27, 2003, rule. *See* 68 FR 61248. Specifically, EPA is not acting on the incorporation by reference of the 2003 changes to 40 CFR 51.166(b)(2)(iii)(*a*), the incorporation by reference of 40 CFR 51.166(b)(53) through (b)(56), or 51.166(y). Instead, the version of 40 CFR 51.166(b)(2)(iii)(*a*) approved into the SIP would remain March 15, 1996. The 2003 changes and new provisions were in the version of the federal rule incorporated by North Carolina, but prior to this were vacated by the Circuit Court of Appeals for the District of Columbia. *See New York* v. *EPA,* 443 F.3d 880 (D.C. Cir. 2006). EPA subsequently removed the vacated provisions from the CFR. *See* 86 FR 37918 (July 19, 2021). NCDAQ provided a letter to EPA dated September 6, 2022, clarifying that it is not requesting approval of these provisions into the North Carolina SIP.

[10] In this NPRM, EPA is not proposing to act on provisions addressing the treatment of fugitive emissions, as provided in EPA's December 19, 2008, rule. *See* 73 FR 77882. Specifically, EPA is not acting on the incorporation by reference of 40 CFR 51.166(b)(2)(v) nor 51.166(b)(3)(iii)(*d*). EPA subsequently published a final rule placing an indefinite stay on the effective date of these provisions. *See* 76 FR 17548 (March 30, 2011). NCDAQ provided a letter to EPA dated September 6, 2022, clarifying that it is not requesting approval of these provisions into the North Carolina SIP.

[11] In this NPRM, EPA is not proposing to incorporate a provision removing nonattainment NSR for revoked NAAQS where the area is attainment for the current NAAQS (''orphan nonattainment areas''), as provided in the implementation rule for the 2008 8-hour ozone NAAQS at 40 CFR 51.166(i)(2). *See* 80 FR 12264 (March 6, 2015). This provision was in the version of the federal rule incorporated by North Carolina. Instead, the version of 40 CFR 51.166(i)(2) incorporated by reference at 02D .0530 would remain July 1, 2014. The Circuit Court of Appeals for the District of Columbia vacated the ability to remove nonattainment NSR from such orphan nonattainment areas in the absence of formal redesignation to attainment or unclassifiable for that NAAQS. *See South Coast Air Quality Management District* v. *EPA,* 882 F.3d 1138 (D.C. Cir. 2018). NCDAQ provided a letter to EPA dated September 6, 2022, clarifying that it is not requesting approval of this provision into the North Carolina SIP. Such a provision would not have been operable in the North Carolina SIP, as all nonattainment areas for the 1997 8-hour ozone NAAQS were redesignated prior to the revocation of the NAAQS, and the 1997 annual $PM_{2.5}$ NAAQS is only revoked for areas first redesignated.

[12] In this NPRM, EPA is not proposing to incorporate the grandfathering provision for the 2015 8-hour ozone NAAQS at 40 CFR 51.166(i)(11)(ii). *See* 80 FR 65292 (October 26, 2015). This provision was in the version of the federal rule incorporated by North Carolina, but was later vacated by the Circuit Court of Appeals for the District of Columbia. *Sierra Club* v. *EPA,* 936 F.3d 597 (D.C. Cir. 2019). EPA subsequently removed the vacated provision from the CFR. *See* 86 FR 37918 (July 19, 2021). NCDAQ provided a letter to EPA dated September 6, 2022, clarifying that it is not requesting approval of this provision into the North Carolina SIP.

[13] On August 19, 2015, EPA revised the PSD program to remove vacated elements regarding the regulation of greenhouse gas (GHG) sources referred to as ''Step 2'' or ''GHG-only'' sources. *See* 80 FR 50199. North Carolina regulates GHG sources for the purposes of implementing the PSD program at Rule 02D .0544, and therefore, this change will be addressed more specifically under Section III.B of this NPRM which discusses Rule 02D .0544.

[14] Changing the definition of ''building, structure, facility, or installation'' effectively changes the definition of ''stationary source'' for purposes of PSD permitting because ''stationary source'' is defined as ''any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.''

facility, or installation'' with respect to Standard Industrial Classification Group 13 for onshore oil and gas extraction activities. Pollutant-emitting activities in this SIC group are considered to be adjacent under this provision ''if they are located on the same surface site; or if they are located on surface sites that are located within ¼ mile of one another . . . and they share equipment.'' The effect of this change is that permitting is simplified for these activities, and there is a bright line beyond which oil and gas extraction activities on different surface sites do not need to be aggregated as a single stationary source. Therefore, with this change, fewer onshore oil and gas projects may be considered major. EPA noted in the June 3, 2016, final rule that these changes to paragraph (b)(6), in conjunction with the landscape of updated emissions controls for this sector, is not likely to have adverse impacts on air quality, and that other factors such as ''the location of the underground mineral assets, advances in drilling technology that allow multiple wells to be drilled from one surface site, restrictions on well spacing imposed by a state agency such as an oil and gas conservation commission, and the restrictions imposed by the owner of the surface land'' are more likely to affect the owner's or operator's selection of spacing of these activities than this rule change.[15] *See* 81 FR 35622 (June 3, 2016) for more information on EPA's rationale for the revised definition. NCDAQ confirmed that this revised definition of ''building, structure, facility, or installation'' at 40 CFR 51.166(b)(6)(ii) is included in the State's revised PSD program as portions of 40 CFR 51.166 that allow the State to exempt or not apply certain requirements in certain circumstances are adopted under the State's PSD Rule.[16]

Next, NCDAQ's paragraph .0530(r) provides procedures and requirements for processing permit applications and incorporates EPA's public notice provisions at 40 CFR 51.166(q). EPA issued a final rule on October 18, 2016, that provided permitting authorities with the ability to public notice draft permits and permitting decisions for major sources, including for PSD through revisions to 40 CFR 51.166(q), on a website identified by the reviewing authority as a possible alternative to newspaper notices. *See* 81 FR 71613. NCDAQ's updated IBR date would reference the modified language at 40 CFR 51.166(q) which provides at (q)(2)(iii) that the required notifications ''may be made on a website identified by the reviewing authority,'' and that the selected notification method, the ''consistent noticing method,'' ''shall be used for all permits subject to notice under this section and may, when appropriate, be supplemented by other noticing methods on individual permits.''

The ability to use a website as the exclusive method for notification as an alternative to newspaper noticing for PSD permits requires the reviewing authority to select electronic notification as its ''consistent noticing method'' for all PSD permits. There is no language in Rule .0530 or the SIP revision that identifies electronic notification as NCDAQ's ''consistent noticing method'' for its PSD permits nor is a website for such notices identified. Therefore, although NCDAQ may include public notice via a website identified by the State, NCDAQ must also continue to public notice all of these permits via ''advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed'' until the State submits a SIP revision selecting electronic notice as its ''consistent noticing method'' and EPA approves that revision.[17]

Finally, the updated incorporation by reference of federal PSD provisions captures EPA's updated air quality modeling procedures. As part of EPA's April 15, 2020, conditional approval of infrastructure SIP requirements for PSD for the 2015 8-hour ozone NAAQS, North Carolina committed to update its PSD regulations to reference the most current version of Appendix W to part 51. *See* 85 FR 20836. EPA approved the most recent version of Appendix W on January 17, 2017 (82 FR 5182), so North Carolina's incorporation by reference of the federal PSD rules with a date of July 1, 2019, includes the provisions found in paragraph 51.166(l), *Air Quality Models,* which requires use of the latest approved version of Appendix W when carrying out air quality modeling for PSD purposes. Also note that the language discussed above that the State adds to paragraph .0530(v) to include subsequent amendments and editions of federal regulations referenced in 40 CFR 51.166 ensures that North Carolina's PSD rule will automatically incorporate the most up-to-date version of Appendix W because it is cross-referenced in 40 CFR 51.166(l). Therefore, EPA proposes to find that these changes resolve EPA's April 15, 2020, conditional approval of North Carolina's September 27, 2018, 2015 8-hour ozone infrastructure SIP submission addressing PSD-related requirements of CAA sections 110(a)(2)(C), 110(a)(2)(D)(i)(II) (prong 3), and 110(a)(2)(J), and EPA is proposing to convert the conditional approval to a full approval.

The changes to North Carolina's PSD regulation at Rule 2D .0530 are either consistent with or more stringent than federal requirements and would not interfere with any applicable requirement concerning attainment or reasonable further progress or any other applicable CAA requirement. For these reasons, as detailed above, EPA is proposing to approve the aforementioned changes to 2D .0530 into the North Carolina SIP.

B. 15A NCAC 02D .0544, Prevention of Significant Deterioration Requirements for Greenhouse Gases

1. Revisions to the North Carolina GHGs PSD Rule

As part of the April 13, 2021, submission, North Carolina also includes changes to the State's PSD requirements for Greenhouse Gases (GHGs) found at Rule 02D .0544. The updates include clarification to the applicability of the rule; changes to requirements for monitoring, recordkeeping, and reporting; an update to the incorporation by reference date of 40 CFR 51.166; and other minor changes such as typographical changes.

In paragraph .0544(a), similar to paragraph .0530(a) in the companion PSD rule, North Carolina moves the applicability provisions that clarify the rule's connection to the federal PSD rules found at 40 CFR 51.166, from paragraph .0544(f) to .0544(a). Next, North Carolina clarifies the compliance requirements for these sources by revising a reference to 40 CFR 51.166 at paragraph .0544(f). Paragraph .0544(f) previously stated that major sources and major modifications had to comply with requirements in 40 CFR 51.166(i) and (a)(7) and in 51.166(j) through (o) and

[15] Also note that the North Carolina SIP prohibits certain sources from causing an exceedance of an air quality standard or contributing to a violation of such standards (*see* 15A NCAC 02D .0401(c)), and includes a minor NSR construction permitting program for new minor sources and minor modifications to existing sources (*see* 15A NCAC 02Q .0300).

[16] *See* the document entitled ''Call between Region 4 of the Environmental Protection Agency (EPA) and the North Carolina Department of Environmental Quality's Division of Air Quality (NCDAQ) regarding 15A NCAC 02D .0530, *Prevention of Significant Deterioration,*'' which is included in the docket for this proposed action.

[17] *See* the document entitled ''Call between Region 4 of the Environmental Protection Agency (EPA) and the North Carolina Department of Environmental Quality's Division of Air Quality (NCDAQ) Regarding 15A NCAC 02D .0530, *Prevention of Significant Deterioration,*'' which is included in the docket for this proposed action.

(w). North Carolina modifies this sentence to read that these projects shall comply with requirements in 51.166(i) and (a)(7) and in 51.166(j) through (r) and (w), which now includes paragraphs (p)–(r). NCDAQ already included the provisions of paragraphs 51.166(p)(1), (p)(3), and (p)(4)–(7) regarding impacts to federal Class I areas at Rule 02D .0530(q). Rule 02D .0544 did not expressly cover paragraph 40 CFR 51.166(p) because air quality related values in federal Class I areas such as visibility are covered by Rule 02D .0530.[18] However, paragraph .0544(f) now also includes a reference to paragraph 51.166(p). This is not a true change to the North Carolina SIP because if GHGs are regulated for PSD—because another regulated NSR pollutant has triggered PSD—Class I protections also already apply wherever there may be impacts, pursuant to Rule 02D .0530(q).

Additionally, 40 CFR 51.166(r)(1) is already covered by paragraph .0544(m), and 40 CFR 51.166(r)(2) is already covered by paragraph .0544(i). Moreover, paragraph .0544(n) is covered the requirements of 40 CFR 51.166(r)(6)–(7) in a different, but more stringent manner, and this paragraph continues to outline different and more stringent requirements than the federal minimum requirements. Paragraph .0544(n) is discussed in more detail below. Paragraph .0544(l) provides procedures and requirements for processing permit applications and also covers 40 CFR 51.166(q) and continues to do so. Additionally, the language previously approved at .0544(f) regarding the transition provisions at 40 CFR 52.21(i)(11)(i) and (ii) and 40 CFR 52.21(m)(1)(vii)–(viii) is removed. These transition provisions functioned for a short time [19] as grandfathering provisions in moving from total suspended particulates as the indicator of a PM NAAQS to PM_{10} and have recently been removed from 40 CFR 52.21.[20] EPA notes that this language would never have functioned in Rule 02D .0544 because it does not relate to GHGs. Therefore, the removal of this PM_{10} grandfathering language is clarifying in nature.

The State then makes changes to paragraph .0544(h) to align with paragraph .0530(j) by eliminating a reference to Rule 02Q .0302. Previously, paragraph .0544(h) specified that Rule 02Q .0302 did not apply to sources subject to Rule 02D .0544. However, Rule 02Q .0302, *Facilities Not Likely to Contravene Demonstration,* which provided exemptions from the requirement to obtain minor NSR construction permits, is repealed and was never approved as part of the North Carolina SIP. Therefore, there is no need to specify that this repealed regulation is not applicable to sources that trigger PSD.

Next, North Carolina makes changes in paragraph .0544(n) that conform to the changes made to companion PSD paragraph .0530(u), described in greater detail above. Like the PSD changes discussed in Section III.A.1 of this NPRM, the North Carolina regulations remain more stringent than the federal requirements by (1) requiring all projects utilizing the ''projected actual emissions'' approach to document the project details and notify NCDAQ of the project,[21] which is more stringent than the documentation and initial recordkeeping requirements of 51.166(r)(6)(i), and (2) requiring those projects which calculate a ''projected actual emissions'' increase pursuant to 40 CFR 51.166(b)(40)(ii)(a) and (ii)(b), minus the baseline actual emissions, without reference to the amount that is a significant net emissions increase, of 50 percent or greater of the amount that is a significant emissions increase for the regulated NSR pollutant to include monitoring, recordkeeping, and reporting (consistent with 51.166(r)(6)(ii)–(v)) in the issued permit.

The State then makes several changes to paragraph .0544(o). First, North Carolina updates the incorporation by reference date of 40 CFR 51.166 from July 20, 2011, to July 1, 2019, and revises the direct link to the new CFR version. Next, like changes made to 02D .0530(v), the State adds a sentence to paragraph .0544(o) stating that ''[f]ederal regulations referenced in 40 CFR 51.166 shall include subsequent amendments and editions.'' This addition ensures that North Carolina's PSD GHG rule will automatically incorporate updates to rules cross-referenced in 40 CFR 51.166.

2. Revisions Based on the IBR Update

There are several changes included in the PSD program with the change to the IBR date. The relevant changes related to GHGs in this timeframe covered by the update are discussed in this section.

On January 2, 2011, GHG emissions were, for the first time, covered by the PSD and title V operating permit programs. *See* 75 FR 17004 (April 2, 2010). To establish a process for phasing in the permitting requirements for stationary sources of GHGs under the CAA's PSD and title V programs, on June 3, 2010, EPA published a final rule entitled ''Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule'' (hereinafter referred to as the ''GHG Tailoring Rule''). *See* 75 FR 31514. In Step 1 of the GHG Tailoring Rule, which began on January 2, 2011, EPA limited application of PSD and title V requirements to sources and modifications of GHG emissions, but only if they were subject to PSD or title V ''anyway'' due to their emissions of pollutants other than GHGs. These sources and modifications covered under Step 1 are commonly referred to as ''anyway sources'' and ''anyway modifications,'' respectively.

In Step 2 of the GHG Tailoring Rule, which applied as of July 1, 2011, the PSD and title V permitting requirements extended beyond the sources and modifications covered under Step 1 to apply to sources that were classified as major sources based solely on their GHG emissions or potential to emit GHGs. Step 2 also applied PSD permitting requirements to modifications of otherwise major sources that would increase only GHG emissions above the level in the federal PSD regulations. EPA generally described the sources and modifications covered by PSD under Step 2 of the Tailoring Rule as ''Step 2 sources and modifications'' or ''GHG-only sources and modifications.''

Subsequently, EPA published Step 3 of the GHG Tailoring Rule on July 12, 2012. *See* 77 FR 41051. In this rule, EPA decided against further phase-in of the PSD and title V requirements for sources emitting lower levels of GHG emissions. Thus, the thresholds for determining PSD and title V applicability based on emissions of GHGs remained the same as established in Steps 1 and 2 of the Tailoring Rule.

[18] *See, e.g.,* ''PSD and Title V Permitting Guidance for Greenhouse Gases'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Policy Division, Research Triangle Park, NC. EPA–457/B–11–001 (March 2011). Available at: *https://www.epa.gov/sites/default/files/2015-12/documents/ghgpermittingguidance.pdf.*

[19] The exemption at 40 CFR 52.21(i)(11)(i) for air quality monitoring required at 40 CFR 52.21(m)(1)(i)–(iv) of PM_{10} functioned for PSD permit applications received on or before June 1, 1988. The exemption at 40 CFR 52.21(i)(11)(ii) relating to air quality monitoring required at 40 CFR 52.21(m)(1)(iii)–(iv) and (m)(3) functioned for PSD permit applications received after June 1, 1988, but no later than December 1, 1988. *See* 52 FR 24672 (July 1, 1987).

[20] *See* 86 FR 37918 (July 19, 2021).

[21] Notification ''shall include: (1) a description of the project; (2) identification of sources whose emissions could be affected by the project; (3) the calculated projected actual emissions and an explanation of how the projected actual emissions were calculated, including identification of emissions excluded by 40 CFR 51.166(b)(40)(ii)(c); (4) the calculated baseline actual emissions in Subparagraph (b)(1) of this Rule an explanation of how the baseline actual emissions were calculated; and (5) any netting calculations, if applicable.'' *See* 15A NCAC 02D .0544(n).

On June 23, 2014, the U.S. Supreme Court addressed the application of stationary source permitting requirements to GHG emissions in *Utility Air Regulatory Group (UARG)* v. *EPA,* 134 S. Ct. 2427 (2014). The Supreme Court upheld EPA's regulation of GHG Step 1—or ''anyway'' sources—but held that EPA may not treat GHGs as air pollutants for the purpose of determining whether a source is a major source (or is undergoing a major modification) and thus require the source to obtain a PSD or title V permit. Therefore, the Court invalidated the PSD and title V permitting requirements for GHG Step 2 sources and modifications.

In accordance with the Supreme Court's decision, on April 10, 2015, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an Amended Judgment vacating the regulations that implemented Step 2 of the GHG Tailoring Rule, but not the regulations that implement Step 1 of the GHG Tailoring Rule. *See Coalition for Responsible Regulation, Inc.* v. *EPA,* 606 Fed. Appx. 6, 7 (D.C. Cir. 2015). The Amended Judgment specifically vacated the EPA regulations under review (including 40 CFR 51.166(b)(48)(v) and 40 CFR 52.21(b)(49)(v)) ''to the extent they require a stationary source to obtain a PSD permit if greenhouse gases are the only pollutant (i) that the source emits or has the potential to emit above the applicable major source thresholds, or (ii) for which there is a significant emissions increase from a modification.'' *Id.* at 7–8.

EPA subsequently promulgated a good cause final rule on August 19, 2015, entitled ''Prevention of Significant Deterioration and Title V Permitting for Greenhouse Gases: Removal of Certain Vacated Elements.'' *See* 80 FR 50199 (August 19, 2015) (hereinafter referred to as the ''Good Cause GHG Rule''). The rule removed from the federal regulations the portions of the PSD permitting provisions for Step 2 sources that were vacated by the D.C. Circuit (*i.e.,* 40 CFR 51.166(b)(48)(v) and 52.21(b)(49)(v)). EPA therefore no longer has the authority to conduct PSD permitting for Step 2 sources, nor can the Agency approve provisions submitted by a state for inclusion in its SIP providing this authority. On October 3, 2016, EPA proposed to revise provisions in the PSD permitting regulations applicable to GHGs to address the GHG applicability threshold for PSD in order to fully conform with *UARG* and the Amended Judgment, but those revisions have not been finalized. *See* 81 FR 68110 and 81 FR 81711.

North Carolina regulates GHG sources for the purposes of implementing the PSD program at Rule 02D .0544, and the State's updated IBR date of 40 CFR 51.166(b) includes this update to the definition of ''subject to regulation'' at (b)(48) included in EPA's August 19, 2015, Good Cause GHG Rule. However, on August 8, 2019, EPA approved a January 12, 2018, SIP revision to modify the applicability procedures at Rule 02D .0544(a) to specify that a ''major stationary source or major modification shall not be required to obtain a prevention of significant deterioration (PSD) permit on the sole basis of its greenhouse gases emissions.'' *See* 84 FR 38876. The intent and effect of the January 12, 2018, SIP revision was to address the D.C. Circuit court's vacatur of GHG-only or ''Step 2'' provisions in the federal PSD regulations. Therefore, the North Carolina SIP already contains a provision addressing the *UARG* decision, which vacated the ability to regulate GHG-only sources under the PSD program.[22] The change to the definition of ''subject to regulation'' at 40 CFR 51.166(b)(48) made in EPA's August 19, 2015, final rule is incorporated in the April 13, 2021, SIP revision, which aligns the North Carolina definitions with the federal regulations and with North Carolina's approved applicability procedures. *See* EPA's August 8, 2019, final action for further details on how the January 12, 2018, SIP revision revised the North Carolina PSD program for regulating GHGs.

Finally, similar to changes made to 02D .0530(v), the updated incorporation by reference of federal PSD provisions captures EPA's updated air quality modeling procedures. As part of EPA's April 15, 2020, conditional approval of infrastructure SIP requirements for PSD for the 2015 8-hour ozone NAAQS, North Carolina committed to update its PSD regulations to reference the most current version of Appendix W to part 51. *See* 85 FR 20836. EPA approved the most recent version of Appendix W on January 17, 2017 (82 FR 5182), so North Carolina's incorporation by reference of the federal PSD rules with a date of July 1, 2019, includes the provisions found in paragraph 51.166(l), *Air Quality Models,* which requires use of the latest approved version of Appendix W when carrying out air quality modeling for PSD purposes. Also note that the language discussed above that the State adds to paragraph .0544(o) to include subsequent amendments and editions for federal regulations referenced in 40 CFR 51.166 will automatically incorporate the most up-to-date version of Appendix W because it is cross-referenced in 40 CFR 51.166(l). Therefore, EPA proposes to find that these changes resolve EPA's April 15, 2020, conditional approval of North Carolina's September 27, 2018, 2015 8-hour ozone infrastructure SIP submission addressing the PSD-related requirements of element C, Prong 3, and element J, and EPA is proposing to convert the conditional approval to a full approval.

The changes to North Carolina's PSD regulation for GHGs, 02D .0544, are either consistent with or more stringent than federal requirements and would not interfere with any applicable requirement concerning attainment and reasonable further progress, or any other applicable CAA requirement. For these reasons, as detailed above, EPA is proposing to approve the aforementioned changes to Rule 02D .0544 into the North Carolina SIP.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule, regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, and as discussed in Section III of this preamble, EPA is proposing to incorporate by reference North Carolina regulations 15A NCAC 02D .0530, ''Prevention of Significant Deterioration,'' state effective on October 1, 2020, and .0544, ''Prevention of Significant Deterioration Requirements for Greenhouse Gases,'' state effective on November 1, 2020.[23]

[22] North Carolina supplemented its January 12, 2018, submittal on March 4, 2019, to, among other things, exclude the incorporation by reference of the provisions of the Biomass Deferral Rule. *See* 76 FR 43490 (July 20, 2011). For further discussion on the March 4, 2019, letter, refer to EPA's May 23, 2019, NPRM (84 FR 23750). Therefore, EPA understands that North Carolina continues to not adopt the Biomass Deferral Rule provisions in this IBR update of 40 CFR 51.166 provisions. EPA has since removed this Biomass Deferral Rule language from the CFR. *See* 86 FR 37918 (July 19, 2021).

[23] EPA is not proposing to approve the October 1, 2020, state effective version of Rule 02D .0530 to the extent the rule would incorporate by reference 40 CFR 51.166(b)(2)(iii)(*a*) as of July 1, 2019. Instead, the version of 40 CFR 51.166(b)(2)(iii)(*a*) approved into the SIP would remain March 15, 1996, with a state effective date of November 21, 1996. *See* 64 FR 55831 (October 15, 1999). EPA is not proposing to approve the October 2020, state effective version of Rule 02D .0530 to the extent the rule would incorporate by reference 40 CFR 51.166(i)(2). Instead, the version of 40 CFR 51.166(i)(2) approved into the SIP would remain July 1, 2014, approved with a state effective date of September 1, 2017. *See* 83 FR 45827 (September 11, 2018). Finally, EPA is not proposing to approve the October 1, 2020, state effective version of Rule 02D .0530 to the extent the rule would incorporate by reference the following federal provisions: 40 CFR 51.166(b)(2)(v), 51.166(b)(3)(iii)(*d*), 51.166(b)(53)–(56), 51.166(i)(11)(ii), and 51.166(y). If EPA finalizes

EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region 4 office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Proposed Action

EPA is proposing to approve changes to the North Carolina SIP and convert the conditional approval for element C, Prong 3, and element J, for the 2015 8-hour ozone Infrastructure SIP to a full approval. Specifically, EPA is proposing to approve changes to North Carolina Rules 15A NCAC 02D .0530, *Prevention of Significant Deterioration,* and .0544, *Prevention of Significant Deterioration Requirements for Greenhouse Gases.*

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. This action merely proposes to approve 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 a 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).

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 proposed 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, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

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

Dated: September 30, 2022.

Daniel Blackman,

Regional Administrator, Region 4.

[FR Doc. 2022–21655 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

this action, the Agency will update the SIP table at 40 CFR 52.1770(c) to reflect these exceptions.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R03–OAR–2017–0090; FRL–10222–01–R3]

Air Plan Approval; Delaware; Removal of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve certain portions of a state implementation plan (SIP) revision submitted by the State of Delaware, through the Delaware Department of Natural Resources and Environmental Control (DNREC), on November 22, 2016. The revision was submitted by Delaware in response to a national finding of substantial inadequacy and SIP call published on June 12, 2015, which included certain provisions in the Delaware SIP related to excess emissions during startup, shutdown, and malfunction (SSM) events. EPA is proposing to approve two specific provisions of the submitted SIP revision and proposing to determine that such SIP revision corrects some of the deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call. EPA plans to act on the remainder of the SIP revision in a separate action or actions.

DATES: Written comments must be received on or before November 14, 2022.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R03–OAR–2017–0090 at *www.regulations.gov,* or via email to *gordon.mike@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, 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, 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 *www.epa.gov/dockets/commenting-epa-dockets.*

FOR FURTHER INFORMATION CONTACT: Mallory Moser, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, Four Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2030. Ms. Moser can also be reached via electronic mail at *moser.mallory@epa.gov.*

SUPPLEMENTARY INFORMATION:
Throughout this document wherever ''we'' or ''our'' is used, it refers to EPA.

I. Background

On February 22, 2013, the EPA issued a **Federal Register** notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the Clean Air Act (CAA) with regard to excess emission events.[1] For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a D.C. Circuit decision that determined the CAA precludes authority of the EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate (79 FR 55920, September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized ''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'' (80 FR 33840, June 12, 2015), hereafter referred to as the ''2015 SSM SIP Action.'' The 2015 SSM SIP Action clarified, restated, and updated EPA's interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a Memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.[2] Importantly, the 2020 Memorandum stated that it ''did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.'' Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Delaware in 2015. The 2020 Memorandum did, however, indicate EPA's intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA's Deputy Administrator withdrew the 2020 Memorandum and announced EPA's return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).[3] As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including overburdened communities, receive the full health and environmental protections provided by the CAA.[4] The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum of EPA's plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA's intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the agency takes action on SIP submissions, including this SIP submittal provided in response to the 2015 SIP call.

With regard to the Delaware SIP, in the 2015 SSM SIP Action, EPA determined that the following regulations were substantially inadequate to meet CAA requirements (80 FR 33973, June 12, 2015): Title 7 of Delaware's Administrative Code (7 DE Admin. Code) 1104 Section 1.5, 7, DE Admin. Code 1105 Section 1.7, 7 DE Admin. Code 1108 Section 1.2, 7 DE Admin. Code 1109 Section 1.4, 7 DE Admin. Code 1114 Section 1.3, 7 DE Admin. Code 1124 Section 1.4, and 7 DE Admin. Code 1142 Section 2.3.1.6. These provisions allow for exemptions from otherwise applicable SIP emission limitations. The rationale underlying EPA's determination that these provisions were substantially inadequate to meet CAA requirements, and therefore to issue a SIP call to Delaware to remedy the provisions, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

Delaware submitted a SIP revision on November 22, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. Delaware's 2016 SIP submission addressed all of the SIP provisions identified in the SIP call, but this proposed action is only addressing the portion of Delaware's submittal that pertains to 7 DE Admin. Code 1124, Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. 7 DE Admin. Code 1124 regulates various coating and non-coating sources of VOCs, while 7 DE Admin. Code 1142 controls NO_X emissions from industrial boilers and process heaters at petroleum refineries. EPA is acting on these two provisions first because they are subject to a court ordered deadline of February 22, 2023, whereas the remaining provisions have court ordered deadlines of June 22, 2023, for a proposed action, and October 20, 2023, for a final action. Delaware's 2016 SIP submission showed that these two regulatory provisions had been removed from Delaware's regulations, and therefore Delaware requested that EPA remove these provisions from the Delaware SIP. Delaware's 2016 submission also notes that the deficiency highlighted in 7 DE Admin. Code 1108 Section 1.2 was corrected by a previous SIP revision, which was submitted to EPA on July 10, 2013.[5] In its 2016 submission, Delaware also requested that EPA approve revisions to the remaining four provisions in the Delaware SIP that were highlighted in the 2015 SSM SIP Action. EPA will be acting on those revisions under a separate action or actions.

[1] State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

[2] October 9, 2020, memorandum ''Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,'' from Andrew R. Wheeler, Administrator.

[3] September 30, 2021, memorandum ''Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,'' from Janet McCabe, Deputy Administrator.

[4] 80 FR 33985, June 12, 2015.

[5] EPA approval of the July 10, 2013, SIP submittal on July 11, 2022. See 87 FR 41074.

II. Summary of SIP Revision and EPA Analysis

EPA is proposing to approve those portions of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. Delaware's 2016 SIP submission shows that these two provisions have been removed from Delaware's regulations,[6] and EPA has confirmed that these two provisions are no longer in Delaware's regulations.[7] Based on Delaware's request to remove these sections from the Delaware SIP, EPA proposes to find that Delaware's November 22, 2016, SIP revision, for 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6 only, is consistent with CAA requirements and addresses two of the seven deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the Delaware SIP. Delaware's 2016 SIP submission also made small, non-substantive style changes to other sections of 7 DE Admin. Code 1142, which EPA is proposing to approve. These changes consisted of inserting the words ''subsection'' or ''section'' before references to specific regulatory provisions to conform to Delaware's regulatory style requirements. Also, on July 11, 2022, EPA published a Final Rule which removed the SSM provisions contained in 7 DE Admin. Code 1108, from the Delaware SIP.[8] EPA will act on the revisions that address the deficiencies in 7 DE Admin. Code 1104 Section 1.5, 7 DE Admin. Code 1105 Section 1.7, 7 DE Admin. Code 1109 Section 1.4, and 7 DE Admin. Code 1114 Section 1.3 in a separate action or actions.

III. Proposed Action

EPA is proposing to approve that portion of Delaware's November 22, 2016, SIP submission addressing 7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6. These specific provisions have been removed from Delaware's regulations and this action is proposing to remove these two provisions from the EPA-approved Delaware SIP. EPA is further proposing to determine that this portion of Delaware's 2016 SIP revision corrects two of the seven deficiencies identified in the June 12, 2015, SIP call. EPA is not reopening the 2015 SSM SIP Action and is only taking comment on whether this SIP revision is consistent with CAA requirements and whether it addresses the inadequacies in the two specific Delaware SIP provisions (7 DE Admin. Code 1124 Section 1.4 and 7 DE Admin. Code 1142 Section 2.3.1.6) identified in the 2015 SSM SIP Action.

IV. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, EPA is proposing to incorporate by reference the amendments to 1124, Control of Volatile Organic Compound Emissions, and 1142, Specific Emission Control Requirements, in section 52.420, as explained in Section II of this preamble. EPA has made, and will continue to make, these materials generally available through *www.regulations.gov* and at the EPA Region III Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this 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:

Accordingly, this 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 the 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, this proposed rule, which corrects some of the deficiencies in Delaware's SIP identified in the June 12, 2015, SIP call, does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Volatile organic compounds.

Diana Esher,

Acting Regional Administrator, Region III.

[FR Doc. 2022–22110 Filed 10–11–22; 8:45 am]

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[6] See Appendix A to Delaware's November 21, 2016, SIP submission, found in the docket for this action.

[7] See *www.regulations.delaware.gov/AdminCode/title7/1000/1100/1124.pdf* and *www.regulations.delaware.gov/AdminCode/title7/1000/1100/1142.pdf.*

[8] 87 FR 41074.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 152

[EPA–HQ–OPP–2019–0701; FRL–7542–04–OCSPP]

RIN 2070–AK56

Notification of Submission to the Secretary of Agriculture; Pesticides; Addition of Chitosan (Including Chitosan Salts) to the List of Active Ingredients Permitted in Exempted Minimum Risk Pesticide Products

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notification of submission to the Secretary of Agriculture.

SUMMARY: This document notifies the public as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) that the EPA Administrator has forwarded to the Secretary of the United States Department of Agriculture (USDA) a draft final rulemaking regulatory document concerning ''Pesticides; Addition of Chitosan (Including Chitosan Salts) to the List of Active Ingredients Permitted in Exempted Minimum Risk Pesticide Products (RIN 2070–AK54).'' The draft regulatory document is not available to the public until after it has been signed and made available by EPA.

DATES: See Unit I. under **SUPPLEMENTARY INFORMATION**.

ADDRESSES: The docket for this action, identified by docket identification (ID) number EPA–HQ–OPP–2019–0701 is available at *https://www.regulations.gov.* That docket contains historical information and this **Federal Register** document; it does not contain the draft final rule. Additional instructions on visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT: Sara Kemme, Mission Support Division (7101M), Office of Program Support, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–1217; email address: *kemme.sara@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is EPA taking?

FIFRA section 25(a)(2)(B) requires the EPA Administrator to provide the Secretary of USDA with a copy of any draft final rule at least 30 days before signing it in final form for publication in the **Federal Register**. The draft final rule is not available to the public until after it has been signed by EPA. If the Secretary of USDA comments in writing regarding the draft final rule within 15 days after receiving it, then the EPA Administrator shall include the comments of the Secretary of USDA and the EPA Administrator's response to those comments with the final rule that publishes in the **Federal Register**. If the Secretary of USDA does not comment in writing within 15 days after receiving the draft final rule, then the EPA Administrator may sign the final rule for publication in the **Federal Register** any time after the 15-day period.

II. Do any statutory and Executive Order reviews apply to this notification?

No. This document is merely a notification of submission to the Secretary of USDA. As such, none of the regulatory assessment requirements apply to this document.

List of Subjects in 40 CFR Part 152

Environmental protection, Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting, and recordkeeping requirements.

Dated: October 4, 2022.

Michal Freedhoff,

Assistant Administrator, Office of Chemical Safety and Pollution Prevention.

[FR Doc. 2022–22079 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

Notices

Federal Register

Vol. 87, No. 196

Wednesday, October 12, 2022

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

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–ST–22–0060]

Information Collection for National Science Laboratories

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the Agricultural Marketing Service's (AMS) intention to request approval, from the Office of Management and Budget (OMB), for a new information collection ''National Science Laboratories.''

DATES: Comments on this notice must be received by December 12, 2022 to be assured of consideration.

ADDRESSES: Interested persons are invited to submit comments concerning this notice by using the electronic process available at *https://www.regulations.gov.* All comments should reference the document number and the date and page number of this issue of the **Federal Register**. All comments submitted in response to this notice will be posted without change, including any personal information provided, at *https://www.regulations.gov* and will be included in the record and made available to the public.

FOR FURTHER INFORMATION CONTACT: Roger Simonds, National Science Laboratories, Laboratory Approval and Testing Division, Science & Technology Program, 801 Summit Crossing Place, Suite B, Gastonia, NC 28054; Phone: (704) 867–3873; or Email: *NationalScienceLaboratories@usda.gov.*

SUPPLEMENTARY INFORMATION:

Agency: USDA, AMS.

Title: National Science Laboratories.

OMB Number: 0581–NEW.

Type of Request: New Information Collection.

Abstract: This information collection is necessary to conduct voluntary analytical testing on a fee-for-service basis. The Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621–1627), authorizes the Agricultural Marketing Service, AMS' National Science Laboratories (NSL) to provide chemical, microbiological, and bio-molecular lab analytical testing services to facilitate domestic and international marketing of food and agricultural commodities. NSL is a fee-for-service lab network utilized by both industry and government and provides testing services for AMS commodity programs, other USDA agencies, Federal and State agencies, U.S. Military, research institutions, and private sector food and agricultural industries. Applicants voluntarily submit samples for analytical testing and pay testing fees. Regulations implementing the NSL program appear at 7 CFR part 91.

The information collected is information needed to perform analytical testing, issue a certificate/report of analytical results, and collect payment for services requested by the applicant. This includes information about applicant's business, sample(s) submitted, and the required test(s). AMS will collect business information on form ST–1, Application for Service. The information requested will be used by the Administrative Officer to identify the applicant in the billing system, to set up an account in the billing system and contact the party responsible for payment of testing fee.

Applicants, when submitting samples, provide sample information documentation needed to conduct analytical laboratory testing. This information can be submitted using documentation provided by the applicant or on form FRM–12, provided by NSL. Such information includes: Applicant contact information; Product description; Number of containers; Lot number or production date; Analyses requested; Any other information required by the applicant to be on the analytical certificate/report of analytical results. Information collection requirements in this request are essential to provide applicants with the service requested and administer the program.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average 0.254 hours per response.

Respondents: Food and Agricultural Businesses.

Estimated Number of Respondents: 10,279.

Estimated Total Annual Responses: 10,279.

Estimated Number of Responses per Respondent: 1.0.

Estimated Total Annual Burden on Respondents: 2613.25 hours.

Comments are invited on: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including completion of analyses related documentation; (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 the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

All responses to this notice will be summarized and included in the request for OMB approval. All comments will become a matter of public record.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2022–22137 Filed 10–11–22; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FGIS–22–0066]

United States Standards for Beans: Chickpea/Garbanzo Beans

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: The United States Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is proposing revision to the U.S. Standards for Beans, pertaining to the grade determining

factors Moisture and Contrasting Chickpeas in the class Chickpea/Garbanzo Beans, under the United States Agricultural Marketing Act of 1946, as amended, (AMA). Stakeholders in the bean processing/handling industry requested AMS to amend the grading requirements for Moisture and Contrasting Chickpeas in Chickpea/Garbanzo Beans in the U.S. Bean Standards. To ensure that the bean standards remain relevant, AMS invites interested parties to comment on whether revising the Chickpea/Garbanzo standard will facilitate the marketing of Chickpea/Garbanzo Beans. This action may revise or amend the table of Grades and Grade Requirements for Chickpea/Garbanzo Beans in the U.S. Standard for Beans.

DATES: Comments must be received by December 12, 2022.

ADDRESSES: Interested persons are invited to submit written comments concerning this notice. All comments must be submitted through the Federal e-rulemaking portal at *https://www.regulations.gov* and should reference the document number and the date and page number of this issue of the **Federal Register**. Instructions for submitting and reading comments are detailed on the site. All comments submitted in response to this notice will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Loren Almond, USDA AMS; Telephone: (816) 702–3925; Email: *Loren.L.Almond@usda.gov.*

SUPPLEMENTARY INFORMATION: Under the authority of the AMA (7 U.S.C. 1621–1627), as amended, AMS establishes and maintains a variety of quality and grade standards for agricultural commodities that serve as a fundamental starting point to define commodity quality in the domestic and global marketplace.

Standards developed under the AMA include those for rice, whole dry peas, split peas, feed peas, lentils, and beans. The U.S. standards for whole dry peas, split peas, feed peas, lentils and beans no longer appear in the Code of Federal Regulations but are now maintained by USDA–AMS–Federal Grain Inspection Service (FGIS). The U.S. standards for beans are voluntary and widely used in private contracts, government procurement, marketing communication, and for some commodities, consumer information.

The bean standards facilitate bean marketing and define U.S. bean quality in the domestic and global marketplace. The standards define commonly used industry terms; contain basic principles governing the application of standards such as the type of sample used for a particular quality analysis; the basis of determination; and specify grades and grade requirements. Official procedures for determining grading factors are provided in the Bean Inspection Handbook. Together, the grading standards and testing procedures allow buyers and sellers to communicate quality requirements, compare bean quality using equivalent forms of measurement, and assist in price discovery.

AMS engages in outreach with stakeholders to ensure commodity standards maintain relevance to the modern market. Stakeholders, including the U.S.A. Dry Pea and Lentil Council (USA DPLC), requested AMS revise the Chickpea/Garbanzo Bean criteria for the grade determining factors Moisture and Contrasting Chickpeas.

Currently, Chickpeas/Garbanzo Beans are assigned the Special Grade, ''High Moisture'' when the moisture content exceeds 18.0 percent. Contrasting Chickpeas over 5.0 percent cause the Chickpea/Garbanzo Beans to be considered U.S. Substandard Chickpea/Garbanzo Beans. AMS–FGIS proposes to revise the bean inspection criteria in the U.S. Standards for Beans and revise the Bean Inspection Handbook, by amending the criteria requirements for Moisture and Contrasting Chickpea/Garbanzo Beans.

Moisture Determination in Chickpea/Garbanzo Beans

Representatives of bean industry stakeholders contacted AMS–FGIS to discuss the issues of high moisture in Chickpea/Garbanzo Beans. Stakeholders stated that 18.0 percent moisture is too high to properly store and maintain Chickpea/Garbanzo Beans. FGIS pointed out that moisture content is often a contract specification. During meetings and discussions, bean stakeholders recommended revising the Chickpea/Garbanzo Bean moisture content downward from 18.0 percent to 14.0 percent when applying the special grade criteria High Moisture. Therefore, Chickpea/Garbanzo Beans with more than 14.0 percent moisture would be designated as Special Grade, ''High Moisture.''

Contrasting Chickpea/Garbanzo Beans

Stakeholders stated that designating Chickpea/Garbanzo Beans with more than 5.0 percent Contrasting Chickpeas as U.S. Substandard is illogical because the entire sample of beans is still considered Chickpea/Garbanzo Beans, regardless of its U.S. Substandard designation due to contrast. During meetings and discussions, bean stakeholders communicated the need to revise the standard by changing the grade criteria for Contrasting Chickpeas in Chickpea/Garbanzo Beans. Stakeholders suggested changing the 5.0 percent Contrasting Chickpea/Garbanzo Bean maximum limit for U.S. No. 3 to ''>2.0 percent.'' Therefore, Chickpea/Garbanzo Beans found to contain more than 2.0 percent Contrasting Chickpeas may be designated as U.S. No. 3 but shall grade no higher than U.S. No. 3. Contrasting Chickpea grading criteria for U.S. No. 1 and U.S. No. 2 would remain unchanged.

This revision would assist in moving the U.S. Bean market towards fewer quality complaints and serve to ensure consistent grading results across the nation. These changes were recommended to AMS by the stakeholder organizations identified in the background section of this notice to facilitate the current marketing practices.

AMS grading and inspection services, provided through a network of federal, state, and private laboratories, conduct tests to determine the quality and condition of Beans. These tests are conducted in accordance with applicable standards using approved methodologies and can be applied at any point in the marketing chain. Furthermore, these tests yield rapid, reliable, and consistent results. The U.S. Standards for Beans and the affiliated grading and testing services offered by AMS verify that a seller's Beans meet specified requirements and ensure that customers receive the quality purchased.

In order for U.S. standards and grading procedures for beans to remain relevant, AMS is issuing this request for information to invite interested parties to submit comments on the proposal to amend U.S. Standards for Beans pertaining to the class Chickpea/Garbanzo Beans, and to revise the Bean Inspection Handbook accordingly.

Proposed AMS Action

Based on input from stakeholder organizations in the bean industry, AMS proposes to amend the U.S. Standards for Beans by revising the criteria for Special Grade High Moisture and the grade determining factor ''Contrasting Chickpeas'' in Chickpea/Garbanzo Beans. As a result, Chickpeas/Garbanzo Beans with more than 14.0 percent moisture would be considered Special

Grade, ''High Moisture.'' Contrasting Chickpeas over 2.0 percent will no longer be considered U.S. Substandard Chickpea/Garbanzo Beans, but instead would grade no higher than U.S. No. 3 Chickpea/Garbanzo Beans. AMS would revise the Bean Inspection Handbook to reflect these changes.

AMS is accepting comments on this proposed action for 60 days. All comments received within the comment period will be made part of the public record maintained by AMS, will be available to the public for review, and will be considered by AMS before a final action is taken on this proposal.

Authority: 7 U.S.C. 1621–1627.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2022–22109 Filed 10–11–22; 8:45 am]

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DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

[Doc. No. AMS–FGIS–21–0017]

United States Standards for Wheat

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice.

SUMMARY: The United States Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) is making no changes regarding the U.S. Standards for Wheat under the U.S. Grain Standards Act, as amended (USGSA).

DATES: Applicable: October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Barry Gomoll, USDA AMS; Telephone: (202) 720–8286; Email: *Barry.L.Gomoll@usda.gov.*

SUPPLEMENTARY INFORMATION: Section 4 of the USGSA (7 U.S.C. 76(a)) grants the Secretary of Agriculture the authority to establish standards for grain regarding kind, class, quality, and condition. AMS published a request for information on April 20, 2021, in the **Federal Register** (86 FR 20480), inviting interested parties to comment on whether the current wheat standards and grading practices need to be changed. Current U.S. Standards for Wheat can be found at 7 CFR 810.2201–5.

AMS received a total of five comments on the U.S. Standards for Wheat during the comment period.

Four commenters, representing grain merchandisers, exporters, and traders, responded that they are satisfied with the standards as currently written, stating that changes may create confusion and uncertainty for the market and should only be made if they significantly improve the marketing of U.S. wheat. Three of these commenters further stated a desire for further research into the marketing of Hard White Wheat (HDWH), either by differentiating between winter and spring varieties, merging HDWH with the class Hard Red Winter Wheat (HRW) to create a Hard Winter Wheat class, or increasing the allowable amount of HDWH in HRW.

One commenter, representing a wheat growing group, suggested changing the standards, either by merging HDWH and HRW to create a Hard Winter Wheat class or by increasing the allowable Wheat of Other Classes in HRW to 25%. The commenter mentioned that such a standards change could help remove barriers to growers hoping to market HDWH for export markets.

Based on the balance of comments received in response to the request, AMS has decided to make no changes to the wheat standards at this time. However, AMS will collaborate with the wheat industry to consider any data and research from interested stakeholders regarding the possibilities, impacts, and potential market acceptance of either merging HDWH and HRW to create a Hard Winter Wheat class, or increasing the allowable Wheat of Other Classes in HRW to 25%.

Final Action

Based on the comments received, AMS–FGIS is making no changes to the U.S Standards for Wheat at this time.

Authority: 7 U.S.C. 71–87k.

Melissa Bailey,

Associate Administrator, Agricultural Marketing Service.

[FR Doc. 2022–22113 Filed 10–11–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

Agency Information Collection Activities: Proposed Collection; Comment Request; Understanding the Relationship Between Poverty, Well-Being and Food Security

AGENCY: Food and Nutrition Service (FNS), USDA.

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice invites the general public and other public agencies to comment on this proposed information collection. This new collection will provide the U.S. Department of Agriculture, Food and Nutrition Service with new information about food security and individual and family circumstances and environmental factors related to poverty in six persistently poor counties.

DATES: Written comments must be received on or before December 12, 2022.

ADDRESSES: Comments may be mailed to Michael Burke, Senior Social Science Research Analyst, Food and Nutrition Service, Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314. Comments may also be submitted via email to *michael.burke@usda.gov.* Comments will also be accepted through the Federal eRulemaking Portal. Go to *http://www.regulations.gov* and follow the online instructions for submitting comments electronically.

All written comments will be open for public inspection at the office of the Food and Nutrition Service during regular business hours (8:30 a.m. to 5:00 p.m.), Monday through Friday at Braddock Metro Center II, 1320 Braddock Place, Alexandria, VA 22314.

All responses to this notice will be summarized and included in the request for Office of Management and Budget approval. All comments will be a matter of public record.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of this information collected should be directed to Michael Burke by email at *michael.burke@usda.gov* or by phone at (703) 305–4369.

SUPPLEMENTARY INFORMATION: Comments are invited on the following topics: (1) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (2) the accuracy of the agency's estimate of the burden on the proposed collection of information, including the validity of the methodology and assumptions that were used; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Title: Understanding the Relationship Between Poverty, Well-Being, and Food Security.

Form Number: Not applicable.

OMB Number: 0584–NEW.

Expiration Date: Not yet determined.

Type of Request: New collection.

Abstract: This is a new information collection request. The Supplemental Nutrition Assistance Program (SNAP) is the nation's largest federal program aimed at reducing food insecurity and increasing access to healthy food. SNAP is administered by the U.S. Department of Agriculture's (USDA), Food and Nutrition Service (FNS) and provides nutrition assistance benefits to program participants, the majority of whom are children, the elderly, or people with disabilities. Through this data collection effort, FNS seeks to understand the interrelated factors that lead to household food insecurity. Data will be collected in six counties experiencing persistent intergenerational poverty through a study titled *Understanding the Relationship Between Poverty, Well-Being, and Food Security.*

Understanding the Relationship Between Poverty, Well-Being, and Food Security will allow FNS to gain a deeper understanding of the interrelated factors that affect the food security status of SNAP beneficiaries and SNAP-eligible nonparticipants, information which has not previously collected in persistently poor counties. The USDA's Economic Research Service (ERS) defines counties as being persistently poor if 20 percent or more of county residents were poor at each of several points in time over a 30-year period, measured by the 1980, 1990, and 2000 censuses and the 2007–2011 American Community Survey. Examining food insecurity and poverty in these populations will help FNS better understand the association between SNAP, other USDA-administered programs, and community-based assistance with well-being and the food environment. Study objectives include:

- Objective 1: Produce descriptive statistics on key sociodemographic and economic variables, including household food security in a representative sample of all residents in each of six persistent-poverty counties.
- Objective 2: Produce descriptive statistics on key sociodemographic and economic variables, including household food insecurity in two representative stratified subsamples of low and very low food-secure residents, in each county of six persistent-poverty counties.
- Objective 3: Produce descriptive statistics for each subgroup in each county on key social, geospatial, and other policy-actionable elements of well-being and material deprivation associated with both household food security and SNAP participation.
- Objective 4: Characterize the social context and the life course of individuals, within a multigenerational family unit, as they define their experiences with food insecurity through In-Depth Interviews (IDIs).

To ensure a representative probability sample of households in each of the six persistent poverty counties (each located within six different states) we propose a two-stage address-based sampling (ABS) approach in which the primary sampling units (PSUs) will be small geographic clusters consisting of census-defined blocks or groups of blocks within the country, and the secondary sampling units will be residential addresses within the selected PSUs. We will use American Community Survey (ACS) and SNAP administrative data to obtain an estimate of SNAP-eligibility by PSU. The study includes several data collection activities: (1) SNAP administration data; (2) a household survey; (3) in-depth interviews with household survey respondents; and (4) focus groups with community stakeholders.

Affected Public: Respondent groups identified include: (a) Individual/Households (county residents in the six selected counties); (b) Business—Profit, Non-Profit, or Farm (community stakeholder focus group participants); (c) State, Local, or Tribal Government (State/County SNAP agencies).

Estimated Number of Respondents: 15,997. The total estimated number of individuals/households (I/H) initially contacted is 15,840. Out of the initial number of I/H contacted 6,600 respondents will be surveyed, and a subsample of 156 respondents will participate in an in-depth interview. A total of 48 community stakeholders will participate in focus groups—36 Business (Profit, Non-Profit, or Farm) and 12 State, Local, or Tribal Government. 38 police stations (State, Local, or Tribal Government) will receive notifications that field staff are working in the area. In addition, 6 State SNAP agencies and 1 County SNAP agency (State, Local, or Tribal Government) will be asked to provide SNAP administrative data once to support development of the survey sampling frame. All 7 are expected to respond.

Estimated Number of Responses per Respondent: All respondents will be asked to respond to each specific data collection activity only once. County residents will be asked to participate in one survey; a subset of interview respondents will be asked to participate in one in-depth interview. Community stakeholders will be asked to participate in one focus group, and SNAP agency will be asked to complete one data request. The estimated number of responses is 5.8 responses per respondent, including all contact materials.

Estimated Total Annual Responses: The estimate total annual responses is 115,347 (86,894 respondents and 28,453 non-respondents).

Estimated Time per Response: The estimated time of response varies from 1 minute (0.0167 hours) to 8 hours, depending on respondent group, as shown in the table below, with an average estimated time of 0.0673 hours for all participants.

Estimated Total Annual Burden on Respondents: 465,761 minutes (7,763 hours). See the table below (Table 1) for estimated total annual burden for each type of respondent.

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Table 1: Respondent Burden Estimate Table

					Responsive					Non-Responsive							
Respondent Category	Type of respondents	Instruments	Appendix	Sample Size	Number of respondents	Frequency of response	Total Annual responses	Hours per response	Annual burden (hours)	Number of Non-respondents	Frequency of response	Total Annual responses	Hours per response	Annual burden (hours)	Grand Total Annual Burden Estimate (hours)	Hourly rate	Cost
Individual/ Household	Survey participants	Survey Invitation Letter	B1/B2	19,800	15,840	1	15,840	0.0334	529	3,960	1	3,960	0.0334	132.264	661	$ 7.25	$ 4,795
		Study Brochure	C	19,800	15,840	1	15,840	0.0334	529	3,960	1	3,960	0.0334	132.264	661	$ 7.25	$ 4,795
		Endorsement Letter	D1/D2	19,800	15,840	1	15,840	0.0334	529	3,960	1	3,960	0.0334	132.264	661	$ 7.25	$ 4,795
		First Survey Reminder Letter	E1/E2	17,325	10,395	1	10,395	0.0334	347	6,930	1	6,930	0.0334	231.462	579	$ 7.25	$ 4,195
		Second Survey Reminder Letter	F1/F2	13,860	5,544	1	5,544	0.0334	185	8,316	1	8,316	0.0334	277.754	463	$ 7.25	$ 3,356
		Survey Door Hanger	G	10,395	9,875	1	9,875	0.0167	165	520	1	520	0.0167	8.680	174	$ 7.25	$ 1,259
		Survey Refusal Letter	I1/I2	3,960	3,168	1	3,168	0.0334	106	792	1	792	0.0334	26.453	132	$ 7.25	$ 959
		Thank You Letter	J1/J2	2,178	2,178	1	2,178	0.0167	36	0	0	-	0.0167	-	36	$ 7.25	$ 264
		Household Survey	R1	6,600	6,600	1	6,600	0.5845	3,858	0	0	-	0.5845	-	3,858	$ 7.25	$ 27,968
		IDI Invitation Call Script	K1/K2	624	562	1	562	0.1002	56	62	0	-	0.1002	-	56	$ 7.25	$ 408
		IDI Confirmation Letter/Email	L1/L2	624	156	1	156	0.0167	3	468	0	-	0.0167	-	3	$ 7.25	$ 19
		IDI Reminder Call Script	M1/M2	624	156	1	156	0.0334	5	468	0	-	0.0334	-	5	$ 7.25	$ 38
		IDI Consent Form	N1/N2	624	156	1	156	0.0334	5	468	0	-	0.0334	-	5	$ 7.25	$ 38
		IDI Interview Guide	O1/O2	624	156	1	156	2.0000	312	468	0	-	2.0000	-	312	$ 7.25	$ 2,262
Individual/ Household Sub-Total				**19,800**	**15,840**	**5.46**	**86,466**	**0.0771**	**6,666**	**3,960**	**7.18**	**28,438**	**0.0331**	**941.141**	**7,606.770**		**$ 55,149.09**
Business (Profit, Non-Profit, or Farm)	Focus groups	Focus Group Consent Form	P1	96	36	1	48	0.0334	2	60	0	-	0.0334	-	2	$ 25.94	$ 42
		Focus Group Discussion Guide	P2	96	36	1	48	1.5000	72	60	0	-	1.5000	-	72	$ 25.94	$ 1,868
		Focus Group Invitation	P3	96	96	1	96	0.0167	2	0	0	-	0.0167	-	2	$ 25.94	$ 42
		Study Description	Q	96	96	1	96	0.0334	3	0	0	-	0.0334	-	3	$ 25.94	$ 83
Business (Profit, Non-Profit, or Farm) Sub-Total				**96**	**96**	**3.000**	**288**	**0.272**	**78**	**60**	-	-	-	-	**78**		**$ 2,034.03**
State, Local, or Tribal Government	State or county staff	SNAP Agency Data Request	A	7	7	1	7	8.0000	56.0000	0	0	-	8.0000	-	56	$78.88	$ 4,417
	State or local police station staff	Police Station Letter	H	38	30	1	30	0.0167	1	7.6	1	8	0.0167	0.127	1	$78.88	$ 50
		Study Description	Q	38	30	1	30	0.0334	1	7.6	1	8	0.0334	0.254	1.3	$78.88	$ 100
	Focus groups	Focus Group Consent Form	P1	24	12	1	12	0.0334	0	12	0	-	0.0334	-	0	$78.88	$ 32
		Focus Group Discussion Guide	P2	24	12	1	12	1.5000	18	12	0	-	1.5000	-	18	$78.88	$ 1,420
		Focus Group Invitation	P3	24	24	1	24	0.0167	0	0	0	-	0.0167	-	0	$78.88	$ 32
		Study Description	Q	24	24	1	24	0.0334	1	0	0	-	0.0167	-	1	$78.88	$ 63
State, Local, or Tribal Government Sub-Total				**69**	**61**	**2.28**	**139.8**	**0.552**	**77.126**	**20**	**0.776**	**15.2**	**0.025**	**0.381**	**77.507**		**$ 6,113.93**
COMBINED TOTAL				**19,965**	**15,997**		**86,894**		**6,821**	**4,040**	**8**	**28,453**		**942**	**7,762.69**		**$ 63,297.04**

Tameka Owens,

Assistant Administrator, Food and Nutrition Service.

[FR Doc. 2022–22149 Filed 10–11–22; 8:45 am]

BILLING CODE 3410–30–C

DEPARTMENT OF AGRICULTURE

Forest Service

El Dorado County Resource Advisory Committee

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of meeting.

SUMMARY: The El Dorado County Resource Advisory Committee (RAC) will hold a virtual meeting by phone and/or video conference. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (the Act) and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with title II of the Act, as well as make recommendations on recreation fee proposals for sites on the Eldorado National Forest and Lake Tahoe Basin Management Unit within El Dorado county, consistent with the Federal Lands Recreation Enhancement Act. General information and meeting details can be found at the following website: *www.fs.usda.gov/main/eldorado/workingtogether/advisorycommittees.*

DATES: The meeting will be held on November 2, 2022, from 3:30 p.m.–5:30 p.m., Pacific daylight time.

All RAC meetings are subject to cancellation. For the status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: The meeting is open to the public and will be held virtually via telephone and/or video conference. Virtual meeting participation details can be found on the website listed under **SUMMARY** or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written comments may be submitted as described under **SUPPLEMENTARY INFORMATION**. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

FOR FURTHER INFORMATION CONTACT: James Bacon, Acting Designated Federal Officer (DFO), by phone at 530–303–2412 or email at *james.bacon@usda.gov* or Jennifer Chapman, RAC Coordinator at 530–957–9660 or email at *jennifer.chapman@usda.gov.*

Individuals who use telecommunication devices for the deaf and hard of hearing (TDD) may call the Federal Relay Service (FRS) at 1–800–877–8339, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION: The purpose of the meeting is to:

1. Discuss RAC projects and program updates;

2. Discuss the recent county allocations process for the Secure Rural Schools program;

3. Schedule the next meeting.

The meeting is open to the public. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. Written comments and requests for time to make oral comments must be sent to Jennifer Chapman, 100 Forni Road, Placerville, CA 95667; or by email to *jennifer.chapman@usda.gov.*

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

Persons with disabilities who require alternative means of communication for program information (*e.g.,* Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at 1–202–720–2600 (voice and TTY) or contact USDA through the Federal Relay Service at 1–800–877–8339. Additionally, program information may be made available in languages other than English.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken in account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: October 5, 2022.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2022–22111 Filed 10–11–22; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

Sensors and Instrumentation Technical Advisory Committee; Notice of Partially Closed Meeting

The Sensors and Instrumentation Technical Advisory Committee (SITAC) will meet on Tuesday, October 25, 2022, 1:00 p.m., Eastern Standard Time, in the Herbert C. Hoover Building, Room 48019, 14th Street between Constitution and Pennsylvania Avenues NW, Washington, DC The Committee advises the Office of the Assistant Secretary for Export Administration on technical questions that affect the level of export controls applicable to sensors and instrumentation equipment and technology.

Agenda

Open Session

1. Welcome and Introductions.
2. Remarks from the Bureau of Industry and Security Management.
3. Industry Presentations.
4. New Business.

Closed Session

5. Discussion of matters determined to be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 2 10(a)(1) and 10(a)(3).

The open session will be accessible via teleconference. To join the conference, submit inquiries to Ms. Yvette Springer at *Yvette.Springer@bis.doc.gov* no later than October 18, 2022.

A limited number of seats will be available during the public session of the meeting. Reservations are not accepted. To the extent that time permits, members of the public may present oral statements to the Committee. The public may submit written statements at any time before or after the meeting. However, to facilitate distribution of public presentation materials to the Committee members, the Committee suggests that the

materials be forwarded before the meeting to Ms. Springer.

The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on January 25, 2022, pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. app. 2 10(d)), that the portion of the meeting dealing with pre-decisional changes to the Commerce Control List and the U.S. export control policies shall be exempt from the provisions relating to public meetings found in 5 U.S.C. app. 10(a)(1) and 10(a)(3). The remaining portions of the meeting will be open to the public. For more information, please contact Yvette Springer via email.

Yvette Springer,

Committee Liaison Officer.

[FR Doc. 2022–22108 Filed 10–11–22; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–036, C–570–037]

Certain Biaxial Integral Geogrid Products From the People's Republic of China: Continuation of Antidumping Duty Order and Countervailing Duty Order

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) and countervailing duty (CVD) orders on certain biaxial integral geogrid products (geogrids) from the People's Republic of China (China) would likely lead to continuation or recurrence of dumping, countervailable subsidies, and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD and CVD orders.

DATES: Applicable October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Kabir Archuletta, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–2593.

SUPPLEMENTARY INFORMATION:

Background

On March 3, 2017, Commerce published the AD and CVD orders on geogrids from China.[1] On February 1, 2022, the ITC instituted,[2] and Commerce initiated, the first sunset reviews of the *Orders,* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[3] As a result of its reviews, Commerce determined that revocation of the *Orders* would likely lead to continuation or recurrence of dumping and countervailable subsidies and, therefore, notified the ITC of the magnitude of the margins and net countervailable subsidy rates likely to prevail should the *Orders* be revoked.[4]

On October 4, 2022, the ITC published its determination, pursuant to sections 751(c) and 752(a) of the Act, that revocation of the *Orders* would likely lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[5]

Scope of the Orders

The products covered by the scope are certain biaxial integral geogrid products. Biaxial integral geogrid products are a polymer grid or mesh material (whether or not finished, slit, cut-to-length, attached to woven or non-woven fabric or sheet material, or packaged) in which four-sided openings in the form of squares, rectangles, rhomboids, diamonds, or other four-sided figures predominate. The products covered have integral strands that have been stretched to induce molecular orientation into the material (as evidenced by the strands being thinner in width toward the middle between the junctions than at the junctions themselves) constituting the sides of the openings and integral junctions where the strands intersect. The scope includes products in which four-sided figures predominate whether or not they also contain additional strands intersecting the four-sided figures and whether or not the inside corners of the four-sided figures are rounded off or not sharp angles. As used herein, the term ''integral'' refers to strands and junctions that are homogenous with each other. The products covered have a tensile strength of greater than 5 kilonewtons per meter (kN/m) according to American Society for Testing and Materials (ASTM) Standard Test Method D6637/D6637M in any direction and average overall flexural stiffness of more than 100,000 milligram-centimeter according to the ASTM D7748/D7748M Standard Test Method for Flexural Rigidity of Geogrids, Geotextiles and Related Products, or other equivalent test method standards.

Subject merchandise includes material matching the above description that has been finished, packaged, or otherwise further processed in a third country, including by trimming, slitting, coating, cutting, punching holes, stretching, attaching to woven or nonwoven fabric or sheet material, or any other finishing, packaging, or other further processing that would not otherwise remove the merchandise from the scope of the *Orders* if performed in the country of manufacture of the biaxial integral geogrid.

The products subject to the scope are currently classified in the Harmonized Tariff Schedule of the United States (HTSUS) under the following subheading: 3926.90.9995. Subject merchandise may also enter under subheadings 3920.20.0050 and 3925.90.0000. The HTSUS subheadings set forth above are provided for convenience and U.S. Customs purposes only. The written description of the scope is dispositive.

Continuation of the Orders

As a result of the determinations by Commerce and the ITC that revocation of the *Orders* would likely lead to a continuation or a recurrence of dumping and countervailable subsidies, as well as material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Orders.* U.S. Customs and Border Protection will continue to collect AD and CVD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise.

The effective date of the continuation of the *Orders* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year reviews of the *Orders* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

[1] *See Certain Biaxial Integral Geogrid Products from the People's Republic of China: Antidumping Duty Order,* 82 FR 12440 (March 3, 2017); and *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Countervailing Duty Order,* 82 FR 12437 (March 3, 2017) (collectively, *Orders*).

[2] *See Biaxial Integral Geogrid Products from China; Institution of Five-Year Reviews,* 87 FR 5508 (February 1, 2022).

[3] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 5467 (February 1, 2022).

[4] *See Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Results of the Expedited First Sunset Review of Antidumping Duty Order,* 87 FR 34847 (June 8, 2022); and *Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Results of the Expedited First Sunset Review of the Countervailing Duty Order,* 87 FR 31521 (May 24, 2022).

[5] *See Biaxial Integral Geogrid Products from China,* 87 FR 60199 (October 4, 2022).

Administrative Protective Order

This notice serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of the APO is a sanctionable violation.

Notification to Interested Parties

These five-year sunset reviews and this notice are in accordance with section 751(c) of the Act and published in accordance with section 777(i)(1) of the Act and 19 CFR 351.218(f)(4).

Dated: October 5, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–22153 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–520–804]

Certain Steel Nails From the United Arab Emirates: Final Results of Antidumping Duty Administrative Review; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that certain steel nails from the United Arab Emirates were sold in the United States at less than normal value during the period of review (POR) May 1, 2020, through April 30, 2021.

DATES: Applicable October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Brittany Bauer or Kelsie Hohenberger, AD/CVD Operations, Office V, Enforcement and Compliance, International Trade Administration, Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3860 or (202) 482–2517, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 2022, Commerce published the *Preliminary Results.*[1] We invited interested parties to comment.[2] This review covers one respondent: Middle East Manufacturing Steel LLC/Master Nails and Pins Manufacturing, LLC (MEM/Master).[3] No party commented on the *Preliminary Results,* and the final results remain unchanged from the *Preliminary Results.*

Commerce conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Order [4]

The merchandise covered by the *Order* includes certain steel nails having a shaft length up to 12 inches. Certain steel nails include, but are not limited to, nails made of round wire and nails that are cut. Certain steel nails may be of one piece construction or constructed of two or more pieces. Certain steel nails may be produced from any type of steel, and have a variety of finishes, heads, shanks, point types, shaft lengths and shaft diameters. Finishes include, but are not limited to, coating in vinyl, zinc (galvanized, whether by electroplating or hot-dipping one or more times), phosphate cement, and paint. Head styles include, but are not limited to, flat, projection, cupped, oval, brad, headless, double, countersunk, and sinker. Shank styles include, but are not limited to, smooth, barbed, screw threaded, ring shank and fluted shank styles. Screw-threaded nails subject to the *Order* are driven using direct force and not by turning the fastener using a tool that engages with the head. Point styles include, but are not limited to diamond, blunt, needle, chisel and no point. Certain steel nails may be sold in bulk, or they may be collated into strips or coils using materials such as plastic, paper, or wire.

Certain steel nails subject to the *Order* are currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7317.00.55, 7317.00.65, and 7317.00.75.

Excluded from the scope of the *Order* are steel nails specifically enumerated and identified in ASTM Standard F 1667 (2011 revision) as Type I, Style 20 nails, whether collated or in bulk, and whether or not galvanized. Also excluded from the scope of the *Order* are the following products:

- non-collated (*i.e.,* hand-drive or bulk), two-piece steel nails having plastic or steel washers (''caps'') already assembled to the nail, having a bright or galvanized finish, a ring, fluted or spiral shank, an actual length of 0.500″ to 8″, inclusive; an actual shank diameter of 0.1015″ to 0.166″, inclusive; and an actual washer or cap diameter of 0.900″ to 1.10″, inclusive;
- non-collated (*i.e.,* hand-drive or bulk), steel nails having a bright or galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500″ to 4″, inclusive; an actual shank diameter of 0.1015″ to 0.166″, inclusive; and an actual head diameter of 0.3375″ to 0.500″, inclusive;
- wire collated steel nails, in coils, having a galvanized finish, a smooth, barbed or ringed shank, an actual length of 0.500″ to 1.75″, inclusive; an actual shank diameter of 0.116″ to 0.166″, inclusive; and an actual head diameter of 0.3375″ to 0.500″, inclusive;
- non-collated (*i.e.,* hand-drive or bulk), steel nails having a convex head (commonly known as an umbrella head), a smooth or spiral shank, a galvanized finish, an actual length of 1.75″ to 3″, inclusive; an actual shank diameter of 0.131″ to 0.152″, inclusive; and an actual head diameter of 0.450″ to 0.813″, inclusive;
- corrugated nails. A corrugated nail is made of a small strip of corrugated steel with sharp points on one side;
- thumb tacks, which are currently classified under HTSUS 7317.00.10.00;
- fasteners suitable for use in powder-actuated hand tools, not threaded and threaded, which are currently classified under HTSUS 7317.00.20 and 7317.00.30;
- certain steel nails that are equal to or less than 0.0720 inches in shank diameter, round or rectangular in cross section, between 0.375 inches and 2.5 inches in length, and that are collated with adhesive or polyester film tape backed with a heat seal adhesive; and
- fasteners having a case hardness greater than or equal to 50 HRC, a carbon content greater than or equal to

[1] *See Certain Steel Nails from the United Arab Emirates: Preliminary Results of Antidumping Duty Administrative Review; 2020–2021,* 87 FR 34637 (June 7, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum.

[2] *Id.,* 87 FR at 34639.

[3] Commerce selected two mandatory respondents for individual examination in this review: Middle East Manufacturing Steel LLC and Master Nails and Pins Manufacturing, LLC. We find, however, that it is appropriate to treat the companies as a single entity. *See* Memoranda, ''Antidumping Duty Administrative Review of Certain Steel Nails from the United Arab Emirates: Middle East Manufacturing Steel LLC and Master Nails and Pins Manufacturing LLC—Preliminary Affiliation and Single Entity Treatment,'' dated May 31, 2022; and ''Administrative Review of Antidumping Duty Order on Certain Steel Nails from the United Arab Emirates: Respondent Selection,'' dated August 13, 2021.

[4] *See Certain Steel Nails from the United Arab Emirates: Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 77 FR 27421 (May 10, 2012) (*Order*).

0.5 percent, a round head, a secondary reduced-diameter raised head section, a centered shank, and a smooth symmetrical point, suitable for use in gas-actuated hand tools.

While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Order* is dispositive.

Final Results of the Review

We determine that the following weighted-average dumping margin exists for the respondent for the POR, May 1, 2020, through April 30, 2021:

Exporter/producer	Weighted-average dumping margin (percent)
Middle East Manufacturing Steel LLC/Master Nails and Pins Manufacturing, LLC	3.65
Review-Specific Average Rate Applicable to the Following Companies:	
Al Falaq Building Materials	3.65
Al Khashab Building Materials Co., LLC	3.65
Al Rafaa Star Building Materials Est	3.65
Al Sabbah Trading and Importing, Est	3.65
All Ferro Building Materials, LLC	3.65
Asgarali Yousuf Trading Co., LLC	3.65
Azymuth Consulting, LLC	3.65
Burj Al Tasmeem, Tr	3.65
Gheewala Hardware Trading Company, LLC	3.65
New World International, LLC	3.65
Okzeela Star Building Materials Trading, LLC	3.65
Rich Well Steel Industries LLC	3.65
Rishi International, FZCO	3.65
Samrat Wire Industry, LLC	3.65
Sea Lan Contracting	3.65
SK Metal International DMCC	3.65
Trade Circle Enterprises, LLC	3.65

Disclosure

As noted above, no party commented on Commerce's *Preliminary Results.* As a result, we have not modified our analysis from the *Preliminary Results,* and we will not issue a decision memorandum to accompany this **Federal Register** notice. We are adopting the *Preliminary Results* as the final results of this review. Further, because we have not changed our calculations since the *Preliminary Results,* there are no new calculations to disclose in accordance with 19 CFR 351.224(b) for these final results.

Assessment Rates

Pursuant to section 751(a)(2)(C) of the Act and 19 CFR 351.212(b)(1), Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with the final results of this review. For MEM/Master, we will calculate importer-specific *ad valorem* assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to the total entered value of those same sales in accordance with 19 CFR 351.212(b)(1).

Consistent with Commerce's assessment practice, for entries of subject merchandise during the POR produced by MEM/Master for which MEM/Master did not know that the merchandise was destined for the United States, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[5]

For the companies which were not selected for individual examination, we intend to assign an assessment rate based on the rate calculated for MEM/Master, as noted above.

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following cash deposit requirements for estimated antidumping duties will be effective for all shipments of subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for MEM/Master will be equal to its weighted-average dumping margin established in the final results of this administrative review; (2) for merchandise exported by a producer or exporter not covered in this review but covered in a prior completed segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer has been covered in a prior completed segment of this proceeding, the cash deposit rate will be the company-specific rate established for the most recent period for the producer of the merchandise; (4) the cash deposit rate for all other producers or exporters will continue to be 4.30 percent,[6] the all-others rate established in the LTFV investigation. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping and/or countervailing

[5] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[6] *See Order.*

duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping and/or countervailing duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with section 751(a)(1) and 777(i) of the Act, and 19 CFR 351.221(b)(5).

Dated: October 4, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–22105 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–899]

Certain Artist Canvas From the People's Republic of China: Continuation of Antidumping Duty Order

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

SUMMARY: As a result of the determinations by the U.S. Department of Commerce (Commerce) and the U.S. International Trade Commission (ITC) that revocation of the antidumping duty (AD) order on certain artist canvas (artist canvas) from the People's Republic of China (China) would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, Commerce is publishing a notice of continuation of the AD order.

DATES: Applicable October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Patrick Barton, AD/CVD Operations, Office III, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–0012.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2006, Commerce published the AD order on artist canvas from China.[1] On February 1, 2022, Commerce initiated the third five-year (sunset) review of the *Order* pursuant to section 751(c) of the Tariff Act of 1930, as amended (the Act).[2] As a result of its review, Commerce determined that revocation of the *Order* would likely lead to a continuation or recurrence of dumping and, therefore, notified the ITC of the magnitude of the margins likely to prevail should the *Order* be revoked.[3] On October 5, 2022, the ITC published its determination, pursuant to section 751(c) of the Act, that revocation of the *Order* would likely lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[4]

Scope of the Order

The products covered by the *Order* are artist canvases regardless of dimension and/or size, whether assembled or unassembled, that have been primed/coated, whether or not made from cotton, whether or not archival, whether bleached or unbleached, and whether or not containing an ink receptive top coat. Priming/coating includes the application of a solution, designed to promote the adherence of artist materials, such as paint or ink, to the fabric. Artist canvases (*i.e.,* pre-stretched canvases, canvas panels, canvas pads, canvas rolls (including bulk rolls that have been primed), printable canvases, floor cloths, and placemats) are tightly woven prepared painting and/or printing surfaces. Artist canvas and stretcher strips (whether or not made of wood and whether or not assembled) included within a kit or set are covered by the *Order.*

Artist canvases subject to the *Order* are currently classifiable under subheadings 5901.90.20.00 and 5901.90.40.00, 5901.90.40.00, 5903.90.2500, 5903.90.2000, 5903.90.1000, 5907.00.8090, 5907.00.8010, and 5907.00.6000 of the Harmonized Tariff Schedule of the United States (HTSUS). Specifically excluded from the scope of the *Order* are tracing cloths, ''paint-by-number'' or ''paint-it-yourself'' artist canvases with a copyrighted preprinted outline, pattern, or design, whether or not included in a painting set or kit. Also excluded are stretcher strips, whether or not made from wood, so long as they are not incorporated into artist canvases or sold as part of an artist canvas kit or set. While the HTSUS subheadings are provided for convenience and customs purposes, the written description of the scope of the *Order* is dispositive.

Continuation of the Order

As a result of the determinations by Commerce and the ITC that revocation of the *Order* would likely lead to a continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section 751(d)(2) of the Act, Commerce hereby orders the continuation of the *Order.* U.S. Customs and Border Protection will continue to collect AD cash deposits at the rates in effect at the time of entry for all imports of subject merchandise. The effective date of the continuation of the *Order* will be the date of publication in the **Federal Register** of this notice of continuation. Pursuant to section 751(c)(2) of the Act, Commerce intends to initiate the next five-year review of the *Order* not later than 30 days prior to the fifth anniversary of the effective date of continuation.

Administrative Protective Order

This notice also serves as the only reminder to parties subject to an administrative protective order (APO) of their responsibility concerning the return/destruction or conversion to judicial protective order of proprietary information disclosed under APO in accordance with 19 CFR 351.305(a)(3). Failure to comply is a violation of the APO which may be subject to sanctions.

Notification to Interested Parties

This five-year (sunset) review and this notice are in accordance with section 751(c) of the Act and published pursuant to section 777(i)(1) of the Act.

Dated: October 5, 2022.

Lisa W. Wang,

Assistant Secretary for Enforcement and Compliance.

[FR Doc. 2022–22152 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–DS–P

[1] *See Notice of Antidumping Duty Order: Certain Artist Canvas from the People's Republic of China,* 71 FR 31154 (June 1, 2006) (*Order*).

[2] *See Initiation of Five-Year (Sunset) Reviews,* 87 FR 5467 (February 1, 2022).

[3] *See Certain Artist Canvas from the People's Republic of China: Final Results of the Third Expedited Sunset Review of the Antidumping Duty Order,* 87 FR 33722 (June 3, 2022), and accompanying Issues and Decision Memorandum.

[4] *See Artists' Canvas from China,* 87 FR 60415 (October 5, 2022); *see also Artists' Canvas from China,* Inv. No. 731–TA–1091 (Third Review), USITC Pub. 5371 (September 2022).

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–887]

Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Final Results of Antidumping Duty Administrative Review; 2020–2021

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

SUMMARY: The U.S. Department of Commerce (Commerce) determines that POSCO and its affiliated companies (collectively, the POSCO single entity), the sole producer and/or exporter subject to this review, made sales of subject merchandise in the United States at less than normal value during the period of review (POR), May 1, 2020, through April 30, 2021.

DATES: Applicable October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Jaron Moore or William Horn, AD/CVD Operations, Office VIII, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482–3640 or (202) 482–4868, respectively.

SUPPLEMENTARY INFORMATION:

Background

On June 1, 2022, Commerce published the *Preliminary Results* of the antidumping duty administrative review of the order on carbon and alloy steel cut-to-length plate from the Republic of Korea.[1] We invited interested parties to comment on the *Preliminary Results.* For a complete description of the events that occurred subsequent to the *Preliminary Results, see* the Issues and Decision Memorandum.[2]

Scope of the Order [3]

The merchandise subject to the *Order* is carbon and alloy steel cut-to-length plate. The product is currently classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheadings 7208.40.3030, 7208.40.3060, 7208.51.0030, 7208.51.0045, 7208.51.0060, 7208.52.0000, 7211.13.0000, 7211.14.0030, 7211.14.0045, 7225.40.1110, 7225.40.1180, 7225.40.3005, 7225.40.3050, 7226.20.0000, and 7226.91.5000.

The products subject to the *Order* may also enter under the following HTSUS subheadings: 7208.40.6060, 7208.53.0000, 7208.90.0000, 7210.70.3000, 7210.90.9000, 7211.19.1500, 7211.19.2000, 7211.19.4500, 7211.19.6000, 7211.19.7590, 7211.90.0000, 7212.40.1000, 7212.40.5000, 7212.50.0000, 7214.10.000, 7214.30.0010, 7214.30.0080, 7214.91.0015, 7214.91.0060, 7214.91.0090, 7225.11.0000, 7225.19.0000, 7225.40.5110, 7225.40.5130, 7225.40.5160, 7225.40.7000, 7225.99.0010, 7225.99.0090, 7206.11.1000, 7226.11.9060, 7229.19.1000, 7226.19.9000, 7226.91.0500, 7226.91.1530, 7226.91.1560, 7226.91.2530, 7226.91.2560, 7226.91.7000, 7226.91.8000, and 7226.99.0180.

The HTSUS subheadings are provided for convenience and customs purposes only; the written product description of the scope of the *Order* is dispositive. For a complete description of the scope of the *Order, see* the *Preliminary Results.*[4]

Analysis of Comments Received

All issues raised by the POSCO single entity in its case brief [5] are addressed in the Issues and Decision Memorandum and are listed in the appendix to this notice. The Issues and Decision Memorandum is a public document and is on file electronically via Enforcement and Compliance's Antidumping and Countervailing Duty Centralized Electronic Service System (ACCESS). ACCESS is available to registered users at *https://access.trade.gov.* In addition, a complete version of the Issues and Decision Memorandum can be accessed directly at *https://access.trade.gov/public/FRNoticesListLayout.aspx.*

Changes Since the Preliminary Results

Based on the comments received from the POSCO single entity and record information, we made several changes to our preliminary calculation of the weighted-average dumping margin for the POSCO single entity. For a discussion of these changes, *see* the Issues and Decision Memorandum.

Final Results of the Review

As a result of this review, we determine the following estimated weighted-average dumping margin exists for the period May 1, 2020, through April 30, 2021:

Exporter or producer	Weighted-average dumping margin (percent)
POSCO single entity [6]	2.59

Disclosure

Commerce intends to disclose the calculations for these final results of review within five days of the date of publication of this notice in the **Federal Register**, in accordance with section 751(a) of the Tariff Act of 1930, as amended (the Act) and 19 CFR 351.224(b).

Assessment Rates

Commerce has determined, and U.S. Customs and Border Protection (CBP) shall assess, antidumping duties on all appropriate entries of subject merchandise in accordance with these final results of review.[7]

Commerce will calculate importer-specific antidumping duty assessment rates when a respondent's weighted-average dumping margin is not zero or *de minimis* (*i.e.,* less than 0.5 percent). Pursuant to 19 CFR 351.212(b)(1), where the respondent reported the entered value of its U.S. sales, we will calculate importer-specific *ad valorem* duty assessment rates based on the ratio of the total amount of dumping calculated for the examined sales to each importer to the total entered value of those sales. Where the respondent did not report entered value, we will calculate importer-specific assessment rates on the basis of the ratio of the total amount of dumping calculated for the examined sales to each importer to the total quantity of those sales, in accordance

[1] *See Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review; 2020–2021;* 87 FR 33121 (June 1, 2022) (*Preliminary Results*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum, ''Issues and Decision Memorandum for the Final Results in the 2020–2021 Antidumping Duty Administrative Review of Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea,'' dated concurrently with, and hereby adopted by, this notice (Issues and Decision Memorandum).

[3] *See Certain Carbon and Alloy Steel Cut-To-Length Plate from Austria, Belgium, France, the Federal Republic of Germany, Italy, Japan, the Republic of Korea, and Taiwan: Amended Final Affirmative Antidumping Determinations for France, the Federal Republic of Germany, the Republic of Korea and Taiwan, and Antidumping Duty Orders,* 82 FR 24096 (May 25, 2017) (*Order*).

[4] *See Preliminary Results* PDM at 3–7.

[5] Only the POSCO single entity filed a case brief in this review. No other party filed a case or rebuttal brief.

[6] Commerce continues to find that POSCO, POSCO International Corporation, POSCO SPS, and certain distributors and service centers (*i.e.,* Taechang Steel Co., Ltd. and Winsteel Co., Ltd.) are affiliated pursuant to section 771(33)(E) of the Act, and further that these companies should be treated as a single entity (collectively, the POSCO single entity) pursuant to 19 CFR 351.401(f). *See Preliminary Results* PDM at 1.

[7] *See* 19 CFR 351.212(b).

with 19 CFR 351.212(b)(1).[8] We will also calculate an estimated *ad valorem* importer-specific assessment rate with which to assess whether the per-unit assessment rate is *de minimis.* We will instruct CBP to assess antidumping duties on all appropriate entries covered by this review when the importer-specific *ad valorem* assessment rate calculated in the final results of this review is not zero or *de minimis.* Where either the respondent's *ad valorem* weighted-average dumping margin is zero or *de minimis,* or an importer-specific *ad valorem* assessment rate is zero or *de minimis,*[9] we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties.

Commerce's ''reseller policy'' will apply to entries of subject merchandise during the POR produced by companies included in these final results of review for which the reviewed companies did not know that the merchandise they sold to the intermediary (*e.g.,* a reseller, trading company, or exporter) was destined for the United States. In such instances, we will instruct CBP to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction.[10]

Commerce intends to issue assessment instructions to CBP no earlier than 35 days after the date of publication of the final results of this review in the **Federal Register**. If a timely summons is filed at the U.S. Court of International Trade, the assessment instructions will direct CBP not to liquidate relevant entries until the time for parties to file a request for a statutory injunction has expired (*i.e.,* within 90 days of publication).

Cash Deposit Requirements

The following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of the final results of this administrative review, as provided by section 751(a)(2)(C) of the Act: (1) the cash deposit rate for the POSCO single entity will be equal to the weighted-average dumping margin established in the final results of this administrative review (*i.e.,* 2.59 percent); (2) for merchandise exported by a producer or exporter not covered in this review but covered in a prior segment of the proceeding, the cash deposit rate will continue to be the company-specific rate published for the most recently completed segment of this proceeding in which the producer or exporter participated; (3) if the exporter is not a firm covered in this review, a prior review, or the original less-than-fair-value (LTFV) investigation, but the producer is, the cash deposit rate will be the rate established for the most recently completed segment of the proceeding for the producer of the merchandise; and (4) the cash deposit rate for all other producers and exporters will continue to be 7.10 percent *ad valorem,* the all-others rate established in the LTFV investigation.[11] These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during the POR. Failure to comply with this requirement could result in Commerce's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

Administrative Protective Order

This notice also serves as a reminder to parties subject to an 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(a)(3), which continues to govern business proprietary information in this segment of the proceeding. Timely written notification of the return or destruction of APO materials, or conversion to judicial protective order, is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

Notification to Interested Parties

We are issuing and publishing this notice in accordance with sections 751(a)(1) and 777(i)(1) of the Act, and 19 CFR 351.221(b)(5).

Dated: September 28, 2022.

Abdelali Elouaradia,

Deputy Assistant Secretary for Enforcement and Compliance.

Appendix

List of Topics Discussed in the Issues and Decision Memorandum

I. Summary
II. Background
III. The POSCO Single Entity
IV. Discussion of the Issues
Comment 1: Downstream Home Market Sales of POSCO's Affiliated Reseller and Service Centers
Comment 2: General and Administrative (G&A) Expense and Financial Expense Ratios for POSCO International Corporation (PIC)
Comment 3: Financial Expense Ratio for POSCO SPS
Comment 4: G&A Expenses Ratio for POSCO SPS
V. Recommendation

[FR Doc. 2022–22106 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Docket Number 21006–0213]

Implementation of the CHIPS Incentives Program

AGENCY: National Institute of Standards and Technology (NIST), Commerce.

ACTION: Notice; request for information.

SUMMARY: The CHIPS Program Office (CPO) within the National Institute of Standards and Technology (NIST) is seeking further information in order to inform the design and implementation of the CHIPS incentive programs, based on amendments to the CHIPS program resulting from the CHIPS Act of 2022. This Request for Information (RFI) follows the ''Incentives, Infrastructure, and Research and Development Needs to Support a Strong Domestic Semiconductor Industry'' RFI issued by the U.S. Department of Commerce (the Department) on January 24, 2022, prior to enactment of the CHIPS Act of 2022. On September 6, 2022, the Department released ''A Strategy for the CHIPS for America Fund,'' describing the Department's implementation strategy for the funds Congress appropriated to catalyze long-term growth in the domestic semiconductor industry. This strategy was informed in part by the information received in response to the January 2022 RFI. Responses to this RFI, considered alongside responses to the prior RFI, will further inform the planning of the CPO for the implementation of these programs.

[8] In these final results, Commerce applied the assessment rate calculation method adopted in *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Proceedings: Final Modification,* 77 FR 8101 (February 14, 2012).

[9] *See* 19 CFR 351.106(c)(2).

[10] For a full discussion of this practice, *see Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties,* 68 FR 23954 (May 6, 2003).

[11] *See Order,* 82 FR at 24098.

DATES: Comments must be received by 5:00 p.m. Eastern time on November 14, 2022. Written comments in response to this RFI should be submitted in accordance with the instructions in the **ADDRESSES** and **SUPPLEMENTARY INFORMATION** sections below.

ADDRESSES: To respond to this RFI, please submit electronic public comments via the Federal e-Rulemaking Portal.

1. Go to *www.regulations.gov* and enter DOC–2022–0001 in the search field,

2. Click the ''Comment Now!'' icon, complete the required fields, and

3. Enter or attach your comments.

Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered.

Information submitted in response to this request may contain business proprietary information, which will not be published and will be protected from disclosure, provided the submitters follow the instructions in **SUPPLEMENTARY INFORMATION** for submitting confidential business information.

Comments containing references, studies, research, and other empirical data that are not widely published should include electronic copies of the referenced materials.

For Public Meetings/Webcast:

The CPO may hold future workshops to explore in more detail questions raised in the RFI. Notice and details about any potential future workshop dates, registration deadlines, and other related information will be announced at *www.chips.gov.*

FOR FURTHER INFORMATION CONTACT: For questions about this Notice, please contact Sam Marullo at 202–482–3844 or email *RFI@chips.gov.* Please direct media inquiries to the CHIPS Press Team at *press@chips.gov.*

SUPPLEMENTARY INFORMATION:

Background

The CPO is currently working to implement programs authorized by Title XCIX of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, 15 U.S.C. 4651 *et seq.,* as amended by sections 103 and 105 of the CHIPS Act of 2022, with the goal of releasing an initial funding document for the semiconductor incentives program within six months of the passage of the CHIPS Act of 2022.

The Department of Commerce published an RFI in January 2022 seeking to inform the planning of the CHIPS Programs.[1] However, the CHIPS Act of 2022 subsequently amended the authorizing legislation for these programs in several areas, including:

- Permitting incentives in the form of loans, loan guarantees, or other transactions,
- Expanding eligibility for CHIPS incentives to include facilities and equipment for the fabrication, assembly, testing, production, or research and development of materials used to manufacture semiconductors and semiconductor manufacturing equipment,
- Requiring applicants to provide plans to identify and mitigate relevant semiconductor supply chain security risks and policies and procedures to combat cloning, counterfeiting, and relabeling,
- Establishing an expansion clawback that prohibits CHIPS incentive recipients from investing in certain projects in countries of concern,
- Creating taxpayer protections to prevent recipients from spending CHIPS funds on stock buybacks or dividends, and
- Directing analyses of certain diversity, equity, and inclusion elements of the CHIPS programs.

The CPO is issuing this RFI to inform its consideration and implementation of these amended sections.

Specific Requests for Information

The following statements and questions cover the major topic areas about which the CPO seeks comment. They are not intended to limit the topics that may be addressed. Responses may include any topic believed to inform U.S. Government efforts in developing recommendations for supporting the growth and sustainment of a robust domestic semiconductor manufacturing sector to meet the current and future needs of the public and private sectors, regardless of whether the topic is included in this document.

Respondents are encouraged to respond to any or all of the following questions and topic areas, and may address related topics. Your comments should indicate which questions or topics you are addressing. Responses may include estimates, which should be designated as such. Your responses may include supporting data and examples. If your response relies on publications or studies, please attach them. Respondents may organize their submissions in response to this RFI in any manner.

The CPO is requesting information related to the following topics:

Use of Grants, Loans, and Loan Guarantees

1. The Department may allocate up to $6 billion out of the $39 billion of total incentives to support loans and loan guarantees to covered entities. This $6 billion has a significant multiplier effect: the principal amount of financing available through loans and loan guarantees could be leveraged to support up to $75 billion in loans and loan guarantees. This leverage will help the CPO achieve the needed scale of investment by facilitating additional private capital and providing access to debt for companies with reasonable prospects for repayment. Applicants will be encouraged to consider loans or loan guarantees as part of their federal assistance application package. Which types of companies in the supply chain would benefit most from the use of the loans or loan guarantees to supplement or in lieu of CHIPS grants?

2. How should CHIPS financial assistance (grants, loans and/or loan guarantees) be designed to be additive to, rather than a substitute for, private sector equity or debt capital?

3. What information is available on how foreign and domestic companies engaged in semiconductor manufacturing or suppliers to that industry evaluate whether to invest in a discrete project—for example, through internal rates of return (IRR)? Do evaluations and IRRs differ by producer, project, technology, or segment of industry?

4. What debt/equity ratios have semiconductor manufacturers or suppliers used in previous projects that are individually financed?

5. Does the industry, including foreign and domestic firms, finance semiconductor manufacturing or supplier investments on a limited recourse or nonrecourse project finance basis? What proportion of investments are financed this way?

6. How does access to debt and capital markets differ for companies across the semiconductor sector? Which parts of the sector struggle to access debt and equity capital?

Financial Assistance for Upstream Suppliers and Materials Used To Manufacture Semiconductors

7. For purposes of this set of questions, the upstream supply chain refers to companies that provide materials (including minerals, chemicals, slurries, gases, photomasks,

[1] *Incentives, Infrastructure, and Research and Development Needs to Support a Strong Domestic Semiconductor Industry, 87 FR 3497* (January 24, 2022), *https://www.federalregister.gov/d/2022-01305.*

photoresists), equipment, or other inputs (including specialized services) for the semiconductor manufacturing process. Which elements of the upstream supply chain could constrain the ability to expand domestic semiconductor production? For example, if U.S. semiconductor production were to increase by 30%, would suppliers be able to keep pace? Please specify in terms of categories like industrial gases, raw materials, specialty chemicals, wafers, photoresists, and/or photomasks.

8. The CHIPS Act of 2022 increased the eligibility for Section 9902 incentives to include facilities and equipment for the fabrication, assembly, testing, production, or research and development of materials used to manufacture semiconductors. Which materials should be included in the definition of ''materials used to manufacture semiconductors'' and why? For each material identified, if a new facility were constructed for the production of that material, what typical percentage of that facility's equipment and output would be expected to be used for semiconductor production, as opposed to other manufacturing processes?

9. Which materials used to produce semiconductors and semiconductor manufacturing equipment are currently produced within the U.S. and which are not? Are there technological or other limitations that currently inhibit production of such materials in the United States? Which materials and equipment, if any, have contributed to production delays or other inventory challenges? Which do you think are most likely to contribute to delays or challenges in the future?

10. How are upstream suppliers concentrated geographically? Are any concentrated in a manner that could constrain the ability to expand semiconductor manufacturing?

11. Which materials or equipment critical to semiconductor production are only or predominately available from a single source?

12. How do upstream suppliers work with fabs on new facility proposals? What types of agreements or commitments do fabs offer upstream suppliers to co-locate with new construction?

13. What have been the biggest supply chain bottlenecks for U.S. semiconductor fabs over the past five years?

Intellectual Property

14. The CHIPS Act of 2022 requires that applicants submit ''policies and procedures to combat cloning, counterfeiting, and relabeling of semiconductors.'' Are there standard policies and procedures that companies or industry groups use to achieve this goal? Which industry or publicly defined standards should be used to measure the effectiveness of efforts to combat cloning, counterfeiting, or relabeling?

Expansion Clawback

15. The Secretary has authority, in consultation with the Secretary of Defense and the Director of National Intelligence, to define the terms ''semiconductor manufacturing'' and ''semiconductor manufacturing capacity.'' To ensure effective limits on manufacturing in foreign countries of concern—while balancing the interests of potential eligible CHIPS applicants that may have existing legacy facilities—what types of activities would need to be included under the scope of these terms? How do industry members define the terms in trade usage?

16. What considerations are relevant in determining what memory, analog, packaging, and other technologies should be considered equivalent to 28 nm logic chips?

17. Given the complexities in chipmakers determining where their product might eventually reach its end-use, how can the CPO best enforce the requirement that a proposed investment ''predominately serve[s] the market'' of the foreign country?

Taxpayer Protections

18. The CPO has committed to prioritizing companies that are dedicated to making investments in manufacturing, innovation, and workers. Are there types of investments and/or pre-commitments that data suggest have been most effective in promoting inclusive economic growth for workers and communities?

19. The CPO intends to preference companies which commit not to engage in stock buybacks with non-CHIPS funds. What terms and length should the CPO seek in such a commitment and should the commitment extend to any forms of capital distribution beyond buybacks? What types of existing buyback programs or programs tailored to prevent dilution from the award of employee stock compensation exist within the industry?

20. Should the CPO consider companies' existing capital allocation strategies in formulating the standards it will apply to its evaluation of stock buybacks and the payment of dividends, and if so, how?

Opportunity and Inclusion

21. What are the primary barriers to entry for individuals from underserved communities seeking employment in the industry, including economically disadvantaged individuals, women, people of color, veterans, disabled individuals, people without college degrees, and people in rural communities? Do the barriers differ by job type? By community? By geography?

22. What policies have been successful in ensuring that job opportunities are good quality and available to and filled by a diverse pool of workers? Does industry currently offer wrap-around services to employees: childcare, paid leave, transportation, etc.? Why or why not?

23. What actions can industry take to promote diversity, equity, and inclusion in the projects that receive CHIPS incentives? What actions is industry already taking to promote diversity, equity, and inclusion? In responding, please consider inclusion broadly, such as women, people of color, veterans, disabled individuals, people without college degrees, and people in rural communities.

24. What policies have proven effective in providing opportunities for small and underrepresented businesses including minority-owned, women-owned and veteran-owned businesses and rural businesses. Which tactics are most effective in creating opportunities in fab constriction? The production supply chain? R&D?

25. What actions can the CPO take to ensure that the implementation of the CHIPS incentive programs is equitable and inclusive?

Other

26. What other information should inform the CPO's implementation of the CHIPS incentive programs?

27. What data will be important for the agency to collect to build evidence on the effectiveness of the CHIPS program? What are potential data sources?

Requirements for Written Comments

Anyone submitting business confidential information should clearly identify the business confidential portion at the time of submission, file a statement justifying nondisclosure and referring to the specific legal authority claimed, and provide a non-confidential version of the submission. Users submitting a form that contains business confidential information will need to submit a non-confidential version of the same form that does not contain the confidential business information. The

non-confidential version of the submission will be placed in the public file on *https://www.regulations.gov.* For comments submitted electronically containing business confidential information, the file name of the business confidential version should begin with the characters ''BC.'' Any page containing business confidential information must be clearly marked ''BUSINESS CONFIDENTIAL'' on the top of that page. The non-confidential version must be clearly marked ''PUBLIC.'' The file name of the non-confidential version should begin with the character ''P.'' The ''BC'' and ''P'' should be followed by the name of the person or entity submitting the comments.

All relevant non-confidential comments, including attachments and other supporting materials, received in response to the RFI will generally be made publicly available on *www.regulations.gov.*

Alicia Chambers,

NIST Executive Secretariat.

[FR Doc. 2022–22158 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC450]

Fisheries of the South Atlantic; National Marine Fisheries Service—Public Meetings

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

ACTION: Notice of Dolphin (*i.e.,* dolphinfish or mahi mahi) Management Strategy Stakeholder workshops to be held by the National Marine Fisheries Service.

SUMMARY: The National Marine Fisheries Service will hold a series of in-person workshops on November 2 and November 3, 2022.

DATES: The workshops will be held on Wednesday, November 2, 2022, from 5:30 p.m. until 8:30 p.m. EDT, and on Thursday, November 3, 2022, from 5:30 p.m. until 8:30 p.m. EDT.

ADDRESSES: *Meeting address:* The meeting is open to members of the public. The workshop on November 2 will be held at the Montauk Fire Department, 12 Flamingo Ave, Montauk, NY 11954. The workshop on November 3 will be held at the Coastal Institute Building, Room #140, University of Rhode Island Graduate School of Oceanography, 215 South Ferry Road, Narragansett, RI 02882. Those interested in participating should contact Cassidy Peterson (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Cassidy Peterson, Management Strategy Evaluation Specialist, NMFS Southeast Fisheries Science Center, phone (910) 708–2686; email: *Cassidy.Peterson@noaa.gov.*

SUPPLEMENTARY INFORMATION: In collaboration with the South Atlantic Fishery Management Council, NMFS is embarking on a Management Strategy Evaluation (MSE) to guide dolphin (*i.e.,* dolphinfish or mahi mahi) management in the jurisdiction. The MSE will be used to develop a management procedure that best achieves the suite of management objectives for the U.S. Atlantic dolphin fishery. Stakeholder input is necessary for characterizing the management objectives of the fishery and stock, identifying any uncertainties in the system that should be built into the MSE analysis, and providing guidance on the acceptability of the proposed management procedures.

Agenda items for the meeting include: developing an understanding of management procedures and management strategy evaluation, developing conceptual management objectives, and clarifying uncertainties that should be addressed within the framework.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to Cassidy Peterson (see **FOR FURTHER INFORMATION CONTACT**) 5 days prior to the meeting.

The times and sequence specified in this agenda are subject to change.

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

Dated: October 5, 2022.

Jennifer M. Wallace,

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

[FR Doc. 2022–22140 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC452]

Marine Mammals and Endangered Species

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

ACTION: Notice; issuance of permits and permit amendments.

SUMMARY: Notice is hereby given that permits and permit amendments have been issued to the following entities under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), as applicable.

ADDRESSES: The permits and related documents are available for review upon written request via email to *NMFS.Pr1Comments@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: Erin Markin, Ph.D. (Permit No. 26591), Jennifer Skidmore (Permit No. 26667, 26678, and 26708), and Sara Young (Permit No. 21018); at (301) 427–8401.

SUPPLEMENTARY INFORMATION: Notices were published in the **Federal Register** on the dates listed below that requests for a permit or permit amendment had been submitted by the below-named applicants. To locate the **Federal Register** notice that announced our receipt of the application and a complete description of the activities, go to *www.federalregister.gov* and search on the permit number provided in Table 1 below.

TABLE 1—ISSUED PERMITS AND PERMIT AMENDMENTS

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
21018–01 ...	0648–XF536	Brent Stewart, Ph.D., Hubbs-SeaWorld Research Institute, 2595 Ingraham Street, San Diego, CA 92109.	82 FR 48985; October 23, 2017.	September 26, 2022.
26591	0648–XC141	BBC Natural History and Factual Productions, Ltd., Television Centre, 101 Wood Lane, London, UK W12 7FA.	87 FR 39803; July 5, 2022.	September 2, 2022.

TABLE 1—ISSUED PERMITS AND PERMIT AMENDMENTS—Continued

Permit No.	RTID	Applicant	Previous **Federal Register** notice	Issuance date
26667	0648–XC179	North Slope Borough Department of Wildlife Management (Taqulik Hepa, Responsible Party), P.O. Box 69, Barrow, AK 99723.	87 FR 43499; July 21, 2022.	September 20, 2022.
26678	0648–XC256	Matson Laboratory (Carolyn Nistler, Responsible Party), 135 Wooden Shoe Lane, Manhattan, MT 59741.	87 FR 48649; August 10, 2022.	September 27, 2022.
26708	0648–XC255	Chicago Zoological Society (Michael J. Adkesson, D.V.M., Responsible Party), 3300 South Golf Road, Brookfield, Illinois 60513.	87 FR 49808; August 12, 2022.	September 28, 2022.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), a final determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

As required by the ESA, as applicable, issuance of these permit was based on a finding that such permits: (1) were applied for in good faith; (2) will not operate to the disadvantage of such endangered species; and (3) are consistent with the purposes and policies set forth in Section 2 of the ESA.

Authority: The requested permits have been issued under the MMPA of 1972, as amended (16 U.S.C. 1361 *et seq.*), the regulations governing the taking and importing of marine mammals (50 CFR part 216), the ESA of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR parts 222–226), as applicable.

Dated: October 5, 2022.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–22089 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC451]

Marine Mammals; File No. 26778

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

ACTION: Notice; receipt of application.

SUMMARY: Notice is hereby given that Wildstar Films Ltd., Embassy House, Queens Avenue, Bristol, BS8 1SB, UK (Responsible Party: Jennie Hammond), has applied in due form for a permit to conduct commercial or educational photography on humpback whales (*Megaptera novaeangliae;* Hawaii distinct population segment).

DATES: Written, telefaxed, or email comments must be received on or before November 14, 2022.

ADDRESSES: These documents are available upon written request via email to *NMFS.Pr1Comments@noaa.gov*.

Written comments on this application should be submitted via email to *NMFS.Pr1Comments@noaa.gov*. Please include File No. 26778 in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request via email to *NMFS.Pr1Comments@noaa.gov*. The request should set forth the specific reasons why a hearing on this application would be appropriate.

FOR FURTHER INFORMATION CONTACT: Amy Hapeman or Erin Markin, Ph.D., (301) 427–8401.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 CFR part 216).

The applicant proposes to film up to 1,520 humpback whales annually in Hawaiian waters for a natural history series in production for National Geographic and Disney+. The applicant seeks to collect footage of humpback male singers, heat runs, and intimate moments between adult females and their calves. Filming would occur topside from two boats, underwater with a polecam or divers, and aerially using an unmanned aircraft system. Up to 150 bottlenose dolphins (*Tursiops truncatus*), 100 melon-headed whales (*Peponocephala electra*), and 100 short-finned pilot whales (*Globicephala macrorhynchus*), 150 spinner dolphins (*Stenella longirostris*), and 150 spotted dolphins (*S. attenuata*) would be unintentionally harassed and filmed annually if they are in the vicinity of whales. The applicant is requesting the permit be valid until December 31, 2024.

It has come to the agency's attention that the 2016 interim final humpback approach rule (50 CFR 216.19; 81 FR 62010, September 8, 2016) does not explicitly exempt permits issued under section 104(c)(6) of the MMPA from its prohibitions. It is not the agency's intent to preclude the issuance of permits or authorizations consistent with the requirements of the MMPA. We interpret the rule to allow issuance of these permits. Consistent with this interpretation, it has been our practice to continue to issue section 104(c)(6) permits that are in compliance with the MMPA's requirements and our review procedures. However, to eliminate any potential ambiguity, we intend to revise the rule to explicitly clarify that photography permits issued under section 104(c)(6) of the MMPA are exempt from the prohibitions on approach.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of the application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: October 5, 2022.

Julia M. Harrison,

Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–22090 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XC326]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Marine Site Characterization Surveys in the Area of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf (OCS) Lease Areas OCS–A 0486, 0487, and 0500

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to Orsted Wind Power North America LLC (Orsted) to incidentally harass, by Level B harassment only, marine mammals during marine site characterization surveys offshore from Rhode Island to Massachusetts, including the areas of Commercial Lease of Submerged Lands for Renewable Energy Development on the Outer Continental Shelf Lease Areas OCS–A 0486, 0487, 0500, and along potential export cable routes (ECR)s to landfall locations between Raritan Bay and Falmouth, MA.

DATES: This authorization is effective for one year from the date of issuance.

FOR FURTHER INFORMATION CONTACT: Jessica Taylor, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act-other-energy-activities-renewable.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The MMPA prohibits the ''take'' of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other ''means of effecting the least practicable adverse impact'' on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as ''mitigation''); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On April 19, 2022, NMFS received a request from Orsted for an IHA to take small numbers of marine mammals incidental to marine site characterization surveys in federal waters located in the OCS Commercial Lease Areas off the coasts from Rhode Island to Massachusetts, and along potential ECRs to landfall locations between Raritan Bay (part of the New York Bight) and Falmouth, Massachusetts. Following NMFS' review of the draft application, a revised version was submitted on July 8, 2022. The application was deemed adequate and complete on August 3, 2022. Orsted's request is for take of 16 species of marine mammals (consisting of 16 stocks) by Level B harassment only. Neither Orsted nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

NMFS previously issued IHAs and a renewal IHA to Orsted for marine site characterization HRG surveys in the OCS–A 0486, 0487, and 0500 Lease Areas (84 FR 52464, October 2, 2019; 85 FR 63508, October 8, 2020; 87 FR 13975, March 11, 2022). Orsted complied with all the requirements (*e.g.,* mitigation, monitoring, and reporting) of the previous IHAs and information regarding their monitoring results may be found in the Effects of the Specified Activity on Marine Mammals and their Habitat section in the proposed **Federal Register** notice (87 FR 52515). There are no changes from the proposed IHA to the final IHA.

On August 1, 2022, NMFS announced proposed changes to the existing North Atlantic right whale vessel speed regulations to further reduce the likelihood of mortalities and serious injuries to endangered right whales from vessel collisions, which are a leading cause of the species' decline and a primary factor in an ongoing Unusual Mortality Event (87 FR 46921). Should a final vessel speed rule be issued and become effective during the effective period of this IHA (or any other MMPA incidental take authorization), the authorization holder would be required to comply with any and all applicable requirements contained within the final rule. Specifically, where measures in any final vessel speed rule are more protective or restrictive than those in this or any other MMPA authorization, authorization holders would be required to comply with the requirements of the rule. Alternatively, where measures in this or any other MMPA authorization are more restrictive or protective than those in any final vessel speed rule, the measures in the MMPA authorization would remain in place. These changes would become effective immediately upon the effective date of any final vessel speed rule and would not require any further action on NMFS's part.

Description of Authorized Activity

Overview

Orsted plans to conduct HRG surveys in the Lease Areas OCS–A 0486, 0487, 0500 and ECR Area in federal and state waters from New York to Massachusetts to support the characterization of the existing seabed and subsurface geological conditions, which is necessary for the development of an offshore electric transmission system. The project will use active acoustic sources, including some with potential to result in the incidental take of marine mammals by Level B harassment. This take of marine mammals is anticipated to be in the form of behavioral harassment only. In-water work will include approximately 400 survey days using multiple vessels for a period of one year.

Dates and Duration

As described above, HRG surveys are expected to consist of approximately 400 survey days (Table 1) over the course of one year. Orsted plans to conduct continuous HRG survey operations 12-hours per day and 24-

hours per day using multiple vessels. A survey day is defined as a 24-hour activity day in which an assumed number of line kilometer (km) are surveyed. The number of anticipated survey days was calculated as the number of days needed to reach the overall level of effort required to meet survey objectives assuming any single vessel covers, on average 70 line kilometer (km) per 24-hour operations. A survey day accounts for multiple vessels such that two vessels operating within one 24-hour period equates to two survey days. A maximum of three vessels will work concurrently in the project area in any combination of 24-hour and 12-hour vessels. To be conservative, our exposure analysis assumes daily 24-hour operations. Although vessels may complete 20–80 km/day of actual source operations, we anticipate that vessels will average 70 line km of active sources assumed to potentially cause take of marine mammals per day. As shown by Table 1, the estimated number of survey days varies by Lease Area and ECR.

TABLE 1—NUMBER OF SURVEY DAYS FOR EACH LEASE AREA AND ECR

Area	Total number of survey days [1]
OCS–A–0486	10
OCA–A–0487	10
OCS–A–0500	200
ECR	180
Total	400

[1] *Up to three total survey vessels may be operating within both of the survey areas concurrently.*

Specific Geographic Region

Orsted's survey activities will occur in the Lease Areas located approximately 14 miles (22.5 km) south of Martha's Vineyard, Massachusetts at its closest point to land, as well as along potential export cable route (ECR) corridors off the coast of New York, Connecticut, Rhode Island, and Massachusetts to landfall locations between Raritan Bay and Falmouth, MA, as shown in Figure 1. Water depths in the project area extend out from shoreline to approximately 90 m in depth.

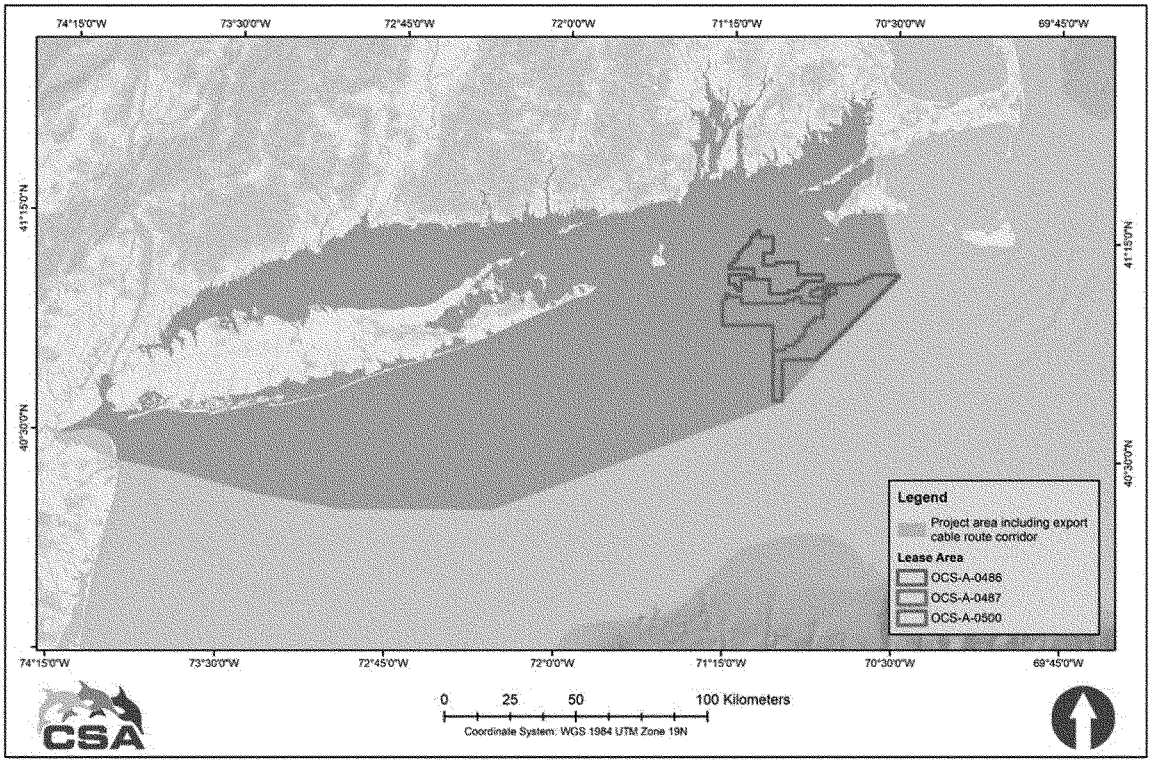

Figure 1. Survey area for site characterization surveys

Orsted plans to conduct HRG survey operations, including multibeam depth sounding, seafloor imaging, and shallow and medium penetration sub-bottom profiling. The HRG surveys will include the use of seafloor mapping equipment with operating frequencies above 180 kilohertz (kHz) (*e.g.,* side-scan sonar (SSS), multibeam echosounders (MBES)); magnetometers and gradiometers that have no acoustic output; and shallow- to medium-penetration sub-bottom profiling (SBP) equipment (*e.g.,* parametric sonars, compressed high-intensity radiated pulses (CHIRPs), boomers, sparkers) with operating frequencies below 180 kilohertz (kHz). No deep-penetration SBP surveys (*e.g.,* airgun or bubble gun surveys) will be conducted. A detailed description of the planned HRG surveys is provided in the **Federal Register** notice for the proposed IHA (87 FR 52515; August 26, 2022). Since that time, no changes have been made to the planned HRG survey activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

Comments and Responses

A notice of NMFS' proposal to issue an IHA to Orsted was published in the

Federal Register on August 26, 2022 (87 FR 52515), initiating a 30-day public comment period. The proposed notice described, in detail, Orsted's activities, the marine mammal species that may be affected by the activities, and the anticipated effects on marine mammals. In that notice, we requested public input on the request for authorization described therein, our analyses, the proposed authorization, and any other aspect of the notice of proposed IHA, and requested that interested persons submit relevant information, suggestions, and comments.

During the 30-day public comment period, NMFS received one comment from a private citizen that did not provide relevant information to NMFS' decision, and one comment letter from Responsible Offshore Development Alliance (RODA). A summary of comments from RODA and NMFS' responses is provided below; the letter is available online at: *https://www.fisheries.noaa.gov/action/incidental-take-authorization-orsted-wind-power-north-america-llc-marine-site-0.* Please review the letter for full details regarding the comments and underlying justification.

Comment 1: RODA states that, to their knowledge, there are no resources easily accessible to the public to understand what authorizations are required for each of these activities (pre-construction surveys, construction, operations, monitoring surveys, etc.). RODA recommends that NMFS improve the transparency of this process and move away from what it refers to as a ''segmented phase-by-phase and project-by-project approach to IHAs.''

NMFS' response: The MMPA, and its implementing regulations, allows, upon request, the incidental take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region. NMFS responds to these requests by authorizing the incidental take of marine mammals if it is found that the taking would be of small numbers, have no more than a ''negligible impact' on the marine mammal species or stock, and not have an ''unmitigable adverse impact'' on the availability of the species or stock for subsistence use. NMFS emphasizes that an IHA does not authorize the activity itself but authorizes the take of marine mammals incidental to the ''specified activity'' for which incidental take coverage is being sought. In this case, NMFS is responding to the applicant, Orsted, and the specified activity described in their application and making necessary findings on the basis of what was provided in their application. The authorization of Orsted's activity (note, not the authorization of takes incidental to that activity) is not within the jurisdiction of NMFS. NMFS refers RODA to the Permitting Dashboard for Federal Infrastructure Projects for further information on timelines and proposed authorizations planned for application for each of these activities: *https://www.permits.performance.gov/.*

NMFS is required to consider applications upon request. To date, NMFS has not received any joint applications. While an individual company owning multiple lease areas may apply for a single authorization to conduct site characterization surveys across a combination of those lease areas (see 85 FR 63508, October 8, 2020; 87 FR 13975, March 11, 2022), this is not applicable in this case. In the future, if applicants wish to undertake this approach, NMFS is open to the receipt of joint applications and additional discussions on joint actions.

Comment 2: RODA expressed concern regarding the potential for increased uncertainty in estimates of marine mammal abundance resulting from wind turbine presence during aerial surveys and potential effects of NMFS' ability to continue using current aerial survey methods to fulfill its mission of precisely and accurately assessing protected species.

NMFS' response: NMFS has determined that offshore wind development projects may impact several surveys carried out by its Northeast Fisheries Science Center (NEFSC), including aerial surveys for protected species. NEFSC has developed a federal survey mitigation program to mitigate the impacts to these surveys, and is in the early stages of implementing this program. However, this impact is outside the scope of analysis related to the authorization of take incidental to Orsted's specified activity under the MMPA.

Comment 3: RODA expressed concerns with the high amount of increased vessel traffic associated with the OSW projects throughout the region in areas transited or utilized by certain protected resources, as well as concern for vessel noise.

NMFS' response: Orsted did not request authorization for take incidental to vessel traffic during Orsted's marine site characterization survey. Nevertheless, NMFS analyzed the potential for vessel strikes to occur during the survey, and determined that the potential for vessel strike is so low as to be discountable. NMFS does not authorize any take of marine mammals incidental to vessel strike resulting from the survey. If Orsted were to strike a marine mammal with a vessel, this would be an unauthorized take and be in violation of the MMPA. This gives Orsted a strong incentive to operate its vessels with all due caution and to effectively implement the suite of vessel strike avoidance measures called for in the IHA. Orsted proposed a very conservative suite of mitigation measures related to vessel strike avoidance, including measures specifically designed to avoid impacts to North Atlantic right whales. Section 4(g) in the IHA contains a suite of non-discretionary requirements pertaining to ship strike avoidance, including vessel operation protocols and monitoring. To date, NMFS is not aware of any site characterization vessel from surveys reporting a vessel strike within the United States. When considered in the context of low overall probability of any vessel strike by Orsted vessels, given the limited additional survey-related vessel traffic relative to existing traffic in the survey area, the comprehensive visual monitoring, and other additional mitigation measures described herein, NMFS believes these measures are sufficiently protective to avoid ship strike. These measures are described fully in the Mitigation section below, and include, but are not limited to: training for all vessel observers and captains, daily monitoring of North Atlantic right whale Sighting Advisory System, WhaleAlert app, and USCG Channel 16 for situational awareness regarding North Atlantic right whale presence in the survey area, communication protocols if whales are observed by any Orsted personnel, vessel operational protocol should any marine mammal be observed, and visual monitoring.

The potential for impacts related to an overall increase in the amount of vessel traffic due to OSW development is separate from the aforementioned analysis of potential for vessel strike during Orsted's specified survey activities.

Comment 4: RODA defers to the Marine Mammal Commission's previous comments on the matter of effects on marine mammals from offshore wind development, expressing that ''they are more knowledgeable on impacts of pile driving and acoustics to marine mammals''.

NMFS' response: In response to RODA's deferral to the Marine Mammal Commission, the Commission, the agency charged with advising federal agencies on the impacts of human activity on marine mammals, has questioned in its previous public comment whether incidental take

authorizations are even necessary for surveys utilizing HRG equipment (*i.e.,* take is unlikely to occur), and has subsequently informed NMFS that they would no longer be commenting on such actions, including Orsted's activity described herein. Additionally, comments related to pile driving and OSW construction are outside the scope of this IHA and, therefore, are not discussed.

Comment 5: RODA defers to the September 9, 2020 letter submitted by seventeen Environmental NRGs and echoes their concerns.

NMFS' response: NMFS refers RODA to the **Federal Register** notice 85 FR 63508 (October 8, 2020) for previous responses to the Environmental NGOs' previous letter of which RODA references and defers expertise to.

Comment 6: RODA expressed concern that negative impacts to local fishermen and coastal communities as a result of a potentially adverse impact to marine mammals (*e.g.,* vessel strike resulting in death or severe injury) were not mentioned nor evaluated in ''the IHA request for this project''. RODA also emphasized concern about the lack of adequate analysis of individual and cumulative impacts to marine mammals, noting existing fishery restrictions as a result of other North Atlantic right whale protections.

NMFS' response: Neither the MMPA nor our implementing regulations require NMFS to analyze impacts to other industries (*e.g.,* fisheries) or coastal communities from issuance of an ITA. Nevertheless, as detailed in the proposed IHA notice and in our response to comment 3, NMFS has analyzed the potential for adverse impacts such as vessel strikes to marine mammals, including North Atlantic right whales, as a result of Orsted's planned site characterization survey activities and determined that no serious injury or mortality is anticipated. In fact, as discussed in the Negligible Impact Analysis and Determination section, later in this document, no greater than low-level behavioral harassment is expected for any affected species. For North Atlantic right whale in particular it is considered unlikely, as a result of the required precautionary shutdown zone (*i.e.,* 500 m versus the estimated maximum Level B harassment zone of 141 m), that the authorized take would occur at all. Thus, NMFS would also not anticipate the impacts RODA raises as a result of issuing this IHA for site characterization survey activities to Orsted.

In regards to cumulative impacts, neither the MMPA nor NMFS' codified implementing regulations call for consideration of other unrelated activities and their impacts on populations. The preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989) states in response to comments that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline, *e.g.,* as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors. The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There NMFS stated that such effects are not considered in making findings under section 101(a)(5) concerning negligible impact. In this case, this IHA, as well as other IHAs currently in effect or proposed within the specified geographic region, are appropriately considered an unrelated activity relative to the others. The IHAs are unrelated in the sense that they are discrete actions under section 101(a)(5)(D), issued to discrete applicants.

Section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a ''specified activity'' will have a negligible impact on the affected species or stocks of marine mammals. NMFS' implementing regulations require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals. 50 CFR 216.104(a)(1). Thus, the ''specified activity'' for which incidental take coverage is being sought under section 101(a)(5)(D) is generally defined and described by the applicant. Here, Orsted was the applicant for the IHA, and we are responding to the specified activity as described in that application (and making the necessary findings on that basis).

Through the response to public comments in the 1989 implementing regulations, NMFS also indicated (1) that we would consider cumulative effects that are reasonably foreseeable when preparing a NEPA analysis, and (2) that reasonably foreseeable cumulative effects would also be considered under section 7 of the Endangered Species Act (ESA) for ESA-listed species, as appropriate. Accordingly, NMFS has written Environmental Assessments (EA) that addressed cumulative impacts related to substantially similar activities, in similar locations, *e.g.,* the 2019 Avangrid EA for survey activities offshore North Carolina and Virginia; the 2017 Ocean Wind, LLC EA for site characterization surveys off New Jersey; and the 2018 Deepwater Wind EA for survey activities offshore Delaware, Massachusetts, and Rhode Island. Cumulative impacts regarding issuance of IHAs for site characterization survey activities such as those planned by Orsted have been adequately addressed under NEPA in prior environmental analyses that support NMFS' determination that this action is appropriately categorically excluded from further NEPA analysis. NMFS independently evaluated the use of a categorical exclusion (CE) for issuance of Orsted's IHA, which included consideration of extraordinary circumstances.

Separately, the cumulative effects of substantially similar activities in the northwest Atlantic Ocean have been analyzed in the past under section 7 of the ESA when NMFS has engaged in formal intra-agency consultation, such as the 2013 programmatic Biological Opinion for BOEM Lease and Site Assessment Rhode Island, Massachusetts, New York, and New Jersey Wind Energy Areas (*https://repository.library.noaa.gov/view/noaa/29291*). Analyzed activities include those for which NMFS issued previous IHAs (82 FR 31562; July 7, 2017, 83 FR 28808; June 21, 2018, 83 FR 36539; July 30, 2018; and 86 FR 26465; May 10, 2021), which are similar to those planned by Orsted under this current IHA request. This Biological Opinion determined that NMFS' issuance of IHAs for site characterization survey activities associated with leasing, individually *and* cumulatively, are not likely to adversely affect listed marine mammals. NMFS notes that, while issuance of this IHA is covered under a different consultation, this BiOp remains valid.

Comment 7: RODA expressed interest in understanding the outcome if the number of actual takes exceed the number authorized during construction of an offshore wind project (*i.e.,* would the project be stopped mid-construction or operation), and how offshore wind developers will be held accountable for impacts to protected species such that impacts are not inadvertently assigned to fishermen, should they occur. Lastly, RODA maintains that the OSW industry must be accountable for incidental takes from construction and operations separately from the take authorizations for managed commercial fish stocks.

NMFS' response: It is important to recognize that an IHA does not authorize the activity but authorizes take of marine mammals incidental to the activity. As described in condition 3(b) and (c) of the IHA, authorized take, by Level B harassment only, is limited to the species and numbers listed in Table 1 of the final IHA, and any taking exceeding the authorized amounts listed in Table 1 is prohibited and may result in the modification, suspension, or revocation of the IHA. As described in condition 4(f)(vii), shutdown of acoustic sources is required upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the Level B harassment zone as described in Table 2 of the IHA.

It is unclear why RODA would be concerned that the OSW developers are responsible for their own impacts and ''the burdens of those are not also assigned to fishermen''. Fishing impacts generally center on entanglement in fishing gear, which is a very acute, visible, and severe impact. In contrast, the pathway by which impacts occur incidental to construction or site characterization survey activities, such as those planned by Orsted here, is primarily acoustic in nature. Regardless, NMFS reiterates that this IHA does not authorize take incidental to construction activities, but site characterization survey activities, and any take beyond that authorized would be in violation of the MMPA. It is BOEM's responsibility as the permitting agency to make decisions regarding ceasing Orsted's overall offshore wind development activities, not NMFS. If the case suggested by RODA does occur, NMFS would work with BOEM and Orsted to determine the most appropriate means by which to ensure compliance with the MMPA. The impacts of commercial fisheries on marine mammals and incidental take for said fishing activities are indeed managed separately from those of non-commercial fishing activities such as offshore wind site characterization surveys (MMPA section 118).

Comment 8: RODA urges NMFS to use the best available science including the most comprehensive models for estimating marine mammal take and developing robust mitigation measures.

NMFS' response: NMFS has carefully reviewed the best available scientific information in assessing impacts to marine mammals, and recognizes that the surveys have the potential to impact marine mammals through behavioral effects, stress responses, and auditory masking. To limit the potential severity of any possible behavioral disruptions, NMFS has prescribed a robust suite of mitigation measures, including extended distance shutdowns for North Atlantic right whale, that are expected to further reduce the duration and intensity of acoustic exposure. As described in the Mitigation section, NMFS has determined that the prescribed mitigation requirements are sufficient to effect the least practicable adverse impact on all affected species or stocks.

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions, incorporated here by reference, instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (SARs; *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments*) and more general information about these species (*e.g.,* physical and behavioral descriptions) may be found on NMFS' website (*https://www.fisheries.noaa.gov/find-species).*

Table 2 lists all species or stocks for which take is expected and authorized for these activities, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS' stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS' U.S. 2021 U.S. Atlantic and Gulf of Mexico SARs. All values presented in Table 2 are the most recent available at the time of publication and are available in the 2021 SARs (Hayes *et al.,* 2022).

TABLE 2—MARINE MAMMAL SPECIES[6] LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES

Common name	Scientific name	Stock	ESA/MMPA status; strategic (Y/N)[1]	Stock abundance (CV, N_{min}, most recent abundance survey)[2]	PBR	Annual M/SI[3]
Order Artiodactyla—Infraorder Cetacea—Mysticeti (baleen whales)						
Family Balaenidae:						
North Atlantic right whale	*Eubalaena glacialis*	Western Atlantic	E/D, Y	368 (0; 364; 2019)[5]	0.7	7.7
Family Balaenopteridae (rorquals):						
Humpback whale	*Megaptera novaeangliae*	Gulf of Maine	-/-, Y	1,396 (0; 1,380; 2016)	22	12.15
Fin whale	*Balaenoptera physalus*	Western North Atlantic	E/D, Y	6,802 (0.24; 5,573; 2016)	11	1.8
Sei whale	*Balaenoptera borealis*	Nova Scotia	E/D, Y	6,292 (1.02; 3,098; 2016)	6.2	0.8
Minke whale	*Balaenoptera acutorostrata*	Canadian East Coastal	-/-, N	21,968 (0.31; 17,002; 2016).	170	10.6
Odontoceti (toothed whales, dolphins, and porpoises)						
Family Physeteridae:						
Sperm whale	*Physeter macrocephalus*	North Atlantic	E/D, Y	4,349 (0.28; 3,451; 2016)	3.9	0

TABLE 2—MARINE MAMMAL SPECIES [6] LIKELY IMPACTED BY THE SPECIFIED ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) [1]	Stock abundance (CV, N_{min}, most recent abundance survey) [2]	PBR	Annual M/SI [3]
Family Delphinidae:						
Long-finned pilot whale	*Globicephala melas*	Western North Atlantic	-/-, N	39,215 (0.3; 30,627; 2016).	306	29
Striped dolphin	*Stenella coeruleoalba*	Western North Atlantic	-, -, N	67,036 (0.29, 52,939, 2016).	529	0
Atlantic white-sided dolphin	*Lagenorhynchus acutus*	Western North Atlantic	-/-, N	93,233 (0.71; 54,443; 2016).	544	27
Bottlenose dolphin	*Tursiops truncatus*	Western North Atlantic Offshore	-/-, N	62,851 (0.23; 51,914; 2016).	519	28
Short-beaked Common dolphin.	*Delphinus delphis*	Western North Atlantic	-/-, N	172,974(0.21, 145,216, 2016).	1,452	390
Atlantic spotted dolphin	*Stenella frontalis*	Western North Atlantic	-/-, N	39,921 (0.27; 32,032; 2016).	320	0
Risso's dolphin	*Grampus griseus*	Western North Atlantic Sock	-/-, N	35,215 (0.19; 30,051; 2016).	301	34
Harbor porpoise	*Phocoena phocoena*	Gulf of Maine/Bay of Fundy	-/-, N	95,543 (0.31; 74,034; 2016).	851	164
Order Carnivora—Pinnipedia						
Harbor seal	*Phoca vitulina*	Western North Atlantic	-/-, N	61,336 (0.08; 57,637; 2018).	1,729	339
Gray seal [4]	*Halichoerus grypus*	Western North Atlantic	-/-, N	27,300 (0.22; 22,785; 2018).	1,389	4,453

[1] ESA status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

[2] NMFS marine mammal stock assessment reports online at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments. CV is the coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases,* CV is not applicable.

[3] These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (*e.g.,* commercial fisheries, ship strike).

[4] NMFS' stock abundance estimate (and associated PBR value) applies to U.S. population only. Total stock abundance (including animals in Canada) is approximately 451,431. The annual M/SI value given is for the total stock.

[5] The draft 2022 SARs have yet to be released; however, NMFS has updated its species web page to recognize the population estimate for NARWs is now below 350 animals (*https://www.fisheries.noaa.gov/species/north-atlantic-right-whale*).

[6] Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (*https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/;* Committee on Taxonomy (2022)).

A detailed description of the species likely to be affected by Orsted's activities, including information regarding population trends, threats, and local occurrence, was provided in the **Federal Register** notice for the proposed IHA (87 FR 52515; August 26, 2022); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. Please also refer to NMFS' website (*https://www.fisheries.noaa.gov/find-species*) for generalized species accounts.

Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Not all marine mammal species have equal hearing capabilities (*e.g.,* Richardson *et al.,* 1995; Wartzok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, etc.). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.,* low-frequency cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for low-frequency cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 3.

TABLE 3—MARINE MAMMAL HEARING GROUPS

[NMFS, 2018]

Hearing group	Generalized hearing range *
Low-frequency (LF) cetaceans (baleen whales)	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales)	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, *Kogia,* river dolphins, Cephalorhynchid, *Lagenorhynchus cruciger* & *L. australis*).	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals)	50 Hz to 86 kHz.

TABLE 3—MARINE MAMMAL HEARING GROUPS—Continued

[NMFS, 2018]

Hearing group	Generalized hearing range *
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals)	60 Hz to 39 kHz.

* Represents the generalized hearing range for the entire group as a composite (*i.e.,* all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.,* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids, especially in the higher frequency range (Hemilä *et al.,* 2006; Kastelein *et al.,* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. 16 marine mammal species (14 cetacean and 2 pinniped (both phocid) species) have the reasonable potential to co-occur with the planned survey activities. Please refer to Table 2. Of the cetacean species that may be present, five are classified as low-frequency cetaceans (*i.e.,* all mysticete species), eight are classified as mid-frequency cetaceans (*i.e.,* all delphinid species and the sperm whale), and one is classified as high-frequency cetaceans (*i.e.,* harbor porpoise and Kogia spp.).

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the deployed acoustic sources have the potential to result in behavioral harassment of marine mammals in the vicinity of the study area. The **Federal Register** notice for the proposed IHA (87 FR 52515; August 26, 2022) included a discussion of the effects of anthropogenic noise on marine mammals and their habitat, therefore that information is not repeated here; please refer to the **Federal Register** notice (87 FR 52515; August 26, 2022) for that information.

Estimated Take

This section provides an estimate of the number of incidental takes authorized through the IHA, which will inform both NMFS' consideration of ''small numbers'' and the negligible impact determinations.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA defines ''harassment'' as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Authorized takes are by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to certain HRG sources. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.,* shutdown measures, vessel strike avoidance procedures) discussed in detail below in the Mitigation section, Level A harassment is neither anticipated nor authorized.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the authorized take numbers are estimated.

For acoustic impacts, generally speaking, we estimate take by considering: (1) acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of potential takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.,* previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the authorized take estimates.

Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment.

Level B Harassment—Though significantly driven by received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source or exposure context (*e.g.,* frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.,* bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.,* Southall *et al.,* 2007, 2021, Ellison *et al.,* 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (re 1 μPa) for continuous (*e.g.,* vibratory pile-driving, drilling) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (*e.g.,* seismic airguns) or intermittent (*e.g.,* scientific sonar) sources.

Level A harassment—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive).

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are

described in NMFS' 2018 Technical Guidance, which may be accessed at: *www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance.*

Orsted's activity includes the use of impulsive (*i.e.,* boomers and sparkers) and non-impulsive (*i.e.,* CHIRP SBPs) sources. However, as discussed above, NMFS has concluded that Level A harassment is not a reasonably likely outcome for marine mammals exposed to noise from the sources planned for use here, and the potential for Level A harassment is not evaluated further in this document. Please see Orsted's application (Section 1.4) for a quantitative Level A exposure analysis exercise. The results indicated that maximum estimated distances to Level A harassment isopleths were less than 3 m for all sources and hearing groups, with the exception of an estimated 18.9 m and 11.4 m distance to the Level A harassment isopleth for high-frequency cetaceans (*i.e.,* harbor porpoises) during use of the GeoPulse 5430 and TB CHIRP III, respectively (see Table 2 in the **Federal Register** notice for the proposed IHA for source characteristics; 87 FR 52515; August 26, 2022). Orsted did not request authorization of take by Level A harassment and no take by Level A harassment is authorized by NMFS.

TABLE 4—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset thresholds * (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans	*Cell 1:* $L_{p,0\text{-pk,flat}}$: 219 dB; $L_{E,p,LF,24h}$: 183 dB	*Cell 2:* $L_{E,p,LF,24h}$: 199 dB.
Mid-Frequency (MF) Cetaceans	*Cell 3:* $L_{p,0\text{-pk,flat}}$: 230 dB; $L_{E,p,MF,24h}$: 185 dB	*Cell 4:* $L_{E,p,MF,24h}$: 198 dB.
High-Frequency (HF) Cetaceans	*Cell 5:* $L_{p,0\text{-pk,flat}}$: 202 dB; $L_{E,p,HF,24h}$: 155 dB	*Cell 6:* $L_{E,p,HF,24h}$: 173 dB.
Phocid Pinnipeds (PW) (Underwater)	*Cell 7:* $L_{p,0\text{-pk.flat}}$: 218 dB; $L_{E,p,PW,24h}$: 185 dB	*Cell 8:* $L_{E,p,PW,24h}$: 201 dB.
Otariid Pinnipeds (OW) (Underwater)	*Cell 9:* $L_{p,0\text{-pk,flat}}$: 232 dB; $L_{E,p,OW,24h}$: 203 dB	*Cell 10:* $L_{E,p,OW,24h}$: 219 dB.

* Dual metric thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds are recommended for consideration. **Note:** Peak sound pressure level ($L_{p,0\text{-pk}}$) has a reference value of 1 µPa, and weighted cumulative sound exposure level ($L_{E,p}$) has a reference value of 1µPa²s. In this Table, thresholds are abbreviated to be more reflective of International Organization for Standardization standards (ISO 2017). The subscript "flat" is being included to indicate peak sound pressure are flat weighted or unweighted within the generalized hearing range of marine mammals (*i.e.,* 7 Hz to 160 kHz). The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The weighted cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.,* varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these thresholds will be exceeded.

Ensonified Area

Here, we describe operational and environmental parameters of the activity that are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

NMFS has developed a user-friendly methodology for determining the rms sound pressure level (SPL_{rms}) at the 160–dB isopleth for the purpose of estimating the extent of Level B harassment isopleths associated with HRG survey equipment (NMFS, 2020). This methodology incorporates frequency and some directionality to refine estimated ensonified zones. Orsted used NMFS's methodology, using the source level and operation mode of the equipment planned for use during the survey, to estimate the maximum ensonified area over a 24-hr period also referred to as the harassment area (Table 5). Potential takes by Level B harassment are estimated within the ensonified area (*i.e.,* harassment area) as an SPL exceeding 160 dB re 1 µPa for impulsive sources (*e.g.,* sparkers, boomers) within an average day of activity.

The harassment zone, also known as the Zone of Influence (ZOI), is a representation of the maximum extent of the ensonified area around a sound source over a 24-hr period. The ZOI was calculated for mobile sound sources per the following formula:

$ZOI = (Distance/day \times 2r) + \pi r^2$

Where r is the linear distance from the source to the isopleth for the Level B harassment threshold.

The estimated potential daily active survey distance of 70 km was used as the estimated areal coverage over a 24-hr period. This distance accounts for the vessel traveling at roughly 4 knots (kn) (2.1 m/s) and only for periods during which equipment <180 kHz is in operation. A vessel traveling 4 kn (2.1 m/s) can cover approximately 110 km per day; however, based on data collected since 2017, survey coverage over a 24-hour period is closer to 70 km per day as a result of delays due to, *e.g.,* weather, equipment malfunction. For daylight only vessels, the distance is reduced to 20 km per day; however, to maintain the potential for 24-hr surveys, the corresponding Level B harassment zones provided in Table 5 were calculated for each source based on the Level B threshold distances within a 24-hour (30 km) operational period.

NMFS considers the data provided by Crocker and Fratantonio (2016) to represent the best available information on source levels associated with HRG equipment and, therefore, recommends that source levels provided by Crocker and Fratantonio (2016) be incorporated in the method described above to estimate isopleth distances to harassment thresholds. In cases, when the source level for a specific type of HRG equipment is not provided in Crocker and Fratantonio (2016), NMFS recommends that either the source levels provided by the manufacturer be used, or, in instances where source levels provided by the manufacturer are unavailable or unreliable, a proxy from Crocker and Fratantonio (2016) be used instead. Table 2 in the **Federal Register** notice for the proposed IHA (87 FR 52515; August 26, 2022) shows the HRG equipment types that may be used during the planned surveys and the source levels associated with those HRG equipment types.

Based upon modeling results, of the HRG survey equipment planned for use by Orsted that has the potential to result in Level B harassment of marine mammals, the Applied Acoustics Dura-Spark UHD and GeoMarine Geo-Source sparkers would produce the largest Level B harassment isopleth (141 m) or ZOI. Estimated distances to Level B harassment isopleths for all sources evaluated here, including the sparkers, are provided in Table 5. Although Orsted does not expect to use sparker

sources on all planned survey days, Orsted assumes for purposes of analysis that the sparker would be used on all survey days. This is a conservative approach, as the actual sources used on individual survey days may produce smaller harassment distances.

TABLE 5—DISTANCE TO LEVEL B HARASSMENT THRESHOLDS

[160 dB rms]

Source	Distance to Level B harassment threshold (m)
Non-impulsive, non-parametric, shallow SBP (CHIRPs):	
ET 216 CHIRP	12
ET 424 CHIRP	4
ET 512i CHIRP	6
GeoPulse 5430	29
TB CHIRP III	54
Pangeo SBI	22
Impulsive, medium SBP (Boomers and Sparkers):	
AA Triple plate S-Boom (700/1,000 J)	76
AA, Dura-spark UHD Sparkers	141
GeoMarine Sparkers	141

AA = Applied Acoustics; CHIRP = compressed high-intensity radiated pulses; ET = edgetech; HF = high-frequency; J = joules; LF = low-frequency; MF = mid-frequency; PW = phocid pinnipeds in water; SBI = sub-bottom imager; SBP = sub-bottom profiler; TB = Teledyne benthos; UHD = ultra-high definition.

Marine Mammal Occurrence

In this section we provide information about the occurrence of marine mammals, including density or other relevant information that will inform the take calculations.

Habitat based density models produced by the Duke University Marine Geospatial Ecology Laboratory (Roberts *et al.,* 2016, 2022) represent the best available information regarding marine mammal densities in the project area. The density data presented by Roberts *et al.* (2016, 2022) incorporate aerial and shipboard line-transect data from NMFS and other organizations and incorporate data from 8 physiographic and 16 dynamic oceanographic and biological covariates, and control for the influence of sea state, group size, availability bias, and perception bias on the probability of making a sighting. These density models were originally developed for all cetacean taxa in the U.S. Atlantic (Roberts *et al.,* 2016). In subsequent years, certain models have been updated based on additional data as well as certain methodological improvements. More information is available online at *https://seamap.env.duke.edu/models/Duke/EC/.* Marine mammal density estimates in the project area (animals/km^2) were obtained using the most recent model results for all taxa (Roberts 2022). The updated models incorporate sighting data, including sightings from NOAA's Atlantic Marine Assessment Program for Protected Species (AMAPPS) surveys.

For exposure analysis, density data from Roberts (2022) were mapped using a geographic information system (GIS). Density grid cells that included any portion of the project area were selected for all survey months (see Figure 3 of Orsted's application). Given the variability in level of effort between the Lease Areas and the ECR area, densities were separated for the three Lease Areas (OCS–A 0486, 0487, and 0500) and the ECR area. The densities for each species as reported by Roberts *et al.* (2022) for each of the Lease Areas and ECR were averaged by month; those values were then used to calculate the mean annual density for each species within the project area. Estimated mean monthly and annual densities (animals per km^2) of all marine mammal species that may be taken by the survey are shown in Tables 8–11 of Orsted's application. Please see Table 6 for density values used in the exposure estimation process.

Given their size and behavior when in the water, seals are difficult to identify during shipboard visual surveys and limited information is currently available on their distribution. Therefore, data used to establish the density estimates from Roberts *et al.* (2022) are based on information for all seal species that may occur in the Western North Atlantic (*i.e.,* harbor, gray, hooded, harp). However, only the harbor seal and gray seal are reasonably expected to occur in the project area, and the densities were split evenly between both species.

Long- and short-finned pilot whales are also difficult to distinguish during shipboard surveys so individual habitat models were not able to be developed for these species. As only long-finned pilot whales are expected to occur within the study area, pilot whale densities within the study area were attributed to this species.

For bottlenose dolphin densities, Roberts (2022) does not differentiate by stock. As previously discussed, only the Western North Atlantic offshore stock is expected to occur in the project area. Thus, all bottlenose dolphin density estimates within the project area were attributed to the offshore stock.

TABLE 6—AVERAGE ANNUAL MARINE MAMMAL DENSITY ESTIMATES ACROSS SURVEY SITES

Species	Average annual density (km^2)			
	OCS–A 0486	OCS–A 0487	OCS–A 0500	ECR
Low-frequency Cetaceans:				
Fin whale	0.0013	0.0021	0.0023	0.0015
Sei whale	0.0000	0.0001	0.0001	0.0000
Minke whale	0.0005	0.0008	0.0009	0.0005
Humpback whale	0.0012	0.0013	0.0015	0.0006
North Atlantic right whale	0.0040	0.0020	0.0034	0.0008
Mid-frequency Cetaceans:				
Sperm whale	0.0001	0.0001	0.0001	0.0001
Atlantic white sided dolphin	0.0092	0.0234	0.0367	0.0163
Atlantic spotted dolphin	0.0001	0.0003	0.0004	0.0003
Common bottlenose dolphin	0.0151	0.0078	0.0097	0.0266
Long-finned pilot whale	0.0020	0.0074	0.0090	0.0043
Risso's dolphin	0	0.0001	0.0001	0.0001
Common dolphin	0.0457	0.0924	0.0945	0.0562
Striped dolphin	0.0000	0.0000	0.0000	0.0000
High-frequency Cetaceans:				
Harbor porpoise	0.0335	0.0399	0.0384	0.0337

TABLE 6—AVERAGE ANNUAL MARINE MAMMAL DENSITY ESTIMATES ACROSS SURVEY SITES—Continued

Species	Average annual density (km^2)			
	OCS–A 0486	OCS–A 0487	OCS–A 0500	ECR
Pinnipeds in-water [1]:				
Gray seal	0.0104	0.0110	0.0124	0.0182
Harbor seal	0.0104	0.0110	0.0124	0.0182

[1] Seal species are not separated in the Roberts (2022) data therefore densities were evenly split between the two species expected to occur in the project area.

Take Estimation

Here we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur.

Level B exposures were estimated by multiplying the average annual density of each species within the project area (Table 6) by the largest ZOI that was estimated to be ensonified to an SPL exceeding 160 dB re 1 µPa (141m; Table 5). That result was then multiplied by the number of survey days in that Lease Area or ECR (Table 1), and rounded to the nearest whole number to arrive at estimated take. This final number equals the instances of take for the entire operational period. It was assumed the sparker systems were operating all 400 survey days as it is the sound source expected to produce the largest harassment zone. A summary of this method is illustrated in the following formula with the resulting authorized take of marine mammals is shown below in Table 7:

Estimated take = species density × ZOI × # of survey days

TABLE 7—TOTAL ESTIMATED AND AUTHORIZED TAKE NUMBERS

[By Level B harassment only]

Species	Abundance	Estimated Level B takes	Authorized Level B takes	Max percent population
Low-frequency Cetaceans:				
Fin whale	6,802	14	14	0.21
Sei whale	6,292	0	3	0.05
Minke whale	21,968	6	13	0.06
Humpback whale	1,396	8	34	2.44
North Atlantic right whale	368	17	17	4.62
Mid-frequency Cetaceans				
Sperm whale	4,349	0	2	0.05
Atlantic white-sided dolphin:	93,233	210	210	0.23
Atlantic spotted dolphin	39,921	3	29	0.07
Common bottlenose dolphin	62,851	139	139	0.22
Pilot whale	39,215	17	17	0.13
Risso's dolphin	35,215	1	30	0.09
Common dolphin	172,974	601	6,000	3.47
Striped dolphin	67,036	0	20	0.03
High-frequency Cetaceans:				
Harbor porpoise	95,543	287	287	0.30
Pinnipeds:				
Seals				
Gray seal	27,300	118	118	0.43
Harbor seal	61,336	118	118	0.19

Additional data regarding average group sizes from survey effort in the region was considered to ensure adequate take estimates are evaluated. Take estimates for several species were adjusted based upon observed group sizes in the area. The adjusted take estimates for these species are indicated in Table 7. These calculated take estimates were adjusted for these species as follows:

- *Sei whale:* Although no takes were estimated, prior Protected Species Observer (PSO) monitoring documented the presence of sei whales in the area. One take was requested based on the most common group size reported in Kenney and Vigness-Raposa (2010);
- *Minke and humpback whales:* Requested takes were increased to the number recorded within 500 m of an active source based on draft PSO data (see Table 13 in the application);
- *Sperm whale:* No takes were estimated but based on their occurrence in PSO data, 1 group of 2 (Barkaszi and Kelly, 2019) was added to the requested takes;
- *Atlantic spotted dolphin:* Requested takes were increased to the average number of dolphins in a group reported in Palka *et al.* (2017, 2021);
- *Risso's dolphin:* Only one take was estimated but based on their occurrence in PSO data, 1 group of 30 (Kenney and Vigness-Raposa, 2010) was added to the requested takes.
- Common dolphin: Requested takes were increased to 6,000. This is based on the average group size of 15 from the PSO data (calculated by dividing the total number of individuals [14,250] by the total number of detections [927] in Table 13 of the application) multiplied by the planned number of survey days (400) in Table 1.
- *Striped dolphin:* No takes were estimated but based on their occurrence in PSO data, one group of 20 dolphins

(Kenney and Vigness-Raposa, 2010) was added to the requested takes.

PSO data for adjusting take estimates of minke whales, humpback whales, common bottlenose dolphins, and common dolphins was derived from draft PSO observer reports from surveys conducted in the project lease areas and ECR from 2020–2021, as shown in Table 13 of Orsted's application.

Mitigation

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

Mitigation for Marine Mammals and Their Habitat

NMFS has determined that the following mitigation measures be implemented during Orsted's marine site characterization surveys. Pursuant to section 7 of the ESA, Orsted will also be required to adhere to relevant Project Design Criteria (PDC) of the NMFS' Greater Atlantic Regional Fisheries Office (GARFO) programmatic consultation (specifically PDCs 4, 5, and 7) regarding geophysical surveys along the U.S. Atlantic coast (*https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/section-7-take-reporting-programmatics-greater-atlantic#offshore-wind-site-assessment-and-site-characterization-activities-programmatic-consultation*).

Marine Mammal Shutdown Zones

Marine mammal shutdown zones will be established around impulsive HRG survey equipment (<180 kHz; *e.g.,* sparkers and boomers) for all marine mammals, and around impulsive HRG survey equipment and non-impulsive, non-parametric sub-bottom profilers (*e.g.,* CHIRPs) for North Atlantic right whales. Shutdown zones will be monitored by protected species observers (PSOs) based upon the radial distance from the acoustic source rather than being based around the vessel itself. An immediate shutdown of impulsive HRG survey equipment will be required if a whale is sighted at or within the corresponding marine mammal shutdown zones to minimize noise impacts on the animals. If a shutdown is required, a PSO will notify the survey crew immediately. Vessel operators and crews will comply immediately with any call for shutdown. The shutdown zone may or may not encompass the Level B harassment zone. Shutdown zone distances are as follows:

- A 500-meter (m) Shutdown Zone for North Atlantic right whales for use of impulsive acoustic sources (*e.g.,* boomers and/or sparkers) and non-impulsive, non-parametric sub-bottom profilers; and
- A 100-m shutdown zone for use of impulsive acoustic sources for all other marine mammals, with the exception of delphinids belonging to the Family *Delphinidae* and one of the following genera: *Delphinus, Lagenorhynchus, Stenella,* or *Tursiops,* and pinnipeds.

Shutdown will remain in effect until the minimum separation distances (detailed above) between the animal and noise source are re-established. If a marine mammal enters the respective shutdown zone during a shutdown period, the equipment may not restart until that animal is confirmed outside the clearance zone as stated in the pre-start clearance procedures. These stated requirements will be included in the site-specific training to be provided to the survey team.

Pre-Start Clearance

Marine mammal clearance zones will be established at the following distances around the HRG survey equipment and monitored by PSOs:

- 500 m for all ESA-listed marine mammals;
- 100 m for all other whales; and
- 50 m for dolphins and porpoises.

Orsted will implement a 30-minute pre-start clearance period prior to the initiation of ramp-up of specified HRG equipment. During this period, clearance zones will be monitored by PSOs, using the appropriate visual technology. Ramp-up may not be initiated if any marine mammal(s) is within its respective clearance zone. If a marine mammal is observed within a clearance zone during the pre-start clearance period, ramp-up may not begin until the animal(s) has been observed exiting its respective exclusion zone or until an additional time period has elapsed with no further sighting (*i.e.,* 15 minutes for small odontocetes and seals, and 30 minutes for all other species). Monitoring will be conducted throughout all pre-clearance and shutdown zones as well as all visible waters surrounding the sound sources and the vessel. All marine mammals detected will be recorded as described in the Monitoring and Reporting section.

Ramp-up of Survey Equipment

A ramp-up procedure, involving a gradual increase in source level output, is required at all times as part of the activation of the acoustic source when technically feasible. The ramp-up procedure will be used at the beginning of HRG survey activities in order to provide additional protection to marine mammals near the project area by allowing them to vacate the area prior to the commencement of survey equipment operation at full power. Operators should ramp-up sources to half power for 5 minutes and then proceed to full power.

The ramp-up procedure will not be initiated (*i.e.,* equipment will not be started) during periods of inclement conditions when the marine mammal pre-start clearance zone cannot be adequately monitored by the PSOs for a 30 minute period using the appropriate visual technology. If any marine mammal enters the clearance zone, ramp-up will not be initiated until the animal is confirmed outside the marine mammal clearance zone, or until the appropriate time (30 minutes for whales, 15 minutes for dolphins, porpoises, and seals) has elapsed since the last sighting of the animal in the clearance zone.

Shutdown, pre-start clearance, and ramp-up procedures are not required during HRG survey operations using only non-impulsive sources (*e.g.,* echosounders) other than non-parametric sub-bottom profilers (*e.g.,* CHIRPs).

Vessel Strike Avoidance

Orsted must adhere to the following measures except in the case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply.

- Vessel operators and crews must maintain a vigilant watch for all protected species and slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any protected species. A visual observer aboard the vessel must monitor a vessel strike avoidance zone based on the appropriate separation distance around the vessel (distances stated below). Visual observers monitoring the vessel strike avoidance zone may be third-party observers (*i.e.,* PSOs) or crew members, but crew members responsible for these duties must be provided sufficient training to (1) distinguish protected species from other phenomena, and (2) broadly identify a marine mammal as a right whale, other whale (defined in this context as sperm whales or baleen whales other than right whales), or other marine mammal;
  - All survey vessels, regardless of size, must observe a 10-knot speed restriction in specified areas designated by NMFS for the protection of North Atlantic right whales from vessel strikes including seasonal management areas (SMAs) and dynamic management areas (DMAs) when in effect;
  - Members of the monitoring team will consult NMFS North Atlantic right whale reporting system and Whale Alert, as able, for the presence of North Atlantic right whales throughout survey operations, and for the establishment of a DMA. If NMFS should establish a DMA in the project area during the survey, the vessels will abide by speed restrictions in the DMA;
  - All vessels greater than or equal to 19.8 m in overall length operating from November 1 through April 30 will operate at speeds of 10 kn (5.1 m/s) or less at all times;
  - All vessels must reduce their speed to 10 kn (5.1 m/s) or less when mother/calf pairs, pods, or large assemblages of any species of cetaceans is observed near a vessel;
  - All vessels must maintain a minimum separation distance of 500 m from right whales and other ESA-listed large whales;
  - If a whale is observed but cannot be confirmed as a species other than a right whale or other ESA-listed large whale, the vessel operator must assume that it is a right whale and take appropriate action;
  - All vessels must maintain a minimum separation distance of 100 m from non-ESA listed whales;
- All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an understanding that at times this may not be possible (*e.g.,* for animals that approach the vessel);
- When marine mammals are sighted while a vessel is underway, the vessel shall take action as necessary to avoid violating the relevant separation distance (*e.g.,* attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area). If marine mammals are sighted within the relevant separation distance, the vessel must reduce speed and shift the engine to neutral, not engaging the engines until animals are clear of the area. This does not apply to any vessel towing gear or any vessel that is navigationally constrained.

Project-specific training will be conducted for all vessel crew prior to the start of a survey and during any changes in crew such that all survey personnel are fully aware and understand the mitigation, monitoring, and reporting requirements. Prior to implementation with vessel crews, the training program will be provided to NMFS for review and approval. Confirmation of the training and understanding of the requirements will be documented on a training course log sheet. Signing the log sheet will certify that the crew member understands and will comply with the necessary requirements throughout the survey activities.

Based on our evaluation, NMFS has determined that the mitigation measures provide the means of effecting the least practicable impact on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an IHA for an activity, section 101(a)(5)(D) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for authorizations must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.,* presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.,* source characterization, propagation, ambient noise); (2) affected species (*e.g.,* life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.,* age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.,* marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Monitoring Measures

Visual monitoring will be performed by qualified, NMFS-approved PSOs, the resumes of whom will be provided to NMFS for review and approval prior to the start of survey activities. Orsted will employ independent, dedicated, trained PSOs, meaning that the PSOs must (1) be employed by a third-party observer provider, (2) have no tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of marine mammals and mitigation requirements (including brief alerts regarding maritime hazards), and

(3) have successfully completed an approved PSO training course appropriate for their designated task. On a case-by-case basis, non-independent observers may be approved by NMFS for limited, specified duties in support of approved, independent PSOs on smaller vessels with limited crew operating in nearshore waters.

The PSOs will be responsible for monitoring the waters surrounding each survey vessel to the farthest extent permitted by sighting conditions, including shutdown and pre-clearance zones, during all HRG survey operations. PSOs will visually monitor and identify marine mammals, including those approaching or entering the established shutdown and pre-clearance zones during survey activities. It will be the responsibility of the Lead PSO on duty to communicate the presence of marine mammals as well as to communicate the action(s) that are necessary to ensure mitigation and monitoring requirements are implemented as appropriate.

During all HRG survey operations (*e.g.,* any day on which use of an HRG source is planned to occur), a minimum of one PSO must be on duty during daylight operations on each survey vessel, conducting visual observations at all times on all active survey vessels during daylight hours (*i.e.,* from 30 minutes prior to sunrise through 30 minutes following sunset). Two PSOs will be on watch during nighttime operations. The PSO(s) will ensure 360 degree visual coverage around the vessel from the most appropriate observation posts and will conduct visual observations using binoculars and/or night vision goggles and the naked eye while free from distractions and in a consistent, systematic, and diligent manner. PSOs may be on watch for a maximum of 4 consecutive hours followed by a break of at least 2 hours between watches and may conduct a maximum of 12 hours of observations per 24-hr period. In cases where multiple vessels are surveying concurrently, any observations of marine mammals will be communicated to PSOs on all nearby survey vessels.

PSOs must be equipped with binoculars and have the ability to estimate distance and bearing to detect marine mammals, particularly in proximity to exclusion zones. Reticulated binoculars must also be available to PSOs for use as appropriate based on conditions and visibility to support the sighting and monitoring of marine mammals. During nighttime operations, night-vision goggles with thermal clip-ons and infrared technology will be used. Position data will be recorded using hand-held or vessel GPS units for each sighting.

During good conditions (*e.g.,* daylight hours; Beaufort sea state (BSS) 3 or less), to the maximum extent practicable, PSOs will also conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the active acoustic sources. Any observations of marine mammals by crew members aboard any vessel associated with the survey will be relayed to the PSO team. Data on all PSO observations will be recorded based on standard PSO collection requirements. This will include dates, times, and locations of survey operations; dates and times of observations, location and weather, details of marine mammal sightings (*e.g.,* species, numbers, behaviors); and details of any observed marine mammal behavior that occurs (*e.g.,* notes behavioral disturbances). For more detail on the monitoring requirements, see Condition 5 of the IHA.

Reporting Measures

Within 90 days after completion of survey activities or expiration of this IHA, whichever comes sooner, a draft comprehensive report will be provided to NMFS that fully documents the methods and monitoring protocols, summarizes the data recorded during monitoring, summarizes the number of marine mammals observed during survey activities (by species, when known), summarizes the mitigation actions taken during surveys including what type of mitigation and the species and number of animals that prompted the mitigation action, when known), and provides an interpretation of the results and effectiveness of all mitigation and monitoring. Any recommendations made by NMFS must be addressed in the final report prior to acceptance by NMFS. A final report must be submitted within 30 days following any comments on the draft report. All draft and final marine mammal and acoustic monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.Taylor@noaa.gov.* The report must contain at minimum, the following:

a. PSO names and affiliations;

b. Dates of departures and returns to port with port names;

c. Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort;

d. Vessel location (latitude/longitude) when survey effort begins and ends; vessel location at beginning and end of visual PSO duty shifts;

e. Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change;

f. Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions change significantly), including wind speed and direction, Beaufort sea state, Beaufort wind force, swell height, weather conditions, cloud cover, sun glare, and overall visibility to the horizon;

g. Factors that may be contributing to impaired observations during each PSO shift change or as needed as environmental conditions change (*e.g.,* vessel traffic, equipment malfunctions); and

h. Survey activity information, such as type of survey equipment in operation, acoustic source power output while in operation, and any other notes of significance (*i.e.,* pre-clearance survey, ramp-up, shutdown, end of operations, etc.).

If a marine mammal is sighted, the following information should be recorded:

a. Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

b. PSO who sighted the animal;

c. Time of sighting;

d. Vessel location at time of sighting;

e. Water depth;

f. Direction of vessel's travel (compass direction);

g. Direction of animal's travel relative to the vessel;

h. Pace of the animal;

i. Estimated distance to the animal and its heading relative to vessel at initial sighting;

j. Identification of the animal (*e.g.,* genus/species, lowest possible taxonomic level, or unidentified); also note the composition of the group if there is a mix of species;

k. Estimated number of animals (high/low/best);

l. Estimated number of animals by cohort (adults, yearlings, juveniles, calves, group composition, etc.);

m. Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

n. Detailed behavior observations (*e.g.,* number of blows, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior);

o. Animal's closest point of approach and/or closest distance from the center point of the acoustic source;

p. Platform activity at time of sighting (*e.g.,* deploying, recovering, testing, data acquisition, other); and

q. Description of any actions implemented in response to the sighting (*e.g.,* delays, shutdown, ramp-up, speed or course alteration, etc.) and time and location of the action.

If a North Atlantic right whale is observed at any time by PSOs or personnel on any project vessels, during surveys or during vessel transit, Orsted must immediately report sighting information to the NMFS North Atlantic Right Whale Sighting Advisory System: (866) 755–6622. North Atlantic right whale sightings in any location may also be reported to the U.S. Coast Guard via channel 16.

In the event that Orsted personnel discover an injured or dead marine mammal, Orsted will report the incident to the NMFS Office of Protected Resources (OPR) and the NMFS New England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report would include the following information:

a. Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

b. Species identification (if known) or description of the animal(s) involved;

c. Condition of the animal(s) (including carcass condition if the animal is dead);

d. Observed behaviors of the animal(s), if alive;

e. If available, photographs or video footage of the animal(s); and

f. General circumstances under which the animal was discovered.

In the unanticipated event of a ship strike of a marine mammal by any vessel involved in this activities covered by the IHA, Orsted will report the incident to NMFS OPR and the NMFS New/England/Mid-Atlantic Stranding Coordinator as soon as feasible. The report will include the following information:

a. Time, date, and location (latitude/longitude) of the incident;

b. Species identification (if known) or description of the animal(s) involved;

c. Vessel's speed during and leading up to the incident;

d. Vessel's course/heading and what operations were being conducted (if applicable);

e. Status of all sound sources in use;

f. Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

g. Environmental conditions (*e.g.,* wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

h. Estimated size and length of animal that was struck;

i. Description of the behavior of the marine mammal immediately preceding and following the strike;

j. If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

k. Estimated fate of the animal (*e.g.,* dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

l. To the extent practicable, photographs or video footage of the animal(s).

Negligible Impact Analysis and Determination

NMFS has defined negligible impact as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.,* population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be ''taken'' through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.,* intensity, duration), the context of any impacts or responses (*e.g.,* critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with the 1989 preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.,* as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

To avoid repetition, the discussion of our analysis applies to all the species listed in Table 2, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. Where there are meaningful differences between species or stocks—as is the case of the North Atlantic right whale—they are included as separate subsections below. NMFS does not anticipate that serious injury or mortality will occur as a result from HRG surveys, even in the absence of mitigation, and no serious injury or mortality is authorized. As discussed in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section in the **Federal Register** notice for the proposed IHA (87 FR 52515; August 26, 2022), non-auditory physical effects and vessel strike are not expected to occur. NMFS expects that all potential takes will be in the form of Level B behavioral harassment in the form of temporary avoidance of the area or decreased foraging (if such activity was occurring), reactions that are considered to be of low severity and with no lasting biological consequences (*e.g.,* Southall *et al.,* 2007, 2021). As described above, Level A harassment is not expected to occur given the nature of the operations and the estimated small size of the Level A harassment zones.

In addition to being temporary, the maximum expected harassment zone around the survey vessel is 141 m. Therefore, the ensonified area surrounding each vessel is relatively small compared to the overall distribution of the animals in the area and their use of the habitat. Feeding behavior is not likely to be significantly impacted as prey species are mobile and are broadly distributed throughout the project area; therefore, marine mammals that may be temporarily displaced during survey activities are expected to be able to resume foraging once they have moved away from areas with disturbing levels of underwater noise. Because of the temporary nature of the disturbance and the availability of similar habitat and resources in the surrounding area, the impacts to marine mammals and the food sources that they utilize are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

There are no rookeries, mating or calving grounds known to be biologically important to marine mammals within the project area. Several harbor and gray seal haul out sites have been identified on Block Island, Great Gull Island, and Fishers Island as wells as along Narragansett and Nantucket Sounds. As the acoustic footprint of the HRG activities is relatively small, hauled seals are not expected to be impacted by these activities. In addition, cable landfall sites have yet to be determined and may

not be in the vicinity of haul out sites. The ECR area encompasses a feeding BIA for fin whales east of Montauk Point, NY that is active from March through October (LaBrecque *et al.,* 2015). The fin whale feeding BIA is extensive and sufficiently large (2,933 km^2), and the acoustic footprint of the survey activities is sufficiently small (project area) that feeding opportunities for fin whales will not be reduced appreciably. Given the relatively small size of the ensonified area, it is unlikely that prey availability will be adversely affected by HRG survey operations. In addition, feeding success is not likely to be significantly affected as minimal impacts to prey species are expected, for reasons as described above in the Potential Effects of Specified Activities on Marine Mammals and their Habitat section in the **Federal Register** notice of the proposed IHA (87 FR 52515; August 26, 2022).

North Atlantic Right Whale

The status of the North Atlantic right whale population is of heightened concern and therefore, merits additional analysis. As noted previously, elevated North Atlantic right whale mortalities began in June 2017 and there is an active UME. Overall, preliminary findings support human interactions, specifically vessel strikes and entanglements, as the cause of death for the majority of right whales. The project area overlaps with a migratory corridor BIA for North Atlantic right whales (effective March-April; November-December) that extends from Massachusetts to Florida and, off the coast of NY and RI, from the coast to beyond the shelf break (LaBrecque *et al.,* 2015). Right whale migration is not expected to be impacted by the survey activities due to the very small size of the project area relative to the spatial extent of the available migratory habitat in the BIA. The project area also overlaps with the Block Island seasonal management area (SMA), active from November 1 to April 30. North Atlantic right whales may be feeding or migrating within the SMA. Required vessel strike avoidance measures and following the speed restrictions of the SMA will decrease the risk of ship strike during North Atlantic right whale migration; no ship strike is expected to occur during Orsted's activities. For reasons as described above, minimal impacts are expected to prey availability and feeding success. Additionally, HRG survey operations are required to maintain a 500 distance and shutdown if a North Atlantic right whale is sighted at or within 500 m. The 500 m shutdown zone for right whales is conservative, considering the Level B harassment isopleth for the most impactful sources (*i.e.,* GeoMarine Sparkers, AA Dura-spark UHD Sparkers, AA Triple plate S-Boom) is estimated to be 141 m, and thereby minimizes the potential for behavioral harassment of this species. Therefore only very limited take by Level B harassment of North Atlantic right whale has been authorized by NMFS. As noted previously, Level A harassment is not expected, nor authorized, due to the small PTS zones associated with HRG equipment types planned for use. NMFS does not anticipate North Atlantic right whale takes that result from the survey activities will impact annual rates of recruitment or survival. Thus, any takes that occur will not result in population level impacts.

Other Marine Mammals With Active UMEs

As noted previously, there are several active UMEs occurring in the vicinity of Orsted's project area. Elevated humpback whale mortalities have occurred along the Atlantic coast from Maine through Florida since January 2016. Of the cases examined, approximately half had evidence of human interaction (ship strike or entanglement). The UME does not yet provide cause for concern regarding population-level impacts. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or DPS) remains stable at approximately 12,000 individuals.

Beginning in January 2017, elevated minke whale strandings have occurred along the Atlantic coast from Maine through South Carolina, with highest numbers in Massachusetts, Maine, and New York. This event does not provide cause for concern regarding population level impacts, as the likely population abundance is greater than 20,000 whales.

The required mitigation measures are expected to reduce the number and/or severity of takes for all species listed in Table 2, including those with active UMEs, to the level of least practicable adverse impact. In particular, they will provide animals the opportunity to move away from the sound source before HRG survey equipment reaches full energy, thus preventing them from being exposed to more severe Level B harassment. No Level A harassment is anticipated, even in the absence of mitigation measures, or authorized.

NMFS expects that takes will be in the form of short-term Level B behavioral harassment by way of brief startling reactions and/or temporary vacating of the area, or decreased foraging in the area (if such activity was occurring)—reactions that (at the scale and intensity anticipated here) are considered to be of low severity, with no lasting biological consequences. Since both the sources and marine mammals are mobile, animals will only be exposed briefly to a small ensonified area that might result in take. Required mitigation measures, such as shutdown zones and ramp up, will further reduce exposure to sound that could result in more severe behavioral harassment.

In summary and as described above, the following factors support our determination that the impacts resulting from this activity are not expected to adversely affect any of the species or stocks through effects on annual rates of recruitment or survival:

- No serious injury or mortality is anticipated or authorized;
- No Level A harassment (PTS) is anticipated, even in the absence of mitigation measures, or authorized;
- Foraging success is not likely to be significantly impacted as effects on species that serve as prey species for marine mammals from the survey are expected to be minimal;
- The availability of alternate areas of similar habitat value for marine mammals to temporarily vacate the survey area during the planned survey to avoid exposure to sounds from the activity;
- Take is anticipated to be of Level B behavioral harassment only consisting of brief startling reactions and/or temporary avoidance of the survey area;
- While the project area is within areas noted as a migratory BIA and SMA for North Atlantic right whales, the activities will occur in such a comparatively small area such that any avoidance of the ensonified area due to activities will not affect migration. In addition, mitigation measures require shutdown at 500 m (almost four times the size of the Level B harassment isopleth (141 m), which minimizes the effects of the take on the species; and
- The mitigation measures, including visual monitoring and shutdowns, are expected to minimize potential impacts to marine mammals.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned survey activities will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The amount of take NMFS has authorized is below one third of the estimated stock abundance for all species (in fact, take of individuals is less than 6 percent of the abundance of the affected stocks for these species, see Table 7). The figures presented in Table 7 are likely conservative estimates as they assume all takes are of different individual animals which is likely not to be the case. Some individuals may return multiple times in a day, but PSOs will count them as separate takes if they cannot be individually identified.

Based on the analysis contained herein of the planned survey activities (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216–6A, NMFS must review our proposed action (*i.e.,* the issuance of an IHA) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) of the Companion Manual for NOAA Administrative Order 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

Endangered Species Act

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS Office of Protected Resources (OPR) consults internally whenever we propose to authorize take for endangered or threatened species.

NMFS OPR has authorized the incidental take of four species of marine mammals which are listed under the ESA, including the North Atlantic right, fin, sei, and sperm whale, and has determined that these activities fall within the scope of activities analyzed in GARFO's programmatic consultation regarding geophysical surveys along the U.S. Atlantic coast in the three Atlantic Renewable Energy Regions (completed June 29, 2021; revised September 2021).

Authorization

NMFS has issued an IHA to Orsted for potential harassment of small numbers of 16 marine mammal species incidental to HRG site characterization surveys off the coast of New York and Rhode Island, provided the previously mentioned mitigation, monitoring, and reporting requirements are followed.

Dated: October 6, 2022.

Catherine Marzin,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2022–22150 Filed 10–11–22; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2022–OS–0116]

Proposed Collection; Comment Request

AGENCY: Office of the Under Secretary of Defense for Policy, Department of Defense (DoD).

ACTION: 60-Day information collection notice.

SUMMARY: In compliance with the *Paperwork Reduction Act of 1995,* and as directed by the *National Defense Authorization Act for Fiscal Year 2022,* the Under Secretary of Defense for Policy announces a proposed public information collection and seeks public comment on the provisions thereof. Comments are invited on this statutory collection requirement as to: whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the agency's estimate of the burden of the proposed information collection; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology.

DATES: Consideration will be given to all comments received by December 12, 2022.

ADDRESSES: You may submit comments, identified by docket number and title, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

Mail: Department of Defense, Office of the Assistant to the Secretary of Defense for Privacy, Civil Liberties, and Transparency, Regulatory Directorate, 4800 Mark Center Drive, Attn: Mailbox 24, Suite 08D09, Alexandria, VA 22350–1700.

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

FOR FURTHER INFORMATION CONTACT: To request more information on this

proposed information collection or to obtain a copy of the proposal and associated collection instruments, please write to Ms. Angela Duncan at the Department of Defense, Washington Headquarters Services, ATTN: Executive Services Directorate, Directives Division, 4800 Mark Center Drive, Suite 03F09–09, Alexandria, VA 22350–3100 or call 571–372–7574.

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Anomalous Health Incidents Secure Reporting Tool; OMB Control Number 0704–AHIT.

Needs and Uses: As directed by Section 6603 (d) of the National Defense Authorization Act for Fiscal Year 2022, the DoD is directed to develop a process to provide a secure mechanism for personnel to self-report any suspected exposure that could be an anomalous health incident (AHI). The respondents to the AHI Secure Reporting Tool are military service members, DoD civilian employees, contractors, and any DoD family member who may have encountered an AHI. The secure reporting tool is a web based application that will provide DoD affiliated individuals affected by an AHI a secure self-reporting mechanism, through a *DoD.gov* website, that will trigger an appropriate DoD response for medical care and investigation requirements.

Affected Public: Individuals or households.

Annual Burden Hours: 50 hours.

Number of Respondents: 100.

Responses per Respondent: 1.

Annual Responses: 100.

Average Burden per Response: 30 minutes.

Frequency: 1.

Dated: October 6, 2022.

Kayyonne T. Marston,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2022–22147 Filed 10–11–22; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Reopening; Application for New Awards; Basic Needs for Postsecondary Students Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice; reopening of application period.

SUMMARY: On August 2, 2022, the Department of Education (Department) published in the **Federal Register** a notice inviting applications (NIA) for new awards for fiscal year (FY) 2022 for the Basic Needs for Postsecondary Students (Basic Needs) Program, Assistance Listing Number 84.116N. This notice reopens this competition to allow more time for the preparation and submission of applications by eligible applicants that are affected applicants (as described in Eligibility below), located in Puerto Rico, portions of Alaska covered by a Presidential major disaster declaration, and areas under a Presidential major disaster or emergency declaration resulting from Hurricane Ian, which includes Florida, the Seminole Tribe of Florida, North Carolina, and South Carolina.

DATES: *Deadline for Transmittal of Applications for Affected Applicants:* October 14, 2022.

FOR FURTHER INFORMATION CONTACT: Njeri Clark, U.S. Department of Education, 400 Maryland Avenue SW, room 2B186, Washington, DC 20202–4260. Telephone: (202) 453–6224. Email: *Njeri.Clark@ed.gov.*

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

SUPPLEMENTARY INFORMATION: On August 2, 2022, we published in the **Federal Register** the NIA for the Basic Needs Program (87 FR 47201). Under the NIA, applications were due on October 3, 2022. We are reopening this competition for affected applicants described below to allow them more time—until October 14, 2022—to prepare and submit their applications.

Eligibility:

The reopening of this competition applies to eligible applicants under the Basic Needs competition that are affected applicants. An eligible applicant for this competition is defined in the NIA. To qualify as an affected applicant, the applicant must have a mailing address that is located in a jurisdiction that is part of one of the applicable federally declared disaster areas and must provide appropriate supporting documentation, if requested.

The affected areas are those in which assistance to individuals or public assistance has been authorized under the following FEMA declarations:

- Puerto Rico (*https://www.fema.gov/disaster/4671*);
- Portions of Alaska covered by a Presidential major disaster declaration (*https://www.fema.gov/disaster/4672*);
- Florida (*https://www.fema.gov/disaster/4673*);
- The Seminole Tribe of Florida (*https://www.fema.gov/disaster/4675*);
- North Carolina (*https://www.fema.gov/disaster/3586*); and
- South Carolina (*https://www.fema.gov/disaster/3585*).

Affected applicants that have already timely submitted applications under the FY 2022 Basic Needs competition may submit a new application, but they are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that is last submitted and timely received. Applications that did not meet the original deadline may be resubmitted to be considered for review.

We are not reopening the application period for all applicants. Thus, applications from applicants that are not affected applicants may not be submitted as part of this reopened period for submission of applications.

Note: All information in the NIA remains the same, except for the deadline date for affected applicants.

Program Authority: 20 U.S.C. 1138–1138d; and the Explanatory Statement accompanying Division H of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103) (Explanatory Statement).

Accessible Format: On request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this notice, the NIA, and a copy of the application in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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

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

Nasser Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2022–22114 Filed 10–11–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; Lead of a Career and Technical Education (CTE) Network: Research Networks Focused on Critical Problems of Education Policy and Practice Program; Correction

AGENCY: Institute of Education Sciences, Department of Education.

ACTION: Notice; correction.

SUMMARY: On August 19, 2022, we published in the **Federal Register** a notice inviting applications for the Lead of a Career and Technical Education (CTE) Network under the fiscal year (FY) 2023 Research Networks Focused on Critical Problems of Education Policy and Practice Grant Program (NIA), Assistance Listing Number (ALN) 84.305N. We are correcting this NIA to add ''the significance of the application'' to the selection criteria that peer reviewers are asked to use in evaluating applications received under this competition. We are also clarifying that the project period for the Lead is 60 months. All other information in the NIA remains the same.

DATES: This correction is applicable October 12, 2022.

FOR FURTHER INFORMATION CONTACT: Dr. Corinne Alfeld, Institute of Education Sciences, U.S. Department of Education, Potomac Center Plaza, 550 12th Street SW, Washington, DC 20202. Email: *Corinne.Alfeld@ed.gov.* Telephone: (202) 245–8203.

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

SUPPLEMENTARY INFORMATION:

Corrections:

In FR Doc. No. 2022–17847, appearing on page 51070 of the **Federal Register** of August 19, 2022, we make the following corrections:

1. On page 51070, in the third column, in the section titled II. Award Information, after the heading *Project Period,* remove ''Up to''.

2. On page 51071, in the second column, in the second paragraph after the heading *Selection Criteria,* add the phrase, ''the significance of the application,'' before ''the quality of the overall network administration and coordination plan''.

Program Authority: 20 U.S.C. 2324(c)(1); 20 U.S.C. 9501 *et seq.*

Accessible Format: On request to the person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this notice and the NIA in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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

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

Mark Schneider,

Director, Institute of Education Sciences.

[FR Doc. 2022–22072 Filed 10–11–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Reopening; Applications for New Awards; Augustus F. Hawkins Centers of Excellence Program

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Notice; reopening of application period.

SUMMARY: On August 23, 2022, the Department of Education (Department) published in the **Federal Register** a notice inviting applications (NIA) for new awards for fiscal year (FY) 2022 for the Augustus F. Hawkins Centers of Excellence (Hawkins) Program, Assistance Listing Number (ALN) 84.116K. The NIA established a deadline date of October 7, 2022, for the transmittal of applications. For eligible applicants that are affected applicants (as described in Eligibility below), located in Puerto Rico, portions of Alaska covered by a Presidential major disaster declaration, and areas under a Presidential major disaster or emergency declaration resulting from Hurricane Ian, which includes Florida, the Seminole Tribe of Florida, North Carolina, and South Carolina, this notice reopens this competition to allow more time for the preparation and submission of applications by eligible applicants.

DATES: *Deadline for Transmittal of Applications for Affected Applicants:* October 17, 2022.

FOR FURTHER INFORMATION CONTACT: Dr. Vicki Robinson, U.S. Department of Education, 400 Maryland Avenue SW, Room 2B136, Washington, DC 20202. Telephone: (202) 453–7907. Email: *Vicki.Robinson@ed.gov.* You may also contact Ashley Hillary, U.S. Department of Education, 400 Maryland Avenue SW, Room 2C143, Washington, DC 20202. Telephone: (202) 453–7880. Email: *Ashley.Hillary@ed.gov.*

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

SUPPLEMENTARY INFORMATION: On August 23, 2022, we published the NIA for the Augustus F. Hawkins Centers of Excellence Program competition in the **Federal Register** (87 FR 51656). Under the NIA, applications are due on October 7, 2022. We are reopening this competition for affected applicants, which are applicants from: Puerto Rico due to a declared disaster caused by Hurricane Fiona (*https://www.fema.gov/disaster/4671*); the portions of Alaska with declared disaster designations caused by ex-Typhoon Merbok (*https://www.fema.gov/disaster/4672*); and areas under a Presidential major disaster or emergency declaration resulting from Hurricane Ian, which include Florida (*https://www.fema.gov/disaster/4673*), the Seminole Tribe of Florida (*https://www.fema.gov/disaster/4675*), North Carolina (*https://www.fema.gov/disaster/3586*), and South Carolina (*https://www.fema.gov/disaster/3585*) in order to allow applicants from these jurisdictions more time to prepare and submit their applications.

Eligibility: The reopening of this competition applies to eligible applicants under the Augustus F. Hawkins Centers of Excellence Program competition that are affected applicants. An eligible applicant for this competition is defined in the NIA. To qualify as an affected applicant, the applicant must have a mailing address that is located in one of the areas listed below and must provide appropriate supporting documentation, if requested.

The affected areas are those in which assistance to individuals or public assistance has been authorized under the following FEMA declarations:

- Puerto Rico (*https://www.fema.gov/disaster/4671*);
- Portions of Alaska covered by a Presidential major disaster declaration (*https://www.fema.gov/disaster/4672*);

- Florida (*https://www.fema.gov/disaster/4673*);
- The Seminole Tribe of Florida (*https://www.fema.gov/disaster/4675*);
- North Carolina (*https://www.fema.gov/disaster/3586*); and
- South Carolina (*https://www.fema.gov/disaster/3585*).

Affected applicants that have already timely submitted applications under the FY 2022 Augustus F. Hawkins Centers of Excellence Program competition may submit a new application on or before the new application deadline of October 17, 2022, but they are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that is last submitted and timely received by 11:59:59 p.m., Eastern Time, on October 17, 2022. Any application submitted by an affected applicant under the reopened deadline must contain evidence (*e.g.,* the applicant organization mailing address) that the applicant is located in one of the applicable areas and, if requested, must provide appropriate supporting documentation.

The application period is not reopened for all applicants. Applications from applicants that are not affected, as defined above, will not be accepted past the original October 7, 2022 deadline.

Note: All requirements and conditions in the NIA remain the same, except for the deadline date for affected applicants.

Program Authority: 20 U.S.C. 1033–1033a; 20 U.S.C. 1138–1138d; the Explanatory Statement accompanying Division H of the Consolidated Appropriations Act, 2022 (Pub. L. 117–103).

Accessible Format: On request to one of the contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this notice, the NIA, and a copy of the application in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

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

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

Nasser Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2022–22115 Filed 10–11–22; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

[DOE Docket No. 202–22–1]

Emergency Order Issued to the California Independent System Operator Corporation To Operate Power Generating Facilities Under Limited Circumstances in California as a Result of Extreme Weather

AGENCY: Office of Cybersecurity, Energy Security, and Emergency Response; Department of Energy.

ACTION: Notice of emergency action.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is issuing this Notice to document emergency actions that it has taken pursuant to the Federal Power Act. California experienced several periods of extreme heat, drought conditions, and threat of wildfires. California Governor Gavin Newsom issued a proclamation declaring a state of emergency regarding increased electrical demand and generation. Because the additional generation may result in a conflict with environmental standards and requirements, the DOE authorized only the necessary additional generation, allowing CAISO to sufficiently supply the necessary amount of energy needed to prevent electrical disruption.

FOR FURTHER INFORMATION CONTACT: For further information on this Notice, or for information on the emergency activities described herein, contact Kenneth Buell, (202) 586–3362, *Kenneth.Buell@hq.doe.gov,* or by mail to the attention of Kenneth Buell, CR–30, 1000 Independence Ave. SW, Washington, DC 20585.

SUPPLEMENTARY INFORMATION: The Order and all related information are available here: *https://www.energy.gov/ceser/federal-power-act-section-202c-caiso-september-2022*.

Background

Section 202(c) of the Federal Power Act

The U.S. Department of Energy is issuing this Notice pursuant to 10 CFR 1021.343(a) to document emergency actions taken in accordance with section 202(c) of the Federal Power Act (FPA) (16 U.S.C. 824a(c)). FPA section 202(c) provides that ''[d]uring the continuance of any war in which the United States is engaged, or whenever the [Secretary of Energy] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the [Secretary of Energy] shall have authority, either upon [her] own motion or upon complaint, with or without notice, hearing ore report, to require by order such temporary connections of facilities and generation, delivery, interchange, or transmission of electric energy as in [her] judgment will best meet the emergency and serve the public interest.

1. Request for Emergency Order From the California Independent System Operator Corporation

On September 1, 2022, the California Independent System Operator Corporation (CAISO) submitted to the Department a Request for Emergency Order under section 202(c) of the Federal Power Act (Application) with the Department ''to preserve the reliability of bulk electric power system in California.'' In its Application, CAISO cited extreme heat and forecasted a supply deficiency to meet demand during peak demand hours. CAISO requested the authority to direct the operation of three natural gas-fired generating resources capable of providing 28 megawatts of additional generation supply (the Covered Resources). CAISO stated that the emergency order it was requesting could result in exceedances of National Ambient Air Quality Standards under the Clean Air Act. Given the permit limits of the Covered Resources, CAISO anticipated that the additional capacity could not be made available absent an order under FPA section 202(c).

2. CAISO Order

On September 2, 2022, the Acting Under Secretary for Infrastructure, acting pursuant to delegated authority, issued Order No. 2022–22–1 (the CAISO Order). As set forth in the CAISO Order, the Acting Under Secretary for Infrastructure found that an emergency exists in California due to a shortage of

electric energy, a shortage of facilities for the generation of electric energy, and other causes, and that the issuance of the CAISO Order would meet the emergency and serve the public interest.

The CAISO Order authorized the CAISO to dispatch the Covered Resources from September 2, 2022 to September 8, 2022, solely under the following conditions: (i) the issuance and continuation of an Energy Emergency Alert Level 2 (EEA2) condition or greater between the hours of 14:00 Pacific Daylight Time and 22:00 Pacific Daylight Time; and (ii) a transmission emergency that requires operation of a Covered Resource to prevent or mitigate load curtailment during any operating hour. Under the CAISO Order, the CAISO was required to exhaust all reasonably and practically available resources prior to dispatching the Covered Resources.

The CAISO Order requires that CAISO provide a report by October 10, 2022, to include all source-specific data for dates between September 2, 2022 and September 8, 2022, during which the Covered Resources operated. The report must include, ''for each unit: (1) the hours of operation, as well as the hours in which any permit limit was exceeded, and (2) a preliminary description of each permit term that was exceeded and the manner in which such exceedance occurred.'' The CAISO Order also requires the CAISO to ''submit a final report by November 14, 2022, with any revisions to the information reported on December 12, 2022.'' The Department will prepare a special environmental analysis of the potential impacts resulting from issuance of the CAISO Order, including impacts on air quality and environmental justice. The CAISO will be responsible for the reasonable third-party costs of the special environmental analysis.

3. Amendment Number 1 to CAISO Order

On September 7, 2022, the CAISO submitted to the Department a Request for Modification of Emergency Order Pursuant to section 202(c) of the Federal Power Act (Request for Modification) in which it requested that the CAISO Order be amended to add two units at Calpine's Greenleaf Unit 1 site in Yuba City, California (the Greenleaf Units) as additional Covered Resources and that the Greenleaf Units be permitted to operate through September 9, 2022, and otherwise in accordance with the terms of CAISO Order. In its Request for Modification, the CAISO reported that the water injection pump failed at the Greenleaf Units on September 6, 2022. Operation of the Greenleaf Units could cause exceedance of permitted emissions limits, and thus could result in suspension of their operation absent the issuance of an emergency order permitting operation of the Greenleaf Units during specified conditions.

On September 7, 2022, the Acting Under Secretary for Infrastructure issued Amendment Number 1 to Order No. 202–22–1 (Amendment Number 1), finding that the circumstances which led to her previous determination that California was experiencing a shortage of electric energy was continuing and that Amendment Number 1 would help meet the emergency conditions in the CAISO control area and serve the public interest. Amendment Number 1 added the Greenleaf Units as Covered Resources subject to all of the terms of the CAISO Order, except that the Greenleaf Units could be operated through September 9, 2022. All other terms of CAISO Order remained in effect and applied to all of the Covered Resources, including the Greenleaf Units. The CAISO Order as amended by Amendment Number 1 is referred to herein as the Amended CAISO Order.

4. Amendment Number 2 to the Amended CAISO Order

On September 7, 2022, the CAISO submitted to the Department a Request for Extension of Emergency Order Pursuant to Section 202(c) of the Federal Power Act (Extension Application) to the Department. In its Extension Application, the CAISO requested an extension of the expiration date of the Amended CAISO Order through September 12, 2022. The CAISO stated that California was experiencing extreme heat, which the CAISO forecasted to continue through at least September 9, 2022, and the extended and excessive heat as well as wildfire risk could ''exacerbate electric grid reliability issues at any time.'' Consequently, the CAISO believed it prudent to ask that the expiration date of the Amended CAISO Order be extended through September 12, 2022.

On September 8, 2022, the Acting Under Secretary for Infrastructure issued Amendment Number 2 to Order No. 202–22–1 (Amendment Number 2), finding that an emergency continued to exist in California due to a shortage of electric energy and that issuance of the extension would help to meet the emergency conditions and serve the public interest. Amendment Number 2 extended the expiration date of the Amended CAISO Order through September 12, 2022. All other terms of the Amended CAISO Order remained in effect, including the obligation of the CAISO to exhaust all reasonably and practically available resources prior to dispatching the Covered Resource and the obligation to report information regarding the environmental impacts of the operation of the Covered Resources permitted by the CAISO Order. As required by FPA section 202(c), the Department consulted with the Environmental Protection Agency (EPA) in considering the CAISO's request for an extension of the Amended CAISO Order. The EPA did not request any additional conditions be included in the Amended CAISO Order.

5. Further Information

The CAISO Order, Amendment Number 1, Amendment Number 2, and other documents referenced herein can be found on the Department's website at *https://www.energy.gov/ceser/federal-power-act-section-202c-banc-september-2022.* The reports required by the Amended CAISO Order will be posted to the Department's website when they become available.

Signing Authority

This document of the Department of Energy was signed on October 1, 2022, by Puesh M. Kumar, Director for the Office of Cybersecurity, Energy Security, and Emergency Response, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 6, 2022.

Treena V. Garrett,

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

[FR Doc. 2022–22123 Filed 10–11–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

[DOE Docket No. 202–22–2]

Emergency Order Issued to the Balancing Authority of Northern California To Operate Power Generating Facilities Under Limited Circumstances in California as a Result of Extreme Weather

AGENCY: Office of Cybersecurity, Energy Security, and Emergency Response; Department of Energy.

ACTION: Notice of emergency action.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is issuing this Notice to document emergency actions that it has taken pursuant to the Federal Power Act. California experienced several periods of extreme heat, drought conditions, and threat of wildfires. California Governor Gavin Newsom issued a proclamation declaring a state of emergency regarding increased electrical demand and generation. Because the additional generation may result in a conflict with environmental standards and requirements, the DOE authorized only the necessary additional generation, allowing BANC to sufficiently supply the necessary amount of energy needed to prevent electrical disruption.

ADDRESSES: Requests for more information should be addressed by electronic mail to *AskCR@hq.doe.gov.*

FOR FURTHER INFORMATION CONTACT: For further information on this Notice, or for information on the emergency activities described herein, contact Kenneth Buell, (202) 586–3362, *Kenneth.Buell@hq.doe.gov,* or by mail to the attention of Kenneth Buell, CR–30, 1000 Independence Ave. SW, Washington, DC 20585. Due to limited access to DOE facilities because of current COVID–19 restrictions, contact via phone or email is preferred.

SUPPLEMENTARY INFORMATION: The Order and all related information are available here: *https://www.energy.gov/ceser/federal-power-act-section-202c-banc-september-2022.*

Background

Section 202(c) of the Federal Power Act

The U.S. Department of Energy (the Department) is issuing this Notice pursuant to 10 CFR 1021.343(a) to document emergency actions taken in accordance with section 202(c) of the Federal Power Act (FPA) (16 U.S.C. 824a(c)). FPA section 202(c) provides that ''[d]uring the continuance of any war in which the United States is engaged, or whenever the [Secretary of Energy] determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the [Secretary of Energy] shall have authority, either upon [her] own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and generation, delivery, interchange, or transmission of electric energy as in [her] judgment will best meet the emergency and serve the public interest.''

1. Request for Emergency Order From the Balancing Authority of Northern California

On September 2, 2022, the Balancing Authority of Northern California (BANC) submitted to the Department a Request for Emergency Order under section 202(c) of the Federal Power Act which it amended on September 3, 2022, by an Amended, Supplement and Clarified Draft Request for Emergency Order Pursuant to section 202(c) of the Federal Power Act. BAN's request as so amended is referred to herein as the Application.ge (Application) with the Department ''to preserve the reliability of bulk electric power system in California.'' In its Application, BANC requested that the Department issue an emergency order to preserve the reliability of the bulk electric power system in California to allow BANC to dispatch generation within the BANC Balancing Authority Area (BAA) ''that may be necessary for BANC to meet demand in the face of extreme heat.'' BANC sought the emergency order to allow it to direct the operation of 24 diesel-fired generators located at a data center in Sacramento, California (the Covered Resource), up to a maximum output of 26.1 megawatts (the Covered Maximum Amount). BANC represented that the Covered Resource could not operate due to restrictions in its existing permits absent an emergency order.

2. BANC Order

On September 4, 2022, the Acting Under Secretary for Infrastructure, acting pursuant to delegated authority, issued Order No. 202–22–2 (the BANC Order). As set forth in the BANC Order, the Acting Under Secretary for Infrastructure found that because of the expected shortage of electric energy, shortage of facilities for the generation of electric energy, and other emergency conditions prevailing and forecasted in the BANC BAA, the operation of the Covered Resource up to the Covered Maximum Amount was necessary to contribute to the reliability of the BANC BAA.

The BANC Order authorized BANC to dispatch the Covered Resource from September 4, 2022 to September 8, 2022, solely upon issuance and continuation of an Energy Emergency Alert Level 2 (EEA2) condition or greater between 14:00 Pacific Daylight Time and 22:00 Pacific Daylight Time, after exhausting all reasonably and practically available resources.

The BANC Order requires that BANC provide a report by October 10, 2022, to include all source-specific data for dates between September 4, 2022 and September 8, 2022, during which the Covered Resource operated. The report must include, ''for each unit: (1) the hours of operation, as well as the hours in which any permit limit was exceeded; and (2) a preliminary description of each permit term that was exceeded and the manner in which such exceedance occurred.'' The BANC Order also require BANC to ''submit a final report by November 14, 2022, with any revisions to the information reported on December 12, 2022.'' DOE will prepare a special environmental analysis of the potential impacts resulting from issuance of the BANC Order, including impacts on air quality and environmental justice. BANC will be responsible for the reasonable third-party costs of the special environmental analysis.

3. Amendment Number 1 to BANC Order

On September 7, 2022, BANC submitted a Request for Extension and Limited Amendment of Emergency Order Pursuant to Section 202(c) of the Federal Power Act (Amendment Request). The Amendment Request requested that: (1) the Department extend the effective date of the BANC Order through September 11, 2022; and (2) the Department allow BANC to dispatch the Covered Resource outside of EEA2 conditions to allow the Covered Resource time to start up and fully transition load prior to the commencement of EEA2 conditions. BANC explained that the actual heat event was more severe than expected and record loads had been experienced.

The Acting Under Secretary for Infrastructure issued Amendment Number 1 to Order No. 202–22–2 (Amendment Number 1) on September 8, 2022, finding that an emergency continued to exist in California due to a shortage of electric energy and that the issuance of Amendment Number 1 would help to meet the emergency conditions and serve the public interest. Amendment Number 1 extended the

effectiveness of the BANC Order through September 11, 2022. In addition, Amendment Number 1 allowed BANC to dispatch the Covered Resource upon notification of an EEA2 or greater (without limiting operation to the hours of 14:00 Pacific Time and 22:00 Pacific Time), and to operate for such reasonable and limited time as is necessary for the Covered Resource to ramp down following an EEA2 or greater. All other terms of the BANC Order remained in effect, including the obligation of BANC to exhaust all reasonably and practically available resources prior to dispatching the Covered Resource and the obligation to report information regarding the environmental impacts of the operation of the Covered Resource permitted by the BANC Order. As required by FPA section 202(c), the Department consulted with the Environmental Protection Agency (EPA) in considering BANC's request for an extension of the BANC Order. The EPA did not request any additional conditions be included in the BANC Order as amended by Amendment Number 1.

4. Further Information

The BANC Order, Amendment Number 1, and other documents referenced herein can be found on the Department's website at *https://www.energy.gov/ceser/federal-power-act-section-202c-banc-september-2022.* The reports required by the BANC Order as amended by Amendment Number 1 will be posted to the Department's website when they become available.

Signing Authority

This document of the Department of Energy was signed on October 1, 2022, by Puesh M. Kumar, Director for the Office of Cybersecurity, Energy Security, and Emergency Response, pursuant to delegated authority from the Secretary of Energy. That document with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the **Federal Register**.

Signed in Washington, DC, on October 6, 2022.

Treena V. Garrett,

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

[FR Doc. 2022–22124 Filed 10–11–22; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: RP23–13–000.

Applicants: MountainWest Pipeline, LLC.

Description: § 4(d) Rate Filing: Statement of Negotiated Rates V.21.0.0 to be effective 11/1/2022.

Filed Date: 10/4/22.

Accession Number: 20221004–5099.

Comment Date: 5 p.m. ET 10/17/22.

Docket Numbers: RP23–14–000.

Applicants: Nautilus Pipeline Company, L.L.C.

Description: § 4(d) Rate Filing: Negotiated Rates—Ridgewood Samurai eff 10–1–22 to be effective 10/1/2022.

Filed Date: 10/4/22.

Accession Number: 20221004–5182.

Comment Date: 5 p.m. ET 10/17/22.

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.

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

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 5, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–22117 Filed 10–11–22; 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 corporate filings:

Docket Numbers: EC22–26–000.

Applicants: Liberty Utilities Co., Kentucky Power Company, AEP Kentucky Transmission Company, Inc.

Description: Informational Report of new and existing rate schedules, tariffs, and service agreements related to a proposed transaction of Liberty Utilities Co., Kentucky Power Co.

Filed Date: 9/30/22.

Accession Number: 20220930–5458.

Comment Date: 5 p.m. ET 10/21/22.

Docket Numbers: EC23–2–000.

Applicants: Starwood Energy Group Global, L.L.C.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Starwood Energy Group Global, L.L.C.

Filed Date: 10/4/22.

Accession Number: 20221004–5202.

Comment Date: 5 p.m. ET 10/25/22.

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

Docket Numbers: ER15–957–002; ER11–3634–009.

Applicants: KES Kingsburg, L.P., AltaGas Ripon Energy Inc.

Description: Triennial Market Power Analysis and Notice of Change of Status for Northwest Region of AltaGas Ripon Energy Inc., et al.

Filed Date: 10/3/22.

Accession Number: 20221003–5356.

Comment Date: 5 p.m. ET 10/24/22.

Docket Numbers: ER23–16–000.

Applicants: ISO New England Inc., The Narragansett Electric Company.

Description: § 205(d) Rate Filing: ISO New England Inc. submits tariff filing per 35.13(a)(2)(iii: Addition of Schedule 21–RIE and Amendment of Attachment E to the ISO–NE Tariff to be effective 1/1/2023.

Filed Date: 10/4/22.

Accession Number: 20221004–5184.

Comment Date: 5 p.m. ET 10/25/22.

Docket Numbers: ER23–17–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 4019 Southwestern Power Admin & GRDA Interconnection Agr to be effective 10/1/2022.

Filed Date: 10/5/22.

Accession Number: 20221005–5040.

Comment Date: 5 p.m. ET 10/26/22.

Docket Numbers: ER23–18–000.

Applicants: Southwest Power Pool, Inc.

Description: § 205(d) Rate Filing: 3910R1 AEP & Southwestern Addendum 1 to Attachment AO to be effective 12/31/9998.

Filed Date: 10/5/22.

Accession Number: 20221005–5060.

Comment Date: 5 p.m. ET 10/26/22.

Docket Numbers: ER23–19–000.

Applicants: New York State Electric & Gas Corporation, New York Independent System Operator, Inc.

Description: § 205(d) Rate Filing: New York State Electric & Gas Corporation submits tariff filing per 35.13(a)(2)(iii: Joint 205: SGIA among NYISO, NYSEG, SunEast (SA2696)—contains CEII to be effective 9/21/2022.

Filed Date: 10/5/22.

Accession Number: 20221005–5064.

Comment Date: 5 p.m. ET 10/26/22.

Docket Numbers: ER23–20–000.

Applicants: CMC Steel US LLC.

Description: Tariff Amendment: Cancellation entire tariff to be effective 10/6/2022.

Filed Date: 10/5/22.

Accession Number: 20221005–5086.

Comment Date: 5 p.m. ET 10/26/22.

Docket Numbers: ER23–21–000.

Applicants: PJM Interconnection, L.L.C.

Description: § 205(d) Rate Filing: Original NSA, Service Agreement No. 6663; Queue No. AC1–076/AE2–134 to be effective 9/6/2022.

Filed Date: 10/5/22.

Accession Number: 20221005–5121.

Comment Date: 5 p.m. ET 10/26/22.

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

Docket Numbers: RR22–2–001.

Applicants: North American Electric Reliability Corporation.

Description: Joint Compliance Filing of North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc. for Approval of Amendments to the Bylaws of Northeast Power Coordinating Council, Inc.

Filed Date: 10/5/22.

Accession Number: 20221005–5051.

Comment Date: 5 p.m. ET 10/26/22.

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

Any person desiring to intervene or protest in any of the above proceedings must file in accordance with Rules 211 and 214 of the Commission's Regulations (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Dated: October 5, 2022.

Debbie-Anne A. Reese,

Deputy Secretary.

[FR Doc. 2022–22118 Filed 10–11–22; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

FDIC Advisory Committee on Economic Inclusion; Notice of Meeting

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice of open meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, notice is hereby given of a meeting of the FDIC Advisory Committee on Economic Inclusion. The Advisory Committee will provide advice and recommendations on initiatives to expand access to banking services by underserved populations. The meeting is open to the public. In alignment with the Center for Disease Control's guidelines related to current and potential coronavirus developments and the Corporation's return to office plan, the public's means to observe this meeting of the Advisory Committee on Economic Inclusion will be both in-person and via a Webcast live on the internet. In addition, the meeting will be recorded and subsequently made available on-demand approximately two weeks after the event. To view the live event, visit *http://fdic.windrosemedia.com.*

DATES: Thursday, October 27, 2022, from 9:00 a.m. to 4:00 p.m.

ADDRESSES: The meeting will be held in the FDIC Board Room on the 6th floor of the FDIC Building located at 550 17th Street NW, Washington, DC. If you require a reasonable accommodation to participate, please email *Reasonable AccommodationRequests@fdic.gov* to make necessary arrangements. To view the recording, visit *http://fdic.windrosemedia.com/index.php?category=Advisory+Committee+on+Economic+Inclusion+-+(Come-IN).*

FOR FURTHER INFORMATION CONTACT: Requests for further information concerning the meeting may be directed to Debra A. Decker, Committee Management Officer of the FDIC at (202) 898–8748.

SUPPLEMENTARY INFORMATION:

Agenda: The agenda will include updates from Committee members about key challenges facing their communities or organizations. There will also be panel discussions on maintaining confidence in banks and deposit insurance as well as a presentation and review of data from the 2021 Household Survey of the Unbanked and Underbanked. The agenda is subject to change. Any changes to the agenda will be announced at the beginning of the meeting.

Type of Meeting: The meeting will be open to the public, limited only by the space available on a first-come, first-served basis. For security reasons, members of the public will be subject to security screening procedures and must present a valid photo identification to enter the building. The FDIC will provide attendees with auxiliary aids (*e.g.,* sign language interpretation) required for this meeting. Those attendees needing such assistance should email *InterpreterDC@fdic.gov* at least two days before the meeting to make necessary arrangements. Written statements may be filed with the committee before or after the meeting. This meeting of the Advisory Committee on Economic Inclusion will be Webcast live via the internet *http://fdic.windrosemedia.com.* For optimal viewing, a high-speed internet connection is recommended. To view the recording, visit *http://fdic.windrosemedia.com/index.php?category=Advisory+Committee+on+Economic+Inclusion+-+(Come-IN).*

Federal Deposit Insurance Corporation.

Dated at Washington, DC, on October 5, 2022.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2022–22071 Filed 10–11–22; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

TIME AND DATE: Tuesday, October 18, 2022 at 10 a.m. and its continuation at the conclusion of the open meeting on October 20, 2022.

PLACE: 1050 First Street NE, Washington, DC and virtual (this meeting will be a hybrid meeting)

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Compliance matters pursuant to 52 U.S.C. 30109.

Matters concerning participation in civil actions or proceedings or arbitration.

* * * * *

CONTACT PERSON FOR MORE INFORMATION: Judith Ingram, Press Officer, Telephone: (202) 694–1220.

Authority: Government in the Sunshine Act, 5 U.S.C. 552b.

Vicktoria J. Allen,

Acting Deputy Secretary of the Commission.

[FR Doc. 2022–22199 Filed 10–7–22; 11:15 am]

BILLING CODE 6715–01–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 public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)).

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington DC 20551–0001, not later than November 10, 2022.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Head of Bank Applications) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *The Adirondack Trust Company Employee Stock Ownership Trust, Saratoga Springs, New York;* to acquire additional shares of 473 Broadway Holding Corporation and additional shares of The Adirondack Trust Company, both of Saratoga Springs, New York.

B. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414:

1. *FVSB Mutual Bancorp, MHC, and FVSB Bancorp, Inc., both of Fond du Lac, Wisconsin;* to become a mutual bank holding company and a mid-tier stock bank holding company, respectively, by acquiring Fox Valley Savings Bank, Fond du Lac, Wisconsin, in connection with the conversion of Fox Valley Savings Bank from mutual to stock form.

C. Federal Reserve Bank of Dallas (Karen Smith, Director, Applications) 2200 North Pearl Street, Dallas, Texas 75201–2272:

1. *Woodforest Financial Group Employee Stock Ownership Plan (with 401(k) Provisions)(Amended and Restated Effective 01/01/2016) and the related Woodforest Financial Group Employee Stock Ownership Trust, both of The Woodlands, Texas;* to acquire up to 33 percent of the voting shares of Woodforest Financial Group, Inc., and thereby indirectly acquire voting shares of Woodforest National Bank, both of The Woodlands, Texas.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–22142 Filed 10–11–22; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (Act) (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the applications are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The public portions of the applications listed below, as well as other related filings required by the Board, if any, are available for immediate inspection at the Federal Reserve Bank(s) indicated below and at the offices of the Board of Governors. This information may also be obtained on an expedited basis, upon request, by contacting the appropriate Federal Reserve Bank and from the Board's Freedom of Information Office at *https://www.federalreserve.gov/foia/request.htm.* Interested persons may express their views in writing on the standards enumerated in paragraph 7 of the Act.

Comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors, Ann E. Misback, Secretary of the Board, 20th Street and Constitution Avenue NW, Washington, DC 20551–0001, not later than October 26, 2022.

A. Federal Reserve Bank of New York (Ivan Hurwitz, Head of Bank Applications) 33 Liberty Street, New York, New York 10045–0001. Comments can also be sent electronically to *Comments.applications@ny.frb.org:*

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of NBT Bancorp Inc., and thereby indirectly acquire additional voting shares of NBT Bank, National Association, both of Norwich, New York.

B. Federal Reserve Bank of Richmond (Brent B. Hassell, Assistant Vice President) P.O. Box 27622, Richmond, Virginia 23261. Comments can also be sent electronically to or *Comments.applications@rich.frb.org:*

1. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of Eagle Bancorp, Inc., and thereby indirectly acquire additional voting shares of EagleBank, both of Bethesda, Maryland.

2. *The Vanguard Group, Inc., Malvern, Pennsylvania; on behalf of itself, its subsidiaries and affiliates, including investment companies registered under the Investment Company Act of 1940, other pooled investment vehicles, and institutional accounts that are sponsored, managed, or advised by Vanguard;* to acquire additional voting shares of City Holding Company, and thereby indirectly

acquire additional voting shares of City National Bank of West Virginia, both of Charleston, West Virginia.

C. Federal Reserve Bank of San Francisco (Joseph Cuenco, Assistant Vice President, Formations & Transactions) 101 Market Street, San Francisco, California 94105–1579:

1. *Carol K. Lawson and William J. Lawson, Spokane, Washington;* to acquire additional voting shares of RiverBank Holding Company, and thereby indirectly acquire additional voting shares of RiverBank, both of Spokane, Washington.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2022–22144 Filed 10–11–22; 8:45 am]

BILLING CODE P

GENERAL SERVICES ADMINISTRATION

[Notice–MRB–2022–04; Docket No. 2022–02; Sequence No. 25]

GSA Acquisition Policy Federal Advisory Committee; Notification of Upcoming Web-Based Public Meeting

AGENCY: Office of Government-wide Policy, General Services Administration (GSA).

ACTION: Notice.

SUMMARY: GSA is providing notice of a meeting of the GSA Acquisition Policy Federal Advisory Committee (hereinafter ''the Committee'' or ''the GAP FAC'') in accordance with the requirements of the Federal Advisory Committee Act. This meeting will be open to the public. Information on attending and providing written public comment is under the **SUPPLEMENTARY INFORMATION** section.

DATES: The GSA Acquisition Policy Federal Advisory Committee will hold a web-based open public meeting on October 27, 2022, from 1:00 p.m. to 4:00 p.m. Eastern Standard Time (EST).

ADDRESSES: The meeting will be accessible via webcast. Registrants will receive the webcast information before the meeting.

FOR FURTHER INFORMATION CONTACT: Boris Arratia, Designated Federal Officer, Office of Government-wide Policy, 703–795–0816, or email: *boris.arratia@gsa.gov;* or Stephanie Hardison, Office of Government-wide Policy, 202–258–6823, or email: *stephanie.hardison@gsa.gov.* Additional *information about* the Committee, including meeting materials and agendas, will be available on-line at *https://gsa.gov/policy-regulations/policy/acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.*

SUPPLEMENTARY INFORMATION: The Administrator of GSA established the GSA Acquisition Policy Federal Advisory Committee) as a discretionary advisory committee under agency authority in accordance with the provisions of the Federal Advisory Committee Act (FACA), as amended (5 U.S.C. App 2).

As America's buyer, GSA is uniquely positioned to enable a modern, accessible, and streamlined acquisition ecosystem and a robust marketplace connecting buyers to the suppliers and businesses that meet their mission needs. The GAP FAC will assist GSA in this endeavor through expert advice on a broad range of innovative solutions to acquisition policy, workforce, and industry partnership challenges.

The GAP FAC will serve as an advisory body to GSA's Administrator on how GSA can use its acquisition tools and authorities to target the highest priority Federal acquisition challenges. The GAP FAC will advise GSA's Administrator on emerging acquisition issues, challenges, and opportunities to support its role as America's buyer.

The initial focus for the GAP FAC will be on driving regulatory, policy, and process changes required to embed climate and sustainability considerations in Federal acquisition. This includes examining and recommending steps GSA can take to support its workforce and industry partners in ensuring climate and sustainability issues are fully considered in the acquisition process.

Purpose of the Meeting

The purpose of this meeting is to set the priorities and start the work of three GAP FAC subcommittees: Policy and Practices, Industry Partnerships, and Acquisition Workforce.

Meeting Agenda

- Opening Remarks
- Policy and Practices Subcommittee Priorities Discussion
- Industry Partnerships Subcommittee Priorities Discussion
- Acquisition Workforce Subcommittee Priorities Discussion
- Closing Remarks and Adjourn

Meeting Registration

The meeting is open to the public. The meeting will be accessible by webcast. Registration is required for web viewing. To register, go to: *https://www.eventbrite.com/e/october-2022-gap-fac-public-meeting-tickets-433294614857* Online registration closes at 5:00 p.m. EST October 26, 2022. All registrants will be asked to provide their name, affiliation, and email address. After registration, individuals will receive webcast access information via email.

Public Comments

Written public comments are being accepted throughout the life of the Committee. Written comments can be sent to *gapfac@gsa.gov.* For comments specific to this public meeting, submit the comment via email by October 26, 2022 with the meeting date in the subject line. Comments submitted after this date will still be provided to the Committee members, but please be advised that Committee members may not have adequate time to consider the comments prior to the meeting.

Special Accomodations

For information on services for individuals with disabilities, or to request accommodation of a disability, please contact the Designated Federal Officer at least 10 business days prior to the meeting to give GSA as much time as possible to process the request. Closed captioning and live ASL interpreter services will be available.

Boris Arratia,

Designated Federal Officer, Office of Government-wide Policy, General Services Administration.

[FR Doc. 2022–22133 Filed 10–11–22; 8:45 am]

BILLING CODE 6820–61–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10137 & CMS–10237]

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the Paperwork Reduction Act of 1995 (PRA), federal agencies are required to publish notice in the **Federal Register**

concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, and to allow a second opportunity for public comment on the notice. Interested persons are invited to send comments regarding the burden estimate or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments on the collection(s) of information must be received by the OMB desk officer by November 14, 2022.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain*. Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION: Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA (44 U.S.C. 3506(c)(2)(A)) requires federal agencies to publish a 30-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice that summarizes the following proposed collection(s) of information for public comment:

1. *Type of Information Collection Request:* Revision of a currently approved collection; *Title:* Solicitation for Applications for Medicare Prescription Drug Plan 2024 Contracts; *Use:* Coverage for the prescription drug benefit is provided through contracted prescription drug plans (PDPs) or through Medicare Advantage (MA) plans that offer integrated prescription drug and health care coverage (MA–PD plans). Cost Plans that are regulated under Section 1876 of the Social Security Act, and Employer Group Waiver Plans (EGWP) may also provide a Part D benefit. Organizations wishing to provide services under the Prescription Drug Benefit Program must complete an application, negotiate rates, and receive final approval from CMS. Existing Part D Sponsors may also expand their contracted service area by completing the Service Area Expansion (SAE) application.

Collection of this information is mandated in Part D of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) in Subpart 3. The application requirements are codified in Subpart K of 42 CFR 423 entitled ''*Application Procedures and Contracts with PDP Sponsors.*''

The information will be collected under the solicitation of proposals from PDP, MA–PD, Cost Plan, Program of All-Inclusive Care for the Elderly (PACE), and EGWP applicants. The collected information will be used by CMS to: (1) ensure that applicants meet CMS requirements for offering Part D plans (including network adequacy, contracting requirements, and compliance program requirements, as described in the application), (2) support the determination of contract awards. *Form Number:* CMS–10137 (OMB Control Number: 0938–0936); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 783*; Number of Responses:* 425 *Total Annual Hours:* 1,861. (For policy questions regarding this collection contact Arianne Spaccarelli at 410–786–5715.)

2. *Type of Information Collection Request:* Revision of a currently approved collection; *Title:* Applications for Part C Medicare Advantage, 1876 Cost Plans, and Employer Group Waiver Plans to Provide Part C Benefits; *Use:* Collection of this information is mandated by the Code of Federal Regulations, MMA, and CMS regulations at 42 CFR 422, subpart K, in ''Application Procedures and Contracts for Medicare Advantage Organizations.'' In addition, the Medicare Improvement for Patients and Providers Act of 2008 (MIPPA) further amended titles XVII and XIX of the Social Security Act.

This information collection includes the process for organizations wishing to provide healthcare services under MA plans. These organizations must complete an application annually (if required), file a bid, and receive final approval from CMS. The MA application process has two options for applicants that include (1) request for new MA product or (2) request for expanding the service area of an existing product. CMS utilizes the application process as the means to review, assess and determine if applicants are compliant with the current requirements for participation in the MA program and to make a decision related to contract award. This collection process is the only mechanism for organizations to complete the required MA application process. *Form Number:* CMS–10237 (OMB Control Number: 0938–0935); *Frequency:* Annually; *Affected Public:* Private Sector, Business or other for-profit and not-for-profit institutions; *Number of Respondents:* 500; *Number of Responses:* 500 *Total Annual Hours:* 9,173. (For policy questions regarding this collection contact Keith Penn-Jones at 410–786–3104 or *Keith.Penn-Jones@cms.hhs.gov*.)

Dated: October 5, 2022.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2022–22076 Filed 10–11–22; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifier: CMS–10628]

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: Centers for Medicare & Medicaid Services, Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Centers for Medicare & Medicaid Services (CMS) is announcing an opportunity for the public to comment on CMS' intention to collect information from the public. Under the

Paperwork Reduction Act of 1995 (the PRA), federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information (including each proposed extension or reinstatement of an existing collection of information) and to allow 60 days for public comment on the proposed action. Interested persons are invited to send comments regarding our burden estimates or any other aspect of this collection of information, including the necessity and utility of the proposed information collection for the proper performance of the agency's functions, the accuracy of the estimated burden, ways to enhance the quality, utility, and clarity of the information to be collected, and the use of automated collection techniques or other forms of information technology to minimize the information collection burden.

DATES: Comments must be received by December 12, 2022.

ADDRESSES: When commenting, please reference the document identifier or OMB control number. To be assured consideration, comments and recommendations must be submitted in any one of the following ways:

1. *Electronically.* You may send your comments electronically to *http://www.regulations.gov.* Follow the instructions for ''Comment or Submission'' or ''More Search Options'' to find the information collection document(s) that are accepting comments.

2. *By regular mail.* You may mail written comments to the following address: CMS, Office of Strategic Operations and Regulatory Affairs, Division of Regulations Development, Attention: Document Identifier/OMB Control Number: _____, Room C4–26–05, 7500 Security Boulevard, Baltimore, Maryland 21244–1850.

To obtain copies of a supporting statement and any related forms for the proposed collection(s) summarized in this notice, please access the CMS PRA website by copying and pasting the following web address into your web browser: *https://www.cms.gov/Regulations-and-Guidance/Legislation/PaperworkReductionActof1995/PRA-Listing.*

FOR FURTHER INFORMATION CONTACT: William N. Parham at (410) 786–4669.

SUPPLEMENTARY INFORMATION:

Contents

This notice sets out a summary of the use and burden associated with the following information collections. More detailed information can be found in each collection's supporting statement and associated materials (see **ADDRESSES**).

CMS–10628—Initial Request for State Implemented Moratorium Form

Under the PRA (44 U.S.C. 3501–3520), federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. The term ''collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) and includes agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. Section 3506(c)(2)(A) of the PRA requires federal agencies to publish a 60-day notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension or reinstatement of an existing collection of information, before submitting the collection to OMB for approval. To comply with this requirement, CMS is publishing this notice.

Information Collection

1. *Type of Information Collection Request:* Reinstatement of a previously approved collection; *Title of Information Collection:* Initial Request for State Implemented Moratorium Form; *Use:* Congress has enacted section 1866 (j)(7) of the Social Security Act, which allows for the imposition of temporary moratorium. CMS promulgated 42 CFR 424.570 in order to comply with that statute, which requires that prior to implementing state Medicaid moratoria the state Medicaid agency must notify the Secretary in writing, including all of the details of the moratoria, and obtain the Secretary's concurrence with the imposition of the moratoria.

The Initial Request for State Medicaid Implemented Moratorium, named the ''Initial Request for State Medicaid Implemented Moratorium'' has been created to collect that data, in a uniform manner, which the states report to CMS when they request a moratorium. Currently, CMS is collecting this data on an ad-hoc basis, however this process needs to be standardized so that moratoria decisions are being made based on the same criteria each time. The form may be used by states and territories who wish to impose a Medicaid or Children's Health Insurance Program moratorium. CMS will use this information as a standardized method to collect and track state-imposed moratoria requests.

Form number: CMS–10628 (OMB control number: 0938–1328); *Frequency:* Occasionally; *Affected Public:* State, Local, or Tribal Governments; *Number of Respondents:* 5; *Number of Responses:* 5; *Total Burden Hours:* 25. (For questions regarding this collection contact Alisha Jacobs at 410–786–0671).

Dated: October 5, 2022.

William N. Parham, III,

Director, Paperwork Reduction Staff, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2022–22077 Filed 10–11–22; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration.

[Docket No. FDA–2022–N–2354]

Generic Drug User Fee Rates for Fiscal Year 2023

AGENCY: Food and Drug Administration, Department of Health and Human Services (HHS).

ACTION: Notice.

SUMMARY: The Federal Food, Drug, and Cosmetic Act (FD&C Act or statute), as amended by the Generic Drug User Fee Amendments of 2022 (GDUFA III), authorizes the Food and Drug Administration (FDA, Agency, or we) to assess and collect fees for abbreviated new drug applications (ANDAs); drug master files (DMFs); generic drug active pharmaceutical ingredient (API) facilities, finished dosage form (FDF) facilities, and contract manufacturing organization (CMO) facilities; and generic drug applicant program user fees. In this document, FDA is announcing fiscal year (FY) 2023 rates for GDUFA III fees. These fees are effective on October 1, 2022, and will remain in effect through September 30, 2023.

FOR FURTHER INFORMATION CONTACT: Robert Marcarelli, Office of Financial Management, Food and Drug Administration, 4041 Powder Mill Rd., Rm. 61075, Beltsville, MD 20705–4304, and the User Fees Support Staff at *OO-OFBAP-OFM-UFSS-Government@fda.hhs.gov,* 301–796–7223.

SUPPLEMENTARY INFORMATION:

I. Background

Sections 744A and 744B of the FD&C Act (21 U.S.C. 379j–41 and 379j–42), as amended by GDUFA III, authorize FDA to assess and collect fees associated with human generic drug products. Fees are assessed on: (1) certain types of applications for human generic drug products; (2) certain facilities where APIs and FDFs are produced; (3) certain

DMFs associated with human generic drug products; and (4) generic drug applicants who have ANDAs (the program fee) (see section 744B(a)(2) through (5) of the FD&C Act). For more information about GDUFA III, please refer to the FDA website (*https://www.fda.gov/gdufa*).

For FY 2023, the generic drug fee rates are: ANDA ($240,582), DMF ($78,293), domestic API facility ($37,544), foreign API facility ($52,544), domestic FDF facility ($213,134), foreign FDF facility ($228,134), domestic CMO facility ($51,152), foreign CMO facility ($66,152), large size operation generic drug applicant program ($1,620,556), medium size operation generic drug applicant program ($648,222), and small business generic drug applicant program ($162,056). These fees are effective on October 1, 2022, and will remain in effect through September 30, 2023. The fee rates for FY 2023 are set out in table 1.

TABLE 1—FEE SCHEDULE FOR FY 2023

Generic drug fee category	Fees rates for FY 2023
Applications	
Abbreviated New Drug Application (ANDA)	$240,582
Drug Master File (DMF)	78,293
Facilities	
Active Pharmaceutical Ingredient (API)—Domestic	37,544
API—Foreign	52,544
Finished Dosage Form (FDF)—Domestic	213,134
FDF—Foreign	228,134
Contract Manufacturing Organization (CMO)—	51,152
Domestic	
CMO—Foreign	66,152
GDUFA Program	
Large size operation generic drug applicant	1,620,556
Medium size operation generic drug applicant	648,222
Small business operation generic drug applicant	162,056

II. Fee Revenue Amount for FY 2023

The fee revenue amount for FY 2023 for GDUFA III is $582,500,000. Since this is the first fiscal year of the GDUFA III authorization period, there is no inflation adjustment. Applicable inflation adjustments shall be made beginning with FY 2024.

Beginning with FY 2024, FDA shall, in addition to the inflation adjustment, apply the capacity planning adjustment under section 744B(c)(2) of the FD&C Act to further adjust, as needed, the fee revenue and fees to reflect changes in the resource capacity needs of FDA for human generic drug activities.

Beginning with FY 2024, FDA may, in addition to the inflation and capacity planning Adjustments, apply the operating reserve adjustment under section 744B(c)(3) of the FD&C Act to further increase the fee revenue and fees if necessary to provide operating reserves of carryover user fees for human generic drug activities for not more than the number of weeks specified in such section (or as applicable, shall apply such adjustment to decrease the fee revenues and fees to provide for not more than 12 weeks of such operating reserves).

III. Fee Amounts for FY 2023

GDUFA III directs FDA to use the annual revenue amount determined under the statute as a starting point to set the fee rates for each fee type. The fee revenue amount for FY 2023 is $582,500,000. The ANDA, DMF, API facility, FDF facility, CMO facility, and generic drug applicant program fee (GDUFA program fee) calculations for FY 2023 are described in this document.

A. ANDA Filing Fee

Under GDUFA III, the FY 2023 ANDA filing fee is owed by each applicant that submits an ANDA on or after October 1, 2022. This fee is due on the submission date of the ANDA. Section 744B(b)(2)(B) of the FD&C Act specifies that the ANDA fee will make up 33 percent of the $582,500,000, which is $192,225,000.

To calculate the ANDA fee, FDA estimated the number of full application equivalents (FAEs) that will be submitted in FY 2023. The submissions are broken down into three categories: new originals (submissions that have not been received by FDA previously); submissions that FDA refused to receive (RTR) for reasons other than failure to pay fees; and applications that are resubmitted after an RTR decision for reasons other than failure to pay fees. An ANDA counts as one FAE; however, 75 percent of the fee paid for an ANDA that has been RTR shall be refunded according to GDUFA III if: (1) the ANDA is refused for a cause other than failure to pay fees or (2) the ANDA has been withdrawn prior to receipt (section 744B(a)(3)(D)(i) of the FD&C Act). Therefore, an ANDA that is considered not to have been received by FDA due to reasons other than failure to pay fees or withdrawn prior to receipt counts as one-fourth of an FAE. After an ANDA has been RTR, the applicant has the option of resubmitting. For user fee purposes, these resubmissions are equivalent to new original submissions: ANDA resubmissions are charged the full amount for an application (one FAE).

FDA utilized data from ANDAs submitted from October 1, 2020, to April 30, 2022, to estimate the number of new original ANDAs that will incur filing fees in FY 2023. For FY 2023, FDA estimates that approximately 800 new original ANDAs will be submitted and incur filing fees. Not all of the new original ANDAs will be received by FDA and some of those not received will be resubmitted in the same fiscal year. Therefore, FDA expects that the FAE count for ANDAs will be 799 for FY 2023.

The FY 2023 application fee is estimated by dividing the number of FAEs that will pay the fee in FY 2023 (799) into the fee revenue amount to be derived from ANDA application fees in FY 2023 ($192,225,000). The result, rounded to the nearest dollar, is a fee of $240,582 per ANDA.

The statute provides that those ANDAs that include information about the production of APIs other than by reference to a DMF will pay an additional fee that is based on the number of such APIs and the number of

facilities proposed to produce those ingredients (see section 744B(a)(3)(F) of the FD&C Act). FDA anticipates that this additional fee is unlikely to be assessed often; therefore, FDA has not included projections concerning the amount of this fee in calculating the fees for ANDAs.

B. DMF Fee

Under GDUFA III, the DMF fee is owed by each person that owns a type II API DMF that is referenced, on or after October 1, 2012, in a generic drug submission by an initial letter of authorization. This is a one-time fee for each DMF. This fee is due on the earlier of the date on which the first generic drug submission is submitted that references the associated DMF or the date on which the DMF holder requests the initial completeness assessment. Under section 744B(a)(2)(D)(iii) of the FD&C Act, if a DMF has successfully undergone an initial completeness assessment and the fee is paid, the DMF will be placed on a publicly available list documenting DMFs available for reference.

To calculate the DMF fee, FDA assessed the volume of DMF submissions over time. We assessed DMFs from October 1, 2020, to April 30, 2022, and concluded that averaging the number of fee-paying DMFs provided the most accurate model for predicting fee-paying DMFs for FY 2023. The monthly average of paid DMF submissions FDA received in FY 2021 and FY 2022 is 31. To determine the FY 2023 projected number of fee-paying DMFs, the average of 31 DMF submissions is multiplied by 12 months, which results in 372 estimated FY 2023 fee-paying DMFs. FDA is estimating 372 fee-paying DMFs for FY 2023.

The FY 2023 DMF fee is determined by dividing the DMF target revenue by the estimated number of fee-paying DMFs in FY 2023. Section 744B(b)(2)(A) of the FD&C Act specifies that the DMF fees will make up 5 percent of the $582,500,000, which is $29,125,000. Dividing the DMF revenue amount ($29,125,000) by the estimated fee-paying DMFs (372), and rounding to the nearest dollar, yields a DMF fee of $78,293 for FY 2023.

C. Foreign Facility Fee Differential

Under GDUFA III, the fee for a facility located outside the United States and its territories and possessions shall be $15,000 higher than the amount of the fee for a facility located in the United States and its territories and possessions. The basis for this differential is the extra cost incurred by conducting an inspection outside the United States and its territories and possessions.

D. FDF and CMO Facility Fees

Under GDUFA III, the annual FDF facility fee is owed by each person who owns an FDF facility that is identified in at least one approved generic drug submission owned by that person or its affiliates. The CMO facility fee is owed by each person who owns an FDF facility that is identified in at least one approved ANDA but is not identified in an approved ANDA held by the owner of that facility or its affiliates. Section 744B(b)(2)(C) of the FD&C Act specifies that the FDF and CMO facility fee revenue will make up 20 percent of the $582,500,000, which is $116,500,000.

To calculate the fees, data from FDA's Integrity Services (IS) were utilized as the primary source of facility information for determining the denominators of each facility fee type. IS is the master data steward for all facility information provided in generic drug submissions received by FDA. A facility's reference status in an approved generic drug submission is extracted directly from submission data rather than relying on data from self-identification. This information provided the number of facilities referenced as FDF manufacturers in at least one approved generic drug submission. Based on FDA's IS data, the FDF and CMO facility denominators are 176 FDF domestic, 293 FDF foreign, 90 CMO domestic, and 114 CMO foreign facilities for FY 2023.

GDUFA III specifies that the CMO facility fee is to be equal to 24 percent of the FDF facility fee. Therefore, to generate the target collection revenue amount from FDF and CMO facility fees ($116,500,000), FDA must weight a CMO facility as 24 percent of an FDF facility. FDA set fees based on the estimate of 176 FDF domestic, 293 FDF foreign, 21.60 CMO domestic (90 multiplied by 24 percent), and 27.36 CMO foreign facilities (114 multiplied by 24 percent), which equals 518 total weighted FDF and CMO facilities for FY 2023.

To calculate the fee for domestic facilities, FDA first determines the total fee revenue that will result from the foreign facility differential by subtracting the fee revenue resulting from the foreign facility fee differential from the target collection revenue amount ($116,500,000) as follows: the foreign facility fee differential revenue equals the foreign facility fee differential ($15,000) multiplied by the number of FDF foreign facilities (293) plus the foreign facility fee differential ($15,000) multiplied by the number of CMO foreign facilities (114), totaling $6,105,000. This results in foreign fee differential revenue of $6,105,000 from the total FDF and CMO facility fee target collection revenue.

Subtracting the foreign facility differential fee revenue ($6,105,000) from the total FDF and CMO facility target collection revenue ($116,500,000) results in a remaining facility fee revenue balance of $110,395,000. To determine the domestic FDF facility fee, FDA divides the $110,395,000 by the total weighted number of FDF and CMO facilities (518), which results in a domestic FDF facility fee of $213,134. The foreign FDF facility fee is $15,000 more than the domestic FDF facility fee, or $228,134.

According to GDUFA III, the domestic CMO fee is calculated as 24 percent of the amount of the domestic FDF facility fee. Therefore, the domestic CMO fee is $51,152, rounded to the nearest dollar. The foreign CMO fee is calculated as the domestic CMO fee plus the foreign fee differential of $15,000. Therefore, the foreign CMO fee is $66,152.

E. API Facility Fee

Under GDUFA III, the annual API facility fee is owed by each person who owns a facility that is identified in: at least one approved generic drug submission or a Type II API DMF referenced in at least one approved generic drug submission. Section 744B(b)(2)(D) of the FD&C Act specifies the API facility fee will make up 6 percent of $582,500,000 in fee revenue, which is $34,950,000.

To calculate the API facility fee, data from FDA's IS were utilized as the primary source of facility information for determining the denominator. As stated above, IS is the master data steward for all facility information provided in generic drug submissions received by FDA. A facility's reference status in an approved generic drug submission is extracted directly from submission data rather than relying on data from self-identification. This information provided the number of facilities referenced as API manufacturers in at least one approved generic drug submission.

The total number of API facilities identified was 688; of that number, 80 were domestic and 608 were foreign facilities. The foreign facility differential is $15,000. To calculate the fee for domestic facilities, FDA must first subtract the fee revenue that will result from the foreign facility fee differential. FDA takes the foreign facility differential ($15,000) and multiplies it by the number of foreign facilities (608) to determine the total fee revenue that

will result from the foreign facility differential. As a result of this calculation, the foreign fee differential revenue will make up $9,120,000 of the total API fee revenue. Subtracting the foreign facility differential fee revenue ($9,120,000) from the total API facility target revenue ($34,950,000) results in a remaining balance of $25,830,000. To determine the domestic API facility fee, we divide the $25,830,000 by the total number of facilities (688), which gives us a domestic API facility fee of $37,544. The foreign API facility fee is $15,000 more than the domestic API facility fee, or $52,544.

F. Generic Drug Applicant Program Fee

Under GDUFA III, if a person and its affiliates own at least one but not more than five approved ANDAs on October 1, 2022, the person and its affiliates shall owe a small business GDUFA program fee. If a person and its affiliates own at least 6 but not more than 19 approved ANDAs, the person and its affiliates shall owe a medium size operation GDUFA program fee. If a person and its affiliates own at least 20 approved ANDAs, the person and its affiliates shall owe a large size operation GDUFA program fee. Section 744B(b)(2)(E) of the FD&C Act specifies the GDUFA program fee will make up 36 percent of $582,500,000 in fee revenue, which is $209,700,000.

To determine the appropriate number of parent companies for each tier, FDA asked companies to claim their ANDAs and affiliates in the Center for Drug Evaluation and Research (CDER) NextGen Portal. The companies were able to confirm relationships currently present in FDA's records, while also reporting newly approved ANDAs, newly acquired ANDAs, and new affiliations.

In determining the appropriate number of approved ANDAs, FDA has factored in a number of variables that could affect the collection of the target revenue: (1) inactive ANDAs: applicants who have not submitted an annual report for one or more of their approved applications within the past 2 years; (2) Program Fee Arrears List: parent companies that are on the arrears list for any fiscal year; (3) Large Tier Adjustment: the frequency of large-tiered companies dropping to the medium tier and medium-tiered companies moving to the large tier after the completion of the program fee methodology and tier determination; (4) Center for Biologics Evaluation and Research (CBER) approved ANDAs: applicants and their affiliates with CBER-approved ANDAs in addition to CDER's approved ANDAs; and (5) withdrawals of approved ANDAs by April 1: applicants who have submitted a written request for withdrawal of approval by April 1 of the previous fiscal year.

The list of original approved ANDAs from the Generic Drug Review Platform as of April 30, 2022, shows 253 applicants in the small business tier, 75 applicants in the medium size tier, and 79 applicants in the large size tier. Factoring in all the variables, we estimate there will be 220 applicants in the small business tier, 76 applicants in the medium size tier, and 77 applicants in the large size tier for FY 2023.

To calculate the GDUFA program fee, GDUFA III provides that large size operation generic drug applicants pay the full fee, medium size operation applicants pay two-fifths of the full fee, and small business applicants pay one-tenth of the full fee. To generate the target collection revenue amount from GDUFA program fees ($209,700,000), we must weigh medium and small tiered applicants as a subset of a large size operation generic drug applicant. FDA will set fees based on the weighted estimate of 22 applicants in the small business tier (220 multiplied by 10 percent), 30.4 applicants in the medium size tier (76 multiplied by 40 percent), and 77 applicants in the large size tier, arriving at 129.4 total weighted applicants for FY 2023.

To generate the large size operation GDUFA program fee, FDA divides the target revenue amount of $209,700,000 by 129.4, which equals $1,620,556. The medium size operation GDUFA program fee is 40 percent of the full fee ($648,222), and the small business operation GDUFA program fee is 10 percent of the full fee ($162,056).

IV. Fee Schedule For FY 2023

The fee rates for FY 2023 are set out in table 2.

TABLE 2—FEE SCHEDULE FOR FY 2023

Generic drug fee category	Fees rates for FY 2023
Applications:	
Abbreviated New Drug Application (ANDA)	$240,582
Drug Master File (DMF)	78,293
Facilities:	
Active Pharmaceutical Ingredient (API)—Domestic	37,544
API—Foreign	52,544
Finished Dosage Form (FDF)—Domestic	213,134
FDF—Foreign	228,134
Contract Manufacturing Organization (CMO)—	51,152
Domestic:	
CMO—Foreign	66,152
GDUFA Program:	
Large size operation generic drug applicant	1,620,556
Medium size operation generic drug applicant	648,222
Small business operation generic drug applicant	162,056

V. Fee Payment Options and Procedures

The new fee rates are effective October 1, 2022, and will remain in effect through September 30, 2023. Under sections 744B(a)(4) and (5) of the FD&C Act, respectively, facility and program fees are generally due on the later of the first business day on or after October 1 of each fiscal year or the first business day after the enactment of an appropriations act providing for the collection and obligation of GDUFA fees for the fiscal year. Here, that date is October 3, 2022. However, given the late date of the GDUFA reauthorization for FYs 2023 through 2027, facility and program fees for FY 2023 should be paid within 30 days from the issue date of this notice.

To pay the ANDA, DMF, API facility, FDF facility, CMO facility, and GDUFA program fees, a Generic Drug User Fee Cover Sheet must be completed, available at *https://www.fda.gov/gdufa and https://userfees.fda.gov/OA_HTML/gdufaCAcdLogin.jsp,* and a user fee identification (ID) number must be generated. Payment must be made in U.S. currency drawn on a U.S. bank by electronic check, check, bank draft, U.S. postal money order, credit card, or wire transfer. The preferred payment method is online using electronic check (Automated Clearing House (ACH), also known as eCheck) or credit card (Discover, VISA, MasterCard, American Express). FDA has partnered with the U.S. Department of the Treasury to utilize *Pay.gov,* a web-based payment application, for online electronic payment. The *Pay.gov* feature is available on the FDA website after completing the Generic Drug User Fee Cover Sheet and generating the user fee ID number.

Secure electronic payments can be submitted using the User Fees Payment Portal at *https://userfees.fda.gov/pay.* (Note: only full payments are accepted; no partial payments can be made online.) Once an invoice is located, ''Pay Now'' should be selected to be redirected to *Pay.gov.* Electronic payment options are based on the balance due. Payment by credit card is available for balances less than $25,000. If the balance exceeds this amount, only the ACH option is available. Payments must be made using U.S. bank accounts as well as U.S. credit cards.

The user fee ID number must be included on the check, bank draft, or postal money order and must be made payable to the order of the Food and Drug Administration. Payments can be mailed to: Food and Drug Administration, P.O. Box 979108, St. Louis, MO 63197–9000. If checks are to be sent by a courier that requests a street address, the courier can deliver checks to U.S. Bank, Attention: Government Lockbox 979108, 1005 Convention Plaza, St. Louis, MO 63101. (Note: This U.S. Bank address is for courier delivery only. For questions concerning courier delivery, U.S. Bank can be contacted at 314–418–4013. This telephone number is only for questions about courier delivery.) The FDA post office box number (P.O. Box 979108) must be written on the check, bank draft, or postal money order.

For payments made by wire transfer, the unique user fee ID number must be referenced. Without the unique user fee ID number, the payment may not be applied. If the payment amount is not applied, the invoice amount will be referred to collections. The originating financial institution may charge a wire transfer fee. Applicable wire transfer fees must be included with payment to ensure fees are fully paid. Questions about wire transfer fees should be addressed to the financial institution. The following account information should be used to send payments by wire transfer: U.S. Department of the Treasury, TREAS NYC, 33 Liberty St., New York, NY 10045, account number: 75060099, routing number: 021030004, SWIFT: FRNYUS33. FDA's tax identification number is 53–0196965.

Dated: October 5, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–22099 Filed 10–6–22; 11:15 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2022–N–2274]

Medical Devices; Voluntary Total Product Life Cycle Advisory Program Pilot

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice; request for comments.

SUMMARY: The Food and Drug Administration's (FDA, Agency, or we) Center for Devices and Radiological Health (CDRH or Center) is announcing its voluntary Total Product Life Cycle (TPLC) Advisory Program (TAP) Pilot that will begin in fiscal year (FY) 2023 with the initial phase, hereafter referred to as the TAP Pilot Soft Launch. The TAP Pilot is one of the commitments agreed to between FDA and industry as part of the reauthorization of the Medical Device User Fee Amendments for FY 2023 through FY 2027 (MDUFA V). The long-term vision for TAP is to help spur more rapid development and more rapid and widespread patient access to safe, effective, high-quality medical devices of public health importance. Over the course of MDUFA V, the voluntary TAP Pilot is intended to demonstrate the feasibility and benefits of process improvements to FDA's early interactions with participants and of FDA's facilitation of interactions between participants and stakeholders that support the vision for TAP.

DATES: Beginning January 1, 2023, FDA is seeking requests for enrollment in the TAP Pilot Soft Launch for FY 2023. Either electronic or written comments on this notice must be submitted by January 10, 2023 to ensure that the Agency considers your comment on this notice before it begins work on the next phase of the TAP Pilot.

ADDRESSES: You may submit comments as follows. Please note that late, untimely filed comments will not be considered. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. Eastern Time at the end of January 10, 2023. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are received on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions.'')

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2022–N–2274 for ''Medical Devices; Voluntary Total Product Life Cycle

Advisory Program Pilot.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff office between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

• Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Matthew Hillebrenner, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, Rm. 2302, Silver Spring MD 20993, 301–796–6358, *matthew.hillebrenner@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

As part of the reauthorization of the MDUFA V,[1] FDA committed to establish the TAP Pilot during the course of MDUFA V.[2] The long-term vision for TAP is to help spur more rapid development and more rapid and widespread patient access to safe, effective, high-quality medical devices of public health importance. A mature TAP is also intended to help ensure the sustained success of the Breakthrough Devices program (see more information on this program below in Section I.C). Through the TAP Pilot, as described in the MDUFA V commitment letter, FDA will provide the following types of strategic engagement for innovative devices of public health importance:

• Improving participants' experiences with FDA by providing for more timely premarket interactions;

• Enhancing the experience of all participants throughout the device development and review process, including FDA staff;

• Facilitating improved strategic decision-making during device development, including earlier identification, assessment, and mitigation of device development risk;

• Facilitating regular, solutions-focused engagement between FDA review teams, participants, and other stakeholders, such as patients, providers, and payers, beginning early in device development; and

• Collaborating to better align expectations regarding evidence generation, improve submission quality, and improve the efficiency of the premarket review process (Ref. 1).[3]

Consistent with the MDUFA V commitment letter, FDA initially intends to include only devices with a granted Breakthrough designation in the TAP Pilot in FY 2023–FY 2025 and intends to include devices with a granted Breakthrough designation or request for inclusion in the Safer Technologies Program (STeP) in FY 2026–FY 2027. At this time, devices regulated by the Center for Biologics Evaluation and Research (CBER) are outside the scope of the TAP Pilot.[4] In addition, given the complexities involved with the review of combination products,[5] including coordination with review staff outside of CDRH, we anticipate that it will be difficult for sponsors of combination products to benefit fully from the TAP Pilot. Therefore, at this time, we do not intend to enroll combination products in the Pilot.

A. Enrollment and Pilot Expansion Schedule

To implement the TAP Pilot and in accordance with the MDUFA V commitment letter, FDA intends to take a phased-enrollment approach throughout the duration of MDUFA V. The first phase is the TAP Pilot Soft Launch, which will be conducted during FY 2023 (Ref. 1). During the TAP Pilot Soft Launch phase, FDA intends to enroll up to 15 devices in the Office of Health Technology 2 (OHT2): Office of Cardiovascular Devices. Selection of OHT2 for the TAP Pilot Soft Launch was based on consideration of multiple factors, including OHT2's historical number of granted Breakthrough designations, workload, staffing levels, and expertise, as well as experience with review paradigms involving rapid interactions, such as Early Feasibility Studies. For example, OHT2 has granted 163 Breakthrough Device designations as of June 30, 2022, which represents 23.7 percent of the 687 Breakthrough Device designations granted by CDRH.

In subsequent fiscal years, FDA intends to expand the TAP Pilot to enroll more devices and to include devices reviewed in other OHTs.[6] Specifically, as stated in the MDUFA V commitment letter, in FY 2024, the TAP Pilot will continue to support devices enrolled in the previous fiscal year and will expand to enroll up to 45 additional devices in at least two OHTs (*i.e.,* up to 60 total devices enrolled through FY 2024). In FY 2025, the TAP Pilot will continue to support devices enrolled in previous fiscal years and will expand to enroll up to 65 additional devices in at least four OHTs (*i.e.,* up to 125 total devices enrolled through FY 2025). In FY 2026 and FY 2027, the TAP Pilot will continue to support devices enrolled in previous

[1] MDUFA V spans from FY 2023 through FY 2027. The fiscal year runs from October 1 through September 30, so FY 2023 runs from October 1, 2022 through September 30, 2023.

[2] For more information on FDA's TAP Pilot, see the TAP Pilot web page at: *https://www.fda.gov/medical-devices/how-study-and-market-your-device/total-product-life-cycle-advisory-program-tap.*

[3] For more information on the goals and objectives of the TAP Pilot, see the MDUFA V commitment letter, MDUFA Performance Goals and Procedures, Fiscal Years 2023 Through 2027, available at *https://www.fda.gov/industry/medical-device-user-fee-amendments-mdufa/medical-device-user-fee-amendments-2023-mdufa-v.*

[4] In the MDUFA V commitment letter, FDA committed to conducting the TAP Pilot within Offices of Health Technology (OHTs), which are offices that review devices regulated by CDRH.

[5] See 21 CFR 3.2(e).

[6] During the TAP Pilot, if spaces remain available in participating OHTs for any fiscal year, or if resources permit, FDA may consider enrolling devices from OHTs not yet participating in the TAP Pilot.

fiscal years and will expand to enroll up to 100 additional devices each fiscal year within existing OHTs or expand to additional OHTs, depending on lessons learned from the FY 2023 to FY 2025 experience (*i.e.,* up to 225 total devices enrolled through FY 2026 and up to 325 total devices enrolled through FY 2027). For FY 2024–FY 2027, selection of the OHTs will include consideration of the factors mentioned above regarding the selection of OHT2 for the Soft Launch, experience from prior years, and input from industry and other stakeholders (Ref. 1). For FY 2024–FY 2027, FDA plans to announce the OHT(s) selected for future participation in the TAP Pilot via the TAP Pilot web page no later than 30 days prior to the start of each fiscal year.

B. Enrollment in the TAP Pilot

FDA will inform potential participants of the TAP Pilot as part of the Breakthrough designation process or request for inclusion in the STeP process, as applicable. Eligible TAP Pilot participants will be enrolled on a first-come, first-served basis. The Pilot's capacity for additional participating devices and the number of participating OHTs within CDRH will increase each fiscal year as described in Section I.A. As noted above, at this time, devices regulated by CBER are outside the scope of the TAP Pilot, and we do not intend to enroll combination products in the Pilot.

FDA intends to enroll devices reviewed in a participating OHT in the voluntary TAP Pilot using the following enrollment criteria, consistent with the MDUFA V commitment letter:

1. Devices will be those with either a granted Breakthrough designation or (during FY 2026 and FY 2027) a granted request for inclusion in the Safer Technologies Program (STeP);
2. Potential participants will not have submitted a Pre-Submission about the device after being granted a Breakthrough designation or inclusion in STeP;
3. Devices will be early in their device development process (*e.g.,* have not yet initiated a pivotal study for the device) at time of enrollment; and
4. Each potential participant will have a maximum of one device enrolled in the TAP Pilot per fiscal year.

Enrollment in the TAP Pilot, including in the Soft Launch, does not change any statutory or regulatory requirements that may apply to the TAP Pilot device or participant, including, but not limited to, investigational device exemption (IDE) requirements under 21 CFR part 812; premarket notification requirements under 21 CFR part 807, subpart E; premarket approval requirements under 21 CFR part 814; and/or De Novo classification requirements under 21 CFR part 860, subpart D. It is the sponsor's responsibility to ensure compliance with applicable laws and regulations.

C. Procedures for Enrollment in the TAP Pilot

To have a device considered for enrollment in the voluntary TAP Pilot, sponsors should submit an amendment to the Q-submission under which their device was granted Breakthrough designation or (during FY 2026 and FY 2027) inclusion in STeP, with the following information:

1. A subject heading clearly indicating ''TAP Pilot Request for Enrollment'';
2. Name and address of the device sponsor; and
3. The Q-Submission number under which the device proposed for enrollment in the TAP Pilot was granted Breakthrough designation or inclusion in STeP.

For more information on the Breakthrough Devices program, see FDA's website, *https://www.fda.gov/medical-devices/how-study-and-market-your-device/breakthrough-devices-program,* and FDA Guidance, Breakthrough Devices Program (Ref. 2). For more information on STeP, see FDA's website, *https://www.fda.gov/medical-devices/how-study-and-market-your-device/safer-technologies-program-step-medical-devices* and FDA Guidance, Safer Technologies Program for Medical Devices (Ref. 3).

Following receipt of a request for enrollment in the TAP Pilot, FDA intends to consider the request using the enrollment criteria outlined in Section I.B if spaces remain available in the TAP Pilot for the relevant fiscal year. Within 30 days of receipt, FDA intends to notify the potential participant in writing whether or not the device has been enrolled into the TAP Pilot. If a participant's device is enrolled into the TAP Pilot, FDA will contact the participant to schedule an initial meeting to provide an overview of the TAP Pilot processes, expectations, and engagement opportunities. If, after review of a request for enrollment, a device is not enrolled in the TAP Pilot, FDA will identify the reason(s) for that decision.

As noted in Section I.B., eligible TAP Pilot participants will be enrolled on a first-come, first-served basis, for which we plan to use the date of receipt of requests for enrollment in each respective fiscal year. To facilitate an orderly enrollment process, FDA does not intend to consider requests to enroll in the TAP Pilot until the start of the fiscal year in which the participant wishes to enroll. (For example, beginning on October 1, 2023, FDA intends to consider requests to enroll in the TAP Pilot for FY 2024.) If the maximum number of devices has been enrolled for the fiscal year in which a request is received, FDA intends to notify the sponsor submitting the request that enrollment in the TAP Pilot has reached capacity for the current fiscal year. FDA also intends to provide enrollment updates, including a notification that we have reached capacity for a given fiscal year, on the TAP Pilot web page.[7]

D. Performance Metrics

In an effort to achieve the TAP Pilot objectives, FDA committed to implement and track the following quantitative performance metrics[8] beginning in FY 2024:

- CDRH will engage in a teleconference with the participant on requested topic(s) pertaining to the TAP device within 14 days of the request for 90 percent of requests for interaction.
- CDRH will provide written feedback on requested biocompatibility and sterility topics(s) pertaining to the TAP device within 21 days of the request for 90 percent of such requests for written feedback.
- CDRH will provide written feedback on requested topic(s) pertaining to the TAP device other than biocompatibility and sterility within 40 days of the request for 90 percent of requests for written feedback.

During this voluntary TAP Pilot, CDRH staff intend to be available to answer questions or address concerns that may arise. The TAP Pilot Program participants may comment on and discuss their experiences with the Center.

For informational purposes, FDA will conduct an assessment of the TAP Pilot using an independent third party (or parties) to assess the TAP Pilot. This assessment will include a participant survey and quantitative and qualitative success metrics, starting in FY 2024, that include, but are not limited to: (a) the extent to which FDA is successful at meeting the quantitative goals described above; (b) participant satisfaction with

[7] For more information on FDA's TAP Pilot, see the TAP Pilot web page at: *https://www.fda.gov/medical-devices/how-study-and-market-your-device/total-product-life-cycle-advisory-program-tap.*

[8] See section J.3 of the MDUFA V commitment letter, MDUFA Performance Goals and Procedures, Fiscal Years 2023 Through 2027, available at: *https://www.fda.gov/industry/medical-device-user-fee-amendments-mdufa/medical-device-user-fee-amendments-2023-mdufa-v.*

the timeliness, frequency, quality, and efficiency of interactions with and written feedback from FDA; (c) participant satisfaction with the timeliness, frequency, quality, and efficiency of voluntary interactions with non-FDA stakeholders facilitated by FDA (if utilized); and (d) an overall assessment of the outcomes of the Pilot and opportunities for improvement (Ref. 1).

II. Request for Comments

FDA understands that to make this program the most effective, we will need additional feedback and suggestions from industry and other stakeholders. FDA encourages all stakeholders to comment on the TAP Pilot generally. The Agency is particularly interested in feedback on the following topics:

1. TAP Pilot participation will expand to include additional Offices of Health Technology (OHTs) in FY 2024 through FY 2027. In what order do you believe additional OHTs should be included in the TAP Pilot? Please provide the reasons/rationale/justification to support your recommendations in your response.

2. The TAP Pilot is intended to facilitate improved strategic decision-making and better align expectations regarding evidence generation during device development, including through facilitating interactions between TAP participants and stakeholders, such as patients, providers, and payers. These interactions are voluntary and may, for example, help provide a better understanding of the current treatment options used to treat or manage a given condition, which outcomes are most important to patients and providers, how a new technology may fit into clinical care paradigms and patient lives, how patients and providers consider tradeoffs between anticipated benefits and risks, and the evidence that may help support clinical adoption and coverage.

(1) What additional questions or topics could patients, providers, and/or payers address that could help inform sponsors' strategic decision-making?

(2) Are there specific patient, provider, or payer organizations whose members may be well-suited and willing to provide insights regarding evidence generation strategies to sponsors who wish to obtain such input?

III. Paperwork Reduction Act of 1995

This notice refers to previously approved collections of information. These collections of information are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521). The collections of information regarding Q-Submissions have been approved under OMB control number 0910–0756.

IV. References

The following references are on display at the Dockets Management Staff (see **ADDRESSES**) and are available for viewing by interested persons between 9 a.m. and 4 p.m., Monday through Friday; they are also available electronically at *https://www.regulations.gov.* FDA has verified the website addresses, as of the date this document publishes in the **Federal Register**, but websites are subject to change over time.

1. U.S. Food and Drug Administration, ''MDUFA Performance Goals and Procedures, Fiscal Years 2023 Through 2027,'' available at *https://www.fda.gov/industry/medical-device-user-fee-amendments-mdufa/medical-device-user-fee-amendments-2023-mdufa-v.*
2. U.S. Food and Drug Administration, ''Breakthrough Devices Program,'' available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/breakthrough-devices-program.*
3. U.S. Food and Drug Administration, ''Safer Technologies Program for Medical Devices,'' available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/safer-technologies-program-medical-devices.*
4. U.S. Food and Drug Administration, ''Requests for Feedback and Meetings for Medical Device Submissions: The Q-Submission Program,'' available at *https://www.fda.gov/regulatory-information/search-fda-guidance-documents/requests-feedback-and-meetings-medical-device-submissions-q-submission-program.*
5. U.S. Food and Drug Administration, ''Total Product Life Cycle Advisory Program (TAP),'' available at *https://www.fda.gov/medical-devices/how-study-and-market-your-device/total-product-life-cycle-advisory-program-tap/.*

Dated: October 3, 2022.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2022–21835 Filed 10–11–22; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health and Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended, notice is hereby given of a meeting of the National Advisory Child Health and Human Development Council Stillbirth Working Group.

The meeting will be open to the public as indicated below. Individuals who need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting. The session will be videocast and can be accessed from the NIH Videocasting website (*http://videocast.nih.gov/*).

Name of Committee: National Advisory Child Health and Human Development Council; Stillbirth Working Group.

Date: October 20, 2022.

Time: 1:30 p.m. to 5 p.m.

Agenda: The NICHD Stillbirth Working Group of Council (Working Group) is charged with providing a report to the National Advisory Child Health and Human Development Council focusing on the current barriers to collecting data on stillbirths throughout the United States, communities at higher risk of stillbirth, the psychological impact and treatment for mothers following stillbirth, and known risk factors for stillbirth.

Place: Eunice Kennedy Shriver National Institute of Child Health and Human Development, National Institutes of Health, 6710B Rockledge Drive, Bethesda, MD 20892–7510 (Virtual Meeting).

Contact Person: Dr. Natasha H. Williams, Branch Chief, Office of Legislation and Public Policy, *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, NIH, 6710B Rockledge Drive, *natasha.williams2@nih.gov*, Bethesda, MD 20892–7510, (240) 551–4985.

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person.

Information is also available on the Institute's/Center's home page: *https://www.nichd.nih.gov/about/advisory,* where an agenda and any additional information for the meeting will be posted when available.

(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: October 5, 2022.

David W. Freeman,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22068 Filed 10–11–22; 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, 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; Epigenetics of Aging and Age-Associated Diseases.

Date: October 25, 2022.

Time: 12 p.m. to 5:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue, Bethesda, MD 20892 (Virtual Meeting).

Contact Person: Joshua Park, Ph.D., Scientific Review Officer, Scientific Review Branch, NIA (National Institute on Aging), GWY BG RM 2W200, 7201 Wisconsin Ave., Bethesda, MD 20892, (301) 496–6208, *joshua.park4@nih.gov.*

Information is also available on the Institute's/Center's home page: *www.nia.nih.gov/,* where an agenda and any additional information for the meeting will be posted when available.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: October 6, 2022.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22116 Filed 10–11–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Collection; 60-Day Comment Request; Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery (NCI)

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: In compliance with the requirement of the Paperwork Reduction Act of 1995 to provide an opportunity for public comment on proposed data collection projects, the National Institutes of Health and National Cancer Institute (NCI) will publish periodic summaries of proposed projects to be submitted to the Office of Management and Budget (OMB) for review and approval.

DATES: Comments regarding this information collection are best assured of having their full effect if received within 60 days of the date of this publication.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the data collection plans and instruments, submit comments in writing, or request more information on the proposed project, contact: Diane Kreinbrink, Office of Management Policy and Compliance, National Cancer Institute, 9609 Medical Center Drive, Bethesda, MD 20892–9760 or call non-toll-free number (240) 276–5582 or Email your request, including your address to: *diane.kreinbrink@nih.gov.* Formal requests for additional plans and instruments must be requested in writing.

SUPPLEMENTARY INFORMATION: Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires: written comments and suggestions from the public, and affected agencies are invited to address one or more of the following points: (1) Whether the proposed collection of information is necessary for the proper performance of the function of the agency, including whether the information will have practical utility; (2) The accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) Ways to enhance the quality, utility, and clarity of the information to be collected; and (4) Ways to minimizes the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Proposed Collection Title: Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery (NCI), 0925–0642, Expiration Date 03/31/2023, EXTENSION, National Cancer Institute (NCI), National Institutes of Health (NIH).

Need and Use of Information Collection: This activity collects qualitative customer and stakeholder feedback efficiently and timely, per the Administration's commitment to improving service delivery. This generic provides information about the National Cancer Institute's customer or stakeholder perceptions, experiences, and expectations provides an early warning of service issues, or focuses on areas where communication, training, or operations changes might improve product or service delivery. It also allows feedback to contribute directly to the improvement of program management. Feedback collected under this generic clearance provides valuable information but will not yield data that can be generalized to the overall population.

OMB approval is requested for 3 years. There are no costs to respondents other than their time. The total estimated annualized burden hours are 9,337 hours.

ESTIMATED ANNUALIZED BURDEN HOURS

Form name	Type of respondent	Number of respondents	Number of responses per respondent	Average burden per response (in hours)	Total annual burden hours
Surveys	Individuals	27,100	1	12/60	5,420
In-Depth Interviews (IDIs) or Small Discussion Groups.	Individuals	500	1	90/60	750
Focus Groups	Individuals	1,000	1	90/60	1,500
Website or Software Usability Tests	Individuals	5,000	1	20/60	1,667
Total			33,600		9,337

Dated: October 6, 2022.

Diane Kreinbrink,

Project Clearance Liaison, National Cancer Institute, National Institutes of Health.

[FR Doc. 2022–22154 Filed 10–11–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Integrating Mental Health Care into Health Care Systems in LMICs.

Date: November 7, 2022.

Time: 12:00 p.m. to 4:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Regina Dolan-Sewell, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Room 4154, MSC 9606, Bethesda, MD 20852, *regina.dolan-sewell@nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Short Courses, Mentoring Networks, and Education Programs in Mental Health and Psychiatry.

Date: November 9, 2022.

Time: 11:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Serena Chu, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Room 6000, MSC 9606, Bethesda, MD 20852, 301–500–5829, *serena.chu@nih.gov.*

Name of Committee: National Institute of Mental Health Special Emphasis Panel; Biobehavioral Research Awards for Innovative New Scientists (NIMH BRAINS) (R01).

Date: November 9, 2022.

Time: 11:00 a.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Rebecca Steiner Garcia, Ph.D., Scientific Review Officer, Division of Extramural Activities, National Institute of Mental Health, National Institutes of Health, Neuroscience Center, 6001 Executive Blvd., Room 6149, MSC 9608, Bethesda, MD 20892–9608, 301–443–4525, *steinerr@mail.nih.gov.*

(Catalogue of Federal Domestic Assistance Program No. 93.242, Mental Health Research Grants, National Institutes of Health, HHS)

Dated: October 6, 2022.

Melanie J. Pantoja,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2022–22119 Filed 10–11–22; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below.

The FIRM and FIS report are the basis of the floodplain management measures that a 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 Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of February 23, 2023 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov*; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html*.

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov*.

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Bartholomew County, Indiana and Incorporated Areas Docket Nos.: FEMA–B–1804 and FEMA–B–2174	
City of Columbus	City of Columbus-Bartholomew County Planning Department, 123 Washington Street, Suite 8, Columbus, IN 47201.
Town of Hope	Town Hall, 404 Jackson Street, Hope, IN 47246.
Unincorporated Areas of Bartholomew County	City of Columbus-Bartholomew County Planning Department, 123 Washington Street, Suite 8, Columbus, IN 47201.
LaSalle Parish, Louisiana and Incorporated Areas Docket No.: FEMA–B–2127	
Town of Jena	Town Hall, 2908 East Oak Street, Jena, LA 71342.
Town of Olla	Town Hall, 1907 Louisiana Street, Olla, LA 71465.
Town of Tullos	LaSalle Parish Courthouse, 1050 Courthouse Street, Room 13, Jena, LA 71342.
Town of Urania	Town Hall, 2021 East Hardtner Drive, Urania, LA 71480.
Unincorporated Areas of LaSalle Parish	LaSalle Parish Courthouse, 1050 Courthouse Street, Room 13, Jena, LA 71342.
Kent County, Michigan (All Jurisdictions) Docket No.: FEMA–B–2138	
Charter Township of Caledonia	Township Hall, 8196 Broadmoor Avenue Southeast, Caledonia, MI 49316.
Charter Township of Cascade	Cascade Charter Township Office, 5920 Tahoe Drive Southeast, Grand Rapids, MI 49546.
Charter Township of Gaines	Gaines Charter Township Office, 8555 Kalamazoo Avenue Southeast, Caledonia, MI 49316.
Charter Township of Grand Rapids	Township Hall, 1836 East Beltline Avenue Northeast, Grand Rapids, MI 49525.
Charter Township of Lowell	Township Hall, 2910 Alden Nash Avenue Southeast, Lowell, MI 49331.
Charter Township of Plainfield	Plainfield Charter Township Hall, 6161 Belmont Avenue Northeast, Belmont, MI 49306.
City of Cedar Springs	City Hall, 66 South Main Street, Cedar Springs, MI 49319.
City of East Grand Rapids	Community Center, 750 Lakeside Drive Southeast, East Grand Rapids, MI 49506.
City of Grand Rapids	City Hall, 300 Monroe Avenue Northwest, Grand Rapids, MI 49503.
City of Grandville	City Hall, 3195 Wilson Avenue Southwest, Grandville, MI 49418.
City of Kentwood	City Hall Engineering Department, 4900 Breton Avenue Southeast, Kentwood, MI 49508.
City of Lowell	City Hall, 301 East Main Street, Lowell, MI 49331.
City of Rockford	City Hall, 7 South Monroe Street, Rockford, MI 49341.
City of Walker	Engineering Department City Hall, 4243 Remembrance Road Northwest, Walker, MI 49534.
City of Wyoming	City Hall, 1155 28th Street Southwest, Wyoming, MI 49509.
Township of Ada	Township Hall, 7330 Thornapple River Drive, Ada, MI 49301.
Township of Algoma	Algoma Township Office, 10531 Algoma Avenue Northeast, Rockford, MI 49341.
Township of Alpine	Alpine Township Hall, 5255 Alpine Avenue Northwest, Comstock Park, MI 49321.
Township of Byron	Byron Township Hall, 8085 Byron Center Avenue Southwest, Byron Center, MI 49315.
Township of Cannon	Cannon Township Center, 6878 Belding Road, Rockford, MI 49341.
Township of Solon	Solon Township Offices, 15185 Algoma Avenue Northeast, Cedar Springs, MI 49319.
Township of Sparta	Township Hall, 160 East Division Street, Sparta, MI 49345.
Township of Tyrone	Tyrone Township Hall, 28 East Muskegon Street, Kent City, MI 49330.
Township of Vergennes	Vergennes Township Hall, 69 Lincoln Lake Avenue Northeast, Lowell, MI 49331.
Village of Casnovia	Village Hall, 141 North Main Street, Casnovia, MI 49318.
Village of Kent City	Village Office, 83 Spring Street, Kent City, MI 49330.
Village of Sparta	Village Hall, 156 East Division Street, Sparta, MI 49345.
Manitowoc County, Wisconsin and Incorporated Areas Docket No.: FEMA–B–2126	
City of Manitowoc	City Hall, 900 Quay Street, Manitowoc, WI 54220.
City of Two Rivers	City Hall, 1717 East Park Street, Two Rivers, WI 54241.
Unincorporated Areas of Manitowoc County	Manitowoc County Courthouse, 1010 South 8th Street, Manitowoc, WI 54220.
Village of Cleveland	Village Hall, 1150 West Washington Avenue, Cleveland, WI 53015.

[FR Doc. 2022–22130 Filed 10–11–22; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002]

Final Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Flood hazard determinations, which may include additions or modifications of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or regulatory floodways on the Flood Insurance Rate Maps (FIRMs) and where applicable, in the supporting Flood Insurance Study (FIS) reports have been made final for the communities listed in the table below. The FIRM and FIS report are the basis of the floodplain management measures that a 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 Federal Emergency Management Agency's (FEMA's) National Flood Insurance Program (NFIP).

DATES: The date of March 7, 2023 has been established for the FIRM and, where applicable, the supporting FIS report showing the new or modified flood hazard information for each community.

ADDRESSES: The FIRM, and if applicable, the FIS report containing the final flood hazard information for each community is available for inspection at the respective Community Map Repository address listed in the tables below and will be available online through the FEMA Map Service Center at *https://msc.fema.gov* by the date indicated above.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: The Federal Emergency Management Agency (FEMA) makes the final determinations listed below for the new or modified flood hazard information for each community listed. Notification of these changes has been published in newspapers of local circulation and 90 days have elapsed since that publication. The Deputy Associate Administrator for Insurance and Mitigation has resolved any appeals resulting from this notification.

This final notice is issued in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR part 67. FEMA has developed criteria for floodplain management in floodprone areas in accordance with 44 CFR part 60.

Interested lessees and owners of real property are encouraged to review the new or revised FIRM and FIS report available at the address cited below for each community or online through the FEMA Map Service Center at *https://msc.fema.gov.*

The flood hazard determinations are made final in the watersheds and/or communities listed in the table below.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Delta County, Michigan (All Jurisdictions) Docket No.: FEMA–B–2168	
City of Escanaba	City Hall, Protective Inspection Department, 410 Ludington Street, Escanaba, MI 49829.
City of Gladstone	City of Gladstone Zoning Administrator's Office, 1100 Delta Avenue, Gladstone, MI 49837.
Little Traverse Bay Bands of Odawa Indians	Little Traverse Bay Bands of Odawa Indians Government Center, 7500 Odawa Circle, Harbor Springs, MI 49740.
Township of Baldwin	Baldwin Township Hall, 5901 Perkins 30.5 Road, Perkins, MI 49872.
Township of Bay De Noc	Bay De Noc Township Hall, 5870 County 513 T Road, Rapid River, MI 49878.
Township of Brampton	Brampton Township Hall, 9019 Bay Shore Drive, Gladstone, MI 49837.
Town of Cornell	Township Supervisor's Office, 9912 River J.5 Lane, Cornell, MI 49818.
Township of Ensign	Ensign Fire Hall, 9498 24th Road, Rapid River, MI 49878.
Township of Escanaba	Escanaba Township Hall, 4618 County 416 20th Road, Gladstone, MI 49837.
Township of Fairbanks	Fairbanks Township Hall, 13717 11th Road, Garden, MI 49835.
Township of Ford River	Ford River Township Building, 3845 K Road, Bark River, MI 49807.
Township of Garden	Township Office, 6316 State Street, Garden, MI 49835.
Township of Maple Ridge	Maple Ridge Community Building, 3892 West Maple Ridge 37th Road, Rock, MI 49880.
Township of Masonville	Masonville Township Office, 10574 North Main Street, Rapid River, MI 49878.
Township of Nahma	Township Hall, 13751 Wells Street, Nahma, MI 49864.
Township of Wells	Township Building, 6436 North 8th Street, Wells, MI 49894.
Village of Garden	Village Hall, 15951 Garden Avenue, Garden, MI 49835.

[FR Doc. 2022–22135 Filed 10–11–22; 8:45 am]
BILLING CODE 9111–23–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002; Internal Agency Docket No. FEMA–B–2275]

Proposed Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: Comments are requested on proposed flood hazard determinations, which may include additions or modifications of any Base Flood Elevation (BFE), base flood depth, Special Flood Hazard Area (SFHA) boundary or zone designation, or regulatory floodway on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports for the communities listed in the table below. The purpose of this notice is to seek general information and comment regarding the preliminary FIRM, and where applicable, the FIS report that the Federal Emergency Management Agency (FEMA) has provided to the affected communities. The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

DATES: Comments are to be submitted on or before January 10, 2023.

ADDRESSES: The Preliminary FIRM, and where applicable, the FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2275, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed below, in accordance with section 110 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4104, and 44 CFR 67.4(a).

These proposed flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. These flood hazard determinations are used to meet the floodplain management requirements of the NFIP.

The communities affected by the flood hazard determinations are provided in the tables below. Any request for reconsideration of the revised flood hazard information shown on the Preliminary FIRM and FIS report that satisfies the data requirements outlined in 44 CFR 67.6(b) is considered an appeal. Comments unrelated to the flood hazard determinations also will be considered before the FIRM and FIS report become effective.

Use of a Scientific Resolution Panel (SRP) is available to communities in support of the appeal resolution process. SRPs are independent panels of experts in hydrology, hydraulics, and other pertinent sciences established to review conflicting scientific and technical data and provide recommendations for resolution. Use of the SRP only may be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://www.floodsrp.org/pdfs/srp_overview.pdf.*

The watersheds and/or communities affected are listed in the tables below. The Preliminary FIRM, and where applicable, FIS report for each community are available for inspection at both the online location *https://hazards.fema.gov/femaportal/prelimdownload* and the respective Community Map Repository address listed in the tables. For communities with multiple ongoing Preliminary studies, the studies can be identified by the unique project number and Preliminary FIRM date listed in the tables. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
East Feliciana Parish, Louisiana and Incorporated Areas Project: 21–06–0049S Preliminary Date: May 10, 2022	
Town of Jackson	Town Hall, 1610 Charter Street, Jackson, LA 70748.
Unincorporated Areas of East Feliciana Parish	East Feliciana Parish Police Jury Office, 12064 Marston Street, Clinton, LA 70722.
West Feliciana Parish, Louisiana and Incorporated Areas Project: 21–06–0048S Preliminary Date: May 10, 2022	
Town of St. Francisville	Town Hall, 11936 Ferdinand Street, St. Francisville, LA 70775.
Unincorporated Areas of West Feliciana Parish	West Feliciana Parish Governmental Building, 5934 Commerce Street, St. Francisville, LA 70775.

Community	Community map repository address
Holmes County, Mississippi and Incorporated Areas **Project: 14–04–2387S Preliminary Date: September 29, 2021**	
City of Lexington	City Hall, 112 Spring Street, Lexington, MS 39095.
Unincorporated Areas of Holmes County	Holmes County Administrative Offices, 408 Court Square, Lexington, MS 39095.
Leflore County, Mississippi and Incorporated Areas **Project: 14–04–2387S Preliminary Date: September 29, 2021**	
Unincorporated Areas of Leflore County	Leflore County Chancery Clerk's Office, 306 West Market Street, Greenwood, MS 38930.
Madison County, Mississippi and Incorporated Areas **Project: 13–04–8486S Preliminary Date: June 30, 2021**	
City of Canton	City Hall, 226 East Peace Street, Canton, MS 39046.
City of Madison	City Hall, 1004 Madison Avenue, Madison, MS 39110.
Pearl River Valley Water Supply District	Pearl River Valley Water Supply District Building Department, 100 Reservoir Park Road, Brandon, MS 39047.
Unincorporated Areas of Madison County	Madison County Administrative Building, 125 West North Street, Canton, MS 39046.
Yazoo County, Mississippi and Incorporated Areas **Project: 14–04–2387S Preliminary Date: September 29, 2021 and April 25, 2022**	
City of Yazoo City	City Hall, 128 East Jefferson Street, Yazoo City, MS 39194.
Unincorporated Areas of Yazoo County	Yazoo County Office Building, 212 East Broadway Street, Yazoo City, MS 39194.

[FR Doc. 2022–22132 Filed 10–11–22; 8:45 am]
BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002; Internal Agency Docket No. FEMA–B–2257]

Proposed Flood Hazard Determinations; Correction

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice; correction.

SUMMARY: On August 4, 2022, FEMA published in the **Federal Register** a proposed flood hazard determination notice that contained an erroneous table. This notice provides corrections to that table to be used in lieu of the erroneous information. The table provided here represents the proposed flood hazard determinations and communities affected for Athens County, Ohio and Incorporated Areas.

DATES: Comments are to be submitted on or before January 10, 2023.

ADDRESSES: The Preliminary Flood Insurance Rate Map (FIRM), and where applicable, the Flood Insurance Study (FIS) report for each community are available for inspection at both the online location and the respective Community Map Repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

You may submit comments, identified by Docket No. FEMA–B–2257, to Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov.*

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov;* or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html.*

SUPPLEMENTARY INFORMATION: FEMA proposes to make flood hazard determinations for each community listed in the table 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.

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 may only be exercised after FEMA and local communities have been engaged in a collaborative consultation process for at least 60 days without a mutually acceptable resolution of an appeal. Additional information regarding the SRP process can be found online at *https://floodsrp.org/pdfs/srp_fact_sheet.pdf.*

The communities affected by the flood hazard determinations are provided in the table below. Any request for reconsideration of the revised flood hazard determinations 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 will also be considered before the FIRM and FIS report are made final.

Correction

In the proposed flood hazard determination notice published at 87 FR 47769 in FR Doc. 2022–16753 of the August 4, 2022 issue of the **Federal Register**, FEMA published a table titled ''Athens County, Ohio, and Incorporated Areas''. This table contained inaccurate information as to the community map repository address for the Unincorporated Areas of Athens County, Ohio featured in the table. In this document, FEMA is publishing a table containing the accurate information. The information provided below should be used in lieu of that previously published.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

Community	Community map repository address
Athens County, Ohio and Incorporated Areas Project: 12–05–3508S Preliminary Date: November 30, 2021	
Unincorporated Areas of Athens County	Athens County Courthouse, 1 South Court Street, Athens, OH 45701.

[FR Doc. 2022–22134 Filed 10–11–22; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

[Docket ID FEMA–2022–0002; Internal Agency Docket No. FEMA–B–2280]

Changes in Flood Hazard Determinations

AGENCY: Federal Emergency Management Agency, Department of Homeland Security.

ACTION: Notice.

SUMMARY: This notice lists communities where the addition or modification of Base Flood Elevations (BFEs), base flood depths, Special Flood Hazard Area (SFHA) boundaries or zone designations, or the regulatory floodway (hereinafter referred to as flood hazard determinations), as shown on the Flood Insurance Rate Maps (FIRMs), and where applicable, in the supporting Flood Insurance Study (FIS) reports, prepared by the Federal Emergency Management Agency (FEMA) for each community, is appropriate because of new scientific or technical data. The FIRM, and where applicable, portions of the FIS report, have been revised to reflect these flood hazard determinations through issuance of a Letter of Map Revision (LOMR), in accordance with Federal Regulations. The currently effective community number is shown in the table below and must be used for all new policies and renewals.

DATES: These flood hazard determinations will be finalized on the dates listed in the table below and revise the FIRM panels and FIS report in effect prior to this determination for the listed communities.

From the date of the second publication of notification of these changes in a newspaper of local circulation, any person has 90 days in which to request through the community that the Deputy Associate Administrator for Insurance and Mitigation reconsider the changes. The flood hazard determination information may be changed during the 90-day period.

ADDRESSES: The affected communities are listed in the table below. Revised flood hazard information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

Submit comments and/or appeals to the Chief Executive Officer of the community as listed in the table below.

FOR FURTHER INFORMATION CONTACT: Rick Sacbibit, Chief, Engineering Services Branch, Federal Insurance and Mitigation Administration, FEMA, 400 C Street SW, Washington, DC 20472, (202) 646–7659, or (email) *patrick.sacbibit@fema.dhs.gov*; or visit the FEMA Mapping and Insurance eXchange (FMIX) online at *https://www.floodmaps.fema.gov/fhm/fmx_main.html*.

SUPPLEMENTARY INFORMATION: The specific flood hazard determinations are not described for each community in this notice. However, the online location and local community map repository address where the flood hazard determination information is available for inspection is provided.

Any request for reconsideration of flood hazard determinations must be submitted to the Chief Executive Officer of the community as listed in the table below.

The modifications are made pursuant to section 201 of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4105, and are in accordance with the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.,* and with 44 CFR part 65.

The FIRM and FIS report are the basis of the floodplain management measures that the community is required either to adopt or to show evidence of having in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These flood hazard determinations, together with the floodplain management criteria required by 44 CFR 60.3, are the minimum that are required. They should not be construed to mean that the community must change any existing ordinances that are more stringent in their floodplain management requirements. The community may at any time enact stricter requirements of its own or pursuant to policies established by other Federal, State, or regional entities. The flood hazard determinations are in accordance with 44 CFR 65.4.

The affected communities are listed in the following table. Flood hazard determination information for each community is available for inspection at both the online location and the respective community map repository address listed in the table below. Additionally, the current effective FIRM and FIS report for each community are accessible online through the FEMA Map Service Center at *https://msc.fema.gov* for comparison.

(Catalog of Federal Domestic Assistance No. 97.022, ''Flood Insurance.'')

Nicholas A. Shufro,

Assistant Administrator for Risk Management (Acting), Federal Emergency Management Agency, Department of Homeland Security.

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Arizona:						
Maricopa	Unincorporated Areas of Maricopa County (22–09–0553P).	The Honorable Bill Gates, Chair, Board of Supervisors, Maricopa County, 301 West Jefferson Street, 10th Floor, Phoenix, AZ 85003.	Flood Control District of Maricopa County, 2801 West Durango Street, Phoenix, AZ 85009.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 6, 2023	040037
Pima	Town of Marana (22–09–0373P).	The Honorable Ed Honea, Mayor, Town of Marana, 11555 West Civic Center Drive, Marana, AZ 85653.	Engineering Department, Marana Municipal Complex, 11555 West Civic Center Drive, Marana, AZ 85653.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 13, 2023	040118
California:						
Nevada	City of Grass Valley (22–09–0608P).	The Honorable Ben Aguilar, Mayor, City of Grass Valley, 125 East Main Street, Grass Valley, CA 95945.	Public Works Department, 125 East Main Street, Grass Valley, CA 95945.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 12, 2023	060211
Placer	Unincorporated Areas of Placer County (22–09–0128P).	The Honorable Cindy Gustafson, Chair, Placer County Board of Supervisors, 175 Fulweiler Avenue, Suite 206, Auburn, CA 95603.	Placer County Public Works, 3091 County Center Drive, Suite 220, Auburn, CA 95603.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 9, 2023	060239
Riverside	City of Moreno Valley (22–09–0602P).	The Honorable Yxstian A. Gutierrez, Mayor, City of Moreno Valley, 14177 Frederick Street, Moreno Valley, CA 92552.	Public Works Department, 14177 Frederick Street, Moreno Valley, CA 92552.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 9, 2023	065074
San Bernardino.	City of Fontana (20–09–1006P).	The Honorable Acquanetta Warren, Mayor, City of Fontana, 8353 Sierra Avenue, Fontana, CA 92335.	City Hall, Engineering Department, 8353 Sierra Avenue, San Bernardino, CA 92415.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	060274
San Bernardino.	City of Rialto (20–09–1006P).	The Honorable Deborah Robertson, Mayor, City of Rialto, 150 South Palm Avenue, Rialto, CA 92376.	City Hall, 150 South Palm Avenue, Rialto, CA 92376.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	060280
San Bernardino.	City of San Bernardino (20–09–1006P).	The Honorable John Valdivia, Mayor, City of San Bernardino, 290 North D Street, San Bernardino, CA 92401.	City Hall, 300 North D Street, San Bernardino, CA 92418.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	060281
San Bernardino.	Unincorporated Areas of San Bernardino County (20–09–1006P).	The Honorable Curt Hagman, Chair, Board of Supervisors, San Bernardino County, 385 North Arrowhead Avenue, 5th Floor, San Bernardino, CA 92415.	San Bernardino County Public Works, Water Resources Department, 825 East 3rd Street, San Bernardino, CA 92415.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	060270
Florida:						
Nassau	Town of Callahan (21–04–4290P).	The Honorable Matthew Davis, Mayor, Town of Callahan, 542300 US Hwy 1, Callahan, FL 32011.	Town Hall, 542300 US Highway 1, Callahan, FL 32011.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 12, 2023	120171
Nassau	Unincorporated Areas of Nassau County (21–04–4290P).	The Honorable Jeff Gray, Chair, Nassau County Board of Commissioners, 97572 Pirates Point Road, Yulee, FL 32097.	Nassau County Building Department, 96161 Nassau Place, Yulee, FL 32097.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 12, 2023	120170
Hawaii: Honolulu ...	City and County of Honolulu (21–09–0747P).	The Honorable Rick Blangiardi, Mayor, City and County of Honolulu, 530 South King Street, Room 300, Honolulu, HI 96813.	Department of Planning and Permitting, 650 South King Street, 1st Floor, Honolulu, HI 96813.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 6, 2022	150001
Idaho:						

State and county	Location and case No.	Chief executive officer of community	Community map repository	Online location of letter of map revision	Date of modification	Community No.
Blaine	City of Ketchum (22–10–0349P).	The Honorable Neil Bradshaw, Mayor, City of Ketchum, City Hall, P.O. Box 2315, Ketchum, ID 83340.	City Hall, 480 East Avenue North, Ketchum, ID 83340.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 22, 2022	160023
Blaine	Unincorporated Areas of Blaine County (22–10–0349P).	Chair Dick Fosbury, Blaine County Board of Commissioners, Old County Courthouse, 206 South 1st Avenue, Hailey, ID 83333.	Blaine County Planning & Zoning, 219 1st Avenue South, Suite 208, Hailey, ID 83333.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 22, 2022	165167
Nevada:						
Clark	City of North Las Vegas (22–09–0330P).	The Honorable John J. Lee, Mayor, City of North Las Vegas, 2250 Las Vegas Boulevard North, North Las Vegas, NV 89030.	Public Works Department, 2250 Las Vegas Boulevard North, Suite 200, North Las Vegas, NV 89030.	*https://msc.fema.gov/portal/advanceSearch.*	Jan. 11, 2023	320007
Washoe	City of Sparks (22–09–0027P).	The Honorable Ed Lawson, Mayor, City of Sparks, 431 Prater Way, Sparks, NV 89431.	City Hall, 431 Prater Way, Sparks, NV 89431.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	320021
Washoe	Unincorporated Areas of Washoe County (22–09–0027P).	The Honorable Vaughn Hartung, Chair, Board of Commissioners, Washoe County, 1001 East 9th Street, Reno, NV 89512.	Washoe County Administration Building, Department of Public Works, 1001 East 9th Street, Reno, NV 89512.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 12, 2022	320019
Washington: Okanogan.	Unincorporated Areas of Okanogan County (22–10–0287P).	Chair Chris Branch, Board of Commissioners, District 1, 149 North 3rd Avenue, Okanogan, WA 98840.	Okanogan Planning Department, 123 North 5th Street, Okanogan, WA 98840.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 16, 2022	530117
Wisconsin:						
Brown	Unincorporated Areas of Brown County (22–05–0903P).	Commissioner Patrick Buckley, Brown County, 305 East Walnut Street, Green Bay, WI 54305.	Brown County Zoning Office, 305 East Walnut Street, Green Bay, WI 54301.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 19, 2022	550020
Brown	Village of Bellevue (21–05–4432P).	President Steve Soukup, Village of Bellevue, 2828 Allouez Avenue, Bellevue, WI 54311.	Village Hall, 2828 Allouez Avenue, Bellevue, WI 54311.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 15, 2022	550627
Brown	Village of Hobart (22–05–0903P).	President Richard Heidel, Village of Hobart, 2990 South Pine Tree Road, Hobart, WI 54155.	Village Hall, 2990 South Pine Tree Road, Hobart, WI 54155.	*https://msc.fema.gov/portal/advanceSearch.*	Dec. 19, 2022	550626

[FR Doc. 2022–22131 Filed 10–11–22; 8:45 am]

BILLING CODE 9110–12–P

DEPARTMENT OF HOMELAND SECURITY

[Docket No. CISA–2022–0009]

Notice of President's National Security Telecommunications Advisory Committee Meeting

AGENCY: Cybersecurity and Infrastructure Security Agency (CISA), Department of Homeland Security (DHS).

ACTION: Notice of *Federal Advisory Committee Act* (FACA) meeting; request for comments.

SUMMARY: As stipulated by the Federal Advisory Committee Act, CISA is hereby giving notice that a meeting is scheduled to be held for the President's National Security Telecommunications Advisory Committee (NSTAC). This meeting will be partially closed to the public. The public can access the meeting via teleconference.

DATES:

Meeting Registration: Registration to attend the meeting via teleconference is required and must be received no later than 5 p.m. eastern time (ET) on November 22, 2022. For more information on how to participate, please contact *NSTAC@cisa.dhs.gov*.

Speaker Registration: Registration to speak during the meeting's public comment period must be received no later than 5 p.m. ET on November 22, 2022.

Written Comments: Written comments must be received no later than 5 p.m. ET on November 22, 2022.

Meeting Date: The NSTAC will meet on December 1, 2022, from 1 p.m. to 5 p.m. ET. The meeting may close early if the committee has completed its business.

ADDRESSES: The December 2022 NSTAC Meeting's open session is set to be held from 3:30 p.m. to 5 p.m. ET in person at 1650 Pennsylvania Avenue NW, Washington, DC 20504; however, members of the public may participate via teleconference only. For access to the conference call bridge, information on services for individuals with disabilities, or to request special assistance, please email *NSTAC@cisa.dhs.gov* by 5 p.m. ET on November 22, 2022. The NSTAC is committed to ensuring all participants have equal access regardless of disability status. If you require a reasonable accommodation due to a disability to fully participate, please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section as soon as possible.

Comments: Members of the public are invited to provide comment on issues that will be considered by the committee as listed in the

SUPPLEMENTARY INFORMATION section below. Associated materials that may be discussed during the meeting will be made available for review at *https://www.cisa.gov/nstac* on November 16, 2022. Comments should be submitted by 5:00 p.m. ET on November 22, 2022 and must be identified by Docket Number CISA–2022–0009. Comments may be submitted by one of the following methods:

- *Federal eRulemaking Portal: www.regulations.gov*. Please follow the instructions for submitting written comments.
- *Email: NSTAC@cisa.dhs.gov*. Include the Docket Number CISA–2022–0009 in the subject line of the email.

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 to *www.regulations.gov,* including any personal information provided. You may wish to review the Privacy & Security Notice available via a link on the homepage of *www.regulations.gov*.

Docket: For access to the docket and comments received by the NSTAC, please go to *www.regulations.gov* and enter docket number CISA–2022–0009.

A public comment period is scheduled to be held during the meeting from 4:30 p.m. ET to 4:40 p.m. ET. Speakers who wish to participate in the public comment period must email *NSTAC@cisa.dhs.gov* to register. Speakers should limit their comments to 3 minutes and will speak in order of registration. Please note that the public comment period may end before the time indicated, following the last request for comments.

FOR FURTHER INFORMATION CONTACT: Christina Berger, 202- 701–6354, *NSTAC@cisa.dhs.gov*.

SUPPLEMENTARY INFORMATION: The NSTAC is established under the authority of Executive Order (E.O.) 12382, dated September 13, 1982, as amended by E.O. 13286, continued and amended under the authority of E.O. 14048, dated September 30, 2021. Notice of this meeting is given under FACA, 5 U.S.C. appendix (Pub. L. 92–463). The NSTAC advises the President on matters related to national security and emergency preparedness (NS/EP) telecommunications and cybersecurity policy.

Agenda: The NSTAC will meet in an open session on Thursday, December 1, 2022, from 3:30 p.m. ET to 5 p.m. ET to discuss current NSTAC activities and the government's ongoing cybersecurity and NS/EP communications initiatives. This open session will include: (1) a keynote address;(2) a status update on NSTAC recommendations; and (3) a deliberation and vote on the *NSTAC Report to the President on a Strategy for Increasing Trust in the Information and Communications Technology and Services Ecosystem*.

The committee will also meet in a closed session from 1 p.m. ET to 3 p.m. ET during which time: (1) senior government intelligence officials will provide a threat briefing concerning threats to NS/EP communications and engage NSTAC members in follow-on discussion; and (2) NSTAC members and senior government officials will discuss potential NSTAC study topics.

Basis for Closure: In accordance with section 10(d) of FACA and 5 U.S.C. 552b(c)(1), *The Government in the Sunshine Act,* it has been determined that a portion of the agenda requires closure.

These agenda items are the: (1) classified threat briefing and discussion, which will provide NSTAC members the opportunity to discuss information concerning threats to NS/EP communications with senior government intelligence officials; and (2) potential NSTAC study topics discussion. The briefing is anticipated to be classified at the top secret/sensitive compartmented information level. Disclosure of these threats during the briefing, as well as vulnerabilities and mitigation techniques, is a risk to the Nation's cybersecurity posture since adversaries could use this information to compromise commercial and government networks. Subjects discussed during the potential study topics discussion are tentative and are under further consideration by the committee.

Therefore, this portion of the meeting is required to be closed pursuant to section 10(d) of FACA and 5 U.S.C. 552b(c)(1) because it will disclose matters that are classified.

Christina Berger,

Designated Federal Officer, NSTAC, Cybersecurity and Infrastructure Security Agency, Department of Homeland Security.

[FR Doc. 2022–22121 Filed 10–11–22; 8:45 am]

BILLING CODE 4410–10–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7062–N–18]

Privacy Act of 1974; System of Records

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Notice of a modified system of records.

SUMMARY: The Distributive Shares and Refund Subsystem (DSRS) serves as the Federal Housing Administration (FHA) repository for verifying mortgage insurance premium refunds and distributive share payments which are issued to eligible homeowners (mortgagors) who had an FHA mortgage insured loan. Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of Housing and Urban Development (HUD) is issuing a public notice of its intent to modify a system of records entitled ''Distributive Shares and Refund Subsystem'' (DSRS). This system of records is being revised to make clarifying changes within: System Location, System Manager, Record Authority for Maintenance of the System, Purpose of the System, Categories of Individuals Covered by the System, Categories of Records in the System, Records Source Categories, Routine Uses of Records Maintained in the System, Retention and Disposal of Records. The SORN modifications are outlined in the SORN **SUPPLEMENTARY INFORMATION** section.

DATES: Comments will be accepted on or before November 14, 2022. The SORN becomes effective immediately, while the routine uses become effective after the comment period immediately upon publication except for the routine uses, which will become 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 by one method:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and

docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov.* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001; telephone number 202–708–3054 (this is not a toll-free number). Individuals who are hearing- or speech-impaired can dial 7–1–1 to access the Telecommunications Relay Service (TRS), which permits users to make text-based calls, including Text Telephone (TTY) and Speech to Speech (STS) calls. Individuals who require an alternative aid or service to communicate effectively with HUD should email the point of contact listed above and provide a brief description of their preferred method of communication.

SUPPLEMENTARY INFORMATION: HUD, Single Family Insurance Operations Division, maintains the DSRS system. HUD is publishing this revised notice to establish a new and modified routine use and to reflect updated information in the sections being revised. The modification of the system of records will have no undue impact on the privacy of the individuals covered and updates made are explained below.

The following are updates since the previous SORN publication:

Security Classification: Added systems of record classification status.

System Location: Replaced former data center and HUD locations with new locations in Virginia, Mississippi, and Washington.

System Manager: Identified new system manager expected to operate this system of records.

Authority for Maintenance of the System: Updated with existing authorities that permit the maintenance of the systems records. Statutes and regulations are listed below.

Categories of Individuals Covered by the System: Reorganized this section to group and clarify individuals according to their system coverage. Updated to reflect the inclusion of records previously covered as ''Third Party Representatives''.

Categories of Records in the System: Updated this section to clarify the individuals whose personal identifiable information is collected and reflect the inclusion of new and previously covered records entitled ''Identification and Verification''.

Records Source Categories: Updated to cover all record sources for internal and external systems to HUD.

Routine Use of Records:

Added General Service Administration for purpose of supporting agency dispute resolution.

Updated routine uses for breach remediation efforts to extend agency data sharing when relevant for breach remediation efforts to appropriate agencies.

Readded a routine use for disclosure to the general public which had previously been placed in the section immediately preceding the routine use section.

Reorganized, incorporated, and updated routine uses previously applied through HUD's 2015 Routine Use Inventory publication as part of this system of records. See routine uses (C), (K), (L), and (M) for updates.

Records Retention and Disposition: Updated this section to describe current retention and disposal requirements.

Policy and Practice for Retrieval of Records: Updated to include minor changes and format.

Records Access, Contesting, and Notification Procedures: Updated to include Federal requirements and HUD office to which the individuals' request should be directed.

SYSTEM NAME AND NUMBER:

Distributive Shares and Refund Subsystem (DSRS) HUD/HOU–03.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

National Center for Critical Information Processing and Storage, 9325 Cypress Loop Road, Stennis Space Center, MS 39529–0001; 250 Burlington Drive, Clarksville, VA 23927; and at the HUD Headquarter, 451 Seventh Street SW, Room 3238, Washington, DC 20410.

SYSTEM MANAGER(S):

Silas Vaughn, System Manager, Single Family Insurance Operations Division, HWAFS, Department of Housing and Urban Development, 451 Seventh Street SW, Ninth floor, Washington, DC 20410–0001 telephone number, 202–708–2438.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 203(a) of the National Housing Act of 1934 (12 U.S.C. 1709(a)); 24 CFR 203.35. Section 7(d) of the Department of Housing and Urban Development Act of 1965 (12 U.S.C. 3535(d)); 24 CFR 5.210; 24 CFR 200.1101. The Housing Community Development Act of 1987, 42 U.S.C. 3543(a). The Debt Collection Act of 1982, Public Law 97–365.

PURPOSES OF THE SYSTEM:

DSRS maintains detailed records for single family non-claim terminated case activities to ensure that the proper homeowner associated with the FHA guaranteed loan is identified. Upon non-claim termination (*i.e.,* prepayment, assignment, assumption, or refinance), the borrower may be eligible for a refund of any unearned upfront mortgage insurance premium (UFMIP) paid at closing or a distributive share payment. The ''*Does HUD Owe You a Refund?*'' website is used in conjunction with DSRS to allow homeowners who have had an FHA endorsed mortgage determine if they are eligible for an upfront mortgage insurance premium refund or distributive share payment. In addition, DSRS utilizes the *Premium Refund Application Upload* web page component to provide another option for homeowners to securely send the required documents to HUD to complete the homeowner refund process. SFIOD staff can request disbursement of refunds due, and DSRS will certify that the requests are valid.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Homeowners (Mortgagors) who had Federal Housing Administration (FHA) mortgage insured loans and may be eligible for a mortgage insurance premium refund or distributive share payment; Third Party Representatives who are sources of mortgagor information.

CATEGORIES OF RECORDS IN THE SYSTEM:

Full Name, Social Security Number (SSN), Date of Birth, Phone Number, Home Address, Email Address, Employer Identification Number, and User id, Related Premium Refund/Payment Correspondence (borrower name, address, email address, phone and fax number), Supporting Documentation (borrower identification and verification document copies): Birth, Death, Marriage, Religion, Naturalization, Citizenship Certificate, US Passport, Green Card, Change-of-Address, Drivers' license, Military, State, Federal ID, or similar identification, Bank, Mortgage, Credit Card, Tax, Utility, Doctor, Hospital Company Bill, Medicaid, Medicare Statement, Social Security Administration, Pension, Retirement Benefit Statement, Veteran Discharge or Separation Papers, Dependent, Medical, SSN Card, W–2, 1099, DD–214 form (for SSN verification purposes), Pay Statement, Vehicle, Voters Registration, Legal documents (mortgage, deed, will, loan, rental contracts, gender, name change) or similar document.

Information on Supporting documents may include State were issued, SSN, Birthdate, Gender, Sex, Affiliation, Marital, Financial, Retirement, Pay, Employment, Medical, Account Number, and Address information.

RECORD SOURCE CATEGORIES:

Homeowners, third party businesses, and authorized representatives of the homeowners that complete the form application for premium refund. Internal and External data exchanges from the following systems:

Housing Office of Finance and Budget: Single Family Insurance System (SFIS) A43, The ''*Does HUD Owe You a Refund?*'' website, and Premium Refund Application Upload webpage.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

(A) To the National Archives and Records Administration, Office of Government Information Services (OGIS), to the extent necessary to fulfill its responsibilities in 5 U.S.C. 552(h), to review administrative agency policies, procedures, and compliance with the Freedom of Information Act (FOIA), and to facilitate OGIS's offering of mediation service to resolve disputes between persons making FOIA requests and administrative agencies.

(B) 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.

(C) To contractors, grantees, experts, consultants, Federal agencies, and non-Federal entities, including, but not limited to, State and local governments and other research institutions or their parties, and entities and their agents with whom HUD has a contract, service agreement, grant, cooperative agreement, or other agreement, for the purposes of statistical analysis and research in support of program operations, management, performance monitoring, evaluation, risk management, and policy development, or to otherwise support the Department's mission. Records under this routine use may not be used in whole or in part to make decisions that affect the rights, benefits, or privileges of specific individuals. The results of the matched information may not be disclosed in identifiable form.

(D) To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, or cooperative agreement with HUD, when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function.

(E) To authorized requesters or third-party tracers who request access to Upfront Mortgage Insurance Premiums homeowner refund and distributive share payment information, when such information is unavailable on HUD's FOIA reading room or *Does HUD Owe You a Refund?* websites. This information is releasable under FOIA. Third party release of this material may require authorized consent of the homeowner to whom the records belong and must adhere to all HUD procedures prior to release.

(F) To the U.S. Department of the Treasury for collection and disbursement of check transactions.

(G) To the general public when, after two-years of attempting to contact each unpaid mortgagor of their FHA insurance refund, the Department makes available a cumulative listing of any unpaid refund that remains unpaid. The information that will be disclosed includes eligible mortgagor(s) full name, last known address, refund amount, termination date, and FHA case number. This information is available to the public on HUD's refund database ''*Does HUD Owe You A Refund?*'' and ''FOIA Mortgage Insurance State List Page.''

(H) To the recorders' offices for recording legal documents and responses to offsets (*i.e.,* child support) or other legal responses required during the servicing of the insured loan to allow HUD to release mortgage liens and respond to bankruptcies or deaths of mortgagors to protect the interest of the Secretary of HUD.

(I) To appropriate federal, state, local, tribal, or foreign governmental agencies or multilateral governmental organizations, with the approval of the Chief Privacy Officer, when HUD is aware of a need to use relevant data for purposes of testing new technology.

(J)(1) To another Federal agency or Federal entity when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (a) responding to a suspected or confirmed breach or (b) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

(K) To appropriate agencies, entities, and persons when (a) HUD suspects or has confirmed that there has been a breach of the system of records; (b) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD (including its information systems, programs, and operations), the Federal Government, or national security; and (c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

(L) To appropriate Federal, State, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws, when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

(M) To a court, magistrate, administrative tribunal, or arbitrator in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, mediation, or settlement negotiations, or in connection with criminal law proceedings; when HUD determines that use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where HUD has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

(N) To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (1) HUD, or any component thereof; or (2) any HUD employee in his or her official capacity; or (3) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (4) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper and electronic.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by Name, SSN and Property Address.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

(1) Payments and Disbursements files. Temporary. Destroy 6 years after final payment or cancellations, but longer retention is authorized if required for business use.

(2) System development/infrastructure project files. Temporary. Destroy 5 years after project is terminated, but longer retention is authorized if required for business use.

(3) System general technology management records. Temporary. Destroy 5 years after system is superseded by a new iteration, or is terminated, defunded, or no longer needed for agency/IT administrative purposes, but longer retention is authorized if required for business use.

(4) System technical documents. Temporary. Destroy 5 years after the project/activity/transaction is completed or superseded, or the associated system is terminated, or the associated data is migrated to a successor system, but longer retention is authorized if required for business use.

(5) System access records. Temporary. Destroy 6 years after password is altered or user account is terminated, but longer retention is authorized if required for business use.

(6) System backups and tape library records (Incremental backup files). Temporary. Destroy when second subsequent backup is verified as successful, or when no longer needed for system restoration, whichever is later.

(7) System backups and tape (full backup files). Temporary. Destroy when subsequent backup is verified as successful or when no longer needed for system restoration, whichever is later.

(8) System backup on master files. Temporary. Destroy when second subsequent backup is verified as successful or when no longer needed for system restoration, whichever is later.

(9) Premium Refund Application website search files. Temporary. Destroy upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later.

(10) Premium Refund Application Upload page files. Temporary. Destroy upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later.

(11) System input/output files. Temporary. Destroy upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later.

(12) Paper Records and related technical documentation. Temporary. Destroy upon verification of successful creation of the final document or file, or when no longer needed for business use, whichever is later.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

Administrative Controls: Backups Secured Off-Site, Methods to Ensure Only Authorized Personnel Access to PII, Periodic Security Audits, and Regular Monitoring of User's Security Practices. Technical Controls: Encryption of Data at Rest, Firewall, Role-Based Access Controls, Virtual Private Network (VPN), Encryption of Data in Transit, Least Privilege Access, User Identification and Password, PIV Card, Intrusion Detection System (IDS).

Physical Safeguards: Combination locks, Key Cards, Security Guards, Identification badges, and all paper records that contain PII and sensitive information are locked in file rooms.

RECORD ACCESS PROCEDURES:

Individuals seeking notification of and access to their records in this system of records may submit a request in writing to the Department of Housing and Urban Development, Attn: FOIA Program Office, 451 7th Street SW, Suite 10139, Washington, DC 20410–0001. or by emailing *foia@hud.gov.* Individuals must furnish the following information for their records to be located:

1. Full name.
2. Signature.
3. The reason why the individual believes this system contains information about him/her.
4. The address to which the information should be sent.

CONTESTING RECORD PROCEDURES:

Same as the Notification Procedures above.

NOTIFICATION PROCEDURES:

Any person wanting to know whether this system of records contains information about him or her should contact the System Manager. Such person should provide his or her full name, position title and office location at the time the accommodation was requested, and a mailing address to which a response is to be sent.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

DSRS SORN: 81 FR 22293 (April 15, 2016)

DSRS SORN: 72 FR 40890 (July 25, 2007)

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2022–22103 Filed 10–11–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–7062–N–17]

Privacy Act of 1974: System of Records

AGENCY: Office of Chief Human Capital Officer, HUD.

ACTION: Notice of a modified system of records.

SUMMARY: Pursuant to the provisions of the Privacy Act of 1974, as amended, the Department of Housing and Urban Development (HUD), the Office of Chief Human Capital Officer (OCHCO), proposes to modify the records titled *Personnel Security Integrated Tracking System (PerSIST).* PerSIST is an enterprise personnel security case management system that automates activities associated with the tracking of personnel security investigations for HUD. The Department of Housing and Urban Development is issuing a public notice of its intent to modify the Personnel Security Integrated System for Tracking (PerSIST). This system of records is being modified to make clarifying notification in the supplementary information that the process is being partially automated, which will become effective immediately.

DATES: Comments will be accepted on or before November 14, 2022. 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 by one method:

Federal e-Rulemaking Portal: http://www.regulations.gov. Follow the instructions provided on that site to submit comments electronically.

Fax: 202–619–8365.

Email: www.privacy@hud.gov.

Mail: Attention: Privacy Office; LaDonne White, Chief Privacy Officer; The Executive Secretariat; 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov.* including any personal information provided.

Docket: For access to the docket to read background documents or comments received go to *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: LaDonne White, 451 Seventh Street SW, Room 10139; Washington, DC 20410–0001; telephone number 202–708–3054 (this is not a toll-free number). Individuals who are hearing- or speech-impaired can dial 7–1–1 to access the Telecommunications Relay Service (TRS), which permits users to make text-based calls, including Text Telephone (TTY) and Speech to Speech (STS) calls. Individuals who require an alternative aid or service to communicate effectively with HUD should email the point of contact listed above and provide a brief description of their preferred method of communication.

SUPPLEMENTARY INFORMATION: The Personnel Security Integrated Tracking System (PerSIST) system of records was most recently published in the **Federal Register** on May 11th, 2018 (83 FR 22094). The Department is hereby modifying that notice by updating the supplementary information.PerSIST was integrated with the Government Services Administration's (GSA) USAccess system to help facilitate the issuance of the commonly approved credential (HSPD–12 Credential), often referred to as the Privately Identifiable Verification Card (PIV), that supports activities like enrollment, personal data updates, fingerprinting, badge pickup, sponsorship, and PIV credential operations. PerSIST was also integrated with the Defense Counterintelligence and Security Agency's Electronic Delivery (DCSA) (eDelivery) system, which is an electronic assembly and delivery of investigative case materials to the requesting agency. These integrations partially, automates HUD's process to subsequently, increase the timeliness and efficiency of the investigative process.

SYSTEM NAME AND NUMBER:

Personnel Security Integrated System for Tracking HUD/OCHCO–02.

SECURITY CLASSIFICATION:

Unclassified.

SYSTEM LOCATION:

Records are maintained at the following locations: U.S. Department of Housing and Urban Development Headquarters location, Room 2135, 451 7th Street SW, Washington, DC 20410–0001.

SYSTEM MANAGER(S):

Director, Cyrus Walker, Personnel Security Division (PSD), Office of the Chief Human Capital Officer (OCHCO), 451 7th Street SW, U.S. Department of Housing and Urban Development; Washington, DC 20410–000.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Relative to the purpose of your investigation, the U.S government is authorized to request this information under Executive Orders: 10865, 12333, 12356, and 13764. Sections 3301 and 9101, of title 5, U.S. Code; section 2165 of title 42, U.S. Code; sections 781 to 887 of title 50, U.S. Code; parts 5, 732, and 736 of title 5, Code of Federal Regulations; and Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors, August 21, 2004. Amending the civil service rules, Executive Order 13488, and Executive Order 13467, Privacy Act of 1974, 5 U.S.C. 552a.

PURPOSE OF THE SYSTEM:

The purpose of the system is to allow HUD to document and support decisions regarding the suitability, eligibility, and fitness for services of applicants for federal employment and contract positions to include students, interns, or volunteers eligible for logical and physical access to federally controlled facilities and information systems; eligible to hold sensitive positions (including but not limited to eligibility for access to classified information); fit to perform work for or on behalf of the Government as a contractor employee; qualified for Government service; qualified to perform contractual services for the Government; and loyal to the United States. Another purpose for this system is also to document such determinations, and to otherwise comply with mandates and Executive Orders. These records may also be used to locate individual for personnel research, as well as to document security violations, and supervisory actions taken. Additionally, these records may be used to help streamline and make more efficient the investigations and adjudications processes generally.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Current HUD Employees, Applicants, Contractors, Students, Interns, and volunteers

CATEGORIES OF RECORDS IN THE SYSTEM:

Full Name, date of birth, birthplace, social security number, home address, phone numbers, employment history, contact information, citizenship, relatives, birth dates, birth place; criminal history, mental health history, history of drug use, financial information, fingerprints, report of investigation, results of suitability decisions, security clearance(s); date of issuance, request for appeal, witness statements, investigator's notes, tax returns, credit reports, security violations, circumstances of violation, and agency action taken.

RECORD SOURCE CATEGORIES IN THE SYSTEM:

Individuals, Defense Counterintelligence and Security Agency, Office of Personnel Management, GSA. OPM e-QIP —General Services Administration (GSA) USAccess- Defense Counterintelligence Security Agency (DCSA) e-Delivery

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. 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.

2. To appropriate Federal, State, local, tribal, or governmental agencies or multilateral governmental organizations responsible for investigating or prosecuting the violations of, or for enforcing or implementing, a statute, rule, regulation, order, or license, where HUD determines that the information would assist in the enforcement of civil or criminal laws and when such records, either alone or in conjunction with other information, indicate a violation or potential violation of law.

(3). To any component of the Department of Justice or other Federal agency conducting litigation or in proceedings before any court, adjudicative, or administrative body, when HUD determines that the use of such records is relevant and necessary to the litigation and when any of the following is a party to the litigation or have an interest in such litigation: (I) HUD, or any component thereof; or (II) any HUD employee in his or her official capacity; or (III) any HUD employee in his or her individual capacity where the Department of Justice or agency conducting the litigation has agreed to represent the employee; or (IV) the United States, or any agency thereof, where HUD determines that litigation is likely to affect HUD or any of its components.

4. (a) To appropriate agencies, entities, and persons when: (I) HUD

suspects or has confirmed that there has been a breach of the system of records; (II) HUD has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, HUD (including its information systems, programs, and operations), the Federal Government, or national security; and (III) The disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

5. (b) To another Federal agency or Federal entity, when HUD determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (I) responding to a suspected or confirmed breach or (II) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

6. Accept as noted on Forms SF–85, 85P, and 86, when a record on its face, or in junction with other records, made to the appropriate public authority, whether Federal, foreign, State, local, or tribal, or otherwise, enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto, if the information disclosed is relevant to any enforcement, regulatory, investigative or prosecutorial responsibility of the receiving entity.

7. To contractors, grantees, experts, consultants and their agents, or others performing or working under a contract, service, grant, or cooperative agreement with HUD or under contract to another agency when necessary to accomplish an agency function related to a system of records. Disclosure requirements are limited to only those data elements considered relevant to accomplishing an agency function.

8. To a Federal, State, or local agency, or other appropriate entities or individuals, or through established liaison channels to selected foreign governments, in order to enable an intelligence agency to carry out its responsibilities under the National Security Act of 1947 as amended, the CIA Act of 1949 as amended, Executive Order 12333 or any successor order, applicable national security directives, or classified implementing procedures with 54836 **Federal Register**/Vol. 71, No. 181/Tuesday, September 19, 2006/Notices approved by the Attorney General and promulgated pursuant to such statutes, orders or directives.

9. To the Office of Personnel Management (OPM), the Merit Systems Protection Board (and its office of the Special Counsel), the Federal Labor Relations Authority (and its General Counsel), or the Equal Employment Opportunity Commission when requested in performance of their authorized duties of exclusive representation concerning personnel policies, practices, and matters affecting work conditions.

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Paper and electronic records.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

Records are retrieved by name and social security number.

POLICIES AND PRACTICIES FOR RETENTION AND DISPOSAL OF RECORDS:

Destroy 3 years after employee separation from the agency or all appeals are concluded whichever is later, but longer retention is authorized if required for business use.

ADMINISTRATIVE, TECHNICAL, AND PHYSICAL SAFEGUARDS:

For Paper Records: Comprehensive paper records are kept in locked metal file cabinets in locked rooms in HUD Headquarters, in the Personnel Security Division which is the office responsible for suitability determinations. Access to the records is limited to those employees who have a need for them in the performance of their official duties.

For Electronic Records: Comprehensive electronic records are kept in the Personnel Security Division. Access to the records is restricted to those who have specific roles in the Personal Security Division and require access to background investigative data to perform their duties; and who have been given a password or two (2) factor authentication to access applicable files within the system including background investigative data. An electronic audit trail is maintained within the system and reviewed periodically to identify and track authorized/unauthorized access.

For Electronic Records (cloud based): Comprehensive electronic records are secured and maintained on a cloud-based software server and operating system that resides in Federal Risk and Authorization Management Program (FedRAMP) and Federal Information Security Management Act (FISMA) Moderate dedicated hosting environment. All data located in the cloud-based server is firewalled and encrypted at rest and in transit. The security mechanisms for handing data at rest and in transit are in accordance with HUD encryption standards.

RECORD ACCESS PROCEDURES:

Individuals seeking notification of and access to their records in this system of records may submit a request in writing to the Department of Housing and Urban Development, Attn: FOIA Program Office, 451 7th Street SW, Suite 10139, Washington, DC 20410–0001 or by emailing *foia@hud.gov.* Individuals must furnish the following information for their records to be located:

1. Full name.
2. Signature.
3. The reason why the individual believes this system contains information about him/her.
4. The address to which the information should be sent.

CONTESTING RECORD PROCEDURES:

Same as the Notification Procedures below.

NOTIFICATION PROCEDURES:

Any person wanting to know whether this system of records contains information about him or her should contact the System Manager. Such person should provide his or her full name, position title and office location at the time the accommodation was requested, and a mailing address to which a response is to be sent.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

Persist system published in the **Federal Register** dated May 11, 2018 (83 FR 22094).

LaDonne White,

Chief Privacy Officer, Office of Administration.

[FR Doc. 2022–22104 Filed 10–11–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–6357–N–01]

Notice of HUD-Held Multifamily and Healthcare Loan Sale (MHLS 2023–1)

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner, HUD.

ACTION: Notice of sale of one multifamily and 15 healthcare mortgage loans.

SUMMARY: This notice announces HUD's intention to sell one unsubsidized multifamily and fifteen unsubsidized healthcare mortgage loans, without

Federal Housing Administration (FHA) insurance, in a competitive, sealed bid sale on or about November 16, 2022 (MHLS 2023–1 or Loan Sale). This notice also describes generally the bidding process for the sale and certain persons who are ineligible to bid.

DATES: A Bidder's Information Package (BIP) will be made available on or about October 19, 2022. Bids for the loans must be submitted on the bid date, which is currently scheduled for November 16, 2022, between certain specified hours. HUD anticipates that an award or awards will be made on or before November 21, 2022. Closing is expected to take place on a specified date between November 29 and December 7, 2022.

ADDRESSES: To become a qualified bidder and receive the BIP, prospective bidders must complete, execute, and submit a Confidentiality Agreement and a Qualification Statement acceptable to HUD. Both documents will be available on the Mission Capital Advisors bidding system website: *market.missioncap.com.* This website contains information and links for sale registration and electronically completing and submitting the documents.

Questions about bidder qualification process may be sent to: Transaction Specialist at 1–844–709–0763 or email *HUDSales@FalconAssetSales.com.*

FOR FURTHER INFORMATION CONTACT: John Lucey, Director, Asset Sales, U.S. Department of Housing and Urban Development at *john.w.lucey@hud.gov.*

SUPPLEMENTARY INFORMATION: HUD announces its intention to sell, in MHLS 2023–1, sixteen (16) unsubsidized mortgage loans (Mortgage Loans), consisting of fourteen (14) first lien and one (1) 2nd lien healthcare notes secured by skilled nursing and assisted living facilities located in various locations within Illinois, Indiana, New York, Ohio, Pennsylvania, Tennessee, Texas, Vermont, and Wisconsin, and one (1) first lien multifamily note secured by a multifamily property located in Alaska. The Mortgage Loans are non-performing mortgage loans. The listing of the Mortgage Loans is included in the BIP. The Mortgage Loans will be sold without FHA insurance and with HUD servicing released. HUD will offer qualified bidders an opportunity to bid competitively on the Mortgage Loans.

The Mortgage Loans will be stratified for bidding purposes into mortgage loan pools as appropriate. Each pool will contain Mortgage Loans that generally have similar performance, property type, geographic location, lien position and other characteristics. Loans may be offered in pools of more than one loan and, or in single loan pools. Qualified bidders may bid on one or more pools.

Bidder eligibility criteria is set forth in the Qualification Statement. As detailed in the Qualification Statement, certain entities/individuals may be precluded from bidding depending on their prior involvement with the loan(s).

The Bidding Process

The BIP describes in detail the procedure for bidding in MHLS 2023–1. The BIP also includes a standardized non-negotiable loan sale agreement (Loan Sale Agreement).

As part of its bid, each bidder must submit a minimum deposit of the greater of One Hundred Thousand Dollars ($100,000) or ten percent (10%) of the aggregate bid prices for all of such bidder's bids. In the event the bidder's aggregate bid is less than One Hundred Thousand Dollars ($100,000), the minimum deposit shall be not less than fifty percent (50%) of the bidder's aggregate bid. HUD will evaluate the bids submitted and determine the successful bid(s) in its sole and absolute discretion. If a bidder is successful, the bidder's deposit will be non-refundable and will be applied toward the purchase price, with any amount beyond the purchase price being returned to the bidder. Deposits will be returned to unsuccessful bidders after notification to successful bidders. Closings are expected to take place on a specified date between November 29 and December 7, 2022.

The Loan Sale Agreement, which is included in the BIP, contains additional terms and details. To ensure a competitive auction, the terms of the bidding process and the Loan Sale Agreement are not subject to negotiation.

Due Diligence Review

The BIP describes the due diligence process for reviewing loan files in MHLS 2023–1. Qualified bidders will be able to access loan information remotely via a high-speed internet connection. Further information on performing due diligence review of the Mortgage Loans is provided in the BIP.

Mortgage Loan Sale Policy

HUD reserves the right to add Mortgage Loans to or delete Mortgage Loans from MHLS 2023–1 at any time prior to the award date. HUD also reserves the right to reject any and all bids, in whole or in part, without prejudice to HUD's right to include the Mortgage Loans in a later sale. The Mortgage Loans will not be withdrawn after the award date except as is specifically provided for in the Loan Sale Agreement.

This is a sale of unsubsidized mortgage loans, pursuant to Section 204(a) of the Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1997, (12 U.S.C. 1715z–11a(a)).

Mortgage Loan Sale Procedure

HUD selected a competitive auction as the method to sell the Mortgage Loans. This method of sale optimizes HUD's return on the sale of these Mortgage Loans, affords the greatest opportunity for all qualified bidders to bid on the Mortgage Loans, and provides the most efficient vehicle for HUD to dispose of the Mortgage Loans.

Bidder Eligibility

In order to bid in the sale, a prospective bidder must complete, execute, and submit both a Confidentiality Agreement and a Qualification Statement acceptable to HUD. The following individuals and entities are among those INELIGIBLE to bid on the Mortgage Loans being sold in MHLS 2023–1:

1. A mortgagor or healthcare operator, including its principals, affiliates, family members, and assigns, with respect to one or more of the Mortgage Loans being offered in the Loan Sale, or an Active Shareholder (as such term is defined in the Qualification Statement);

2. With respect to any other HUD multifamily and/or healthcare mortgage loan not offered in the Loan Sale, any mortgagor or healthcare operator, including any Related Party (as such term is defined in the Qualification Statement) of either, that has failed to file financial statements or is otherwise in default under such mortgage loan or is in violation or noncompliance of any regulatory or business agreements with HUD and that fails to cure such default or violation by no later than November 1, 2022;

3. Any individual or entity that is debarred, suspended, or excluded from doing business with HUD pursuant to Title 2 of the Code of Federal Regulations, Part 2424;

4. Any contractor, subcontractor and/or consultant or advisor (including any agent, employee, partner, director, principal or affiliate of any of the foregoing) who performed services for, or on behalf of, HUD in connection with MHLS 2023–1;

5. Any employee of HUD, a member of such employee's family, or an entity owned or controlled by any such

employee or member of such an employee's family;

6. Any individual or entity that uses the services, directly or indirectly, of any person or entity ineligible under provisions (3) through (5) above to assist in preparing its bid on any Mortgage Loan;

7. An FHA-approved mortgagee, including any principals, affiliates, or assigns thereof, that has received FHA insurance benefits for one or more of the Mortgage Loans being offered in the Loan Sale;

8. An FHA-approved mortgagee and/or loan servicer, including any principals, affiliates, or assigns thereof, that originated one or more of the Mortgage Loans being offered in the Loan Sale if the Mortgage Loan defaulted within two years of origination and resulted in the payment of an FHA insurance claim;

9. Any affiliate, principal or employee of any person or entity that, within the two-year period prior to November 1, 2022, serviced any Mortgage Loan or performed other services for or on behalf of HUD in regard to any Mortgage Loan;

10. Any contractor or subcontractor working for or on behalf of HUD that had access to information concerning any Mortgage Loan or provided services to any person or entity which, within the two-year period prior to November 1, 2022, had access to information with respect to any Mortgage Loan; and/or

11. Any employee, officer, director or any other person that provides or will provide services to the prospective bidder with respect to the Mortgage Loans during any warranty period established for the Loan Sale, that serviced the Mortgage Loans or performed other services for or on behalf of HUD or within the two-year period prior to November 1, 2022, provided services to any person or entity which serviced, performed services or otherwise had access to information with respect to any Mortgage Loan for or on behalf of HUD.

Other entities/individuals not described herein may also be restricted from bidding on the Mortgage Loans, as fully detailed in the Qualification Statement.

The Qualification Statement provides further details pertaining to eligibility requirements. Prospective bidders should carefully review the Qualification Statement to determine whether they are eligible to submit bids on the Mortgage Loans in MHLS 2023–1.

Freedom of Information Act Requests

HUD reserves the right, in its sole and absolute discretion, to disclose information regarding MHLS 2023–1, including, but not limited to, the identity of any successful bidder and its bid price or bid percentage for the Mortgage Loans, upon the closing of the sale of the Mortgage Loans. Even if HUD elects not to publicly disclose any information relating to MHLS 2023–1, HUD may be required to disclose information relating to MHLS 2023–1 pursuant to the Freedom of Information Act and all regulations promulgated thereunder.

Scope of Notice

This notice applies to MHLS 2023–1 and does not establish HUD's policy for the sale of other mortgage loans.

Jeffrey Little,

General Deputy Assistant Secretary, Office of Housing.

[FR Doc. 2022–22127 Filed 10–11–22; 8:45 am]

BILLING CODE 4210–67–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–ES–2022–N047; FXES11140100000–223–FF01E00000]

Draft Safe Harbor Agreement; Draft Environmental Assessment for the Marbled Murrelet in Washington

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability; request for comments.

SUMMARY: We, the U.S. Fish and Wildlife Service, have received an application from Weyerhaeuser Timber Holdings, Inc., for an enhancement of survival permit (permit) pursuant to the Endangered Species Act. If granted, the permit would authorize incidental take of the marbled murrelet, associated with forest management actions on private lands. The application includes a draft safe harbor agreement (SHA), which describes the actions the applicant will take to achieve a net conservation benefit for the marbled murrelet within its range on enrolled lands in Washington. We announce the availability of a draft environmental assessment addressing the SHA and permit application. We invite comments from all interested parties.

DATES: To ensure consideration, please submit written comments by November 14, 2022.

ADDRESSES: You may view or download copies of the draft SHA and draft EA and obtain additional information on the internet at *https://www.fws.gov/office/washington-fish-and-wildlife.* To request further information or submit written comments, please use one of the following methods, and note that your information request or comments are in reference to ''Weyerhaeuser SHA in Washington.''

- *Email: wfwocomments@fws.gov.*
- *U.S. Mail:* Public Comments Processing, Attn: FWS–R1–ES–2022–N047; U.S. Fish and Wildlife Service; Washington Fish and Wildlife Office, 510 Desmond Drive SE, Suite 102; Lacey, WA 98503.

FOR FURTHER INFORMATION CONTACT: Vince Harke, U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office (see **ADDRESSES**); telephone: 360–753–9440; email: *vince_harke@fws.gov.* Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The U.S. Fish and Wildlife Service (FWS) received an application from Weyerhaeuser Timber Holdings, Inc. (applicant), for an enhancement of survival permit (permit) pursuant to section 10(a)(1)(A) of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). The application requests a 34-year permit that would authorize take of the threatened marbled murrelet (*Brachyramphus marmoratus*), incidental to otherwise lawful timber harvest related activities within the range of the species on the enrolled lands. The application includes a safe harbor agreement (SHA), which describes the actions the applicant will take to achieve a net conservation benefit for the covered species. FWS also announces the availability of a draft environmental assessment (EA) addressing the effects of the permit application and SHA on the human environment, in accordance with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). We invite comments from all interested parties on the permit application, including the SHA and draft EA.

Background

Section 9 of the ESA prohibits ''take'' of fish and wildlife species listed as endangered or threatened. Under the ESA, the term ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill,

trap, capture, or collect, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). The term ''harm,'' as defined in our regulations, includes significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering (50 CFR 17.3). Incidental take is defined as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity (50 CFR 17.3).

Under an SHA, participating landowners undertake management activities on their property to enhance, restore, or maintain habitat conditions for species listed under the ESA to an extent that is likely to result in a net conservation benefit for the covered listed species. An SHA and its associated permit issued to participating landowners pursuant to section 10(a)(1)(A) of the ESA encourage private and other non-Federal property owners to implement conservation actions for federally listed species by assuring the participating landowners that they will not be subjected to increased property-use restrictions as a result of their efforts to either attract listed species to their property or to increase the numbers or distribution of listed species already on their property.

The SHA and its associated permit allow the property owner to alter or modify the enrolled property back to agreed-upon pre-permit baseline conditions at the end of the term of the permit, even if such alteration or modification results in the incidental take of a covered species. The baseline conditions must reflect known biological and habitat characteristics that support existing levels of use of the enrolled property by species covered in the SHA. The authorization to take listed species is contingent on the property owner complying with obligations in the SHA and the terms and conditions of the permit. The SHA's net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species. Enrolled landowners may lawfully use their enrolled property during the term of the permit and may incidentally take the listed species covered by the permit in accordance with its terms and conditions.

Permit application requirements and issuance criteria for enhancement of survival permits for SHAs are found at 50 CFR 17.22(c). More information about the Service's Safe Harbor Policy (64 FR 32717, June 17, 1999) and the Safe Harbor Regulations (68 FR 53320, September 10, 2003; and 69 FR 24084, May 3, 2004) is available at *https://www.fws.gov/service/safe-harbor-agreements.*

Proposed Action

The proposed SHA is for forest management activities associated with over 652,000 acres of privately owned lands located in 8 counties in western Washington State. The SHA would allow the applicant to maintain or increase potential nesting habitat for marbled murrelet on enrolled lands without incurring additional ESA restrictions. Under the proposed SHA, the applicant would continue to manage their forest lands for timber production in compliance with the Washington Forest Practices Rules (WAC Title 222), which include provisions for the protection of forested buffers along rivers, streams, wetlands, and unstable slopes. Because the forested buffers are largely deferred from timber harvesting, the buffers represent areas that could support potential marbled murrelet nesting habitat now or in the future. Under the SHA, the applicant will continue to protect all previously documented occupied marbled murrelet habitat on their lands. Additionally, the applicant will defer harvest in certain areas identified as potential marbled murrelet nesting habitat on enrolled lands for the term of the SHA. By volunteering to defer timber harvest in certain areas, the proposed SHA protects more forest habitat on their lands than would otherwise be protected under existing forest practices rules. The permit would provide incidental take authorization for marbled murrelets and long-term assurances for the limited timber harvest allowed within forest buffers protected under the Washington Forest Practices Rules, and for forest management activities located within 300 feet of forest buffers. The term of the SHA is 34 years (until 2056) and coincides with the term of the State of Washington's Forest Practices Habitat Conservation Plan (2006) for federally threatened or endangered salmon and other aquatic species.

National Environmental Policy Act Compliance

The proposed issuance of a permit is a Federal action that triggers the need for compliance with the National Environmental Policy Act of 1969, as amended (NEPA; 42 U.S.C. 4321 *et seq.*). Pursuant to the requirements of NEPA, we have prepared a draft environmental assessment (EA) to analyze the environmental impacts of a reasonable range of alternatives to the proposed permitting action.

Alternatives analyzed in the draft EA include a no-action alternative, the proposed action, and an additional action alternative. Under the no-action alternative, the proposed Federal action of issuing the permit would not proceed. The proposed action is implementation of the SHA and issuance of the requested permit, as described above and in more detail in the SHA. In the additional action alternative, an SHA similar to the proposed action would be developed and implemented with additional set-asides, including conservation activities other than or in addition to those outlined in the proposed action.

Public Comments

You may submit your comments and materials by one of the methods listed in the **ADDRESSES** section. We specifically request information, views, and opinions from interested parties regarding our proposed Federal action, including on the adequacy of the SHA pursuant to the requirements for permits at 50 CFR parts 13 and 17 and the adequacy of the draft EA pursuant to the requirements of NEPA.

Public Availability of Comments

All comments and materials we receive become part of the public record associated with this action. Before including your address, phone number, email address, or other personally identifiable information in your comments, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available at any time. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so.

Next Steps

After public review and completion of the EA, we will determine whether the proposed action warrants a finding of no significant impact or whether an environmental impact statement should be prepared pursuant to NEPA. We will evaluate the permit application, associated documents, and any comments received to determine if the permit application meets the requirements of section 10(a)(1)(A) of the ESA. We will also evaluate whether issuance of the requested permit complies with section 7(a)(2) of the ESA by conducting an intra-Service consultation. The final NEPA and permit determinations will not be completed until after the end of the 30-day comment period; in making these determinations, we will fully consider

all substantive comments received during the comment period. If we determine that all requirements are met, we will issue a permit for take of the covered species, incidental to otherwise lawful covered activities.

Authority

We provide this notice in accordance with the requirements of the ESA and NEPA and their implementing regulations (50 CFR 17.32 and 40 CFR 1506.6, respectively).

Nanette Seto,

Acting Deputy Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2022–22078 Filed 10–11–22; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–34685; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before October 1, 2022, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by October 27, 2022.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before October 1, 2022. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers:

KEY: State, County, Property Name, Multiple Name (if applicable), Address/Boundary, City, Vicinity, Reference Number.

Arizona

Maricopa County

Guadalupe Cemetery, 4649 South Beck Ave., Tempe, SG100008342

Nebraska

Thurston County

Hensley Spring (Hōcąk Nīšoc Haci Mā'į eja), Address Restricted, Winnebago vicinity, MP100008364

Highway 73 Spring (Hōcąk Nīšoc Haci Mā'į eja), Address Restricted, Winnebago vicinity, MP100008365

Sampson Spring (Hōcąk Nīšoc Haci Mā'į eja), Address Restricted, Winnebago vicinity, MP100008366

New York

Essex County

Graves Mansion, 27 Church Ln., Au Sable Forks, SG100008338

Franklin County

Corey Cottage (Saranac Lake MPS), 19 Helen St., Saranac Lake, MP100008337

Lewis County

Martinsburg Common School District #4, 6503 Ramos Rd., Martinsburg, SG100008340

Monroe County

Sperbeck, Martin & Andrew, House, 200 South Main St., Fairport, SG100008336

New York County

Lithuanian Alliance of America, 307 West 30th St., Manhattan, SG100008334

West Harlem Historic District, West 135th to West 153rd Sts. between Amsterdam Ave. and Riverside Dr., Manhattan, SG100008341

Niagara County

Buildings on Niagara Street at Fourth Street, 308–328 Niagara St., Niagara Falls, SG100008345

Ontario County

Naples South Main Street Historic District, Portions of James, South Main, Reed, Sprague, and Weld Sts., Naples, SG100008347

Seneca County

Huntington Building, The, 201 Fall St., Seneca Falls, SG100008335

South Dakota

Brookings County

Archaeological Site 39BK0003 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Bruce vicinity, MP100008354

Archaeological Site 39BK0102 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Bruce vicinity, MP100008355

Lawrence County

Patterson Homestead, 12445 Misty Meadows Rd., Nemo vicinity, SG100008361

Marshall County

Archaeological Site 39ML0012 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Britton vicinity, MP100008356

Archaeological Site 39ML0002 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Lake City vicinity, MP100008357

Archaeological Site 39ML0032 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Lake City vicinity, MP100008358

Minnehaha County

Archaeological Site 39MH0005 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Sioux Falls vicinity, MP100008359

Pennington County

Reynolds, Joseph, Ranch Yard and Stage Stop, 22875 South Rochford Rd., Rochford vicinity, SG100008362

Roberts County

Archaeological Site 39RO0073 (Burial Mounds in South Dakota 50 B.C. to A.D. c.1875 MPS), Address Restricted, Sisseton vicinity, MP100008360

Wisconsin

Dane County

Madison Saddlery Company, 313–317 East Wilson St., Madison, SG100008333

Waukesha County

St. Mary's Catholic Church Complex, 225 South Hartwell Ave. and 520 East Newhall Ave., Waukesha, SG100008332

A request for removal has been made for the following resources:

Tennessee

Blount County

Gillespie, James, House (Blount County MPS), Lowes Ferry Rd., 1 mi. N of Louisville, Louisville vicinity, OT89000880

Grundy County

Scott Creek Stone Arch Bridge (Grundy County MRA),

Over Scott Creek at Flat Branch Rd., Coalmont vicinity, OT87000539

Meigs County

Buchanan House (Meigs County, Tennessee MRA), Vernon St., Decatur, OT82003996

Additional documentation has been received for the following resources:

New York

Albany County

Slingerlands Historic District (Additional Documentation), New Slingerlands & Mullens Rds., Bridge St., Slingerlands, AD12000007

Nominations submitted by Federal Preservation Officers:

The State Historic Preservation Officer reviewed the following nominations and responded to the Federal Preservation Officer within 45 days of receipt of the nominations and supports listing the properties in the National Register of Historic Places.

California

Monterey County

Pinnacles National Park Roads, 5000 East Entrance Rd., Pinnacles National Park (PINN), Paicines vicinity, SG100008339

North Carolina

Haywood County

Cataloochee Historic District (Great Smoky Mountains National Park MPS), Cataloochee Rd., Great Smoky Mountains National Park (GRSM), Cataloochee, MP100008348

Authority: Section 60.13 of 36 CFR part 60.

Dated: October 5, 2022.

Sherry A. Frear,

Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2022–22138 Filed 10–11–22; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Bureau of Safety and Environmental Enforcement

[EEEE500000 223E1700D2 ET1SF0000.EAQ000; BOEM–2021–0043]

Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf

AGENCY: Bureau of Safety and Environmental Enforcement (BSEE)

ACTION: Notice of availability of the Draft Programmatic Environmental Impact Statement for Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf.

SUMMARY: BSEE announces the availability of the Draft Programmatic Environmental Impact Statement (PEIS) for Oil and Gas Decommissioning Activities on the Pacific Outer Continental Shelf (OCS). This Notice of Availability (NOA) is published pursuant to the regulations implementing the provisions of the National Environmental Policy Act. The Bureau of Ocean Energy Management (BOEM) assisted BSEE in the preparation of this environmental impact statement. BSEE and BOEM prepared the Draft PEIS to inform BSEE's future decisions on operator applications to decommission OCS oil and gas platforms and associated infrastructure off the Southern California coast. The Army Corps of Engineers participated as a cooperating agency. This notice marks the start of the public review and comment period and announces two virtual public meetings. After the public meetings and written comments on the Draft PEIS have been reviewed and considered, a final PEIS will be prepared.

DATES: Comments on this Draft PEIS will be accepted until November 28, 2022. BOEM and BSEE will host two virtual public meetings on the Draft PEIS as follows:

- Thursday, November 10, 2022; 3:00 p.m.–5:00 p.m. Pacific Standard Time (PST)
- Wednesday, November 15, 2022; 11:00 a.m.–1:00 p.m. (PST)

Information regarding these meetings can be found at *www.boem.gov/Pacific-Decomm-PEIS* by clicking on the blue ''*Public Meeting*'' tab.

ADDRESSES: You may submit your comments through the Federal eRulemaking Portal at *http://www.regulations.gov.* In the search box, enter ''BOEM–2021–0043'' and then ''Search.'' Click on the ''Comment'' button below the document link. Enter your information and comment, then click ''Submit Comment.''

Written comments should be enclosed in an envelope labeled ''Comments on the Draft PEIS for Decommissioning Activities on the Pacific OCS'' and mailed to Mr. Richard Yarde, Regional Supervisor, Bureau of Ocean Energy Management, Pacific OCS Region, 760 Paseo Camarillo, Suite 102, Camarillo, CA 93010–6002.

Comments by email should be sent to: *richard.yarde@boem.gov.* Please see the **SUPPLEMENTARY INFORMATION** section below for information on submitting comments via the internet and the public disclosure of commenters' names and addresses.

FOR FURTHER INFORMATION CONTACT: You may contact Mr. Richard Yarde, Regional Supervisor, Bureau of Ocean Energy Management, Pacific OCS Region, 760 Paseo Camarillo, Suite 102, Camarillo, CA 93010–6002. You may also contact Mr. Yarde by telephone at (805) 384–6379 or email at *richard.yarde@boem.gov.*

SUPPLEMENTARY INFORMATION:

Proposed Action: The proposed action evaluated in this PEIS is for BSEE to review and accept or reject, or approve with conditions, operator decommissioning applications for the removal and disposal of OCS oil and gas platforms, associated pipelines, and other facilities. Under the proposed action, all platforms, pipelines, and other facilities, and their related infrastructure, would be removed to a depth below the mudline, as required by regulation (15 feet; 30 CFR 250.1728(a)).

Alternatives Considered: The four alternatives analyzed in the Draft PEIS include Complete Removal (Proposed Action), Partial Removal without artificial reef option, Partial Removal with artificial reef option, and the No Action alternative. The activities analyzed in the PEIS include, but are not limited to, complete removal of the platforms employing non-explosive severance, removal of associated pipelines and other facilities and obstructions, onshore disposal, abandonment-in-place of associated pipelines, complete removal of topside superstructure, partial jacket removal to at least 26m (85 ft) below the waterline, as well as three sub-alternatives using explosive severance for the platform jackets.

Availability of the Draft PEIS: You may download or view the Draft PEIS, appendices, and associated information on the following website: *www.boem.gov/Pacific-Decomm-PEIS.*

Information on Submitting Comments: BSEE and BOEM do not accept anonymous comments. Your name and contact information are required to submit comments on the Federal eRulemaking Portal. Before including your name, return address, phone number, email address, or other personally identifiable information in your comment, you should be aware that your entire comment—including your personally identifiable information—may be made publicly available. In order for BSEE and BOEM to withhold from disclosure your personally identifiable information, you must identify, in a cover letter, any information contained in the submittal of your comments that, if released, would constitute a clearly unwarranted invasion of your personal privacy. You must also briefly describe in such cover letter any possible harmful

consequences of the disclosure of information, such as embarrassment, injury, or other harm. While you can ask us in your comment to withhold your personally identifiable information from public review, we cannot guarantee that we will be able to do so. Even if BSEE and BOEM withhold your information in the context of this comment period, your submission is subject to the Freedom of Information Act (FOIA) and any relevant court orders, and if your submission is requested under the FOIA or such court order, your information will only be withheld if a determination is made that one of the FOIA's exemptions to disclosure applies or if such court order is challenged. Such a determination will be made in accordance with the Department's FOIA regulations and applicable law.

Authority: 42 U.S.C. 4231 *et seq.;* 43 CFR 46.415 (2019 *ed.*).

Kevin M. Sligh, Sr.,

Director, Bureau of Safety and Environmental Enforcement.

[FR Doc. 2022–21994 Filed 10–11–22; 8:45 am]

BILLING CODE 4310–VH–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–1280]

Certain Laptops, Desktops, Servers, Mobile Phones, Tablets, and Components Thereof; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation Based on Settlement; Termination of the Investigation

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission (''Commission'') has determined not to review an initial determination (''ID'') (Order No. 40) of the presiding administrative law judge (''ALJ'') granting a joint motion to terminate the investigation in its entirety based on settlement. The investigation is terminated.

FOR FURTHER INFORMATION CONTACT: Robert Needham, Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On September 7, 2021, the Commission instituted this investigation based on a complaint, as amended, filed on behalf of Sonrai Memory Ltd. of Carrickmines, Ireland (''Sonrai''). 86 FR 50170–71 (Sept. 7, 2021). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laptops, desktops, servers, mobile phones, tablets, and components thereof that infringe certain claims of U.S. Patent Nos. 7,159,766; 7,325,733; and 8,193,792 (''the '792 patent''). *Id.* at 50170. The complaint also alleged that a domestic industry exists or is in the process of being established. *Id.* The Commission's notice of investigation named ten respondents: Amazon.com Inc. of Seattle, Washington; Dell Technologies Inc. of Round Rock, Texas; EMC Corporation of Round Rock, Texas; Lenovo Group Ltd. of Beijing, China; Lenovo (United States) Inc. of Morrisville, North Carolina; Motorola Mobility LLC of Chicago, Illinois; LG Electronics Inc. of Seoul, South Korea; LG Electronics USA, Inc. of Englewood Cliffs, New Jersey; Samsung Electronics Co., Ltd. of Gyeonggido, South Korea; and Samsung Electronics America, Inc. of Ridgefield Park, New Jersey (collectively, ''Respondents''). *Id.* at 50171. The Office of Unfair Import Investigations (''OUII'') is participating in this investigation. *Id.*

On August 22, 2022, Sonrai and Respondents filed a joint motion to terminate the investigation in its entirety based on settlement. On September 1, 2022, OUII filed a response stating that the motion papers are overly redacted. On September 7, 2022, the ALJ ordered the parties to reduce the level of redaction in their motion papers. Order No. 39 (Sept. 7, 2022). The parties then provided new versions of the motion papers.

On September 19, 2022, the ALJ issued the subject ID granting the motion to terminate the investigation based on settlement pursuant to Commission Rule 210.21(b) (19 CFR 210.21(b)). The ID finds that the requirements of Rule 210.10(b) are satisfied and that no extraordinary circumstances prevent termination of the investigation. No party petitioned for review of the subject ID.

The Commission has determined not to review the subject ID. The investigation is hereby terminated in its entirety.

The Commission vote for this determination took place on October 5, 2022.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: October 5, 2022.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2022–22101 Filed 10–11–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

Certain Televisions, Remote Controls, and Components Thereof

[Investigation No. 337–TA–1263]

Notice of a Commission Determination To Review in Part a Final Determination To Review in Part a Final Initial Determination Finding No Violation of Section 337 and Two Related Orders

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part a final initial determination (''ID'') issued by the presiding administrative law judge (''ALJ'') on June 28, 2022, finding no violation of section 337 in the above-referenced investigation and two related Orders (Order Nos. 30 and 37).

FOR FURTHER INFORMATION CONTACT: Michael Liberman, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436, telephone (202) 205–2392. Copies of non-confidential documents filed in connection with this investigation may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.* For help accessing EDIS, please email *EDIS3Help@usitc.gov.* General information concerning the Commission

may also be obtained by accessing its internet server at *https://www.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810.

SUPPLEMENTARY INFORMATION: On May 14, 2021, the Commission instituted this investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, based on a complaint filed by Roku, Inc. of San Jose, California (''Roku''). 86 FR 26542–43 (May 14, 2021). The complaint alleged a violation of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain televisions, remote controls, and components thereof by reason of infringement of certain claims of U.S. Patent Nos. 8,378,875 (''the '875 patent'') and 7,388,511 (''the '511 patent''). The complaint also alleged that a domestic industry exists or is in the process of being established. The notice of investigation named as respondents: Universal Electronics, Inc. of Scottsdale, Arizona; Gemstar Technology (Qinzhou) Co. Ltd. of Qinzhou, China; Gemstar Technology (Yangzhou) Co. Ltd of Yanzhou, China.; C.G. Development Ltd. of Kowloon, Hong Kong; Universal Electronics BV of Enschede, the Netherlands; UEI Brasil Controles Remotos Ltda. of ManausAmazonas-Brasil, Brazil; CG México Remote Controls, S. de R.L. de C.V. of Nuevo Leon, Mexico; LG Electronics Inc. of Seoul, Republic of Korea; LG Electronics USA, Inc. of Englewood Cliffs, New Jersey; Samsung Electronics Co., Ltd. of Gyeonggi do, Republic of Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; Charter Communications, Inc. of Stamford, Connecticut; Charter Communications Operating, LLC of St. Louis, Missouri; Spectrum Management Holding Company, LLC of Stamford, Connecticut; Altice USA, Inc. of Long Island City, New York; Cablevision Systems Corp. of Bethpage, New York; Cequel Communications, LLC d/b/a Suddenlink Communications of Long Island City, New York; and WideOpenWest, Inc. of Englewood, Colorado (collectively, ''Respondents''). *Id.* at 26543. The Commission's Office of Unfair Import Investigations was not named as a party in this investigation. *Id.*

Subsequently, UEI Brasil Controles Remotos Ltda. was terminated from this investigation. Order No. 20 (Nov. 19, 2021), *unreviewed by* Comm'n Notice (Dec. 14, 2021). Also, on November 19, 2021, an initial determination issued that granted Roku's motion for partial termination of the investigation based upon withdrawal of claim 11 of the '875 patent. Order No. 19 (Nov. 19, 2021), *unreviewed by* Comm'n Notice (Dec. 14, 2021).

On June 24, 2022, the presiding ALJ issued an initial determination (Order No. 37) granting summary determination in part on the invalidity of the '511 patent and granting a joint motion for the reconsideration of Motion Docket No. 1263–015. On July 1, 2022, complainant Roku filed a petition for review of Order No. 37. On July 11, 2022, respondents Universal Electronics Inc.; Gemstar Technology (Qinzhou) Co. Ltd.; Gemstar Technology (Yangzhou) Co. Ltd.; C.G. Development Ltd.; Universal Electronics BV; CG México Remote Controls, S. de R.L. de C.V.; Samsung Electronics Co., Ltd.; Samsung Electronics America, Inc.; LG Electronics, Inc.; and LG Electronics USA, Inc. filed a response to Roku's petition for review of Order No. 37.

On June 28, 2022, the ALJ issued a final ID on violation of section 337 and a recommended determination (''RD'') on remedy and bond finding no violation of section 337. The ID held that no violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain televisions, remote controls, and components thereof of claims 1–5, 8–10, and 14 of the '875 patent and claim 5 of the '511 patent.

The ID found that the Representative Accused Products, UEI OFA Streamer Remote (URC 7935), Charter Spectrum RF4CE Remote (URC 1160), Altice/Charter Pulse RF Remote (URC 2068), and WOW Experience Remote (URC 2135), satisfy claims 1–5, 8, and 10 of the '875 patent. The ID also found that Representative Accused Products, Altice/Charter Pulse RF Remote (URC 2068) and WOW Experience Remote (URC 2135), satisfy claim 9 of the '875 patent. The ID further found that it has been shown by clear and convincing evidence that the asserted claims of the '875 and '511 patents are invalid. The ID found that Roku's domestic industry product does not practice any of the claims of the '875 patent. The ID also found that Roku's domestic activities with respect to its DI product do not satisfy the economic prong of the domestic industry requirement under 19 U.S.C. 337(a)(3)(B).

On July 11, 2022, complainant Roku filed a petition for review of various portions of the final ID. Likewise, on July 11, 2022, respondents Universal Electronics Inc.; Gemstar Technology (Qinzhou) Co. Ltd.; Gemstar Technology (Yangzhou) Co. Ltd.; C.G. Development Ltd.; Universal Electronics BV; CG México Remote Controls, S. de R.L. de C.V.; Charter Communications, Inc., Charter Communications Operating, LLC, and Spectrum Management Holding Company, LLC; Altice USA, Inc., Cablevision Systems Corp., and Cequel Communications, LLC d/b/a Suddenlink Communications; and WideOpenWest, Inc. filed a contingent petition for review of the various portions of the final ID.

On July 19, 2022, Respondents filed a response to Roku's petition for review. On the same day, Roku filed its response to Respondents' contingent petition for review of the final ID. No other petitions or responses to petitions were filed.

Having examined the record in this investigation, including the final ID, the petitions for review, and the responses thereto, the Commission has determined to review in part the ID and Order Nos. 30 and 37. Specifically, the Commission has determined to review the ID's infringement, invalidity, technical prong, and economic prong findings regarding the '875 patent and the invalidity findings regarding the '511 patent. The Commission has also determined to review Order Nos. 30 and 37 as they relate to the invalidity of the '511 patent.

The Commission has determined not to review the remainder of the ID and Order Nos. 30 and 37. The Commission does not request additional briefing.

The Commission vote for this determination took place on October 5, 2022.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in Part 210 of the Commission's Rules of Practice and Procedure, 19 CFR part 210.

By order of the Commission.

Issued: October 5, 2022.

William Bishop,

Supervisory Hearings and Information Officer.

[FR Doc. 2022–22102 Filed 10–11–22; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–673–675 and 677 (Final)]

Steel Nails From India, Oman, Sri Lanka and Turkey

Determinations

On the basis of the record [1] developed in the subject investigations, the United States International Trade Commission (''Commission'') determines, pursuant to the Tariff Act of 1930 (''the Act''), that an industry in the United States is not materially injured or threatened with material injury by reason of imports of steel nails from India, Oman, and Turkey, provided for in subheadings 7317.00.55, 7317.00.65, and 7317.00.75 of the Harmonized Tariff Schedule of the United States, that have been found by the U.S. Department of Commerce (''Commerce'') to be subsidized by the governments of India, Oman, and Turkey.[2] The Commission further finds that imports of steel nails from Sri Lanka that Commerce has determined are subsidized by the government of Sri Lanka are negligible and terminates that investigation.

Background

The Commission instituted these investigations effective December 30, 2021, following receipt of petitions filed with the Commission and Commerce by Mid Continent Steel & Wire, Inc., Poplar Bluff, Missouri. The Commission scheduled the final phase of the investigations following notification of preliminary determinations by Commerce that imports of steel nails from India, Oman, Sri Lanka, Thailand,[3] and Turkey were being subsidized within the meaning of section 703(b) of the Act (19 U.S.C. 1671b(b)). Notice of the scheduling of the final phase of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the **Federal Register** of June 21, 2022 (87 FR 36882). In light of the restrictions on access to the Commission building due to the COVID–19 pandemic, the Commission conducted its hearing through written testimony and video conference on August 17, 2022. All persons who requested the opportunity were permitted to participate.

The Commission made these determinations pursuant to § 705(b) of the Act (19 U.S.C. 1671d(b)). It completed and filed its determinations in these investigations on October 6, 2022. The views of the Commission are contained in USITC Publication 5370 (October 2022), entitled *Steel Nails from India, Oman, Sri Lanka, and Turkey: Investigation Nos. 701–TA–673–675 and 677 (Final).*

By order of the Commission.

Issued: October 6, 2022.

Katherine Hiner,

Acting Secretary to the Commission.

[FR Doc. 2022–22148 Filed 10–11–22; 8:45 am]

BILLING CODE 7020–02–P

[1] The record is defined in § 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR 207.2(f)).

[2] 87 FR 51333, August 22, 2022; 78 FR 51335, August 22, 2022; and 87 FR 51339, August 22, 2022.

[3] Commerce published notice in the **Federal Register** of a negative final determination of subsidies in connection with the investigation concerning steel nails from Thailand (87 FR 51343, August 22, 2022). Accordingly, effective August 22, 2022, the Commission terminated its countervailing duty investigation concerning steel nails from Thailand (87 FR 55036, September 8, 2022).

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–23–0001; NARA–2023–002]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by November 28, 2022.

ADDRESSES: To view a records schedule in this notice, or submit a comment on one, use the following address: *https://www.regulations.gov/docket/NARA-23-0001/document.* This is a direct link to the schedules posted in the docket for this notice on *regulations.gov.* You may submit comments by the following method:

- *Federal eRulemaking Portal: https://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on *regulations.gov* and on submitting comments, see their FAQs at *https://www.regulations.gov/faq.*

If you are unable to comment via *regulations.gov,* you may email us at *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Kimberly Richardson, Strategy and Performance Division, by email at *regulation_comments@nara.gov* or by phone at 301–837–2902. For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule.

We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a

comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we made to the proposed schedule. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Defense, Defense Threat Reduction Agency, Weekly Arms Control Report (DAA–0374–2022–0011).
2. Department of Transportation, Federal Aviation Administration, Accident Incident Database System (DAA–0237–2021–0011).
3. Central Intelligence Agency, Agency-wide, Communications Security Accounting Records (DAA–0263–2022–0005).
4. Central Intelligence Agency, Agency-wide, Student Evaluation and Administrative Records (DAA–0263–2022–0004).
5. National Archives and Records Administration, Government-wide, GRS 3.1—Revision to Information technology oversight compliance records (DAA–GRS–2022–0007).
6. National Archives and Records Administration, Government-wide, GRS 5.7—Revision to Mandatory Reports (DAA–GRS–2022–0008).
7. National Archives and Records Administration, Government-wide, GRS 5.2—Revision to Transitory and Intermediary Records (DAA–GRS–2022–0009).
8. National Archives and Records Administration, Government-wide, GRS 4.5—Digitizing Records (DAA–GRS–2022–0010).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2022–22136 Filed 10–11–22; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL SCIENCE FOUNDATION

Advisory Committee for Integrative Activities; Notice of Meeting

In accordance with the Federal Advisory Committee Act (Pub. L. 92–463, as amended), the National Science Foundation (NSF) announces the following meeting:

Name and Committee Code: Advisory Committee for Integrative Activities (#1373).

Date and Time: November 3, 2022; 9:00 a.m.–5:00 p.m.

November 4, 2022; 9:00 a.m.–4:00 p.m.

Place: National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314/Virtual Meeting Registration: Virtual attendance information will be forthcoming on the OIA website at *http://www.nsf.gov/od/oia/activities*

Type of Meeting: Part-open.

Contact Person: Dr. Bernice Anderson, Senior Advisor and Contracting Officer's Representative, Office of Integrative Activities (OIA), National Science Foundation, 2415 Eisenhower Avenue, Alexandria, VA 22314. Contact Information: 703–292–8040, *banderso@nsf.gov.*

Purpose of Meeting: To provide advice and recommendations about the use of and need for the Science and Technology Policy Institute.

Agenda

Day 1—Open, Thursday, November 3, 2022

- *9:00 a.m.–Noon: Welcome, Charge to the Panel, Overview of STPI and STPI Research Presentation*
- *1:30 p.m.–5:00 p.m.: Presentations/Briefings of the Office of Science and Technology and the National Science Foundation Representatives; Discussions about the Need and Use of STPI*

Day 2—Part Closed, Friday, November 4, 2022

- *9:00 a.m.–11:15 a.m.: (Open)—Presentations/Briefings by other Government Clients*
- *11:15 a.m.–4:00 p.m.: (Closed)—Review of the Contract and Report Writing*

Purpose of Closing: The contract being reviewed includes information of proprietary or confidential nature, including technical and personal data that must be considered in the evaluation and the development of recommendations. These matters are exempt under 5 U.S.C. 552b(c), (4), (6) and (9) (B) of the Government in the Sunshine Act.

Dated: October 6, 2022.

Crystal Robinson,

Committee Management Officer.

[FR Doc. 2022–22120 Filed 10–11–22; 8:45 am]

BILLING CODE 7555–01–P

NEIGHBORHOOD REINVESTMENT CORPORATION

Sunshine Act Meetings

TIME AND DATE: 2 p.m., Thursday, October 20, 2022.

PLACE: Via Conference Call.

STATUS: Parts of this meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Regular Board of Directors meeting.

The General Counsel of the Corporation has certified that in his opinion, one or more of the exemptions set forth in the Government in the Sunshine Act, 5 U.S.C. 552b (c)(2) and (4) permit closure of the following portion(s) of this meeting:

- Executive Session

Agenda

I. CALL TO ORDER
II. Sunshine Act Approval of Executive (Closed) Session
III. Executive Session Report from CEO
IV. Executive Session: Report from CFO
V. Executive Session: General Counsel Report
VI. NeighborWorks Compass—Future Planning Discussion
VII. Action Item Approval of Minutes
VIII. Action Item FY2022 HUD Housing Counseling Award
IX. Action Item Revised Whistleblower Policy
X. Action Item Revised Code of Ethical Conduct
XI. Discussion Item September 8, 2022 Audit Committee Report
XII. Discussion Item Report From CIO
XIII. Discussion Item FY2023 Corporate Scorecard
XIV. Discussion Item DC/NYC Office Relocation Status Update
XV. Management Program Background and Updates
XVI. Adjournment

PORTIONS OPEN TO THE PUBLIC: Everything except the Executive Session.

PORTIONS CLOSED TO THE PUBLIC: Executive Session.

CONTACT PERSON FOR MORE INFORMATION: Lakeyia Thompson, Special Assistant, (202) 524–9940; *Lthompson@nw.org.*

Lakeyia Thompson,

Special Assistant.

[FR Doc. 2022–22232 Filed 10–7–22; 11:15 am]

BILLING CODE 7570–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–249, OMB Control No. 3235–0258]

Submission for OMB Review; Comment Request; Extension: Form F–1

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form F–1 (17 CFR 239.31) is used by certain foreign private issuers to register securities pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The information collected is intended to ensure that the information required to be filed by the Commission permits verification of compliance with securities law requirements and assures the public availability of such information. Form F–1 takes approximately 1,615.64 hours per response and is filed by approximately 66 respondents. We estimate that 25% of the 1,615.64 hours per response (403.91 hours) is prepared by the registrant for a total annual reporting burden of 26,658 hours (403.91 hours per response × 66 responses). An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 14, 2022 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 5, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22095 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–288, OMB Control No. 3235–0325]

Submission for OMB Review; Comment Request; Extension: Form F–4

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form F–4 (17 CFR 239.34) is used by foreign issuers to register securities in business combinations, reorganizations and exchange offers pursuant to federal securities laws pursuant to the Securities Act of 1933 (15 U.S.C. 77a *et seq.*). The information collected is intended to ensure that the information required to be filed by the Commission permits verification of compliance with securities law requirements and assures the public availability of such information. The information provided is mandatory and all information is made available to the public upon request. Form F–4 takes approximately 1,438.05 hours per response and is filed by approximately 39 respondents. We estimate that 25% of the 1,438.05 hours per response (359.51 hours) is prepared by the registrant for a total annual reporting burden of 14,021 hours (359.51 hours per response × 39 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 14, 2022 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John

Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 5, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22098 Filed 10–11–22; 8:45 am]

BILLING CODE P

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–287, OMB Control No. 3235–0324]

Submission for OMB Review; Comment Request; Extension: Form S–4

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Form S–4 (17 CFR 239.25) is the form used for registration under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) of securities issued in business combination transactions. The information collected is intended to ensure the adequacy of information available to investors in connection with business combination transactions. Form S–4 is a public document and all information provided is mandatory. Form S–4 takes approximately 3,820.89 hours per response to prepare and is filed by 588 registrants annually. We estimate that 25% of the 3,820.89 hours per response (955.223 hours) is prepared by the registrant for an annual reporting burden of 561,671 hours (955.223 hours per response × 588 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 14, 2022 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 5 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22097 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95987; File No. SR–CBOE–2022–041]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Exchange Rule 5.34(b) Related to Price Protections and Risk Controls for Complex Orders

October 5, 2022.

I. Introduction

On August 4, 2022, Cboe Exchange, Inc. (''Exchange'' or ''Cboe Options'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Exchange Rule 5.34(b) to revise the definition of butterfly spread and to adopt a new buy strategy price check that will reject or cancel vertical or butterfly spread orders to buy that have a price of zero and are not designated as either Immediate-or-Cancel (''IOC'') or Direct to PAR.[3] The proposed rule change was published for comment in the **Federal Register** on August 23, 2022.[4] On September 14, 2022, the Exchange filed Amendment No. 1 to the proposed rule change.[5] The Commission has received no comment letters regarding the proposal. The Commission is publishing this notice to solicit comment on Amendment No. 1 and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1

As described more fully in the Notice, the Exchange proposes to amend Exchange Rule 5.34(b)(4) to adopt a new buy strategy price check for complex orders. Under proposed Exchange Rule 5.34(b)(4)(B), the System cancels or rejects a vertical or butterfly spread order to buy that has a price of zero and is not designated as either IOC or Direct to PAR, and the System does not initiate a Complex Order Auction (''COA'') with a vertical or butterfly spread order to buy that has a price of zero unless the order is auctioned via PAR.[6] The

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Under the Exchange's rules, an Immediate-or-Cancel or IOC order is a limit order that must execute in whole or in part as soon as the System receives it; the System cancels and does not post to the Book an IOC order (or unexecuted portion) not executed immediately on the Exchange or another options exchange. Users may designate bulk messages as IOC. A User may not designate an IOC order as Direct to PAR. A Direct to PAR order is an order a User designates to be routed directly to a specified PAR workstation for manual handling. A User must designate a Direct to PAR order as RTH Only. *See* Exchange Rule 5.6(b).

[4] *See* Securities Exchange Act Release No. 95520 (August 17, 2022), 87 FR 51723 (''Notice'').

[5] Amendment No. 1 revises the proposal to (1) correct an error in the description section of the Form 19b–4 by stating that the component legs of a butterfly spread order have different strike prices; (2) provide additional explanation by stating that, in rare circumstances, market participants may seek to sell a vertical or butterfly spread at a price of zero to liquidate a position; (3) state that the proposal continues to provide execution opportunities for vertical and butterfly spread buy orders priced at zero through the IOC instruction or manual handling, while preventing these orders from overwhelming the Complex Order Book (''COB''); (4) state that the proposed price check does not extend to zero-priced vertical or butterfly spread sell orders, which will continue to be permitted to rest on the COB; (5) correct an error in the description section of the Form 19b–4 by stating that between January and July 2022, only 1.3% of the approximately 177 million zero-priced vertical and butterfly spread contracts (rather than orders) of the approximately 6.5 million orders submitted to rest in the COB, were filled; and (6) state that zero-bid vertical or butterfly spread orders may be submitted as part of a paired order as a cross on the trading floor or to a Complex Automated Improvement Mechanism (''C–AIM'') auction. Amendment No. 1 makes no changes to Exhibit 5 of the proposal. Amendment No. 1 is available on the Commission's website at *https://www.sec.gov/comments/sr-cboe-2022-041/srcboe2022041.htm.*

[6] For purposes of Exchange Rule 5.34(b), a vertical spread is a two-legged complex order with one leg to buy a number of calls (puts) and one leg to sell the same number of calls (puts) with the same expiration date but different exercise prices, except as set forth in Exchange Rule 5.34(b)(3)(A). *See* Exchange Rule 5.34(b)(1)(A). As discussed below, Exchange Rule 5.34(b)(1)(B), as proposed to be amended, defines a butterfly spread as a three-legged complex order with two legs to buy (sell) the same number of calls (puts) and one leg to sell (buy) twice as many calls (puts), all with the same expiration date but different exercise prices, and the exercise price of the middle leg is between the exercise prices of the other legs. The System considers a true butterfly and a skewed butterfly to be a butterfly spread. If the exercise price of the middle leg is the average of the exercise prices of the other legs, it is a ''true'' butterfly; and if the exercise price of the middle leg is less in-the-money

Exchange may apply the proposed price check on a class-by-class basis.[7]

The Exchange states that it has observed a significant and increasing number of zero-priced vertical and butterfly spread buy orders in certain classes submitted to rest in the COB.[8] The Exchange further states that these zero-priced buy orders execute infrequently against an opposing complex order and remain resting in the COB because market participants rarely desire to sell these strategies at a price of zero.[9] Based on its analysis of orders submitted from January 2022 through July 2022, the Exchange identified that approximately only 1.3% of the approximately 177 million zero-priced buy vertical and butterfly spread contracts, of the approximately 6.5 million orders submitted to rest in the COB, were filled.[10] The Exchange states that multiple Trading Permit Holders (''TPHs'') have expressed concern regarding the amount of excess market data that results from zero-priced vertical and butterfly spread buy strategies, and the Exchange believes that the high number of these orders may impede liquidity providers from executing against marketable customer interest because the stream of incoming strategies creates new data messages that liquidity providers must process and synthesize into their systems, interfering with their time and resources to process, synthesize, and react to data messages in connection with marketable customer interest.[11] In addition, the Exchange states that it has expended resources to implement multiple System enhancements to enable its System to continue to handle the large number of these strategies.[12]

The Exchange acknowledges that there may be limited cases in which market participants may seek to sell a zero-priced vertical or butterfly spread, including when liquidating a position.[13] Under the proposal, zero-priced vertical or butterfly spread sell orders will continue to be permitted to rest on the COB.[14] By requiring zero-priced vertical and butterfly spread buy orders to be designated as IOC or Direct to PAR, the Exchange states that proposed Exchange Rule 5.34(b)(4)(B) will ensure that these zero-priced buy orders are either executed immediately against marketable orders (in whole or in part) and then cancelled, or are sent to directly to a PAR workstation for manual handling by a Floor Broker.[15] The Exchange further states that by allowing zero-priced vertical and butterfly buy spread orders to be submitted only as IOC or for manual handling, including manual submission into a COA, the proposal continues to provide execution opportunities for vertical and butterfly spread strategies that are legitimately priced at zero, while preventing a significant number of these orders from overwhelming the COB.[16] Proposed Exchange Rule 5.34(b)(4)(B) provides the Exchange with flexibility to apply the proposed price check on a class-by-class basis, which will permit the Exchange to determine whether allowing zero-priced vertical and butterfly spread orders to rest in the COB is appropriate for different option classes, which may exhibit different trading characteristics and have different market models.[17]

The proposal also revises the definition of butterfly spread in Exchange Rule 5.34(b)(1)(B) to more precisely define what the Exchange's System considers to be true and skewed butterfly spreads for purposes of Exchange Rule 5.34(b) and to provide that the System considers both skewed and true butterfly spreads to be butterfly spreads. As described more fully in the Notice, Exchange Rule 5.34(b)(1)(B) currently states, in part, that ''If the exercise price of the middle leg is halfway between the exercise prices of the other legs, it is a ''true'' butterfly; otherwise, it is a ''skewed'' butterfly.'' The Exchange proposes to revise this sentence to state that ''If the exercise price of the middle leg is the average of the exercise prices of the other legs, it is a ''true'' butterfly; and if the exercise price of the middle leg is less-in-the-money than the average of the exercise prices of the other legs, it is a ''skewed'' butterfly.'' The Exchange states that the proposed changes more accurately reflect what the Exchange's System considers to be a skewed butterfly and a butterfly spread generally.[18]

III. Discussion and Commission Findings

After careful review, 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.[19] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[20] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

For the reasons set forth below, the Commission believes that the proposal to adopt a price check that will reject or cancel vertical and butterfly spread buy orders with a price of zero that are not designated as IOC or Direct to PAR is designed to protect investors and the public interest. As discussed above, orders to buy a vertical or butterfly spread for a price of zero execute infrequently and instead remain resting in the COB without being filled.[21] The Exchange states that these zero-priced vertical and butterfly spread buy orders generate a substantial amount of market data that market participants must process and synthesize into their systems, and that this excess data, about which TPHs have expressed concern, may impede liquidity providers from executing against marketable customer interest.[22] Although vertical and butterfly spread buy orders priced at zero will no longer be permitted to rest in the COB, the proposal will provide

than the average of the exercise prices of the other legs, it is a ''skewed'' butterfly.

[7] *See* proposed Exchange Rule 5.34(b)(4)(B).

[8] *See* Notice, 87 FR 51724.

[9] *See id.*

[10] *See* Amendment No. 1 at 4.

[11] *See* Notice, 87 FR 51724. In addition, the Exchange states that complex orders generate a COA auction message before resting in the COB and that the COA auction message volume resulting from the influx of zero-priced vertical and butterfly buy spread orders saturates the auction market data and may deter liquidity providers from providing auction liquidity, which adversely impacts customer orders. *See id.*

[12] *See id.*

[13] *See* Amendment No. 1 at 3.

[14] *See id.*

[15] *See* Notice, 87 FR 51725. Proposed Exchange Rule 5.34(b)(4)(B) also allows a zero-priced vertical and butterfly spread buy order to initiate a COA if the order is auctioned via PAR.

[16] *See id.*

[17] *See id.*

[18] *See* Notice, 87 FR 51725.

[19] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[20] 15 U.S.C. 78f(b)(5).

[21] *See* Notice, 87 FR 51724. As noted above, based on its analysis of such orders submitted from January 2022 through July 2022, the Exchange found that approximately only 1.3% of the approximately 177 million zero-priced buy vertical and butterfly spread contracts, of the approximately 6.5 million orders submitted to rest in the COB, were filled. *See* Amendment No. 1 at 4.

[22] *See* Notice, 87 FR 51724. In addition, the Exchange states that it has implemented multiple System enhancements to enable its System to handle the large number of these strategies. *See id.*

for the continued execution of the limited number of vertical and butterfly spread orders that are legitimately priced at zero. In this regard, vertical and butterfly spread sell orders with a price of zero will continue to have the ability to rest in the COB and market participants will be able to submit zero-priced vertical and butterfly spread IOC buy orders to execute against the resting zero-priced sell orders.[23] In addition, the proposal will allow market participants to submit vertical and butterfly spread buy orders with a price of zero as Direct to PAR for manual handling, and market participants will continue to have the ability to submit zero-bid vertical and butterfly spread orders as part of a paired order in a crossing transaction.[24]

The Commission believes that the proposed changes to the definition of butterfly spread are designed to protect investors and the public interest by providing more precise definitions of skewed and true butterfly spreads.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 1 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–CBOE–2022–041 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2022–041. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CBOE–2022–041, and should be submitted on or before November 2, 2022.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. As described more fully above, Amendment No. 1 revises the proposal to acknowledge more clearly that, in limited circumstances, vertical and butterfly spread sell orders may legitimately be priced at zero, including when a market participant seeks to liquidate a position. Amendment No. 1 also states that zero-priced vertical and butterfly spread sell orders will continue to have the ability to rest in the COB. Amendment No. 1 emphasizes that the proposal provides methods for executing vertical and butterfly spread buy orders priced at zero by allowing market participants to submit these orders as IOC or for manual handling, or as part of a paired crossing transaction. In addition, Amendment No. 1 replaces an incorrect reference to ''approximately 177 million zero-priced buy vertical and butterfly spread orders'' with a correct reference to ''approximately 177 million zero-priced buy vertical and butterfly spread contracts,'' which helps to ensure that the proposal accurately represents the scope of the issue that the proposal seeks to address. Amendment No. 1 raises no novel regulatory issues and provides additional discussion that assists the Commission in evaluating the Exchange's proposal and determining that it is consistent with the Act. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[25] to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–CBOE–2022–041), as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22083 Filed 10–11–22; 8:45 am]

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[23] *See* Amendment No. 1 at 3 and proposed Exchange Rule 5.34(b)(4)(B).

[24] *See* Exchange Rule 5.34(b)(4)(B) and Amendment No. 1 at 4.

[25] 15 U.S.C. 78s(b)(2).

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[SEC File No. 270–331, OMB Control No. 3235–0383]

Submission for OMB Review; Comment Request; Extension: Form F–7

Upon Written Request Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget this request for extension of the previously approved collection of information discussed below.

Form F–7 (17 CFR 239.37) is a registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) used to register securities that are offered for cash upon the exercise of rights granted to a registrant's existing security holders to purchase or subscribe such securities. The information collected is intended to ensure that the information required to be filed by the Commission permits verification of compliance with securities law requirements and assures the public availability of such information. The information provided is mandatory and all information is made available to the public upon request. Form F–7 takes approximately 4 hours per response to prepare and is filed by approximately 3 respondents.

We estimate that 25% of 4 hours per response (one hour) is prepared by the company for a total annual reporting burden of 3 hours (one hour per response × 3 responses).

An agency may conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by November 14, 2022 to (i) *www.reginfo.gov/public/do/PRAMain* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 5, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22094 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95986; File No. SR–MEMX–2022–29]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule

October 5, 2022

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 30, 2022, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing with the Commission a proposed rule change to amend the Exchange's fee schedule applicable to Members [3] (the ''Fee Schedule'') pursuant to Exchange Rules 15.1(a) and (c). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal on October 3, 2022. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the Fee Schedule to modify the required criteria under the Step-Up Additive Rebate.

The Exchange first 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 or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues, to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading.[4] Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow, and the Exchange currently represents approximately 3% of the overall market share.[5] The Exchange in particular operates a ''Maker-Taker'' model whereby it provides rebates to Members that add liquidity to the Exchange and charges fees to Members that remove liquidity from the Exchange. The Fee Schedule sets forth the standard rebates and fees applied per share for orders that add and remove liquidity, respectively. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

The Exchange currently offers the Step-Up Additive Rebate under which the Exchange provides an additive rebate of $0.0002 per share in addition to the otherwise applicable rebate for a qualifying Member's executions of certain orders in securities priced at or above $1.00 per share that add displayed liquidity to the Exchange (''Added Displayed Volume'').[6] Currently, a Member qualifies for the Step-Up Additive Rebate by achieving one of the following two alternative criteria: (1) a Step-Up ADAV [7] (excluding Retail Orders) from April 2022 that is equal to or greater than 0.07% of the TCV; [8] or (2) a Step-Up ADAV from July 2022 that is equal to or greater than 0.05% of the TCV and an ADAV that is equal to or greater than 0.30% of the TCV. The Exchange notes that the Step-Up Additive Rebate is

[3] *See* Exchange Rule 1.5(p).

[4] Market share percentage calculated as of September 29, 2022. The Exchange receives and processes data made available through consolidated data feeds (*i.e.,* CTS and UTDF).

[5] *Id.*

[6] The Step-Up Additive Rebate applies to all executions of Added Displayed Volume other than: (i) orders that establish the national best bid or offer (''NBBO'') if such Member qualifies for the Exchange's NBBO Setter Tier; and (ii) Retail Orders. A ''Retail Order'' is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. *See* Exchange Rule 11.21(a).

[7] As set forth on the Fee Schedule, ''ADAV'' means the average daily added volume calculated as the number of shares added per day, which is calculated on a monthly basis, and ''Step-Up ADAV'' means ADAV in the relevant baseline month subtracted from current ADAV.

[8] As set forth on the Fee Schedule, ''TCV'' means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

designed to encourage Members that add liquidity on the Exchange to increase their liquidity-adding order flow, which benefits all Members by providing greater execution opportunities on the Exchange.

Now, the Exchange proposes to modify the required criteria such that a Member would now qualify for the Step-Up Additive Rebate by achieving one of the following two alternative criteria: (1) an ADAV that is equal to or greater than 0.45% of the TCV; or (2) a Step-Up ADAV from August 2022 that is equal to or greater than 0.10% of the TCV and an ADAV that is equal to or greater than 0.30% of the TCV. Thus, the proposed change would: (i) replace the first of the two alternative criteria (*i.e.,* the April 2022 Step-Up ADAV threshold) with an overall ADAV threshold, and (ii) modify the second of such alternative criteria (*i.e.,* the July 2022 Step-Up ADAV and overall ADAV thresholds) to increase the Step-Up ADAV threshold, reference a more recent baseline month for such threshold, and keep the overall ADAV threshold intact. As the proposed new alternative criteria are based on Step-Up ADAV and/or overall ADAV thresholds, such criteria are intended to encourage Members to maintain or increase their liquidity-adding order flow, thereby contributing to a deeper and more liquid market to the benefit of all Members. While the Exchange has no way of predicting with certainty how the proposed new criteria will impact Member activity, the Exchange expects that more Members will strive to qualify for such tier than currently qualify, resulting in the submission of additional order flow to the Exchange. The Exchange is not proposing to change the rebate provided under the Step-Up Additive Rebate.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,[9] in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As discussed above, the Exchange operates in a highly fragmented and 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 or incentives to be insufficient, and the Exchange represents only a small percentage of the overall market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and also recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange believes the proposal reflects a reasonable and competitive pricing structure designed to incentivize market participants to direct additional order flow, including liquidity-adding orders, to the Exchange, which the Exchange believes would enhance liquidity and market quality on the Exchange to the benefit of all Members.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality associated with higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns, and the introduction of higher volumes of orders into the price and volume discovery process. The Exchange believes that the Step-Up Additive Rebate, as modified by the proposed changes to the required criteria under such tier, is reasonable, equitable and not unfairly discriminatory for these same reasons, as such tier would continue to provide Members with an incremental incentive to achieve certain volume thresholds on the Exchange, is available to all Members on an equal basis, and, as described above, is designed to encourage Members to maintain or increase their order flow, including liquidity-adding orders, to the Exchange in order to qualify for an additive rebate for certain executions of Added Displayed Volume, thereby contributing to a deeper and more liquid market to the benefit of all Members. The Exchange also believes that the proposed changes to the required criteria under the Step-Up Additive Rebate reflect a reasonable and equitable allocation of fees and rebates, as the Exchange believes that the additive rebate for qualifying executions of Added Displayed Volume under such tier remains commensurate with the corresponding required criteria under such tier and is reasonably related to the market quality benefits that such tier is designed to achieve, as described above. That is, such additive rebate reasonably reflects the difficulty in achieving the corresponding criteria, as modified.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act [12] in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully below in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees and rebates described herein are appropriate to address such forces.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposal will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the proposal is intended to incentivize market participants to direct additional order flow, including liquidity-adding orders, to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members. As a result, the Exchange believes the proposal would enhance its competitiveness as a market that attracts

[9] 15 U.S.C. 78f.

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

[12] 15 U.S.C. 78f(b)(4) and (5).

actionable orders, thereby making it a more desirable destination venue for its customers. For these reasons, the Exchange believes that the proposal furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes ''more efficient pricing of individual stocks for all types of orders, large and small.'' [13]

Intramarket Competition

As discussed above, the Exchange believes that the proposal would incentivize Members to submit additional order flow, including liquidity-adding orders, to the Exchange, thereby enhancing liquidity and market quality on the Exchange to the benefit of all Members, as well as enhancing the attractiveness of the Exchange as a trading venue, which the Exchange believes, in turn, would continue to encourage market participants to direct additional order flow to the Exchange. Greater liquidity benefits all Members by providing more trading opportunities and encourages Members to send additional orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The opportunity to qualify for the proposed new alternative criteria under the Step-Up Additive Rebate, and thus receive the additive rebate for qualifying executions of Added Displayed Volume, would continue to be available to all Members that meet the associated volume requirements in any month. As described above, the Exchange believes that the proposed new required criteria under such tier remain commensurate with the additive rebate provided for qualifying executions of Added Displayed Volume under such tier and are reasonably related to the enhanced liquidity and market quality that such tier is designed to promote. For the foregoing reasons, the Exchange believes the proposed changes would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intermarket Competition

As noted above, the Exchange 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 or incentives to be insufficient. Members have numerous alternative venues that they may participate on and direct their order flow to, including 15 other equities exchanges and numerous alternative trading systems and other off-exchange venues. As noted above, no single registered equities exchange currently has more than approximately 16.5% of the total market share of executed volume of equities trading. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Moreover, the Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to new or different pricing structures being introduced into the market. Accordingly, competitive forces constrain the Exchange's transaction fees and rebates, including with respect to executions of Added Displayed Volume, and market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As described above, the proposed changes represent a competitive proposal through which the Exchange is seeking to encourage additional order flow, including liquidity-adding orders, to the Exchange through a volume-based tier, which have been widely adopted by exchanges, including the Exchange. Accordingly, the Exchange believes the proposal would not burden, but rather promote, intermarket competition by enabling it to better compete with other exchanges that offer similar pricing incentives to market participants.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [14] The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition* v. *SEC,* the DC Circuit stated as follows: ''[n]o one disputes that competition for order flow is 'fierce.' . . . As the SEC explained, '[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'. . . .''.[15] Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [16] and Rule 19b–4(f)(2) [17] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule 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.* Please include File Number SR–MEMX–2022–29 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange

[13] *See supra* note 11.

[14] *See supra* note 11.

[15] *NetCoalition* v. *SEC,* 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSE–2006–21)).

[16] 15 U.S.C. 78s(b)(3)(A)(ii).

[17] 17 CFR 240.19b–4(f)(2).

Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR–MEMX–2022–29. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MEMX–2022–29 and should be submitted on or before November 2, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22082 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95985; File No. SR–Phlx–2022–37]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Temporarily Waive Certain Port-Related Fees at Equity 7, Section 3

October 5, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on September 22, 2022, Nasdaq PHLX LLC (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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 temporarily waive certain port-related fees at Equity 7, Section 3, as described further below. The text of the proposed rule change is available on the Exchange's website at *https://listingcenter.nasdaq.com/rulebook/phlx/rules,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Equity 7, Section 3 to provide a temporary fee waiver for newly added OUCH order entry ports (production and Testing Facility environments) with the updated version of the OUCH Order entry protocol,[3] referred to as ''OUCH 5.0.'' The Exchange has proposed [4] to introduce this new upgraded version of the OUCH Order entry protocol that will enable the Exchange to make functional enhancements and improvements to specific Order Types [5] and Order Attributes.[6]

First, the Exchange proposes to amend Equity 7, Section 3 to provide a 30-day waiver of the OUCH production port fee for up to five [7] newly added OUCH ports with the updated version of the OUCH Order entry protocol, OUCH 5.0. The fee waiver would be offered for a three-month period, beginning on October 10, 2022. At the end of the three-month period, users would no longer be eligible for the waiver. A user may only receive the 30-day waiver once per port (up to a maximum of five ports) within the three-month window. The Exchange proposes to offer this temporary waiver to encourage new, prospective customers to adopt and returning customers to migrate to the updated version of the OUCH Order entry protocol.

Second, the Exchange proposes to amend Equity 7, Section 3 to provide a 30-day waiver of the $300 Testing Facility fee for up to five [8] newly added OUCH Testing Facility ports with the updated version of the OUCH Order entry protocol, OUCH 5.0. This fee waiver would be offered for a three-month period, beginning on September 22, 2022. At the end of the three-month period, users would no longer be

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The OUCH Order entry protocol is a proprietary protocol that allows subscribers to quickly enter orders into the System and receive executions. OUCH accepts limit Orders from members, and if there are matching Orders, they will execute. Non-matching Orders are added to the Limit Order Book, a database of available limit Orders, where they are matched in price-time priority. OUCH only provides a method for members to send Orders and receive status updates on those Orders. *See https://www.nasdaqtrader.com/Trader.aspx?id=OUCH.*

[4] *See* Securities Exchange Act Release No. 95769 (September 14, 2022), 87 FR 57527 (September 20, 2022).

[5] An ''Order Type'' is a standardized set of instructions associated with an Order that define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. See Equity 1, Section 1(e).

[6] An ''Order Attribute'' is a further set of variable instructions that may be associated with an Order to further define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. *See id.*

[7] The fee waiver is limited to a maximum of five OUCH production ports per Web Central Registration Depository (''CRD'') membership.

[8] The fee waiver is limited to a maximum of five OUCH Testing Facility ports per CRD membership.

eligible for the waiver. A user may only receive the 30-day waiver once per port (up to a maximum of five ports) within the three-month window. The Testing Facility provides subscribers with a virtual System test environment that closely approximates the production environment on which they may test their automated systems that integrate with the Exchange. For example, the Testing Facility provides subscribers a virtual System environment for testing upcoming releases and product enhancements, as well as testing firm software prior to implementation. The Exchange proposes to offer this temporary waiver to encourage customers to test the updated version of the OUCH Order entry protocol free of charge.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[10] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its fee schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system ''has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.'' [11]

The Exchange believes that it is reasonable to provide temporary fee waivers for up to five newly added OUCH order entry ports (production and Testing Facility environments) with the updated version of the OUCH Order entry protocol, OUCH 5.0. The Exchange believes it is important to provide users an opportunity to test OUCH 5.0 free of charge. The temporary fee waivers would encourage users to test and adopt the enhanced OUCH Order entry protocol.

The Exchange believes that the proposed temporary fee waivers are an equitable allocation of reasonable dues, fees and other charges and not unfairly discriminatory because the Exchange will apply the same temporary fee waivers to all similarly situated members. The waivers will reduce fees for and benefit all users that add OUCH 5.0 order entry ports (production and Testing Facility environments) within the three-month window.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participants at a competitive disadvantage. The proposed change to temporarily waive fees for newly added OUCH 5.0 order entry ports (production and Testing Facility environments) will apply uniformly to all similarly situated participants. The temporary fee waivers are available to all users and would enable users to test the OUCH enhancements at no cost.

Intermarket Competition

The Exchange believes that the proposed temporary fee waivers will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock.

The proposed fee waivers are reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17–18% market share, which in most markets could hardly be categorized as having enough market power to burden competition. The proposed fee waivers would facilitate adoption of enhancements to the Exchange's System and Order entry protocols, which is pro-competitive because the enhancements bolster the efficiency, functionality, and overall attractiveness of the Exchange in an absolute sense and relative to its peers. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members, participants, or competing order execution venues to maintain their competitive standing in the financial markets.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,[12] and Rule 19b–4(f)(2) [13] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–Phlx–2022–37 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–Phlx–2022–37. This file number should be included on the subject line if email is used. To help the Commission process and review your

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'').

[12] 15 U.S.C. 78s(b)(3)(A)(ii).

[13] 17 CFR 240.19b–4(f)(2).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–Phlx–2022–37 and should be submitted on or before November 2, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22081 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[TM–270–650; OMB Control No. 3235–0700]

Submission for OMB Review; Comment Request; Extension: Rule 18a–4

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE, Washington, DC 20549–2736

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (''PRA'') (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 18a–4 (17 CFR 240.18a–4), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) (''Exchange Act'').

Rule 18a–4 establishes segregation requirements for cleared and non-cleared security-based swap transactions, which applies to non-broker-dealer security-based swap dealers (''SBSDs'') (*i.e.,* bank SBSDs and nonbank stand-alone SBSDs), as well as notification requirements for non-broker-dealer SBSDs and major security-based swap participants (''MSBSPs'').

The aggregate annual burden for all respondents is estimated to be 7,647 hours. The aggregate annual cost burden for all respondents is estimated to be $2,667.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information under the PRA unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: *www.reginfo.gov.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function. Written comments and recommendations for the proposed information collection should be sent by November 14, 2022 to (i) *MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov* and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: *PRA_Mailbox@sec.gov.*

Dated: October 5, 2022.

J. Matthew DeLesDernier,

Deputy Secretary.

[FR Doc. 2022–22096 Filed 10–11–22; 8:45 am]

BILLING CODE 8011–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Opportunity for Public Comment on Proposed Land Use Changes of Surplus Property at Everett-Stewart Regional Airport, Union City, Tennessee

AGENCY: Federal Aviation Administration, DOT.

ACTION: Request for public comments.

SUMMARY: Notice is being given that the FAA is considering a request from Obion County, Tennessee to change 507.07± acres of airport property from Aeronautical Use to Non-Aeronautical Use for a Solar Facility at Everett-Stewart Regional Airport. The solar facility is being constructed on Surplus Property land not required for aviation use. The land has been designed for non-aeronautical use on the Airport Layout Plan. The County will have a land lease agreement with the solar company that will generate non-aeronautical revenue to be deposited in the airport operation and maintenance account.

DATES: Comments must be received on or before November 14, 2022.

ADDRESSES: The public may send comments using the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov,* and follow the instructions on providing comments.
- *Fax:* 901–322–8195.
- *Mail:* L. Bernard Green, Community Planner, 2600 Thousand Oaks Blvd., Suite 2250 Memphis, TN 38118.
- *Hand Delivery:* Deliver to mail address above between 8 a.m. and 5 p.m. Monday through Friday, excluding Federal holidays.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Obion County, Tennessee, Attn: Mayor Benny McGuire, Obion County, Tennessee 316 S. Third Street Union City, TN 28281.

Interested persons may inspect the request and supporting documents by contacting the FAA at the address listed under **FOR FURTHER INFORMATION CONTACT**.

FOR FURTHER INFORMATION CONTACT: L. Bernard Green, 2600 Thousand Oaks Blvd., Suite 2250 Memphis, TN 38118, 901–322–8187. The land release request may be reviewed in person at this same location.

Issued in Memphis, Tennessee on October 3, 2022.

Tommy L. Dupree,

Manager, Memphis Airports District Office, Southern Region.

[FR Doc. 2022–22125 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

FY 2022 and FY 2023 Competitive Funding Opportunity: Competitive Grants for Rail Vehicle Replacement Program

AGENCY: Federal Transit Administration (FTA), Department of Transportation (DOT).

ACTION: Notice of Funding Opportunity (NOFO).

[14] 17 CFR 200.30–3(a)(12).

SUMMARY: The Federal Transit Administration (FTA) announces the opportunity to apply for $600 million in competitive grants under the fiscal year (FY) 2022 and FY 2023 Competitive Grants for Rail Vehicle Replacement Program. As required by Federal public transportation law, Competitive Grants for Rail Vehicle Replacement Program funds will be awarded competitively to assist in the funding of capital projects to replace rail rolling stock. FTA may award additional funding made available to the program prior to the announcement of project selections.

DATES: Complete proposals must be submitted electronically through the *GRANTS.GOV* ''APPLY'' function by 11:59 p.m. Eastern time, January 5, 2023. Prospective applicants should initiate the process by promptly registering on the *GRANTS.GOV* website to ensure completion of the application process before the submission deadline. Instructions for applying can be found on FTA's website at *https://www.transit.dot.gov/funding/grants/applying/applying-fta-funding* and in the ''FIND'' module of *GRANTS.GOV*. The funding opportunity ID is FTA–2023–001–TPM–RAIL. Mail and fax submissions will not be accepted.

FOR FURTHER INFORMATION CONTACT: Donna Iken, Competitive Grants for Rail Vehicle Replacement Program Manager, FTA Office of Program Management, 202–366–0876, or *donna.iken@dot.gov*.

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A. Program Description

Federal public transportation law (49 U.S.C. 5337(f)) authorizes FTA to award grants for the replacement of rail rolling stock through a competitive process, as described in this notice. The Competitive Grants for Rail Vehicle Replacement Program provides funding to State and local governmental authorities. The Federal Assistance Listing for the program is 20.525.

FTA recognizes that passenger rail service provides critical and cost-effective transportation links throughout the United States and faces a critical backlog of state of good repair and safety investments. This program supports FTA's priorities and objectives through investments that: (1) renew our transit systems; (2) advance racial equity; (3) connect communities; and (4) reduce greenhouse gas emissions. This program will be implemented, as appropriate and consistent with law, in alignment with the priorities in Executive Order 14052, Implementation of the Infrastructure Investment and Jobs Act (86 FR 64355). In addition, this NOFO will advance the goals of the President's January 20, 2021, Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (86 FR 7009).

B. Federal Award Information

Federal public transportation law (49 U.S.C. 5338(a)(2)(L)) authorizes $300,000,000 in contract authority funds for each of FY 2022 and FY 2023 for competitive grants under the Competitive Grants for Rail Vehicle Replacement Program.

FTA will grant pre-award authority to incur costs for selected projects beginning on the date the FY 2022 and FY 2023 project selections are announced on FTA's website. Funds are available for obligation for three years after the fiscal year in which the awards are announced. For multi-year grant agreements, subsequent obligations must be made in the following year for a two-year agreement, and each of the two consecutive fiscal years for a three-year agreement, following the fiscal year from which the first obligation is made. Funds are available only for projects that have not already incurred costs prior to the announcement of project selections. Per Federal public transportation law (49 U.S.C. 5337(f)(3)), FTA intends to fund up to three new awards each fiscal year. This NOFO announces two fiscal years of funding; as such, FTA may select up to six awards.

FTA may select projects to receive multi-year grant agreements. If a project is selected to receive a multi-year grant agreement, that agreement will establish the maximum amount of Federal financial assistance for the project that may be provided in not more than three consecutive fiscal years. A multi-year grant agreement will obligate an amount of available budget authority and include a contingent commitment to obligate an additional amount from future available budget authority. The contingent commitment under a multi-year agreement is not an obligation of the Federal Government.

C. Eligibility Information

1. Eligible Applicants

Eligible applicants for the Competitive Grants for Rail Vehicle Replacement Program are States and local governmental authorities.

2. Cost Sharing or Matching

Per 49 U.S.C. 5337(f)(5), the Competitive Grants for Rail Vehicle Replacement funding may be up to 50 percent of the total eligible project cost. Other Federal funding, including FTA funding, such as State of Good Repair Program formula funding, may be applied for the project up to a maximum 80 percent Federal share of eligible project costs, per 49 U.S.C. 5337(f)(6). For example, a rail vehicle replacement project with a total eligible cost of $100,000,000 may receive up to $50,000,000 from this program. The remaining $50,000,000 could be provided from a combination of non-Federal and other Federal funds, up to $30,000,000 of which could be other Federal funding. For a $100,000,000 project, at least $20,000,000 (20%) must be non-Federal funds.

Eligible sources of non-Federal matching funds include:

i. Cash from non-governmental sources other than revenues from providing transit services (such as fare revenues);

ii. Non-farebox revenues from the operation of public transportation service, such as the sale of advertising and concession revenues;

iii. Monies received under a service agreement with a State or local social service agency or private social service organization;

iv. Undistributed cash surpluses, replacement or depreciation cash funds, reserves available in cash, or new capital;

v. In-kind contributions integral to the project;

vi. Revenue bond proceeds for a capital project, with prior FTA approval; and

vii. Transportation Development Credits (formerly referred to as Toll Revenue Credits).

3. Eligible Projects

The focus of the grant program is to modernize America's transit system, focusing on maintaining a State of Good Repair for fixed-guideway rail transit. Under the Competitive Grants for Rail Vehicle Replacement Program (49 U.S.C. 5337(f)), eligible projects are the replacement of rail rolling stock. For the purposes of this program, rail rolling stock is defined as revenue service, passenger carrying vehicles, or propulsion (locomotives) vehicles necessary for the provision of rail public transportation. Replacement is defined as the number of vehicles required to replace the number of vehicles to be

removed from service that are substantially the same type. If changing vehicle type (*e.g.,* a commuter rail switching from single level to double-decker cars), the eligible project is the number of cars necessary to carry an equivalent number of passengers as the substantially same type of replacement would. These rail vehicles can include, but are not limited to, commuter rail, heavy rail, and light rail vehicles. Up to 0.5 percent of the Federal request may be used to pay for project-related workforce development activities, as long as the Federal share under this program of those workforce development activities is not more than 80 percent. Up to 0.5 percent of the Federal request may be used to pay for project related training from the National Transit Institute (NTI), as long as the Federal share under this program for the related training from NTI is not more than 80 percent. Applicants must identify the proposed use of funds for these activities in the project proposal and identify them separately in the project budget. Vehicles that do not operate on rails, including rubber tire support vehicles, as well as maintenance and other non-revenue vehicles that do operate on rails, are not eligible under this program. Fleet expansion projects are also not eligible under this program. If a procurement includes both expansion and replacement vehicles, only the cost of the replacement vehicles may be included in the total eligible project cost under this program.

As required by Federal public transportation law (49 U.S.C. 5337(f)(4)), FTA will consider the size of the rail system of the applicant, the amount of funds available to the applicant from this program, the age and condition of the rail rolling stock of the applicant that has exceeded or will exceed the useful service life in the five-year period following a grant award, and whether the applicant has identified replacement of the rail vehicles as a priority in the investment prioritization portion of the transit asset management plan of the recipient pursuant to part 625 of title 49 of the Code of Federal Regulations. Evaluation criteria are described in detail in Section E of this notice.

D. Application and Submission Information

1. Address To Request Application Package

Applications may be accessed, and must be submitted, electronically through *GRANTS.GOV*. General information for accessing and submitting applications through *GRANTS.GOV* can be found at *www.fta.dot.gov/howtoapply* along with specific instructions for the forms and attachments required for submission. Mail or fax submissions will not be accepted. The required SF–424 Application for Federal Assistance can be downloaded from *GRANTS.GOV,* and the required supplemental form can be downloaded from *GRANTS.GOV* or the FTA website at: *https://www.transit.dot.gov/notices-funding/fiscal-year-2022-and-fiscal-year-2023-competitive-grants-rail-vehicle-replacement*.

2. Content and Form of Application Submission

a. Proposal Submission

A complete proposal submission consists of two forms: (1) the SF–424 Application for Federal Assistance; and (2) the supplemental form. The supplemental form and any supporting documents must be attached to the ''Attachments'' section of the SF–424. The application must include responses to all sections of the SF–424 Application for Federal Assistance and the supplemental form, unless designated as optional. The information on the supplemental form will be used to determine applicant and project eligibility for the program, and to evaluate the proposal against the selection criteria described in part E of this notice. Failure to submit the information as requested can delay review or disqualify the application.

FTA will accept only one supplemental form per SF–424 submission. FTA encourages applicants to consider submitting a single supplemental form that includes multiple activities as one project to be evaluated as a consolidated proposal. If an applicant chooses to submit separate proposals for individual consideration by FTA, each proposal must be submitted using a separate SF–424 and supplemental form.

Applicants may attach additional supporting information to the SF–424 submission, including but not limited to documentation supporting the applicant's eligibility for the grant programs, letters of support, project budgets, fleet status reports, or excerpts from relevant planning documents. Supporting documentation should be described and referenced by file name in the appropriate response section of the supplemental form, or it may not be reviewed.

Information such as applicant name, Federal amount requested, local match amount, and description of areas served may be requested in varying degrees of detail on both the SF–424 and supplemental form. Applicants must fill in all fields unless otherwise stated on the forms. Applicants should not place N/A or ''refer to attachment'' in lieu of typing in responses in the field sections. If information is copied into the supplemental form from another source, applicants should verify that pasted text is fully captured on the supplemental form and has not been truncated by the character limits built into the form. Applicants should use both the ''Check Package for Errors'' and the ''Validate Form'' validation buttons on both forms to check all required fields on the forms, and ensure that the Federal and local amounts specified are consistent.

b. Application Content

The SF–424 Application for Federal Assistance and the supplemental form will prompt applicants for the required information:

a. Applicant name
b. Unique entity identifier (generated by *SAM.GOV*)
c. Key contact information (including contact name, address, email address, and phone)
d. Congressional district(s) in which project is located
e. Project information (including title, executive summary, and type)
f. A detailed description of the need for the project
g. A detailed description of how the project will support the program objectives
h. Evidence that the project is consistent with local and regional planning objectives
i. Evidence that the applicant can provide the non-Federal cost share
j. A description of the technical, legal, and financial capacity of the applicant
k. A detailed project budget
l. An explanation of the scalability of the project
m. Details on the non-Federal matching funds
n. A detailed project timeline
o. The applicant's Transit Asset Management Plan (or, if lengthy, applicable sections sufficient to determine the project is consistent with the plan)
p. Information related to priority considerations in Sections E.2.

Applicants should reference the criteria described in Section E of this NOFO for further description of the content applicants should address in their applications.

3. Unique Entity Identifier and System for Award Management (SAM)

Each applicant is required to: (1) be registered in SAM before submitting an

application; (2) provide a valid unique entity identifier in its application; and (3) continue to maintain an active SAM registration with current information at all times during which the applicant has an active Federal award or an application or plan under consideration by FTA. FTA may not make an award until the applicant has complied with all applicable unique entity identifier and SAM requirements. If an applicant has not fully complied with the requirements by the time FTA is ready to make an award, FTA may determine that the applicant is not qualified to receive an award and use that determination as a basis for making a Federal award to another applicant. These requirements do not apply if the applicant has an exception approved by FTA or the U.S. Office of Management and Budget under 2 CFR 25.110(c) or (d).

All applicants must provide a unique entity identifier provided by SAM. Registration in SAM may take as little as 3–5 business days, but since there could be unexpected steps or delays (for example, if there is a need to obtain an Employer Identification Number), FTA recommends allowing ample time, up to several weeks, for completion of all steps. For additional information on obtaining a unique entity identifier, please visit *https://www.sam.gov*.

4. Submission Dates and Times

Project proposals must be submitted electronically through *GRANTS.GOV* by 11:59 p.m. Eastern Time on January 5, 2023. *GRANTS.GOV* attaches a time stamp to each application at the time of submission. Mail and fax submissions will not be accepted.

FTA urges applicants to submit applications at least 72 hours prior to the deadline to allow time to correct any problems that may have caused either *GRANTS.GOV* or FTA systems to reject the submission. Proposals submitted after the deadline will be considered only if lateness was due to extraordinary circumstances not under the applicant's control. Deadlines will not be extended due to scheduled website maintenance. *GRANTS.GOV* scheduled maintenance and outage times are announced on the *GRANTS.GOV* website.

Within 48 hours after submitting an electronic application, the applicant should receive an email message from *GRANTS.GOV* with confirmation of successful transmission to *GRANTS.GOV*. If a notice of failed validation or incomplete materials is received, the applicant must address the reason for the failed validation, as described in the email notice, and resubmit before the submission deadline. If making a resubmission for any reason, include all original attachments regardless of which attachments were updated and check the box on the supplemental form indicating this is a resubmission.

Applicants are encouraged to begin the process of registration on the *GRANTS.GOV* site well in advance of the submission deadline. Registration is a multi-step process, which may take several weeks to complete before an application can be submitted. Registered applicants may still be required to take steps to keep their registration up to date before submissions can be made successfully: (1) registration in SAM is renewed annually; and (2) persons making submissions on behalf of the Authorized Organization Representative (AOR) must be authorized in *GRANTS.GOV* by the AOR to make submissions.

5. Funding Restrictions

Funds made available under this NOFO cannot be used to reimburse applicants for otherwise eligible expenses incurred prior to the posting of project selections on FTA's website and the corresponding issuance of pre-award authority. Allowable direct and indirect expenses must be consistent with the Government-wide Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (2 CFR part 200) and FTA Circular 5010.1E.

6. Other Submission Requirements

Applicants are encouraged to identify scaled funding options in case insufficient funding is available to fund a project at the full requested amount. If an applicant advises that a project is scalable, the applicant must provide an appropriate minimum funding amount that will fund an eligible project that achieves the objectives of the program and meets all relevant program requirements. The applicant must provide a clear explanation of how the project budget would be affected by a reduced award. FTA may award a lesser amount whether or not a scalable option is provided. FTA may award funds using a multi-year grant agreement of up to three years, as described in Section B of this notice.

E. Application Review Information

1. Criteria

Projects will be evaluated primarily on the responses provided in the supplemental form. Additional information may be provided to support the responses; however, any additional documentation must be directly referenced on the supplemental form, including the file name where the additional information can be found. FTA will evaluate project proposals based on the criteria described in this notice.

a. Demonstration of Need

Since the purpose of this program is to fund rail rolling stock and maintain public transportation systems in a state of good repair, applications will be evaluated based on the quality and extent to which they demonstrate how the proposed project will address an unmet need for capital investment in rail vehicles.

Applicants must provide information on the age, condition, and performance of the rail vehicles to be replaced. The law requires FTA ''to consider the age and condition of the rail rolling stock of the applicant that has exceeded or will exceed the useful service life of the rail rolling stock in the 5-year period following the grant.'' FTA will define that 5 years as starting 1 year after the date applications are due. FTA will provide higher priority for rolling stock already past its useful life. The proposal must address how the project conforms to the applicant's spare ratio guidelines and provide the rationale.

b. Demonstration of Benefits

FTA will evaluate the potential for projects to improve the condition of the transit system by replacing rail vehicles that are in poor condition or have surpassed their minimum or intended useful life benchmarks.

Safety. FTA will evaluate the potential for projects to improve the safety of the transit system. Applicants may describe the benefits of increased safety of replacement vehicles and how that may impact the broader safety of their transportation system.

Performance: FTA will evaluate the benefits of reducing breakdowns and service interruptions, increasing service performance and reliability, and reducing the cost of maintaining outdated vehicles.

Enhanced Access and Mobility for People with Disabilities. FTA will evaluate the potential for projects to improve access and mobility for persons with disabilities, including wheelchair users.

Combatting Climate Change: FTA will evaluate the benefits of any otherwise eligible project that is proposing to replace a locomotive or self-propelled passenger cars with a locomotive or self-propelled passenger cars that produces fewer harmful emissions at the point of service.

c. Planning and Local/Regional Prioritization

Applicants must demonstrate how the proposed project is consistent with local and regional planning documents and identified priorities. This will involve assessing whether the project is consistent with the transit priorities identified in the long-range transportation plan and the State and Metropolitan Transportation Improvement Program (STIP/TIP). Applicants should note if the project could not be included in the financially constrained STIP or TIP due to lack of funding, and if selected that the project can be added to the federally approved STIP before grant award.

FTA will evaluate applications based on the quality and extent to which they assess whether the project is consistent with the rail vehicle replacement priorities identified in the applicant's Transit Asset Management Plan (TAM), pursuant to 49 CFR part 625.

FTA encourages applicants to demonstrate State or local support by including letters of support from State departments of transportation, local transit agencies, local government officials and public agencies, local non-profit or private sector organizations, and other relevant stakeholders. Applications that include letters of support will be viewed more favorably than those that do not. For FTA to fully consider a letter of support, the letter must be included in the application package. In an area with both rail and other public transit operators, FTA will evaluate whether project proposals demonstrate coordination with and support of other related projects within the applicant's Metropolitan Planning Organization (MPO) or the geographic region within which the proposed project will operate.

d. Local Financial Commitment

Applicants must identify the sources of funding for the total eligible vehicle replacement project cost, including other Federal funding if applicable, and the local cost share, and describe whether such funds are currently available for the project or will need to be secured if the project is selected for funding. FTA will consider the availability of the local cost share as evidence of local financial commitment to the project. Additional consideration will be given to those projects for which local funds have already been made available or reserved. Applicants should submit evidence of the availability of funds for the project, by including, for example, a board resolution, letter of support from the State, a budget document highlighting the line item or section committing funds to the proposed project, or other documentation of the source of other non-Federal funds.

An applicant may provide documentation of previous and recent local investments in the project, which cannot be used to satisfy non-Federal matching requirements, as evidence of local financial commitment.

e. Project Implementation Strategy

Projects will be evaluated based on the extent to which the project is ready to implement within a reasonable period of time and whether the applicant's proposed implementation plans are reasonable and complete.

In assessing whether the project is ready to implement within a reasonable period of time, FTA will consider whether the project qualifies for a Categorical Exclusion, or whether the required environmental work has been initiated or completed for projects that require an Environmental Assessment or Environmental Impact Statement under the National Environmental Policy Act of 1969. As such, applicants should submit information describing the project's anticipated path and timeline through the environmental review process. If the project will qualify as a Categorical Exclusion, the applicant must say so explicitly in the application. The proposal must also state whether grant funds can be obligated within 12 months from time of award, if selected, and if necessary, the timeframe under which the Metropolitan TIP and STIP can be amended to include the proposed project. Additional consideration will be given to projects for which grant funds can be obligated within 12 months from time of award.

In assessing whether the proposed implementation plans are reasonable and complete, FTA will review the proposed project implementation plan, including all necessary project milestones and the overall project timeline. For projects that will require formal coordination, approvals, or permits from other agencies or project partners, the applicant must demonstrate coordination with these organizations and their support for the project, such as through letters of support.

f. Technical, Legal, and Financial Capacity

Applicants must demonstrate that they have the technical, legal, and financial capacity to undertake the project. FTA will review relevant oversight assessments and records to determine whether there are any outstanding legal, technical, or financial issues with the applicant that would affect the outcome of the proposed project. Additional information on the compliance requirements for these grants appears later in this notice.

Applicants with outstanding legal, technical, or financial compliance issues from an FTA compliance review or FTA grant-related Single Audit finding must explain how corrective actions taken will mitigate negative impacts on the project.

2. Review and Selection Process

FTA technical evaluation committees will evaluate proposals using the project evaluation criteria. FTA staff may request additional information from applicants, if necessary. After consideration of the findings of the technical evaluation committees, the FTA Administrator will determine the final selection of projects for program funding. In determining the allocation of program funds, FTA may consider geographic diversity, the age of the vehicles to be replaced, diversity in the size of the transit systems receiving funding, and the applicant's availability of State of Good Repair Formula funding or other competitive awards. FTA may consider capping the amount a single applicant may receive.

After applying the above criteria, and in support of Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, and Executive Order 14052, Implementation of the Infrastructure Investment and Jobs Act, FTA will give priority to applications that advance racial equity in two areas: (1) planning and policies related to racial equity and overcoming barriers to opportunity; and (2) project investments that either proactively address racial equity and barriers to opportunity, including automobile dependence as a form of barrier, or redress prior inequities and barriers to opportunity. This objective has the potential to enhance environmental stewardship and community partnerships, and reflects Executive Order 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government. FTA encourages the applicant to include sufficient information to evaluate how the applicant will advance racial equity and address barriers to opportunity. The applicant should describe any transportation plans or policies related to equity and barriers to opportunity they are implementing or have implemented in relation to the proposed project, along with the specific project

investment details necessary for FTA to evaluate if the investments are being made either proactively to advance racial equity and address barriers to opportunity or redress prior inequities and barriers to opportunity. All project investment costs for the project that are related to racial equity and barriers to opportunity should be summarized.

3. Integrity and Performance Review

Prior to making an award with a total amount of Federal share greater than the simplified acquisition threshold (currently $250,000), FTA is required to review and consider any information about the applicant that is in the Federal Awardee Performance and Integrity Information Systems (FAPIIS) accessible through SAM. An applicant may review and comment on information about itself that a Federal awarding agency previously entered. FTA will consider any comments by the applicant, in addition to the other information in FAPIIS, in making a judgment about the applicant's integrity, business ethics, and record of performance under Federal awards when completing the review of risk posed by applicants as described in 2 CFR 200.206.

F. Federal Award Administration Information

1. Federal Award Notices

Final project selections will be posted on the FTA website. Only proposals from eligible recipients for eligible activities will be considered for funding. There is no minimum or maximum grant award amount; however, FTA intends to fund up to three meritorious projects per year of funding. FTA may also award multi-year grant agreements of up to three years.

2. Administrative and National Policy Requirements

a. Pre-Award Authority

At the time the project selections are announced, FTA will extend pre-award authority for the selected projects. There is no blanket pre-award authority for these projects before announcement, and pre-award authority cannot be used prior to FTA issuance of pre-award authority. FTA does not provide pre-award authority for competitive funds until projects are selected and even then, there are Federal requirements that must be met before costs are incurred. For more information about FTA's policy on pre-award authority, please see FTA's 2022 Apportionment Notice (87 FR 25362).

b. Grant Requirements

If selected, awardees will apply for a grant through FTA's Transit Award Management System (TrAMS). All recipients are subject to the grant requirements of the State of Good Repair program (49 U.S.C. 5337), FTA's Master Agreement for financial assistance awards, the annual Certifications and Assurances required of applicants, and FTA Circular ''State of Good Repair Grant Program'' (FTA.C.5300.1E). All recipients must also follow the Award Management Requirements (FTA.C.5010.1) and the labor protections required by Federal public transportation law (49 U.S.C. 5333(b)). All these documents are available on FTA's website. Technical assistance regarding these requirements is available from each FTA regional office.

c. Buy America and Domestic Preference for Infrastructure Projects

All capital procurements must comply with FTA's Buy America requirements (49 U.S.C. 5323(j) and 49 CFR part 661), which require that all iron, steel, and manufactured products be produced in the United States, and imposes minimum domestic content and final assembly requirements for rolling stock. In addition, any award must comply with the Build America, Buy America Act (BABA) (Pub. L. 117–58 §§ 70901–52). BABA provides that none of the funds provided under an award made pursuant to this notice may be used for a project unless all iron, steel, manufactured products, and construction materials are produced in the United States. FTA's Buy America requirements are consistent with BABA requirements for iron, steel, and manufactured products.

Any proposal that will require a waiver of any domestic preference standard must identify the items for which a waiver will be sought in the application. Applicants should not proceed with the expectation that waivers will be granted.

d. Civil Rights Requirements

Applications should demonstrate that the recipient has a plan for compliance with civil rights obligations and nondiscrimination laws, including Title VI of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and Section 504 of the Rehabilitation Act, and accompanying regulations. This should include a current Title VI program plan and a completed Community Participation Plan (alternatively called a Public Participation Plan), if applicable. Applicants who have not sufficiently demonstrated the conditions of compliance with civil rights requirements will be required to do so before receiving funds.

Recipients of Federal transportation funding will be required to comply fully with regulations and guidance for the ADA, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and all other civil rights requirements. The Department's and FTA's Office of Civil Rights may work with awarded grant recipients to ensure full compliance with Federal civil rights requirements.

e. Disadvantaged Business Enterprise

Projects for railcar acquisitions are subject to the transit vehicle manufacturer (TVM) rule of the USDOT's Disadvantaged Business Enterprise (DBE) program regulations (49 CFR 26.49). The TVM rule requires recipients procuring transit vehicles to limit eligible bidders to certified TVMs. To become a certified TVM, a manufacturer of transit vehicles must submit a DBE program plan and annual goal to FTA for approval. A list of certified TVMs is posted on FTA's web page at *https://www.transit.dot.gov/TVM*. Recipients should contact FTA before accepting bids from entities not listed on this web page.

In lieu of restricting eligibility to certified TVMs, a recipient may, with FTA's approval, establish project-specific goals for DBE participation in the procurement of transit vehicles.

For more information on DBE requirements, please contact Monica McCallum, FTA Office of Civil Rights, 206–220–7519, *Monica.McCallum@dot.gov*.

f. Planning

FTA encourages applicants to notify the appropriate State Departments of Transportation and MPOs in areas likely to be served by the project funds made available under these initiatives and programs. Selected projects must be incorporated into the long-range plans and transportation improvement programs of States and metropolitan areas before they are eligible for FTA funding. As described under the evaluation criteria, FTA may consider whether a project is consistent with or already included in these plans when evaluating a project.

g. Standard Assurances

The applicant assures that it will comply with all applicable Federal statutes, regulations, executive orders, directives, FTA circulars, and other Federal administrative requirements in carrying out any project supported by

the FTA grant. The applicant acknowledges that it is under a continuing obligation to comply with the terms and conditions of the grant agreement issued for its project with FTA. The applicant understands that Federal laws, regulations, policies, and administrative practices might be modified from time to time and may affect the implementation of the project. The applicant agrees that the most recent Federal requirements will apply to the project, unless FTA issues a written determination otherwise. The applicant must submit the Certifications and Assurances before receiving a grant if it does not have current certifications on file.

3. Reporting

Post-award reporting requirements include the electronic submission of Federal Financial Reports and Milestone Progress Reports. Applicant should include goals, targets, and indicators referenced in their application to the project in the Executive Summary of the TrAMS application. Recipients or beneficiaries of funds made available through this NOFO are also required to regularly submit data to the National Transit Database. National Transit Database reports include total sources of revenue and complete expenditure reports for all public transportation operations, not just those funded by this project.

FTA is committed to making evidence-based decisions guided by the best available science and data. In accordance with the Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act), FTA may use information submitted in discretionary funding applications; information in FTA's Transit Award Management System (TrAMS), including grant applications, Milestone Progress Reports (MPRs), Federal Financial Reports (FFRs); transit service, ridership and operational data submitted in FTA's National Transit Database; documentation and results of FTA oversight reviews, including triennial and state management reviews; and other publicly available sources of data to build evidence to support policy, budget, operational, regulatory, and management processes and decisions affecting FTA's grant programs.

As part of completing the annual certifications and assurances required of FTA grant recipients, a successful applicant must report on the suspension or debarment status of itself and its principals. If the award recipient's active grants, cooperative agreements, and procurement contracts from all Federal awarding agencies exceeds $10,000,000 for any period of time during the period of performance of an award made pursuant to this Notice, the recipient must comply with the Recipient Integrity and Performance Matters reporting requirements described in Appendix XII to 2 CFR part 200.

G. Federal Awarding Agency Contacts

For further information concerning this notice, please contact the Competitive Grants for Rail Vehicle Replacement Program manager, Donna Iken, by phone at 202–366–8076, or by email at *Donna.Iken@dot.gov*. A TDD is available for individuals who are deaf or hard of hearing at 800–877–8339. To ensure receipt of accurate information about eligibility or the program, the applicant is encouraged to contact FTA directly, rather than through intermediaries or third parties. For issues with *GRANTS.GOV,* please contact *GRANTS.GOV* by phone at 1–800–518–4726 or by email at *support@grants.gov*. Contact information for FTA's regional offices can be found on FTA's website at *https://www.transit.dot.gov*.

H. Other Information

This program is not subject to Executive Order 12372, ''Intergovernmental Review of Federal Programs.'' FTA will consider applications for funding only from eligible recipients for eligible projects listed in Section C.

Nuria I. Fernandez,

Administrator.

[FR Doc. 2022–22122 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–57–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA–2022–0091]

NHTSA Safety Research Portfolio Public Meeting: Fall 2022

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

ACTION: Notice of public meeting.

SUMMARY: NHTSA will hold a Public Meeting from November 1–3, 2022, as a joint effort between the Agency's Vehicle Safety Research and Behavioral Safety Research offices to share information on activities within the Agency's research programs. The meeting will be held in a virtual format with representatives from across the two research offices presenting the information in a panel format. Questions from the audience will be accepted following presentations. Each presentation will include visual slides that will be available in a public docket after the Public Meeting. Video of the panels will also be available on the NHTSA website.

DATES: NHTSA will hold the public meeting on November 1–3, 2022, with times to be established as the agenda is further refined. The meeting will be held virtually, via Zoom. Registration to attend the meeting must be received no later than October 28, 2022. There is no cost to register. Registration can be completed at *https://www.nhtsa.gov/events/research-public-meeting-2022.* The public docket will remain open for 90 days following the publication of this notice.

ADDRESSES: The meeting will be held virtually via Zoom. The virtual meeting's online access link(s) will be available upon registration. Details regarding the agenda and speakers will be added to the Public Meeting website, *https://www.nhtsa.gov/events/research-public-meeting-2022,* regularly prior to the event. The meeting will also be recorded and made available after the event for offline viewing at *https://www.nhtsa.gov/events/research-public-meeting-2022.*

FOR FURTHER INFORMATION CONTACT: If you have questions about the public meeting, please contact Lisa Floyd at 202–366–4697, or by email at *Lisa.Floyd@dot.gov.*

SUPPLEMENTARY INFORMATION: Traditionally, NHTSA held its Safety Research Portfolio public meetings in-person; however, the most recent meeting was held in a virtual format in Fall 2021. The Fall 2021 meeting was widely attended and allowed for robust participation in each of the panels through the virtual format. While the Agency will reconsider formats in future iterations, the Fall 2022 public meeting will again be held in a virtual format. For reference, NHTSA's previous Safety Research Portfolio public meeting, held in Fall 2021, is available for viewing at *https://www.nhtsa.gov/events/research-public-meeting-2021.*

Registration is recommended for all attendees. Attendees should register at *https://www.nhtsa.gov/events/research-public-meeting-2022* by October 28, 2022. Follow the designated registration instructions and indicate whether you may need an accommodation.

NHTSA is committed to providing equal access to this meeting for all participants. Persons with disabilities in need of an accommodation should contact Lisa Floyd at 202–366–4697, or

via email at *Lisa.Floyd@dot.gov,* with your request as soon as possible. A sign language interpreter will be provided, and closed captioning services will be available.

Should it be necessary to cancel or reschedule the meeting due to an unforeseen circumstance, NHTSA will take all available measures to notify registered participants as soon as possible. NHTSA will conduct the public meeting informally, and technical rules of evidence will not apply. The meeting will be recorded, and a recording will be made available after the event.

Comments: Comments may be submitted electronically or in hard copy during the 90-day comment period. Please submit all comments no later than January 10, 2023 by any of the following methods:

- *Federal Rulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* 1200 New Jersey Avenue SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays. To be sure someone is there to help you, please call 202–366–9826 before coming.
- *Fax:* 202–366–1767.

Instructions: All submissions must include the agency name and docket number. Note that all comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Please see the Privacy Act discussion below.

Docket: For access to the docket go to *http://www.regulations.gov* at any time or to 1200 New Jersey Avenue SE, West Building, Ground Floor, Room W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays. Telephone: 202–366–9826.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit *http://www.regulations.gov/privacy.html.*

Confidential Business Information: If you wish to submit any information under a claim of confidentiality, you should submit three copies of your complete submission, including the information you claim to be confidential business information to the Chief Counsel, NHTSA, at 1200 New Jersey Avenue SE, Washington, DC 20590. In addition, you should submit two copies, from which you have deleted the claimed confidential business information, to Docket Management at the address given above. When you send a comment containing information claimed to be confidential business information, you should submit a cover letter setting forth the information specified in our confidential business information regulation (49 CFR part 512). To facilitate social distancing during COVID–19, NHTSA is temporarily accepting confidential business information electronically. Please see *https://www.nhtsa.gov/coronavirus/submission-confidential-business-information* for details.

Background: Each year, NHTSA executes a broad array of research programs in support of Administration, DOT, and agency priorities. The Agency's research portfolio covers a diverse range of program areas pertaining to vehicle safety, including the safety consequences of novel automotive technologies that aim to improve the crash avoidance and/or occupant protection characteristics of motor vehicles; and behavioral safety, which includes safety countermeasures that pertain to the behavior and actions of drivers, occupants, and other road users, including vulnerable populations.

This public meeting is intended to provide public and stakeholder outreach regarding research activities at NHTSA for both vehicle and behavioral safety, including expected near-term deliverables. NHTSA technical research staff will discuss projects recently concluded or underway and may also introduce early-stage projects. As time allows, there will be an opportunity for session attendees to submit questions via the chat feature in Zoom. Presentations will be displayed during the panel sessions and will be posted to the docket (*regulations.gov*) after the meeting. Updates on this event will be available at *https://www.nhtsa.gov/events/research-public-meeting-2022* and NHTSA recommends checking back periodically for updates or potential scheduling changes.

Discussion of research projects will occur in the form of technical panel presentations. Participants will be able to register for any or all of the days and be able to join the Zoom webinar in parts or for full sessions throughout each day.

The Agency invites comments on the information presented as well as on the Agency's research priorities, research goals, and additional research gaps/needs the public may believe NHTSA should be addressing. Select project work may be posted to the docket for which comments are also welcome. Slides presented at the public meeting will be posted to the docket subsequently for public access and a recording of the meeting will be made available after the event for offline viewing.

Cem Hatipoglu,

Associate Administrator, Vehicle Safety Research.

[FR Doc. 2022–22146 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–59–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT–OST–2022–0099]

Privacy Act of 1974; System of Records

AGENCY: Office of the Departmental Chief Information Officer, Office of the Secretary of Transportation, DOT.

ACTION: Notice of a modified system of records.

SUMMARY: In accordance with the Privacy Act of 1974, the Department of Transportation (DOT) intends to rename, modify and re-issue a DOT Federal Aviation Administration (FAA) system of records notice titled, ''DOT/FAA 845 Administrators Correspondence Control and Hotline Information System, ACCIS, Administrator's Hotline Information System, AHIS, and Consumer Hotline Information System, CHIS.'' The name of this SORN will be changed to ''DOT/FAA 845 Complaint Intake System.'' The modification of the system of records notice (hereafter referred to as ''Notice'') will include the intake records for additional types of allegations that need to be identified in the Notice for purposes of transparency and accountability by FAA. These expanded reports are of actual or perceived aviation safety hazards and potential violations of criminal, civil and administrative laws and regulations, and aviation safety related orders under the regulatory oversight of the FAA. The Suspected Unapproved Program (SUP) complaint intake records covered by the former DOT/FAA 852 SUP Program SORN will be subsumed

by this Notice. The records of the complaint investigations and resolutions will be covered by the updated DOT/FAA 852 Complaint Investigations System (formerly SUP Program) SORN, while the complaint intake will be covered by this Notice.

DATES: Written comments should be submitted on or before November 14, 2022. The Department may publish an amended SORN in light of any comments received. This new system will be effective November 14, 2022.

ADDRESSES: You may submit comments, identified by docket number 2022–0099 by any of the following methods:

- *Federal e-Rulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Ave. SE, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal Holidays.
- *Fax:* (202) 493–2251.
- *Instructions:* You must include the agency name and docket number DOT–OST–2022–0099. All comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided.

Privacy Act: Anyone is able to search the electronic form of all comments received in any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.).

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

FOR FURTHER INFORMATION CONTACT: For questions, please contact Karyn Gorman, Acting Departmental Chief Privacy Officer, Privacy Office, Department of Transportation, Washington, DC 20590; *privacy@dot.gov*; or 202–366–3140.

SUPPLEMENTARY INFORMATION:

I. Background

In accordance with the Privacy Act of 1974, 5 U.S.C. 552a, the Department of Transportation (DOT) proposes to rename, modify and re-issue a DOT system of records notice to be titled, ''Department of Transportation, Federal Aviation Administration, DOT/FAA 845 Complaint Intake System.''

The Notice currently covers FAA Administrator correspondence and hotline records which includes those who write, call, or are referred to the Administrator, the Deputy Administrator, and their immediate offices; those who write, call, or are referred to the Secretary, the Deputy Secretary, and their immediate offices, and the correspondence which has been referred to the FAA; individuals who are the subject of an action requiring approval or action by one of the forenamed, such as appeals, actions, grievances, and applications for waivers from the FAA. These FAA correspondence control records will be subsumed under the DOT/Office of the Secretary (OST)–041 Correspondence Control Mail (CCM) SORN.[1] This Notice will cover the intake and processing of administrator hotlines along with additional reports of actual or perceived aviation safety hazards as well as allegations of violations of criminal, civil and administrative laws and regulations, and aviation safety related orders under the regulatory oversight of the FAA. These records, hereafter referred to as ''complaints or complaint records,'' originate from members of the public as well as FAA employees and contractors. While the information technology (IT) systems referenced in the previous Notice, ACCIS, AHIS and CHIS, are decommissioned, their records have been subsumed into different IT systems and continue to be covered by this updated Notice with the exception of the correspondence control files. Records pertaining to the SUP program, whistleblower complaints and other aviation safety-related issues, such as aircraft noise concerns, and allegations by FAA's Office of Aviation Safety (AVS) employees about individuals and external entities, are being added to this system of records in order to consolidate maintenance of complaint records by the FAA. AVS employees utilize an internal system to report their issues whereas others, including remaining FAA personnel and members of the public, use external facing websites to submit their SUP, whistleblower and other aviation safety-related complaints. The records of all complaint investigations and resolutions are currently covered by the updated DOT/FAA 852 Complaint Investigations System (formerly SUP Program), while the complaint intake records are to be covered by this Notice. Complaint records may include, but are not limited to, certain personal information such as name, address, phone number, email address, aircraft registration number, and certificate number of the reporting individual or subject of alleged violations.

The following substantive changes have been made to the Notice:

1. *System Name:* This Notice updates the system name to ''DOT/FAA 845 Complaint Intake System'' to better reflect the expanded scope of the system of records created as part of the complaint intake process under this Notice.

2. *System Location:* This Notice updates the system location to include the multiple system locations for the various complaint records added to this Notice. The additional system locations include the William J. Hughes Technical Center (WJHTC) in Atlantic City, New Jersey, and the facility at 3701 MacIntosh Drive, Warrenton, Virginia. The complaints submitted by AVS employees prior to April 2021 are located at the Mike Monroney Aeronautical Center (MMAC) in Oklahoma City, Oklahoma, and the subsequent records are located at the MITRE offices at 7525 Colshire Drive, McLean, Virginia. The previous reference to the Administrator offices at the FAA headquarters locations will be removed from this Notice given correspondence control records will be covered by the DOT/OST–041 SORN, however, the FAA headquarters location will remain with updated office information.

3. *System Manager:* This Notice updates the system manager information to reflect the inclusion of records maintained at the WJHTC in Atlantic City, New Jersey, the facility at Warrenton, Virginia, the MMAC in Oklahoma City, Oklahoma (pre-April 2021) and the MITRE offices in McLean, Virginia (April 2021 onward). Additionally, contact information for each system manager is included in this update. The reference in the previous Notice to the Administrator offices at the FAA headquarters locations will be removed from this Notice given correspondence control records will be covered by the DOT/OST–041 SORN, however, the FAA headquarters location will remain with updated office and contact information.

4. *Authority:* This Notice updates the authorities to include: 49 United States Code (U.S.C.) 42121 which applies to discrimination against airline employees reporting safety concerns/violations, as well as reporting of other safety issues covered by 49 U.S.C. 40101 section 341, section 510, section 1210 Federal Aviation Reauthorization Act of 1996, and section 180 FAA

[1] DOT is in the process of updating the DOT/OST–041 CCM SORN. Please check the DOT Privacy Act System of Records Notices page (Privacy Act System of Records Notices | US Department of Transportation) for the current status of the update.

Reauthorization Act of 2018, and 49 U.S.C. 106(t). 49 U.S.C. 44701, from DOT/FAA 852, covering the SUP program, including discussion on safety and minimum safety standards, will be added given that SUP complaint intake records are subsumed into this Notice. This statute also applies to AVS personnel complaints and other hotline records. The previously referenced authority of 44 U.S.C. 3101 as it pertains to records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency that are maintained by heads of agencies, such as the Administrator and Noise Ombudsman, will remain in this Notice.

5. *Purpose:* This Notice updates the purpose of this System as covering the records pertaining to the complaint reports of unsafe or unauthorized aviation activities concerning the perceived or actual violations of FAA regulation, order, or other provision of Federal law related to aviation safety or practices, including SUP, whistleblower and noise complaints. The previous purpose to provide documentation of hotline calls will remain with expanded language, and information related to correspondence records will be removed in this Notice.

6. *Categories of Individuals:* This Notice updates the categories of individuals to include complainants, such as members of the public, FAA employees and contractors, and other individuals alleged to have been involved in the reported alleged violations or other aviation safety concerns. These individuals add clarification to the previously referenced individuals who write, call in or are referred to senior agency heads, as well as correspondence and subjects of actions requiring approval by these agency heads.

7. *Categories of Records:* This Notice updates the categories of records with files specific to reports of alleged violations. The list of personal information contained in these complaint records could include names of complainants and other individuals involved with the alleged violations, contact information (phone number, address, email address), certificate number, aircraft registration number, aircraft tail number, and report/case tracking number (to include, but not limited to, reference number, case number, record number, and control number). The previously referenced records, such as specific correspondence files involving senior agency heads, will be removed from this Notice.

8. *Records Source Categories:* The Notice updates the records source categories to clarify that records related to complaints of alleged violations are received from complainants, including members of the public, FAA employees and contractors, and other federal agencies. The previously referenced correspondence by members of the public to senior agency heads will be removed from this Notice.

9. *Routine Uses:* This Notice updates the routine uses to include the Department of Transportation's general routine uses applicable to this Notice as they were previously only incorporated by reference. OMB Memoranda A–108 recommends that agencies include all routine uses in one notice rather than incorporating general routine uses by reference. Therefore, the Department is replacing the statement in DOT/FAA 845 that referenced the ''Statement of General Routine Uses'' with all of the general routine uses that apply to this system of records. The routine use referenced in the previous Notice is superseded by the departmental routine uses and will be removed in this update. This Notice adds new system-specific routine uses that are compatible with the purpose of the system of records. The routine uses include:

a. To the Federal Bureau of Investigation, U.S. Customs Service, and the Department of Defense, the initial SUP complaints received by FAA, for their use in any civil/criminal investigations when an FAA suspected unapproved parts case is initiated. FAA waits for the go-ahead from these external entities before proceeding with any investigation of their own;

b. Routine use (2)(a) and 2(b) apply only to records pertaining to noise complaints, and do not apply to information contained in related hotline or whistleblower protection complaint files. Pursuant to routine use 2(a) and 2(b), the FAA may disclose:

i. To airport sponsors, federal agencies and departments when necessary to resolve noise complaints of their manned and unmanned aircraft, and other operators of aerial landing and takeoff sites, records relating to noise complaints stemming from their flight operations and to ensure consistency between the FAA and these entities on noise complaints;

ii. To manned and unmanned aircraft operators when necessary to resolve a complaint pertaining to the operator, or when necessary to ensure consistency between the FAA and the operator in responding to noise complaints. Records disclosed pursuant to this routine use are limited to the following information: geolocation only to the extent necessary to identify the general location of the noise complaint; time and date of complaint; and description of the complaint or inquiry. Complainant names and contact information will not be disclosed pursuant to this routine use; and

c. To officials of labor organizations recognized under 5 U.S.C. chapter 71, when relevant and necessary to their duties of exclusive representation concerning AVS's Voluntary Safety Reporting Program. The FAA analysts work in conjunction with the labor organizations in conducting the investigations of actual or alleged violations reported by AVS employees.

10. *Records Retrieval:* This Notice updates records retrieval to include all records that can be retrieved by report/case tracking number (to include, but not limited to, reference number, case number, and record number). Additionally, FAA complaint records can be retrieved by individual's name (including complainant name and subject of complaint) while noise complaint records can be retrieved by individual's name, email address and address (street/city/state). This language supersedes that in the previous Notice.

11. *Records Retention and Disposal:* This Notice updates the records retention and disposal to reflect records retention timeframes for the new type of complaints covered by this System. FAA complaints and whistleblower records are to be maintained in accordance with DAA–0237–2019–0012 with cut off after cases are closed and destruction 3 years after cut off, and the SUP records maintained in accordance with DAA–0237–2019–0010 with cut off at the end of the calendar year in which cases are closed and destruction 8 years after cut off. The FAA is adding a new section to DAA–0237–2019–0012 to request destruction of noise complaint records to be 10 years after cut off. These records will be treated as permanent records until the temporary record is approved by the National Archives and Records Administration (NARA). Finally, records on AVS employee reporting on aviation safety matters are maintained in accordance with DAA–0237–2019–0012 with destruction 3 years after cut off (pre-April 2021) with subsequent records collected to be treated as permanent records until NARA approves the new records retention request, DAA–0237–2020–0028, for 15 years. This language supersedes that in the previous Notice.

12. *Records Access:* This Notice updates the record access procedures to reflect that signatures on signed requests for records must either be notarized or accompanied by a statement made

under penalty of perjury in compliance with 28 U.S.C. 1746.

The following non-substantive changes to Records storage, administrative, technical and physical safeguards, contesting records procedures, and notification procedures, have been made to improve the transparency and readability of the Notice:

13. *Records Storage:* This Notice updates records storage procedures to generalize the language.

14. *Administrative, Technical and Physical Safeguards:* This Notice updates the administrative, technical and physical safeguards to generalize the language.

15. *Contesting Records:* This Notice updates the procedures for contesting records to refer the individual to the record access procedures section.

16. *Notifications:* This Notice updates the notification procedures to refer the individual to the record access procedures section.

II. Privacy Act

The Privacy Act (5 U.S.C. 552a) governs the means by which the Federal Government collects, maintains, and uses personally identifiable information (PII) in a System of Records. A ''System of Records'' is a group of any records under the control of a Federal agency from which information about individuals is retrieved by name or other personal identifier. The Privacy Act requires each agency to publish in the **Federal Register** a System of Records Notice (SORN) identifying and describing each System of Records the agency maintains, including the purposes for which the agency uses PII in the system, the routine uses for which the agency discloses such information outside the agency, and how individuals to whom a Privacy Act record pertains can exercise their rights under the Privacy Act (*e.g.,* to determine if the system contains information about them and to contest inaccurate information). In accordance with 5 U.S.C. 552a(r), DOT has provided a report of this system of records to the Office of Management and Budget and to Congress.

SYSTEM NAME AND NUMBER:

Department of Transportation (DOT)/ Federal Aviation Administration (FAA) 845 Complaint Intake and Correspondence Records System.

SECURITY CLASSIFICATION:

Unclassified, sensitive.

SYSTEM LOCATION:

The system locations are as follow:

1. Hotline complaints, including SUP and whistleblower records: Office of Audit and Evaluation, Reporting and Data Analysis Branch, AAE–300, Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591; and, AIT Infrastructure and Operations, Data Center Services, AIF–300, Federal Aviation Administration, William J. Hughes Technical Center, Atlantic City, New Jersey 08405.

2. AVS employee reporting: Operations Services Division AIF–300, Federal Aviation Administration, Mike Monroney Aeronautical Center (MMAC), 6500 South Macarthur Boulevard, Oklahoma City, Oklahoma 73169 (pre-April 2021); and MITRE Corporation, 7525 Colshire Drive, McLean, Virginia 22102 (April 2021 onward).

3. Noise specific complaints: ATO System Operations, NAS Data Integration and Services, AJR–G2, Federal Aviation Administration, 3701 MacIntosh Dr., Warrenton, Virginia 20187.

SYSTEM MANAGER(S):

The system managers are as follows:

1. Hotline complaints, including SUP and whistleblower records: Director, Office of Audit and Evaluation (AAE–1), Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, *https://www.faa.gov/about/office_org/headquarters_offices/aae/.*

2. AVS employee reporting: Manager, Flight Standards Service, Quality Control and Investigations Branch (AFB–440A), Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591 (pre-April 2021); and Executive Director, Office of Quality, Integration and Executive Services (AQS–1), Federal Aviation Administration, 800 Independence Avenue SW, Washington, DC 20591, *9-avs-vsrp@faa.gov* (April 2021 onward); and

3. Noise specific complaints: IT Program Manager, System Data and Infrastructure (AJR–G2), Federal Aviation Administration, 3701 MacIntosh Dr., Warrenton, Virginia 20187, *https://noise.faa.gov.*

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

44 U.S.C. 3101; 49 U.S.C. Section 106(t); 49 U.S.C. 40101 section 341, section 510, section 1210 Federal Aviation Reauthorization Act of 1996, and section 180 FAA Reauthorization Act of 2018; 49 U.S.C. 42121; and 49 U.S.C. 44701.

PURPOSE(S) OF THE SYSTEM:

The purpose of this system of records is to cover reports of unsafe or unauthorized aviation activities concerning the perceived or actual violations of FAA regulation, order, or other provision of Federal law related to aviation safety or practices, including whistleblower, SUP and noise complaints.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals covered by this system of records consist of complainants, including members of the public and FAA employees and contractors, and individuals who are the subject of such violations; and members of Congress and the public who call in or correspond with the FAA personnel.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records maintained in this system include files specific to reports of alleged violations. Individual records may include names of complainants, contact information (phone number, address, email address), geolocation of noise, aircraft registration number, certificate number, aircraft tail number, and report/case tracking number (to include, but not limited to, reference number, case number, record number, and control number).

RECORD SOURCE CATEGORIES:

Reports of alleged violations and other aviation related concerns and safety-related issues, such as noise complaints, are received from complainants, including members of the public, FAA employees and contractors, and other federal agencies.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to other disclosures, generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, all or a portion of the records or information contained in this system may be disclosed outside DOT as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

System Specific Routine Uses:

1. To the Federal Bureau of Investigation, U.S. Customs Service, and the Department of Defense, the initial SUP complaints received by FAA, for their use in any civil/criminal investigations when an FAA suspected unapproved parts case is initiated.

2. Routine use (2)(a) and (b) apply only to records pertaining to noise complaints, and do not apply to information contained in related hotline or whistleblower protection complaint files. Pursuant to routine use (2), the FAA may disclose:

a. To airport sponsors, federal agencies and departments operating manned and unmanned aircraft outside FAA's regulatory jurisdiction, and other operators of aerial landing and takeoff sites, records relating to noise complaints stemming from their operations to ensure consistency between the FAA and these entities on noise complaints;

b. To man and unmanned aircraft operators when necessary to resolve a complaint pertaining to the operator, or when necessary to ensure consistency between the FAA and the operator in responding to noise complaints. Records disclosed pursuant to this routine use are limited to the following information: geolocation only to the extent necessary to identify the general location of the noise complaint; time and date of complaint; and description of the complaint or inquiry. Complainant names and contact information will not be disclosed pursuant to this routine use; and

3. To officials of labor organizations recognized under 5 U.S.C. chapter 71, access to all information when relevant and necessary to their duties of exclusive representation concerning AVS's Voluntary Safety Reporting Program.

Department General Routine Uses:

4. In the event that a system of records maintained by DOT 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 particular program pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, or rule, regulation, or order issued pursuant thereto.

5. A record from this system of records may be disclosed, as a routine use, to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to a DOT decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant or other benefit.

6. A record from this system of records may be disclosed, as a routine use, to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

7a. Routine Use for Disclosure for Use in Litigation. It shall be a routine use of the records in this system of records to disclose them to the Department of Justice or other Federal agency conducting litigation when (a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof, in his/her official capacity, or (c) Any employee of DOT or any agency thereof, in his/her individual capacity, where the Department of Justice has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that litigation is likely to affect the United States, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice or other Federal agency conducting the litigation is deemed by DOT to be relevant and necessary in the litigation, provided, however, that in each case, DOT determines that disclosure of the records in the litigation is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

7b. Routine Use for Agency Disclosure in Other Proceedings. It shall be a routine use of records in this system to disclose them in proceedings before any court or adjudicative or administrative body before which DOT or any agency thereof, appears, when (a) DOT, or any agency thereof, or (b) Any employee of DOT or any agency thereof in his/her official capacity, or (c) Any employee of DOT or any agency thereof in his/her individual capacity where DOT has agreed to represent the employee, or (d) The United States or any agency thereof, where DOT determines that the proceeding is likely to affect the United States, is a party to the proceeding or has an interest in such proceeding, and DOT determines that use of such records is relevant and necessary in the proceeding, provided, however, that in each case, DOT determines that disclosure of the records in the proceeding is a use of the information contained in the records that is compatible with the purpose for which the records were collected.

8. The information contained in this system of records will be disclosed to the Office of Management and Budget, OMB in connection with the review of private relief legislation as set forth in OMB Circular No. A–19 at any stage of the legislative coordination and clearance process as set forth in that Circular.

9. Disclosure 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. In such cases, however, the Congressional office does not have greater rights to records than the individual. Thus, the disclosure may be withheld from delivery to the individual where the file contains investigative or actual information or other materials which are being used, or are expected to be used, to support prosecution or fines against the individual for alleged violations of a statute, or of regulations of the Department based on statutory authority. No such limitations apply to records requested for Congressional oversight or legislative purposes; release is authorized under 49 CFR 10.35(9).

10. One or more records from a system of records may be disclosed routinely to the National Archives and Records Administration in records management inspections being conducted under the authority of 44 U.S.C. 2904 and 2906.

11. Routine Use for disclosure to the Coast Guard and to Transportation Security Administration. A record from this system of records may be disclosed as a routine use to the Coast Guard and to the Transportation Security Administration if information from this system was shared with either agency when that agency was a component of the Department of Transportation before its transfer to the Department of Homeland Security and such disclosure is necessary to accomplish a DOT, TSA or Coast Guard function related to this system of records.

12. DOT may make available to another agency or instrumentality of any government jurisdiction, including State and local governments, listings of names from any system of records in DOT for use in law enforcement activities, either civil or criminal, or to expose fraudulent claims, regardless of the stated purpose for the collection of the information in the system of records. These enforcement activities are generally referred to as matching programs because two lists of names are checked for match using automated assistance. This routine use is advisory in nature and does not offer unrestricted access to systems of records for such law enforcement and related antifraud activities. Each request will be considered on the basis of its purpose, merits, cost effectiveness and alternatives using Instructions on reporting computer matching programs

to the Office of Management and Budget, OMB, Congress, and the public, published by the Director, OMB, dated September 20, 1989.

13. It shall be a routine use of the information in any DOT system of records to provide to the Attorney General of the United States, or his/her designee, information indicating that a person meets any of the disqualifications for receipt, possession, shipment, or transport of a firearm under the Brady Handgun Violence Prevention Act. In case of a dispute concerning the validity of the information provided by DOT to the Attorney General, or his/her designee, it shall be a routine use of the information in any DOT system of records to make any disclosures of such information to the National Background Information Check System, established by the Brady Handgun Violence Prevention Act, as may be necessary to resolve such dispute.

14a. To appropriate agencies, entities, and persons when (1) DOT suspects or has confirmed that there has been a breach of the system of records; (2) DOT has determined that as a result of the suspected or confirmed breach there is a risk of harm to individuals, DOT (including its information systems, programs, and operations), the Federal Government, or national security; and (3) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with DOT's efforts to respond to the suspected or confirmed breach or to prevent, minimize, or remedy such harm.

14b. To another Federal agency or Federal entity, when DOT determines that information from this system of records is reasonably necessary to assist the recipient agency or entity in (1) responding to a suspected or confirmed breach or (2) preventing, minimizing, or remedying the risk of harm to individuals, the recipient agency or entity (including its information systems, programs, and operations), the Federal Government, or national security, resulting from a suspected or confirmed breach.

15. DOT may disclose records from this system, as a routine use, to the Office of Government Information Services for the purpose of (a) resolving disputes between FOIA requesters and Federal agencies and (b) reviewing agencies' policies, procedures, and compliance in order to recommend policy changes to Congress and the President.

16. DOT may disclose records from this system, as a routine use, to contractors and their agents, experts, consultants, and others performing or working on a contract, service, cooperative agreement, or other assignment for DOT, when necessary to accomplish an agency function related to this system of records.

17. DOT may disclose records from this system, as a routine use, to an agency, organization, or individual for the purpose of performing audit or oversight operations related to this system of records, but only such records as are necessary and relevant to the audit or oversight activity. This routine use does not apply to intra-agency sharing authorized under Section (b)(1) of the Privacy Act.

18. DOT may disclose from this system, as a routine use, records consisting of, or relating to, terrorism information (6 U.S.C. 485(a)(5)), homeland security information (6 U.S.C. 482(f)(1)), or Law enforcement information (Guideline 2 Report attached to White House Memorandum, ''Information Sharing Environment, November 22, 2006) to a Federal, State, local, tribal, territorial, foreign government and/or multinational agency, either in response to its request or upon the initiative of the Component, for purposes of sharing such information as is necessary and relevant for the agencies to detect, prevent, disrupt, preempt, and mitigate the effects of terrorist activities against the territory, people, and interests of the United States of America, as contemplated by the Intelligence Reform and Terrorism Prevention Act of 2004 (Pub. L. 108–458) and Executive Order 13388 (October 25, 2005).

POLICIES AND PRACTICES FOR STORAGE OF RECORDS:

Records are stored in electronic databases and/or hard copy files.

POLICIES AND PRACTICES FOR RETRIEVAL OF RECORDS:

All complaint records can be retrieved by report/case tracking number (to include, but not limited to, reference number, case number, record number, and control number). FAA Hotline complaint records, including whistleblower records, can be retrieved by individual's name, and noise complaint records can be retrieved by individual's name, email address and address (street/city/state).

POLICIES AND PRACTICES FOR RETENTION AND DISPOSAL OF RECORDS:

FAA will maintain hotline complaint records, including whistleblower records, in accordance with DAA–0237–2019–0012 with cut off after cases are closed and destruction 3 years after cut off, SUP records in accordance with DAA–0237–2019–0010 with cut off at the end of the calendar year in which cases are closed and destruction 8 years after cut off, and AVS employee safety reporting records in accordance with DAA–0237–2019–0012 with destruction 3 years after cut off (pre-April 2021). The new retention schedule, DAA–0237–2020–0028, for the AVS employee safety reporting records (April 2021 onward) is still pending at NARA, so the FAA will treat these records as permanent records until it receives an approval of record disposition authority for the 15-year retention request. Additionally, the FAA is adding a new section to DAA–0237–2019–0012 to request destruction of noise complaint records to be 10 years after cut off with records to be treated as permanent records until approval of the new schedule by NARA.

ADMINISTRATIVE, TECHNICAL AND PHYSICAL SAFEGUARDS:

Records in this system are safeguarded in accordance with applicable rules and policies, including all applicable DOT automated systems security and access policies. Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to records in this system is limited to those individuals who have a need to know the information for the performance of their official duties and who have appropriate clearances or permissions.

RECORD ACCESS PROCEDURES:

Individuals seeking notification of whether this system of records contains information about them may contact the System Manager at the address provided in the section ''System Manager''. When seeking records about yourself from this system of records or any other Departmental system of records your request must conform to the Privacy Act regulations set forth in 49 CFR part 10. You must sign your request and your signature must either be notarized or submitted under 28 U.S.C. 1746, a law that permits statements to be made under penalty of perjury as a substitute for notarization. If your request is seeking records pertaining to another living individual, you must include a statement from that individual certifying his/her agreement for you to access his/her records.

CONTESTING RECORDS PROCEDURES:

See ''Redress Access Procedure'' above.

NOTIFICATION PROCEDURES:

See ''Redress Access Procedure'' above.

EXEMPTIONS PROMULGATED FOR THE SYSTEM:

None.

HISTORY:

A full notice of this system of records, DOT/FAA 845, was published in the **Federal Register** on April 11, 2000 (65 FR 19526).

Issued in Washington, DC.

Karyn Gorman,

Acting Departmental Chief Privacy Officer.

[FR Doc. 2022–22126 Filed 10–11–22; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Communications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Wednesday, November 9, 2022.

FOR FURTHER INFORMATION CONTACT: Conchata Holloway at 1–888–912–1227 or 214–413–6550.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel Taxpayer Communications Project Committee will be held Wednesday, November 9, 2022, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Conchata Holloway. For more information, please contact Conchata Holloway at 1–888–912–1227 or 214–413–6550, or write TAP Office, 1114 Commerce St., MC 1005, Dallas, TX 75242 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 3, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22091 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Taxpayer Assistance Center Improvements Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will still be held via teleconference.

DATES: The meeting will be held Thursday, November 10, 2022.

FOR FURTHER INFORMATION CONTACT: Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Taxpayer Assistance Center Improvements Project Committee will be held Thursday, November 10, 2022, at 3:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Matthew O'Sullivan. For more information please contact Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274, or write TAP Office, 1301 Clay Street, Oakland, CA 94612–5217 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 4, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22086 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Special Projects Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will still be held via teleconference.

DATES: The meeting will be held Wednesday, November 9, 2022.

FOR FURTHER INFORMATION CONTACT: Antoinette Ross at 1–888–912–1227 or 202–317–4110.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Special Projects Committee will be held Wednesday, November 9, 2022, at 11:00a.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Antoinette Ross. For more information please contact Antoinette Ross at 1–888–912–1227 or 202–317–4110, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 4, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22092 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Toll-Free Phone Lines Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, November 8, 2022.

FOR FURTHER INFORMATION CONTACT: Rosalind Matherne at 1–888–912–1227 or 202–317–4115.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Toll-Free Phone Lines Project Committee will be held Tuesday, November 8, 2022, at 3:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Rosalind Matherne. For more information, please contact Rosalind Matherne at 1–888–912–1227 or 202–317–4115, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 3, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22087 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel Joint Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel Joint Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service.

DATES: The meeting will be held Thursday, November 17, 2022.

FOR FURTHER INFORMATION CONTACT: Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel Joint Committee will be held Thursday, November 17, 2022, at 1:30 p.m. Eastern Time via teleconference. The public is invited to make oral comments or submit written statements for consideration. For more information, please contact Matthew O'Sullivan at 1–888–912–1227 or (510) 907–5274, or write TAP Office, 1301 Clay Street, Oakland, CA 94612–5217, or post comments to the website: *http://www.improveirs.org.*

The agenda will include various committee issues for submission to the IRS and other TAP related topics. Public input is welcomed.

Dated: October 4, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22088 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, November 8, 2022.

FOR FURTHER INFORMATION CONTACT: Robert Rosalia at 1–888–912–1227 or (718) 834–2203.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Taxpayer Advocacy Panel's Notices and Correspondence Project Committee will be held Tuesday, November 8, 2022, at 12:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Robert Rosalia. For more information, please contact Robert Rosalia at 1–888–912–1227 or (718) 834–2203, or write TAP Office, 2 Metrotech Center, 100 Myrtle Avenue, Brooklyn, NY 11201 or contact us at the website: *http://www.improveirs.org.* The agenda will include various IRS issues.

Dated: October 4, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22084 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee

AGENCY: Internal Revenue Service (IRS) Treasury.

ACTION: Notice of meeting.

SUMMARY: An open meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be conducted. The Taxpayer Advocacy Panel is soliciting public comments, ideas, and suggestions on improving customer service at the Internal Revenue Service. This meeting will be held via teleconference.

DATES: The meeting will be held Tuesday, November 8, 2022.

FOR FURTHER INFORMATION CONTACT: Fred Smith at 1–888–912–1227 or (202) 317–3087.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to Section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that a meeting of the Taxpayer Advocacy Panel's Tax Forms and Publications Project Committee will be held Tuesday, November 8, 2022, at 1:00 p.m. Eastern Time. The public is invited to make oral comments or submit written statements for consideration. Due to limited time and structure of meeting, notification of intent to participate must be made with Fred Smith. For more information, please contact Fred Smith at 1–888–912–1227 or (202) 317–3087, or write TAP Office, 1111 Constitution Ave. NW, Room 1509, Washington, DC 20224 or contact us at the website: *http://www.improveirs.org.*

Dated: October 3, 2022.

Kevin Brown,

Acting Director, Taxpayer Advocacy Panel.

[FR Doc. 2022–22085 Filed 10–11–22; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Enhanced-Use Lease (EUL) of Department of Veterans Affairs (VA) Real Property for the Development of Permanent Supportive Housing at the Greater Los Angeles Healthcare System (GLAHS)—MacArthur A EUL—West Los Angeles (WLA), California Campus

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Intent to Enter into an EUL.

SUMMARY: The purpose of this **Federal Register** notice is to provide the public with notice that the Secretary of Veterans Affairs intends to enter into an EUL of certain assets identified below on the GLAHS–WLA campus.

FOR FURTHER INFORMATION CONTACT: Brett Simms, Executive Director, Office of Asset Enterprise Management, Office of Management, 810 Vermont Avenue NW, Washington, DC 20420, 202–502–0262. This is not a toll-free number.

SUPPLEMENTARY INFORMATION: Pursuant to 38 U.S.C. 8161–8169 and the West Los Angeles Leasing Act of 2016, Public Law 114–226, as amended, the Secretary of Veterans Affairs is authorized to enter into an EUL for a term of up to 99 years on the GLAHS–WLA campus for the provision of supportive housing, if the lease is not inconsistent with and will not adversely affect the mission of VA. Consistent with this authority, the Secretary intends to enter into an EUL for the purpose of outleasing MacArthur Field, consisting of approximately 2.72 acres of land on the GLAHS–WLA campus, to develop 75 units of permanent supportive housing for Veterans and their families. The competitively selected EUL lessee/developer, MacArthur A, LP, will finance, design, develop, construct, manage, maintain and operate permanent supportive housing for eligible homeless Veterans or Veterans-at-risk of homelessness and their families on a priority placement basis. The housing will be developed over the next 2 years, consistent with the GLAHS–WLA Master Plan 2022. Additionally, the lessee/developer will be required to provide supportive services that guide Veteran residents towards long-term independence and self-sufficiency.

Signing Authority: Denis McDonough, Secretary of Veterans Affairs, approved this document on October 5, 2022, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,

Assistant Director, Office of Regulation Policy & Management, Office of General Counsel, Department of Veterans Affairs.

[FR Doc. 2022–22112 Filed 10–11–22; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 87 Wednesday,

No. 196 October 12, 2022

Part II

Department of Labor

Employment and Training Administration
20 CFR Parts 653 and 655

Wage and Hour Division
29 CFR Part 501

Temporary Agricultural Employment of H–2A Nonimmigrants in the United States; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 653 and 655

Wage and Hour Division

29 CFR Part 501

[DOL Docket No. ETA–2019–0007]

RIN 1205–AB89

Temporary Agricultural Employment of H–2A Nonimmigrants in the United States

AGENCY: Employment and Training Administration and Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor (Department or DOL) is amending its regulations governing the certification of agricultural labor or services to be performed by temporary foreign workers in H–2A nonimmigrant status (H–2A workers) and enforcement of the contractual obligations applicable to employers of such nonimmigrant workers. These regulations are consistent with the Secretary of Labor's (Secretary) statutory responsibility to certify that there are not sufficient able, willing, and qualified workers available to fill the petitioning employer's job opportunity, and that the employment of H–2A workers in that job opportunity will not adversely affect the wages and working conditions of workers in the United States similarly employed. Among the issues addressed in this final rule are improving the minimum standards and conditions of employment that employers must offer to workers; expanding the Department's authority to use enforcement tools, such as program debarment for substantial violations of program requirements; modernizing the process by which the Department receives and processes employers' job orders and applications for temporary agricultural labor certifications, including the recruitment of United States workers (U.S. workers); and revising the standards and procedures for determining the prevailing wage rate. This final rule will strengthen protections for workers, modernize and simplify the H–2A application and temporary labor certification process, and ease regulatory burdens on employers.

DATES: This final rule is effective November 14, 2022.

FOR FURTHER INFORMATION CONTACT: For further information regarding 20 CFR part 653, contact Kimberly Vitelli, Administrator, Office of Workforce Investment, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–3980 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via Teletypewriter (TTY)/Telecommunications Device for the Deaf (TDD) by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 20 CFR part 655, contact Brian Pasternak, Administrator, Office of Foreign Labor Certification, Employment and Training Administration, Department of Labor, 200 Constitution Avenue NW, Room N–5311, Washington, DC 20210, telephone: (202) 693–8200 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

For further information regarding 29 CFR part 501, contact Amy DeBisschop, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, Department of Labor, Room S–3502, 200 Constitution Avenue NW, Washington, DC 20210, telephone: (202) 693–0406 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone number above via TTY/TDD by calling the toll-free Federal Information Relay Service at 1 (877) 889–5627.

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I. Executive Summary

A. Purpose of the Regulatory Action

This final rule amends the standards and procedures by which the Department grants certification of agricultural labor or services to be performed by H–2A workers on a seasonal or temporary basis, and enforcement of the contractual obligations applicable to employers of H–2A workers. The major provisions contained in this final rule will strengthen protections for workers, modernize and simplify the H–2A application and temporary labor certification process, and ease regulatory burdens on employers.

It is the policy of the Department to maintain robust protections for workers and vigorously enforce all laws within its jurisdiction governing the administration and enforcement of nonimmigrant visa programs. This includes the coordination of the administration and enforcement activities of the Employment and Training Administration (ETA), Wage and Hour Division (WHD), and the Department's Office of the Solicitor in the promotion of the hiring of U.S. workers and the safeguarding of wages and working conditions in the United States. In addition, these agencies make criminal referrals to the Department's Office of Inspector General to combat visa-related fraud schemes.

The Department is updating its H–2A regulations to ensure that employers can address temporary labor needs by employing foreign agricultural workers, without undue cost or administrative burden, while maintaining the program's strong protections. The changes in this final rule will enhance WHD's enforcement capabilities, thereby ensuring that responsible employers are not faced with unfair competition and allowing for robust enforcement against program fraud and abuse that undermine the rights and interests of workers.

B. Legal Authority

The Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), establishes an ''H–2A'' nonimmigrant visa classification for a worker ''having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a); *see also* 8 U.S.C. 1184(c)(1) and 1188.[1] The admission of foreign workers under this classification involves a multi-step process before several Federal agencies. A prospective H–2A employer must first apply to the Secretary for a certification that:

- there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
- the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

8 U.S.C. 1188(a)(1). The INA prohibits the Secretary from issuing this certification—known as a ''temporary agricultural labor certification''—unless both of the above-referenced conditions are met and none of the conditions in 8 U.S.C. 1188(b) apply concerning strikes or lock-outs, labor certification program debarments, workers' compensation assurances, and positive recruitment.

The Secretary has delegated the authority to issue temporary agricultural labor certifications to the Assistant Secretary for Employment and Training, who in turn has delegated that authority to ETA's Office of Foreign Labor Certification (OFLC). *See* Secretary's Order 06–2010 (Oct. 20, 2010), 75 FR 66268 (Oct. 27, 2010). In addition, the Secretary has delegated to the Department's WHD the responsibility under 8 U.S.C. 1188(g)(2) to assure employer compliance with the terms and conditions of employment under the H–2A program. *See* Secretary's Order 01–2014 (Dec. 19, 2014), 79 FR 77527 (Dec. 24, 2014).

Once an employer obtains a temporary agricultural labor certification from DOL, it may then file a petition for a nonimmigrant worker with the Secretary of Homeland Security. *See* 8 U.S.C. 1184(c).[2] If the employer's petition is approved, the foreign workers residing outside the United States whom it seeks to employ must, generally, apply for a nonimmigrant H–2A visa at a U.S. embassy or consulate abroad, and seek admission to the United States with U.S. Customs and Border Protection.[3] If the employer seeks to employ foreign workers already performing work in the United States in H–2A status and wishes to petition the workers through an extension of stay or change of status, the foreign workers are not required to apply for a visa but should they depart from the United States subsequent to being granted such H–2A status, must generally obtain an H–2A visa in order to return to the country.

[1] For ease of reference, sections of the INA are referred to by their corresponding section in the United States Code.

[2] Under sec. 1517 of title XV of the Homeland Security Act of 2002, Public Law 107–296, 116 Stat. 2135, reference to the Attorney General's or other Department of Justice Official's responsibilities under sec. 1184(c) have been expressly transferred to the Secretary of Homeland Security. *See* 6 U.S.C. 202, 271(b).

[3] *See generally* 8 U.S.C. 1225; 8 CFR part 235.

C. Current Regulatory Framework

Since 1987, the Department has operated the H–2A temporary labor certification program under regulations promulgated pursuant to the INA. The standards and procedures applicable to the certification and employment of workers under the H–2A program are found in 20 CFR part 655, subpart B, and 29 CFR part 501. The majority of the Department's current regulations governing the H–2A program were published in 2010.[4] In addition, the Department has issued special procedures for the employment of foreign workers in the herding and production of livestock on the range as well as animal shearing, commercial beekeeping, and custom combining occupations.[5] The Department incorporated the provisions for employment of workers in the herding and production of livestock on the range into the H–2A regulations, with modifications, in 2015.[6] The provisions governing the employment of workers in the herding and production of livestock on the range are now codified at 20 CFR 655.200 through 655.235.[7]

D. Summary of Major Provisions of This Final Rule

After careful consideration of the public comments received, this final rule adopts much of the regulatory text proposed in the notice of proposed rulemaking (NPRM or proposed rule) published in the **Federal Register** on July 26, 2019, with some significant changes.[8] In particular, and as discussed in detail elsewhere in this preamble, this final rule adopts the following major changes to the Department's H–2A program regulations:

Strengthening Worker Protections and Program Integrity

- Revises the standards and procedures by which employers qualifying as H–2A Labor Contractors (H–2ALCs) obtain temporary labor certification by permitting the electronic submission of surety bonds, adjusting the required surety bond amounts based on changes to adverse effect wage rates (AEWR), adopting a common bond form that includes standardized bond language, and permitting debarment of H–2ALCs that fail to provide adequate surety bonds. These provisions are intended to reduce the likelihood of program abuse by ensuring H–2ALCs are better able to meet their payroll and other program obligations to workers, streamline the process for accepting surety bonds, and strengthen the Department's authority to address noncompliant bonds.
- Clarifies the definitions of ''employer'' and ''joint employment,'' the use of these terms in the filing of *Applications for Temporary Employment Certification,* and the responsibilities of joint employers. Employers that file as joint employers are treated as such as a matter of law for purposes of compliance and enforcement. In addition, employers that do not file applications but nonetheless jointly employ workers under the common law of agency are responsible as joint employers. These provisions are intended to enhance worker protections by providing greater clarity regarding the responsibilities of joint employers, consistent with the statute and the Department's current policy and practice.
- Provides that rental and/or public accommodations secured to house workers must meet applicable local, State, or Federal standards addressing certain health or safety concerns (*e.g.,* minimum square footage per occupant, sanitary food preparation and storage areas, laundry and washing facilities), and requires employers to submit written documentation that such housing meets applicable standards and contains enough bed(s) and room(s) to accommodate all workers requested. These provisions are intended to better protect the health and safety of workers without imposing an undue burden on employers.
- Enhances the Department's debarment authority by holding agents and attorneys, and their successors in interest, accountable for their own misconduct independent of the employer's violation(s), and clarifies that *Applications for Temporary Employment Certification* filed by debarred entities during the period of debarment will be denied without review. These provisions are intended to improve program integrity and promote greater compliance with program requirements.

Modernizing the H–2A Application Process and Prevailing Wage Surveys

- Establishes a single point of entry by requiring that employers, except in limited circumstances, electronically file *Applications for Temporary Employment Certification,* job orders, and all supporting documentation through a centralized electronic system maintained by the Department, and permits the use of electronic signatures meeting valid signature standards. These provisions are intended to reduce costs and burdens for most employers, improve the quality of applications, reduce the frequency of delays associated with deficient applications, and better facilitate interagency data-sharing.
- Codifies the use of electronic methods for the OFLC Certifying Officer (CO) to send notices and requests to employers, circulate approved job orders to appropriate SWAs for

[4] Final Rule, *Temporary Agricultural Employment of H–2A Aliens in the United States,* 75 FR 6884 (Feb. 12, 2010) (2010 H–2A Final Rule); *but see* Final Rule, *Modernizing Recruitment Requirements for the Temporary Employment of H–2A Foreign Workers in the United States,* 84 FR 49439 (Sept. 20, 2019) (2019 H–2A Recruitment Final Rule) (rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department's electronic job registry; and leveraging the expertise and existing outreach activities of State Workforce Agencies (SWAs) to promote agricultural job opportunities); *see also* Final Rule, *Rules Concerning Discretionary Review by the Secretary,* 85 FR 30608 (May 20, 2020) (establishing a system of discretionary secretarial review over cases pending before or decided by the Board of Alien Labor Certification Appeals [BALCA] and to make technical changes to Departmental regulations governing the timing and finality of decisions of the Administrative Review Board [ARB] and the BALCA).

[5] *See* Training and Employment Guidance Letter (TEGL) No. 32–10, *Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3042;* TEGL No. 15–06, Change 1, *Special Procedures: Labor Certification Process for Occupations Involved in the Open Range Production of Livestock under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3044;* TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041;* TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043;* TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040.*

[6] Final Rule, *Temporary Agricultural Employment of H–2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States,* 80 FR 62958 (Oct. 16, 2015) (2015 H–2A Herder Final Rule).

[7] Consistent with a court-approved settlement agreement in *Hispanic Affairs Project, et al.* v. *Scalia et al.,* No. 15-cv-1562 (D.D.C.), the Department recently rescinded 20 CFR 655.215(b)(2).

[8] Notice of Proposed Rulemaking, *Temporary Agricultural Employment of H–2A Nonimmigrants in the United States,* 84 FR 36168 (July 26, 2019). In late 2020, the Department published a final rule to revise the methodology by which it determines the hourly AEWR for non-range agricultural occupations. Final Rule, *Adverse Effect Wage Rate Methodology for the Temporary Employment of H–2A Nonimmigrants in Non-Range Occupations in the United States,* 85 FR 70445 (Nov. 5, 2020) (2020 H–2A AEWR Final Rule). The 2020 H–2A AEWR Final Rule addressed only that aspect of the NPRM. This final rule addresses the remaining aspects of the NPRM published on July 26, 2019.

interstate clearance and recruitment of U.S. workers, and issue temporary labor certification decisions directly to the Department of Homeland Security (DHS). These provisions are intended to modernize OFLC's processing of applications to minimize delays, reduce administrative costs for the employer and the Department, and expedite the delivery of temporary agricultural labor certifications to DHS, while maintaining program integrity.

- Replaces outdated prevailing wage survey guidelines from the Department's ETA Handbook 385 (Handbook 385) with modernized standards that are more effective in producing prevailing wages for distinct crop or agricultural activities, and expands the universe of State entities that may conduct prevailing wage surveys, including SWAs, other State agencies, State colleges, or State universities. These provisions are intended to refine the minimum standards for prevailing wage surveys, including providing SWAs with the flexibility to leverage other State survey resources to expand the number and scope of surveys conducted based on information that is as reliable and representative as possible. In addition, while the minimum standards may not ensure statistically valid estimates for larger categories of workers, they are designed to provide more options for SWAs to make decisions about prioritizing precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages.

Expanding Employer Access and Flexibilities To Use the H–2A Program

- Establishes new standards that permit individual employers possessing the same need for agricultural services or labor to file a single *Application for Temporary Employment Certification* and job order to jointly employ workers in full-time employment, consistent with the statute and the Department's longstanding practice. This provision is intended to provide small employers who cannot offer full-time work for their H–2A employees with an opportunity to participate in the H–2A program and ensure each employer will be held jointly liable for compliance with all program requirements.
- Codifies a unique set of standards and procedures, with some revisions, for employers that employ workers engaged in animal shearing, commercial beekeeping, and custom combining according to a planned itinerary across multiple areas of intended employment (AIE) in one or more contiguous States. These provisions are intended to provide appropriate flexibilities for employers engaged in these unique agricultural activities that are substantially similar to the processes formerly set out in administrative guidance letters, and greater certainty in the handling of these applications by the Department under 20 CFR part 655, subpart B.

E. Summary of Costs and Benefits

Executive Order (E.O.) 12866 [9] and E.O. 13563 [10] direct agencies to assess the costs and benefits of available alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rulemaking has been designated a ''significant regulatory action'' under section (sec.) 3(f)(1) of E.O. 12866. Accordingly, it has been reviewed by the Office of Management and Budget (OMB).

The Department estimates that this final rule will result in costs, cost savings, and qualitative benefits. The cost of this final rule is associated with rule familiarization and recordkeeping requirements for all H–2A employers, as well as increases in the amount of surety bonds required for H–2ALCs. This final rule is expected to have an annualized quantifiable cost of $2.75 million and a total 10-year quantifiable cost of $19.29 million at a discount rate of seven percent. The cost savings of this final rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the OFLC National Processing Center (NPC) with the SWAs. This final rule is estimated to have annualized cost savings of $0.16 million and total 10-year quantifiable cost savings of $1.12 million at a discount rate of seven percent.

The Department estimates that this final rule will result in an annualized net quantifiable cost of $2.59 million and a total 10-year net cost of $18.17 million, both at a discount rate of seven percent and expressed in 2021 dollars. The Department expects that this final rule will provide qualitative benefits including: (1) clearer application of certain housing-related standards when employers choose to meet their H–2A housing obligations by providing rental and/or public accommodations, which will bolster worker health and safety protections; (2) an improved process of submitting and reviewing H–2A applications, which will reduce workforce instability; and (3) the adoption of electronic surety bonds and a standardized bond form, which will help streamline the H–2A application process and reduce delays. The Department believes that the qualitative benefits outweigh the quantitative net costs in this rule.

F. Severability

To the extent that any portion of this final rule is declared invalid by a court, the Department intends for all other parts of this final rule that can operate in the absence of the specific portion that has been invalidated to remain in effect. Thus, even if a court decision invalidating a portion of this final rule results in a partial reversion to the current regulations or to the statutory language itself, the Department intends that the rest of this final rule continue to operate, to the extent possible, in tandem with the reverted provisions.

II. Acronyms and Abbreviations

AEWR Adverse effect wage rate(s)
AIE Area(s) of intended employment
ALJ Administrative Law Judge
AOWL Agricultural Online Wage Library
ARB Administrative Review Board
ARIMA Autoregressive integrated moving average
BALCA Board of Alien Labor Certification Appeals
BLS Bureau of Labor Statistics
CBA Collective bargaining agreement
CFR Code of Federal Regulations
CO Certifying Officer(s)
COVID–19 Novel coronavirus disease
CPI Consumer Price Index
DBA Doing Business As
DC District of Columbia
DHS Department of Homeland Security
DOJ Department of Justice
DOL Department of Labor
DOS Department of State
ECI Employment Cost Index
E.O. Executive Order
E–SIGN Electronic Signatures in Global and National Commerce Act
ETA Employment and Training Administration
FEIN Federal Employer Identification Number
FICA Federal Insurance Contributions Act
FLAG Foreign Labor Application Gateway
FLC Farm Labor Contractor
FLS Farm Labor Survey
FLSA Fair Labor Standards Act
FR Federal Register
FTC Federal Trade Commission
FY Fiscal Year(s)
GPEA Government Paperwork Elimination Act
H–2ALC(s) H–2A Labor Contractor(s)

[9] E.O. 12866, *Regulatory Planning and Review,* 58 FR 51735 (Oct. 4, 1993).

[10] E.O. 13563, *Improving Regulation and Regulatory Review,* 76 FR 3821 (Jan. 21, 2011).

HR Human Resources
iCERT iCERT Visa Portal System
ICR Information Collection Request
IFR Interim final rule
INA Immigration and Nationality Act
IRC Internal Revenue Code
IRCA Immigration Reform and Control Act of 1986
IRS Internal Revenue Service
MSA Metropolitan Statistical Area(s)
MSPA Migrant and Seasonal Agricultural Worker Protection Act
NAICS North American Industry Classification System
NOA Notice(s) of Acceptance
NOD Notice(s) of Deficiency
NPC National Processing Center
NPRM Notice of proposed rulemaking
NPWC National Prevailing Wage Center
NW Northwest
OALJ Office of Administrative Law Judges
OEWS Occupational Employment and Wage Statistics
OFLC Office of Foreign Labor Certification
OIRA Office of Information and Regulatory Affairs
OMB Office of Management and Budget
OSHA Occupational Safety and Health Administration
PRA Paperwork Reduction Act
Pub. L. Public Law
PWD Prevailing wage determination(s)
QCEW Quarterly Census of Employment and Wages
RFA Regulatory Flexibility Act
RIN Regulation Identifier Number
RV Recreational vehicle
SBA Small Business Administration
Sec. Section of a Public Law
Secretary Secretary of Labor
SOC Standard Occupational Classification
Stat. U.S. Statutes at Large
SWA(s) State Workforce Agency(-ies)
TDD Telecommunications Device for the Deaf
TEGL Training and Employment Guidance Letter
TTY Teletypewriter
UI Unemployment insurance
UMRA Unfunded Mandates Reform Act of 1995
U.S. United States
U.S.C. United States Code
USCIS U.S. Citizenship and Immigration Services
USDA U.S. Department of Agriculture
WHD Wage and Hour Division

III. Background and Public Comments Received on the Notice of Proposed Rulemaking

On July 26, 2019, the Department published an NPRM requesting public comments on proposals intended to modernize and simplify the process by which OFLC reviews employers' job orders and applications for temporary agricultural labor certifications for use in petitioning DHS to employ H–2A workers. *See* 84 FR 36168. The Department also proposed to amend the regulations for enforcement of contractual obligations applicable to the employment of H–2A workers and workers in corresponding employment administered by WHD, and to amend the Wagner-Peyser Act regulations administered by ETA to provide consistency with revisions to H–2A program regulations governing the temporary agricultural labor certification process. *Id.* The NPRM invited written comments from the public on all aspects of the proposed amendments to the regulations. A 60-day comment period allowed for the public to inspect the proposed rule and provide comments through September 24, 2019.

The Department also received requests for an extension of the comment period for the NPRM. While the Department appreciated the issues raised concerning the public's opportunity to examine the rule and comment, the Department decided not to extend the comment period. The Department continues to believe that a 60-day comment period was sufficient to allow the public to inspect the proposed rule and provide comments, and this conclusion is supported by both the volume of comments received and by the wide variety of stakeholders that submitted comments within the 60-day comment period.

The Department received a total of 83,532 public comments in docket number ETA–2019–007 in response to the NPRM. In addition, the Department received 128 comments in response to document WHD_FRDOC_0001–0070 prior to the comment submission deadline. These comments were incorporated into docket number ETA–2019–007, and each comment received a note on regulations.gov indicating that it was timely received. The commenters represented a wide range of stakeholders from the public, private, and not-for-profit sectors. The Department received comments from a geographically diverse cross-section of stakeholders within the agricultural sector, including farmworkers, workers' rights advocacy organizations, farm owners, trade associations for agricultural products and services, not-for-profit organizations representing agricultural issues, and other organizations with an interest in farming, ranching, and other agricultural activities. Public sector commenters included Federal elected officials, State officials, and agencies representing 14 State governments. Private sector commenters included business owners, recruiting companies, and law firms. Other commenters included immigration advocacy groups, public policy organizations, and trade associations interested in immigration-related issues. The vast majority of comments specifically addressed proposals and issues contained in the NPRM. The Department recognizes and appreciates the value of comments, ideas, and suggestions from all those who commented on the proposal, and this final rule was developed after review and consideration of all public comments timely received in response to the NPRM.[11] [12]

IV. Discussion of General Comments

Following careful consideration of the public comments received, the Department made a number of modifications to the NPRM's proposed regulatory text. Section V of this preamble sets out the Department's interpretation and rationale for the amendments adopted to 20 CFR part 655, subpart B, 20 CFR 653.501(c)(2)(i), and 29 CFR part 501, section by section. Before setting out the detailed section-by-section analysis below, however, the Department will first acknowledge and respond to general comments that did not fit readily into this organizational scheme.

Of the total public comments received, 82,893 comments were associated with form letters or letter writing campaigns. One not-for-profit organization submitted the names of 8,602 community members expressing general concerns about worker wages,

[11] As explained elsewhere in this rule, the Department separately published a final rule—the 2020 H–2A AEWR Final Rule—that addressed the proposal and public comments concerning the AEWR methodology and was limited to only that aspect of the NPRM. This final rule addresses the remaining aspects of the NPRM. Previously, on January 15, 2021, the Department announced and posted on OFLC's website an unpublished final rule on these remaining aspects of the NPRM, explaining that the rule was pending publication in the **Federal Register** with a 30-day delayed effective date. *See* Announcements, *U.S. Department of Labor Withdraws Forthcoming H–2A Temporary Agricultural Program Rule for Review* (Jan. 20, 2021), *https://www.dol.gov/agencies/eta/foreign-labor/news*. On January 20, 2021, however, the Department withdrew this document from the Office of the Federal Register, prior to the document being made available for public inspection, for the purpose of reviewing issues of law, fact, and policy raised by the rule. Therefore, the unpublished draft rule (hereinafter referenced as ''the January 2021 draft final rule'') never took effect. 5 U.S.C. 552(a)(1), 553; *cf. Humane Society* v. *U.S. Dep't of Ag.*, No. 20–5291,—F.4th—, 2022 WL 2898893, at *8 (D.C. Cir. 2022) (holding that ''agencies may repeal a rule made available for public inspection in the Office of the Federal Register only after complying with the [Administrative Procedure Act's] procedural requirements''). The **Federal Register** and the Code of Federal Regulations remain the official sources for regulatory information published by the Department. *Id.* Any statements in the January 2021 draft final rule do not represent the Department's formal policy. Moreover, the January 2021 draft final rule and any statements contained therein do not, and may not be relied upon to, create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party.

worker safety, and enforcement of immigration laws. A not-for-profit foundation and labor union letter writing campaign resulted in the submission of more than 74,000 form letters and postcards from individual farmworkers expressing general concerns over issues such as the growth of the H–2A program, worker wages, costs to workers, working conditions, housing conditions, job opportunities for U.S. workers, and enforcement and oversight of program protections. Additional letter writing campaigns were organized by agricultural associations, trade associations, local groups of farmers, and private individuals. The Department recognizes and appreciates the public's interest in this regulatory action. Where these letters discussed substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

Many of the comments received expressed general support for or opposition to the proposed rule, without discussing specific provisions of the NPRM. The Department received comments from individual business owners, farmers, and trade associations that expressed general support for taking action to change the H–2A program, including efforts to streamline the electronic document filing system, modernizing and improving the efficiency of the program, making the program more flexible and responsive to farmer needs, and creating an environment that fosters a more stable workforce without harming U.S. workers. Other commenters stressed the importance of protecting and improving the American farming industry through the proposed regulations. Another commenter mentioned the growth of the H–2A program in their State as evidence that the program plays a vital role in the agricultural sector. The Department values and appreciates these commenters' support for the proposed rule, as well as their unique and informed perspectives on the program's strengths and proposed points of improvement.

In addition to comments expressing general support for the rule, the Department received several comments supporting other comments that were submitted in response to the NPRM. Most of these comments were from individual farmers and ranchers expressing support for a comment submitted by an agricultural association or trade association. The Department acknowledges the time and effort undertaken by these commenters to voice their opinions on this rulemaking and lend their support for the opinions of others. Where these comments supported substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

The Department also received several comments in general opposition to the changes proposed in the NPRM, including from private citizens, farmworkers, and workers' rights advocacy organizations. These comments included concerns that changes to the H–2A program could disproportionately harm small farms. In accordance with the Regulatory Flexibility Act (RFA), an analysis on the impact on small farms was performed, and the results were considered in formulating this final rule. Additional commenters expressed the view that stronger protections and accountability for worker safety and living conditions are needed, asserting that the changes proposed in the NPRM would serve to weaken labor standards and increase instances of abuse within the immigration system. Some commenters feared that the proposed changes would disproportionately harm marginalized communities, including immigrants, individuals with disabilities, and people of color. One commenter opposed the changes proposed in the NPRM out of a general concern that such changes, once implemented, would encourage employers to deny jobs to U.S. farmworkers in order to hire foreign workers for less pay. Still other commenters stated that the changes proposed in the NPRM would make working and living conditions worse for farmworkers both within the H–2A program as well as farmworkers who are already lawfully present in the United States and employed in that capacity. These commenters underscored the importance of increasing protections for both U.S. workers' and H–2A workers' living and working conditions. Some commenters worried that the proposed changes would increase costs to workers, decrease their wages, or both. In contrast, one commenter expressed concern about the proposal increasing costs for employers through higher wages and labor standards for workers. Other commenters expressed general concerns about how the changes would impact food safety and the appeals process. A few commenters criticized the proposed rule for not including provisions to address recruitment fees and sectors in agriculture that have year-round needs for labor.

The Department values and appreciates the participation and input from these commenters and the perspectives they have to offer. The mission of DOL is to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and protection of workers' rights. Under this charge, the Department continues to be as diligent as possible in safeguarding worker rights, promoting the welfare of all workers, and investigating and preventing abuse within the U.S. agricultural economy, and it shares these commenters' concerns for the protection of all farmworkers in the United States. Where these comments supported substantive changes within the scope of the rule, the Department has considered and addressed these issues, in detail, in the section-by-section analysis of this preamble.

V. Section-by-Section Summary of This Final Rule, 20 CFR Part 655, Subpart B; 20 CFR 653.501(c)(2)(i); and 29 CFR Part 501

This section of the preamble provides the Department's responses to public comments received on the NPRM and rationale for the amendments adopted to 20 CFR part 655, subpart B, 20 CFR 653.501(c)(2)(i), and 29 CFR part 501, section by section, and generally follows the outline of the regulations. Within each section of the preamble, the Department has noted and responded to those public comments that are addressed to that particular section of this final rule. If a proposed change is not addressed in the discussion below, it is because the public comments did not substantively address that specific provision and no changes have been made to the proposed regulatory text. The Department received some comments on the NPRM that were outside the scope of the proposed regulations, and the Department offers no substantive response to such comments. The Department also has made some nonsubstantive changes to the regulatory text to correct grammatical and typographical errors, in order to improve readability and conform the document stylistically, that generally are not discussed below.

A. Introductory Sections

1. Section 655.100, Purpose and Scope of Subpart B

The NPRM proposed minor amendments to this section to clarify the purpose of the H–2A program regulations in paragraph (a) and the scope of those regulations in paragraph

(b). Proposed paragraph (a) reflected the purpose of the final rule as realizing the Department's statutory authority to establish a process through which it will make factual determinations regarding the issuance of a temporary agricultural labor certification and certify its determination to DHS. *See* 8 U.S.C. 1188(a). Proposed paragraph (b) described the scope of the Department's role in receiving, reviewing, and adjudicating *Applications for Temporary Employment Certification,* including establishing standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, and the rights and obligations of H–2A workers and workers in corresponding employment. The Department received some comments on this provision, but has not made any substantive changes to the regulatory text in response to these comments. Therefore, as discussed below, this provision remains unchanged from the NPRM except for minor technical changes.

Although many commenters generally applauded the Department's efforts to amend the H–2A regulations through this rulemaking activity, others stated the proposed regulations were unsatisfactory in addressing a wide array of immigration and workforce issues impacting the United States. Some called for an ''overhaul'' of the immigration system as it relates to agricultural labor through this rule or through a ''guest'' worker program, and some suggested creation of a system where the agricultural workforce would have a pathway to citizenship. Others stated that the changes proposed in this rulemaking would weaken workers' wages, protections, and U.S. worker recruitment obligations, and would not incentivize farmers' use of E-Verify administered by DHS and the Social Security Administration. However, no commenters objected to the Department's proposed language under § 655.100 stating the purpose and scope of its H–2A program regulations based on the Department's statutory authority under the INA.

To the extent commenters urged action beyond the proposed changes that the Department presented for public comment in the NPRM, their comments are outside the scope of this rulemaking. To the extent these commenters commented on the Department's proposals in specific provisions of the NPRM (*e.g.,* wage requirements or recruitment obligations), the Department has addressed their specific comments in the preamble discussion of those particular provisions. Generalized comments relating to this final rule are addressed in section IV, Discussion of General Comments. In the absence of objection to the Department's proposed revisions to this regulatory language describing the purpose and scope of its H–2A program regulations, the Department has adopted these provisions as proposed, with minor changes in § 655.100. In this final rule, the Department reversed the order of the words ''purpose'' and ''scope'' in the section heading in order to reflect the sequence of topics in paragraphs (a) and (b). The Department also revised ''temporary agricultural labor or services'' to now read ''agricultural labor or services of a temporary or seasonal nature'' and included the word ''temporary'' in front of ''foreign workers'' to better reflect the determinations made in the Department's temporary agricultural labor certification.

2. Section 655.101, Authority of the Agencies, Offices, and Divisions of the Department of Labor; and 29 CFR 501.1, Purpose and Scope

The NPRM proposed minor amendments to this section related to the delegated authorities of ETA and WHD and the division of responsibilities between the agencies in administering the H–2A program. In addition to other statutory responsibilities required by 8 U.S.C. 1188, proposed paragraph (a) addressed ETA's authority to carry out the Secretary's responsibility to issue temporary agricultural labor certifications through OFLC, while proposed paragraph (b) addressed WHD's authority to carry out the Secretary's authority to investigate and enforce the terms and conditions of H–2A temporary agricultural labor certifications under 8 U.S.C. 1188, 29 CFR part 501, and 20 CFR part 655, subpart B (''this subpart'') (collectively, ''the H–2A program''). Proposed paragraph (c) reminded program users of ETA and WHD's concurrent authority to impose a debarment remedy, when appropriate, under ETA regulations at 20 CFR 655.182 or under WHD regulations at 29 CFR 501.20. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

Some commenters raised concerns about potential delays or confusion related to the manner in which ETA and WHD coordinate enforcement and share authority, as well as the level of expertise of enforcement agencies to which ETA and WHD may make referrals. One commenter expressed concern about the frequency of WHD investigations of H–2A employers, as compared to non-H–2A employers, and objected to what it perceived as an expansion of WHD's enforcement authority. Another commenter suggested that the complementary regulation at 29 CFR 501.1(b) be revised to explicitly reference OFLC's authority to carry out responsibilities under 20 CFR part 655, subpart B, in addition to its authority under the statute. As the regulations are promulgated pursuant to OFLC's statutory authority, the Department considers the proposed regulations to adequately describe the scope of OFLC's authority. Further, by adding paragraph (b) to 20 CFR 655.101, the Department clarifies the role of WHD with regard to 20 CFR part 655, subpart B, within that subpart rather than solely within the complementary regulation at 29 CFR 501.1(c) and brings consistency to 20 CFR 655.101 and 29 CFR 501.1; both now address ETA's and WHD's roles. To the extent commenters raised concerns about the manner in which ETA and WHD coordinate enforcement and shared authority, in practice, those specific comments are addressed in connection with the relevant regulatory provision (*e.g.,* 20 CFR 655.182(g)). As no commenter raised issues with the proposed revisions to the description of the authority of the Department's agencies, offices, and divisions under 20 CFR 655.101 and 29 CFR 501.1 that necessitate changes, the Department is adopting them in this final rule without change.

3. Section 655.102, Transition Procedures

a. Rescinding the Provision Allowing for the Creation of Special Procedures

As stated in the NPRM, the Department's H–2A regulations have, since their creation, provided authority under 20 CFR 655.102 to ''establish, continue, revise, or revoke special procedures for processing certain H–2A applications,'' and the Department has exercised a limited degree of flexibility in determining when specific variations from the normal labor certification processes were necessary to permit the temporary employment of foreign workers in specific industries or occupations. However, the Department proposed to rescind the special procedures provision in its H–2A regulations in light of the decision in *Mendoza* v. *Perez,* 754 F.3d 1002, 1022 (D.C. Cir. 2014), which found that the

Department's determination to establish special procedures for sheep, goat, and cattle herding under § 655.102 was subject to the Administrative Procedure Act, possessed all the hallmarks of a legislative rule, and could not be issued through sub-regulatory guidance. The Department underwent notice-and-comment rulemaking to convert the sub-regulatory guidance for sheep and goat herding and production of livestock on the range into formal regulations; those provisions appear in the Department's H–2A regulations at 20 CFR 655.200 through 655.235. 2015 H–2A Herder Final Rule, 80 FR 62958.[13] Accordingly, the Department proposed in the NPRM new regulatory provisions under §§ 655.300 through 655.304 to incorporate the remaining special procedures covering the specific occupations of animal shearing, commercial beekeeping, and custom combining into the H–2A regulatory framework, effectively rescinding the TEGLs covering those occupations. The Department received some comments on the Department's proposal to rescind existing § 655.102, but as discussed below, none warranted changes to the Department's proposed rescission. Therefore, the rescission of this provision remains unchanged from the NPRM.

Some commenters generally supported the proposal to engage in rulemaking (*i.e.,* through the NPRM and this final rule) to incorporate the procedures and standards from the TEGLs for itinerant animal shearing, commercial beekeeping, and custom combining into the H–2A regulations, with some remarking that it provided an opportunity to comment on specific aspects of occupational variances. The Department addresses these specific comments in the preamble sections below that discuss §§ 655.300 through 655.304. Several other commenters expressed support for this proposal and cited general agreement with the conclusion that such procedures are substantive and require formal notice-and-comment rulemaking.

One trade association stated that it ''takes no position'' on the proposed rule's rescission of the special procedures provision, but recommended the procedures and standards set forth in TEGLs should undergo ''appropriate due process'' before attaining the status of regulations. Although other trade associations and individual commenters were in favor of eliminating informal special procedures, they recommended the Department retain the ability to develop formal special procedures when circumstances arise in the future. These commenters noted that U.S. agriculture will continue to evolve, and the Department must have the appropriate tools to implement immediate changes to assist farmers while protecting workers.

The Department understands the concerns expressed by a few commenters that consideration of special variances for specific industries or occupations, other than those addressed in this final rule at §§ 655.200 through 655.235 and §§ 655.300 through 655.304, may be appropriate at some point in the future. However, in light of the court's decision in *Mendoza* and the similarity between the special procedures at issue in that case and the current H–2A special procedure TEGLs, the Department has determined that it should engage in formal notice-and-comment rulemaking procedures (*i.e.,* through the NPRM and this final rule) to incorporate into the regulations its current H–2A special procedures. Rescission of the broad authority in § 655.102 to establish special procedures does not preclude the Department from engaging in future notice-and-comment rulemaking or issuing guidance; rather, it reassures the public that the Department will engage in notice-and-comment rulemaking to establish variances in the future. Accordingly, the Department is adopting its proposal to rescind from the H–2A regulations the explicit provision permitting the Department to establish special procedures for processing certain *Applications for Temporary Employment Certification* under § 655.102.

b. Transition Procedures for Implementing Changes Created by This Final Rule

As stated in the NPRM, the Department proposed to repurpose § 655.102 to clarify which set of regulations—the 2010 H–2A Final Rule[14] or this final rule—an employer must satisfy for each *Application for Temporary Employment Certification* that it has already submitted or that it is preparing to submit when this final rule becomes effective. The Department proposed to rename § 655.102 as ''Transition procedures,'' and add regulatory language to support an orderly and seamless transition between the rules.

Paragraph (a) proposed that an *Application for Temporary Employment Certification* submitted to the OFLC NPC before the effective date of the final rule would be processed under the regulations in effect when it was submitted (*i.e.,* the 2010 H–2A Final Rule). However, an employer's engagement with H–2A program requirements begins in advance of its submission of the *Application for Temporary Employment Certification* to the NPC, with its submission of a job order to the SWA for review and clearance. In order to provide similar regulatory continuity for H–2A program job orders, paragraphs (b) and (c) proposed a procedure for determining which set of regulations would apply to an *Application for Temporary Employment Certification* submitted to the NPC on or after the effective date of the final rule.

As a result, any *Application for Temporary Employment Certification* with a first date of need no later than 90 days after the effective date of this final rule would be processed under the 2010 H–2A Final Rule. All other *Applications for Temporary Employment Certification* submitted on or after the effective date of this final rule would be processed under this final rule. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The majority of commenters that addressed transition procedures, including trade associations, an employer, and a SWA, generally supported the proposal. However, they expressed concern that the transition period might occur during a busy season or across calendar years, depending on the timing of the final rule's publication.

[13] The Department recently rescinded § 655.215(b)(2) in a separate rulemaking. Final Rule, *Adjudication of Temporary and Seasonal Need for Herding and Production of Livestock on the Range Applications Under the H–2A Program,* 86 FR 71373 (Dec. 16, 2021) (2021 H–2A Herder Final Rule).

[14] The Department's reference to ''the 2010 H–2A Final Rule'' herein includes the regulatory text adopted through that rulemaking, 75 FR 6884, and in other minor revisions that took effect prior to the effective date of this final rule. 2019 H–2A Recruitment Final Rule, 84 FR 49439 (rescinding the requirement that an employer advertise its job opportunity in a print newspaper of general circulation in the area of intended employment; expanding and enhancing the Department's electronic job registry; and leveraging the expertise and existing outreach activities of SWAs to promote agricultural job opportunities); *see also* Final Rule, *Rules Concerning Discretionary Review by the Secretary,* 85 FR 30608 (establishing a system of discretionary secretarial review over cases pending before or decided by the BALCA and to make technical changes to Departmental regulations governing the timing and finality of decisions of the ARB and the BALCA); 2021 H–2A Herder Final Rule, 86 FR 71373 (amending the regulations regarding the adjudication of temporary need for employers seeking to employ nonimmigrant workers in job opportunities covering the herding or production of livestock on the range).

These commenters urged the Department to include sufficient time in the transition period for employers to become familiar with new requirements and for the Department and SWA to develop and implement processes associated with the changes in the final rule, ideally outside of busy filing periods (*e.g.,* September, October, and November). The Department considered these interests and concluded that the transition procedures adopted in this final rule ensure that all job orders and *Applications for Temporary Employment Certification* submitted to the SWA and/or NPC before the effective date of this final rule will continue to be governed by the 2010 H–2A Final Rule. Not only will this approach ensure that the rule change does not complicate or disrupt an employer's application process mid-stream, but it will provide an appropriate period after publication of this final rule during which the Department, SWAs, and employers can adjust to the new rule before an employer submits its first job order for processing under this final rule (*i.e.,* with a first date of need more than 90 days after the effective date of this final rule).

Three commenters remarked on the length of the transition period proposed. Two trade associations objected to what they viewed as a delay of the actual effective date of the final rule. They remarked that the final rule would not be fully in effect on the 30th day after publication. In contrast, a SWA urged the Department to consider a longer transition period, such as 180 days after the final rule's publication date, stating that both SWAs and employers need more than 90 days to adjust to the substantive changes being proposed, *e.g.,* survey methodologies and staggered entry.[15]

The Department appreciates both the SWA's suggestion for more time as well as other commenters' concerns about prompt implementation of the new rule. The transition period implemented in this final rule balances these concerns. It allows the Department to implement necessary changes to program operations, application forms, and technology systems, and to provide training and technical assistance to the NPC, SWAs, employers, and other stakeholders in order to familiarize them with changes required by this rule. However, the transition period also balances the preparation required to properly implement the new rule with the importance of promptly implementing the modernized regulations. It requires employers to prepare job orders in compliance with the new regulations, and it requires the NPC and SWA to be prepared to receive those job orders, 46 days after publication of this final rule. Further, using employers' first date of need after this final rule's effective date, rather than a job order or *Application for Temporary Employment Certification* submission date, better ensures that workers who perform labor or services during the same season will be covered by the same set of regulations.

4. Section 655.103, Overview of This Subpart and Definition of Terms; 20 CFR 653.501(c)(2)(i) of the Wagner-Peyser Act Regulations; and 29 CFR 501.3, Definitions

a. AEWR

The NPRM proposed conforming changes to the definition of AEWR to be consistent with the NPRM's proposal to adjust the methodology used to establish AEWR in the H–2A program. Subsequently, the Department issued the 2020 H–2A AEWR Final Rule (85 FR 70445), which revised the AEWR methodology for non-range agricultural occupations and included a revised definition of AEWR. On December 23, 2020, in *United Farm Workers* v. *Dep't of Labor,* No. 20–cv–01690 (E.D. Cal. filed Nov. 30, 2020), the U.S. District Court for the Eastern District of California issued an order preliminarily enjoining the Department from further implementing the 2020 H–2A AEWR Final Rule.[16] On April 4, 2022, after the parties submitted summary judgment briefing, the court vacated the 2020 H–2A AEWR Final Rule and remanded the rule to the agency for further rulemaking consistent with the court's order.[17] In this final rule, the Department is implementing the court's vacatur of the 2020 H–2A AEWR Final Rule by removing from the CFR the regulatory text that the Department promulgated through that rulemaking at § 655.103(b) (the definition of AEWR), thereby restoring the regulatory text to appear as it did before the effective date of the 2020 H–2A AEWR Final Rule.

The Department has good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date for this portion of the rule because they are unnecessary and would be contrary to the public interest. *See* 5 U.S.C. 533(b)(B), (d). First, the changes made here carry out the ministerial task of effectuating the court's vacatur order and restores the regulatory text to the operative regulatory text in place prior to the publication of the now-vacated rule (the definition of AEWR in effect under the 2010 H–2A Final Rule). Since the court's vacatur order, no other party has sought to appeal the court's order or otherwise block it from taking effect. The Department has therefore concluded that the notice and delayed effective date requirements are unnecessary.

Second, the Department has concluded that taking comment on this change would be contrary to the public interest because it could lead to confusion, particularly among the regulated public, as to the applicable definition of the AEWR and the AEWR methodology. This is especially true in light of the Department's December 1, 2021, NPRM proposing revisions to the reinstated 2010 AEWR methodology. Continuing to include the vacated methodology in the CFR while simultaneously proposing to amend the 2010 AEWR methodology in the separate rulemaking could be unnecessarily confusing to the regulated community. This change eliminates any possible confusion over the current AEWR methodology and, more importantly, any confusion over what methodology the Department has proposed to change in its current AEWR rulemaking.[18]

The Department has concluded that each of these reasons—that notice and comment and a delayed effective date are unnecessary, impracticable, and contrary to the public interest—independently provides good cause to bypass any otherwise applicable requirements of notice and comment and a delayed effective date.

b. Area of Intended Employment and Place of Employment

The NPRM proposed minor amendments to the definition of AIE by

[15] The Department decided not to adopt several major changes proposed in the NPRM (*e.g.,* staggered entry), as discussed in relevant preamble sections, which mitigates the SWA's concern to some degree. In addition, as explained in the preamble discussing § 655.120, the Department anticipates the modernized prevailing wage determination (PWD) survey requirements will reduce the burden on SWAs.

[16] Order Granting Plaintiffs' Motion for a Preliminary Injunction, *United Farm Workers* v. *U.S. Dep't of Labor,* No. 20–cv–1690 (E.D. Cal. Dec. 23, 2020), ECF No. 37. The court's order was issued two days after the effective date of the 2020 H–2A AEWR Final Rule.

[17] Order Granting Plaintiffs' Motion for Summary Judgment, *United Farm Workers* v. *U.S. Dep't of Labor,* No. 20–cv–1690 (E.D. Cal. Apr. 4, 2022), ECF No. 102; Judgment, *United Farm Workers* v. *U.S. Dep't of Labor,* No. 20–cv–1690 (E.D. Cal. Apr. 4, 2022), ECF No. 103.

[18] As noted below, the comment period for the 2021 H–2A AEWR NPRM closed on January 31, 2022, and the Department will address comments received in response to that proposal in that separate rulemaking.

replacing the terms ''place of the job opportunity'' and ''worksite'' with a newly defined term ''place(s) of employment.'' The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, these definitions remain unchanged from the NPRM with one minor revision.

As explained in the NPRM, the CO will continue using the definition of AIE to assess whether each place of employment—defined as a worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment—is within normal commuting distance from the first place of employment listed on the job order as a work location or, if designated, the centralized ''pick-up'' point (*e.g.,* worker housing) to every other place of employment identified in the application and job order. After considering comments, as discussed below, the Department adopts the proposed definitions of AIE and place of employment with one minor change, to use the term ''place of employment'' in the singular in the definition of AIE.

Some commenters suggested the Department make substantive revisions to the proposed definition of ''place of employment,'' given how it is applied in the proposed definition of AIE at 20 CFR 655.103(b), and the explicit limitation of an *Application for Temporary Employment Certification* to one AIE that the Department proposed to incorporate at § 655.130(e). Some commenters asserted that travel time from one point on a farm to another (*e.g.,* from one field to another noncontiguous field, or from a field to a packing facility) and/or incidental travel off the farm to places outside of the AIE should not be considered in the Department's AIE evaluation. Several commenters, including a trade association, agent, and employers, used job opportunities involving trucking duties (*e.g.,* delivering an employer's crops to storage or market) as examples of their concerns. These commenters objected to listing all of a trucker's delivery and pick-up locations on the *Application for Temporary Employment Certification* as worksites, which the CO would analyze under the definition of AIE at § 655.103(b) and subject to the geographic limitation at § 655.130(e). Several trade associations, agents, and employers commented that the Department should adopt the H–1B definition of place of employment at § 655.715, asserting that the Board of Alien Labor Certification Appeals (BALCA) has done so in some appeal decisions. One commenter stated that adopting the H–1B definition would ensure that certain locations where work is performed for short durations are excluded from consideration in analysis of the AIE. An employer supported this approach as flexible and efficient, while other commenters stated it would provide clarity and certainty to the AIE evaluation. An agent acknowledged that the H–1B definition might be ''less-than-ideal for the H–2A program for other reasons'' and proposed a slightly modified version of the H–1B definition.

The Department declines to adopt the H–1B definition of ''place of employment'' for the H–2A program because doing so would be a major change that commenters and stakeholders generally could not have anticipated as an outcome of the rulemaking, thus warranting additional public notice and opportunity for comment. Additionally, the H–1B definition of ''place of employment'' is tailored to the specialty occupations eligible for the H–1B program, and this definition is not easily retrofitted or modified to apply to agricultural occupations eligible for the H–2A program.[19] Finally, such a change is not necessary to address commenters' concerns.

The Department's proposed definition of AIE considers the normal commuting distance to the place of employment where the workday begins, not the geographic scope of a worker's route after the workday begins. Under the proposed definition of ''place of employment,'' a truck driver's delivery locations, for example, are places of employment, as they are worksites or other physical locations at which the truck driver performs work under the job order. However, those delivery locations are not considered in the AIE analysis of normal commute to the place of employment because the workday for the job opportunity begins before a worker travels to those locations. The geographic scope limitation on such places of employment (*i.e.,* after the workday begins) are addressed under § 655.130(e), which, as revised, accommodates work at ''places of employment outside of a single [AIE] only as is necessary to perform the duties specified in the *Application for Temporary Employment Certification,* and provided that the worker can reasonably return to the worker's residence or the employer-provided housing within the same workday.''

While not assessed as part of an AIE review, an employer must identify on the *Application for Temporary Employment Certification* and job order all places of employment, including those after the workday begins, to allow both for the Department to review, and U.S. workers to be apprised of, the material terms and conditions of the job opportunity. If specific addresses are unknown, such as in the case of crop delivery to storage or market, the employer may describe the places to which deliveries will be made with as much specificity as possible (*e.g.,* county or city names). To be clear, all worksites and physical locations where work will be performed under the job order, both those to which a worker must commute and those to which a worker must travel after their workday begins, must be disclosed in the *Application for Temporary Employment Certification* and job order; however, those worksites and physical locations to which a worker must travel after the workday begins to perform work under the job order will not be analyzed under the definition of AIE. These comments and the limitation of an *Application for Temporary Employment Certification* to one AIE, absent an exception, are discussed further in relation to the geographic scope provision at § 655.130(e).

A State employment agency expressed concern that the term ''places of employment'' may result in employer misrepresentation of the actual worksite, lead to confusion around where the ''actual worksite'' is located when reviewing a job order, and require the SWAs to identify more deficiencies in cases where the employer does not specify the worksite as a place of employment. A forestry employer expressed concern that the proposed definition would be unworkable because the employer performs work at places of employment across areas wider than normal commuting distances, considers employer-provided housing to be home, and does not expect workers to return home to their permanent residence each day.

[19] For example, the H–1B regulations provide the following examples of non-worksites (*i.e.,* locations that do not constitute a place of employment) for an H–1B worker: ''[a] computer engineer sent to customer locations to 'troubleshoot' complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a 'home office' sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer representative at a restaurant; or an individual conducting research at a library.'' *See* § 655.715. These examples have limited parallels within the agricultural economy.

To add clarity, the Department has revised the definition of AIE so that ''place of employment'' is singular. As discussed above, there may be a number of places of employment listed on an *Application for Temporary Employment Certification,* as an employer must identify each worksite or physical location where work under the job order will be performed. However, the CO uses only one place—the first place of employment identified or, if designated, the centralized ''pick-up'' point (*e.g.,* worker housing)—to determine the normal commuting distance around that place and whether all of the worksites or physical locations to which a worker may commute to begin the workday are within that normal commute. Where an employer's job opportunity involves a planned itinerary (*e.g.,* animal shearing subject to § 655.300), and in the event an AIE analysis is required, the normal commute at each place along the planned itinerary would be analyzed.

Some commenters asserted that a normal-commuting-distance analysis should focus on the location of the housing or pick-up point employers provide for workers, rather than the places of employment listed on an employer's *Application for Temporary Employment Certification.* A trade association, with support from other commenters, stated that, because employers are required to provide transportation to worksites from the housing the employer provides or a pick-up point, a normal commuting distance for U.S. workers should be measured from their home to the housing or pick-up point, not the worksite(s); and thus argued that worksites have little bearing on the AIE labor market test. Another trade association similarly remarked that the ''housing or pick-up point, rather than the worksite'' should be the determining factor, asserting that this would reflect the commuting patterns of agricultural workers more accurately. An employer urged adoption of a standard that would consider a worksite to be within the AIE if the employer has provided housing at the worksite; as normal commuting distance would be measured from each of the various locations where the employer provided housing to workers, employers could file fewer *Applications for Temporary Employment Certification,* each application covering multiple AIEs. Similarly, an agent stated that employers are required to provide housing within a normal commuting distance, which ''would allow for multiple work/housing locations on a single application.''

The Department disagrees with commenters who assert that the location of one or more places of employment is not relevant to evaluating normal commuting distance whenever an employer provides transportation from a designated pick-up point, such as the housing it provides to H–2A workers and those workers in corresponding employment who are not reasonably able to return to their own residence within the same day, as provided in § 655.122(d)(1). The Department likewise disagrees that providing additional housing at the place of employment negates the need for the AIE analysis. A worker who does not reside at the pick-up point must commute either to the pick-up point or to the place of employment directly. Further, if the workday does not begin at the pick-up point, the commute for a worker who travels to the pick-up point using their own transportation continues from the pick-up point to the place of employment using the employer's transportation. To the extent a commute involves multiple segments, workers in corresponding employment may not be able to reasonably return to their own residences within the same day. Although an employer would be required to provide such workers with housing, the Department noted in the NPRM (and farmworkers and their advocates agreed in comments) that longer-than-normal commuting distance, transportation issues, and any requirement to live away from home and family are all factors that can discourage U.S. workers from accepting temporary agricultural job opportunities, impacting recruitment and the Department's ability to assess the labor market prior to issuing a final determination. Should a worker in corresponding employment choose not to live in employer-provided housing to reduce the commute, the Department has health and safety concerns, such as driver fatigue that can be exacerbated by increased commute times. In a comment addressing transportation safety under § 655.122(h), a State employment agency noted that driver fatigue in agriculture is a ''real and concerning issue,'' stating that it is not uncommon to see workers at worksites that are hours away from housing sites. (To the extent these commenters are discussing workers' movement between various places of employment after the workday begins, the Department has addressed this issue above and in § 655.130(e).)

Separately, a workers' rights advocacy organization discussed the use of the definition of AIE for other purposes, for example, to frame the geographic area for prevailing practice and wage surveys, asserting that regulatory language at §§ 655.122(d)(5) and 653.501(c)(2)(i) limits AIE in those contexts to a single State. Those comments with regard to prevailing wage surveys are addressed in the discussion of prevailing wage determinations (PWDs) at § 655.120(c).

In addition to soliciting comments on the proposed definitional changes, the Department invited input on whether it should further revise the definition of AIE either to continue making fact-based determinations on a case-by-case basis, with the consideration of other objective factors such as commuting or labor market area designation systems or other comprehensive commuting studies and data, or to implement a uniform standard, like a maximum commuting distance or time above which a commute would be considered unreasonable in all cases. The Department asked that comments address the advantages and disadvantages of different alternatives and how implementation would provide greater clarity and ensure the integrity of the labor market test.

Commenters varyingly expressed general concerns that the current definition of AIE is too broad, too narrow, or too ambiguous, but without offering an alternative framework. A trade association stated that AIE ''varies by the nature of the employer's need and does not fit neatly into one defined box,'' while an employer expressed concern that the current definition created such a broad standard that it could result in subjective review of an application. An agent suggested the definition of AIE should be expanded to reflect that agricultural employers now have statewide and interstate production to ''reduce crop failure risks, expand marketing windows, and improve capital utilization''; otherwise, the commenter suggested, the definition failed to accommodate modernization of agricultural operations. Many farmworkers emphasized that it is important to them to work close either in distance or time to where they live due to the lack of a driver's license, post-work obligations like schoolwork, and the need to care for their children and be available if family emergencies occur. A workers' rights advocacy organization expressed concern that the definition of AIE leads to a large AIE and results in fewer U.S. worker applicants for job opportunities because the regulation does not require employers to provide transportation to local workers.

Some commenters objected to the use of Metropolitan Statistical Areas (MSAs) in the H–2A program's definition of AIE as an objective means of evaluating a

normal commute in particular areas, but did not offer an alternative. Some trade associations, with support from other commenters, asserted that MSAs and commuting distance have no correlation with the nature of agricultural work. For example, one commenter stated that commute times associated with MSAs ''bear little resemblance to how agricultural workers get to their jobs.'' A workers' rights advocacy organization expressed concern that many farmworkers will have difficulty traveling to and between distant points within large MSAs and cited language from OMB stating that MSAs ''are not designed as a general-purpose framework for nonstatistical activities.'' *See 2010 Standards for Delineating Metropolitan and Micropolitan Statistical Areas; Notice,* 75 FR 37246 (June 28, 2010). One of the trade associations, with other commenters echoing its statement, noted that the widely varying commute times associated with different MSAs will make it difficult for a Farm Labor Contractor (FLC) to contract with a farmer with certainty about whether the farm will be determined to be inside or outside an arbitrary commute time for that specific MSA.

The commenters who addressed whether the Department should impose a more uniform standard for all employers, such as a maximum commuting distance or time above which a commute would be considered unreasonable in all cases, generally did not support a rigid measure of time or distance applicable in all cases. Several trade associations and an agent stated that use of a specific metric to determine reasonable commuting distance would be difficult due to various factors. An agent commented that employers transport workers to ''wherever the work is available,'' and the Department should not limit transportation to commute times that may vary widely based on factors like traffic patterns. One stated that measuring commutes in miles would be inappropriate because it would not account for areas in which distance can be traveled quickly, and measuring in time would penalize those who travel difficult terrain or encounter heavy traffic during daily commutes. One trade association stated that there is too much variation in terrain, weather, population concentration, road quality, and traffic across the country to apply a rigid definition of normal commuting distance. Another trade association similarly remarked that it would be impossible to use a definitive rigid measure of reasonable commuting distance due to variation in agriculture across the country, and urged the Department to provide more flexibility. While one agent suggested that a rigid commuting distance could be consistently applied, an employer urged the Department to adopt a flexible approach and not apply a rigid definition of normal commuting distance.

The commenters who suggested a maximum commute distance or commute time disagreed as to an appropriate limit. Trade associations, individual employers, and an agent suggested the Department should not consider a commute time to be unreasonable unless, for example, the worksite is at least 2 hours from the housing, the pick-up point, or both. One viewed it as a more easily understood approach that ''would prevent any misunderstanding of whether a specific farm will fit an MSA's commute time and better conform to the realities of agricultural employment.'' An agent commented that a smaller, more restrictive AIE is not helpful to anyone, neither the small local workforce that is not large enough for farmers' needs, nor the farmer who will have to artificially separate parts of its widespread operation to fit into discrete AIEs. This commenter argued that the Department has ''no statistics that legal, local or domestic workers would take jobs if they were just confined to about a 60-mile radius of any one farm.'' By comparison, a workers' rights advocacy organization urged the Department to limit the definition of ''normal commuting distance'' to distances ''considerably shorter than the 60+ mile figure'' requested by employers and suggested that a more reasonable maximum distance might be 45 miles. Some commenters who opposed a maximum commuting distance stated that if the Department were to adopt a maximum distance standard, it should provide flexibility to account for typical travel delays.

Upon careful consideration of all comments received, the Department declines to further modify the definition of AIE. Although using MSAs as a proxy for commuting area may result in broader geographic areas than might seem typical for jobs in rural areas, employers are required to provide housing to any worker in corresponding employment unable to reasonably return home at the end of the workday, including those who reside within the broadly identified commuting area. Some commenters appeared to conflate the concept of ''reasonable commuting distance'' as used in this section with the requirement that the employer provide housing to workers in corresponding employment who are not reasonably able to return to their residence within the same day. The Department notes that reasonable commuting distance as it relates to AIE is a general concept, whereas a determination as to whether a worker in corresponding employment is reasonably able to return to their residence at the end of the day is specific to the worker in question. Therefore, it is possible that a worker in corresponding employment could reside within a reasonable commuting distance of the place of employment, but could not reasonably return to their residence at the end of the day due to personal circumstances (*e.g.,* lack of a private vehicle or public transportation). In such a situation, the employer would be required to offer housing to the worker in corresponding employment. Therefore, while commenters provided certain arguments that MSAs might be an imperfect fit in some situations, these comments neglect to consider the continued value in using MSAs to provide a level of predictability and adjudicatory consistency for employers nationwide, which the Department and many commenters both consider important. As commenters have not identified any clearly superior alternative, this final rule continues to rely on a case-by-case approach to assessing AIE given the varying circumstances across areas that affect travel and commuting times.

c. Average AEWR

The NPRM proposed to define a new term ''average adverse effect wage rate'' (average AEWR). The term is necessary to effectuate the Department's proposal to make adjustments to the H–2ALC surety bond amounts based on changes to a nationwide average AEWR. The Department proposed to calculate the average AEWR as a simple average of the published AEWRs applicable to the Standard Occupational Classification (SOC) 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and publish an updated average AEWR annually to serve as the benchmark for future adjustments to the required bond amounts.

The Department received only two comments specifically relating to the proposal to define the average AEWR. Both commenters misunderstood the nature of this proposal, believing that the Department was proposing an alternative to the wage sources listed in § 655.120(a), and opposed the proposal for this reason. The Department reiterates that the average AEWR is only intended to be used as a benchmark for

making adjustments to the required bond amounts. Under this proposal, the average AEWR does not change or replace the wage rate required under § 655.120(a).[20]

Accordingly, the Department adopts the definition of average AEWR with minor modifications. As defined in this final rule, the average AEWR is the simple average of the AEWRs applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and published by the OFLC Administrator in accordance with § 655.120.[21] The revised definition clarifies that once set, the average AEWR remains in effect until the OFLC Administrator publishes an adjusted average AEWR and it becomes effective. Adjustments to the average AEWR will occur consistent with the schedule for adjusting the relevant AEWRs under § 655.120.

d. Corresponding Employment

The NPRM did not propose amendments to the definition of corresponding employment or request comments on any aspect of the definition. However, the Department received a few comments suggesting modifications to the definition, none of which necessitated substantive changes to the regulatory text from the NPRM. Therefore, this final rule retains the definition of corresponding employment from the current rule without change.

Several commenters stated that the definition should be modified to include a de minimis exception, allowing non-H–2A workers to perform a limited amount of work similar to the duties described in the job order or performed by the H–2A workers without being considered to be engaged in corresponding employment. Alternatively, several commenters indicated that the definition should be more similar to the definition of corresponding employment under the H–2B program regulations, which defines corresponding employment to include work that is either substantially similar to the work included in the job order or substantially the same work performed by H–2B workers, and excludes certain full-time, incumbent employees. *See* 20 CFR 655.5; 29 CFR 503.4.

The Department has carefully considered these comments requesting that the definition of corresponding employment be revised and narrowed but declines to alter the definition of corresponding employment at this time. The Department did not propose any changes to the definition of corresponding employment or request comments on any aspect of the definition. Many parties who would be affected by any change in the definition of corresponding employment therefore had no reason to anticipate any change in the current definition or to provide input as to how the definition could be revised. The Department received only a limited number of comments on this topic, all from employers and their representatives, with no feedback from other affected parties to enable the Department to obtain multiple perspectives on this issue. Further, the regulation provides important protections for workers by requiring that non-H–2A workers performing the same work as H–2A workers receive the same wages and working conditions as H–2A workers. Accordingly, the Department declines to adopt any changes to the definition of corresponding employment.

e. Employer and Joint Employment

The NPRM proposed amendments to the definitions of ''employer'' and ''joint employment'' to clarify the use of these terms in the filing of *Applications for Temporary Employment Certification* and the responsibilities of joint employers, consistent with the INA and the Department's longstanding administrative and enforcement practice. The Department received many comments on these proposed definitions, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, these definitions remain unchanged from the NPRM with one minor revision.

Section 218 of the INA recognizes that growers, agricultural associations, and H–2ALCs that file applications are employers or joint employers.[22] In conformity with the statute as well as the Department's current policy and practice, the NPRM proposed to clarify the definitions of employer and joint employment with respect to the H–2A program to include all of those entities the statute deems employers or joint employers. Specifically, the Department proposed to add language to the definition of joint employment to clarify that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. The Department further proposed to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer, but only during the period in which the employer-member employs H–2A workers sponsored under the association's joint employer application. The Department proposed to add language to the definition of joint employment to clarify that growers that file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and all workers in corresponding employment. In light of these proposed changes, the Department also proposed a slight change to the joint employment language in the current regulation to clarify that entities that do not file applications but jointly employ workers under the common law of agency are also joint employers that may be held liable for violations under the statute. In other words, entities that file applications as joint employers are joint employers as a matter of law, regardless of the common law of agency. The Department will assess the joint employer status of all other entities based on the nature of the employment relationship between the putative joint employer and the worker under the common law of agency, as provided in the existing definition of employee at § 655.103 and required by Supreme Court precedent. In addition to the proposed changes to the definition of joint employment, the Department proposed to add language to the definition of employer to clarify that a

[20] *See* 84 FR 36168, 36179 (explaining that the Department proposes to maintain the current requirement in § 655.120(a) that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, with only minor changes).

[21] The AEWR methodology proposed in the NPRM would have resulted in the publication of separate AEWRs specific to the SOC 45–2092 and other occupational classifications for field and livestock workers. Under the modifications made to the Department's AEWR methodology in the 2020 H–2A AEWR Final Rule, the OFLC Administrator would instead publish an AEWR for each State for a combined field and livestock workers category, which would be applicable to the SOC 45–2092. However, as discussed above, the 2020 H–2A AEWR Final Rule was preliminarily enjoined in *United Farm Workers* v. *U.S. Dep't of Labor,* No. 20–cv–01690 (E.D. Cal. Dec. 23, 2020). Regardless of the precise AEWR methodology used, the average AEWR will be based on the AEWRs that apply to the SOC 45–2092, whether they are SOC-specific or for a combined field and livestock workers category.

[22] *See* 8 U.S.C. 1188(c)(2) (''The employer shall be notified in writing within seven days of the date of filing if the application does not meet the [relevant] standards''); 8 U.S.C. 1188(c)(3)(A)(i) (''The Secretary of Labor shall make . . . the certification described in subsection (a)(1) if . . . the employer has complied with the criteria for certification''); 8 U.S.C. 1188(d)(2) (''If an association is a joint or sole employer of temporary agricultural workers, . . . [H–2A] workers may be transferred among its [employer-]members'').

person who files an application other than as an agent is an employer and, similarly, that a person on whose behalf an application is filed is an employer. As the Department noted in the NPRM, these proposed revisions reflected the Department's longstanding administrative and enforcement practice that is already familiar to employers.

Joint Employment for Agricultural Associations Filing as a Joint Employer With Their Employer-Members

The Department received numerous comments related to its proposal to clarify that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. Two associations supported the proposed definition of joint employment. Two other associations submitted lengthy comments opposing the proposal. The two associations opposing the proposal each asserted the INA does not permit the Department to impose joint employer liability on an agricultural association for the violations of an association member, unless the association committed, participated in, or had knowledge of the violation. The associations cited sec. 1188(d)(3)(A) of the INA, which limits the debarment of joint employer agricultural associations based on violations an employer-member commits to instances in which the agricultural association committed, participated in, had knowledge of, or had reason to know of the violation. The associations submitted that Congress's specific choice to permit debarment for an employer-member violation only when an agricultural association meets this standard evinces a general intent to hold agricultural associations otherwise accountable for employer-member violations only when they committed, participated in, or knew of the underlying violation.

The associations explained that Congress conferred a ''special status'' on agricultural associations ''in order to level the playing field for small employers'' and that imposing joint employer liability on agricultural associations that elect to file a joint employer application would ''frustrate that status'' because associations cannot afford exposure to such liability. Both assert that exposure to such liability would result in associations' inability to file joint employer applications. The associations also stated that the Department has historically applied the common law of agency to determine whether an entity employs a worker and oppose the ''proposed radical change to agency law.''

Two other associations asserted that the Department has never held an association liable for employer-member violations unless the association was involved in or directly participated in the violation. One of these associations also agreed with the two associations described immediately above that the proposal to hold agricultural associations accountable for employer-member violations when the agricultural association elected to file a joint employer application is inconsistent with the statute. That association also commented that the proposal will reduce small farmers' access to the program and potentially threaten the existence and participation of associations in the program. And finally, various other employer commenters lodged general objections to holding associations liable for the violations that their employer-members commit.[23]

A workers' rights advocacy organization supported the Department's proposal to clarify that an agricultural association that elects to file a joint employer application is at all times a joint employer of the H–2A workers sponsored under the application as well as any corresponding workers. The commenter submitted that the clarification will incentivize associations to monitor employer-member compliance with program requirements.

After carefully considering the comments it received, the Department has decided to retain its proposed clarification of the definition of joint employment to include language specifying that an agricultural association that files an application as a joint employer is, at all times, a joint employer of all H–2A workers sponsored under the application and any corresponding workers. The plain language of sec. 1188(d) of the INA requires this interpretation. Section 1188(d)(2) only allows an agricultural association to file a single application on behalf of its employer-members to sponsor H–2A workers that it may ''transfer'' among its membership ''[i]f [the agricultural] association is a joint or sole employer of temporary agricultural workers.'' [24] Thus, an association attests to joint employer status when it submits a joint employer application for authorization to transfer H–2A workers among its membership. In addition to permitting the association to transfer H–2A workers, filing a single application rather than individual applications on behalf of each employer-member of an agricultural association results in significant financial savings and substantially reduces the efforts and costs associated with the required recruitment and advertising. The statute requires an agricultural association to assume joint employer (or sole employer) status to qualify for these benefits.[25] Even if the statutory language did not compel this result, the Department would nevertheless adopt this interpretation as agricultural associations are uniquely positioned to be knowledgeable of program requirements, and this requirement encourages associations that transfer workers among their employer-members to ensure that their employer-members understand program rules and regulations, assist their membership in achieving compliance, and provide accountability for agricultural associations filing as joint employers.

Should an agricultural association prefer not to accept the obligations of joint (or sole) employment, it may choose instead to file individual applications on behalf of its employer-members as an agent, thereby limiting its liability, consistent with sec. 1188(d)(1) (but also foregoing the privileges that apply if it files a Master Application). The statutory scheme accordingly permits an agricultural association to choose to assume the

[23] Another agricultural association that submitted a comment (generally supported by several other commenters, including trade associations and individual employers) offered no criticism of the NPRM's clarification that agricultural associations that file a joint employer application are liable at all times for violations committed against H–2A workers sponsored under the applications as well as any applicable corresponding workers.

[24] *See also* the title of sec. 1188(d)(2) (''Treatment of Associations *Acting as* Employers.'') (emphasis added).

[25] *See Admin.* v. *WAFLA,* ALJ No. 2018–TAE–00013 (OALJ Aug. 25, 2021), *appeal pending,* ARB No. 2021–0069 (agricultural association is a joint employer of workers employed under master application as a matter of law); *Little* v. *Solis,* 297 FRD. 474, 478 (D. Nev. Jan. 27, 2014) (as a joint employer applicant, agricultural association is a joint employer of H–2A workers for purposes of the H–2A program); *Ruiz* v. *Fernandez,* 949 F. Supp. 2d 1055, 1072 (E.D. Wash. June 7, 2013) (an agricultural association that submits a joint employer application is a party to the H–2A workers' work contracts as a matter of law); *Martinez-Bautista* v. *D & S Produce,* 447 F. Supp. 2d 954, 962 (E.D. Ark. Aug. 25, 2006) (entities that jointly applied to employ H–2A workers are joint employers of the workers); *cf. WHD* v. *Native Techs., Inc.,* ARB No. 98–034, 1999 WL 377285, *6 (ARB May 28, 1999) (filer of a labor condition application under H–1B provisions of the INA is an ''employer'' by operation of law, independent of criteria under the common law test of employer); *but see Admin.* v. *Azzano Farms & WAFLA,* ALJ No. 2019–TAE–00002 (OALJ Oct. 2, 2019), *appeal pending,* ARB No. 2020–0013.

traditional responsibilities of a joint/sole employer, including any liability to the workers it jointly/solely employs—or file an application as an agent and generally avoid employer liability. However, when associations file as agents, H–2A workers cannot be transferred among their employer-members, pursuant to sec. 1188(d)(2).

The Department notes the contention that it has never sought to hold an agricultural association liable for employer-member violations unless the agricultural association was involved in the violations is inaccurate. Holding an association accountable for employer-member violations when the association attested to joint employer status is consistent with WHD's current statutory interpretation and its enforcement policy. WHD is presently asserting before the ARB that an association is liable for its employer-member's violations based solely on its having filed a joint employer application.[26] WHD has also previously sought to enforce program requirements against other associations based solely on their election of joint employer status.

Additionally, it is inaccurate to state that sec. 1188(d)(3)(A) provides that violations committed by an association member are not the responsibility of an association unless the Secretary determines that the association participated in, had knowledge of, or had reason to know of the violations. Rather, this section provides that an association *is not subject to debarment* when an employer-member commits a violation (unless the Secretary determines that the association or other employer-member participated in, had knowledge of, or had reason to know of the violations). Read together, sec. 1188(d)(2) and (3)(A) assign full legal responsibility to agricultural associations for employer-member violations, with the exception of a release from program debarment for an agricultural association when the Department cannot satisfy sec. 1188(d)(3)(A)'s more exacting standard.

The debarment standard provides a meaningful limitation on the Department's authority to debar an agricultural association for its employer-member's violations. Consistent with the provision, the Department's implementing regulations do not permit the Department to debar an association merely because its employer-member committed a substantial violation that subjects the employer-member to debarment. *See* 29 CFR 501.20(f).

When an association is not subject to debarment, civil money penalty assessments against the agricultural association for employer-member violations may be lower than those assessed for association members. As the Department noted in the NPRM, it will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the factors at § 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. Thus, for example, if the Department determines an agricultural association achieved no financial gain from an employer-member's failure to pay the required wage to H–2A or corresponding workers, but that the employer-member achieved significant financial gain, the civil money penalty, if any, applicable to the association would likely be less than that applicable to the employer-member for this violation.

Joint Employment for Employers Filing Joint Employer Applications Under § 655.131(b)

The Department received various comments concerning its proposal to add language to the definition of joint employment clarifying that growers that file the joint employer application proposed in § 655.131(b) are joint employers, at all times, with respect to the H–2A workers sponsored under the application and any corresponding workers. Five organizations representing growers' interests expressed appreciation that the Department was proposing to permit ''small growers to jointly apply'' for H–2A workers and to permit such growers to share H–2A workers. However, these commenters, as well as a sixth organization, all opposed the Department's proposal to treat each grower as a joint employer at all times for purposes of liability. The five organizations representing growers' interests requested that the Department only hold employer(s) that commit a program violation accountable. They asserted that co-applicants that do not commit the violations are ''innocent'' and should not be held liable ''for another employer's violation(s).'' The sixth organization similarly submitted that ''[o]nly the employer [that] is guilty for violating the terms of the program should be penalized.'' Another organization representing growers' interests likewise contended ''there is no basis for extending liability to any entity that did not have knowledge of or participate in any violation . . . .''

A workers' rights advocacy organization suggested that the job order that joint employers file in connection with a § 655.131(b) joint employer application should include language specifying that all named employers are agreeing to joint employment liability for the entire period of employment listed on the order. Otherwise, the commenter asserted, joint employers might contend liability extends solely to the dates on which H–2A workers complete work at the property owned or operated by the particular employer. The commenter specifically submitted this addition is necessary to prevent joint employer applicants from ''disputing joint employment should something go wrong.''

The Department has reviewed closely the comments it received on this subject. It has decided to retain its proposed clarification of the definition of joint employment to include language specifying that the joint employers that file an application under § 655.131(b) are, *at all times,* joint employers of all H–2A workers sponsored under the application and, if applicable, of corresponding workers. The purpose of the Department's proposal to add § 655.131(b) to its implementing regulations was to permit a small grower that has a need for H–2A workers but cannot, alone, guarantee full-time employment to use the H–2A program by joining with another (or other) small grower(s) in the same area to obtain H–2A workers to perform the same work. Full-time employment under the program is 35 hours per workweek. *See* § 655.135(f). The proposal accordingly permits co-applicants that cannot, alone, employ a worker for 35 hours per workweek to file an application together to employ H–2A workers and to move sponsored H–2A workers from one employer to another to satisfy the 35 hours per workweek requirement.

The statute specifically contemplates that all filers (other than agents) are employers and only expressly permits an entity (*i.e.,* an agricultural association) to move H–2A workers from one employer to another when the entity agrees to retain program responsibility and liability with respect to the workers it moves. *See* 8 U.S.C. 1188(d)(2). Therefore, as the Department stated in the NPRM and reaffirms here, the statute requires entities that jointly apply for H–2A workers whom they intend to move among themselves to retain program responsibility with respect to the H–2A workers and, if applicable, any corresponding workers. Because the statute provides that an entity permitted to move H–2A workers from one employer to another must

[26] *See Azzano Farms,* ARB No 2020–0013; *WAFLA,* ARB No. 2021–0069.

retain program responsibility with respect to the workers, and because the retention of such responsibility will aid the Department's enforcement of the program and enable corresponding workers and H–2A workers to obtain the wages they are owed consistent with joint employment principles, the Department is not adopting the commenters' request to release co-applicants from liability for the violations that another co-applicant commits. Thus, if the Department determines any employer named in the *Application for Temporary Employment Certification* under § 655.131(b) has committed a violation, either one or all of the employers named in the *Application for Temporary Employment Certification* can be found responsible for remedying the violation(s) and for attendant penalties. For example, if employer C and employer D file a joint employer application under proposed § 655.131(b) and employer C fails to pay the H–2A workers the required wage, employer D will be jointly liable for employer C's violations. This approach not only conforms to the statute, it is consistent with judicial authority.[27] Further, even if the statutory language did not require this interpretation, the Department would adopt it. The Department believes this policy will encourage employer compliance while helping to ensure that any back wages owed by joint employers will be paid. As an enforcement matter, it can be difficult to determine exactly where workers employed by joint employers are employed in a given workweek. The focus on the joint nature of the employment rather than the individual employer will assist in obtaining the wages owed to workers in the event they are underpaid and provide an incentive for all joint employers to maintain and monitor compliance.

However, the Department retains discretion to impose lower civil money penalties against the joint employers that did not commit the underlying violation. If it determines any such penalties are appropriate, such penalties may be less than those it imposes against the joint employer that committed the violation. As the Department noted above, it will continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy includes consideration of the factors at 29 CFR 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. Thus, for example, if the Department determines a joint employer had no previous history of violations, but that the other joint employer had a previous history of violations, the civil money penalty, if any, applicable to the joint employer with no previous history of violations would likely be less than that applicable to the joint employer that committed the violation.

Furthermore, as with agricultural associations that filed a joint employer application with their employer-members, the Department will not debar a joint employer that filed a joint employer application under 20 CFR 655.131(b) merely because another joint employer committed a substantial violation that subjects that other joint employer to debarment. Thus, for instance, if employer D in the example above did not participate in employer C's violation, the Department will not seek to debar employer D, even if employer C's underlying violation is substantial and subjects employer C to a debarment remedy. The Department has edited 20 CFR 655.182(h) and 29 CFR 501.20(f) to confirm this approach.

Joint Employment Period for Employer-Members Employing H–2A Workers Under an Agricultural Association Filing as a Joint Employer With the Employer-Members

The Department proposed to clarify the definition of joint employment to include an employer-member of an agricultural association that is filing as a joint employer during the time the employer-member employs H–2A workers sponsored under the association's joint employer application. Therefore, an employer that employs H–2A workers sponsored under an agricultural association joint employer application is jointly employing the H–2A workers with the agricultural association and, accordingly, is liable for any violations committed during the period it employs such workers. The proposed rule additionally clarified that an employer that is a member of an agricultural association that filed a joint employer application is *only* in joint employment with the agricultural association when it is employing the pertinent H–2A workers. Thus, if employer-member A commits program violations at a time when it is the only employer-member jointly employing the pertinent H–2A workers with the agricultural association, other employer-members within the association are not liable for such violations (provided the other employer-members did not participate in the violations, which were substantial, and thereby subject themselves to debarment). *See* 8 U.S.C. 1188(d)(3)(A); 29 CFR 501.20(f). The Department received no comments that caused it to reconsider this proposal. The Department has accordingly implemented the provision unchanged from the NPRM in this final rule.

The Department notes that the arrangement described above under § 655.103(b) is different from employers filing joint employer applications under § 655.131(b) that are, at all times, liable for any violation that another joint employer commits. As discussed previously, each § 655.131(b) joint employer is permitted to move H–2A workers to its co-applicants, whereas it is the agricultural association, not the employer-member, that may transfer workers when the agricultural association files as a joint or sole employer. The statute expressly permits an association to move H–2A workers from one entity to another *only* when the association agrees to retain program responsibility with respect to the moved H–2A workers by filing as a joint or sole employer. The Department has accordingly concluded that to permit § 655.131(b) joint employers to move workers, it must require the joint employers, like an agricultural association permitted to transfer H–2A workers, to retain program responsibility with respect to the H–2A workers. In short, the legally relevant analog to § 655.131(b) joint employers for purposes of determining whether to require such employers to retain program responsibility at all times is an agricultural association that files a joint or sole employer application (not an employer-member of such an association). As a matter of policy, providing joint employers joint responsibility also serves to better ensure compliance with statutory and regulatory requirements in the same way that shared responsibility between associations and their membership incentivizes compliance.

The Joint Employment Language More Expressly Codifies That the Common Law of Agency Determines Joint Employer Status for Non-Filers

In the NPRM, the Department proposed a slight change to the joint employment language in the current regulation to make clear that an entity that meets the definition of employer under the common law of agency but did not file an H–2A application is a joint employer. As the Department explained in the NPRM, controlling judicial and administrative decisions provide that to the extent a Federal

[27] *Martinez-Bautista* v. *D & S Produce,* 447 F. Supp. 2d 954, 960–62 (E.D. Ark. 2006) (ruling entities that jointly applied to employ H–2A workers are joint employers of the workers and rejecting application of agricultural association liability principles when the joint employers had not filed through an association).

statute does not define the term employer, the common law of agency governs whether an entity is an employer.[28] Accordingly, the proposal continued to use the common law of agency, as provided by current § 655.103 in the definition of employee, to define the term joint employment for associations and growers that have not filed applications (as well as to define the term employer when an entity has not filed an application). Thus, for example, under the Department's current and continuing enforcement policy—with which employers are already familiar—a grower is a joint employer with an H–2ALC with which it contracts to provide H–2A workers if the grower is jointly employing the H–2A workers under the common law of agency. The Department received no comments that caused it to reconsider this proposal. It has accordingly implemented the proposal unchanged from the NPRM in this final rule.[29]

The Department Is Adopting Clarifications to the Definition of Employer Proposed in the NPRM

In the NPRM, the Department proposed to add language to the definition of employer to clarify both that a person who files an application other than as an agent is an employer and that a person on whose behalf an application is filed is an employer. An employer association opposed the proposed clarification. Its comment appeared to say that the definition of employer should be no broader than an entity that employs H–2A workers under the common law of agency. Two other associations asserted the proposed clarifications to the definition of employer are inconsistent with the INA. These two associations specifically asserted the statute does not permit the Department to hold agricultural associations accountable as an ''employer'' when they have filed a joint employer application on behalf of their employer-members. The Department addressed above why the statute not only permits but also requires it to treat an agricultural association that files a Master Application as a joint employer of the pertinent workers. Because a joint employer is simply an employer of workers that another entity also employs, the statute requires the Department to treat an agricultural association that files an application as a joint employer as an ''employer.'' The Department's clarification of the definition of employer to include those that file an application (other than as an agent) is not only consistent with the INA; the INA compels it. Further, even if the INA did not compel this conclusion, the Department would nonetheless adopt these clarifications as a matter of good policy. The Department believes this policy will encourage employer compliance by providing an incentive for associations to disseminate information, make additional inquiries regarding their employer-members' responsibilities to workers under certified H–2A applications, and help to assure that any back wages owed by joint employers will be paid in full.

The Department also received a comment that the current definition of employer does not adequately contemplate complex business organizations. It is beyond the scope of this rulemaking for the Department to determine all the ways that a business seeking to use the H–2A program might organize itself. The Department hopes the following general guidance will be useful to entities that use complex business structures. The Department will treat the entity that files an application as an employer unless the filer identifies itself as an agent. If the filer identifies itself as an agent, the Department will treat as an employer the entity the agent identifies as its principal. The Department will also treat any other entity that actually employs the pertinent H–2A workers under the common law of agency as an employer. For example, if one entity within a complex business organization files an application as an employer and another entity within the same complex business organization employs the workers under the common law of agency, the Department will treat each entity as an employer (whether or not the filer jointly employs the workers under the common law). Other tests that may pertain to the employment relationship under Federal common law such as the integrated employer or the successor in interest tests may also be applicable depending on the facts of the individual case. This paragraph is intended to provide general guidance, however, and as mentioned above, it is beyond the scope of this rulemaking to determine all the ways that a business seeking to participate in the program might organize itself.

A commenter also brought to the Department's attention a minor grammatical error in the regulatory text's definition of employer at paragraph (iii). The Department agrees with the commenter and has made a minor technical change to the language to address the grammatical error.

Employer-Member Responsibility for Violations Committed Under a Joint Employer Application Filed by an Agricultural Association

Consistent with existing practice, the Department observed in the NPRM that when an agricultural association files a joint employer application, an employer-member of that association is an employer of the H–2A workers during the time the employer-member employs the workers. The Department further noted that when only one employer-member is employing the H–2A workers at the time of a program violation, only that employer-member and its agricultural association are fiscally responsible for program violations. The Department received no comments opposing this approach and is accordingly implementing it unchanged from the NPRM.

Department's Approach To Imposing Liability Among Culpable Joint Employers

In the NPRM, the Department proposed to continue to apply its longstanding policy with respect to imposing liability among culpable joint employers. This policy, as noted previously, includes consideration of the factors at 29 CFR 501.19(b) when the Department assesses civil money penalties. The Department applies these factors to joint employers on a case-by-case basis. For example, if the Department determines an agricultural association achieved no financial gain from an employer-member's failure to pay the required wage to H–2A or corresponding workers, but that the employer-member achieved significant financial gain, the civil money penalty, if any, applicable to the association would likely be less than that applicable to the employer-member for this violation.

The Department received multiple comments supporting this approach. For example, a grower association specifically voiced its support for the

[28] *See Nationwide Mutual Insurance* v. *Darden,* 503 U.S. 318, 322–24 (1992); *Garcia-Celestino* v. *Ruiz Harvesting,* 843 F.3d 1276, 1288 (11th Cir. 2016); *Admin.* v. *Seasonal Ag. Services, Inc.,* ARB Case No. 15–023, 2016 WL 5887688, at *6 (ARB Sept. 30, 2016). The focus of the common law standard is the ''hiring entity's 'right to control the manner and means by which the product is accomplished.' '' *Ruiz Harvesting,* 843 F.3d at 1292–93 (quoting *Darden,* 503 U.S. at 323). Application of the standard typically entails consideration of a variety of factors. *See id.* at 1293 (citing *Darden,* 503 U.S. at 323–24).

[29] The Department additionally notes, as it did in the NPRM, that the current H–2A program definitions of employer and joint employment, as well as those the Department is implementing herein, are different from the definitions of ''employer,'' ''employee,'' and ''employ'' in the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* (FLSA) and the definition of ''employ'' in the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 *et seq.* (MSPA).

case-by-case approach. The Department also received a comment from another grower association opposing this approach, however, arguing that only the culpable party or parties should be assessed a civil money penalty. As noted above, the Department will apply the relevant factors on a case-by-case basis to joint employers and thus appropriately consider culpability. The Department accordingly intends to continue to assess civil money penalties against joint employers in this manner.

Proposal To Move Certain Requirements in the Definition of Employer

The current definition of employer in the H–2A program requires an employer to have a place of business in the United States and a means of contact for employment as well as a Federal Employer Identification Number (FEIN). The Department proposed to move these requirements to §§ 655.121(a)(1) and 655.130(a). The proposal required a prospective employer to include its FEIN, its place of business in the United States, and a means of contact for employment in both its job order submission to the NPC and its *Application for Temporary Employment Certification.* The Department is implementing its proposal to move these requirements unchanged from the NPRM in this final rule.

f. First Date of Need and Period of Employment

The NPRM proposed to add definitions of the terms ''first date of need'' and ''period of employment.'' The Department received many comments on the definition of ''first date of need'' and has revised the proposed definition after consideration of these comments, as discussed below. The Department received no comments on the proposed definition of ''period of employment'' and has adopted the definition without change from the NPRM.

The Department explained in the NPRM that an employer indicates the period of employment on its job order and *Application for Temporary Employment Certification* by identifying the first and last dates on which it requires the temporary agricultural labor or services for which it seeks a temporary agricultural labor certification. The first date the employer identifies on the job order and *Application for Temporary Employment Certification* is used as the date on which work will start for purposes of recruitment and for calculating program requirements (*e.g.,* the positive recruitment period under § 655.158). However, as actual start dates may vary due to such factors as travel delays or crop conditions at the time the employer expected work to begin, the Department proposed to define the term ''first date of need'' as the first date on which the employer ''anticipates'' requiring the temporary agricultural labor or services sought. The Department explained that the inclusion of the word ''anticipates'' in the definition would provide a limited degree of flexibility—up to 14 calendar days after the first date of need listed on the temporary agricultural labor certification—for the actual start date of work for some or all of the temporary workers hired to occur.

Commenters who supported the proposed definition and the inclusion of the word ''anticipates,'' included employers, agents, trade associations, two State government commenters, and a State elected official. These commenters asserted that some flexibility to adjust actual start dates would simplify the program and facilitate both compliance and administration, while ensuring workers still receive the benefits promised.

Commenters who opposed the definition, including a workers' rights advocacy organization and farmworkers, focused their opposition on the potential for actual start date variability underlying the word ''anticipates.'' These commenters asserted that delayed start dates are harmful to workers, who value predictability and certainty in employment start dates, particularly where they turn down other work or have to travel far to make themselves available to work at the time and place needed. In addition, these commenters stated that farmworkers have expenses beyond housing and meals and cannot afford to lose expected pay for up to 2 weeks, should the actual start date be later than the first date of need offered. Similarly, one State government commenter recommended the Department further clarify employer obligations to provide subsistence and/or meals to workers when work does not start on the anticipated start date to ensure that employers understand and satisfy those obligations.

The workers' rights advocacy organization urged the Department to strengthen protections in the employment service regulations at § 653.501(c)(5) if the Department retains the proposal, by requiring the employer to pay workers the hourly rate for the hours listed on the job order on each day work is delayed (not only the workdays in the first workweek), unless the employer notifies both the SWA and worker (not only the SWA) at least 10 days before the anticipated start date, and setting the three-fourths guarantee calculation to the anticipated start date, rather than the actual start date. Amending the regulations at § 653.501(c)(5) as suggested would be a major change to that regulation that commenters and stakeholders could not have anticipated as an outcome of the proposed definitions, thus warranting additional public notice and opportunity for comment. As such, the Department declines to adopt the suggestion at this time.

A number of commenters expressed concern about the proposal. One employer thought workers might misuse the definition to arrive ''late'' and, as a result, employers would not have workers in place when needed. However, the Department did not intend for this definition to provide a flexible window for workers' arrival at the place of employment without the employer's consent. During recruitment, workers agree to make themselves available at the time and place needed. Should a worker not report for work for 5 consecutive working days without the employer's consent, the employer may exercise the abandonment provision at § 655.122(n). In addition, a workers' rights advocacy organization expressed concern about the definition's application in master applications (*i.e.,* applications agricultural associations may file in joint employment with their employer-members). The commenter thought that the actual start date flexibility, when combined with the Department's proposal to allow employer-members' actual start dates to vary by up to 14 days, could result in workers employed under a master application having actual start dates that vary by up to 28 days. This commenter asserted that this combination would increase the complexity of master applications and uncertainty for workers, which could discourage U.S. workers from applying. However, the proposed definition was intended to anchor the 14-day actual start date flexibility applicable to all employer-members on the master application to the earliest anticipated start date of any employer-member included in the application. As a result, all employer-members included in the master application would have been limited to the same 14-day ''anticipated'' start date flexibility window as any other H–2A application, calculated from the earliest employer-member start date included in the application.

One commenter supported the definition and the 14-day flexibility discussed but stated 30 days of flexibility would be preferable. The commenter's suggestion would amplify

concerns other commenters have expressed about workers waiting for work to begin, which is a concern shared by the Department. In addition, the suggestion is inconsistent with the Department's observation of existing practice, as discussed above, in which a start date may vary slightly due to factors beyond an employer's control. Because the Department intended in the NPRM to clarify, not change, existing requirements and practice regarding anticipated and actual start dates, the Department declines to adopt the suggestion by the commenter.

After consideration of the comments and suggestions, the Department reiterates that the proposed definition, including the word ''anticipates,'' was only intended to make plain the Department's existing understanding that a projected start date of need is difficult to set with certainty, given the required time periods for filing, and the actual start date of agricultural work must be afforded some flexibility to accommodate environmental and other agricultural conditions at the time work was projected to begin. For example, the Wagner-Peyser agriculture clearance system uses the term ''anticipated'' in relation to start dates and provides a process close to the start date the employer identified in the job order for the employer, the SWA, and referred farmworkers to communicate regarding the actual start date of work. *See* § 653.501(c)(1)(iv)(D), (c)(3)(i) and (iv), (c)(5), and (d)(4). These regulations require an employer to notify the SWA of start date changes at least 10 business days before the originally anticipated start date and require the SWA to notify farmworkers that they should contact the SWA between 9 and 5 business days before the anticipated start date to verify the actual start date of work. § 653.501(c)(5) and (d)(4).

The Department also appreciates the opportunity to clarify employer obligations and worker protections regarding possible changes from the first date of need disclosed in the H–2A job order to the actual start date of work. As discussed above, the Wagner-Peyser agriculture clearance system regulations facilitate communication between employers and farmworkers before workers who must travel to the place of employment depart for the place of employment. If an employer fails to timely notify the SWA of a start date change (*i.e.,* at least 10 business days before the anticipated first date identified in the job order), beginning on the first date of need, it must offer work hours and pay hourly wages to each farmworker who followed the procedure to contact the SWA for updated start date information. *See* § 653.501(c)(3)(i) and (c)(5). In addition, under the Department's H–2A regulations at § 655.145(b), if an employer requests a start date delay after workers have departed for the place of employment, the employer must assure the CO that it will provide housing and subsistence to all workers who are already traveling to the place of employment, without cost to the workers, until work commences. If an employer fails to comply with its obligations, the SWA may notify the Department's WHD for possible enforcement, as provided in § 653.501(c)(5), or the Department may pursue revocation of the temporary agricultural labor certification, following the procedures at § 655.181, or debarment of the employer, following the procedures at 20 CFR 655.182 or 29 CFR 501.20.

Although the January 2021 draft final rule would have adopted the proposed definition of ''first date of need,'' after further consideration of the comments, the Department has determined that adopting the definition as proposed—including the term ''anticipates,'' which the Department explained as a 14-day start date flexibility in the actual start date of work—in this final rule could increase, rather than decrease, complexity and confusion with regard to an employer's obligations in the event a start date delay is necessary. Including the word ''anticipates'' in the definition added ambiguity to the requirement, which could increase the potential for miscommunication or misunderstandings about when workers should be expected to begin work, or from when they should expect to be compensated. For example, as discussed above, commenters interpreted the proposal to mean that workers could choose to arrive within a flexible window of time, or that this would allow a variability of up to 28 days in master applications. In addition to the potential confusion this change might cause, the Department agrees that adding this language without also considering additional worker protections could be detrimental to workers, and this was not the Department's intention. As such, the Department has revised the definition of ''first date of need'' in this final rule to remove the term ''anticipates'' and the related 14-day flexibility for the actual start date of work.

While the Department appreciates the suggestions commenters made with regard to enhancing existing worker protections related to start date delays, those suggestions are beyond the scope of this rulemaking as noted above. The proposal within the scope of this rulemaking was inclusion of start date flexibility of up to 14 days in the definition of ''first date of need'' and conforming language. For clarity, the Department reiterates that revising the proposed definition has no impact on the employer's obligations in the event of a start date delay, for example, under the Wagner-Peyser agriculture clearance system regulations.

g. Job Order

The NPRM proposed minor amendments to the definition of ''job order'' to conform to the proposed change under § 655.121, requiring electronic filing of the job order by the employer and transmittal of the approved job order by the CO to the SWA, and updating the job order form name and number. The Department received one comment on the proposed changes to this definition, which did not necessitate substantive changes to the regulatory text. Therefore, as discussed below, this definition remains unchanged from the NPRM.

A workers' rights advocacy organization expressed support for the proposal, explaining that electronic filing would streamline processing times and reduce burden, but commented that the SWA, in addition to the NPC, should receive immediate notice of the filing of the job order and proposed that the words ''and SWA'' be added to the end of the proposed definition. The Department appreciates the comment but respectfully declines. As explained in addressing comments on § 655.121, the changes to the job order filing process, under this final rule, avoid duplication of processes and will create significant savings and efficiencies for employers, SWAs, and the Department. Furthermore, transmission of the job order to the SWA will be virtually instantaneous upon submission in OFLC's Foreign Labor Application Gateway (FLAG) system.

h. Prevailing Wage

Proposed Definition in 20 CFR 655.103(b)

The NPRM defined prevailing wage as the wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a State that meets the requirements in § 655.120(c). The Department received no comments on this change. This final rule therefore adopts the language of the NPRM with a minor revision to account for a prevailing wage for a distinct work task or tasks performed within a crop or

agricultural activity, as applicable. This modification conforms the definition of prevailing wage with current practice and language in ETA Handbook 385, as well as changes made to other portions of § 655.120(c) in this final rule, discussed below.

Proposal in 20 CFR 653.501(c)(2)(i)

The current H–2A regulation defines ''prevailing wage'' as the ''[w]age established pursuant to § 653.501(d)(4),'' the Wagner-Peyser Act regulation that covers clearance of both H–2A and non-H–2A interstate and intrastate agricultural job orders. Due to regulatory revisions to part 653, § 653.501(d)(4) no longer addresses prevailing wages but rather discusses the referral of workers.[30] The current version of § 653.501(c)(2)(i), in turn, requires SWAs to ensure the employer has offered no less than the higher of prevailing wages or the applicable Federal or State minimum wage for H–2A and non-H–2A agricultural job orders, but it does not address how prevailing wages are established.

In the NPRM, the Department proposed to use the same methodology to establish the prevailing wage for both H–2A and non-H–2A agricultural job orders. As a result, it proposed to amend § 653.501(c)(2)(i) to define ''prevailing wage'' for the agricultural recruitment system in the same manner as the Department proposed to define ''prevailing wage'' for the H–2A program in § 655.103(b). Section 655.103(b), as proposed, defined ''prevailing wage'' as ''[a] wage rate established by the OFLC Administrator for a crop activity or agricultural activity and geographic area based on a survey conducted by a [S]tate that meets the requirements in § 655.120(c).'' As discussed below, this final rule adopts the proposed amendment to § 653.501(c)(2)(i) with minor clarifying changes.

A workers' rights advocacy organization opposed the Department's proposed change to § 653.501(c)(2)(i) on the basis that it only referred to prevailing wage surveys, thus establishing such surveys as the ''sole mechanism'' to determine whether the prevailing wage rate is the highest rate of pay. This commenter expressed concern that the proposal would reduce the SWA's role in determining prevailing wages. The commenter explained the current regulation at § 653.501(c)(2)(i) allows an ''active role'' by SWAs to ''independently determine'' that prevailing wages in some areas of a State are higher than the AEWR, the minimum wage, or the prevailing wage in other areas. By codifying a survey methodology, the commenter believed, the Department would restrict the SWAs' ability to use other methods to determine whether the job order is offering an ''adequate'' wage. According to the commenter, the current regulation protects U.S. workers, especially piece rate workers, who receive a higher wage rate than their peers in other parts of the State, as a result of collective bargaining or market conditions.

After careful consideration of the commenter's concerns, the Department has decided to retain the NPRM proposal with minor clarifying changes. Specifically, this final rule adopts the NPRM's proposal to amend § 653.501(c)(2)(i) so that it incorporates the Department's revised prevailing wage survey methodology in § 655.120(c) and revised definition of ''prevailing wage'' in § 655.103(b). In addition, this final rule revises § 653.501(c)(2)(i) to more clearly distinguish the minimum requirements for wages and working conditions. The existing regulation addresses the minimum requirements for working conditions within the minimum requirements for wages, which may cause confusion as to the standards that apply to each requirement. Accordingly, this final rule separates these requirements into two different sentences to clarify that agricultural positions subject to 20 CFR part 653, subpart F, must, at a minimum, offer (1) the applicable prevailing wage or the applicable Federal or State minimum wage, whichever is higher, and (2) working conditions that are not less than the prevailing working conditions among similarly employed workers in the AIE. The standards governing the prevailing wage methodology are set forth in revised §§ 655.103(b) and 655.120(c), and addressed in the preamble to § 655.120(c). The standards governing the wage rate an H–2A employer must offer, advertise in its recruitment, and pay are set forth in revised §§ 655.120(a) and 655.122(l).

The Department disagrees with the commenter that the above-referenced revisions to § 653.501(c)(2)(i) will diminish the SWA's role in determining prevailing wages under the H–2A program. Under this final rule, SWAs will continue to follow the Department's criteria for prevailing wage surveys, either to conduct a survey itself or to select a survey conducted by another State agency to submit to the Department. Prior to this rule, the SWAs used ETA Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to conduct such surveys and submit prevailing wage findings, when available, to the Department for review. In this sense, the Department has directed SWAs to use prevailing wage surveys to determine prevailing wage rates for agricultural job orders since at least 1981. The NPRM simply proposed to amend §§ 655.103(b) and 653.501(c)(2)(i) to reflect the new proposed survey methodology at § 655.120(c).

Under the revised methodology, SWAs continue to play an active role in determining prevailing wages. They retain the discretion to develop, administer, and report the results of prevailing wage surveys to the Department, including the discretion to determine where to conduct surveys for particular crop or agricultural activities and, if applicable, distinct work task(s) within those activities, subject to the methodological requirements of this final rule. For example, SWAs may conduct prevailing wage surveys of State, sub-State, and regional geographic areas based on the factors listed in § 655.120(c)(1)(vi). In instances where a non-SWA State entity conducts the prevailing wage survey, the SWA will review the survey and submit, if appropriate and as before, the applicable information to the Department.

Moreover, prevailing wage surveys are but one method used to determine whether the wage offer in a job order for temporary agricultural work is ''adequate.'' Employers applying for H–2A temporary labor certification must generally offer in their job order and pay the highest of five wage sources (*i.e.,* the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage). *See* § 655.120(a) (excluding certain employment). All other (non-H–2A) employers seeking to place interstate or intrastate job orders for temporary agricultural work must still pay the highest of the applicable prevailing wage or the applicable Federal or State minimum wage, as specified under this section.

The commenter's assertion that the current regulation protects U.S. workers who enjoy a higher wage rate as a result of collective bargaining conflates the prevailing wage and the required wage for purposes of the H–2A program. As explained above, prevailing wage surveys are but one of the distinct wage sources the Department compares to

[30] The Department revised 20 CFR part 653 in 2016 in response to the enactment of the Workforce Innovation and Opportunity Act in 2014, which amended the Wagner-Peyser Act. *See* Final Rule, *Workforce Innovation and Opportunity Act,* 81 FR 56072 (Aug. 19, 2016). The contents in § 653.501(d)(4) are now located, with changes not relevant here, in § 653.501(c)(2)(i).

determine which wage source is the highest and therefore the wage that an H–2A employer must offer and pay. If an employer files an H–2A application for job opportunities subject to the agreed-upon collective bargaining wage, the collective bargaining wage would be evaluated as one of the applicable wage sources under § 655.120(a). If the collective bargaining wage is the highest of available wage sources applicable to the H–2A application, the employer must offer and pay that wage to its H–2A workers and non-H–2A workers in corresponding employment. Similar principles hold for a non-H–2A interstate or intrastate agricultural job order, in which the prevailing wage may differ from the required wage a particular employer may be legally obligated to offer and pay. Section 653.501(c)(2)(i) provides a floor, rather than a ceiling, for the wage that must be offered in an interstate or intrastate job order for a temporary agricultural position. Employers may always offer wages that exceed the minimum required under this section, and in some instances, such as where an applicable collective bargaining agreement (CBA) requires a higher wage offer, they may be obligated to do so. However, the Department reminds H–2A employers that any job offer to U.S. workers must offer no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. § 655.122(a).

i. Successor in Interest

The Department proposed conforming changes to the definition of ''successor in interest'' consistent with proposed changes to 20 CFR 655.182 and 29 CFR 501.20, which clarify that the Department may take action against an employer, agent, attorney, or combination thereof, for debarrable violations described under those sections. As discussed below, this provision remains unchanged from the NPRM. A workers' rights advocacy organization supported the conforming changes to the definition without further comment. An agent further proposed that the Department should modify the definition of successor in interest to formally adopt guidance issued under the 2010 H–2A Final Rule where the Department determined that the regulation could be reasonably interpreted to allow a temporary agricultural labor certification to be assumed by a successor employer. The commenter also thought the definition should be more generalized, rather than framed from an enforcement perspective. Although the Department appreciates this comment, further modification to the definition is unnecessary. The Department added agents and attorneys to the definition to clarify that successor in interest to agents and attorneys may be subject to enforcement actions, consistent with 20 CFR 655.182 and 29 CFR 501.20. In doing so, the Department made no change to the definition with regard to employers. The Department maintains its position, established in the supporting guidance, that a successor in interest entity may use a temporary agricultural labor certification issued, provided that it assumes all obligations, liabilities, and undertakings arising under the temporary agricultural labor certification. Therefore, this final rule adopts the proposed definition from the NPRM without change.

j. Additional Definitions Adopted in This Final Rule

The NPRM proposed minor amendments to the definition of Temporary Agricultural Labor Certification and proposed adding definitions of the following terms to provide greater clarity throughout the regulations: Act, Administrator, applicant, *Application for Temporary Employment Certification,* BALCA, Chief Administrative Law Judge (ALJ), DHS, ETA, H–2A Petition, MSA, OFLC Administrator, piece rate, place of employment, Secretary of Labor, Secretary of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), WHD, and WHD Administrator. The Department received no comments on the proposed definitions of these terms. Therefore, this final rule adopts the definitions of these terms from the NPRM, with two minor changes. In this final rule, the Department simplifies the definition of ''USCIS'' to mean U.S. Citizenship and Immigration Services, an operational component of DHS, while defining ''DHS'' as the Department of Homeland Security as established by sec. 111 of title 6, U.S. Code. The respective authorities and functions of DHS and USCIS, as an operational component of DHS, are set forth in their authorizing statutes, implementing regulations, and delegation of authorities.

k. 20 CFR 655.103(c) and 29 CFR 501.3(b), Definition of Agricultural Labor or Services

The NPRM proposed amendments to expand the regulatory definition of agricultural labor or services pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a) to include reforestation and pine straw activities. The Department received many comments on this section and, for the reasons explained below, has decided to rescind the proposal to incorporate reforestation and pine straw activities into the definition of agricultural labor or services at § 655.103(c). However, in proposing the occupational definitions for itinerant employment in animal shearing, commercial beekeeping, and custom combining at § 655.301, subject to the proposed procedural variances contained in §§ 655.300 through 655.304, the Department has made a technical, conforming revision to this section to clarify that the job duties under § 655.301 qualify for certification under the H–2A program.

The Department proposed to define reforestation activities as predominantly manual forestry operations associated with developing, maintaining, or protecting forested areas, including, but not limited to, planting tree seedlings in specified patterns using manual tools, and felling, pruning, pre-commercial thinning, and removing trees and brush from forested areas. The proposed definition of reforestation activities would have included some forest fire prevention or suppression duties, when incidental to other reforestation activities, and would have excluded vegetation management activities in and around utility, highway, railroad, and other rights-of-way because these activities involve the destruction of vegetation, not cultivation. The NPRM proposed to define pine straw activities as operations associated with clearing the ground of underlying vegetation, pine cones, and debris; and raking, lifting, gathering, harvesting, baling, grading, and loading of pine straw for transport from pine forests, woodlands, pine stands, or plantations.

In the NPRM, the Department reasoned that reforestation and pine straw activities share fundamental similarities with traditional agricultural industries, both in terms of activities performed and working conditions. These similarities had previously prompted the Department to consider similar proposals to include reforestation and pine straw activities within the H–2A program in the 2008 and 2009–2010 rulemakings, but ultimately the Department rejected these proposals due to lack of stakeholder support. 2010 H–2A Final Rule, 75 FR 6884; 2008 H–2A NPRM, 73 FR 8538, 8555 (Feb. 13, 2008). The NPRM posited that many of the comments that led the Department to opt against expanding the definition of agriculture in the 2009–2010 rulemaking were no longer applicable due to recent regulatory changes in the H–2B program—specifically the publication of the 2015 H–2B Interim Final Rule (IFR) (80 FR

24042, Apr. 29, 2015), which implemented cost-related requirements in the H–2B program similar to those currently found in H–2A.

Comments Related to the Inclusion of Reforestation and Pine Straw Gathering Activities in the H–2A Program

Comments attributable to the reforestation industry or its representatives either opposed the change or did so absent significant changes to the proposal. Some industry commenters simply stated that the H–2A program, particularly with the changes proposed in the NPRM, was a less attractive, more costly, and more burdensome alternative to the H–2B program. Other commenters rejected the assertion that reforestation shared similar characteristics to traditional agricultural industries and stated that these differences resulted in the H–2A program, or certain key H–2A provisions, being essentially unworkable for the reforestation industry.

Many industry commenters stated that the unpredictable nature of reforestation work precluded compliance with the H–2A program. Some commenters posited that the H–2A program was designed for workers returning to the same fields each year, whereas reforestation occurs on a rotating cycle of up to 30 years and is heavily weather-dependent. Industry commenters stated that the flexibility required for reforestation work presents difficulties in obtaining pre-inspected housing that complies with H–2A housing standards, and that it would be impossible at the time of the application to determine whether each potential motel along an itinerary would meet these standards. Another industry commenter stated that it would be impossible to make hotel reservations in advance as schedules are constantly changing. Some commenters also indicated that remote worksites require additional housing flexibility, such as tents or mobile housing.

Industry commenters further stated that the unpredictable and transient nature of reforestation work would not allow employers to submit itineraries to the Department when applying for temporary labor certification, and that the requirement of a separate application per itinerary was unworkable and would dramatically increase filing costs. One commenter stated that some reforestation employers have more than 30 crews working on 30 separate itineraries, and another commenter with 35 crews on separate itineraries stated that its filing costs would increase from $8,500 for one application to $297,500 for 35 applications.

Similarly, many industry commenters stated that the reforestation industry would be unable to comply with the H–2A requirement to provide meals or kitchen facilities to workers. Commenters stated that motel accommodations for reforestation workers frequently lack kitchen facilities, and that the unpredictable nature of reforestation work means that arranging catering is logistically difficult. Some commenters stated that the workers cook for themselves at the worksites. One commenter may have misunderstood the H–2A meals requirement and stated that it could not provide meals and kitchen facilities (whereas only one or the other is required).

Further, industry commenters opposed the proposed exclusion of utility right-of-way maintenance activities from the definition of reforestation activities. These commenters asserted that utility right-of-way maintenance cannot be divorced from other reforestation activities because the same companies necessarily engage in both, and the activities are nearly identical. Commenters stated that a large number of forestry employers—including three of the top five H–2B employers overall—also perform utility right-of-way spraying, and these activities are included in the same contracts and have the same job duties as reforestation work. Another commenter stated that the exclusion of utility right-of-way work would bifurcate a successful business model historically used by the industry, and another stated that the two industries rely on the same workforce and separating them between visa classifications would harm both industries.

The Department received significantly fewer comments from the pine straw industry. Three comments from the pine straw industry supported the proposal to include pine straw in the definition of agricultural labor or services for the reasons offered in the NPRM, one of which represented a letter-writing campaign with 100 identical comments. These comments emphasized that the pine straw industry is agricultural in nature and should be regulated as such under agricultural rules. Additionally, one commenter pointed out that many pine straw companies already use the H–2A program.

Worker advocates opposed the proposal, primarily because the inclusion of the pine straw and reforestation industries in the H–2A program would remove nonimmigrant reforestation and pine straw workers' access to MSPA protections. These commenters identified access to the MSPA right to private action as an essential worker protection for H–2B workers engaged in reforestation and pine straw activities. Employee advocates also expressed concern that reforestation and pine straw employers would stop paying overtime to reforestation and pine straw workers due to a misunderstanding (as explained below) (either from the commenter itself or on the part of the employer) that H–2A employees are exempt from the FLSA overtime requirements simply by virtue of holding an H–2A visa. Some commenters also stated that the inclusion of reforestation within the uncapped H–2A program removes the numerical limitation on one of the largest users of the capped H–2B program and presents a substantial benefit to all H–2B employers by essentially providing H–2B cap relief.

Commenters raised other concerns and objections to the inclusion of reforestation and pine straw activities in the H–2A program. Two commenters stated that the Department's rationale for the proposal was not justified and does not overcome objections raised in prior rulemakings to similar proposals. One commenter stated that costs for reforestation employers would increase because they would not be permitted to house four employees in the same hotel room under the H–2A standards. This same commenter also stated that reforestation employers would be unable to comply with the three-fourths guarantee due to the uncertainty inherent in reforestation work, that the Department is unable to enforce the H–2B inbound transportation standards in some States, and that the Department risked violating the permanent injunction entered under *Bresgal* v. *Brock,* 843 F.2d 1163 (9th Cir. 1987).[31] Two commenters representing State governments posited that inclusion of these industries in the H–2A program would increase work for SWAs and asked if additional funding would be provided. Another commenter advised that the Department and the Department of State (DOS) must be fully funded, particularly given any potential expansions to the H–2A program.

Comments from non-industry specific sources, including agents, State

[31] In *Bresgal* v. *Brock,* the Ninth Circuit Court of Appeals enjoined the Department to cease refusing to enforce MSPA as to recruiting, soliciting, hiring, employing, furnishing, or transporting any migrant or seasonal agricultural worker for all predominantly manual forestry work, including but not limited to tree planting, brush clearing, pre-commercial tree thinning, and forest firefighting.

governments, State farm bureaus and trade associations, tended to favor the proposal, albeit mostly in a generic and unsubstantiated way. Some comments expressed their support for any expansion of the H–2A program. One commenter representing the landscaping industry expressed support for the proposal because it would relieve pressure on the H–2B visa cap, and an insurance association supported the proposal because this expansion of H–2A would require more employers to obtain surety bonds. One State farm bureau, however, supported the proposal because the forest industry adds $6.4 billion annually in value to Arkansas' economy, and expanding the scope of the H–2A program would allow this industry to address labor shortages.

Upon careful consideration of the comments submitted, the Department declines to adopt the proposal to include reforestation and pine straw activities within the H–2A program. As noted above, the Department had hypothesized in the NPRM that objections to similar proposals in previous rulemakings would no longer be considered relevant; however, this hypothesis was disproved by the multitude of comments in opposition. As was found in the 2009–2010 rulemaking, comments from or on behalf of those that would be most affected by the reforestation proposal (*i.e.,* from the reforestation industry and employee advocates) overwhelmingly opposed the proposal, citing, in part, additional burdens due to the differences between the programs. While the pine straw industry submitted some comments supporting its inclusion in the H–2A program, the Department finds persuasive the concerns raised by employee advocates and accordingly declines to adopt the proposal with respect to pine straw as well. Additionally, as many commenters identified, pine straw employers are currently permitted use of the H–2A program (pursuant to the FLSA definition of agriculture and if the other requirements of the program are met) if the pine straw activities are performed by a farmer or on a farm as an incident to or in conjunction with such farming activities. For example, employees engaged in the gathering of pine straw on a Christmas tree farm are engaged in H–2A agriculture if the Christmas trees are produced using extensive agricultural and horticultural techniques.[32] Declining to adopt the proposal has no impact on employers seeking workers to perform pine straw gathering under these circumstances, and such employers may continue to use the H–2A program. On the other hand, pine straw gathering that is not performed by a farmer or on a farm (*e.g.,* that occurs in wild or uncultivated forests, in forest tree nurseries, or on timber tracts, or that is performed in conjunction with commercial landscaping activities) does not constitute agricultural labor or services; employers seeking temporary foreign workers to perform pine straw activities under these circumstances may continue to use the H–2B program.

Though not within the scope of this rulemaking, the Department also wants to take this opportunity to address comments raising concerns about the current state of working conditions for H–2B reforestation workers. When commenters indicate that they cannot reasonably provide meals or kitchen facilities to reforestation workers because the worksites are too remote and conditions too uncertain, the Department cannot ignore the implication that some reforestation workers may not currently have access to sufficient food and/or facilities to prepare food. Itinerant workers constitute a vulnerable population; these workers are frequently wholly dependent on their employer for housing and transportation, work in remote areas far removed from services, and may not be fully aware of their geographic location. The Department reminds employers of itinerant workers not using the H–2A program that they should, at the very least, facilitate access to food and/or kitchen facilities by ensuring that workers have sufficient time and available transportation options to access grocery stores/cooking facilities, and/or prepared meals.

In response to concerns expressed by commenters that some reforestation employers using the H–2B program may not provide full-time job opportunities and may not pay for inbound transportation, the Department reminds the public that such legal requirements are already in place. An H–2B job opportunity must be for full-time work, defined as 35 hours of work per week, and the FLSA applies independently of the H–2B program's requirements. Specifically, the Fifth Circuit's decision in *Castellanos-Contreras* v. *Decatur Hotels, LLC,* 622 F.3d 393 (5th Cir. 2010), affects an employer's responsibility for inbound transportation costs under the FLSA in that Circuit, but does not affect an employer's inbound transportation obligations pursuant to the H–2B program regulations, nor does it affect the Department's ability to enforce those obligations. *See* 20 CFR 655.20(d); 20 CFR 655.5; 29 CFR 503.16(d); 29 CFR 503.4; 20 CFR 655.20(j)(1)(i); and 29 CFR 503.16(j)(1)(i).

Other Comments Requesting the Inclusion or Exclusion of Certain Agricultural Activities or Industries in the H–2A Program

The Department received many comments in this section that did not address the specific proposal relating to reforestation and pine straw, but rather suggested modifications to the scope of the H–2A program to include or exclude other activities or industries. As discussed below, the Department is not adopting these suggested modifications to the definition of agricultural labor or services.

These commenters sought to expand the H–2A program to include all employment in packing houses or processing facilities that pack, process, or handle agricultural or horticultural commodities, even if, for example, more than half of the commodities are produced by other growers. Commenters stated that this division between packing houses based solely on the producer of the commodity is outdated and inequitable, because some packing houses have access to the H–2A program whereas others conducting identical activities do not. Commenters stated that all packing houses experience the same shortage of labor, regardless of the producer of the products, and the nature of the H–2B program is inadequate to address the packing house's needs, both in terms of the number of workers available under the program and certification processing timelines. Multiple commenters suggested an expansive definition of agricultural labor or services encompassing packing houses and processing facilities.

Many commenters stated that the H–2A program should encompass all transporting of an agricultural commodity to a facility for preparation to market, regardless of who produced the commodity or where the transportation occurs. Several commenters stated that harvesting is not complete until the product arrives at the packing facility or place of first processing, and the transportation to the place of first processing is an essential component of harvesting. Others stated that a contractor transporting agricultural or horticultural products is

[32] These techniques include activities such as planting seedlings in a nursery; ongoing treatment with fertilizer, herbicides, and pesticides as necessary; replanting in line-out beds or in cultivated soil; yearly pruning or shearing; and harvesting for ornamental use. *See* 29 CFR 780.216(b).

essentially working for, or acting in the place of, the grower that produced those products, and thus is engaged in agricultural work. Many commenters referenced a critical shortage of truck drivers willing, qualified, and available to transport crops (particularly within the shorter season inherent in agriculture), and noted that many growers do not have the means to perform these transportation services themselves. The expansive definition submitted by multiple commenters similarly addressed this issue by suggesting inclusion of the following: the transportation of any agricultural or horticultural product in its unmanufactured state by any person from the farm to a storage facility, to market, or to any place of handling, planting, drying, packing, packaging, processing, freezing, or grading such as a packing house, a processing establishment, a gin, a seed conditioning facility, a mill, or a grain elevator; and the handling, planting, drying, packing, packaging, processing, freezing, or grading by any person of any agricultural or horticultural commodity in its unmanufactured state.

Some commenters sought the explicit inclusion of specific industries in the definition of agriculture or more generally in the H–2A program. Some commenters requested that the H–2A program encompass work in seafood cultivation, harvesting, and processing due to the industry's connection to food production and its difficulty in meeting its labor needs using a domestic workforce and the capped H–2B program. One commenter requested that the definition explicitly incorporate activities related to the care and feeding of horses and suggested it should incorporate grooms, stable-hands, exercise riders, and general caretakers, regardless of where the work is performed. A different commenter sought the inclusion of all agribusinesses, including agricultural retailers, in the program. Some commenters stated that all aspects of the ginning of cotton, including the related transportation from the field to the gin, are agricultural. A trade association representing the landscaping industry suggested the reclassification of several other industries currently within the H–2B program to reduce pressure on the H–2B visa cap.

Some commenters stated that specific industries, or employers in general, should have the flexibility to use either the H–2A or H–2B program depending on their specific needs. Some commenters opined that employers have the expertise to know which program best meets their needs, whereas others stated that their industry was sufficiently diverse to require participation in both the H–2A and H–2B programs.

One commenter sought to exclude activities from the program that are currently performed by H–2A workers. Specifically, this commenter suggested that work in constructing livestock buildings on farms, when the worker is not employed by the farmer, should not be permitted in the H–2A program because the work is, generally, non-agricultural.

To the extent that commenters suggested amendments to the definitions of agricultural labor under sec. 3121(g) of the Internal Revenue Code (IRC) and agriculture under sec. 3(f) of the FLSA, these suggestions are outside the scope of this rulemaking as well as beyond the Department's statutory authority under the H–2A program. Congress defined these terms in their respective statutes and expressly incorporated these definitions into sec. 101(a)(15)(H)(ii)(a) of the INA. Any ability to amend these definitions, or their incorporation in the INA, also lies with Congress. Similarly, the Department is unable to reinterpret these statutory definitions solely within the context of the INA; the Department is constrained by pre-existing interpretations of these definitions within their respective statutes, including their implementing regulations, sub-regulatory guidance, and resulting case law. As a result, the Department cannot edit or limit these definitions in this rulemaking, such as by removing the 50-percent threshold from the IRC definition of agricultural labor; reinterpreting the phrase ''in the employ of the operator of a farm''; or excluding all construction occupations from the H–2A program because, in specific circumstances, construction work may constitute agricultural labor or services within one of the statutory definitions. In addition, the Department notes that it defers to the Department of the Treasury's Internal Revenue Service (IRS) for interpretation of the IRC.

The Department has carefully considered all comments requesting that the Secretary use his statutory authority to define additional activities and/or industries as agricultural labor or services, and respectfully declines to make further revisions to this definition beyond the technical or conforming revisions discussed above. These comments did not respond to proposals made in the NPRM, nor did the Department propose or invite comment on possible additions to the definition of agricultural labor or services beyond the proposal to add reforestation and pine straw activities. All affected parties could not reasonably expect that the Department was contemplating and seeking comment on potential additions other than reforestation and pine straw activities, and thus, the public has not been fully afforded the opportunity to consider and respond to the potential inclusion of these activities and/or industries in the H–2A program.

Many comments received in response to the NPRM, as well as in previous rulemakings, illustrate that some employers perceive significant advantages in participating in the H–2B program as opposed to the H–2A program, and vice versa, depending on the labor demands of the specific industries who commented. Additionally, nearly all comments regarding additional expansions to the H–2A program originated from employers and their representatives, with minimal input from other affected parties, further suggesting that all parties could not reasonably have thought to comment on the proposals to expand the definition beyond the additions proposed in the NPRM. Consequently, the Department is disinclined to further expand the definition of agricultural labor or services in this rulemaking.

The Department also declines to adopt the suggestion that employers be afforded the discretion to choose participation in either the H–2A or H–2B program. As previously explained in the preamble to the 2010 H–2A Final Rule, Congress clearly intended to create two separate programs: H–2A for agricultural work and H–2B for other, non-agricultural work. *Compare* 8 U.S.C. 1101(a)(15)(H)(ii)(a) *with* 8 U.S.C. 1101(a)(15)(H)(ii)(b). 2010 H–2A Final Rule, 75 FR 6884, 6888. Allowing employers the discretion to use either program based on their individual preferences erases any meaningful distinction between the two programs and is inconsistent with congressional intent. However, as some commenters identified, certain industries necessarily will use both the H–2A and H–2B programs depending on the specific activities being performed. For example, the grooming and exercise riding of horses at a racetrack in connection with commercial racing is non-agricultural, whereas the care and feeding of those horses on a farm is agricultural work.[33]

[33] Employees engaged in the breeding, raising, and training of horses on farms for racing purposes are agricultural employees as defined by the FLSA. On the other hand, employees engaged in the racing, training, and care of horses and other activities performed off the farm in connection with commercial racing are not employed in agriculture.

Continued

Other Comments Requesting Expansion of the H–2A Program for Year-Round Employment in Agriculture

Many commenters requested that the scope of the H–2A program be expanded to include all job opportunities in certain industries, regardless of whether the opportunity is seasonal or temporary, including dairy, mushroom, poultry, livestock, aquaculture, and indoor nursery/greenhouse farming. Commenters emphasized that these industries encounter the same labor shortages as other agricultural industries, and that the limitation of the H–2A program to seasonal and temporary agricultural work is fundamentally inequitable and ignores the realities faced by year-round agriculture. Of the industries submitting comments, commenters representing the dairy industry noted particular concerns with difficulties in obtaining and retaining a sufficient workforce, and proposed solutions such as allowing for year-round visas and cycling different short-term H–2A workers through employment in a given year so that a series of workers on temporary visas could satisfy the employer's permanent need. Other commenters stated that there was no statutory basis for allowing herders to be employed for 364 days in a year while not allowing the same for other industries.

The Department received nearly identical comments in response to the 2008 and 2009–2010 rulemakings. In response to current comments, the Department reiterates that it must consider each employer's specific job opportunity on a case-by-case basis and its program experience has consistently shown that the majority of activities in these industries are year-round and therefore cannot be classified as either temporary or seasonal as required under the H–2A regulations and the INA, and not because they are non-agricultural. While the Department recognizes the workforce challenges encountered by various agricultural industries, it is limited by the INA to certifying H–2A applications for jobs of a temporary or seasonal nature. As stated in the preamble to the 2010 H–2A Final Rule, the determination as to whether a particular activity is eligible for H–2A certification rests on a finding that the duration of the activity or the need for that activity is temporary or seasonal. Permanent job opportunities cannot be classified as temporary or seasonal. 2010 H–2A Final Rule, 75 FR 6884, 6890–6891. Instead, employers that cannot find U.S. workers to fill permanent rather than temporary or seasonal jobs may wish to petition for workers under employment-based immigrant visa programs. *See, e.g.,* 8 U.S.C. 1153(b)(3); *see also* 8 U.S.C. 1101(a)(15)(H)(ii)(a) (INA permits only ''agricultural labor or services . . . of a temporary or seasonal nature'' to be performed under the H–2A visa category). Finally, with regard to comments above related to the period of need for herders, the Department recently rescinded, in the separate 2021 H–2A Herder Final Rule, the 364-day provision that governed the adjudication of temporary need for employers of sheep and goat herders (§ 655.215(b)(2)) to ensure the Department's adjudication of temporary or seasonal need is conducted in the same manner for all H–2A applications.

Other Comments Related to the Requirements for Overtime Pay Under the FLSA

Some commenters expressed concerns about or requested clarification of the requirement for overtime pay under the FLSA to H–2A workers. One commenter said that some employers incorrectly assume that H–2A workers are always exempt from the FLSA overtime requirement, and another commenter made this same incorrect assumption in its comment. Other commenters stated that the classification of certain industries and activities as agricultural under one Act and non-agricultural under another was confusing, and that the reclassification of pine straw activities as agricultural under the INA would simplify compliance. Another commenter suggested a regulatory clarification that construction labor performed on a farm for an independent contractor, as opposed to for the farm operator, is not agricultural employment for the purposes of the FLSA, and that employees providing such services are entitled to overtime pay.

In light of these comments, the Department reiterates that the FLSA applies independently of the H–2A program. H–2A workers are not exempt from overtime pay under the FLSA simply by virtue of holding an H–2A visa, nor are workers engaged in corresponding employment with H–2A workers exempt from FLSA overtime pay simply because they are so engaged. The FLSA exempts employees employed in agriculture, as defined in sec. 3(f) of that same Act, from overtime pay (and, in more limited circumstances, from the Federal minimum wage) in any workweek that the worker is employed solely in agriculture. *See* FLSA sec. 13(a)(6) and (b)(12), 29 U.S.C. 213(b)(6) and (12). However, the INA defines agriculture more broadly than the FLSA and, consequently, some H–2A workers are employed in activities that do not constitute FLSA agriculture and thus are entitled to FLSA overtime pay. For example, H–2A workers employed by a farmer are exempt from FLSA overtime in any workweek in which they are engaged in packing fruit grown exclusively by that same farmer. However, if during a given workweek these same H–2A workers, in addition to packing fruit grown by their employer also pack fruit grown by another farmer, they are entitled to FLSA overtime pay in that workweek.[34] Because the H–2A program's definition of agricultural labor or services is broader than the FLSA definition of agriculture (*i.e.,* it encompasses activities that constitute agricultural labor under the IRC, as well as logging and pressing of apples for cider on a farm), workers may be engaged in agricultural labor for H–2A program purposes but exempt or nonexempt from FLSA overtime in any particular workweek depending on their activities during that period. The Department encourages employers to consult the FLSA regulations at 29 CFR part 780 to determine if employees are entitled to FLSA overtime, and to consult applicable State and local laws, which may impose overtime or other wage requirements.

Reforestation and pine straw activities, as defined in the NPRM, similarly do not constitute FLSA agriculture unless performed by a farmer or on a farm as incident to or in conjunction with such farming activities, and employees engaged in these activities are frequently entitled to FLSA overtime pay.

One commenter opined that construction labor performed by an independent contractor on a farm never

For these purposes, a training track at a racetrack is not a farm. *See* 29 CFR 780.122.

[34] As defined by the FLSA, packing, processing, and transporting agricultural or horticultural commodities do not constitute agricultural employment *unless* these activities are performed by a farmer or on a farm as incident to or in conjunction with such farming activities (*i.e.,* the farming activities of the farm or farmer). The packing, processing, or transporting of fruit produced by a different grower is performed as incident to or in conjunction with the farming activities of the farmer that produced the fruit, not the employer, and thus is outside the scope of the exemption from FLSA overtime pay. *See generally* 29 CFR part 780, subparts A, B, and C; §§ 780.137 and 780.138. FLSA exemptions are determined on a workweek basis, and an employee performing exempt work (*i.e.,* packing, processing, and transporting the employer's own fruit) and nonexempt work (*i.e.,* packing, processing, and transporting the fruit produced by a different grower) in the same workweek is entitled to overtime pay in that particular workweek. *See* §§ 780.10 and 780.11.

constitutes FLSA agriculture. The Department notes that construction labor may constitute FLSA agriculture when performed by a farmer or on a farm as incident to or in conjunction with such farming activities.

Minor Revisions Incorporating Occupational Definitions for Animal Shearing, Commercial Beekeeping, and Custom Combining in the H–2A Program

In proposing the occupational definitions for itinerant employment in animal shearing, commercial beekeeping, and custom combining at 20 CFR 655.301, the Department acknowledged in the NPRM that some of the listed activities may not otherwise constitute agricultural work under the current definition of agricultural labor or services in § 655.103(c), but are a necessary part of performing this work on an itinerary. *See* 84 FR 36168, 36222. Accordingly, and solely for the purposes of the proposed variances in §§ 655.300 through 655.304, the Department explained that it would include these activities in the occupational definitions. *Id.* The Department did not receive any comments on this aspect of its proposal. However, because only duties that fall within the definition of agricultural labor or services under § 655.103(c) may be certified under the H–2A program, and to clarify that the activities set forth under the definitions for animal shearing, commercial beekeeping, and custom combining in § 655.301 qualify for certification under the H–2A program, the Department is making a technical, conforming revision to § 655.103(c). Under new § 655.103(c)(5), the Department expressly states that, for the purposes of § 655.103(c), agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304. Additionally, this final rule incorporates the minor technical changes to correct the internal citations from paragraphs (c)(1)(iv) and (v) to now read paragraphs (c)(1)(i)(D) and (E), respectively, in § 655.103(c)(1)(i)(E) and (F).

l. 20 CFR 655.103(d) and 29 CFR 501.3(c), Definition of a Temporary or Seasonal Nature

The NPRM sought public comments to inform a decision whether to retain the current, two-arbiter model in which both the Department and DHS evaluate temporary or seasonal need during their sequential review processes, or to move the adjudication of an employer's temporary or seasonal need either exclusively to DHS or exclusively to DOL. The Department solicited input from the public on this idea as a way to eliminate duplication of agency reviews. The Department received many comments on this idea and, for the reasons explained below, has decided to retain at present the current two-arbiter model of DHS and DOL sequentially adjudicating an employer's temporary or seasonal need.

The INA grants DHS broad authority to determine whether to admit temporary workers as H–2A nonimmigrants based on an employer's petition, in consultation with appropriate Federal agencies, and further defines an H–2A nonimmigrant as an individual coming temporarily to the United States to perform agricultural labor or services ''of a temporary or seasonal nature.'' 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c)(1), and 1188. Pursuant to the INA and implementing regulations promulgated by the Department and DHS, the Department evaluates an employer's need for agricultural labor or services to determine whether it is seasonal or temporary during the review of an *Application for Temporary Employment Certification.* 20 CFR 655.161(a); 8 CFR 214.2(h)(5)(i)(A) and (h)(5)(iv). In order to promote greater consistency and reduce stakeholder confusion concerning the definition of temporary or seasonal need, the Department adopted the DHS definition in the 2010 H–2A Final Rule. *See* 75 FR 6884, 6890. *Compare* 20 CFR 655.103(d) *with* 8 CFR 214.2(h)(5)(iv)(A).

Through its longstanding review of the nature of an employer's need as part of its review of an *Application for Temporary Employment Certification,* such as examining the period of employment identified on the H–2A application and the nature of the employer's need for agricultural labor or services, inclusive of the job duties, qualifications and requirements, and geographic locations where work will be performed, the Department has developed expertise and a process for determining temporary or seasonal need to which H–2A employers have become accustomed. In addition, DHS regulations state that an H–2A petition must establish, among other things, that the ''employment proposed in the certification is of a temporary or seasonal nature'' and that the Department's finding that employment is of a temporary or seasonal nature during review of the *Application for Temporary Employment Certification* is ''normally sufficient'' for the purpose of an H–2A Petition. 8 CFR 214.2(h)(5)(iv). Under current practice, if the Department issues a temporary agricultural labor certification and the employer files an H–2A Petition, DHS may reevaluate and adjudicate the employer's temporary or seasonal need using the same definition or may defer to the Department's finding.

Many commenters supported eliminating the two-arbiter model, with most identifying the Department as the preferred sole arbiter. These commenters argued that retaining both arbiters creates uncertainty, inconsistency, and redundancy with harm to farmers, including crop loss as a result of the time lost should DHS reach a different, adverse decision later in the process than the Department. Most of the commenters who favored a single-arbiter model supported the Department as the sole arbiter. Some commenters urged the Department to consider a new arbiter of temporary or seasonal need, namely the U.S. Department of Agriculture (USDA). Included among these commenters who suggested USDA were several trade associations, a couple of agents, and a State government agency who named the Department as their second choice after USDA. Two other commenters, a trade association, and a State government agency suggested that the Department perform the role over DHS but with increased consultation with USDA. However, in the NPRM, the Department only sought public comment on the potential for only DHS, or only DOL, to serve as a sole arbiter. The Department did not propose or seek comment for an agency other than the Department or DHS to perform this role.

Those commenters who favored the Department as the adjudicating authority for temporary or seasonal need, as opposed to DHS, noted the Department's expertise and greater comparative familiarity with the H–2A program. Commenters also valued the Department's position in the petition process relative to DHS, as employers are able to make adjustments earlier should questions regarding temporary or seasonal need arise and before incurring additional expenses associated with filing an H–2A Petition with DHS.

Several commenters, including an agent, an employer, and a trade association, did not express a position regarding whether the Department or DHS should be the sole arbiter but instead noted the importance of the Department and DHS having congruent definitions of whether employment is of a temporary or seasonal nature. Similarly, another agent did not clearly express an opinion about whether there should be a sole arbiter of temporary or seasonal need but stated that DHS should continue to hold decision-

making authority with respect to the temporary and seasonal requirements.

The Department appreciates the variety of public comment on this proposal. After careful consideration of the comments received, the Department has determined, that it will not at this time be making such a substantial change to the program.[35] Therefore, this final rule retains the current two-arbiter model of DHS and DOL both sequentially evaluating an employer's temporary or seasonal need.

The Department received additional comments regarding the definition of a temporary or seasonal nature at 20 CFR 655.103(d) and 29 CFR 501.3(c). Many of these commenters urged the Department to include year-round work, particularly in the dairy industry. As the Department only sought public comment on determining whether the Department or DHS should act as the sole arbiter of temporary or seasonal need, such comments are outside the scope of this rulemaking.

B. Pre-Filing Procedures

1. Section 655.120, Offered Wage Rate

The statute provides that an H–2A worker is admissible only if the Secretary determines that ''there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.'' *See* 8 U.S.C. 1188(a)(1). In 20 CFR 655.120(a), the Department currently meets this statutory requirement, in part, by requiring an employer to offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage. The Department proposed in the NPRM to maintain this wage-setting structure with only minor revisions and modify the methodologies by which the Department establishes the AEWR and prevailing wages.

Prior to this final rule, the Department engaged in rulemaking to revise the methodology for establishing the AEWR that addressed the Department's proposals at paragraphs (b)(1), (2), and (5) of the NPRM, as well as the definition of AEWR in § 655.103(b). *See* 85 FR 70445. Most recently, the Department issued an NPRM on December 1, 2021, which proposed to revise the methodology for establishing the AEWR. 86 FR 68174. The comment period for the 2021 H–2A AEWR NPRM closed on January 31, 2022, and the Department will address those comments in a separate rulemaking. This final rule addresses all other aspects of the Department's proposals at § 655.120—specifically, paragraphs (a), (b)(3) and (4), (c), and (d). In addition, the Department reinstates the 2010 H–2A Final Rule's method and schedule for updating the AEWR at paragraph (b)(2), which is necessary due to vacatur of the 2020 H–2A AEWR Final Rule, as discussed in the preamble to the definition of AEWR at § 655.103(b).

The Department received many general comments related to H–2A labor costs and wage requirements, some claiming that wage requirements are too high and others stating that wage requirements are too low. To the extent those comments raised specific concerns or suggestions, they are discussed below.

a. The Department Retains the Requirement That the Offered Wage Rate Must Be the Highest of the Available Wage Sources

The Department protects against adverse effect on the wages of workers in the United States similarly employed by requiring, at § 655.120(a), that an employer must offer, advertise in its recruitment, and pay a wage that is the highest of the AEWR, the prevailing wage, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, unless the occupation is subject to an alternative wage rate structure. The Department proposed three minor changes to paragraph (a). As discussed below, this final rule adopts the proposed language from the NPRM with minor conforming changes.

First, the Department proposed to replace the current regulatory provision that provides an exception for separate wage rates set by ''special procedures'' (*i.e.,* sub-regulatory variances from the regulation) and instead include a specific reference to the regulatory provisions covering job opportunities in the herding and production of livestock on the range under §§ 655.200 through 655.235. Applications to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201, are subject to the wage rate structure at § 655.211 and are the only exception to the wage methodology set forth in this final rule at § 655.120. Further, as discussed above, the Department has removed the authority in § 655.102 to establish, continue, revise, or revoke ''special procedures'' for H–2A occupations. The Department received comments requesting that it address herder wages, including a State law involving overtime pay for herders; however, these comments are outside the scope of this rulemaking. The Department explicitly stated in the NPRM that it was not reconsidering the herder wage rate methodology. 84 FR 36168, 36220–36221.

Second, the Department proposed to replace the ''prevailing hourly wage or piece rate'' with ''prevailing wage rate'' in recognition of the fact that the Department has issued prevailing wage rates that are not in the form of an ''hourly'' or ''piece'' rate wages, including, for example, ''monthly'' prevailing wage rates.[36] An employer suggested the Department, instead, replace ''prevailing hourly rate or piece rate'' with ''prevailing guaranteed hourly rate'' and use the hourly guarantee alone to protect against adverse effect on the domestic workforce. The commenter explained that such an approach would protect wages without limiting employers' flexibility to reward productive workers through a piece rate or another incentive-based system. The Department declines to adopt the suggested language. To the extent the commenter seeks an hourly guarantee protection for workers in the event an employer uses incentive pay or piece rate, the regulation already provides hourly rate protection at § 655.122(l)(1) and (2); and, to the extent the commenter seeks to eliminate piece rate PWDs, such a suggestion is beyond the scope of this rulemaking. Further, the Department does not limit an employer's flexibility to offer wages exceeding the minimum required wage.

Third, the Department proposed to clarify that the requirement to offer and pay at least the prevailing wage rate applies only ''if the OFLC Administrator

[35] The January 2021 draft final rule indicated the Departments' intent for DOL to serve as the sole arbiter of temporary or seasonal need through a prospective delegation of authority from DHS as well as a separate regulatory action to amend DHS's related regulations. However, the January 2021 draft final rule was not published and never took effect. Accordingly, any statements contained therein do not represent the Department's formal policy; and, similarly, they do not, and may not be relied upon to, create or confer any right or benefit, substantive or procedural, enforceable at law or equity by any individual or other party. As explained elsewhere in this rule, the **Federal Register** and the Code of Federal Regulations remain the official sources for regulatory information published by the Department.

[36] The Department also makes corresponding changes throughout the regulation, replacing ''the prevailing hourly wage or piece rate'' with ''prevailing wage'' or ''prevailing wage rate,'' except where a given provision specifically applies only to prevailing piece rates.

has approved a prevailing wage survey for the applicable crop activity or agricultural activity meeting the requirements of paragraph (c)'' of § 655.120.[37] In the event there is no prevailing wage finding applicable to an employer's job opportunity, the employer's wage obligation is the highest of the other four applicable wage sources listed in paragraph (a). An employer that supported this proposal asked the Department to clarify that the OFLC Administrator must review the survey for compliance with prevailing wage methodology requirements, asserting that underlying documentation may have been lacking in the past. The Department appreciates this concern and notes that survey documentation demonstrating compliance with methodological requirements must be attached to the updated prevailing wage survey collection (*i.e.,* Form ETA–232) at the time of submission to the OFLC Administrator. *See* § 655.120(c)(1)(i).

The Department received many comments from workers' rights advocacy organizations that asserted the Department is required to determine a prevailing wage in all cases. These commenters expressed concern that the Department proposed to eliminate this ''requirement,'' and, by doing so, would permit employers to offer below-market wage rates in areas where a survey, if conducted, would produce a higher rate than the other wage sources. The Department reiterates that this final rule does not eliminate an existing requirement; rather, the revised language clarifies existing policy and practice. State-conducted prevailing wage surveys are another source of information that can provide protections for workers who are engaged in specific crop or agricultural activities offering piece rate pay or higher hourly rates of pay than the applicable AEWR in a geographic area. However, where the crop or agricultural activities in a geographic area are paid at hourly rates lower than the AEWR, a State-conducted prevailing wage survey would not protect wages from adverse effect; the AEWR does. The AEWR will continue to serve as a wage floor that prevents localized wage stagnation or depression in areas and occupations in which employers desire to employ H–2A workers. Neither the statute nor the Department's H–2A program regulations require the Department to determine a prevailing wage rate in all cases, and the Department's regulations and guidance have contemplated that there are situations in which the wage sources listed in § 655.120(a) may be unavailable or inapplicable, as reflected in past practice.[38] As explained in the NPRM, the Department primarily meets its obligation to protect against adverse effect on the wages of workers in the United States similarly employed by requiring employers to offer, advertise, and pay at least the AEWR. 84 FR 36168, 36179. As such, requiring SWAs to conduct prevailing wage surveys for every crop and agricultural activity in every area within their jurisdiction is unnecessary to prevent adverse effect. However, the Department agrees that prevailing wage rates, under the PWD methodology adopted in this final rule at § 655.120(c), can provide additional safeguards. The Department will continue to issue PWDs based on information that is as reliable and representative as possible concerning the average wages of U.S. workers in a crop or agricultural activity and distinct work task(s) within that activity, if applicable, for a particular geographic region. As explained below, this final rule modernizes the PWD methodology and empowers States to produce a greater number of reliable prevailing wage rates, which the OFLC Administrator may approve under the requirements of § 655.120(c).

The Department also received comments that suggested the Department should stop requiring H–2A employers to offer and pay the highest of the sources listed in paragraph (a) and use a different wage-setting standard instead. Two employers recommended the Department set the H–2A wage rate at the current Federal minimum wage of $7.25 per hour, while a trade association suggested the Department use the minimum wage adjusted annually using the Consumer Price Index (CPI). A trade association recommended the PWD, if available, should be used to set the H–2A wage requirement, even if that wage rate is lower than the AEWR, as it is the most accurate measure of the prevailing wage for that specific crop activity in that specific area. A public policy organization recommended the Department allow employers to pay H–2A workers less than the AEWR and prevailing wage rate, provided that U.S. workers receive five percent more than the highest of those two rates. These comments are outside the scope of the Department's proposed modifications to paragraph (a).

After consideration of the comments, the Department adopts the proposed language with two minor revisions. First, the Department has revised § 655.120(a) to clarify that an employer must offer and pay, at a minimum, the highest of the enumerated wage sources, but may choose to offer and pay a higher rate. Second, the Department has revised § 655.120(a)(2) to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language in this paragraph recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations.

b. AEWR Determinations

This final rule covers the Department's proposals at paragraphs (b)(3) and (4) of § 655.120, which the Department reserved when addressing paragraphs (b)(1), (2), and (5) in a separate rulemaking (*i.e.,* the 2020 H–2A AEWR Final Rule). As explained above in the preamble to the definition of AEWR at § 655.103(b), the 2020 H–2A AEWR Final Rule was vacated, leaving the 2010 H–2A Final Rule in its place. For the same reasons as noted in the preamble to the AEWR definition, the Department is implementing the court's vacatur of the 2020 H–2A AEWR Final Rule in this final rule by removing from the CFR the regulatory text that the Department promulgated through that rulemaking at § 655.120(b)(1), (2), and (5), thereby restoring the regulatory text to appear as it did before the effective date of the 2020 H–2A AEWR Final Rule, subject to the changes noted in this section. The Department has good cause to bypass otherwise applicable requirements of notice and comment and a delayed effective date because these are unnecessary for the implementation of the court's vacatur order and would be impracticable and contrary to public interest in light of the agency's need to implement the final judgment. *See* 5 U.S.C. 533(b)(B), (d). Delaying the ministerial task of restoring the regulatory text also would be contrary to the public interest because it could lead to confusion, particularly

[37] The Department also makes a corresponding change to § 655.122(l).

[38] *See, e.g., AFL–CIO, et al,* v. *Dole, et al.,* 923 F.2d 182, 185 (D.C. Cir. 1991) (noting Congress did not ''define adverse effect and left it in the Department's discretion how to ensure that the importation of farmworkers met the statutory requirements'' and that the Department's chosen methodology to prevent adverse effect is ''a policy decision taken within the bounds of a rather broad congressional delegation''); § 655.122(l)(1) (''any agreed-upon collective bargaining rate''); 1987 H–2A IFR, 52 FR 20496, 20502 (June 1, 1987) (noting H–2A workers ''must be paid at the highest of the applicable wage rates''); 2008 H–2A Final Rule, 73 FR 77110, 77115 (Dec. 18, 2008) (''the highest of the AEWR, prevailing wage, or minimum wage, as applicable''); 2010 H–2A Final Rule, 75 FR 6884, 6947 (''some [S]tates do not perform prevailing wage surveys''); ETA Handbook 385 at I–115 (''Should a survey not result in a prevailing wage rate finding, another survey should be made at the earliest appropriate time.'').

among the regulated public, as to the applicable AEWR methodology. With regard to changes in this section, the Department issued the 2021 H–2A AEWR NPRM, which proposed new paragraphs (b)(1) and (5). Accordingly, the Department retains the 2010 H–2A Final Rule's paragraph (c) that provides for annual AEWR updates to be published in the **Federal Register**, redesignated as paragraph (b)(2) in this final rule, and will address paragraphs (b)(1) and (5) in a separate rulemaking.

i. Must Pay Any Higher AEWR on the Published Effective Date of the New Wage Rate

The text adopted in the 2010 H–2A Final Rule specified the employer's obligation to pay the wage rate ''in effect at the time work is performed.'' [39] In the event the OFLC Administrator publishes an updated AEWR that is higher than the previous AEWR, a prevailing wage for the crop activity or agricultural activity or task(s) and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must start paying the higher wage on the effective date of the new rate. In the **Federal Register** notice publishing the updated AEWRs, the OFLC Administrator identifies the effective date of the new AEWRs. Proposed § 655.120(b)(3) was intended to more clearly articulate the timing of the wage adjustment by codifying the current practice of providing employers a short period of time (*i.e.,* up to 14 days) to update their payroll systems, such that an employer would not be required to adjust a worker's pay in the middle of a pay period, but would be required to promptly implement the adjustment.[40] *See* 84 FR 36168, 36188. Although the January 2021 draft final rule would have accepted the proposal to codify an adjustment period of up to 14 calendar days after the Department's publication of updated AEWRs in the **Federal Register**, after further consideration of the comments and as explained below, the Department has decided not to adopt this proposal, but it otherwise adopts the proposed language from the NPRM with minor conforming changes.

The Department received comments from associations, farm bureaus, employers, agents, individual commenters, an agricultural financial services business, and a national business advocacy organization opposing the requirement that employers must increase the wage rate during the employment period if the Department publishes a higher rate. Many of these commenters expressed concern this provision would make it more difficult for employers to conduct advance operational and budget planning because, at the time of filing, they would lack knowledge of the required wage rate(s) throughout the entire period of employment. An association asserted the wage rate required in the work contract should prevail throughout the employment period because ''the determination of no adverse impact to domestic workers has been satisfied for the contract period'' once the work contract is approved. These commenters, however, generally supported the Department's proposal to include a period of time for employers to adjust to the new wage rate after publication, rather than imposing an obligation to immediately implement, with an employer asserting immediate implementation would have been ''unrealistic at best'' due to the employer's need to update pay structures and a business advocacy organization asserting 14 days is insufficient. Another commenter urged the Department to set a ''date certain'' on which the updated wage rates would be effective.

The wage adjustment provision will affect only those employers whose OFLC-approved offered wage rate falls below the permissible minimum wage floor once the Department issues the new wage rates. The duty to pay an updated AEWR if it is higher than the other wage sources is not a new requirement, as employers participating in the H–2A program historically have been required to offer and pay the highest of the AEWR, the prevailing wage, or the Federal or State minimum wage at the time the work is performed.[41] As explained in the 2010 H–2A Final Rule, ''[t]he Department recognizes that these wage adjustments may alter employer budgets for the season'' and, therefore, ''employers are encouraged to include into their contingency planning certain flexibility to account for any possible wage adjustments.'' 2010 H–2A Final Rule, 75 FR 6884, 6901. This is especially true given that employers have been required to make these adjustments for many years and neither program experience nor comments on the NPRM demonstrated that a longer adjustment period would be necessary to avoid significant operational burdens on employers or the layoffs and crop deterioration cited by some commenters. For similar reasons, the Department believes concerns about significant mid-contract increases in the AEWR are overstated.

A SWA urged the Department to require immediate implementation of increased wage rates, asserting that a delay of up to 14 days would deprive workers of up to 2 weeks of pay at the AEWR and, therefore, would produce the type of adverse effect the Department is required to prevent. This commenter believed that if the Department permitted a 14-day adjustment period, it should require the employer to ''pay any increases retroactively, perhaps in the pay period after the new wage rate becomes effective,'' which the commenter stated was consistent with the Department's FLSA regulations at 29 CFR 778.303. The Department is sensitive both to the worker protection concerns the SWA raised and to adopting an approach that could add complexity, which is inconsistent with the Department's goals in this rulemaking to enhance worker protections while simplifying the program to facilitate compliance and administration.

Therefore, in this final rule, the Department has not adopted the proposal that would have codified an adjustment period of up to 14 calendar days after the Department's announcement of the new AEWRs in the **Federal Register**; instead, the Department will continue current practice of stating the effective date of the new AEWRs in the **Federal Register** announcement of the new AEWRs, which may be immediate and will not be more than 14 calendar days after publication of that notice, consistent with historical and current practice. In addition, the Department has made a minor revision to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language at § 655.120(b)(3) recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural

[39] Under 44 U.S.C. 1507, publication in the **Federal Register** provides legal notice of the new wage rates. Section 655.122(l) of the 2010 H–2A Final Rule required employers to pay the wage rate ''in effect at the time work is performed.''

[40] *See, e.g.,* Notice, *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: 2020 Adverse Effect Wage Rates for Non-Range Occupations,* 84 FR 69774 (Dec. 19, 2019) (announcing AEWRs for 2020 on December 19, 2019, to be effective January 2, 2020).

[41] *See, e.g.,* 1987 H–2A IFR, 52 FR 20496, 20521; *Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States; H–2A Program Handbook,* 53 FR 22076, 22095 (June 13, 1988) (''[c]ertified H–2A employers must agree, as a condition for receiving certification, to pay a higher AEWR than the one in effect at the time an application is submitted in the event publication of the [higher] AEWR coincides with the period of employment'').

activity in certain situations. Additionally, the Department has made a minor revision to clarify that if an updated AEWR is higher than the other wage sources, the employer must pay at least the updated AEWR, but may choose to offer and pay a higher rate.

ii. Must Not Lower Wage Rate After Publication of a Lower AEWR

In § 655.120(b)(4), the Department proposed to prohibit employers from lowering the wage rate during the certified employment period in the event the OFLC Administrator publishes an updated AEWR that is lower than the rate guaranteed on the job order. In order to avoid potential confusion regarding the requirement to continue to pay the previously offered wage if a lower rate is published during the employment period, the Department also proposed to remove language in §§ 655.120(b) and 655.122(l) regarding the wage rate ''in effect at the time work is performed.'' This approach ensures the wage rate does not fall below the rate that was offered to workers and agreed to in the work contract and prevents employers from including a clause in the job order to allow such a reduction within contract terms. As discussed below, this final rule adopts the proposed language from the NPRM unchanged.

Employer, association, agent, and business advocacy group commenters opposed the Department's proposal to prohibit employers from reducing the wage rate during the employment period, in the event the AEWR decreases. Several commenters, including associations, believed the proposal would unfairly undermine mutually agreed-upon contract terms. Some of these commenters asserted that the Department's proposal infringed upon the employers' and workers' contract rights by permitting the Department to ''void'' or ''abrogate'' the wage rate offered and agreed to in the employment contract and prohibiting the employer from including wage reduction clauses in the contract. An agent asserted the prohibition against wage reductions mid-contract would disadvantage employers with start dates before an AEWR adjustment because they would be required to pay a higher rate throughout the period of employment, while an employer with a start date after the new AEWR rates are published could pay the lower rate. Two employers and a trade association stated that the employer should be permitted to pay a lower AEWR if one is published because the AEWR is the ''exact wage'' necessary to protect U.S. workers, and the commenters asserted ''there is no valid basis to require payment of a higher wage when that wage is no longer determined to be the AEWR.''

With respect to commenters' concern that these provisions infringe on employers' and workers' freedom to contract, H–2A employers are free to include any terms and conditions in employment contracts that comply with all laws and regulations governing the H–2A program and employment generally. However, the Department holds the view that agricultural workers ''generally comprise an especially vulnerable population whose low educational attainment, . . . low rates of unionization and high rates of unemployment leave them with few alternatives in the non-farm labor market,'' and, as a result, these workers' ''ability to negotiate wages and working conditions with farm operators or agriculture service employers is quite limited'' (2009 H–2A NPRM, 74 FR 45906, 45911 (Sept. 4, 2009)), and this ''limited bargaining power . . . exacerbates the problem of stagnating [wages]'' (2010 H–2A Final Rule, 75 FR 6884, 6894). Prohibiting contract terms that would lower wages paid below the offered and agreed-to rates aligns with these concerns and is consistent with the Department's broad discretion to determine the most effective method of ensuring the employment of H–2A workers does not have an adverse effect on the wages of workers in the United States similarly employed.

The Department believes that prohibiting downward adjustments of wage rates during the period of certified employment is necessary to provide stability and predictability for workers who have limited ability to negotiate their wages and working conditions. Accordingly, this will help protect against potential adverse effects on the workers' wages and working conditions, without increasing the employer's wage costs above those in effect at the time of certification.

After consideration of the comments, the Department is adopting the proposal to prohibit the employer from reducing the offered wage, even in cases where the Department publishes a lower AEWR. Because the employer advertised and offered the higher rate on its job order, the employer cannot reduce the wage rate below the rate already guaranteed in the work contract. The Department has made a minor revision to clarify that if an updated AEWR is lower than the rate guaranteed on the job order, the employer must pay at least the rate guaranteed on the job order, but may choose to offer and pay a higher rate.

c. Section 655.120(c) Prevailing Wage Determinations

i. Background

The Department proposed to modernize the methodology used to conduct prevailing wage surveys that applies to both H–2A and other agricultural job orders placed in the Wagner-Peyser Act agricultural recruitment system. The Department previously relied on ETA Handbook 385, which was last updated in 1981, and other sub-regulatory guidance to set the standards that govern the prevailing wage surveys SWAs conduct to establish prevailing wage rates. The NPRM proposed to modernize these standards in order to establish reliable prevailing wage rates for employers and workers, and allow SWAs and other State agencies to conduct surveys using standards that are more realistic in a modern budget environment. Under the proposed methodology, the OFLC Administrator would issue a prevailing wage for a given crop activity or agricultural activity only if all of the requirements in proposed § 655.120(c)(1) are met.

In particular, the NPRM proposed the following methodological standards: (1) the SWA must submit a standardized form providing the methodology of the survey; (2) the survey must be independently conducted by the SWA or another State entity; (3) the survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity; (4) the surveyor must make a reasonable, good faith effort to contact all employers who employ workers in the crop or agricultural activity within the geographic area surveyed or conduct a randomized sampling of such employers; (5) the survey must be limited to the wages of U.S. workers, report an average wage, and be based on a single unit of pay used to compensate at least 50 percent of the U.S. workers included in the survey; (6) the survey must cover an appropriate geographic area based on several factors; and (7) the survey must report the wages of at least 30 U.S. workers and five employers and the wages paid by a single employer must represent no more than 25 percent of the sampled wages included in the survey.

SWAs that seek to prioritize precision of their estimates for the purpose of statistical validity for numerically large categories of workers may wish to consider employing statistical sampling methods that exceed the minimum standards contained in this final rule, such as those used by the National Agricultural Statistical Service in the

Agricultural Labor Survey.[42] However, as explained below, the Department is not requiring enhanced sampling methods.

In addition to these standards, the NPRM proposed to establish (1) a 1-year validity period for prevailing wage rates; (2) a 14-day window in which employers must implement newly required higher prevailing wage rates; and (3) the requirement that employers continue to pay at least the rate guaranteed on the job order if a prevailing wage rate is adjusted during a work contract. The Department received comments both in support of and in opposition to these proposals, which are discussed in greater detail below. These comments raised a variety of concerns, some general and some pertaining to specific provisions identified in the NPRM. The Department will first respond to the general comments before turning to the proposals in § 655.120(c) and the specific comments related to these proposals. As discussed below, the Department is adopting paragraphs (c)(1)(ii) and (vi) unchanged from the NPRM and is adopting paragraphs (c)(1) introductory text and (c)(1)(i), (iii) through (v), and (vii) through (ix) with some changes.

ii. General Comments on Prevailing Wage Determinations

The Department received general comments regarding the need for PWDs. Several commenters including employers and trade associations encouraged the Department to remove PWDs from the H–2A regulations entirely. Commenters explained agricultural wages involved too many factors, which prevent the government from establishing an accurate wage rate that is generally applicable and protects the domestic workforce from adverse effect. As an example of this ''inaccuracy,'' a few commenters observed that employers who respond to the survey in some regions or States pay higher rates to compete with employers who use the H–2A program in those areas. According to the commenters, the inclusion of these higher rates distorts survey results.

To the extent these comments recommend eliminating prevailing wages as a wage source under § 655.120(a), they are outside the scope of this rulemaking. With respect to comments on setting accurate wages when different factors affect agricultural workers' pay, the Department acknowledges it cannot delay or forgo its delegated duties because the available data may be less than perfect.[43] The Department disagrees with the commenters' suggestion that the inclusion of responses from employers paying higher rates to compete with H–2A employers necessarily distorts survey results. The commenters did not provide evidence that the inclusion of such rates ''distorts'' survey findings or offer examples of survey inaccuracies, beyond mentioning surveys challenged in two cases that have since been dismissed in favor of the Department and SWA.[44] Moreover, the prevailing wage rate is intended to reflect the average wage of U.S. workers in a geographic area for a crop or agricultural activity and, if applicable, distinct work task(s) within that activity. If employers are paying a certain average rate and the Department validates such a finding, then that is the prevailing wage employers must pay to applicable workers when it is the highest of available wages sources in § 655.120(a).

iii. General Comments on the Prevailing Wage Survey Methodology

Several SWAs, employers, agents, and trade associations supported modernizing the prevailing wage methodology and revising the regulations to provide concrete guidance and criteria. A SWA as well as some employers and trade associations believed the proposed standards were not rigorous enough to produce accurate PWDs. In contrast, workers' rights advocacy organizations claimed the standards were too rigorous and would result in too few PWDs. Similarly, two U.S. Senators asserted the proposed methodology ''is overly complex'' and raises concerns, including ''whether SWAs will be adequately equipped to undertake the wage surveys.'' The Senators did not provide additional explanation on why they believed the proposal was too complex. Some associations expressed concern there was no ''third party . . . peer review'' to show the standards would result in accurate prevailing wages. One association stated, without additional explanation, that changes to the survey methodology should only be attempted in a stand-alone rule, if at all. The Department appreciates and values the commenters' general input on the prevailing wage survey methodology proposed in the NPRM. Because of the general nature of these comments, the Department is unable to address them in further detail. Beyond these general comments, the Department received comments on the specific proposals in § 655.120(c), which are addressed in the sections that follow.

iv. Section 655.120(c)(1) Introductory Text and (c)(1)(i)

The Department proposed in § 655.120(c)(1) that the OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity if all of the requirements in § 655.120(c)(1)(i) through (ix) are met. The Department did not receive comments on this specific proposal, and therefore adopts the language in the NPRM with a minor revision to account for a prevailing wage for ''a distinct work task or tasks performed'' within a crop or agricultural activity, if applicable. As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language recognizes there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations, and conforms to similar changes made to portions of § 655.120(c) in this final rule.

In § 655.120(c)(1)(i), the Department proposed to maintain the current requirement that the SWA submit a Form ETA–232 to explain the methodology used to conduct the prevailing wage survey. An employer and trade association supported the proposal, while several workers' rights advocacy organizations expressed concern that the Department would only require consideration of a prevailing wage rate if it is approved by the Department, and OFLC in particular, because this could lead to the potential rejection of a prevailing wage survey finding submitted by a SWA. Commenters, including two other trade associations, added that the Department should sanction SWAs that submit noncompliant or invalid surveys.

After considering the comments received in response to § 655.120(c)(1)(i), the Department has

[42] This detailed information on the statistical methodology of the Farm Labor Survey (FLS) is publicly available by searching *reginfo.gov* for Information Collection Requests (ICRs) with the key words ''agricultural labor survey,'' opening the most recent ''Agricultural Labor'' ICR package, then selecting ''View Supporting Statement and Other Documents'' and opening the Supporting Statement B (SSB) document.

[43] *See Zirkle Fruit Co.* v. *U.S. Dep't of Labor, et al.,* 442 F. Supp. 3d 1366, 1383 (E.D. Wash. 2020) (''Agency action is not arbitrary or capricious simply because it is imperfect. Nor are agencies required to delay or forego their delegated duties simply because they lack a perfect dataset from which to undertake them.'').

[44] *Zirkle Fruit Co.,* 442 F.Supp.3d at 1383; Order Dismissing Case, *Evans Fruit Co., et al.* v. *U.S. Dep't of Labor, et al.,* No. 19–cv–3202 (E.D. Wash. Nov. 7, 2019); *see also* Order Denying Plaintiffs' Motion for Preliminary Injunction, *Evans Fruit Co., Inc.* v. *U.S. Dep't of Labor, et al.,* No. 19–cv–3202 (E.D. Wash. Oct. 11, 2019) (agency's actions are not arbitrary simply because they rely on ''imperfect data or used an imperfect approach'').

decided to retain the NPRM language with the same minor revision related to distinct work task(s) discussed above.[45] The Department has reviewed and approved SWA prevailing wage findings for decades and paragraph (c)(1)(i) reflects a continuation of this longstanding review and approval process, not a new requirement. *See, e.g.,* 1987 H–2A IFR, 52 FR 20496, 20521; ETA Handbook 385 at I–135. The Department disagrees that a sanction is needed, especially when the Department has and will continue to review prevailing wage findings submitted by SWAs to ensure they satisfy the Department's methodological requirements.

v. Section 655.120(c)(1)(ii)

The Department proposed to allow State entities other than the SWA, including a State agency, State college, or State university, to independently conduct prevailing wage surveys. This proposal sought to encourage more surveys conducted by reliable sources, independent of employer or worker influence. As the NPRM explained, SWAs have limited capacity to conduct surveys given other legal requirements, including the statutory requirement to conduct housing inspections. Other State entities, however, may have resources and expertise to conduct prevailing wage surveys for purposes of the H–2A program. Under the proposal, a State entity other than the SWA could choose to conduct a prevailing wage survey using State resources without any foreign labor certification program funding. Alternatively, the SWA could elect to wholly or partially fund a survey conducted by another State entity using funds provided by the Department for foreign labor certification programs.

The Department proposed to continue to require the SWA to submit the Form ETA–232 for any prevailing wage survey, even if the survey was conducted by another State entity. This process is designed to ensure the Department will not adjudicate conflicting surveys in the event the SWA identifies more than one State prevailing wage survey that might be used for purposes of the H–2A program. The NPRM solicited comments on alternate methods to address concerns with possible conflicting surveys, and whether there are additional neutral sources of prevailing wage information that the Department should use in the H–2A program to further its effort to modernize State-conducted prevailing wage surveys. The Department received several comments on this proposal. Following full consideration of these comments, the Department has decided to retain the proposal in this final rule without change. The Department's responses to these comments are provided below.

Use of Alternative Data Sources

A workers' rights advocacy organization recommended the Department permit SWAs to determine prevailing wages based on information like employers' job service listings for similar positions and information in a State unemployment insurance (UI) database. The commenter explained that a ''wage survey is merely one of the ways'' to determine a prevailing wage and ''SWAs have a variety of real time data available to them that is provided by employers.'' The commenter added that job service staff funded by Migrant and Seasonal Farmworker funds are ''uniquely qualified'' to assess if an hourly or piece rate wage is consistent with the prevailing practice in their region. The commenter also urged the Department to use the local wage from the Occupational Employment and Wage Statistics (OEWS) survey,[46] formerly the Occupational Employment Statistics survey prior to March 31, 2021, to establish prevailing wages for crop activities paid on an hourly basis when the SWA does not produce a prevailing wage finding or if the Department determines the finding submitted does not satisfy methodological requirements.

The Department appreciates the suggestions from the commenter. The Department agrees that SWAs and other State entities may draw on UI data, job service listings, and other sources of State-generated information to formulate prevailing wage surveys. For example, SWAs may use information in their State's UI database as one source to help identify the general universe of employers to contact, so long as there is a 20 CFR part 603 compliant agreement for the transfer of the data. SWAs may also refer to job orders and similar information to help identify the pay structures for certain crop or agricultural activities to determine if there are distinct work task(s) within those activities before conducting a survey. As explained in the NPRM, prevailing wage surveys are specific to crop and agricultural activities and distinct tasks performed within these activities in particular geographic areas, as determined by SWAs. 84 FR 36168, 36185–36187. The Department has relied on SWAs to determine prevailing wages in the H–2A program for decades because they are uniquely positioned to determine the crops and activities to be surveyed, the ideal times to conduct surveys for various seasonal activities, the universe of employers to be surveyed, and the areas in which employers operate, based on their knowledge of prevailing local practices and conditions, differing pay structures for specific activities and crops, and the movement of migratory farm labor within the State. Based on this knowledge of local conditions, SWAs and other State entities can draw on alternative sources of information as they craft prevailing wage surveys in accordance with the methodological requirements in this rule.

To the extent the commenter is suggesting that sources such as employers' job service listings or information in a State UI database be used to solely determine prevailing wages, the Department is not able to adopt this suggestion in this rulemaking. Although these may be neutral sources of wage information, these sources are not surveys or data collections designed to facilitate identification of wages paid to workers engaged in a particular activity in a particular geographic area. As noted in the NPRM, the Department proposed to ''modernize the methodology used by the SWAs to conduct prevailing wage surveys'' and ''allow the SWAs and other State agencies to conduct surveys using standards that are more realistic.'' 84 FR 36168, 36178, 36179.[47] The use of these alternative data sources in lieu of a State-conducted survey of wages in

[45] The Department has updated Form ETA–232 to align with the prevailing wage methodology in this final rule.

[46] OEWS collects wage data from all 50 States as well as the District of Columbia (DC), Puerto Rico, Guam, and the Virgin Islands. *See* Bureau of Labor Statistics (BLS), *Occupational Employment and Wage Statistics Overview, https://www.bls.gov/oes/oes_emp.htm* (last modified Mar. 31, 2021) (''The OEWS survey is a federal-state cooperative program between [BLS] and [SWAs]. BLS provides the procedures and technical support, draws the sample, and produces the survey materials, while the SWAs collect the data. SWAs from all [50 States], plus [DC], Puerto Rico, Guam, and the Virgin Islands participate in the survey. Occupational employment and wage rate estimates at the national level are produced by BLS using data from the [50 States] and [DC].'').

[47] *See also e.g.,* 84 FR 36168, 36179 (''Accordingly, the Department proposes to make the changes discussed below to modernize the prevailing wage methodology and empower States to produce a greater number of reliable prevailing wage surveys results.''); 84 FR 36168, 36263 (prevailing wage defined as a wage rate established, *inter alia,* ''based on a survey conducted by a state that meets the requirements in § 655.120(c)''); 84 FR 36168, 36176 (proposing a corresponding change to the Wagner-Peyser Act regulation at 20 CFR 653.501(c)(2)(i) to define ''prevailing wage'' in the same manner for the agricultural recruitment system as the Department proposes to define ''prevailing wage'' for the H–2A program).

a crop or agricultural activity and geographic area to determine prevailing wages would require further consideration, in part, regarding the appropriate criteria such data sources must meet to produce prevailing wages in the H–2A program. Such a change to the proposal—adding both a method of determining prevailing wages other than State-conducted surveys of employers as well as the criteria for the SWA to use in evaluating and using non-survey data sources to determine prevailing wages—cannot be adopted without further consideration, including notice-and-comment rulemaking.

Similarly, the Department did not propose to rely on an alternative non-State survey, such as the OEWS survey, in the event a SWA or other State entity conducts a survey but the survey does not yield a PWD. Rather, the Department proposed using the OEWS survey to establish the AEWR in certain circumstances. 84 FR 36168, 36183–36184. Moreover, the NPRM explained that the Department meets its obligation to protect against adverse effect on the wages of workers in the United States similarly employed primarily by requiring employers to offer, advertise, and pay the AEWR, which is a form of prevailing wage and under the current wage methodology is the required wage rate in approximately 95 percent of H–2A applications. *Id.* at 36179. The NPRM therefore clarified that the Department is not obligated to establish a prevailing wage separate from the AEWR for every occupation and agricultural activity in every State. *Id.* Instead, the Department proposed to modernize the methodology used by the SWAs to conduct prevailing wage surveys to serve as an additional wage protection for workers in specific crops and activities. *Id.* Adopting the suggestion to use the OEWS survey when there is no PWD from a State-conducted survey would be a change that commenters and stakeholders generally could not have anticipated as an outcome of the rulemaking, thus warranting additional public notice and opportunity for comment.

Finally, to the extent the commenter is referring to SWA staff funded by Wagner-Peyser Act funds when it refers to ''job service staff funded by Migrant and Seasonal Farmworker funds,'' the Department agrees that SWAs are ''uniquely'' positioned to assess differing pay structures based on their knowledge of prevailing local practices and conditions, as discussed above.

Private and Other Third-Party Surveys

An individual commenter mistakenly believed the Department proposed to eliminate employer-provided prevailing wage surveys, but there are no such surveys under the H–2A program and, as such, the NPRM did not propose their elimination. Several trade associations, agents, and a public policy organization asked the Department to permit the use of wage surveys conducted by other third parties, including employer-provided surveys. One of these commenters explained statistically valid employer-provided surveys would save Federal resources and allow for ''more accurate'' surveys tailored to particular areas and occupations. The commenter stated it was irrational for the Department to permit such surveys in the H–2B program, but not the H–2A program.

The Department declines to adopt the request to allow private or employer-provided surveys. As a preliminary matter, the Department notes that the comment mischaracterizes the Department's position on the use of employer-provided surveys in the H–2B program. The 2015 H–2B Final Rule permits employer-provided surveys only in limited circumstances: (1) those conducted by a State or State agency, State college, or State university; (2) those submitted for a geographic area where the OEWS does not collect data, or in a geographic area where the OEWS provides an arithmetic mean only at a national level for workers employed in the SOC occupation; or (3) where the job opportunity is not included in an occupational classification of the SOC system, or is included within a SOC occupation designated as ''all other.'' [48] Further, only in the latter two scenarios (*i.e.,* (2) and (3)) would the Department permit an employer to submit a private wage survey for consideration. Subsequently, Congress required the Department to expand the types of surveys permitted in the H–2B program through Appropriations Act legislation first enacted in 2015 and every year since.[49]

Moreover, due to regulatory differences between the H–2A and H–2B programs, the Department believes it is reasonable to exclude employer-provided surveys in the H–2A program but allow them in limited circumstances in the H–2B program. First, there is no AEWR under the H–2B program. Instead, the employer must offer a wage that is at least equal to the prevailing wage or the Federal, State, or local minimum wage, whichever is highest. Second, the PWD processes in the H–2A and H–2B programs are distinct. In the H–2B program, the prevailing wage is determined on a case-by-case basis, in advance of the employer's application filing with the OFLC NPC.[50] In contrast, prevailing wages under the H–2A program are historically determined using one method—SWA surveys submitted to the OFLC Administrator—and are applicable to all H–2A applications for the crop or agricultural activity in the area surveyed.[51] There is no mechanism in the H–2A program for OFLC to evaluate wage surveys for specific job opportunities or from sources other than the SWA. Instead, the SWA must submit prevailing wage survey results to OFLC on the Form ETA–232. This final rule continues this requirement, even if the survey submitted with the SWA's Form ETA–232 was conducted by another State entity. Finally, given that employers are required to pay the highest of the wage sources listed in § 655.120(a), it seems unlikely that an employer would submit an alternate wage survey because the wage finding from that survey would impact the employer's wage offer requirement only if it is the highest among the sources in § 655.120(a).

Surveys Conducted by Non-SWA State Entities

An employer asserted that only State agriculture agencies should conduct surveys because SWAs and others lack industry expertise. A trade association opposed allowing SWAs to use surveys conducted by other State entities because this could create uncertainty

[48] *See* 2015 H–2B Final Rule, 80 FR 24146, 24165–24171 (Apr. 29, 2015) (discussing at length the reasons the Department does not permit general use of employer-provided private wage surveys); § 655.10(f); *see also Comite de Apoyo a los Trabajadores Agricolas (CATA)* v. *Perez,* 774 F.3d 173, 191 (3d Cir. 2014) (directing ''that private surveys no longer be used in determining the mean rate of wage for occupations except where an otherwise applicable [OEWS] survey does not provide any data for an occupation in a specific geographical location, or where the [OEWS] survey does not accurately represent the relevant job classification'').

[49] *See, e.g.,* Consolidated Appropriations Act, 2021, Public Law 116–260, div. H, tit. 1, sec. 110 (2020); Consolidated Appropriations Act, 2020, Public Law 116–94, div. A, tit. I, sec. 110 (2019); Consolidated Appropriations Act, 2016, Public Law 114–113, div. H, tit. I, sec. 112 (2015); *see also Effects of the 2016 Department of Labor Appropriations Act* (Dec. 29, 2015) at p. 4, *https://www.foreignlaborcert.doleta.gov/pdf/H-2B_Prevailing_Wage_FAQs_DOL_Appropriations_Act.pdf.*

[50] H–2B employers must obtain a PWD from the National Prevailing Wage Center (NPWC) before filing an H–2B application with the NPC. The NPWC engages in a case-by-case analysis of the employer's job opportunity and several wage sources.

[51] During application review, the NPC compares the prevailing wage for the crop or agricultural activity and area, if available, to the other applicable wage sources (*i.e.,* AEWR; CBA; and Federal and State minimum wages) to determine the highest wage.

and may produce wages that ''fluctuate wildly.'' A public policy organization stated the NPRM does not offer a methodology to resolve conflicting surveys or address whether State universities may accept money from grower associations to conduct prevailing wage surveys. In contrast, a commenter from academia and another association supported the proposal in the NPRM, with the association noting that surveys conducted by non-SWA State entities would ''alleviate concerns'' over the reliability of OEWS data for agricultural occupations and provide a ''reasonable alternative'' to the FLS.

The Department declines to adopt the suggestion to limit surveys to State agriculture agencies or SWAs. The Department seeks to increase, rather than limit, the number of State entities that can conduct surveys in order to encourage more prevailing wage findings. The commenters' suggestion would conflict with this goal. Moreover, the Department is retaining the SWA as the entry point for other State entity surveys in order to leverage the SWA's expertise in the selection of surveys to submit for OFLC approval. In response to the comment that the NPRM did not offer a ''methodology'' to resolve conflicting surveys, this final rule clarifies that the SWA will evaluate conflicting State surveys and submit to the Department only one survey for a crop or agricultural activity and distinct work task(s) in that activity, if applicable, for a particular area.

With regard to the comment on whether State universities could accept money from grower associations to conduct a survey, the Department understands this comment to be concerned with the impartiality of State-conducted surveys. As noted in the 2015 H–2B Final Rule, the Department has a long history of partnering with States to collect wage data and determine prevailing wage rates. *See* 80 FR 24146, 24170. The Department accepts surveys conducted by State entities, such as State agriculture agencies and universities, because these sources are considered reliable and independent of employer influence. *Id.* The requirement that the State must independently conduct the survey means that the State must design and implement the survey without regard to the interest of any employer in the outcome of the wage reported from the survey. *Id.* In addition, the Department does not believe wages will vary significantly depending on the State entity that conducts the survey. This is because entities will be held to the same methodological standards, and OFLC will review prevailing wage findings prior to the issuance of any prevailing wage rate to ensure the survey meets methodological requirements.

vi. Section 655.120(c)(1)(iii)

The Department proposed that a prevailing wage survey must cover a distinct work task or tasks performed in a single crop activity or agricultural activity. The Department explained the concept of distinct work tasks is continued from ETA Handbook 385, which provides:

> Some crop activities involve a number of separate and distinct operations. Thus, in harvesting tomatoes, some workers *pick* the tomatoes and place them in containers while others *load* the containers into trucks or other conveyances. Separate wage rates are usually paid for individual operations or combinations of operations. For the purposes of this report, each operation or job related to a specific crop activity for which a separate wage rate is paid should be identified and listed separately.

ETA Handbook 385 at I–113 (emphasis in original). The NPRM stated ''[t]he distinct task requirement means that even within a single crop, distinct work tasks that are compensated differently (*e.g.,* picking and packing) would be required to be surveyed in a manner that produces separate wage results.'' 84 FR 36168, 36186.

The Department received several comments on this proposal. Some trade associations asked the Department to clarify what constitutes a distinct work task within a crop or agricultural activity so employers can provide more accurate and reliable wage data. A workers' rights advocacy organization stated that it would be difficult for SWAs to determine which activities are paid differently until after the survey is complete. One trade association opposed the determination of wage rates by tasks because it believed doing so could negatively affect smaller operations and expose employers to liability.

After careful consideration of the comments, the Department has decided to retain the proposal in this final rule with clarification in this section of the preamble and a minor change to the regulatory text. In particular, the Department clarifies that if the SWA or surveyor knows before the administration of a survey that separate wage rates are paid to a distinct work task or tasks within a crop or agricultural activity, then the survey must be designed to capture that unique task(s) and wage rate(s). This knowledge could come from different sources, including prior experience or stakeholder engagement during the survey development phase.

The Department also clarifies that a SWA or surveyor may determine that a task or tasks within a crop or agricultural activity is paid differently during or after the survey administration period. For example, a survey form could ask employers to list the crop activity—including distinct work task(s) within each activity—associated with each unique wage rate. The survey could also provide a space for employers to furnish additional information on factors that may affect wage rates. Depending on the responses from employers (if any), the SWA or surveyor may determine there are distinct work task(s) within an activity and that it therefore must calculate a separate wage rate for this task or tasks. The Department's above clarifications allow SWAs to retain discretion over which crop and agricultural activities to survey and the methods for collecting data from employers—as is the case under current standard practice—while fulfilling the requirements of this provision. Finally, consistent with current practice and language in the Handbook, the Department has revised the regulatory text for this provision to clarify that the survey must cover work performed in a single crop or agricultural activity and, if applicable, a distinct work task(s) performed in that activity. This change recognizes that not every crop activity or agricultural activity will have a distinct work task or tasks and thus not every survey will cover such task or tasks.[52]

In response to the trade associations' request for clarification, the concept of distinct work tasks is not new, but rather a continuation from ETA Handbook 385. As noted in the Handbook, the hallmark of a distinct work task performed in a crop or agricultural activity is a separate wage rate that is paid for that operation or job. Given the factors that may affect wage rates, the Department is unable to provide an exhaustive list of tasks for all crop or agricultural activities in all geographic areas. Instead, what constitutes a distinct work task must be determined in each case, depending on the information before the SWA or other State surveyor.

The Department acknowledges the workers' rights advocacy organization's comment that SWAs may not know if activities are paid differently until after the completion of a survey. As clarified above, a SWA or surveyor may

[52] *See* ETA Handbook 385 at I–113 (''*Some* crop activities involve a number of separate and distinct operations.'') (emphasis added).

determine a distinct work task or tasks performed within a crop or agricultural activity is paid differently during or after the survey administration period. The Department believes this clarification addresses the workers' rights advocacy organization's comment and notes SWA commenters did not express concern that determining the distinct work tasks to be covered by a survey has been challenging under the Handbook or will be challenging under the similar provision proposed in the NPRM. Finally, the trade association did not explain how the proposal would adversely affect smaller operations, though it claimed that smaller operations rely on fewer workers to perform a more diverse array of tasks. As explained above, the concept of a distinct work task is a continuation from ETA Handbook 385. The Department is not aware of instances where employers have been exposed to liability related to this concept in the decades that prevailing wage surveys have been conducted using the Handbook and related guidance. In addition, because a separate wage rate is the hallmark of a distinct work task, an applicable employer—regardless of size—must pay this rate if it is approved by OFLC as the prevailing wage and is the highest of the applicable wage sources in § 655.120(a).

vii. Section 655.120(c)(1)(iv)

The Department proposed that the surveyor must make a reasonable, good faith effort to contact all employers who employ workers in the crop or agricultural activity and geographic area surveyed or conduct a randomized sampling of such employers. The NPRM explained this requirement is based on general statistical principles and consistent with ETA Handbook 385. 84 FR 36168, 36186 (citing ETA Handbook 385 at I–114). The NPRM proposed to continue the use of a random sample and clarified that a random sample or survey of the entire population is a requirement, not a recommendation. It noted this requirement is consistent with the H–2B prevailing wage regulation at § 655.10 and current H–2B prevailing wage guidance interpreting the H–2B appropriations riders. The Department received two general sets of comments on this proposal. Having carefully considered these comments, the Department has decided to adopt the regulatory text proposed in the NPRM, with some revisions.

The first set of comments addressed the requirement to contact all employers in the area or a random sample of such employers. A workers' rights advocacy organization asserted that contacting all employers of workers in a particular crop or agricultural activity would be impossible for States operating with limited resources because no ready database of this information exists. The commenter asked the Department to clarify what would constitute a ''reasonable'' attempt to contact all employers in the universe and stated it would be clearer to ask the States to perform a random sample of employers of which they have knowledge, rather than a sample of all ''such employers.'' The commenter also suggested the regulations allow States to propose an alternative sampling method that aligns with the conditions and resources in that State. An agent claimed that allowing a reasonable, good faith attempt to contact all employers to substitute for statistically valid sampling ''severely limits'' the validity of resulting wages. A trade association stated it did not oppose the use of random samples if the survey produces reliable, statistically valid data and wages are not separated by task or otherwise discriminates against smaller operations.

The Department agrees with the workers' rights advocacy organization that the surveyor may not know the universe of all relevant employers at the beginning of a survey. This final rule therefore clarifies that the surveyor may estimate the universe of relevant employers and make a reasonable, good faith effort to contact these employers based on the estimated universe. This final rule also clarifies that under the random sample option, the surveyor must, at a minimum, estimate the universe of relevant employers and workers and then randomly select a sufficient number of employers from the estimated universe to contact in order to satisfy the minimum employer and worker sample size requirements. These minimum requirements or ''baseline standards'' are discussed in the preamble to § 655.120(c)(1)(vii) through (ix). The Department's interpretation of the random sample option is consistent with its interpretation of a similar requirement for employer-provided surveys in the H–2B program.[53]

The NPRM proposed that a survey must include the wages of U.S. workers employed by at least five employers, among other baseline standards. As explained in the preamble discussing § 655.120(c)(1)(vii) through (ix), it is the Department's understanding that some crop or agricultural activities and distinct work task(s) in a geographic region may have a smaller number of employers. The Department made changes to § 655.120(c)(1)(vii) through (ix) so that States may still determine a prevailing wage in such a situation. Consistent with those changes, the Department amends this provision to clarify that if the estimated universe of employers is fewer than five, the surveyor must contact all employers in the estimated universe, instead of contacting a random sample or making a reasonable, good faith attempt to contact such employers. This final rule adds two clarifying edits: first, to replace ''conducted'' with ''contacted'' in regard to a randomized sample for consistency with the language in other parts of the provision, namely the ''contact all relevant employers'' option, and with the purpose of this provision, which is to set forth how the surveyor should contact employers in the estimated universe. Second, this final rule amends the regulatory text to clarify that the estimated universe is for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks within that activity. This clarification recognizes there may be a PWD for a distinct work task or tasks within a crop activity or agricultural activity in certain situations, and is consistent with changes to other portions of § 655.120(c) in this final rule.

Consistent with SWAs' current practice, the surveyor may estimate the universe of relevant employers from information obtained from sources such as UI databases, open and closed job orders, State labor market information, and information provided by State agricultural extension offices. The surveyor has the option to conduct a statistically valid sampling or stratified random sampling by employer size. However, the Department is not requiring enhanced sampling methods. Though the minimum standards in this final rule may not return statistically valid results in all cases due to the reduced sample size requirements,[54] the Department believes that the requirements in this provision, along with other safeguards in § 655.120(c), will allow for the increased availability of State-specific data and crop/task categorical granularity, and are aimed at ensuring surveys that are sufficiently

[53] *See, e.g.,* 2015 H–2B Final Rule, 80 FR 24146, 24173 (''Proper randomization requires the surveyor to determine the appropriate 'universe' of employers to be surveyed before beginning the survey and to select randomly a sufficient number of employers to survey to meet the minimum criteria on the number of employers and workers who must be sampled.'').

[54] As noted further below, the sample size requirements in this final rule are consistent with or exceed the OEWS survey requirements as well as the ''safety zone'' standards used by the DOJ and Federal Trade Commission (FTC) in the anti-trust context.

representative and do not rely on selective sampling or other techniques that may produce wage estimates that are not representative of wages paid to workers in the United States similarly employed. In addition, these minimum standards are intended to provide more options for SWAs to make decisions about whether to prioritize precision, accuracy, granularity, or other quality factors in the data they use to inform prevailing wages. The Department will provide technical assistance to the SWAs, as needed.

In response to the suggestion to allow an alternative sampling method, the Department concludes that this final rule balances the need to provide the surveyor with the flexibility to determine the type of survey to conduct with the need to ensure the results of the survey are as reliable as possible. The Department does not believe there is a reasonable alternative sampling method that consistently balances these goals, and the commenter did not suggest any.

With regard to requests for clarification on what constitutes a ''reasonable'' attempt to contact relevant employers, the NPRM explained that a reasonable, good faith effort might mean the surveyor sends the survey through the mail or other appropriate means to all employers in the geographic area and then follows up by telephone with all non-respondents. 84 FR 36168, 36186; *see also* 2015 H–2B Final Rule, 80 FR 24146, 24173. However, a surveyor can make a ''reasonable, good faith'' attempt to contact relevant employers in other ways and the Department believes an assessment of reasonable contact methods will be determined most effectively on a case-by-case basis, depending on the facts before the OFLC Administrator. The Department disagrees with the agent's comment that allowing a reasonable, good faith attempt to contact all employers ''severely limits'' the validity of the resulting wage. Surveys often are based on samples from a population and are not ''severely limited'' merely because the surveyor did not contact the entire population. Rather, the validity of a survey will depend on factors such as the number of responses received. As mentioned above, the minimum standards in § 655.120(c) are aimed at ensuring surveys that are sufficiently representative and do not rely on selecting sampling or other techniques that result in biased prevailing wages.

The second set of comments addressed the perceived elimination of the in-person interview requirement. Specifically, commenters, including two trade associations, claimed that in-person interviews of employers and employees are needed to obtain and verify accurate wage data. A workers' rights advocacy organization stated in-person interviews of workers are likely necessary for reforestation and pine straw work. In contrast, another workers' rights advocacy organization and a commenter from academia agreed that in-person interviews are no longer practical.

In response to comments that in-person employer and employee interviews are necessary, the Department notes, as it explained in the NPRM, that in-person interviews are unnecessarily burdensome and inconsistent with modern survey methods. 84 FR 36168, 36179, 36185. Neither the FLS nor OEWS survey requires in-person interviews of employers as the primary collection method. Both the FLS and OEWS survey, moreover, rely solely on employer-reported data and do not canvass workers directly. The Department's current standard practice for conducting prevailing wage surveys does not require SWAs to interview employers in person.[55] The commenters did not explain why telephone, mail, or electronic methods of contacting employers are insufficient to collect verifiably accurate results. The Department's current standard practice also does not require SWAs to conduct worker interviews.[56] Therefore under this final rule, SWAs are not obligated to conduct in-person interviews of employers or worker interviews. Finally, because reforestation and pine straw workers are not covered in the H–2A program under this final rule, the workers' rights advocacy organization's comment that in-person interviews may be required for these industries is no longer applicable.

viii. Section 655.120(c)(1)(v)

The NPRM proposed to limit prevailing wage surveys to the wages of U.S. workers. It also proposed to require the SWA or other State entity to determine prevailing wages based on the unit of pay used to compensate at least 50 percent of the U.S. workers included in the survey and that the rate of pay must be based on the average wage of all the U.S. workers within the selected unit of pay. This final rule adopts these provisions with changes, explained below.

Limiting the Survey to the Wages of U.S. Workers

Limiting prevailing wage surveys to the wages of U.S. workers applies to both determining the universe of workers' wages to be sampled and the universe of workers' wages reported. The NPRM explained that this limitation is consistent with current policy[57] and reflects the Department's longstanding concern that including the wages of non-U.S. workers may depress wages.

Several trade associations and an agent urged the Department not to limit survey responses to the wages of U.S. workers because of the potential legal implications for employers, including that employers may not know whether workers are undocumented. These commenters and others also opposed the proposal on the basis that the Department does not similarly exclude from survey responses the wages paid to H–2A workers and workers in corresponding employment, which the commenters claim may inflate or skew the prevailing wage. Another trade association suggested the inclusion of non-U.S. workers would allow the Department to determine whether foreign workers are adversely affecting the wages of U.S. workers. An employer and trade association requested the Department add a provision that would make H–2A workers part of the prevailing wage survey if more than 10 percent of the agricultural workforce in a State is composed of H–2A workers or workers in corresponding employment. After careful consideration of the comments, the Department has decided to adopt the proposal to limit the survey to U.S. workers. This final rule clarifies that ''determining the universe of workers' wages to be sampled'' means the survey instrument must ask employers to report the wages of U.S. workers only.

As explained above and in the NPRM, this survey limitation is a continuation of the Department's current policy. Employers already have experience verifying worker eligibility prior to employment, and they have the obligation to continue to do so. Moreover, the Department is not aware of cases where employers have been exposed to liability based on the wages they have provided in response to SWA survey requests. Survey results should exclude the wages of H–2A workers, but

[55] This practice is based on public guidance issued by the Department to SWAs that amended the guidance in ETA Handbook 385. *See, e.g.,* TEGL No. 21–20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance* (May 10, 2021).

[56] *See id.*

[57] The NPRM noted that ETA Handbook 385 uses the terms ''domestic workers'' and ''U.S. workers'' in describing the sample to be conducted, and the previous version of the Form ETA–232 similarly limits the survey to U.S. workers. 84 FR 36168, 36186 n. 50.

should include the wages of U.S. workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area. As noted above, the prevailing wage rate is intended to reflect the average wage of U.S. workers in a geographic area and a given crop or agricultural activity and, if applicable, distinct work task(s) within that activity. If prevailing wage surveys determine employers are paying a certain average rate for an activity or distinct task(s) in an area and the Department validates this finding, then that rate is the prevailing wage rate and must be paid to applicable workers when it is the highest of available wages sources listed in § 655.120(a).

The Department declines to adopt the suggestion to include the wages of non-U.S. workers in a survey, or include the wages of H–2A workers in surveys when they are concentrated in an area, because it is contrary to the purpose of prevailing wage rates, which are intended to reflect the wage paid to U.S. workers in a given crop or agricultural activity and geographic area. As explained in the NPRM, limiting the survey to U.S. workers reflects the Department's longstanding concern that including the wages of non-U.S. workers in a prevailing wage finding may depress wages. 84 FR 36168, 36186. To the extent U.S. workers in corresponding employment are covered by a prevailing wage survey, the Department concludes that the survey will sufficiently represent the wages paid by that employer to its H–2A workers as well. This is because H–2A employers must offer to U.S. workers no less than the same benefits, wages, and working conditions the employer is offering, intends to offer, or will provide to their H–2A workers. *See* § 655.122(a).

Unit of Pay Determinations

The NPRM proposed that a prevailing wage be issued only if a single unit of pay is used to compensate at least 50 percent of the U.S. workers included in the survey, similar to the current requirement in ETA Handbook 385.[58] The Department proposed this requirement both to verify that the rate structure reflected in the survey is actually prevailing and to allow the wages included in the survey to be averaged, as it would not be possible to average wages using different units of measurement.

A trade association expressed support for this proposal. A workers' rights advocacy organization requested the Department revise the regulatory text to clarify that the survey must report the unit of pay used to compensate at least 50 percent of the workers represented in the survey responses, not 50 percent of all workers in the estimated survey universe.

This final rule adopts the NPRM proposal with changes to the regulatory text in response to the above comments and after the Department's own further consideration. First, the Department has revised the provision to require the PWD to be based on the unit of pay used to compensate the largest number of workers, rather than ''at least 50 percent of the workers,'' which is consistent with the current unit of pay provision in the Handbook. The Department made this change in this final rule because the proposed ''50 percent of U.S. workers'' would impose a requirement that is more stringent than the language in the Handbook for crop or agricultural activities involving several units of pay (*e.g.,* per hour, per pound with no bonus, per pound with a bonus). While uncommon, the Department acknowledges there are instances where the survey results reflect more than two units of pay for a crop or agricultural activity and distinct work task(s) in that activity, if applicable. In such situations, there will be at least one unit of pay that is paid to the ''largest number of workers'' whose wages are reported in the survey, but it is possible that no single unit of pay will account for ''at least 50 percent'' of such workers. Because the unit of pay that is paid to the largest number of workers in the survey can be considered prevailing, the Department believes this proposed change better aligns with its goal of encouraging more prevailing wage surveys through the adoption of standards that are as reliable as possible, while also accounting for the realities of a modern budget environment.

The Department made some minor revisions to the regulatory text for clarity and conformity with other provisions. The Department added ''U.S.'' before ''workers'' in the regulatory text for clarification and consistency with the requirement that prevailing wage surveys include only wages of U.S. workers. The Department also changed the phrase from ''whose wages are surveyed'' to ''whose wages are reported in the survey,'' to address the workers' rights advocacy organization's request that the Department clarify that this language refers to survey responses received. Finally, the Department added the language ''and distinct work task(s), if applicable'' after ''crop activity or agricultural activity,'' for clarity and consistency with other changes to the regulatory text in § 655.120(c). As applied to this provision, this change clarifies that if the surveyor determines that a task (or tasks) within a crop or agricultural activity is paid differently (*i.e.,* there is a distinct work task or tasks within the activity), then the survey should report the average wage of U.S. workers in that distinct work task(s).

Rate of Pay Determinations

The NPRM proposed that the survey must report the average wage of all workers within the prevailing unit of pay, which departed from the current requirement in ETA Handbook 385 to use a ''40 percent rule'' and a ''51 percent rule'' to determine the prevailing rate of pay. The NPRM proposed using the average wage because it is consistent with the method the Department proposed to determine the AEWR, as well as the current methodology for determining prevailing wage rates in the H–2B program. The NPRM solicited comments on the proposal, as well as possible alternatives, including whether the Department should retain the ''40 percent rule'' or ''51 percent rule'' from the Handbook or whether the Department should, instead, establish the prevailing wage at the median wage based on wages in the prevailing unit of pay.

An employer, a SWA, and several trade associations urged the Department to use the median wage rather than the average wage on the basis that the former lessens the impact of outliers. A trade association recommended retaining the 40 percent and 51 percent rules without additional explanation. A SWA supported replacing the 40 and 51 percent rules with this proposal as a way to simplify the methodology for determining the prevailing wage rate and potentially reduce confusion among stakeholders regarding how the prevailing wage is determined, but it asked for clarification on whether the SWA must collect ''piece rate dimensions (*i.e.,* specific linear dimensions of apple bins).''

After consideration of these comments, the Department has decided to adopt the NPRM proposal to use the average or mean wage. As explained in the 2015 H–2B Final Rule, the mean is the appropriate wage to use to avoid immigration-induced labor market distortions.[59] The mean is the arithmetic

[58] ETA Handbook 385 at I–117 (noting that, if a survey includes more than one unit of pay, a prevailing wage rate is issued based on the unit of pay that represents the largest number of workers).

[59] *See* 80 FR 24146, 24159–24160; *see also* Interim Final Rule, *Wage Methodology for the*

average of all wages surveyed in a crop or agricultural activity—and distinct work task(s) within that activity, if applicable—in the geographic area. If the applicable prevailing wage is set below the mean, it could result in a depressive effect on U.S. workers' wages overall because the average wage of U.S. workers in the relevant activity or task(s) would be drawn down. *See* 2015 H–2B Final Rule, 80 FR 24146, 24159–24160. Use of the mean is also consistent with the Department's determination of prevailing wages for other foreign worker programs. *See* 20 CFR 655.10(b)(2), (f)(2) (setting the prevailing wage in the H–2B program at the mean for the OEWS and employer-provided surveys); *see also* 20 CFR 656.40(b)(2) (similar for PERM); 20 CFR 655.731(a)(2)(ii) (similar for H–1B); 20 CFR 655.410(b)(1) (similar for CW–1).

Finally, this final rule clarifies that it may be appropriate to collect piece rate dimensions in some situations, such as when the unit of measurement of a piece is not standardized and can have differing dimensions. However, these determinations should be made on a case-by-case basis by the SWA or State entity conducting the survey. If necessary, the Department will provide technical assistance to the SWAs.

Other Comments on § 655.120(c)(1)(v)

Several trade associations and an agent opposed the ''50 percent of U.S. workers'' proposal because they believed it would impose an unrealistic wage level on employers as piece rate work may be converted to hourly compensation. They urged the Department, without additional explanation, to establish piece rate and hourly wages separately to avoid piece rate compensation for those who are most productive from inflating hourly wages. An employer and another trade association claimed that piece rates are effectively ''double counted'' when they are incorporated into the calculations of both the AEWR hourly rate and prevailing piece rates.

The commenters' specific concern regarding the conversion of units of pay is unclear. Under the Department's approach, a prevailing wage is issued when a unit of pay is used to compensate the largest number of U.S. workers in the survey, assuming the survey meets other applicable requirements. For example, if 75 percent of U.S. workers included in the survey results are paid hourly, OFLC would issue an hourly prevailing wage rate for that activity. If those workers were paid, instead, by the piece based on the same unit of measurement (*e.g.,* bushel), OFLC would issue a prevailing wage based on a piece rate. As such, in calculating a prevailing wage, OFLC would not convert one unit of pay to another (*e.g.,* converting piece rates to hourly rates) because the ''largest number of workers'' standard must be for the same unit of pay.

The Department declines to adopt the suggestion to establish separate piece rate and hourly wages because a wage rate based on one unit of pay can be prevailing for a crop or agricultural activity and distinct work task(s), if applicable, in the relevant geographic area even if there are other units of pay.[60] Establishing both a prevailing hourly rate and piece rate for an activity or task(s) in every instance would be at odds with the Department's current regulations and guidance under ETA Handbook 385. However, there could be a situation in which there are different units of pay, each one accounting for an equal number of U.S. workers whose wages are reported in the survey. Should this rare situation occur and the survey meets other applicable requirements, a separate prevailing rate would be determined for each unit of payment. This clarification is consistent with the guidance in ETA Handbook 385. *See* ETA Handbook 385 at I–117.

To the extent commenters are suggesting that piece rates, as incentive pay, not be included in the calculations of the AEWR, the Department declined to adopt this suggestion in the 2020 H–2A AEWR Final Rule. As that rule explains, some agricultural jobs guarantee only the State or Federal minimum wage and otherwise pay based on a piece rate; advertising an hourly wage that does not include ''incentive pay'' is not a reasonable ''base rate'' for H–2A employers to advertise to U.S. workers.[61]

Finally, some comments stated prevailing wage surveys should account for the fact that H–2A employers pay expenses not borne by non-H–2A employers, such as housing, transportation, visa costs, and subsistence. The Department does not agree. Prevailing wage surveys measure the wage rates paid to U.S. workers, not wage rates paid to H–2A workers or total labor costs employers may incur to ensure workers are available when and where needed to perform the labor or services an employer requires. As such, adopting the commenters' suggestion would be inconsistent with the purpose of the prevailing wage and may, instead, depress the wages of workers in the United States similarly employed.

ix. Section 655.120(c)(1)(vi)

The Department proposed that a prevailing wage survey cover an appropriate geographic area based on (1) available resources to conduct the survey; (2) the size of the agricultural population covered by the survey; and (3) any different wage structures in the crop or agricultural activity within the State. The Department stated in the NPRM that it intended to codify existing practice in which OFLC receives prevailing wage surveys of State, sub-State, and regional geographic areas based on the factors listed above. The NPRM solicited comments on whether the Department should consider other factors in determining the appropriate geographic area for prevailing wage surveys.

A workers' rights advocacy organization requested the Department clarify what would constitute an appropriate area to survey, including an explanation of the relevance of the ''size of the agricultural population'' and how it factors in these determinations. The commenter claimed that, in practice, prevailing wages are calculated by SWAs within the boundaries of their respective States because they do not have the capacity or authority to survey across State lines. The commenter also asserted that SWAs appear to rely on agricultural reporting areas, as the term is used in ETA Handbook 385, and suggested the Department codify the asserted reliance on agricultural reporting areas rather than the AIE. An agent expressed concern that the provision would permit SWAs to survey ''truncated'' areas based on resource constraints alone.

After careful consideration of the above comments, the Department has decided to retain the provision as proposed. As noted in the NPRM, the Department intends for this provision to codify existing practice, which allows for surveys based on State, sub-State, and, in some cases, regional areas.

Temporary Non-Agricultural Employment H–2B Program, Part 2, 78 FR 24047, 24058 (Apr. 24, 2013).

[60] *See* ETA Handbook 385 at I–117 (guidance on determining the prevailing wage rate when there is more than one unit of payment). Moreover, § 653.501(c)(2)(i) of the Wagner-Peyser Act regulation states that ''[i]f the wages offered are expressed as piece rates . . . [the Employment Service staff] must check if the employer's calculation of the estimated hourly wage rate is . . . not less than the prevailing wage rate.'' This provision covers clearance of both H–2A and non-H–2A agricultural job orders and requires the SWA to ensure that wages offered by an employer are not less than the higher of several wage sources, as applicable. By explicitly referencing different units of pay, this regulation recognizes that the prevailing wage rate may not be in the unit of payment that the employer offers in its job order.

[61] 2020 H–2A AEWR Final Rule, 85 FR 70445, 70463; *see also* 2021 H–2A AEWR NPRM, 86 FR 68174, 68182.

SWAs currently rely on modernized agricultural wage reporting areas that are consistent with principles in ETA Handbook 385. This geographic area does not necessarily coincide with the AIE.[62]

In completing the updated Form ETA–232, the SWA must explain how the surveyor determined the geographic area to survey. This final rule lists factors that guide this selection, namely available resources, the size of the agricultural population covered by the survey, and different wage structures in the crop or agricultural activity within the State. To use the ''size of the agricultural population'' as an example, this factor may affect the scope of the surveyed area because of the need for sufficient survey responses. A surveyor may undertake a survey in one selected area that yields an insufficient response. In such cases, the surveyor can decide to increase the survey area and either make a reasonable, good faith effort to contact all employers employing workers in the crop or agricultural activity in the expanded area, or contact a new, randomly selected sample of such employers in the expanded area.

In response to the agent's comment, the Department disagrees that this provision would permit SWAs to survey ''truncated'' areas based only on available resources. First, the commenter did not explain what constitutes a ''truncated'' area. Current practice, as noted above, permits a SWA to survey areas of different sizes based on considerations such as available resources.[63] Second, this provision does not permit a surveyor to base its selection of the geographic area on only one factor. Instead, the surveyor must consider all three factors enumerated in the provision. Third, the Department will continue to review and approve SWA survey plans under this final rule, and the Department can work with SWAs to accommodate resource considerations while ensuring planned surveys are as reliable as possible.

x. Section 655.120(c)(1)(vii) Through (ix)

The Department proposed that the survey must include the wages of at least 30 U.S. workers and five employers, and the wages paid by a single employer must represent no more than 25 percent of the wages included in the survey. The NPRM stated the 30-worker standard is consistent with minimum reporting numbers for the OEWS and requirements for H–2B PWDs.[64] The requirement to include wage data from at least five employers is a change from ETA Handbook 385, which does not have a minimum number of employers that must be included in the survey. The five-employer standard also exceeds the number of employers (three) required to establish prevailing wage rates under the H–2B program. As explained in the NPRM, prevailing wages in the H–2B program based on the OEWS are generally set based on the local AIE, but H–2A prevailing wages are typically determined based on a larger geographic area, and this difference in geographic area makes a higher number of employer responses appropriate for the H–2A program. *Id.*

The Department also proposed that the wages paid by a single employer represent no more than 25 percent of the sampled wages so that the prevailing wage is not unduly impacted by the wages of a dominant employer. The NPRM stated the five-employer and 25 percent dominance standards are consistent with the ''safety zone'' standards for exchanges of employer wage information established by the Department of Justice (DOJ) and Federal Trade Commission (FTC) in the antitrust context. Specifically, absent extraordinary circumstances, DOJ or FTC will not challenge as a violation of antitrust law the exchange of information regarding employer wages that meet the requirements for the safety zone. Although created for a different purpose, the safety zone standards establish levels at which the DOJ and FTC determined an exchange of wage information is sufficiently anonymized to prevent the wages of a single employer from being identified because the reported wage results too closely track the wages paid by that employer. The NPRM explained it is the Department's preliminary conclusion that safety zone standards are consistent with the Department's aim of requiring that the wages reported from a prevailing wage survey be sufficiently representative and that the wages of a single employer not drive the wage result. The Department solicited comments on the proposed requirements in § 655.120(c)(1)(vii) through (ix), including whether the proposed sample size requirements, and any recommended alternative requirements, should apply to the survey, overall, or to the prevailing unit of pay. The Department also sought comment on the proposed statistical standards and any alternate standards that might be used to meet the Department's goals of establishing prevailing wage rates that are as reliable as possible but still consistent with the realities of a modern budget environment. After full consideration of the comments, the Department is adopting the proposals in § 655.120(c)(1)(vii) through (ix) with amendments to the regulatory text, as explained below.

Several commenters representing employers, agents, and trade associations expressed concern that the sample size requirements were too small to be representative. For example, a trade association said 30 workers from five employers could set the prevailing wage for ''possibly thousands of workers and hundreds of employers'' and urged the Department to expand the thresholds to ''a reasonable percentage of workers and employers,'' without explanation of what might constitute a reasonable percentage. Similarly, an agent urged the Department to consider a broader sample size while another association recommended the use of a statistically valid sample size, claiming the ''breadth and scope of agricultural employment'' exceeds the scope of PWDs under the H–2B program. In contrast, a commenter from academia and a SWA supported smaller sample sizes as a way to produce more PWDs. The SWA also believed it would eliminate the SWA's responsibility to estimate the universe of employers and workers. A State agency association asserted, without additional explanation, that requiring specific minimum response rates should increase the validity of surveys.

The Department does not agree with comments that claimed larger minimum sample sizes are necessary to produce accurate and representative PWDs. No commenter asserted that the Handbook's much larger sample sizes were necessary, and no commenter proposed an alternative required worker or employer sample size that would be necessary to produce a reliable survey. The NPRM explained that the proposed sample size requirements were consistent with the OEWS survey requirements, as well as the ''safety zone'' standards used by the DOJ and FTC in the anti-trust context, points that no commenter specifically refuted. As stated in the NPRM, the Department has used a baseline of three employers and

[62] *See* 84 FR 36168, 36187 (NPRM noting that while prevailing wages in the H–2B program are generally set based on the AIE, H–2A prevailing wage rates are generally set based on a larger geographic area).

[63] *See also* TEGL No. 21–20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance,* at III–10 (May 10, 2021).

[64] 84 FR 36168, 36187 (noting BLS requires wage information from a minimum of 30 workers before it deems data of sufficient quality to publish on its website); § 655.10(f)(4)(ii) (employer-provided surveys for the H–2B program must include wage data from at least 30 workers and three employers).

30 workers for employer-provided wage surveys in the H–2B program since the 2015 H–2B Final Rule (80 FR 24146). In recognition that H–2A prevailing wage rates are generally set based on a larger geographic area than prevailing wages in the H–2B program, the Department proposed to increase the number of employer responses from three under the H–2B program to five under the H–2A program. The Department also proposed the 25 percent standard as an additional safeguard to ensure prevailing wages are as reliable as possible. With regard to the SWA's comment, the surveyor must still estimate the universe of relevant employers and workers under this final rule, as discussed in the preamble to § 655.120(c)(1)(iv).

A workers' rights advocacy organization stated it may be difficult for SWAs to meet the minimum thresholds for survey areas that are smaller than the State level due to high employer non-response rates. Another workers' rights advocacy organization said random sampling of reforestation and pine straw workers may be difficult because such workers are hard to reach, lists of relevant employers or contractors are likely unavailable, and employers are often reluctant to respond to surveys. As explained elsewhere in the preamble, the Department has declined to adopt the proposal to expand the definition of ''agricultural labor or services'' under § 655.103(c) to include reforestation and pine straw activities. The comment related to surveys of forestry worker wages is therefore no longer applicable. Moreover, the area surveyed may need to be expanded if the surveyor is not able to obtain wage results for at least five employers and 30 workers. If the estimated universe is less than five employers or 30 workers, a surveyor may use the alternative option described below or expand the area surveyed as needed.

The Department solicited, but did not receive, comments on whether the baseline standards should apply to responses received for the survey overall or the prevailing unit of pay. However, after due consideration, the Department has decided to clarify that the baseline standards apply to survey responses received for the unit of pay that is used to compensate the largest number of workers whose wages are reported in the survey. Because the prevailing wage is determined based only on wage data within the prevailing unit of pay, the baseline standards should also apply to that unit of pay to increase the reliability of the survey findings as much as possible. Especially when there are multiple units of pay and a small number of employers or workers in the universe, this approach could require surveyors to increase the overall sample size and may result in fewer survey findings than if the baseline standards applied to the survey overall. However, the Department believes this approach best achieves its goal of establishing prevailing wage rates that are as reliable and accurate as possible, while still encouraging more prevailing wage surveys than under the Handbook.

Based on the above comments and the Department's further assessment of past prevailing wage surveys, the Department recognizes the estimated universe of employers or workers may be very small for some crop or agricultural activities and distinct work task(s) in a geographic area. For example, some distinct work tasks or activities in a particular area may have one or two employers in the estimated universe. In such a situation, applying the 25 percent or 5-employer standard would mean there can never be a prevailing wage finding for this task or activity, unless the number of employers in the estimated universe increases. Similarly, the estimated universe of workers employed to perform particular distinct work tasks or activities may be less than 30 in some cases. Applying the 30-worker standard would not result in a wage determination, unless the number of workers in the estimated universe increased.

As such, the Department has decided to revise the regulatory text to address the limited situations where the estimated universe of employers or workers is less than the baseline standards, while leaving the baseline standards unchanged in other situations. For example, where the estimated universe of U.S. workers is at least 30, the survey must include the wages of at least 30 U.S. workers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. In situations where the estimated universe of U.S. workers is less than 30, the survey must include the wages of *all* such U.S. workers. Similarly, where the estimated universe of employers is fewer than five, this final rule requires the survey to include wage data from *all* employers in the estimated universe. Finally, the 25 percent standard will apply where the estimated universe of employers is four or more, but will not apply when the estimated number of employers in the universe is less than four. These revised requirements encourage additional prevailing wage findings and are consistent with the Department's goal of producing prevailing wage survey results that are as representative as possible by requiring the PWD to be based on data from all workers or employers where the universe of workers or employers is limited.

xi. Other Comments on § 655.120(c)(1)

Special Procedures for Sheep Shearing and Reforestation Employers

Commenters including a trade association urged the Department to promulgate a provision allowing regional or national prevailing wage surveys for the sheep shearing industry because ''there are not enough shearers in any one area'' to establish a piece rate wage through a valid survey. According to the association, the survey instrument used should be able to account for differing types of shearing services in different regions, which result in separate wage rates. The association stated some regions have a larger number of ''small flock'' or ''farm flock'' sheep producers whose operations typically have smaller numbers of sheep than commercial producers, resulting in a higher ''per head'' price and wage than for a commercial producer.

The Department declines to adopt the commenters' suggestion because it does not believe that a variance in the form of a separate provision is needed for prevailing wage surveys for the sheep shearing industry. This is because the commenters' concerns can be addressed through other requirements in this final rule. As discussed in the preamble to § 655.120(c)(1)(iii) and (vi), this final rule allows for regional prevailing wage surveys that are able to capture distinct work tasks as applicable. It is also possible to obtain a prevailing wage for activities with a small number of estimated workers under circumstances explained in the preamble to § 655.120(c)(1)(vii) through (ix). Lastly, as noted in the preamble to § 655.120(c)(1)(iv), the surveyor has the option to conduct a statistically valid sampling or stratified random sampling by employer size, though these enhanced sampling methods are not required.

A workers' rights advocacy organization recommended the Department use the QCEW to set prevailing wages for reforestation workers in the short term on the basis that this data source counts reforestation workers more accurately than the OEWS surveys. Because reforestation is not covered in the H–2A program under this final rule, the workers' rights advocacy

organization's comment is no longer applicable.[65]

Rescission of ETA Handbook 385

An agent and a trade association supported what they believed to be the Department's proposal to ''rescind'' ETA Handbook 385. A State agency urged DOL to update ETA Handbook 385 to conform to the new regulations or provide supplemental guidance. Two other State agencies and a State agency association supported replacing the Handbook.

This final rule does not formally rescind ETA Handbook 385, but SWAs and other surveyors must follow the methodological requirements in § 655.120(c) when conducting prevailing wage surveys. In this way, the survey standards in § 655.120(c) replace the standards in ETA Handbook 385 for H–2A prevailing wage surveys. This final rule clarifies, however, that SWAs and other surveyors may refer to the Handbook and other applicable authorities for additional guidance on issues related to the prevailing wage survey methodology not explicitly addressed in the Department's regulations at 20 CFR part 655, subpart B, and 29 CFR part 501.

Data Collection Period

The NPRM did not propose a required wage data collection period. In particular, the Department did not propose requiring or prohibiting SWAs from capturing the wages paid to workers during the ''peak'' period of a crop or agricultural activity, rather than the wages paid over a season or a year. Several employers and trade associations urged the Department to require surveys cover a longer period than a peak week. According to the commenters, surveying a peak period ''spike[s]'' the results and does not produce prevailing wage findings that measure wages paid over a season or a year.

After consideration of the comments, the Department declines to adopt the commenters' suggestion. There is no requirement that surveys cover a longer time period to measure the wages paid over a season or a year. While ETA Handbook 385 directs SWAs to estimate the beginning and end of the harvest for each crop and the ''period of peak activity'' for State grant plans, SWAs need not include that information in reporting prevailing wage rate results. Recent guidance no longer direct SWAs to identify the period of ''peak activity,'' nor even the anticipated start and end dates for the harvest of each crop, but simply request SWAs provide an anticipated timeframe for the prevailing wage survey.[66] The requirement suggested by the commenters could further deter employers from responding to the survey, given the length of a season or a year and the possible number of unique wage rates paid during that time that an employer would have to report. It would also likely increase the cost of survey administration for SWAs or other State surveyors, without a corresponding compelling justification for such an increase.

In response to the comments received, this final rule clarifies that SWAs continue to have discretion over when to conduct wage surveys and the data collection period. This is because SWAs or other State entities are best positioned to determine the most effective data collection period. To the extent it is helpful, the Department recommends the use of a peak week or peak period. A peak week is generally defined as the week where a commodity activity is the busiest. For harvesting, it would be when an agricultural employer is doing the most harvesting for a given commodity. Some surveys may gather data from a peak period of time that is longer than a week. The use of a peak week or period can afford several advantages. It allows, for example, the collection of data when the most workers are working in order to obtain the most robust amount of data. However, the use of a peak period is not required and may not be appropriate in all cases. For instance, some activities such as irrigation do not have a clearly defined peak week.

Presumption of Validity

A workers' rights advocacy organization suggested that as long as SWAs follow the defined procedures to carry out a prevailing wage survey, the findings should enjoy a presumption of validity. After consideration, the Department declines to adopt the commenter's suggestion. OFLC will review the prevailing wage survey documentation submitted by a SWA to ensure that the survey satisfies the enumerated requirements in § 655.120(c). If these requirements are met, OFLC will issue a prevailing wage for the crop or agricultural activity or distinct work task(s) in question. Based on this regulatory scheme—which continues the Department's current practice—a presumption of validity is not needed and would instead cut against the comprehensive review requested by other commenters.

Timelines for Prevailing Wage Determinations

A SWA suggested adding a requirement that OFLC issue a PWD within 10 days of the SWA's submission of a survey to the Department. The SWA also requested the Department add a regulatory provision requiring OFLC to notify the SWA of any irregularities or deficiencies in the survey within the same 10-day period so the SWA may make corrections expeditiously. After consideration of the SWA's comments, the Department declines to adopt these recommendations. The Department did not propose to set timeframes or solicit comments on setting timeframes for the prevailing wage survey review and approval process and, therefore, the SWA's recommendations are beyond the scope of this rulemaking. The Department understands the importance of timely review and communication and it strives to review the surveys it receives in an expeditious manner. Imposition of a maximum period to review prevailing wage surveys, however, would undermine the Department's ability to conduct a thorough review without a corresponding compelling justification. In particular, the SWA's suggested timeframe would create an impediment to the type of comprehensive review needed to ensure prevailing wage surveys satisfy all methodological requirements, especially in cases where OFLC requests additional information from SWAs in order to complete its review.

Piece Rate and Wage Enforcement Suggestions

Because § 655.120(c) discusses the use of piece rates, some commenters took the opportunity to suggest changes to how piece rates are treated within the H–2A program. A workers' rights advocacy organization recommended the Department make explicit that the employer must pay workers by the piece, rather than by the hour or using another method, if the prevailing wage is a piece rate and payment of the prevailing piece rate would yield a higher average hourly rate than the AEWR. A trade association stated the Department does not include hourly guarantees when reporting prevailing wages by piece rates and asserted this is contrary to standards in ETA Handbook 385. The association added that the Department does not recognize that a piece rate with an AEWR hourly

[65] Moreover, the Department has addressed the use of the QCEW as a wage source for the H–2A program above and in prior rulemaking. *See* 2020 H–2A AEWR Final Rule, 85 FR 70445, 70446 n.6.

[66] *See, e.g.,* TEGL No. 21–20, *Fiscal Year (FY) 2021 Foreign Labor Certification Grant Planning Guidance,* at III–10 (May 10, 2021).

guarantee (*e.g.,* $25 bin rate with a $16.34 per hour guarantee) differs from a piece rate with a State minimum wage hourly guarantee (*e.g.,* $25 bin rate with a $13.69 per hour guarantee).

The Department's proposed changes to the prevailing wage methodology under revised § 655.120(c) did not intend to change the prior application of the offered wage provision at § 655.120(a) or the longstanding procedures for the regulation of piece rates. As such, the workers' rights advocacy organization's suggestion that the Department make explicit that an employer must pay workers by the piece, rather than by the hour or using another method, if the prevailing wage is a piece rate and payment of the prevailing piece rate would yield a higher average hourly rate than the AEWR, is beyond the scope of the Department's proposal. The trade association's comment does not specify if the reporting it references is the Department's posting of prevailing wages to the Agricultural Online Wage Library (AOWL). To the extent the comment is referring to the posting of prevailing wages on AOWL, the Department reports piece rates that contain an hourly guarantee for a crop or agricultural activity or a distinct work task(s) within this activity when such a rate is reported by a SWA and validated by the Department. These piece rates with an hourly guarantee can represent different units of pay under certain circumstances, as discussed below.

Moreover, as relevant to both comments, the Department posts prevailing wage rates on AOWL, not wage information from all applicable sources an H–2A employer must consider when evaluating whether its wage offer meets H–2A requirements under §§ 655.120(a) and 655.122(l). When the prevailing wage rate is hourly, an H–2A employer must compare this hourly rate to the other wage sources listed in § 655.120(a) to determine which is the highest and ensure that its wage offer is at least equal to the highest applicable hourly rate. Similarly, in limited situations where a prevailing wage rate is a piece rate in combination with an hourly guarantee (*e.g.,* $25 bin rate with a $16 per hour guarantee), the H–2A employer must still engage in the comparison of other wage sources and ensure that it offers an hourly wage guarantee that is at least equal to the highest applicable hourly rate. As a result, an H–2A employer may be required to offer at least the prevailing piece rate (*e.g.,* $25 bin rate) and an hourly wage guarantee (*e.g.,* $16.34 per hour guarantee, the applicable AEWR) that is higher than the hourly guarantee listed in the PWD. To the extent either commenter is suggesting the Department add all or some other wage sources to the AOWL, the Department declines to adopt this suggestion, as it could increase, rather than decrease, confusion.

The same workers' rights advocacy organization proposed requiring the employer to attest that neither U.S. nor H–2A workers will be paid at a piece or hourly wage that is less than the rate that was paid for comparable work performed at that location in the prior season, or that is being offered by other employers in the AIE. The organization also requested that the regulations clarify the Department will review and require a change to the rate of pay after certification if presented with worker complaints or ''clear, persuasive evidence'' that the H–2A employer is paying less than the prevailing wage based on information such as UI data and job service listings.

The Department declines to adopt these recommended changes. The Department did not propose or solicit comments on requiring an attestation that wages are not less than those paid for comparable work in the prior season. In addition, the commenter's suggestion would add a wage source to those listed in § 655.120(a), which is a change the Department similarly did not propose in the NPRM. This suggestion is therefore outside the scope of the Department's rulemaking. This final rule requires that H–2A employers pay H–2A workers and workers in corresponding employment the highest of wage sources listed in § 655.120(a)—in particular, the higher of the AEWR and the prevailing wage rate approved by OFLC, as applicable—and thus already includes a prevailing wage concept intended to ensure that H–2A employers pay at least those wages found to be prevailing in the area, where applicable. While the specific change requested by the commenter's second suggestion is unclear, the Department notes that its program integrity measures provide for review and enforcement of H–2A wage requirements. In the event of an audit, OFLC reviews an employer's payroll information. When WHD conducts its investigations, it will enforce the appropriate wage rate for the work performed even when an employer misrepresented the duties on its application or employed workers in classifications not listed on its application. In the event an audit or investigation discovers substantial violations, OFLC or WHD may pursue debarment of the employer.

xii. Section 655.120(c)(2)

The Department proposed that a prevailing wage rate remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the contract period, the employer must continue to guarantee at least the expired prevailing wage rate. As the Department explained in the NPRM, this proposal is generally consistent with OFLC's current practice. *See* 84 FR 36168, 36188. The NPRM solicited comments on this proposal, including whether an alternate duration for the validity of prevailing wage surveys would better meet the Department's goals of basing prevailing wage rates on the most recent data and making prevailing wage findings available where the prevailing wage rate would be higher than the AEWR. The NPRM also sought comment on whether the Department should index prevailing wage rates based on either the CPI or Employment Cost Index (ECI) when the OFLC Administrator issued a prevailing wage rate in one year for a crop or agricultural activity but a prevailing wage finding is not available in a subsequent year, and whether the Department should set limits on the age of the survey data. As discussed below, paragraph (c)(2) is adopted without change from the NPRM.

Commenters generally supported the proposed 1-year validity period. A few commenters including trade associations recommended that a prevailing wage ''expire on its anniversary,'' without clarifying if ''anniversary'' referred to the date the wage was posted by OFLC. Another trade association stated, without additional explanation, that the Department should not use surveys that include data older than 12 months. Citing the current ''dynamic'' business environment, other commenters suggested the Department should not use surveys that include data collected more than 6 months prior to the wage determination. One of these commenters claimed, without additional explanation, that such data should be excluded due to a limited pool of workers and variations in commodity markets, weather changes, and other variables.

Several of these commenters also provided general suggestions regarding indexing prevailing wage rates between determinations. Some commenters recommended that prevailing wage rates not be indexed based on the CPI or ECI when the prevailing wage finding is not

available, without explaining why prevailing wages should not be indexed based on these sources. Other commenters suggested that if the Department is considering indexing the prevailing wage rate to any metric, it should consider metrics that ''reflect the agricultural economy such as wholesale or retail fruit and vegetable prices.'' None of these commenters provided additional explanation.

After consideration of these comments, the Department has decided to adopt the validity period provision as proposed. Under this final rule, a prevailing wage will expire either 1 year after OFLC posts the wage or on the date an adjusted prevailing wage is issued, whichever is earliest. This change is consistent with the specific comments on the 1-year validity period, based on the information provided in those comments. The Department declines to adopt the suggestion to exclude data older than 6 months from prevailing wage findings. The commenters did not explain why survey findings must exclude such data, beyond a general reference to the ''dynamic'' business environment and broad variables in that environment. Nor did the commenters provide evidence suggesting the exclusion of data older than 6 months is necessary for a survey to yield more accurate results or otherwise be an efficient use of a SWA's limited resources. Instead, the commenters' suggestion could elevate form over function—for example, excluding data that are 6½ months old—and may unnecessarily preclude States from producing a valid PWD. The commenters' suggestion is also at odds with the Department's intent to establish survey results that are as reliable as possible using standards that are realistic for SWAs in a modern budget environment. If adopted, the commenters' suggestion would impose more onerous data requirements on SWAs than those mandated by OFLC's prior guidance on prevailing wage surveys and OFLC's current requirements for employer-provided surveys under the H–2B program.[67]

The Department has decided not to adopt the suggestion to index the prevailing wage rate to address subsequent years in which a prevailing wage finding is not available. The commenters either did not provide any recommendation for index sources or did not address why a particular index would be sufficient to accurately reflect the prevailing wages of similarly employed workers. Without additional information, it is not clear what existing metric, if any, would reflect the information the commenters believed should be considered, and it is therefore difficult to evaluate the feasibility or desirability of this type of indexing for SWA prevailing wage survey findings.

xiii. Section 655.120(c)(3)

The current regulation at § 655.120(b) requires the employer to pay a higher prevailing wage upon notice to the employer by the Department.[68] The Department's current practice is to publish prevailing wage rates on its website and directly contact employers covered by a higher prevailing wage. In the NPRM, the Department proposed to continue this current practice of notifying employers directly. The Department also proposed that new higher prevailing wage rates would become effective 14 days after notification, which paralleled the Department's proposal to codify current practice of providing an adjustment period of up to 14 days to start paying a newly issued higher AEWR. Although the January 2021 draft final rule would have adopted the 14-day proposal for prevailing wages, this final rule does not adopt the proposal for the reasons discussed below, but it otherwise adopts the proposed language from the NPRM with minor conforming changes.

An employer and trade association stated a 14-day effective date is an improvement over the current requirement for prevailing wages. An agent and another trade association commented that 14 days do not allow employers adequate time to plan for costs, especially if there is a ''significant increase'' in wages. A SWA opposed the 14-day proposal on the basis that workers can be deprived of up to 2 weeks of pay to which they are entitled. Instead, the SWA suggested that employers should pay any increases retroactively, such as in the pay period after the new wage becomes effective, to alleviate potential burdens associated with adjusting wages mid-pay period.

In response to comments that even 14 days is not enough time for employers to plan for costs, the H–2A regulations already require the employer to pay a higher wage if the prevailing wage rate is adjusted during the work contract and the new adjusted wage is higher than the required wage at the time of certification. The NPRM retained this underlying requirement, which employers have been able to follow since 2010, while proposing to provide employers a brief period to adjust to a higher wage. When the Department added the provision to account for an increase in prevailing wages during a contract period, it recognized these wage adjustments may alter employer budgets for the season. *See* 2010 H–2A Final Rule, 75 FR 6884, 6901. As the Department explained at that time, the change is intended to ensure workers are paid throughout the life of their contracts at an appropriate wage, and the Department encouraged employers to include into their contingency planning certain flexibility to account for any possible wage adjustments. *Id.*

After further consideration of the comments and in conformity with its decision not to adopt a 14-day adjustment period in connection with the AEWR, the Department declines to adopt the proposed delayed implementation of a prevailing wage update to workers' pay. The 14-day grace period proposal was intended to help ensure workers are paid at an appropriate wage throughout the life of their contracts while giving employers a brief window for updating their payroll systems and to simplify the program through the adoption of consistent adjustment periods for wage-related updates. The Department is sensitive both to the worker protection concerns the SWA raised and to adopting an approach that could add complexity, which is inconsistent with the Department's goals in this rulemaking to enhance worker protections while simplifying the program to facilitate compliance and administration. As such, the Department has decided against adopting the proposed adjustment period for prevailing wage updates in this final rule. Not adopting the proposal maintains current prevailing wage adjustment requirements, which help ensure workers are paid at an appropriate wage upon notification of a new, higher wage obligation.

xiv. Section 655.120(c)(4)

The NPRM proposed that if the prevailing wage is adjusted during the contract period and is higher than the previous certified offered wage rate, the employer must pay the higher wage rate, but may not lower the wage rate if OFLC issues a prevailing wage that is lower than the offered wage rate. This proposed change discontinues the current practice permitting employers to include a clause in the job order stating that it may reduce the offered wage rate if an adjustment during the contract

[67] *See* 2015 H–2B Final Rule, 80 FR 24146, 24175 (requiring the wages reported in employer-provided surveys in the H–2B program be no more than 24 months old).

[68] This provision, codified at § 655.120(b) under the 2010 H–2A Final Rule, was redesignated as paragraph (c) in the 2020 H–2A AEWR Final Rule. *See* 85 FR 70445, 70477.

period reduces the highest wage rate among all applicable wage sources. The NPRM also proposed to remove language from § 655.120(b) that requires an employer to pay the wage ''in effect at the time work is performed'' because the presence of that reference may create confusion about the existing requirement to continue to pay a previously offered wage if the new ''effective'' wage is lower. As discussed below, this final rule adopts paragraph (c)(4) as proposed in the NPRM except for a minor conforming change.

The Department received comments from various entities, including employers, trade associations, and agents, in response to this provision. Many employer and trade associations opposed the Department's current requirement mandating mid-contract wage adjustments if a new prevailing wage rate is higher than the required wage at the time of certification. Commenters explained, for example, that mid-season increases make planning impossible, are not fair to employers, and the government should not require employers to change a contract after it has been ''approved.'' A trade association stated it may not be possible to verify the sources of the wage data with no ability to challenge these data under the final rule. An agent and another trade association commented there is no valid basis to require payment of a higher wage that is not the AEWR if the AEWR is supposed to represent the exact wage that protects U.S. workers at that time. Other commenters offered four alternatives to the Department's proposal, including (1) allowing employers to pay the rate(s) listed in a certified application for the duration of the employment period (*i.e.,* a fixed wage with no upward adjustments); (2) authorizing downward wage adjustments; (3) permitting an annual adjustment of prevailing wage rates on a date certain; and (4) placing limitations on in-season prevailing wage increases, including a 10-percent cap. One of these commenters recommended the notice provided by the Department to the employer regarding ''changes in wages be adequate to hand out to workers to meet the disclosure requirement.''

Having carefully considered the comments received, the Department has decided to retain this provision with a minor change to the regulatory text to recognize that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations. This modification is a technical, conforming change with other portions of § 655.120(c). Under this provision, because the employer advertised and offered the higher wage rate, the wage cannot be reduced below the wage already offered and agreed to in the work contract. Accordingly, if a prevailing wage for a geographic area and crop activity or agricultural activity and, if applicable, distinct work task(s) is adjusted during the work contract, and the new prevailing wage is lower than the rate guaranteed on the job order, the employer must continue to pay at least the offered wage rate. Employers who disagree with a wage adjustment after their applications have been certified can continue to challenge the adjustment in Federal court.

The Department does not agree with the comment claiming there is no valid basis to require payment of a higher wage when that wage is not the AEWR. Employers participating in the H–2A program must offer and pay the highest of the AEWR, the prevailing wage, the Federal or State minimum wage, or the agreed-upon collectively bargained wage rate, as applicable, for every hour or portion worked during a pay period. *See* §§ 655.120(a) (excluding certain employment), 655.122(l). The wage adjustment provisions are intended to ensure that workers in the program consistently receive at least the highest of these applicable wages, whether that wage be the AEWR, the prevailing wage, or another wage source listed in § 655.120(a). Moreover, PWDs determined by State-conducted prevailing wage surveys for a particular geographic area can serve as an important additional protection for workers in the United States in crop and agricultural activities with piece rates or higher hourly rates of pay than the AEWR. In such instances, the wage adjustment provisions ensure the wages received by applicable workers reflect the wage paid to similarly employed workers in that area.

The Department declines to adopt the suggested alternatives, as they are not sufficient to ensure workers are paid at an appropriate wage commensurate with the baseline market value of their services throughout the life of their contracts. In addition, an annual adjustment of prevailing wage rates on a certain date each year is not in line with current practice. States do not conduct prevailing wage surveys at the same time each year in all cases, and consequently, OFLC validates PWDs throughout the year. The NPRM did not propose to change this practice. The Department also declines to adopt proposals to impose a 10-percent cap and similar limitations on PWDs. The Department establishes wages based on data representing actual wages paid to workers, including prevailing wages based on wages paid to U.S. workers in a particular geographic area and crop or agricultural activity and if applicable, distinct work task(s). The commenter did not provide a sufficient economic rationale to impose a cap that is unrelated to employer costs or wages paid and such a cap would produce wage stagnation, most significantly in years when the wages of U.S. workers are rising faster due to strong economic and labor market circumstances.

The agent's comment regarding the use of notice(s) of wage adjustment to satisfy ''the disclosure requirement'' did not specify the disclosure requirement to which the comment referred. To the extent the comment refers to the MSPA disclosure requirements under 29 U.S.C. 1821 and 1831 and 29 CFR 500.75 and 500.76, OFLC's notice to the employer of prevailing wage rate adjustment(s) may be sufficient to satisfy the required disclosure of wage rates under MSPA (provided that, if multiple wage adjustments are included in the notice, it is clear which applies to the specific worker), but will not satisfy the required disclosure of other information, such as the place or period of employment. *See* 29 U.S.C. 1821, 1831; 29 CFR 500.75, 500.76. Without additional information, however, the Department cannot assess the agent's recommendation and, therefore, is unable to adopt the recommendation.

d. Section 655.120(d) Appeals

Although the Department employs the same Notice of Deficiency (NOD) and appeal framework regardless of the deficiency noted in an *Application for Temporary Employment Certification,* the NPRM proposed to include an appeal provision at paragraph (d) for clarity. Specifically, if an employer does not include an appropriate offered wage on the H–2A application, the CO will issue a NOD requiring the employer to correct the wage offer. Such a situation may occur, for example, when the employer offers less than the highest of the sources applicable to the job opportunity under § 655.120(a) because it selected an incorrect SOC code for the job opportunity. If the employer disagrees with the wage rate associated with the SOC required by the CO and does not correct the wage offer in its response to the NOD, the application will be denied, and the employer may appeal the denial of its application on this basis (and other bases noted in the denial, as applicable) by following the appeal procedures at § 655.171. As discussed below, this provision remains unchanged from the NPRM.

The Department received several comments on this proposal. An employer expressed concern that an employer who disagrees with the required wage rate cannot appeal unless its application is denied. A trade association expressed concern that the proposal adds inefficiencies to the program and affects employers' due process rights, and it claimed that applications would have to be denied based on a factor other than the wage in order to be appealed.

As the Department explains below in the preamble to § 655.141, the removal of the ability to appeal a NOD better conforms with the statutory requirements under the INA. This change also helps to promote efficiency by providing that all possible grounds for denial are appealed at once, rather than allowing for separate appeals of multiple issues. The appeal process continues to include an expedited administrative review procedure, or an expedited de novo hearing at the employer's request, in recognition of the INA's concern for prompt processing of H–2A applications. Further, it is not true that an employer's application has to be denied based on a factor other than the wage in order for the employer to challenge a wage rate required by the CO. An employer that does not correct a wage deficiency—or any other deficiency—noted in a NOD, may appeal a denial on that basis (and any other bases noted in the denial, as applicable).

A workers' rights advocacy organization noted SOC codes will be critical to determining the AEWR and the Department should allow the SWA to determine the appropriate code because SWAs, according to the organization, are the most knowledgeable about the different work in a certain agricultural industry in a geographic region. The organization requested that § 655.120(d)(1) be revised so that either the SWA or the CO can issue a NOD requiring the employer to correct the offered wage rate on its application. This concern is misplaced. The NPRM did not propose to change the SWA's role in reviewing the offered wage rate and other information in an employer's job order for compliance with 20 CFR part 653, subpart F, and 20 CFR part 655, subpart B. *Compare* § 655.121(b)(1) (2010 H–2A Final Rule) *with* § 655.121(e)(2). Specifically, if the SWA notes any deficiencies with the job order, including with the offered wage rate or SOC code, it must notify the employer and offer the employer an opportunity to respond. *See id.* Upon receipt of a response, the SWA will review the response and notify the employer of its acceptance or denial of the job order. *See id.* After the employer files its *Application for Temporary Employment Certification,* whether under the emergency filing procedures at § 655.134 or the normal filing procedures at § 655.130, the CO will review the employer's application. If the CO determines the application contains an incorrect offered wage rate, the CO will issue a NOD under § 655.141 noting the incorrect rate, SOC code, and any other deficiencies that prevent certification, as applicable. *See id.;* § 655.120(d)(1). As such, the commenter's concern is addressed through the SWA's authority to review and respond to deficiencies in the job order, which this final rule retains in §§ 655.121(e)(2) and 655.134(c)(1).

An agent proposed ''an appeal process in connection with the prevailing wages,'' without additional explanation. To the extent the commenter intended to address an employer's disagreement with, and appeal of, the CO's application of a particular PWD to an employer's job opportunity, such appeals are available in this final rule. *See* §§ 655.120(d), 655.142(c). To the extent the commenter intended to suggest the Department implement an appeals procedure for PWDs set or adjusted in accordance with paragraph (c), the Department respectfully declines, as employers can continue to challenge PWDs and post-certification adjustments in Federal court.

After consideration of these comments, the Department has retained the provision as proposed. This provision provides a process to appeal the required offered wage rate for an employer's job opportunity, both the CO's application of the wage sources in paragraph (a) and determination of which is highest. This process is consistent with other provisions in this final rule that add express authority for the CO to issue multiple NODs and to eliminate appeals of NODs. *See* §§ 655.142(a), 655.141.

2. Section 655.121, Job Order Filing Requirements

In the NPRM, the Department proposed amendments to this section to modernize the process by which employers submit job orders to the SWA for review and clearance in order to test the local labor market and determine the availability of U.S. workers before filing an *Application for Temporary Employment Certification.* Specifically, the Department proposed new standards and procedures requiring employers, unless a specific exemption applies, to electronically submit job orders to the NPC for processing; minor revisions to the timeframes and procedures under which the SWA reviews and circulates approved job orders for intrastate and interstate clearance; and reorganization of several existing provisions to provide clarity and conform to other changes proposed in the NPRM. The Department received several comments on this section, none of which necessitated substantive changes to the regulatory text. However, the Department's decision not to adopt the proposed optional pre-filing positive recruitment provision at § 655.123 necessitated the removal of the proposed pre-filing interstate job order circulation language from paragraph (f). Therefore, as discussed in detail below, the provisions of § 655.121 remain unchanged from the NPRM, except for paragraph (f). The Department will retain the parameters of pre-filing job order circulation from the 2010 H–2A Final Rule in paragraph (f), with minor revisions to conform to the electronic submission and transmission procedures adopted in this final rule, as discussed below.

a. Submission and Transmission of the Job Order

The INA requires employers to engage in the recruitment of U.S. workers through the employment service job clearance system administered by the SWAs. *See* 8 U.S.C. 1188(b)(4); *see also* 29 U.S.C. 49 *et seq.* and 20 CFR part 653, subpart F. The Department proposed to modernize and streamline the process by which employers submit job orders, *H–2A Agricultural Clearance Order* (Form ETA–790/790A), to the SWA for review and clearance to place job orders into intrastate and interstate clearance. Job orders are a required component of testing the labor market for the availability of U.S. workers before filing an *Application for Temporary Employment Certification.* The Department proposed to require all job orders, Form ETA–790/790A, be signed with an electronic signature (*i.e.,* an electronic (scanned) copy of the original signature or a verifiable electronic signature method, as directed by the OFLC Administrator) and submitted electronically to the NPC, using the electronic method(s) designated by the OFLC Administrator.

Currently, the Department's FLAG system, available at *https://flag.dol.gov,* is the OFLC Administrator's designated electronic filing method. Only employers the OFLC Administrator authorizes to file by mail due to lack of internet access or using a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c) would be permitted to file

using those other means. Upon receipt in the electronic filing system, the NPC would transmit Form ETA–790/790A to the SWA serving the AIE for review. If the job opportunity is located in more than one State within the same AIE, the NPC would transmit a copy of the electronic job order, on behalf of the employer, to one of the SWAs with jurisdiction over the place(s) of employment for review.

For job orders submitted to the NPC in connection with a future master application to be submitted under § 655.131(a), the Department proposed the agricultural association would continue to submit a single Form ETA–790/790A in the name of the agricultural association as a joint employer. In the Form ETA–790A, as well as in the future *Application for Temporary Employment Certification,* the agricultural association would identify all employer-members by name.

Where two or more employers are seeking to employ a worker or workers jointly, as permitted by § 655.131(b) (*i.e.,* joint employers other than an agricultural association and its employer-members filing a master application under § 655.131(a)), the Department proposed that any one of the employers may continue to submit the Form ETA–790/790A as long as all joint employers are named on the Form ETA–790A and the future *Application for Temporary Employment Certification.*

Commenters generally expressed strong support for the proposals to modernize the job order filing process by requiring job orders to be signed electronically and submitted through the Department's electronic filing system, absent authorization to file by mail due to lack of internet access or using a reasonable accommodation due to a disability under the proposed procedures in § 655.130(c). A SWA viewed the proposal as a way to improve program efficiency, eliminate paper applications, reduce errors, and streamline the job posting process, and a workers' rights advocacy organization agreed it may streamline the process and reduce paperwork burdens. The workers' rights advocacy organization and a trade association recognized it as a way to improve communication between agencies involved in H–2A processing and improve response times. Several associations stated the ability to submit the job order electronically and to pre-populate certain information for future job orders will help streamline the application process, while the utilization of standardized terms and conditions of employment on the form and electronic data checks will enhance the efficiency of the program for users.

However, some commenters opposed the Department's proposal to require employers submit the Form ETA–790/790A to the NPC, rather than to the SWA directly. Some comments urged the Department to maintain the existing filing procedures and expressed concern the proposed change would strain OFLC resources, hinder the employer's ability to communicate directly with the SWAs, and transfer primary responsibility for job order review to the CO or otherwise diminish the role of the SWAs. Some commenters also asserted the Department failed to explain why this change was necessary and how it would improve the program.

As explained in the NPRM, the Department determined the proposed changes, including submission to the NPC in the Department's electronic filing system, will modernize the job order filing process resulting in more efficient use of SWA and Department resources. The SWAs generally do not have adequate capacity to provide for the full electronic submission and management of agricultural job orders in the OMB-approved format, which may create uncertainty for employers that need to submit job orders within regulatory timeframes. Further, given that an employer must provide a copy of the same job order to the NPC at the time of filing the *Application for Temporary Employment Certification,* the current job order filing process requires duplication of effort for employers, especially those with business operations covering large geographic areas that need to coordinate job order submissions with multiple SWAs; a single electronic submission location simplifies the application process. For the Department and SWAs, electronic submission of job orders to the NPC will decrease data entry, improve the speed with which job order information can be retrieved and shared, reduce staff time and storage costs, and improve storage security. Since the new Form ETA–790/790A will be stored electronically, it also eliminates the need for manual corrections of errors and other deficiencies and improves the efficiency of posting and maintaining approved job orders on the Department's electronic job registry. The Department therefore determined that this process will result in more efficient use of Department and SWA staff time.

The most common concern among commenters with respect to the requirement to submit job orders to the NPC through the Department's electronic filing system, rather than to the SWA directly, related to potential delay in the SWA's receipt of the job order. Commenters expressed concern the proposal might not streamline the job order filing and distribution processes; rather, it might add a ''layer of bureaucracy,'' with the NPC serving as an unnecessary intermediary between employers and the SWAs and causing delays between NPC's receipt of a job order and its transmission of the job order to the SWAs. Commenters noted the NPRM did not impose deadlines by which the CO would be required to transmit the job orders to the SWAs, and an agent and workers' rights advocacy organization stressed the need for the SWA to receive the job order immediately. A few commenters specifically asked the Department to clarify whether the SWA will receive immediate notification and receipt of the job order submission and whether the employer will receive confirmation when the SWA receives the job order. One commenter urged the Department to create a shared platform for electronic submission of the job order that ensures the SWAs have access to the job order without requiring the NPC to provide the SWA notice of the submission. Several commenters also urged the Department to ensure the FLAG electronic filing and application processing system provide notice to employers when the SWA takes action on a job order. A workers' rights advocacy organization requested the Department provide an objectively measurable deadline by when the NPC must transmit job orders to SWAs, rather than the term ''promptly.'' [69]

Under this final rule, there will be no duplication of processes and no delay between an employer's submission of a job order to the NPC and the SWA's access to the job order. As noted in the NPRM, the Department already provides the SWAs with access to OFLC's FLAG system to electronically communicate any deficiencies with job orders associated with employer-filed H–2A and H–2B applications and uploading inspection reports of employer housing. That access has been enhanced so the SWA has access to the job order in the FLAG system upon submission. As a

[69] This comment expressed concern with the term ''promptly'' in relation to the Department's proposal in paragraph (f) to begin interstate clearance after the SWA's approval of the job order, which the Department has not adopted, as discussed below. Both the commenter's underlying concern with the term ''promptly'' and the Department's response apply to the NPC's transmission of a job order to a SWA, regardless of whether the transmission is for initial review or related to interstate clearance, and regardless of whether the transmission occurs pre-filing under paragraph § 655.121(f) or post-filing under § 655.150(a); therefore, the Department acknowledges the comment here.

result, ''transmission'' of the job order from the NPC to the SWA in FLAG is automatic and virtually instantaneous. Once the employer submits the Form ETA–790/790A in the FLAG system, the FLAG system will notify the SWA of the new job order available for its review and will send the employer a confirmation email that includes a generated case number the employer can use to track the submitted job order. The SWA may also send email correspondence to the filer as needed. When the SWA issues a decision on the job order, the case status in the filer's queue will change to reflect that decision (*e.g.,* NOD Issued, Job Order Approved, or Job Order Denied). In addition, if a job order is modified during processing of the *Application for Temporary Employment Certification,* the CO will add a case note directed to the SWA, advising the SWA an amendment has been made to the job order that both the NPC and SWA may access.

The Department also received several comments about § 655.121(e)(1) that suggested a mistaken belief the Department intended for the NPC to choose which SWA would receive the job order in cases where more than one SWA has jurisdiction over the AIE, rather than continuing to allow the employer to make that selection. Agents and agricultural associations urged the Department to continue to permit employers to choose the SWA, while a workers' rights advocacy organization urged the Department to provide specific criteria that the CO and employer must use to determine the SWA to receive the job order to guard against employers using their freedom of choice to avoid SWAs that have identified deficiencies in their past filings. The commenter recommended the Department require the CO to send the job order to the SWA with jurisdiction over the first work location under the contract, which it stated was important because positive recruitment is most likely to be effective in the State where work begins.

Under this final rule, the employer will continue to identify the SWA to which its job order will be submitted for review under § 655.121. When an employer prepares and submits a job order in the FLAG system, the employer will be asked to identify the SWA to receive the job order by selecting a SWA from a drop-down list of SWAs with jurisdiction over that job order. The drop-down list will be consistent with the parameters at § 655.121(e)(1): Where only one SWA has jurisdiction over the AIE, the drop-down list will include only one option; where more than one SWA has jurisdiction over the AIE (*i.e.,* the AIE crosses State lines), the drop-down list will include more than one option. For employers permitted to file by mail, the employer may identify the SWA to receive the job order, consistent with the parameters at § 655.121(e)(1), in a cover letter attached to that job order. Upon submission in the FLAG system, the job order will be electronically transmitted to the SWA the employer identified.

The Department declines to revise § 655.121(e)(1) to restrict an employer's choice among the SWAs sharing jurisdiction in an AIE that crosses State lines by requiring the employer to select the SWA with jurisdiction over the place where work is expected to begin. As a preliminary matter, these job orders may not involve work that begins in one State or another; work may begin simultaneously throughout the AIE and across State lines. Further, an employer's choice in this scenario is limited; the employer has the option to choose only among those SWAs that share State lines in the AIE. In addition, the difference in recruitment exposure in each of the States involved is minimal. As soon as the employer-selected SWA approves the job order and begins intrastate recruitment, it will notify the NPC through the FLAG system to transmit the job order in the FLAG system to the other SWAs with jurisdiction over the AIE, in accordance with § 655.121(f). Adding the suggested restriction to § 655.121(e)(1) would increase the complexity of filings without adding significant value. However, the Department has clarified the SWA selection criteria applicable to a job opportunity that involves work in multiple AIEs along a planned itinerary, where there is a true beginning location for the work to be performed under the contract, in § 655.302.

b. SWA Review of the Job Order

The Department proposed minor revisions to the timeframes and procedures under which the SWA performs a review of the employer's job order. Specifically, the Department proposed that where the SWA issues a notification of deficiencies, the notification the SWA issues must state the reason(s) the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. In addition, the Department proposed that the job order be deemed abandoned if the employer's response to the SWA's notification is not received within 12 calendar days after the SWA issues the notification. Finally, the Department proposed that any notice sent by the SWA to an employer must be sent using a method guaranteeing next-day delivery, including email or other electronic methods, and must include a copy to the employer's representative, if applicable.

Two commenters expressed concern that the Department was diminishing the role of the SWAs in the job order review process. One commenter believed the Department intended to transfer authority for job order review from the SWAs to OFLC, which the commenter asserted would set a ''dangerous precedent'' that would undermine the SWA's role by influencing how and when a SWA receives the job order. Similarly, a workers' rights advocacy organization believed the proposed changes would diminish the SWA's ability to promptly recruit and advise U.S. workers of job opportunities and compromise the SWA's ability to issue a notification of deficiencies when the job order violates State law or fails to conform to local prevailing wages and practices. The commenter emphasized the importance of the SWAs in conducting review of job orders, noting the SWAs have greater knowledge than the CO of actual labor needs, crop needs, and local practice and, therefore, are more likely to identify flaws or fraud in job orders. This commenter further urged SWAs not to accept job orders, and OFLC to deny *Applications for Temporary Employment Certification,* that do not list use of crew leaders as a prevailing practice or that do list qualifications or requirements (*e.g.,* experience requirements, background checks, or productivity standards), unless there has been a determination as to ''whether or not these requirements are, in fact, the prevailing practices of non-H–2A employers in the industry and area.''

Contrary to the concerns of the commenters, the Department is not changing the roles or responsibilities of the SWAs with respect to review and approval of job orders in this rulemaking. The SWAs will continue their traditional role in the recruitment process and work with employers on the specifics of the job order. Section 655.121(e)(2) in the NPRM and this final rule retains the language from the 2010 H–2A Final Rule that explains the SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653 and this subpart. As the Department has noted in prior rulemaking, processing job orders has been an essential function of the SWAs since the inception of the H–2A program, and posting job orders in the employment service system and referring individuals to those jobs is a

core function of the SWAs that remains at the State level in this rule. The Department agrees the SWAs are especially effective arbiters of the acceptability of job orders due to their experience in providing services to farmworkers and their unique expertise in assisting employers in preparing job orders and making determinations regarding their sufficiency. The Department will continue to rely on the SWAs to apply their broad, historical experience in administering our nation's public workforce system and understanding of the practical application of program requirements to the process of clearing job orders.

Further, this final rule continues the CO's existing authority and responsibility with respect to review of job orders after the *Application for Temporary Employment Certification* has been filed. Section 655.121(h) in this final rule is substantively the same as § 655.121(e) in the 2010 H–2A Final Rule. As was the case under the 2010 H–2A Final Rule, § 655.121(h) of this final rule explains that H–2A job orders continue to be subject to CO review and that the CO may require the employer to make modifications to the job order prior to certification. As the Department explained in the 2010 H–2A Final Rule, it has the ultimate authority to ensure that a job order submitted in connection with an *Application for Temporary Employment Certification* satisfies applicable requirements. COs have always had the authority to review job orders; SWA acceptance of a job order has never obligated a CO to overlook any apparent violations or deficiencies the SWA may not have identified. However, in the overwhelming majority of cases, CO determinations about job orders will be consistent with those of the SWA, as is true of these determinations under the 2010 H–2A Final Rule.

Two commenters also asserted some SWAs add an ever-growing and unnecessary list of attestations and assurances. One of the commenters believed this is inconsistent with the Department's goal to streamline the program and expressed concern that the additional attestations may be incompatible with the new streamlined Forms ETA–790/790A and ETA–9142A. The commenters did not cite specific unduly burdensome requirements or state specifically which attestation requirements they consider inappropriate or burdensome.

In the Department's experience, some disagreements about job order content are attributable to differences in experience with the local industries and labor markets, and the resulting content requirements are legitimate outgrowths of those differences. The Department will continue to provide training and ongoing guidance for the SWAs, as necessary, to foster a clear understanding of program and other regulatory requirements and ensure uniformity in the job order review and determination processes. With the newly designed Form ETA–790/790A, the Department anticipates fewer inconsistencies between SWA determinations in various States. However, should a disagreement between the SWA and employer arise regarding attestations, assurances, or other job order content, which the SWA and employer are unable to resolve, the Department reminds employers that they can submit an *Application for Temporary Employment Certification* pursuant to emergency filing procedures contained in § 655.134. *See* § 655.121(e)(3).

Under this final rule, the SWA will provide written notification to the employer of any deficiencies within 7 calendar days from the date the NPC transmitted the job order to the SWA. The notification issued by the SWA, which will be sent using a method ensuring next-day delivery, including email or other electronic methods, will state the reasons the job order fails to meet the applicable requirements and state the modifications needed for the SWA to accept the job order. The employer will continue to have an opportunity to respond to the deficiencies within 5 calendar days from the date the SWA issues the notification, and the SWA will issue a final notification to accept or deny the job order within 3 calendar days from the date the SWA receives the employer's response. To ensure a timely disposition of all job orders, a job order will be deemed abandoned if the employer's response to the notification of deficiencies is not received within 12 calendar days after the SWA issues the notification. In this situation, the SWA will provide written notification and direct the employer to submit a new job order to the NPC that satisfies all the requirements of this section. The 12-calendar-day period provides an employer a reasonable maximum period within which to respond, given the Department's concern for timely processing of the employer's job order.

If the SWA does not respond to the employer's job order submission within the stated timelines, or if after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the Department will continue to permit the employer to file its *Application for Temporary Employment Certification* and job order to the NPC using the emergency filing procedures contained in § 655.134. The Department continues to encourage employers to work with the SWAs early in the process to ensure their job orders meet applicable State-specific laws and regulations and are accepted in a timely manner for intrastate and interstate clearance.

c. Clearance of Approved Job Orders

The 2010 H–2A Final Rule provided for the SWA to review a job order and, after determining the job order was acceptable, to begin intrastate clearance and, in multi-State AIEs, circulate the job order to the SWAs in other States with jurisdiction over the place of employment. Under the 2010 H–2A Final Rule, however, the SWA does not begin interstate clearance until the CO instructs it to do so through the Notice of Acceptance (NOA). Upon receipt of the NOA, the SWA transmits the job order to SWAs in other States, following the CO's instructions.

In the NPRM, the Department proposed changes to the job order circulation process, in part, to bolster the optional pre-filing recruitment procedures proposed at § 655.123. The Department proposed to expand job order circulation to interstate clearance upon SWA approval, rather than upon CO issuance of the NOA. In addition, consistent with the proposed electronic transmission of job orders, the Department proposed that the SWA would notify the CO of the SWA's approval, after which the CO would electronically transmit the job order to other SWAs for interstate clearance.

Although the January 2021 draft final rule would have adopted the pre-filing interstate circulation of job orders, after further consideration of comments that addressed the Department's pre-filing recruitment proposal and the Department's resulting decision not to adopt that proposal, as discussed in the preamble regarding § 655.123, the Department has determined not to revise the timing of job order clearance in this final rule. In particular, and consistent with the Department's reasoning for not adopting the proposed optional pre-filing recruitment provision, the Department has determined that the potential benefits of pre-filing interstate circulation of the job order are outweighed by the potential for confusion regarding job offer details and additional communication (*e.g.,* between the CO and SWA or SWA and farmworker) if the job order is modified before the CO issues a NOA. Retaining the 2010 H–2A Final Rule's timing is consistent with the Department's goal of

simplifying the program and is responsive to comments indicating the importance of clear, accurate, and fixed job offer information for recruitment of U.S. workers. As a result, this final rule retains the 2010 H–2A Final Rule's timing for intrastate and interstate clearance, with procedural modifications to conform to the electronic job order submission and transmission proposals adopted in this final rule. As revised, paragraph (f) provides that the SWA will review a job order and, if approved, will place the job order in intrastate clearance to commence recruitment of U.S. workers within its jurisdiction. In addition, if appropriate, the SWA will notify the NPC that the job order must be transmitted to other SWAs with jurisdiction over the place of employment (*i.e.,* a place of employment located in a multi-State AIE) for intrastate clearance. Subsequently, upon the CO's review and acceptance of the *Application for Temporary Employment Certification,* as provided in § 655.143, interstate circulation of the job order will begin, in accordance with § 655.150.

d. Other Comments Related to § 655.121

To clarify procedures, and as a result of other proposed changes, the Department proposed reorganization of several components of § 655.121. In addition, the Department proposed a technical correction in paragraph (g) of this section, changing ''*Application for Temporary Employment Certification*'' to ''application'' to reflect that the term ''application'' refers to a U.S. worker's application for the employer's job opportunity during recruitment, not the *Application for Temporary Employment Certification.*

The Department received a comment from an agent suggesting an amendment to § 655.121(h)(2) to allow employers to request a modification of the job order to the NPC after filing an *Application for Temporary Employment Certification* and prior to receiving a NOA, rather than limiting employer-requested modifications to the period prior to filing the *Application for Temporary Employment Certification.* The commenter believed its suggestion would be consistent with the fact the NPC may require the employer to modify the job order during the review process through a deficiency notice. However, the Department did not propose changes to this provision, which appeared in the 2010 H–2A Final Rule at paragraph (e)(2) of this section; therefore, the suggestion is beyond the scope of this rulemaking. Further, unlike CO-ordered modifications, employer-requested modifications would confuse and complicate the CO's analysis and ability to identify deficiencies within 7 business days of receipt or, alternatively, issue a NOA as the first action.

Another individual commenter suggested the Department allow employers ''to file 120 days from the date of need,'' which presumably refers to the filing timeframe for submitting a job order in § 655.121(b). As the Department proposed no changes to the filing timeframe, this suggestion is outside the scope of this rulemaking.

3. Section 655.122, Contents of Job Offers

a. Paragraph (a), Prohibition Against Preferential Treatment of H–2A Workers

The Department's current regulation at § 655.122(a) prohibits the preferential treatment of H–2A workers and requires that an employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Section 655.122(a) further prohibits job offers from imposing on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers. The Department did not propose any changes to or request comments on § 655.122(a) in the NPRM, but the Department received one comment on this section. An agent requested that the Department ''clarify'' that the U.S. workers referenced in this section are those U.S. workers engaged in corresponding employment because, it asserted, ''U.S. workers not in corresponding employment are not, in fact, entitled to the same H–2A wage rate as this provision appears to suggest.'' The commenter, however, is incorrect because the requirements of this section are not limited to U.S. workers in corresponding employment. Under this section, for example, an H–2A employer may not impose on prospective U.S. workers applying for the H–2A job opportunity a minimum weight-lifting requirement that it will not and does not impose on H–2A workers. Therefore, this final rule retains the current regulatory language without change.

b. Paragraph (d), Housing

Pursuant to the statute and the Department's regulations, an employer must provide housing at no cost to all H–2A workers and to those non-H–2A workers in corresponding employment who are not reasonably able to return to their residences within the same day. *See* 8 U.S.C. 1188(c)(4); § 655.122(d)(1). Generally, an employer may meet its housing obligations either by providing its own housing that meets the applicable Federal health and safety standards, or by providing rental and/or public accommodations that meet the applicable local, State, or Federal standards.[70] The statute further requires that the determination whether the housing meets the applicable standards must be made not later than 30 days before the first date of need. *See* 8 U.S.C. 1188(c)(3)(A) and (4).

The NPRM proposed several amendments to this section governing housing inspections and certifications. Specifically, the Department proposed to reinforce the statutory requirement that housing certification must be made not later than 30 days prior to the first date of need; clarify that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs; and authorize the SWAs (or other appropriate authorities) to inspect and certify employer-provided housing for a period of up to 24 months. The Department received many comments on the proposed amendments to these sections. After carefully considering these comments, the Department has adopted with minor revisions some of the regulatory text proposed in the NPRM and decided not to adopt the proposals that would have permitted a 24-month housing certification period and employer self-certification of housing, as discussed below.

Employer-Provided Housing

Preoccupancy inspections are a vital step in determining whether employer-provided housing actually meets applicable health and safety standards, allowing the Department to ensure that the housing is safe and sufficient for the number of workers to be housed prior to their arrival for the work contract period. Under the current regulation, employers are required to obtain preoccupancy inspections of their housing for every temporary agricultural labor certification without exception. This requirement can lead to delays in the labor certification process, given the high demand for preoccupancy inspections and the SWAs' finite resources.

To address such delays, the Department proposed to allow the SWAs to inspect and certify employer-provided housing for a period of time up to a maximum period of 24 months. Under this proposal, the SWAs would

[70] Housing for workers principally engaged in the range production of livestock must meet the minimum standards required by § 655.122(d)(2).

be required to provide prior notice to the Department of their intention to certify employer-provided housing for extended periods of time, up to 24 months, and develop their own criteria for determining when such certifications are appropriate. Although the Department proposed to allow the SWAs to develop their own criteria, in recognition of their longstanding expertise in conducting housing inspections, the Department also requested comments as to whether a final rule should include specific criteria that the SWAs must consider in determining whether to certify employer-provided housing for longer time periods. The proposal also stated that when an employer files a subsequent *Application for Temporary Employment Certification* during the validity period of the official housing certification previously received from the SWA (or other appropriate authority), the employer would have been required to conduct its own inspection of the housing and provide the SWA and CO with a copy of the still-valid housing certification, which must be valid for the entire work contract period, and a signed and dated statement that the employer has inspected the housing, that the housing is available and sufficient to accommodate the number of workers requested, and that the housing meets all applicable health and safety standards. Additionally, the NPRM proposed to add language reiterating the statutory requirement that determinations with respect to housing must be made no later than 30 days prior to the first date of need. The NPRM also proposed to clarify that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs, in accordance with the regulatory provisions at § 653.501(b). As discussed below, the Department has decided to adopt with minor revisions some of the regulatory provisions proposed in the NPRM.

The Department received comments from a range of stakeholders regarding the proposed changes to the employer-provided housing inspection requirements. Employers and employer representatives expressed broad support for the proposal to allow certifications of employer-provided housing for a period of up to 24 months with employers self-inspecting their housing for further applications during this period. They indicated that this proposed revision would reduce delays in the application and certification process that they say harm agricultural businesses and create uncertainty for employers and workers. Some State agencies also expressed support for this proposal, indicating that it would improve their ability to allocate their resources for housing inspections. However, many of these commenters expressed concern that the SWAs would have discretion to determine the criteria for determining when such housing certification periods would be appropriate, indicating that the SWAs should be precluded from continuing inspections on an annual basis. Several commenters indicated that the final rule should require the SWAs to allow agricultural employers to have their housing certified for a period of 24 months, or at least provide incentives to the SWAs to encourage them to certify employer-provided housing for a 24-month period as often as possible. Other commenters stated that the Department should require the SWAs to certify employer-provided housing for a 24-month period when previous inspections of housing provided by that employer had found that the housing complied with all applicable standards.

Employers and their representatives were more divided in their comments regarding the proposed clarification that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. Several commenters stated that allowing agencies other than the SWAs to conduct housing inspections, as is already done in some States, reduces the logistical burden on the SWAs. They also noted that in some States, employer-provided housing is already inspected by other agencies due to State laws regarding migrant worker housing. If those agencies also conducted housing inspections for H–2A housing certifications, it would reduce the burden on employers for the same agency to conduct both inspections. Other employer associations expressed concern over the proposed language, particularly the possibility that Federal agencies might conduct housing inspections, as they felt such inspections were more appropriately conducted at the State or local level.

In contrast, workers and workers' rights advocacy organizations generally opposed the proposal to allow the SWAs to certify employer-provided housing for a period of up to 24 months, with employers conducting self-inspections of the housing for any subsequent *Applications for Temporary Employment Certification* filed during that timeframe. Workers, workers' rights advocacy organizations, and some government agencies stated that employer-provided housing frequently fails to meet applicable health and safety standards even when inspected annually under the current rule, and that moving to a 24-month certification period would thus increase the risk that workers would be exposed to unsafe housing conditions. Several commenters also noted that housing conditions can deteriorate significantly over the course of a year, citing examples of housing that passed inspection but was found to have health or safety violations when subsequently investigated during the certification period, making it even less appropriate to certify housing for a longer time period. Workers' rights advocacy organizations also questioned whether the employers' self-inspection of their housing during the 24-month certification period would motivate employers to ensure that their housing continues to meet applicable health and safety standards, given the high rate of violations even when employers know that their housing will be inspected by a government agency annually. Some commenters stated that if the Department allows the SWAs to certify employer-provided housing for a 24-month period, the regulation should include criteria that must be met for employers to receive a longer certification period, such as compliance with Federal, State, or local housing laws, age of the housing, and whether the housing is in a populated, easily accessible area. Two other commenters suggested that if the SWAs were unable to certify housing in a timely manner, the Department itself should inspect the housing.

After consideration of the comments received, the Department has decided not to adopt the proposal to permit certifications of employer-provided housing for a period of up to 24 months, with employers self-inspecting their housing for further applications during this period. Although the Department recognizes that preoccupancy housing inspections must be conducted in a timely manner, the Department concludes that achieving greater expediency in the certification process must not come at the cost of reduced housing compliance monitoring and increased risk to worker health and safety. As several commenters noted, the Department frequently encounters post-certification violations of the housing safety and health requirements even under the current rule; reducing the frequency of housing inspections would likely further exacerbate the frequency and severity of such violations. To do so would be inconsistent with the statute's

requirement that worker housing meet applicable safety and health standards. And while the January 2021 draft final rule would have accepted the proposal, after further consideration of the comments, and for the reasons discussed above, the Department has declined to do so.

The Department has also considered the comments regarding the proposed clarification that other appropriate local, State, or Federal agencies may conduct inspections of employer-provided housing on behalf of the SWAs. As stated above, the proposed language merely reflected the existing regulatory provisions of § 653.501(b)(3), which already allow other appropriate agencies to conduct preoccupancy housing inspections on the SWAs' behalf, and are included with the other housing provisions at § 655.122(d) for clarity and convenience. Indeed, as several commenters noted, preoccupancy inspections are already carried out by agencies other than the SWA in several States. As the proposed language merely reiterated the current regulatory position that preoccupancy inspections may be conducted by any appropriate public agency, the Department did not find that any change to this language was warranted and therefore has adopted the proposed language without change in this final rule. Similarly, the Department is adopting without change the proposed language in paragraph (6)(i) of this section, reiterating the statutory requirement that the determination as to whether housing provided to workers meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.*

Rental and/or Public Accommodations

Where employers choose to meet their H–2A housing obligations by providing rental and/or public accommodations, the statute explicitly states that the accommodations must meet local standards for rental and/or public accommodations. In the absence of applicable local standards, State standards for rental or public accommodations must be met, and in the absence of applicable local or State standards, Federal temporary labor camp standards must be met. *See* 8 U.S.C. 1188(c)(4).[71] The current regulations at 20 CFR 655.122(d)(1)(ii) reflect the statutory language, incorporating the Occupational Safety and Health Administration's (OSHA) temporary labor camp standards at 29 CFR 1910.142, and additionally state that ''[t]he employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards.'' Currently, employers may meet that requirement by several methods, including, but not limited to, providing a copy of a housing inspection report or certification by the SWA, or another local, State, or Federal agency, where such an inspection is required by applicable rental or public accommodation standards, or by providing a signed and dated written statement confirming that the accommodation complies with applicable local, State, and/or Federal standards.[72]

This patchwork of applicable standards creates several challenges to protecting the health and safety of H–2A and corresponding workers housed in rental and/or public accommodations, such as hotels, motels, and other public accommodations that are available to the general public to rent for relatively short-term stays. Under the current regulations, in the absence of any local or State standards applicable to rental and/or public accommodations, the full set of OSHA temporary labor camp standards at § 1910.142 apply. However, several of these standards address health and safety concerns that generally do not arise in rental and/or public accommodations and thus are impractical or infeasible to apply in this context (for example, § 1910.142(a)(1), which addresses drainage of camp sites), leading to inconsistent application and enforcement of the standards overall. Conversely, where *any* local or State standards applicable to rental and/or public accommodations do exist, those standards apply to the complete exclusion of the OSHA temporary labor camp standards. Even where local and State standards for rental and/or public accommodations exist and address basic health and safety concerns for the general population, such as maximum occupancy, these standards are often silent on health and safety concerns unique to agricultural worker housing that are otherwise addressed in the OSHA temporary labor camp standards at § 1910.142.

These gaps in protection can lead to significant health and safety concerns. In particular, overcrowding is one of the most common problems the Department encounters when inspecting hotels or motels used to house H–2A and corresponding workers. Workers have been found to be required to share a bed, sleep on the floor in a sleeping bag, share a single room where as many as eight people may be sleeping, or sleep on mattresses on the ground in laundry rooms or living rooms. In addition, where workers have to cook their own meals, hotels and motels may not have sanitary facilities or adequate cooking equipment, which can lead to worker health issues, rodent or pest infestations, and fire hazards. Workers housed in hotels and motels also may not have access to laundry facilities, a serious concern for workers whose clothing regularly comes into contact with pesticides or herbicides. These issues are all addressed in the OSHA temporary labor camp standards but are not frequently covered in local or State standards for rental and/or public accommodations.[73]

To address these concerns, the Department proposed certain changes to its regulations interpreting the statutory requirements for rental and/or public accommodations standards. The Department identified specific OSHA temporary labor camp standards that are applicable to rental or public accommodations, specifically: § 1910.142(b)(2) (''[e]ach room used for sleeping purposes shall contain at least 50 square feet of floor space for each occupant''), (b)(3) (''[b]eds . . . shall be provided in every room used for sleeping purposes''), (b)(9) (''In a room where workers cook, live, and sleep a minimum of 100 square feet per person shall be provided. Sanitary facilities shall be provided for storing and preparing food.''), (b)(11) (heating, cooking, and water heating equipment installed properly), (c) (water supply); (f) (laundry, handwashing, and bathing facilities), and (j) (insect and rodent control). Where local health and safety standards for rental and/or public

[71] ''The employer shall be permitted at the employer's option . . . to secure housing which meets the local standards for rental and/or public accommodations or other substantially similar class of habitation: Provided, That in the absence of applicable local standards, State standards for rental and/or public accommodations or other substantially similar class of habitation shall be met: Provided further, That in the absence of applicable local or State standards, Federal temporary labor camp standards shall apply.''

[72] *See* OFLC FAQ, *What do I need to submit to demonstrate the [rental and/or public accommodations] complies with applicable housing standards?* (June 2017), *https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!917.*

[73] Beginning on March 13, 2020, continued on February 24, 2021, and again on February 18, 2022, the President has declared a national emergency concerning the novel coronavirus disease (COVID–19) pandemic. The Department encourages H–2A employers to regularly consult Federal, State, and local guidance on the COVID–19. At the time of this publication, OSHA's regulations and guidance relevant to COVID–19 are available at *https://www.osha.gov/coronavirus.* OFLC's guidance on COVID–19 for H–2A employers is available at *https://www.dol.gov/agencies/eta/foreign-labor.*

accommodations exist, the local standards apply in their entirety. However, if the local standards do not address one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant State standards on those issues will apply. If both the local and State standards are silent on one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant OSHA health and safety standards will apply. If there are no applicable local or State standards at all, only the OSHA health and safety standards listed in the regulation will apply. OSHA temporary labor camp standards that are not specifically mentioned in 20 CFR 655.122(d)(1)(ii) will not be applicable to rental or public accommodations.

The following is an example of how local, State, and OSHA health and safety standards would be applied to a specific rental or public accommodation under the regulation. An employer provides housing for workers in a motel located in a county with a local code that includes health and safety standards for public accommodations that address all but one of the health and safety standards in the listed OSHA standards, *i.e.,* a requirement for a minimum number of square feet per occupant for sleeping rooms, one of the applicable OSHA health and safety standards listed in the regulation. The existing local code applies in its entirety to the motel, but since the local code has no applicable standard for a minimum number of square feet per occupant for sleeping rooms, the State standard for the minimum number of square feet per occupant for sleeping rooms, if any, would be applicable to the housing as well. If the State has no standard for the minimum number of square feet per occupant for sleeping rooms that is applicable to public accommodations, then the OSHA standard at 29 CFR 1910.142(b)(2), which states that sleeping rooms must contain at least 50 square feet per occupant, will apply (or, where cooking facilities are present, § 1910.142(b)(9), which requires 100 square feet per occupant in rooms where occupants live, sleep, and cook, would apply), in addition to other requirements of the local code. However, if the local standard (or State standard, in the absence of any local standard) contains a standard for the minimum number of square feet per occupant for sleeping rooms (or, where cooking facilities are present, a standard for the minimum feet per occupant for rooms where occupants live, sleep, and cook) that is applicable to public accommodations, that standard would apply, regardless of whether that local standard was more or less stringent than the applicable OSHA standard, because the listed OSHA standards apply only in the absence of local or State standards addressing those health and safety issues. Similarly, a local or State standard need not explicitly provide for a minimum number of square feet per occupant, provided the standard addresses the relevant area required for a given number of people. For example, a local standard that provides a maximum occupancy of three persons to a room that measures 100 square feet would constitute an applicable local standard, as it provides for a minimum area for each occupant. Alternatively, if there were no local or State health and safety codes applicable to the motel, only the OSHA standards listed in 20 CFR 655.122(d)(1)(ii) would apply. Any other OSHA standards listed at 29 CFR 1910.142 would not be applicable to the motel, because only the OSHA standards specifically listed in 20 CFR 655.122(d)(1)(ii) are applicable to rental or public accommodations, and then only when neither the locality nor the State have applicable standards addressing those issues.

The Department also proposed to modify the current regulatory language, which states that ''[t]he employer must document to the satisfaction of the CO that the housing complies with the local, State, or Federal housing standards'' (§ 655.122(d)(1)(ii)), to specify how an employer must document that the rental or public accommodations meet local, State, or Federal standards. The proposed language states that an employer must submit to the CO a signed, dated, written statement, attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested. This statement must include the number of beds and rooms that the employer will secure for the worker(s). The proposal language further required that, where the applicable local or State standards under § 655.122(d)(1)(ii) require an inspection, the employer also must submit a copy of the inspection report or other official documentation from the relevant authority. Where no inspection is required, the employer's written statement must confirm that no inspection is required. The proposed language generally reflects current OFLC guidance as to how the employer may document that applicable health and safety standards have been met,[74] with the additional requirements that employers submit a written statement even if they are also submitting a copy of an inspection report, where required, and that the written statement must contain the number of beds and rooms that will be provided in the rental or public accommodations. As discussed below, the Department has decided to adopt the regulatory provisions as proposed in the NPRM, with a few modifications.

Several employers and employer associations opposed the proposed changes. These commenters generally stated that there is no basis for requiring employers to ensure that rental or public housing complies with any of the OSHA temporary labor camp health and safety standards, because standards designed for temporary labor camps are inappropriate for rental or public accommodations. They commented that requiring employers to find rental or public accommodations that meet the listed OSHA standards (in the absence of local or State standards addressing those issues) would be very difficult, possibly even preventing H–2A employers from using rental or public accommodations. These employers requested that the regulations no longer require the application of OSHA temporary labor camp standards. At least one commenter stated that the option to provide rental or public accommodations was made available to employers to give them the flexibility to provide housing that does not comply with OSHA health and safety standards in areas where compliant housing may be scarce. Some commenters expressed further concern that employers should be expected to attest to the compliance of rental or public housing accommodations provided to their workers, as it would be too confusing for them to determine which set of standards should apply. One employer association, while generally supportive of the proposed changes, indicated that employers are frequently unable to use public accommodations because the accommodations fail required inspections for minor issues, such as lack of window screens, and urged that employers should have greater access to public accommodation options.

In contrast, workers, workers' rights advocacy organizations, and at least one State agency expressed support for the proposed changes, indicating that specifically requiring the application of

[74] *See* OFLC FAQ, *What do I need to submit to demonstrate the [rental and/or public accommodations] complies with applicable housing standards?* (June 2017), *https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!917.*

Federal OSHA health and safety standards addressing important issues such as overcrowding, or inadequate sleeping, bathing, or laundry facilities, in the absence of such local or State standards, would result in modest improvements to worker health and safety. However, these commenters also stated that these improvements would not be sufficient without a strong commitment to inspections and enforcement of housing violations, with one workers' rights advocacy organization further urging that Federal OSHA should be required to inspect rental or public accommodations in areas where local or State laws do not require such inspections. Another workers' rights advocacy organization stated that the regulations should require the employer to at least use a more detailed self-inspection form, such as Form ETA–338, and identify the applicable standards for DOL or the SWA to review prior to issuing a temporary agricultural labor certification. In addition, most of these commenters expressed general support for additional protections or standards to be included in the regulations, but did not identify specific standards for inclusion. As addressed further below, only one commenter suggested specific additional standards for inclusion in the regulation.

Having reviewed the comments on these issues, the Department adopts the proposals on rental and/or public accommodations at § 655.122(d)(1)(ii) and (d)(6)(iii), with a few modifications. With respect to the concerns raised by employers and employers' associations that requiring compliance with applicable OSHA temporary labor camp health and safety standards may reduce the number of acceptable rental or public housing options, particularly in more rural areas, the Department notes that the statute requires that rental or public accommodations comply with applicable Federal temporary labor camp standards in the absence of applicable local or State standards. Thus, even under the Department's current regulations, in many instances, rental and public accommodations must comply with applicable OSHA temporary labor camp standards if used to satisfy an H–2A employer's housing obligations. The Department therefore cannot, through regulation, remove employers' statutory obligations to comply with applicable Federal temporary labor camp standards in the absence of applicable local or State standards. The Department can, however, identify *which* OSHA temporary labor camp health and safety standards are applicable to rental or public accommodations. Rental and public accommodations are different structures than temporary labor camps, and some temporary labor camp standards are not applicable to such accommodations. However, rental and public accommodations generally are not designed to house groups of unrelated adult agricultural workers for an extended period of time, especially not in only one or two rooms. Accordingly, local or State standards governing rental or public accommodations may not address serious health and safety issues that arise in such worker housing. The regulation thus identifies which OSHA standards employers must meet in the absence of applicable local or State standards on those issues, to prevent serious health and safety issues more likely to occur where rental or public housing is used to house H–2A and corresponding workers, while eliminating confusion about whether such rental or public housing must comply with other OSHA temporary labor camp standards that are not feasibly applied to hotels and motels and other rental or public accommodations.

Similarly, the Department notes that it cannot ''simply require that regardless of local and state standards applicable to public accommodations, the housing must meet the basic minimum standards'' set forth in OSHA's temporary labor camp standards, as one workers' rights advocacy organization suggested, because the statute permits employers to secure housing that meets applicable local or State standards for rental and/or public accommodations. As noted above, the Department also asked for comment specifically as to whether the regulation should identify any additional health and safety standards addressed in the DOL OSHA standards at 29 CFR 1910.142 as applicable to rental or public accommodations. Only one commenter, a workers' rights advocacy organization, provided examples of additional OSHA temporary labor camp standards for inclusion in the regulations. Specifically, the commenter advocated for the addition of § 1910.142(b)(7) (''[a]ll living quarters shall be provided with windows''), (b)(10) (''stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided''), (d) (toilet facilities), (g) (lighting), (h) (refuse disposal), and (i) (construction and operation of kitchens, dining, and feeding facilities).

The Department appreciates the suggestions set forth in this comment. The Department has decided to include some, but not all, of the suggested OSHA standards in the list of applicable OSHA temporary labor camp standards. First, the commenter argued for the inclusion of § 1910.142(b)(10), which states that ''[i]n camps where cooking facilities are used in common, stoves (in ratio of one stove to 10 persons or one stove to two families) shall be provided in an enclosed and screened shelter. Sanitary facilities shall be provided for storing and preparing food.'' The commenter argued that the inclusion of this standard was necessary when employers claim that they are providing cooking and kitchen facilities to workers housed in rental or public accommodations, as rental or public accommodations frequently have inadequate cooking facilities that are either lacking in stoves or have an insufficient number for all workers to have sufficient access to cook their own food. The commenter further pointed out that without sufficient access to stoves, workers often must use microwaves or hot plates for all of their cooking needs, resulting in potential fire hazards. The Department agrees. Where employers choose to meet their meal obligations by providing kitchen and cooking facilities to workers, the facilities must include, among other things, working cooking appliances, an obligation that is not met merely by the provision of one or more electric hot plates, microwaves, or outdoor community grills. The failure to provide adequate cooking appliances when attempting to meet meal obligations through the provision of cooking and kitchen facilities would in itself be a violation of 20 CFR 655.122(g), as was discussed in the preamble to the NPRM and is addressed further below. Including this standard as an applicable OSHA temporary labor camp standard may help employers determine whether rental or public accommodations have adequate kitchen and cooking facilities to enable employers to meet their meal obligations. Moreover, local and State codes applicable to rental or public accommodations are not likely to address this issue, since, in most instances, this type of housing is not generally intended to house groups of people over an extended period of time who need to be able to cook their own meals. This standard has therefore been included in the regulation as one of the applicable OSHA temporary labor camp standards, although it will be applicable only where an employer has chosen to meet its meal obligations by providing kitchen and cooking facilities to workers rather than by providing three meals per day to workers.

The commenter also advocated for the inclusion of § 1910.142(g), ''Lighting,'' which provides that where electric service is available:

- Each habitable room in a camp shall be provided with at least one ceiling-type light fixture and at least one separate floor- or wall-type convenience outlet.
- Laundry and toilet rooms and rooms where people congregate shall contain at least one ceiling- or wall-type fixture.
- Light levels in toilet and storage rooms shall be at least 20 foot-candles 30 inches from the floor.
- Other rooms, including kitchens and living quarters, shall be at least 30 foot-candles 30 inches from the floor.

The commenter stated that worker health and safety requires at least one light fixture and outlet in each sleeping room, as well as adequate lighting in other rooms. It is likely that this issue will be addressed in applicable local or State codes, as various building codes published by the International Code Council, including the International Property Management Code, have standards regarding the number of electrical outlets and light fixtures required in sleeping rooms and other rooms, and these codes have been adopted by most States and/or localities.[75] However, as this standard does address a basic health and safety need, and employers can fairly easily determine whether the rental or public accommodations they intend to use meet this standard, the Department has included § 1910.142(g) in the regulation as one of the applicable OSHA temporary labor camp standards that will apply in the absence of any applicable local or State standard addressing this issue.

The commenter also recommended that the entirety of § 1910.142(d), containing various standards for toilet facilities, should be included in the regulation as one of the applicable OSHA temporary labor camp standards, arguing that requirements for a minimum ratio of toilets per person, as well as provisions for lighting, a supply of toilet paper, and cleanliness, are essential for workers' health. The Department agrees that having adequate and sanitary toilet facilities is clearly necessary for workers' health, but several of the standards included in this section are impractical or less necessary for many types of rental or public accommodations, as the standards were designed for temporary labor camp facilities. For example, in hotels or motels, it may not be practical or necessary to require that toilet rooms be accessible without passing through sleeping rooms, as bathrooms in hotels and motels tend to be accessed directly off of the lone sleeping area and thus there is no other way to access the bathroom. Similarly, it may be impractical to require that there be a minimum of two toilets for every shared facility, since one shared hotel room is likely to have only one toilet. In addition, some of the issues addressed by this standard are covered by other OSHA temporary labor camp standards that are already specified in the regulation. For instance, § 1910.142(d)(8), which requires that each toilet room have natural or artificial light available at all hours, is not necessary when § 1910.142(g), which is included in the regulation as discussed above, requires all toilet rooms to have at least one ceiling or wall-type light fixture. However, some of the standards in this section are more feasibly implemented in rental or public accommodations, are more within the employer's ability to control, and are key to maintaining a sanitary bathroom environment. Section 1910.142(d)(1), which states that ''[t]oilet facilities adequate for the capacity of the camp shall be provided,'' would be sufficient to require employers to ensure that the rental or public accommodation has sufficient toilets for the number of workers housed, without specifying a layout that may be impractical for rental or public accommodations. Section 1910.142(d)(9), requiring that an adequate supply of toilet paper be provided for each toilet, clearly serves a critical sanitary purpose. Section 1910.142(d)(10), requiring toilet rooms to be kept in a clean and sanitary condition and cleaned daily, also ensures that toilet facilities are maintained in a manner adequate for worker health and safety, and employers can ensure that this standard is followed in almost all types of rental or public accommodations. Accordingly, the Department has incorporated § 1910.142(d)(1), (9), and (10) into this final rule as applicable OSHA temporary labor camp standards.

However, the Department declines to include in this final rule all of the other OSHA temporary labor camp standards recommended by the workers' rights advocacy organization (§ 1910.142(b)(7) (ventilation), (h) (refuse disposal), and (i) (kitchens, dining halls, and feeding facilities)). First, § 1910.142(b)(7) states that ''[a]ll living quarters shall be provided with windows the total of which shall be not less than one-tenth of the floor area. At least one-half of each window shall be so constructed that it can be opened for purposes of ventilation.'' The commenter claimed that this standard should be incorporated because rental and public accommodations may otherwise not have sufficient ventilation to combat a damp indoor environment, which can lead to serious health and safety issues such as mold, cockroach infestations, and rodent infestations. Although the Department certainly acknowledges the importance of ventilation in housing, this standard may be too restrictive for rental and public accommodations. In many instances, rental or public accommodations will have mechanical ventilation through a heating, ventilation, and air conditioning system or by other mechanical ventilation, which can provide ventilation at least as adequate as the ventilation provided by windows. An employer is unlikely to be able to require that hotels and motels additionally provide for windows that open. The U.S. Environmental Protection Agency has stated that mechanical ventilation is preferable to ventilation through windows or other openings,[76] making it even less appropriate to require windows that can be opened when the rental or public facility has other adequate means of ventilation. In addition, because windows (natural light) and ventilation are addressed by the various model building, residential, and maintenance codes published by the International Code Council, which have been incorporated by the majority of States,[77] State and local codes are likely to have provisions addressing this standard. Moreover, if a lack of adequate ventilation leads to damp conditions that foster pest infestations or similar unhealthy conditions, the rental or public accommodations would not meet the requirement of § 1910.142(j), already included in this final rule, which states that effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.

Second, § 1910.142(h)(1) requires fly- and rodent-tight containers for the storage of garbage, and that at least one container be provided within 100 feet of each ''family shelter.'' Section 1910.142(h)(2) requires that garbage containers be kept clean, and § 1910.142(h)(3) requires that garbage be

[75] *See https://www.iccsafe.org/wp-content/uploads/Master-I-Code-Adoption-Chart-DEC-2021.pdf* (last visited Dec. 14, 2021).

[76] *See Mechanical Ventilation: Breathe Easy with Fresh Air in the Home, https://www.energystar.gov/ia/new_homes/features/MechVent_062906.pdf* (last visited Dec. 14, 2021).

[77] *See https://www.iccsafe.org/wp-content/uploads/Master-I-Code-Adoption-Chart-DEC-2021.pdf* (last visited Dec. 14, 2021).

emptied when full, but at least twice a week. The workers' rights advocacy organization argued that this standard should be included to prevent rodents and insect infestation, stating that the inclusion of § 1910.142(j) regarding rodent and insect control is undercut by the failure to incorporate this standard. While adequate facilities for containing and disposing of garbage are important to maintaining a healthy living environment, the Department does not believe that the requirements of this standard are always practical in the context of rental or public accommodation, where refuse collection for the worker housing may be conducted very differently than for a temporary labor camp but in a safe and sanitary manner. For example, where workers are housed in several rooms in a hotel, trash may be collected from their rooms along with trash from other rooms and placed into the hotel dumpsters. Although there might not be at least one dumpster for each worker shelter and the dumpster may not be within 100 feet of the shelter, such a system could nevertheless adequately deal with the garbage in a safe and sanitary manner. Moreover, the Department does not agree that the inclusion of § 1910.142(j) regarding rodent and insect control is undercut by the failure to incorporate all elements of this standard, particularly in the context of rental and public accommodations. On the contrary, if accumulating garbage encourages rodents or insects, the employer would not be ensuring that ''[e]ffective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests,'' and would be in violation of § 1910.142(j). However, upon further consideration, the Department concludes that certain aspects of § 1910.142(h), specifically paragraphs (h)(2) and (3) requiring that garbage cans be kept clean and be emptied regularly, address significant safety and health concerns aside from the potential for rodent of insect infestation, and that these standards are easily implemented even in the context of hotels and motels, and are within an employer's control to ensure compliance. Accordingly, the Department has included § 1910.142(h)(2) and (3) in the regulation as two of the applicable OSHA temporary labor camp standards that will apply in the absence of any applicable local or State standard addressing these issues. Though the Department did not include this standard in the January 2021 draft final rule, upon further consideration of the rulemaking record and for the reasons stated above, the Department has concluded it is appropriate to do so here.

Finally, § 1910.142(i) establishes certain standards for central dining halls or multiple family feeding operations and food handling facilities in temporary labor camps. The workers' rights advocacy organization commented that this standard should be applicable to public and rental accommodations because these accommodations often do not have adequate cooking and kitchen facilities. Moreover, even where rental or public accommodations have cooking and kitchen facilities, the commenter alleged that the facilities often have improper refrigerator temperatures, pest infestations, or contaminated water. However, the Department does not agree that the inclusion of § 1910.142(i) as an applicable OSHA temporary labor camp standard is necessary to ensure that workers have adequate and safe cooking facilities when housed in rental or public accommodations. As explained in the preamble discussion of 20 CFR 655.122(g) the Department has addressed the issues that arise when kitchen and cooking facilities in rental or public accommodations are insufficient. The inclusion of § 1910.142(i) would incorporate standards that were designed primarily for larger centralized cooking and dining facilities, such as a large labor camp where an employer has a centralized dining hall and employs people to cook for the workers, and are therefore not appropriate for many rental or public accommodation situations. For example, even when a hotel room or suite has adequate kitchen or cooking facilities, it would not be practical to require that there be no opening from the kitchen into the living or sleeping quarters, as would be required by § 1910.142(i)(2). Moreover, several of the potential harmful conditions mentioned by the commenter are either sufficiently addressed in the context of rental or public accommodations by other standards that were already included in the proposed provisions, such as § 1910.142(b)(9) (''[s]anitary facilities shall be provided for storing and preparing food'' in rooms where workers cook), (c) (''[a]n adequate and convenient water supply, approved by the appropriate health authority, shall be provided in each camp for drinking, cooking, bathing, and laundry purposes''), or (j) (''[e]ffective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests''), or would be further addressed by the additional incorporation of § 1910.142(b)(10), as discussed above.

The Department has made additional minor, nonsubstantive revisions to 20 CFR 655.122(d)(1)(ii) to better describe the applicable OSHA temporary labor camp standards.

With respect to employers' concerns regarding self-attestation under § 655.122(d)(6)(iii) that the rental or public accommodations they furnish to workers comply with applicable local, State, or OSHA standards,[78] the Department notes that under both the statute and the current regulations, employers are responsible for ensuring that if they choose to use rental or public accommodations to meet their housing obligations, those rental or public accommodations must meet applicable standards, and for documenting to the CO that these standards have been met during the application process. By requiring employers to provide a signed and dated statement attesting that the rental and/or public accommodations meet all applicable standards and are sufficient to accommodate the number of workers requested, specifically noting the number of rooms and beds to be provided for the workers, along with any required inspection reports, the proposed changes merely attempt to ensure that employers have considered the applicable standards and verified that the rental or public accommodations comply with the standards prior to workers' arrival. However, the Department will not require that employers use a particular self-inspection form in providing the required statement because doing so would be impracticable. The applicable standards will vary depending upon the locality or State in which the rental or public accommodations are located.

Housing for Workers Covered by 20 CFR 655.200 Through 655.235

The Department is making clarifying edits to paragraph (d)(2) to reflect that §§ 655.230 and 655.235 establish the housing requirements for workers employed in herding and range production of livestock occupations under §§ 655.200 through 655.235. The Department has established separate requirements for these workers due to the unique nature of the work performed. The Department is also making a technical, conforming edit to paragraph (d)(2) to reflect that § 655.304

[78] To the extent that commenters had concerns related to inspections of rental or public housing by SWAs or other agencies, it should be noted that those inspections are not required by these regulations, but by State or local laws, with their own requirements.

establishes the housing standards applicable to mobile housing for workers engaged in itinerant animal shearing or custom combining, as defined and specified under §§ 655.300 through 655.304.

c. Paragraph (g), Meals

The Department did not propose any changes to the current regulation at § 655.122(g), which requires an employer to provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals, and further states that where an employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. However, due to the high incidence of violations of this provision, the Department provided additional clarification of these requirements in the preamble to the NPRM. The Department adopts that guidance in the preamble to this final rule, with some additional clarifications in response to comments received. In addition, as explained below, the Department has revised § 655.122(g) in this final rule to reiterate certain requirements in § 655.173 regarding meal charges.

Specifically, the NPRM clarified that kitchen facilities provided in lieu of meals must include clean space for food preparation, working cooking and refrigeration appliances, and dishwashing facilities. Although no specific cooking appliances are required, the appliances provided must be sufficient to allow workers to safely prepare three meals per day, a requirement that is not met if the employer merely provides an electric hot plate, a microwave, or an outdoor community grill, or if workers are required to purchase cooking appliances or accessories, such as portable burners, charcoal, propane, or lighter fluid. The Department adopts that guidance here.

In addition, the Department noted that public accommodations such as hotels or motels frequently do not have adequate cooking facilities to satisfy an employer's obligations under this section, and, in those instances, employers must provide three meals a day to workers to meet their obligations under § 655.122(g). The Department further explained that, where workers are housed in rental or public accommodations that provide meals, the provision of such meals may be sufficient to satisfy part of the employer's obligations under § 655.122(g). However, upon further consideration of the fact that such meals are unlikely to be sufficient to satisfy the employer's obligations under § 655.122(g), the Department is further clarifying this guidance. Some public accommodations may provide complimentary breakfast (*e.g.,* continental breakfast, buffet, etc.) during a specific allotted time, such as 6 a.m. to 10 a.m. Such complimentary breakfast will generally not satisfy one of the three required daily meals since the daily start time for the workday will frequently preclude the workers from having meaningful access to the meal prior to departing the public accommodation for the place of employment. In addition, and as noted below, the employer should consider whether the meal is nutritionally and calorically adequate given the work performed and the weather conditions. For example, simply providing a muffin or cold cereal for breakfast would not be sufficient to meet an employer's obligation to provide a nutritionally adequate meal. Therefore, the employer may only consider such complimentary breakfast to meet its obligation to provide meals when the breakfast is readily accessible to the workers and is nutritionally adequate.

The Department further explained in the NPRM that where an employer elects to provide meals, the meals must be provided in a timely and sanitary fashion. For example, prepared meals requiring refrigeration that are delivered hours before an anticipated mealtime would not meet the employer's meal obligation. In addition, providing access to third-party vendors but not paying the vendors directly for the workers' meals does not constitute compliance with the requirement to provide meals or facilities, even if the employer provides a meal stipend.[79] An employer who wishes to use a third-party vendor to provide meals may instead arrange for a third-party vendor and pay for the workers' meals or use a voucher or ticket system where the employer initially purchases the meals and distributes vouchers or tickets to workers to obtain the meals from the third-party vendor. For such arrangements, the employer may deduct the corresponding allowable meal charge only if previously disclosed and in compliance with the procedures described under proposed § 655.173. The Department further emphasized that an employer may only deduct meal charges actually incurred up to the amount permitted under § 655.173. The Department adopts that guidance here.

As the Department did not propose any changes to this section, it received comparatively few comments. Several workers' rights advocacy organizations and one State government agency pointed out that employers frequently provide insufficient meals or overcharge workers for those meals. In response to these concerns, the State agency suggested that the Department adopt additional standards to ensure that meals provide adequate nutrition and caloric intake. One workers' rights advocacy organization also suggested that the Department amend § 655.122(g) to include a statement that meal charges remain subject to limitations imposed by the FLSA and to require employers to retain records demonstrating the actual cost of providing meals. One agent[80] commented that employers should be permitted to provide a meal stipend for workers to purchase their own meals, in lieu of providing the meals themselves, particularly if that is the workers' own preference.

After further reviewing these comments, the Department agrees with the workers' rights advocacy organization that the job order should explicitly state the existing requirements in § 655.173 that any meal charges remain subject to limitations and recordkeeping obligations imposed by the FLSA. Although these substantive requirements are not new, as § 655.173 already includes language explaining that meal charges are subject to the FLSA and incorporates the recordkeeping requirements at 29 CFR 516.27, the Department concludes that explicitly reiterating these requirements in the job order will better inform workers of the full terms and conditions of any meal plan offered by the employer. Accordingly, this final rule revises § 655.122(g) to reiterate § 655.173's requirement that when a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

In addition, the Department agrees that where an employer chooses to meet

[79] *See Wickstrum Harvesting, LLC,* 2018–TLC–00018 (May 3, 2018) (affirming an ETA determination denying temporary agricultural labor certifications based on the employer's practice of providing workers with a stipend for meals instead of providing meals or furnishing free and convenient cooking facilities).

[80] The Department received many comments from employers in the reforestation industry noting that the remote, mobile nature of the work makes it difficult to access kitchen facilities or caterers, and that this was one reason why they felt it was inappropriate to include reforestation in the H–2A program. Those comments were reviewed earlier in this document, in the section discussing reforestation.

its meal obligations by providing three meals per day to workers, those meals must be calorically and nutritionally adequate. An employer's determination as to the adequacy of the meals must be reasonable—merely providing snacks such as chips or crackers, for example, would not meet an employer's meal obligations. The Department has declined to adopt any particular standard for nutritional balance and caloric sufficiency at this time but encourages employers to consult the USDA, National Institutes of Health, or other credible sources of nutrition and caloric intake guidelines.

In addition, the Department believes that providing employers with examples of established guidelines for ensuring that meals are calorically and nutritionally adequate will offer employers greater certainty when developing meal plans that such plans comply with the requirements of § 655.122(g). For example, the USDA's Dietary Guidelines for Americans 2020–2025 provide estimated calorie needs per day by age, sex, and physical activity level. They also suggest daily and weekly amounts of food groups, subgroups, and components, which may assist employers in the development of an adequate meal plan. Since the provision of adequate meals is essential to workers' health, employers must exercise care in preparing meal plans. The Department encourages employers to consult workers, when practical, about their own preferences for such plans. The Department further notes that sanctions and remedies for an employer's failure to provide sufficient meals may include, as appropriate, the recovery of back wages, the assessment of civil money penalties, and where warranted, debarment and/or revocation.

Finally, in response to the comments received regarding meal stipends, the Department notes that, as stated above, the provision of a meal stipend is not sufficient to meet an employer's meal obligations. The meal requirement is intended to ensure that workers receive adequate meals and contemplates the cost-effective preparation of such meals by the worker in their own kitchen or by an employer cooking or providing for a group. Workers who receive a stipend rather than three meals per day and do not have kitchen and cooking facilities will generally not be able to obtain equivalent meals, as they will not be able to purchase their individual meals with similar cost-effectiveness, exacerbating the problem of inadequate meals. This problem is even more acute when workers are working or living in more remote or rural locations, as is frequently the case, particularly where they are without transportation to procure their own meals, or where they do not have time during the workday to easily reach shops or restaurants from their worksite.

The Department notes that the January 2021 draft final rule would have left § 655.122(g) unchanged. However, after further consideration of the comments received, and for the reasons discussed above, the Department has revised § 655.122(g) to reiterate certain requirements of § 655.173 regarding meal charges.

d. Paragraph (h), Transportation; Daily Subsistence

i. Paragraph (h)(1), Transportation to Place of Employment

The Department's current regulation at § 655.122(h)(1) requires, in part, that if the employer has not previously advanced transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means, and if the worker completes 50 percent of the work contract period, the employer must reimburse the worker for the reasonable transportation and subsistence costs incurred from the ''place from which the worker has come to work for the employer'' to the place of employment.[81] The Department currently interprets the ''place from which the worker has come to work for the employer'' to mean the ''place of recruitment.'' This is frequently the worker's home,[82] but as H–2A workers are often referred and recruited informally, the place of recruitment varies. Additionally, for a worker who completes the work contract period or is terminated without cause, and who does not have immediate subsequent H–2A employment, § 655.122(h)(2) requires the employer to provide or pay for return transportation and subsistence costs to the place of departure (*i.e.,* recruitment).[83]

The NPRM generally kept the requirements of § 655.122(h)(1) and (2) without change. However, the Department sought to promote the efficiency of the H–2A program by establishing a consistent location and method for calculating a worker's travel and subsistence costs from and to the place of employment. Specifically, the Department proposed to revise § 655.122(h)(1) and (2) to require an employer to provide or pay for inbound and return transportation and subsistence costs (where otherwise required by the regulation) from and to the place from which the worker departed to the employer's place of employment. For an H–2A worker departing from a location outside of the United States who must obtain a visa, the Department proposed that the place from which the worker ''departed'' would mean the ''appropriate'' U.S. embassy or consulate. The Department proposed to define the ''appropriate'' U.S. embassy or consulate as the U.S. embassy or consulate that issued the visa but sought comment on other definitions of ''appropriate'' U.S. embassy or consulate, given the differences in visa processing procedures among overseas posts. The Department further sought comment on the place of ''departure'' for those H–2A workers who do not require a visa to obtain H–2A status.[84] *See* 8 CFR 212.1(a); 22 CFR 41.2. The Department did not propose any changes to the place of departure (*i.e.,* the place of recruitment) for corresponding workers and those H–2A workers departing from locations inside the United States.

The Department received significant comments on this proposal. Employers,

[81] Section 655.122(h)(1) further requires that, when it is the prevailing practice among non-H–2A employers in the area to do so, or when offered to H–2A workers, the employer must advance transportation and subsistence costs to workers in corresponding employment. Section 655.122(h)(1) also places employers on notice that they may be subject to the FLSA, which operates independently of the H–2A program and imposes independent requirements relating to deductions from wages. *See also* § 655.122(p). The Department did not propose any changes to these requirements and this final rule does not affect an FLSA-covered employer's obligations under the FLSA.

[82] *See, e.g.,* 2009 H–2A NPRM, 74 FR 45906, 45915 (''[T]his Proposed Rule requires the employer to pay the costs of transportation and subsistence from the worker's home to and from the place of employment.''); OFLC FAQ (Sept. 15, 2010) (subsistence costs must be paid for costs incurred ''during the worker's inbound trip from the point of recruitment to the employer's worksite . . . and during the worker's outbound trip from the employer's worksite to the worker's home or subsequent employment'').

[83] Section 655.122(h)(2) further provides that, for those workers who do have immediate subsequent H–2A employment, the initial or subsequent employer must provide or cover the costs of transportation and subsistence for the travel between the initial and subsequent worksites. The obligation to provide or pay for such costs remains with the initial H–2A employer if the subsequent H–2A employer has not contractually agreed to provide or pay for such travel. This section also places employers on notice that they are not relieved of their obligation to provide or pay for return transportation and subsistence if an H–2A worker is displaced as a result of an employer's compliance with the recruitment period described in § 655.135(d). The Department did not propose any changes to these requirements.

[84] Pursuant to DHS regulations, H–2A workers from certain localities need not obtain a visa to be admitted to the United States, including citizens of Bermuda and Canada, Bahamian nationals, and British subjects residing in certain islands. *See* 8 CFR 212.1(a).

associations, and their representatives largely supported the proposal, stating that it would greatly simplify reimbursement calculations to be able to use a single, consistent place of departure. Several employers also commented that it is more logical to calculate transportation and subsistence from the U.S. embassy or consulate that issues the worker's visa, because only at that point is the worker's travel for the employer's benefit, since workers who are not able to obtain a visa cannot be employed by the H–2A employer. In addition, some employers mentioned that the FLSA requires reimbursement of travel expenses (to the extent that those travel expenses bring employees below the applicable minimum wage) in the employee's first pay period, and stated that the Department should require that the requisite travel reimbursement be made at 50 percent of the work contract period, to reduce the likelihood that a worker would take advantage of travel reimbursement at an earlier point to come into the country and then abandon the H–2A employment. Some employers also suggested that the Department consider revising the regulation to allow the employer to share the transportation costs with the employee, as the work in the United States is mutually beneficial to both the employee and employer.

In contrast, workers, workers' rights advocacy organizations, and other government agencies generally opposed this change, arguing that the cost of workers' transportation from their home to/from the embassy/consulate should be borne by the employer. They stated that transferring this cost to workers would place an undue burden on workers who frequently incur costs to obtain these job opportunities, thus increasing their vulnerability to debt and trafficking. Several commenters also noted that this change would disproportionately affect indigenous workers in rural communities, who live far from any U.S. embassy or consulate. Similarly, a couple of commenters pointed out that this change would encourage employers to either hire workers from countries with embassies that are comparatively close to the United States, such as Mexico, or to require workers to obtain their visas from U.S. consulates or embassies that are closer to the U.S. border. Some workers' rights advocacy organizations and government entities also commented that shifting this cost to workers will disadvantage and thus adversely affect U.S. workers by artificially reducing the cost of employing H–2A workers. A couple of commenters also stated that the proposed change would cause confusion, as employers would still be liable to reimburse workers for the cost of transportation from their home to the U.S. embassy or consulate under the FLSA. However, one workers' rights advocacy organization commented favorably on the Department's clarification that the employer is required to reimburse employees for all reasonable subsistence costs (including lodging) that arise from the time at which the worker first arrives in the embassy/consulate city, while workers are following the necessary procedures to obtain their visas.

The Department did not receive any comments on how to define the ''appropriate'' consulate for those workers who must obtain a visa, nor did it receive any comments on the place of departure for those H–2A workers who need not obtain a visa, despite its requests for comments on both points.

After carefully considering all of the comments received, the Department has decided to retain the requirements of the 2010 H–2A Final Rule requiring employers to provide, pay, or reimburse employees for their travel and subsistence to and from the place of recruitment, which in many cases will be the worker's home. *See* § 655.122(h)(1), (2). Both commenters who supported the proposed change and those who opposed it recognized that the resulting cost allocation change would be significant to both workers and employers. The Department agrees with the several commenters that noted implementation of the proposed changes in the NPRM would impose an undue burden on workers, many of whom are already vulnerable to exploitation, and many of whom live in remote rural areas and incur considerable expenses traveling to the embassy/consulate city. The cost of the worker's inbound and outbound travel and subsistence is the employer's obligation, as such travel is primarily for the benefit and convenience of the employer, who would not have sufficient workers to perform necessary work without this travel due to the lack of willing and qualified local workers. The use of an administratively consistent and efficient point of departure to calculate the extent of such obligations, as proposed in the NPRM, did not alter this analysis. The Department concludes that the proposed changes in the NPRM would improperly shift to workers a significant portion of this obligation that must instead be borne fully by the employer.

The Department also believes that the Department and employers should be able to ascertain a worker's place of recruitment without significant difficulty; indeed, such a standard has now been in place, with only a brief interruption, for more than 34 years. The recruitment information needed for the current rule generally is not difficult to obtain, and the employer has ready access to its own employees and to the recruiter it hired to acquire this information. To the extent it is difficult in any instance to ascertain the place of recruitment, the Department believes that any such difficulty cannot outweigh the significant burden that would be imposed on the worker by shifting the costs of transportation and subsistence from the place of recruitment to the embassy/consulate city. Moreover, the Department notes that the Department of State (DOS) has, at least temporarily, waived consular interviews for many nonimmigrant visa applicants, thus making it more difficult to determine the appropriate embassy or consulate under the proposal and thereby undermining the desired efficiencies of that proposed standard.[85] In addition, the Department believes it is unlikely that any administrative efficiencies would be achieved through the changes proposed in the NPRM, as the changes would constitute a break with longstanding procedures that are well understood by employers. And even if any such efficiencies might be achieved, the Department believes that they would be minimal in comparison to the additional financial burden shifted onto H–2A workers. In sum, the Department has now determined that, as a matter of policy, any benefits of the proposal set forth in the NPRM are outweighed by the substantial costs imposed upon workers.

Finally, in response to comments regarding the timing of reimbursement for inbound travel costs, the Department notes that the current H–2A regulation requires that inbound transportation and daily subsistence costs must be reimbursed when the worker has completed 50 percent of the work contract period, if reimbursement has not already been made. This requirement remains unchanged. However, the Department reiterates that the FLSA applies independently of the H–2A program's requirements and thus the Department cannot relieve employers of their obligations under the FLSA in this rulemaking. Where an employer has obligations under multiple laws, the employer must comply with the more worker-protective of those obligations. Accordingly, to the

[85] *See https://www.state.gov/expanded-interview-waivers-for-certain-nonimmigrant-visa-applicants/.*

extent that a worker's transportation and subsistence costs bring the worker's pay below the applicable minimum wage during the first pay period of employment, employers will remain responsible under the FLSA for reimbursing workers to that extent during the first pay period. However, relatedly, the Department does not agree with commenters who stated that the proposed regulation would cause greater confusion for employers regarding their FLSA obligations because even under the current regulation, H–2A employers that are also subject to the FLSA must comply with both laws, despite any differences in the amount or timing of any required reimbursements.[86]

ii. Paragraph (h)(4), Employer-Provided Transportation

The Department proposed to clarify the minimum safety standards required for employer-provided transportation in the H–2A program. The Department's current regulation at 20 CFR 655.122(h)(4) provides that employer-provided transportation must comply with applicable Federal, State, or local laws and regulations and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance required under MSPA at 29 U.S.C. 1841, 29 CFR 500.105, and 29 CFR 500.120 through 500.128. However, sec. 1841 of MSPA provides that employers must comply with transportation safety regulations promulgated by the Secretary, which include not only 29 CFR 500.105, providing transportation safety standards for vehicles other than passenger automobiles and station wagons used to transport workers over 75 miles or in day-haul operations, but also 29 CFR 500.104, which provides transportation safety standards applicable to passenger automobiles or station wagons, or other vehicles, for trips of 75 miles or less, not including day-haul operations. The proposed rule therefore slightly modified the language of current 20 CFR 655.122(h)(4) by adding a citation to 29 CFR 500.104, to clarify that either § 500.104 or § 500.105 is applicable, depending upon the type of vehicle that is being used to transport workers, the distance of the trip, and whether the vehicle is being used for a day-haul operation. The Department also sought comments about additional provisions that might help prevent driver fatigue and other unsafe driving conditions in order to improve safety in the transportation of H–2A and corresponding workers. As discussed below, this final rule adopts paragraph (h)(4) from the NPRM with minor clarifying changes.

Several commenters indicated that they supported the clarification that both §§ 500.104 and 500.105 are applicable to employer-provided transportation, depending on the type of vehicle being used to transport workers. One commenter asked for additional clarification that both standards would not apply simultaneously, but that only the appropriate standard would apply depending on the type of vehicle used to provide worker transportation, *i.e.,* either § 500.104 *or* § 500.105. This commenter also requested that the language at 20 CFR 655.122(h)(3), which requires the employer to ''provide transportation between housing provided or secured by the employer and the employer's worksite at no cost to the worker'' (and to which the Department did not propose any changes), be revised to state that employers are required to provide transportation to and from the job site only to those workers for whom the employer must provide housing. One commenter stated that it would be better to have 29 CFR 500.105 apply to all types of vehicles used to provide transportation to workers, rather than having §§ 500.104 and 500.105 apply depending upon the type of vehicle used, indicating that this would be less confusing for employers and more beneficial to workers, as § 500.105 incorporates additional safety standards. Another commenter opposed the application of § 500.104, stating that transportation safety is the concern of the Federal Motor Carrier Safety Administration, and also expressing concern that employers would be responsible for ensuring that these safety standards are met by workers' personal vehicles, when workers choose to use their own vehicles in lieu of employer-provided transportation.

Some commenters also provided feedback on the Department's request for comments about additional provisions that might help prevent driver fatigue and other unsafe driving conditions. Although one commenter indicated that driver fatigue was not a common or serious problem, most commenters acknowledged that driver fatigue and associated accidents can be a serious problem. However, several of these commenters stated that education and outreach would be more helpful than additional regulations on transportation safety. One commenter suggested that H–2A drivers have rest period requirements similar to bus drivers and other commercial driver's license drivers. Another commenter did not address fatigue specifically but recommended that the regulation require vehicles used to transport H–2A workers to be equipped with seatbelts, as well as certain changes to prevent gaps in insurance coverage where employers rely on workers' compensation policies to meet the regulation's vehicle insurance requirements. Specifically, this commenter recommended employers be required to identify during the application process the types of transportation that will be provided to the H–2A workers (such as inbound transportation from abroad to the U.S. job site, daily transportation between the lodging and worksite, transportation to allow the workers to perform personal errands, transportation between different job sites in different States, and outbound transportation at the conclusion of the contract period). In addition, the commenter recommended that if the employer proposes to satisfy the insurance requirements through a workers' compensation policy, it must provide evidence that the policy covers all of the kinds of transportation identified. If the employer cannot do so, the commenter stated that the employer should be required to purchase liability insurance or provide a liability bond in the amount specified by the MSPA regulations.

After a careful review of the comments, the Department is adopting the regulatory text as proposed, with two minor changes for clarification, as suggested by commenters. The proposed regulatory text stated that all employer-provided transportation ''must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 *through* 500.105, and 29 CFR 500.120 through 500.128.'' (Emphasis added.) At least one commenter was concerned that this language could be read as requiring both §§ 500.104 and 500.105 to apply to all vehicles, as discussed above. However, pursuant to § 500.102, § 500.105 applies to ''[a]ny vehicle, other than a passenger automobile or station wagon'' used for any trip of a distance greater than 75 miles, or pursuant to a day-haul operation, or in any manner not otherwise specified in § 500.102(a), (b), or (c), while § 500.104 applies to ''[a]ny passenger automobile or station wagon'' used to transport workers. Therefore, to clarify that §§ 500.104 and 500.105 do

[86] The Department notes that the January 2021 draft final rule would have accepted the NPRM proposal, with some modifications. However, after further consideration of the comments received, and for the reasons discussed above, the Department declines to adopt the proposed changes.

not both apply simultaneously to all vehicles, but apply alternatively depending upon the type of vehicle used, the distance of the trip, and whether the vehicle is being used for a day-haul operation, this final rule provides that all employer-provided transportation ''must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 *or* 500.105, and 29 CFR 500.120 through 500.128.'' (Emphasis added.) The Department has also made a conforming change to 20 CFR 655.132(e)(2), with respect to the requirements for H–2ALCs.

In addition, the prior H–2A job order form (*i.e.,* Form ETA–790A) provided text fields in which employers must describe the employer's transportation plans for workers: (a) to the place of employment from the place from which the worker has come to work for the employer (*i.e.,* inbound); (b) from the place of employment to the place from which the worker has come to work for the employer (*i.e.,* outbound); and (c) daily, between the employer-provided housing and the places where work is performed. In response to a commenter's suggestion, the Department has added a clarification to 20 CFR 655.122(h)(4) to reflect the requirement that employers identify in the job order the mode(s) of transportation (*e.g.,* vans, buses) that will be used for daily transportation and, if known, for inbound and outbound transportation. The Department has also added language to this section of the regulation to require an employer to identify in the job order the mode(s) of transportation that will be used, if any and if known, for other purposes, such as to allow the workers to run personal errands. In addition to apprising workers of the transportation the employer will provide, the Department concludes that this information will improve compliance with applicable transportation safety standards, including those related to vehicle insurance requirements.

In response to a commenter's concern that these standards would apply to workers' personal vehicles when workers choose to use their own vehicles in lieu of employer-provided transportation, the Department notes that the regulation specifically states that all *employer-provided transportation* must meet these transportation safety standards. § 655.122(h)(4). If the employer provides transportation that meets all of the requirements, and one or more employees voluntarily choose to use an employee's personal vehicle instead, without being directed or requested to do so by the employer, the employer would not be responsible for ensuring that the employee's personal vehicle meets the transportation safety standards. Therefore, no revision to the regulatory language is necessary to clarify this issue. Similarly, the Department declines to adopt another commenter's suggestion to modify the regulatory language at § 655.122(h)(3) to state that employers are only required to provide transportation to and from the employer-provided housing and the job site to those workers for whom the employer must provide housing and clarifies here that the transportation to and from the employer-provided or secured housing and job site need only be provided to workers who actually live in the housing.

The Department has chosen not to adopt any additional regulatory provisions to address driver fatigue or other safety conditions at this time. Although one commenter suggested that the Department apply to H–2A drivers rest period requirements similar to those applicable to bus drivers and other commercial driver's license drivers, such requirements do not adequately address the broad variety of circumstances in which H–2A drivers transport workers, as many trips are short in both duration and distance. Moreover, the Department did not receive any specific suggestions or information concerning ways in which a rest period requirement could be tailored to address the varied circumstances in which H–2A drivers transport workers, and the public has not had an opportunity to comment on a proposal tailored to H–2A drivers. While the Department did not receive many comments on the issue of driver fatigue, several commenters indicated that additional education and outreach could help address driver fatigue, as discussed above. Accordingly, the Department recently published a farmworker transportation safety web page that includes tips and best practices from the U.S. Department of Transportation's Federal Motor Carrier Safety Administration related to driver fatigue, unsafe driving practices, and driver distractions, available at *https://www.dol.gov/agencies/whd/agriculture/transportation-safety,* and will further consider how it can address this issue.

Although the Department has carefully considered the suggestion that seatbelt requirements should be specifically added to the transportation safety standards, the Department notes that the issue is generally addressed by applicable State and local laws and regulations. The Department reminds employers that the current transportation safety standards already require compliance with all applicable Federal, State, or local laws and regulations, including applicable State or local seatbelt requirements. Currently, every State except one (New Hampshire) has an applicable seatbelt law, and the majority of States require adults to wear seatbelts in all seats, subject to certain exceptions. *See* Governors Highway Safety Association, *State Laws by Issue: Seat Belts* (last visited Dec. 14, 2021), *https://www.ghsa.org/state-laws/issues/seat%20belts.* Accordingly, seatbelt regulations will not be issued at this time. The Department also appreciates the insightful analysis of the potential problems that can arise when employers rely on workers' compensation policies to meet their liability insurance obligations, and the possible regulatory revisions that might address those problems. However, the Department did not propose any changes to the regulation regarding the sufficiency of workers' compensation to cover vehicle transportation in lieu of vehicle insurance. Many parties who would be affected by any change in these longstanding requirements therefore had no reason to anticipate any such changes or to provide comment or propose alternatives. Accordingly, the Department declines to adopt any regulatory changes to these provisions in this rulemaking.

However, the Department reminds employers that workers' compensation insurance provides specific coverage that varies from State to State and may not cover all circumstances in which the workers are transported. For instance, transportation for a non-work-related purpose, such as a visit to the grocery store or laundromat, may not be covered under the State policy. Additionally, State workers' compensation coverage may not apply to travel outside the State, or in some States, it may not apply to travel to and from work. If using a State workers' compensation policy to meet the insurance requirements, it is important to be aware of precisely what type of travel is covered by the State policy and, if necessary, procure additional coverage through a liability insurance policy or liability bond for transportation not covered by the State law. An employer's failure to maintain required insurance coverage for vehicles used to transport H–2A workers or workers in corresponding employment may result in the assessment of civil money penalties. A violation of the transportation safety requirements may

also serve as the basis for debarment or for revocation of the temporary agricultural labor certification.

e. Paragraph (i), Three-Fourths Guarantee

Although the Department did not propose, and in this final rule does not adopt, any revisions to § 655.122(i), a few employers and employer representatives provided feedback regarding changes that they would like to see incorporated into this section. Three commenters stated that due to the variability inherent in agriculture based on factors beyond the employer's control, which can make it difficult to predict the amount of work that will need to be performed in a given season, the three-fourths guarantee should be based on the 35-hour per workweek required minimum rather than on the number of hours in a workday as stated in the job order. Another commenter requested the removal of the language in § 655.122(i)(1)(iv) stating that the worker cannot be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or on Federal holidays.

The Department has carefully considered these comments. However, the Department did not propose any changes to this section in the NPRM and did not ask for comments regarding any possible modifications of the three-fourths guarantee. Accordingly, many affected parties did not provide any comments on the topic of the three-fourths guarantee, and the Department declines to make any significant changes to this provision in the absence of input from the regulated community as a whole.

f. Paragraph (j), Earning Records

The NPRM proposed minor amendments to this provision to clarify current regulatory requirements at § 655.122(j)(1), requiring an employer to maintain a worker's home address, among other information. The Department proposed that an employer maintain the worker's actual permanent home address, which is usually in the worker's country of origin. Having the worker's permanent addresses would permit the Department to contact a worker in the case of an investigation or litigation, or to distribute back wages. In its effort to enhance enforcement and modernize the H–2A program, the Department also requested comments on whether to require an employer to maintain records of a worker's email address and phone number(s) in the worker's home country, when available. As discussed below, the Department is adopting the proposed changes to paragraph (j)(1), as well as a requirement that the employer maintain records of a worker's email address and phone number(s) in the worker's home country, when available.

The Department received very few comments in response to its proposal and request for comments on this section. Three commenters opposed the proposal, expressing concern about an employer's ability to verify the accuracy of the workers' permanent addresses, phone numbers, or email addresses, with one commenter also noting that many H–2A workers may consider that information to be private. Another commenter noted that DHS should already have H–2A workers' permanent addresses and suggested that the Department obtain that information from them. Conversely, another commenter supported the Department's proposal, commenting that it was a useful clarification and suggesting that an employer maintain records of its H–2A workers' landlines if a cellphone number is not available.

Other commenters requested that employers no longer be required to maintain a record of hours offered (as opposed to merely hours worked), as such information is difficult to track and not needed unless the employer wishes to use it towards the three-fourths guarantee. These comments are outside the scope of the Department's proposal and, as such, were not considered at this time.

After consideration of the comments, the Department adopts paragraph (j)(1) as proposed with two modifications. Specifically, paragraph (j)(1) in this final rule requires employers to maintain records of a worker's permanent home address and, when available, the worker's permanent email address and phone number(s). As with the worker's permanent home address, the worker's permanent email address and phone number(s) will usually mean the worker's contact information, usually in the worker's country of origin. Based on its enforcement experience, the Department concludes that maintaining this information, when available, will further enhance the efficiency of the Department's enforcement efforts by providing multiple points of contact for workers once the workers have left the employer's place of employment. And while the Department acknowledges that employers may not have the ability to verify the accuracy of all contact information provided by their workers, which may occasionally result in the Department attempting to contact a worker at an incorrect address, or that some workers may decline to share this information with an employer, the benefits of maintaining this information outweigh these potential concerns. Finally, the Department notes that the January 2021 draft final rule would have left the regulatory text unchanged from the 2010 H–2A Final Rule. However, upon further consideration of the comments and in light of the substantial benefit that the collection of this information would confer to the Department in its enforcement efforts, the Department adopts the above-described changes in this final rule.

g. Paragraph (l), Rates of Pay

In the NPRM, the Department proposed to remove the statement ''[i]f the worker is paid by the hour'' and replace it with ''[e]xcept for occupations covered by §§ 655.200 through 655.235.'' As explained in the NPRM, this revision clarifies that the highest applicable wage requirement applies, regardless of the unit of pay, for all employers except those employing workers primarily engaged in the herding or production of livestock on the range (*i.e.,* occupations covered by §§ 655.200 through 655.235), which are the only occupations subject to a different wage methodology. If an employer is certified for a monthly salary because, for example, the prevailing wage rate is a monthly rate, the requirement to pay the highest applicable wage means that the employer must pay the hourly AEWR for all hours worked in a given month, if paying the hourly AEWR for all hours worked in that month would result in a higher wage than the certified monthly salary. The Department did not receive comments on this specific proposal, and therefore adopts the language as proposed.

Additionally, the Department proposed to make corresponding changes to align this paragraph with the proposed changes to § 655.120(a). Those changes, as well as related comments, are discussed in more detail in the preamble to § 655.120(a). For the reasons stated in that section, the Department adopts the language in the NPRM with minor revisions to align with language regarding prevailing wages at § 655.120(c). As discussed further in the preamble to § 655.120(c)(1)(iii), the revised language in this paragraph recognizes that there may be a prevailing wage for a distinct work task or tasks within a crop or agricultural activity in certain situations.

The Department also received comments urging the Department to revise productivity standards for workers paid by the piece. One of these

commenters suggested the Department exercise more flexibility in its review of productivity standards, while another commenter suggested a more rigorous review. Because the Department did not propose changes to productivity standards, these comments are beyond the scope of this rulemaking.

h. Paragraph (n), Abandonment of Employment or Termination for Cause

The Department's current regulation at § 655.122(n) states that if a worker voluntarily abandons employment or is terminated for cause, and the employer notifies the NPC (and DHS if the worker is an H–2A worker), then the employer is not responsible for paying or providing for the worker's subsequent transportation and subsistence expenses, and that worker is not entitled to the three-fourths guarantee described in § 655.122(i). Under the Department's changes related to § 655.153, discussed below, timely notice to the NPC of such abandonment or termination will also relieve the employer from its otherwise applicable obligation to contact those U.S. workers it employed in the previous year who abandoned or were terminated for cause to solicit their return to the job. As discussed below, current § 655.153 does not require the employer to have provided the NPC with such notice in order to be relieved of the duty to contact former U.S. workers who abandoned the worksite or were dismissed for cause. The Department also proposed to revise § 655.122(n) to require an employer to maintain records of the notification to the NPC detailed in the same section, including records related to U.S. workers' abandonment of employment or termination for cause during the previous year, for not less than 3 years from the date of the temporary agricultural labor certification. As discussed below, this final rule adopts paragraph (n) from the NPRM with minor clarifying changes.

The Department received comments from employers, agents, and trade associations addressing this section. Most of these comments suggested that employers should not be required to notify the NPC of the abandonment or termination of U.S. workers. These commenters stated that, although it may be important to notify DHS that H–2A workers are out-of-status, DOL does not similarly need to know the status of U.S. workers, making it unfair to penalize employers for not making such a report, particularly as it is not required under other programs. Commenters also suggested that if the notification requirement for U.S. workers was maintained in the final rule, employers should not be required to maintain a record of that notification, as that additional recordkeeping burden is an inefficient use of the employer's resources, particularly as the employer will generally have other records of some kind demonstrating that the workers abandoned their employment or were terminated for cause. One commenter also asked the Department to clarify that these notification and recordkeeping requirements apply only to U.S. workers in corresponding employment and suggested that the requirement be even further limited to full-time workers hired during the recruitment period pursuant to the job order, due to the fluid and migratory nature of the agricultural workforce. Another commenter suggested that abandonment, which under the current regulation is deemed to begin after a worker fails to report for work at the regularly scheduled time for 5 consecutive working days without the consent of the employer, instead be deemed to begin after a worker fails to report for work at the regularly scheduled time for 3 consecutive working days without the consent of the employer, as workers may need to be replaced quickly due to the perishable nature of agricultural goods.

The Department has reviewed the comments suggesting that employers not be required to notify the NPC of the abandonment or termination for cause of U.S. workers. As an initial matter, the Department notes the requirement to notify the NPC of such U.S. worker abandonment or termination for cause is not new; the current regulations require employers to provide such notice in order to be relieved of the otherwise applicable contractual obligations relating to outbound transportation and the three-fourths guarantee. The Department proposed no changes to the notification requirements currently in place to relieve employers of their transportation and three-fourths guarantee contractual obligations and, accordingly, declines to adopt any changes to those existing requirements as beyond the scope of this rulemaking. As discussed further below, the Department has adopted its proposal providing that such notification to the NPC is required to relieve the employer from its obligation to contact these U.S. workers in the subsequent year under § 655.153. Accordingly, the Department has revised proposed § 655.122(n) in this final rule to clarify such relief by explicitly referencing the employer's obligations under § 655.153. Providing notification to the NPC of the abandonment or termination of U.S. workers is not a penalty for the employer. On the contrary, it is an opportunity for the employer to cancel its existing obligations to pay for outbound travel and subsistence; ensure that the employer has met the three-fourths guarantee; and to contact former U.S. workers during recruitment, as discussed in reference to § 655.153 below. Requiring notification to the NPC also ensures that the Department is on notice that the employer considers these obligations to be inapplicable to specific workers. This notification also helps the employer establish that a worker abandoned the job or was terminated for cause.

Similarly, the Department has also decided to retain the proposed requirement that the employer must maintain a record of its notification of abandonment or termination for cause to the NPC to be relieved of their further contractual obligations to such U.S. workers. Once the employer has provided the required notification to the NPC for these workers, maintaining a record of such notifications with the employer's other records relating to the workers' abandonment or termination for cause will not substantially increase the employer's recordkeeping burden. In contrast, maintaining these records could greatly assist employers and the Department in establishing that the employer is no longer required to provide outbound travel and subsistence, the three-fourths guarantee, or recruitment contact for such workers. In response to one commenter's request for clarification, the Department confirms that the requirements for notification of abandonment or termination for cause of U.S. workers, including the recordkeeping requirement, are applicable only when the employer wishes to be relieved of further contractual obligations toward those workers; if the employer does not have any contractual obligation to provide outbound travel and subsistence, pay the three-fourths guarantee, or contact that worker for recruitment, the employer need not make such a notification for that worker.

The Department has considered the comment suggesting that the abandonment be deemed to have occurred after a worker fails to report for work at the regularly scheduled time for 3 consecutive working days without the consent of the employer, as opposed to 5 consecutive working days, but has decided to retain the current regulatory language. As the Department did not propose any changes to, or request comments on, the length of time that a worker must fail to report to work before the worker is deemed to have

abandoned their employment, the affected parties had no reason to anticipate that the Department contemplated a change to this provision, or to provide their input as to the appropriate length of time that should elapse before an absence should be considered abandonment and what factors should be considered. Therefore, the Department finds it is not appropriate to adopt such a change at this time.

i. Paragraph (o), Contract Impossibility

The NPRM proposed to retain the contract impossibility provision at paragraph (o) without change. Although the Department did not propose changes to, or invite comments regarding, this paragraph, the Department received comments from agents, trade associations, and a State government agency that addressed the contract impossibility provision. As discussed below, this provision remains unchanged from the NPRM. All of the commenters supported inclusion of the contract impossibility provision in the final rule. Three commenters suggested that the Department modify the provision. One of the commenters requested the Department add a specified timeframe for the CO's determination, such as within 48 hours of receipt. The second commenter requested the Department remove the employer's obligation to make efforts to transfer H–2A workers to comparable work and retain the obligation for U.S. workers only. The third commenter requested the Department revise this provision to clarify that an employer's request for a contract impossibility determination may involve some, but not all, of its workers, depending on the nature of the Act of God involved.

Revisions to paragraph (o) are beyond the scope of this rulemaking and are therefore not being made. A revision to paragraph (o) is not necessary, however, to address the commenter's concern about Acts of God that reduce, but do not eliminate, an employer's need for temporary workers. This provision involves permissible termination of the work contract between the employer and individual workers in the event that an Act of God renders the planned contract inviable. In the interest of striking an appropriate balance between ensuring fairness to workers and minimizing work contract disruptions, the Department does not require that requests for relief under the contract impossibility provision end the contracts with the entirety of an employer's workforce. Rather, employers are encouraged to request reductions in the quantity of workers needed as best fits their particular circumstances.

j. Paragraph (p), Deductions

The Department's current regulation at § 655.122(p) prohibits unauthorized deductions. An employer must disclose any deductions not required by law in the job offer. The Department noted, however, that employers often fail to disclose deductions by improperly withholding Federal Insurance Contributions Act (FICA) taxes. Alternatively, employers sometimes properly disclose and withhold Federal income tax at the worker's request but fail to remit the withholding to the proper agencies. These actions, even if inadvertent, constitute violations of the H–2A statute and regulations.

The Department did not propose any change to the regulation at § 655.122(p), but clarified in the preamble to the NPRM that according to the IRS, an employer may not withhold FICA taxes from an H–2A worker's paycheck, and that an employer generally is not required to withhold Federal income tax from an H–2A worker's paycheck. In some situations, employers may even be prohibited from withholding Federal income tax under the H–2A program. The Department received no comments in response to this section of the NPRM and has made no changes to the regulation in this final rule.

k. Paragraph (q), Disclosure of Work Contract

The Department's current regulation at § 655.122(q) requires an employer to disclose a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. At a minimum, the work contract must contain all of the provisions required by § 655.122. In the absence of a separate, written work contract entered into between the employer and the worker, the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract. The time by which the work contract must be provided depends on whether the worker is entering the United States to commence employment or is already present in the United States; however, for most H–2A workers, this must occur by the time the worker applies for a visa. The Department proposed to retain the current disclosure requirements with one minor revision to specify that the work contract must be disclosed to those H–2A workers who do not require a visa to enter the United States under 8 CFR 212.1(a)(1) not later than the time of an offer of employment. This is the same point at which H–2A workers who are already in the United States because they are moving between H–2A employers receive the work contract. The Department did not receive any comments on this proposed change and therefore retains the language as proposed.

4. Section 655.123, Optional Pre-Filing Positive Recruitment of U.S. Workers

In the NPRM, the Department proposed to add a new provision at § 655.123 to permit an employer to begin to conduct its positive recruitment efforts earlier in the H–2A application process.[87] Specifically, the Department proposed new standards and procedures establishing a ''pre-filing'' positive recruitment option that would allow an employer to either begin positive recruitment activities after the SWA's acceptance of the job order for clearance under § 655.121 and before submission of the *Application for Temporary Employment Certification* to the NPC (*i.e.,* pre-filing), or wait for the CO's NOA, consistent with current practice. After considering the comments received in response to the NPRM, and the subsequent impact of the Department's decisions in the 2019 H–2A Recruitment Final Rule (effective October 21, 2019) on the proposed optional pre-filing positive recruitment provision, the Department has decided not to adopt § 655.123 in this final rule for the reasons discussed below.

The INA requires the Secretary to deny a temporary agricultural labor certification if ''the employer has not made positive recruitment efforts within a multi-state region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified United States workers who, if recruited, would be willing to make themselves available for work at the time and place needed.'' *See* 8 U.S.C. 1188(b)(4). The requirement for employers to engage in positive recruitment is in addition to, and occurs within the same time period as, the circulation of the job order through the interstate clearance system maintained by the SWAs. *Id.* Under the 2010 H–2A Final Rule, employers begin to conduct required positive recruitment steps after the CO reviews an H–2A application and issues a NOA authorizing such recruitment of U.S. workers to commence.

[87] At the time the NPRM was published, an employer's positive recruitment requirements included the activities set forth in §§ 655.151 through 655.154 of the 2010 H–2A Final Rule. Subsequently, the Department rescinded §§ 655.151 and 655.152 via the 2019 H–2A Recruitment Final Rule to modernize the method(s) used to advertise H–2A job opportunities. 84 FR 49439.

As explained in the NPRM, the Department engaged in the 2019 H–2A Recruitment Final Rule contemporaneously with this rulemaking to modernize the method(s) used to advertise H–2A job opportunities for compliance with the positive recruitment requirements of the 2010 H–2A Final Rule. On September 20, 2019, shortly before the public comment period for this NPRM closed on September 24, 2019, the Department published the 2019 H–2A Recruitment Final Rule, which became effective October 21, 2019. The 2019 H–2A Recruitment Final Rule rescinded §§ 655.151 and 655.152; in lieu of employer-placed print advertisements in a newspaper of general circulation in the AIE, the Department leverages its enhanced electronic job registry, *SeasonalJobs.dol.gov,* to advertise H–2A job opportunities electronically on the employer's behalf. This change in the recruitment process reduced the employer's mandatory positive recruitment activities, while increasing post-acceptance job order exposure through the Department's electronic job registry. Moving forward, an employer's mandatory positive recruitment activities include contacting former U.S. workers, as required under § 655.153, and following the CO's instructions regarding additional positive recruitment activities for the job opportunity, as applicable under § 655.154. However, the 2019 H–2A Recruitment Final Rule did not change the existing timeframe for an employer's positive recruitment activities. As a result, effective October 21, 2019, the CO instructs employers in the NOA to begin positive recruitment of U.S. workers under §§ 655.153 and 655.154 and, contemporaneously, the CO posts the job opportunity on the Department's electronic job registry.

Applying the changes implemented in the 2019 H–2A Recruitment Final Rule to the optional pre-filing positive recruitment procedures proposed in the NPRM at § 655.123, an employer would have begun positive recruitment activities contained in §§ 655.153 (contact with former employees) and 655.154 (statutorily required recruitment in a multi-State region of traditional or expected labor supply, as designated by the Secretary), as applicable, within 7 days of SWA job order acceptance. Then, no more than 50 calendar days before its first date of need, the employer would have submitted an initial recruitment report to the CO with its H–2A application. If the employer complied with the procedures described in § 655.123 and its H–2A application met all requirements for certification at the time of submission, the CO would have been able to issue the temporary labor certification as the CO's first action after review. An employer choosing not to begin positive recruitment early, following the proposed procedures at § 655.123, would have waited for the CO to issue the NOA and then begun positive recruitment in compliance with §§ 655.153 and 655.154.

Proposed § 655.123 would not have changed an employer's obligation to consider and hire able, willing, and qualified U.S. workers who will be available at the time and place needed to perform the labor or services involved in the application. Likewise, the proposed provision would not have changed the methods of contacting or recruiting U.S. workers an employer must use before hiring H–2A workers, or the duration of the recruitment period specified in § 655.135(d). Rather, § 655.123 would have allowed the employer to start compliance with its positive recruitment obligations earlier in the labor certification process and to engage in active recruitment of U.S. workers over a longer period of time before certification. In addition, § 655.123 would have streamlined the certification process for employers who demonstrated compliance with pre-filing recruitment obligations and met all other conditions of certification by permitting the CO to issue a certification determination as the first action.

The Department received several comments from employers, employer associations, agents, and trade associations that generally supported the optional pre-filing positive recruitment concept proposed. They viewed the option to begin positive recruitment activities earlier than current procedures allow, and thereby potentially receive a temporary labor certification as the CO's first action, as a way to reduce paperwork and burdens associated with this step, increase efficiency, and help prevent delays in workers' arrival, without undermining the program's integrity. A few also believed that the Department's certification determination would be better informed. A farm owner, for example, opined that beginning the recruitment period earlier would improve notice and access to these job opportunities for U.S. workers. Commenters employed as farmworkers generally noted the importance of notice and access to job opportunities, both in advance for planning purposes and after the work may have begun.

Two workers' rights advocacy organizations opposed the adoption of the proposed § 655.123. One asserted the proposal would weaken the requirement that employers first try to diligently recruit and hire U.S. workers before hiring H–2A workers. The other expressed concern that positive recruitment activities too far in advance (*e.g.,* 50 days) would waste employer resources and be ineffective because workers are engaged in other work, in other places; if the employer's positive recruitment activities occur earlier than the current regulatory timeline, the intended audience of the recruitment will not ''[be] around to hear it.'' The commenter urged the Department to retain the ''traditional systems of recruitment already in place.''

Within the proposed pre-filing recruitment provision, two agents, a farm owner, and a workers' rights advocacy organization objected to the proposed timing requirement for submission of the initial pre-filing recruitment report. The agents considered the proposed timeframe requirement artificial and unnecessary due to the requirements that employers continue hiring throughout the recruitment period, update the recruitment report as necessary, and retain a final recruitment report with an account of all applicants and referrals received. In addition, one saw the timeframe requirement as potentially creating delays, for example, if the CO questioned discrepancies between the SWA referral database and the employer's initial recruitment report. The farm owner asserted that in ''most years'' there are no applicants or referrals. The workers' rights advocacy organization objected on the grounds insufficient recruitment would have taken place before the employer submitted the initial pre-filing recruitment report to the CO.

At least one commenter found the combination of optional procedures and mandatory obligations in proposed § 655.123 confusing and concerning. For example, the commenter feared employers might incorrectly interpret paragraphs (d) and (e) of proposed § 655.123, relating to interviews and consideration and hiring of U.S. workers, as applicable only to pre-filing recruitment, not to all H–2A program recruitment. The commenter urged the Department to return the interview requirements provision to § 655.152(j); however, the Department rescinded § 655.152 in the 2019 H–2A Recruitment Final Rule. Another commenter urged the Department to integrate regulatory changes implemented through the 2019 H–2A Recruitment Final Rule when considering comments under this rulemaking process.

The January 2021 draft final rule would have adopted the Department's pre-filing recruitment proposal at § 655.123, with clarifying modifications. For example, in that draft final rule the Department recognized the necessity of clarifying that the proposed pre-filing recruitment was an optional process. In addition, in the January 2021 draft final rule, the Department sought to clarify that those employers who opted to use the process remained subject to the program's recruitment obligations. After further considering the comments received and the Department's changes to the recruitment process in the 2019 H–2A Recruitment Final Rule, the Department has decided not to adopt the pre-filing recruitment provision and will not include proposed § 655.123 in this final rule. However, the Department has decided to retain but relocate to § 655.135(c) the mandatory recruitment obligation provisions proposed at paragraphs (d) and (e) of § 655.123. The Department recognizes the comments that highlighted potential benefits of the proposed provision but is sensitive to the potential confusion that could result from adoption of the proposed provision. In light of the concerns raised, the Department considers retaining the current system beneficial, as explained below. Therefore, this final rule retains the positive recruitment process and timing of the 2010 H–2A Final Rule, as modified by the 2019 H–2A Recruitment Final Rule. As the Department is not adopting the proposed optional pre-filing recruitment provision, this final rule does not include minor revisions to other sections, like §§ 655.144 and 655.150, that were included in the January 2021 draft final rule to conform those sections to the optional pre-filing recruitment process.

Comments on both this proposal and the proposed recruitment period changes at § 655.135(d) expressed the importance of aligning the timing of the employer's recruitment activities, such as contact with former U.S. workers, with the time periods during which U.S. workers are accustomed to such contact and most likely to be looking for agricultural job opportunities (*e.g.,* close to or after the start date of work). In addition, employers may not be certain whether a potential pool of workers the OFLC Administrator identified through the labor supply State designation process proposed at § 655.154(d), and the related information posted regarding recruitment of that pool of workers, applies to its *Application for Temporary Employment Certification.* Furthermore, specific information about reaching the workers (*e.g.,* organization point of contact information) may change between the OFLC Administrator's annual posting of traditional or expected labor supply State determinations, which would hinder employers' pre-filing recruitment efforts. In contrast, in a case-specific NOA, the CO can provide current, accurate information regarding additional positive recruitment required to recruit a pool of workers relevant to the employer's job opportunity.

The Department believes that retaining the longstanding requirement that employers contact former U.S. workers and conduct additional positive recruitment activities, as applicable, following the CO's instructions in the NOA, in combination with the Department's decision to retain the requirement that employers continue to hire qualified U.S. workers through 50 percent of the contract period (as discussed in the preamble to § 655.135(d) below) will more effectively ensure U.S. worker access to H–2A job opportunities advertised through positive recruitment activities than the optional pre-filing recruitment proposed in the NPRM. This will also avoid the potential for confusion among U.S. job seekers or employers cited above. Specifically, the Department believes that this final rule will ensure that: (1) recruitment of U.S. workers occurs for a sufficient period of time before and after the first date of need; (2) active employer recruitment occurs during a period of time that is most consistent with the common job seeking practices of U.S. agricultural workers; and, (3) where appropriate, employers receive specific instructions in the NOA regarding the additional positive recruitment activity required and the documentation to retain as evidence of compliance. As discussed above and based on the Department's past experience administering the existing positive recruitment procedures and requirements, the Department believes these provisions effectively provide notice of available job opportunities to U.S. workers.

As a result, through this final rule, the Department retains the positive recruitment timing required in the 2010 H–2A Final Rule. An employer will continue to file a job order no fewer than 60 calendar days before the employer's first date of need, except where the employer files the application under the emergency situations provision at § 655.134, and, upon SWA approval of the job order, intrastate recruitment will begin. Recruitment through the active job order will expand to interstate clearance with the CO's issuance of a NOA and continue throughout the 50 percent period. When issuing the NOA, the CO will post the job opportunity on the Department's electronic job registry, which will broadcast the job offer information through the Department's enhanced electronic job registry at *SeasonalJobs.dol.gov* and ensure the job opportunity posting is continuously accessible to prospective applicants, regardless of their location, until the recruitment period at § 655.135(d) ends. In addition, upon receipt of the NOA, the employer will follow the CO's instructions and begin to conduct positive recruitment activities by contacting former employees to determine their willingness to accept the employer's job opportunity, as discussed further in the preamble to § 655.153 below, and conducting additional positive recruitment based on the OFLC Administrator's determination that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed, as discussed in the preamble to §§ 655.143 and 655.154.

In addition to the comments addressed above, some commenters offered opinions about matters that had been open for public notice and comment through the 2019 H–2A Recruitment Final Rule; those comments are outside the scope of this rulemaking. Other commenters expressed general concerns about employers' methods of contact, interview procedures, consideration of applicants or referrals, and documentation retention, which are matters that are also outside the scope of the optional pre-filing positive recruitment timing proposed in the NPRM.

5. Section 655.124, Withdrawal of a Job Order

The NPRM proposed to reorganize all withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* and job order is located in the section of the rule where an employer at that stage of the labor certification process would look for such a provision. Accordingly, the NPRM proposed revisions to move the job order withdrawal provisions at § 655.172(a) of the 2010 H–2A Final Rule to this new section, and to conform with other proposed changes in the NPRM. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as

discussed below, this provision remains unchanged from the NPRM.

In the 2010 H–2A Final Rule, all withdrawal provisions were found at § 655.172, in the ''Post-Certification'' section of the regulations, regardless of the stage of processing to which they applied. For example, at § 655.172(a), the 2010 H–2A Final Rule addressed the conditions under which an employer could withdraw a job order before it submitted the related *Application for Temporary Employment Certification.* To make the rule better organized and more user-friendly, the Department proposed to reorganize the withdrawal provisions, in part, by moving the content of § 655.172(a) of the 2010 H–2A Final Rule to the ''Pre-Filing Procedures'' section of the regulations, in a new proposed § 655.124. This change would place the job order withdrawal provision in a more logical location within the regulations—in the ''Pre-Filing Procedures'' section with the job order filing and review procedures, and before the ''Application for Temporary Employment Certification Filing Procedures'' section that begins at § 655.130.

In addition to the proposal to relocate the job order withdrawal provision to § 655.124, the Department proposed minor revisions for both clarity and consistency with other proposed changes. In proposed § 655.124(a), the Department continued the 2010 H–2A Final Rule's reminder in § 655.172(a) that ''withdrawal of a job order does not nullify existing obligations to those workers recruited in connection with the placement of a job order pursuant to this subpart'' with greater simplicity. In proposed § 655.124(b), consistent with the proposal employers submit their job orders to the NPC, the Department proposed to establish the NPC as the recipient of job order withdrawal requests.

The Department received no comments objecting to the proposed reorganization of the job order withdrawal provision from § 655.172(a) to § 655.124. However, an agent voiced concerns about establishing the NPC as the recipient of job order withdrawal requests, and that agent and a few other commenters remarked on an employer's continuing obligations after the job order's withdrawal.

Regarding the Department's proposal to establish the NPC as the recipient of job order withdrawal requests, the commenter argued that the Department did not consider the costs and benefits of this particular change, particularly that it would result in undue delays in processing, and also that it lacks the authority to perform what the commenter considers an inherently State function. The Department respectfully disagrees. The costs and benefits of establishing the NPC as the conduit through which job orders are received and transmitted to the SWAs, including technological efficiencies gained in the processing of job orders through the Department's electronic filing system, are addressed in connection with § 655.121. Those costs and benefits encompass receipt and transmission of job order withdrawal requests. In addition, the Department addressed similar concerns about possible delays in the preamble to § 655.121. The NPC will transmit an employer's request for withdrawal of a job order within the FLAG system to all SWAs actively recruiting under the job order. The SWAs that received the job order in accordance with § 655.121(e)(1) and, if applicable, § 655.121(f) will receive notice simultaneously and without delay. Further, the SWAs, not the NPC, will initiate procedures to close withdrawn job orders in the clearance system, as appropriate. As with its transmission of the initial job order submission to the SWA for review under § 655.121(e)(1) and transmission of the approved job order to other SWAs for clearance under § 655.121(f), the procedural role proposed in § 655.124 does not exceed the NPC's authority.

The same agent and a few other commenters objected to employers being ''obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order'' after withdrawal of the job order. Two suggested an employer should be required to honor the terms of a job order only if the employer has filed an *Application for Temporary Employment Certification* with the NPC, with one citing emergency circumstances beyond an employer's control that may prevent the employer from continuing with the H–2A process. The other two commenters objected to continuing obligations beyond withdrawal of the job order, apparently without regard to when the job order is withdrawn. However, these comments overstate the Department's proposed changes and conflict with the underlying obligation that was continued from § 655.172 of the 2010 H–2A Final Rule.

Although the Department proposed clearer language to express an employer's continuing obligations to a worker recruited in connection with the job order it seeks to withdraw, the Department proposed no change to the underlying requirement. If an employer successfully recruits workers through SWA referrals, the employer is bound by the terms and conditions of employment offered in the job order with respect to those workers, including but not limited to wages, housing, and transportation. *See* § 653.501(c)(3)(viii). As stated in the NPRM, and the 2010 H–2A Final Rule, these obligations attach at recruitment and continue after withdrawal. As a result, these comments recommend changes that are beyond the scope of this rulemaking.

C. Applications for Temporary Employment Certification Filing Procedures

1. Section 655.130, Application Filing Requirements

a. Paragraphs (a), What To File; (c), Location and Method of Filing; and (d), Original Signature

The NPRM proposed minor amendments to these sections to clarify the minimum content requirements of a complete *Application for Temporary Employment Certification;* modernize the application process by requiring that employers, unless a specific exemption applies, electronically submit the *Application for Temporary Employment Certification* and all required supporting documentation; and permit the use of electronic signatures by the employer and, if applicable, the employer's authorized attorney, agent, or surety. The Department received many comments on the proposed amendments to these sections, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed language under paragraph (a) to clarify that the content of a complete *Application for Temporary Employment Certification* for submission to the Department must include a completed *Application for Temporary Employment Certification;* all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135; and, unless a specific exemption applies, a copy of Form ETA–790/790A, submitted as set forth in § 655.121(a). The employer's valid FEIN, a valid place of business (physical location) in the United States, and a means by which the employer may be contacted for employment must be included in the employer's submission.

As discussed in the NPRM, OFLC's FLAG system will assist employers and their representatives in preparing complete submissions, as it will not permit an employer to submit an *Application for Temporary Employment Certification* until the employer

completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all documentation and information required at the time of filing, including a copy of the job order submitted in accordance with § 655.121. For applications permitted to be filed by mail pursuant to the procedures discussed below, if an employer submits an application that is incomplete or contains errors, the Department will issue a NOD identifying any deficiencies, and the employer will be required to mail back a revised application, thus requiring a timely back-and-forth to complete the application.

The Department proposed language under paragraph (c) to require an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator. The Department also proposed procedures that would permit employers lacking adequate access to e-filing to file by mail and would permit employers that are unable or limited in their ability to use or access the electronic application due to a disability to request an accommodation to allow them to access and file the application through other means. Under proposed paragraph (c)(2), employers could request an accommodation if they are limited in their ability to use, or are unable to access, electronic forms or communication due to a disability. Unless the employer requested an accommodation due to a disability or inadequate access to e-filing, the NPC would return, without review, any *Application for Temporary Employment Certification* submitted using a method other than the electronic method(s) designated by the OFLC Administrator. Finally, proposed paragraph (d) of this section adopted the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney, agent, or surety.

The Department received many comments expressing strong support for the e-filing proposals as a way to improve the quality and accuracy of documents the Department receives and reduce processing times and paperwork burdens for employers, the Department, and SWAs. Some of these commenters noted employers in rural and remote areas may not have access to the means to file electronically, and they urged the Department to retain in the final rule proposed paragraphs (c)(2) and (3) of this section that permit filing by mail, provided the employer submits, in writing, a request for reasonable accommodation. In response to these comments, the Department agrees and has retained these provisions in this final rule.

Commenters also generally supported the proposal to require electronic signatures for all electronically filed applications, though several commenters stated they would not support any provision requiring the filer to electronically sign documents within the FLAG system or prohibiting the filer from using copies of a ''wet'' signature. One commenter also expressed concern DHS might not accept the electronic signatures required under this final rule.

This final rule does not require employers to sign documents within the FLAG system, and it does not prohibit handwritten ''wet'' signatures, which filers electronically copy (scan) and upload into the electronic filing system, while retaining the original in the employer's document retention file. Under this provision, in addition to accepting electronic (scanned) copies of ''wet'' signatures, the OFLC Administrator will permit an employer, agent, or attorney to sign or certify a document required under this subpart using a valid electronic signature method. Consistent with the Government Paperwork Elimination Act (GPEA) [88] and Electronic Signatures in Global and National Commerce Act (E–SIGN Act),[89] the Department is adopting a ''technology neutral'' policy with respect to the requirements for electronic signatures. That is, the employer, agent, or attorney can apply a required electronic signature on a document using any available technology that can meet the five signing requirements in OMB guidelines: (1) the signer must use an acceptable electronic form of signature; (2) the electronic form of signature must be executed or adopted by the signer with the intent to sign the electronic record; (3) the electronic form of signature must be attached to or associated with the electronic record being signed; (4) there must be a means to identify and authenticate a particular person as the signer; and (5) there must be a means to preserve the integrity of the signed record.[90] The OFLC Administrator will accept electronic signatures affixed to required documents using any available technology that meets the five signing requirements above. DHS will accept electronic signatures that have been accepted by the Department. As noted in the NPRM, the GPEA specifically states electronic records and their related electronic signatures are not to be denied legal effect, validity, or enforceability merely because they are in electronic form, and encourages Federal Government use of a range of electronic signature alternatives. *See* secs. 1704 and 1707 of the GPEA. In addition, this approach is consistent with the Department's conclusion in an earlier rulemaking that these standards for accepting electronic signatures are reasonable and accepted by Federal agencies.[91]

Finally, one SWA that supported the e-filing proposal also urged the Department to use the e-filing process to collect demographic information, including information identifying areas with a high concentration of certified workers and a detailed breakdown of the number of workers certified by occupation. The commenter stated this information is often requested of SWAs and enhanced collection of the information would allow SWAs to better assess farm labor trends and address regional employment needs. The Department agrees it is important to collect H–2A program information and make it available to the public. The Department will continue to collect detailed program information, including information about work locations and certification numbers by occupation, and publish this information on the OFLC website and in periodic reports produced by the agency.

b. Paragraph (e), Scope of Applications

The NPRM proposed amendments to this section to clarify the geographic scope of all *Applications for Temporary Employment Certification* submitted by employers to the NPC and permit the filing of only one *Application for Temporary Employment Certification* for place(s) of employment covering the same geographic scope, period of employment, and occupation or comparable work. The Department received many comments on the proposed amendments to these sections. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions discussed below.

[88] Public Law 105–277, Title XVII (Secs. 1701–1710), 112 Stat. 2681–749 (Oct. 21, 1998), 44 U.S.C. 3504.

[89] Public Law 106–229, 114 Stat. 464 (June 30, 2000), 15 U.S.C. 7001 *et seq.*

[90] Federal Chief Information Council, *Use of Electronic Signatures in Federal Organization Transactions*, Version 1.0 (Jan. 25, 2013).

[91] *See* Interim Final Rule, *Labor Certification Process for Temporary Employment in the Commonwealth of the Northern Mariana Islands (CW–1 Workers),* 84 FR 12380, 12393 (Apr. 1, 2019).

The Department proposed a new paragraph (e) to clarify that each *Application for Temporary Employment Certification* must be limited to places of employment within a single AIE, except where otherwise permitted by the subpart (*e.g.,* under § 655.131(a)(2)), a master application may include places of employment within two contiguous States). This proposal addressed the overall lack of clarity in the 2010 H–2A Final Rule regarding whether an application could include places of employment that span more than one AIE, and ambiguity created by its revisions to § 655.132(a), which specifically limited only H–2ALC applications to places of employment within a single AIE. As stated in the NPRM, limiting the geographic scope of H–2A program job opportunities is an essential component of the labor market test necessary to determine both the availability of U.S. workers for the job opportunity and to ensure that U.S. workers in the local or regional area have an opportunity to apply for those job opportunities located within normal commuting distance of their permanent residences. The Department noted that qualified U.S. workers may be discouraged from applying for these job opportunities if required to perform work at places of employment both within and outside the normal commuting area or where assignment to places of employment outside normal commuting distance was possible, despite the availability of closer work. Furthermore, the Department stated that monitoring program compliance becomes more difficult and the potential for violations increases when workers employed under a single *Application for Temporary Employment Certification* are dispersed across more than one AIE.

After considering the comments received, the Department has decided to adopt this provision, with two modifications. First, the Department split this section into two parts; paragraph (e)(1) addresses the geographic scope limitation, while paragraph (e)(2) maintains the administrative limitation that an employer may file only one *Application for Temporary Employment Certification* covering the same AIE, period of employment, and occupation or comparable work to be performed. Second, as discussed below, the Department modified paragraph (e)(1) to address job opportunities that involve mobility within the workday, after the workday begins.

Employers, agents, and trade associations generally objected to a single AIE limit on fixed-site employer applications. Two commenters viewed it as a limit on the size of farm that can be included on an *Application for Temporary Employment Certification,* explaining that it is not uncommon for a farm to consist of multiple locations (*e.g.,* fields or packing facilities) that may be in close proximity or may be located more broadly throughout a particular growing region of the State. These commenters argued that incidental travel during the regular paid workday in employer-provided vehicles, for example to pick up or deliver crops, move workers between farm locations, etc., should not be a factor in determining the geographic scope of an *Application for Temporary Employment Certification.* In addition, one commenter added that there should be no limit to distances on travel ''as the first worksite location or the employer's pick-up location are clearly defined and transportation between worksites is provided and paid by the employer.'' Other commenters explained that restricting an H–2ALC *Application for Temporary Employment Certification* to one AIE may be justified for monitoring purposes, as such employers provide labor services to various fixed-site growers in different areas according to contracts, unlike a fixed-site grower, which has a known fixed location where the Department can go to perform its monitoring process. One of them objected to what it viewed as a significant change that would apply a restriction reasonable for H–2ALCs but not for fixed-site growers. The commenter urged the Department, without explanation, to retain the single AIE restriction for H–2ALCs only.

Farmworkers and interested private citizens emphasized the importance of local work for farmworkers and generally agreed with the Department's concern that job opportunities with worksites outside the local commuting area discourage U.S. applicants. These commenters provided examples of the difficulties in getting to job opportunities that are not local, whether due to challenges in arranging rides to work or problems with work-life balance when the commute is too long. A workers' rights advocacy organization explained that broad determinations of AIE (*i.e.,* ''normal commute'' to the job) are misused to refuse housing—and related transportation to worksites—to U.S. workers who reside within large AIE.[92]

The Department sought to strike an appropriate balance between the domestic labor market interests served by a single AIE geographic limitation on an *Application for Temporary Employment Certification* and the geographic flexibility growers need within a particular workday for certain job opportunities (*e.g.,* truck drivers who deliver crops to market), which do not impact workers' commute time or distance. To that end, in this final rule, the Department revised proposed paragraph (e)(1) to clarify that where a job opportunity involves work at multiple places of employment after the workday begins, the *Application for Temporary Employment Certification* may include places of employment outside a single AIE. First, this language ensures that any travel outside the AIE occurs during the workday and thus is compensable time.[93] Second, the revised language limits such within-workday mobility to only those job opportunities where it is necessary to perform the duties specified in the *Application for Temporary Employment Certification.* Last, the revised language specifies that this expanded geographic area (*i.e.,* places of employment beyond the AIE after the workday begins) is permitted only if workers can reasonably return to their residence or employer-provided housing within the same workday. This parameter ensures that *Applications for Temporary Employment Certification,* subject to paragraph (e), include places of employment outside a single AIE only where there is no impact to the reasonable, normal, and safe daily commute for all of the employer's workers who reside within the AIE, whether at their own residence or in employer-provided housing.

Accordingly, the additional language in paragraph (e)(1) accommodates the types of job opportunities commenters described (*e.g.,* truck drivers delivering their employer's crop to market or storage) as unreasonably limited by a single AIE limitation, without negative impact to workers or the underlying labor market test. This text is consistent with the definitions of AIE and place of employment in § 655.103(b), and with

[92] The Department also addressed these comments in connection with the definition of AIE at § 655.103(b).

[93] As the INA does not define ''hours worked,'' the Department has concluded that it is beneficial for workers, employers, agents, and WHD to ground enforcement of INA program obligations in its decades of experience enforcing the FLSA, which applies to H–2A workers. *See* 2015 H–2B IFR, 80 FR 24042, 24062. The FLSA clarifies that, unlike normal home-to-work travel, which need not be compensated, time spent by an employee in travel as part of their principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. *See* 29 CFR 785.38. The Department also discusses the relationship between the INA and FLSA hours worked principles in its response to public comments on 20 CFR 655.300.

the comments discussed in the preamble for those definitions.

Regarding paragraph (e)(2), as explained in the NPRM, this provision prevents the Department from receiving and processing duplicate applications and reduces duplicative efforts by preventing an employer from filing a new application for the same job opportunity while an appeal is pending. Paragraph (e)(2) also clarifies that filing more than one *Application for Temporary Employment Certification* is necessary only when an employer needs workers to perform full-time job opportunities that do not involve the same occupation or comparable work, or when workers perform the same full-time work but in a different AIE or with different starting and ending dates (*e.g.,* staggered start dates while ramping up). With respect to this provision, the Department did not receive any comments; accordingly, the Department is adopting this portion of the proposed regulatory text into clause (e)(2) without further change.

c. Paragraph (f), Staggered Entry of H–2A Workers

Current regulations require an employer to file separate *Applications for Temporary Employment Certification* for each sequential start date of work for each group of job opportunities. The NPRM proposed to add a new paragraph (f) at § 655.130 to allow an employer with an H–2A certification and an approved H–2A Petition to bring H–2A workers into the United States at any time during the 120-day period that follows the first date of need identified on the certified *Application for Temporary Employment Certification* (*i.e.,* staggered entry of H–2A workers for up to 120 days), under certain conditions.

The Department received various comments on the proposed staggered entry provision. Many commenters—including trade associations, employers, agents, individual commenters, two State government agencies, and a State elected official—expressed general support for the Department's proposal to allow the staggered entry of H–2A workers under a single *Application for Temporary Employment Certification.* The Department also received multiple comments on this proposal from public policy organizations, workers' rights advocacy organizations, immigration advocacy organizations, trade associations, individual commenters, a commenter from academia, two State government agencies, and two U.S. Senators. These comments highlighted a need for substantial revision of the proposal, both for clarification and to better maintain program integrity. After considering these comments, the Department has decided not to adopt the proposed staggered entry provision in this final rule, for the reasons discussed below.

Commenters who expressed support for the staggered entry proposal generally viewed it as a beneficial simplification of the H–2A program, particularly where an employer has labor-need phases within a season or growing cycle and currently files multiple, separate *Applications for Temporary Employment Certification* for each sequential start date. A few commenters explained, for example, that farmers rarely need their entire workforce at the beginning of a season, but instead need a steadily increasing number of workers as the harvest intensifies. An agent asserted that there is no law or regulation that prohibits staggered entry and urged the Department to retain this option in the final rule to enable employers to account for gradual changes to their labor needs through a single H–2A certification. Other commenters viewed staggered entry as a practical method of accommodating unpredictable factors, such as weather, that may change the exact timing of an employer's labor need within the season. A State elected official said staggered entry would help producers remain in compliance with regulations, while adapting to changing needs and conditions. Some commenters stated that the proposal would support efficient use of farm resources, reduce costs and paperwork burdens, both at the border and on the farm, and create efficiencies for the Department by reducing application processing workload. Some commenters remarked that the proposal would also benefit U.S. workers, who could apply for job opportunities during the extended staggered entry recruitment period.

Some of the commenters that supported the proposal urged the Department to provide additional flexibility for employers within the proposed staggered entry provision. For instance, some employers, trade associations, and agents urged the Department to add the word ''anticipated'' before ''latest date on which such workers will enter'' in paragraph (f), explaining employers may not know the exact dates when filing requests because of the unpredictable influence of weather on agricultural employers' labor needs. Another commenter urged the Department to extend the staggered entry provision beyond the proposed 120 days to accommodate potential delays while recruiting workers abroad, without suggesting an alternative end date. As the Department is not adopting the proposed staggered entry provision in this final rule, these suggestions are moot.

Among commenters opposed to the proposal, the primary concern was that permitting staggered entry of H–2A workers at any time up to 120 days after the advertised date of need would undermine the labor market test and negatively impact U.S. worker access to job opportunities. In addition to concerns about a reduced recruitment period, these commenters expressed concern that U.S. workers would lack clear, accurate information about job opportunities, such as start dates and when jobs are available. Two U.S. Senators stated the staggered entry proposal would introduce instability into domestic and foreign labor markets due to the lack of notification around reliable dates of employment. Workers' rights advocacy organizations expressed concern that U.S. workers would be disadvantaged because staggering would make it more difficult for them to learn of and apply for job opportunities. One of these commenters explained that having accurate, fixed information on dates, locations, and numbers of workers is essential to the labor market test, and staggered entry of H–2A workers would invalidate labor market determinations because the key information on which those determinations are based would change. One of the comment submissions consolidated many comments from agricultural workers who described the importance of knowing when seasonal work will begin and expressed concern over the staggered entry provision. A State agency expressed concern the proposal would complicate the recruitment efforts of SWAs. The two U.S. Senators and three State government agencies recognized the benefits of staggered entry for employers, but did not see benefits for workers, other than, perhaps, for those workers who could not commit to the full duration of employment but could commit to a later start date. The Senators and one of the State agencies asserted that extending the recruitment period for employers who chose to stagger entry of H–2A workers would not sufficiently remedy the harm resulting from the provision.

Another commenter urged the Department to continue to require a separate application if an employer decides to bring in more H–2A workers at a later date in a particular harvesting season, asserting that this is an important safeguard for U.S. workers, as

it provides U.S. workers a new, distinct opportunity to apply when H–2A recruitment activity for each subsequent start date commences, particularly in situations where a U.S. worker is not aware of the recruitment for the first start date of need, or is not available on the employer's first date of need. This commenter questioned how a U.S. worker would know whether the employer is still accepting applications for the job opportunity. A commenter from academia suggested that, if the Department were to adopt a staggered entry provision, then the Department should consider imposing additional recruitment requirements on employers, such as requiring employers to provide additional notice to SWAs that coincides with each phase of staggered entry.

Some commenters who opposed the staggered entry provision expressed concern about the potential for misuse. A workers' rights advocacy organization asserted the staggered entry proposal would provide a disincentive for employers to hire U.S. workers for the gradual start of the season and would make it easier for employers to fire workers (both U.S. and H–2A workers) who are not working up to productivity requirements and replace them with new H–2A workers throughout the staggering period. This commenter also envisioned employers establishing early start dates as a method of thwarting the recruitment of domestic workers. Another workers' rights advocacy organization noted many agricultural workers ''alter their migration patterns depending on the terms and conditions of employment'' and expressed concern that the staggered entry option would allow employers to ''manipulate traditional labor and recruitment patterns through massive applications covering multiple start dates and areas of employment'' and refuse employment to U.S. workers after the recruitment period ends. One of the State government commenters expressed concern that employers would use the ability to update the terms of employment to bring in foreign workers according to evolving need, which it asserted would violate MSPA's disclosure requirements and limit the ability of U.S. workers to obtain agricultural jobs. Another State government commenter expressed concern about the potential for the unlawful movement of workers, thinking that staggered entry could increase the difficulty in tracking and identifying such movement.

A few State agencies suggested that aspects of the proposed provision could be revised for clarity and efficiency. Specifically, one State agency noted the proposal did not set a limit on the number of times an employer may notify the NPC of its intent to stagger entry of H–2A workers and expressed the concern that an employer could submit multiple notices identifying different staffing plans. The commenter was concerned that multiple notices would result in increased communication between the Department, the SWA, and field staff, and would offset any efficiencies potentially gained by the staggered entry provision. Another State agency expressed the concern that allowing employers to opt into using the staggered entry up to 14 days after the first date of need could complicate the process of obtaining an H–2A visa, which could lead to unreimbursed travel and subsistence costs between the workers' home and the U.S. embassy or consulate.

In addition, the Department received other comments indicating a need for clarification of the proposal to permit staggered entry, if the Department were to adopt such a provision in this final rule. For instance, a few commenters sought confirmation that employers would not be prohibited from filing multiple, separate applications for sequential needs, rather than opting to use staggered entry. An association mistakenly understood that the proposed language indicated associations filing joint master applications would not be permitted to stagger the entry of H–2A workers or would have less flexibility than other joint employers. Another commenter mistakenly believed that the staggered entry option could be used by livestock employers to have workers arrive whenever needed; for example, to gather livestock in advance of a major storm event, which may occur outside the employer's seasonal need period or more than 120 days after its first date of need. Two U.S. Senators expressed concern that the staggered entry proposal could complicate compliance with the three-fourths guarantee that dictates the minimum number of hours an employer must offer to workers. Two State government agencies and a State elected official thought the proposal would increase SWA burdens and complicate their provision of services to workers, without an increase in funding, while another State government agency and an individual commenter requested guidance on how the staggered entry provision would affect completed certified housing inspections. One of the commenters explained that in some States, such as Oregon, SWA staff conduct site visits at the beginning of each H–2A contract, in part, to provide information to arriving workers about its services and workers' rights. The commenter believed that if workers were to arrive on multiple start dates, the SWA would be required to conduct multiple site visits per contract to provide the same services, rather than one per contract. Further, the commenter expressed concern that some arriving workers might not receive information through a site visit, as the SWA may not be informed when new workers arrive during the staggering period.

Commenters disagreed as to when the employer's obligation to hire U.S. workers should end (*i.e.,* how long the recruitment period under § 655.135(d)(2) should be) if the employer opted to use staggered entry. Some agreed with the Department's proposal to require the employer to hire U.S. workers through the employer's identified last date for staggering, or 30 days after the first start date, whichever is later. Some commenters clarified that they did not support attempts to extend the proposed hiring period beyond those proposed parameters. One argued that anything beyond 30 days after the last H–2A worker has entered the United States is overregulation, asserting there is no statutory prohibition against staggered entry. However, other commenters generally objected to any reduction in the period during which an employer is required to hire U.S. workers. A workers' rights advocacy organization objected to not including any recruitment obligations past the last date of staggered entry and two commenters suggested the employer's hiring obligation should be tied to the last entry of staggered workers. They urged the Department, for example, to extend an employer's obligation to hire U.S. workers to 30 days after the last H–2A foreign worker enters the United States or 30 days after each sequential staggered start date. In addition, some commenters expressed concern that the combination of proposals in this rulemaking, including staggered entry, would undermine the legitimacy of the labor market test, including the commenter from academia, who asserted the Department failed to evaluate the impact of the provision on the labor market test and urged the Department to evaluate the impact.

The Department also received a few comments addressing issues beyond the scope of the staggered entry proposal. A trade association and an employer involved in the apple production industry discussed the impact of

weather on predicting end dates for employers, and suggested the proposal should allow employers the flexibility to retain workers for an additional period after the anticipated end date of the work order without needing to file an extension. However, the staggered entry proposal involved only start date variability. End date flexibility, as the commenter noted, is already addressed through the extension provision at § 655.170. In addition, a workers' rights advocacy organization suggested the Department should revise the regulations to require a minimum training period in which workers may not be fired for failing to comply with productivity standards, so that employers would not terminate workers who do not initially meet productivity requirements and replace them with staggered workers. However, this suggestion is beyond the scope of this rulemaking.

The Department appreciates the many comments it received on the proposed staggered entry provision. The Department recognizes that in administering the H–2A program, it must strike an appropriate balance between the need to provide U.S. workers notice of available agricultural job opportunities, including clarity regarding the terms and conditions offered, and the opportunity to apply for those job opportunities, and, where insufficient U.S. workers are available to satisfy an employer's temporary agricultural labor need, the need to provide employers access to a pool of foreign labor through effective administration of the H–2A program. The Department is sensitive to comments indicating that the staggered entry provision proposed in the NPRM did not successfully strike this balance and, if adopted without revision, would have weakened the integrity of the labor market test and effective compliance monitoring and enforcement of program obligations, which was not the Department's intent. The Department recognizes that concerns expressed by commenters would require substantial revisions to address the significant limitations of the staggered entry proposal set forth in the NPRM: to address confusing aspects of the proposal; to ensure effective recruitment of U.S. workers for job opportunities, particularly where multiple or mid-season start dates are available; and to include parameters that balance flexibility, efficiency, and notice to prospective applicants, such as a single pre-certification opportunity to submit notice of intent to stagger entry. The Department agrees that additional guidance would be necessary to clarify how the provision would effectively operate in practice and to clarify the standards for enforcing program compliance.

The Department appreciates the concerns of workers' rights and immigration advocacy organizations, U.S. Senators, agricultural workers, and others that the proposed provision could make it more difficult for U.S. workers to learn of available H–2A job opportunities. For example, the Department is sensitive to commenters' concerns regarding the information provided to U.S. workers during the recruitment period and agrees that substantial revisions to the proposed provision would be required to ensure that sufficient information is collected and made available to prospective U.S. worker applicants in the job order and other recruitment. The provision of such information is critical so that U.S. workers may, for example, apply for their preferred start date within the employer's staggered entry plan. Additional disclosure requirements could better apprise U.S. workers of available job opportunities and start date options, which would, in turn, address concerns about agricultural workers' ability to plan their migration routes.

The Department also is sensitive to the concerns of commenters, including State agencies, that applications with multiple start dates of need may raise administrative challenges that merit further consideration and may increase, rather than reduce, administrative burdens and complicate SWA recruitment efforts. For example, applications with multiple start dates of need may require additional communication between the CO and SWA related to modifications to job orders that are active in the SWA clearance system and the Department's electronic job registry, as necessary to ensure prospective applicants receive clear information about available start dates. Additional parameters on the number and timing of such modifications could minimize the administrative impact of such modifications, while simultaneously supporting clearer information disclosure to prospective applicants.

Although the Department believes that a staggered entry provision may provide beneficial employer flexibilities and program administration efficiencies, the commenters correctly identified many areas in which the proposal would need to be substantially changed in order to properly balance employer and U.S. worker interests. At this time, the Department declines to adopt the proposed staggered entry provision, even with substantial revisions considered in the January 2021 draft final rule, as it may present significant drawbacks and unintended consequences.[94] If the Department determines it is appropriate to propose a similar provision in the future that better strikes a balance between the need to provide U.S. workers notice of available agricultural job opportunities—including clarity regarding the terms and conditions offered, and the opportunity to apply for those job opportunities—and the need to provide employers access to a pool of foreign labor through effective administration of the H–2A program, it will do so via the notice and comment rulemaking process, providing the public an opportunity to comment on any such proposal. Accordingly, under this final rule, an employer who anticipates a need for different groups of workers to begin work on sequential start dates must continue to file separate *Applications for Temporary Employment Certification,* each reflecting a distinct start date within the employer's temporary or seasonal need for labor, and engage in recruitment tied to each of those start dates, as provided in the 2010 H–2A Final Rule.

d. Paragraph (f), Information Dissemination

The Department proposed minor amendments to newly designated paragraph (f) (formerly paragraph (e)) in the 2010 H–2A Final Rule and proposed at paragraph (g) in the NPRM) to clarify that OFLC may provide information received in the course of processing *Applications for Temporary Employment Certification,* or in the course of conducting program integrity measures, not only to the WHD, but to any other Federal agency with authority

[94] In the January 2021 draft final rule, the Department considered adopting the proposal with significant revisions to address the many commenter concerns, such as administrative and enforcement challenges, including revisions clarifying limits on the number of notifications an employer might submit to the CO regarding its staggered entry plan, revising the timeframe in which an employer could submit its single notification of intent to stagger entry, expanding the collection of information regarding the employer's staggered entry plan and corresponding start dates offered to prospective applicants, and bolstering disclosure of information to farmworkers regarding start date options. However, even with these changes, the Department believes the January 2021 draft final rule did not sufficiently address confusing aspects of the proposal; ensure effective recruitment of U.S. workers for job opportunities, particularly where multiple or mid-season start dates are available; and balance flexibility, efficiency, and notice to prospective applicants, such as a single pre-certification opportunity to submit notice of intent to stagger entry.

to enforce compliance with program requirements and combat fraud and abuse. The Department received one comment on this provision, which did not necessitate substantive changes to the regulatory text. Therefore, this provision remains unchanged from the NPRM.

An agent objected to OFLC sharing information with ''any other Federal agency'' if the information sharing could lead to adverse action, as it could have a ''significant chilling effect on workers'' and could exceed the Department's statutory authority. The Department appreciates these concerns; however the administration of the H–2A visa program involves multiple agencies. Information sharing between the agencies is used only as necessary to ensure the integrity of the program. As explained in the 2010 H–2A Final Rule, in this regard, the Department affirmatively shares information with DHS and other agencies, within defined limits, when necessary for those agencies to take action within their jurisdiction. For example, the Department may refer certain discrimination complaints to DOJ, under § 655.185, or refer information related to debarred employers or to employers' fraudulent or willful misrepresentations to DHS, under §§ 655.182 and 655.184. Further, this provision aligns with current language in WHD regulations at 29 CFR 501.2, which provides ''[i]nformation received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, *where applicable to employer enforcement under the H–2A program,* other agencies as appropriate, including the Department of State (DOS) and DHS.'' Therefore, under § 655.130(g) in this final rule, the Department will share information when it is necessary and appropriate to do so. In all cases, the Department shares only the specific information the agency requires and ensures that all information sharing complies with the Privacy Act of 1974, Public Law 93–579, 88 Stat. 1896 (5 U.S.C. 552a *et seq.*) (Dec. 31, 1974).

2. Section 655.131, Agricultural Association and Joint Employer Filing Requirements

The NPRM proposed amendments to this section to: (1) retain current requirements governing the submission of *Applications for Temporary Employment Certification* by an agricultural association on behalf of its employer-members; and (2) codify current standards and procedures governing the submission of *Applications for Temporary Employment Certification* by two or more individual employers seeking to jointly employ workers to perform agricultural labor or services. The Department received many comments on the proposed amendments to this section. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions, as discussed below.

a. Paragraph (a), Agricultural Association Filing Requirements

The Department proposed minor revisions to paragraph (a) to clarify the application filing procedures for agricultural associations and to conform with other proposed changes in the NPRM, such as the definition of master application in § 655.103 and the modernization provisions that revise the procedures for issuance of temporary agricultural labor certifications in § 655.162. The Department also proposed to reorganize the procedural provisions applicable to agricultural associations that file *Applications for Temporary Employment Certification* so that paragraph (a)(1) addresses the requirement for an agricultural association to identify the nature of its role in each application it files and retain documentation of its role. Paragraph (a)(2) addresses master application filings; paragraph (a)(3) addresses employer signatures on applications that an agricultural association files; and paragraph (a)(4) addresses certification issuance. As discussed below, the Department is adopting paragraph (a) without change from the NPRM.

An association expressed concern about the interaction of the proposed staggered entry provision at § 655.130(f) and master application filing procedures at § 655.131(a)(2), thinking that agricultural associations that file master applications could not stagger entry of H–2A workers or would have less flexibility than other joint employers. As the Department has decided not to adopt the proposed staggered entry provision, for the reasons discussed in the preamble to § 655.130(f), the concern is moot.

A workers' rights advocacy organization supported the Department's proposal to add explicit language in paragraph (a)(3) regarding signature requirements in applications filed by agricultural associations, while a State agency expressed support for electronic signatures, including those required under this section. Other commenters raised liability concerns related to master applications and joint employment, rather than the procedural provisions in paragraph (a); these comments are discussed in relation to the definitions at § 655.103(b).

Accordingly, this final rule adopts paragraph (a) without change and, as such, continues to permit an agricultural association to file an application as a sole employer, joint employer, or agent, as contemplated in the INA. *See* 8 U.S.C. 1188(c)(3)(B)(iv) and (d).

b. Paragraph (b), Joint Employer Filing Requirements

The Department proposed a new paragraph (b) to codify its longstanding practice of permitting two or more individual employers to file a single *Application for Temporary Employment Certification* as joint employers. These filing requirements would apply when two or more individual employers operating in the same AIE have a shared need for workers to perform the same agricultural labor or services during the same period of employment, but each employer cannot guarantee full-time employment for the workers during each workweek. This provision is intended to allow smaller employers that do not have full-time work for an H–2A worker and lack access to an employer association to use the H–2A program. In these situations, small employers have established an arrangement to share or interchange the services of the workers to provide full-time employment during each workweek and guarantee all the terms and conditions of employment under the job order or work contract.

The application filing procedures for two or more employers under proposed § 655.131(b) are different from the procedures for a master application filed by an agricultural association as a joint employer in several ways. First, unlike the master application provision, the employers filing a single *Application for Temporary Employment Certification* under proposed paragraph (b) would not be joint employers with an agricultural association of which they may be employer-members. Thus, if an agricultural association assists one or more of its employer-members in filing an *Application for Temporary Employment Certification* under proposed paragraph (b), the agricultural association would be filing as an agent for its employer-members. Second, all employers filing an *Application for Temporary Employment Certification* under proposed paragraph (b) must have the same first date of need and require the agricultural labor or services of the workers requested during the same period of employment in order to offer

and provide full-time employment during each workweek. In contrast, in a master application filed by an agricultural association, each employer-member would offer and provide full-time employment to a distinct number of workers during a period of employment that may have first dates of need differing by up to 14 calendar days. Unlike a master application where the places of employment for the employer-members could cover multiple AIEs within no more than two contiguous States, the employers filing a single application as joint employers under proposed paragraph (b) would have to identify places of employment within a single AIE. Finally, under proposed paragraph (b) all joint employers would be jointly and severally liable for violations by any joint employer for the entire period of need. As previously explained, and codified in § 655.103, while an agricultural association that files a master application is always an employer, a grower that is an employer-member of the agricultural association that filed a master application is only in joint employment with the agricultural association when it is employing the pertinent H–2A workers.

Under proposed paragraph (b)(1)(i), any one of the employers could file the *Application for Temporary Employment Certification* with the NPC, so long as the names, addresses, and the crops and agricultural labor or services to be performed are identified for each employer seeking to jointly employ the workers. Consistent with longstanding practice, any applications filed by two or more employers would continue to be limited to places of employment within a single AIE covering the same occupation or comparable work during the same period of employment for all joint employers, as required by § 655.130(e). As the NPRM noted, the proposal would typically allow neighboring farmers with similar needs to use the program, though they do not, by themselves, have a need for a full-time worker under § 655.135(f).

Per proposed paragraph (b)(1)(ii), each joint employer would be required to employ each H–2A worker the equivalent of at least 1 workday (*i.e.,* a 7-hour day) each workweek. This proposed requirement aimed to fulfill the purpose of the filing model, which is to allow smaller employers in the same area and in need of part-time workers performing the same work under the job order to join together on a single application, making the H–2A program accessible to these employers. The proposed requirement also provided an additional limiting principle intended to ensure that individual employers with full-time needs would use the established application process for individual employers, that association members would use the statutory process provided for associations, and that joint applications would be restricted to small employers with a simultaneous need for workers that cannot support the full-time employment of an H–2A worker. In this way, the Department could carry out the statutory requirements applicable to individual employers and to associations. The Department invited comments on the 1-workday requirement in the NPRM, and also sought comments on how to best effectuate the purposes of joint employer applications.

The NPRM additionally noted that each employer seeking to employ the workers jointly under the *Application for Temporary Employment Certification* would have to comply with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F. Therefore, proposed § 655.131(b)(1)(iii) would require each joint employer to sign and date the *Application for Temporary Employment Certification.* By signing the application, each joint employer would attest to the conditions of employment required of an employer participating in the H–2A program and would assume full responsibility for the accuracy of the representations made in the application and job order, and for all of the assurances, guarantees, and requirements of an employer in the H–2A program. The Department noted in the NPRM that, in the event of a violation, all of the employers named in the *Application for Temporary Employment Certification* are liable for the violation and may be held jointly or individually responsible for remedying the violation(s) and for attendant penalties.

Finally, the NPRM observed that where the CO grants temporary agricultural labor certification to joint employers, proposed § 655.131(b)(2) would provide that the joint employer that filed the *Application for Temporary Employment Certification* would receive the Final Determination correspondence on behalf of the other joint employers in accordance with the procedures proposed in § 655.162. As discussed below, the Department is adopting paragraph (b) from the NPRM with some changes.

The Department received many comments related to its proposal to include § 655.131(b) in its implementing regulations. The employer comments related to § 655.131(b) all supported the proposal to permit joint employer applications. However, those employers that commented on § 655.131(b) uniformly criticized the provision's requirement that all joint employers employ the pertinent H–2A workers at least 1 day per workweek. At least four commenters noted that the proposal would unduly complicate joint employer arrangements in which sponsored H–2A workers move from full-time employment at one applicant's farm to full-time employment at another applicant's farm based on growing conditions at the respective farms. Various commenters noted that the proposal would preclude joint applications by growers that need distinct numbers of H–2A workers by compelling a grower that has a lesser need to employ all the workers needed by a grower with a greater need. Some commenters asserted that the requirement would unduly reduce the ''flexibility'' of farms that wish to use the joint employer application process. Still other commenters asserted that the proposal is unduly restrictive, unworkable, or serves no discernible policy objective.

Four commenters each offered what would amount to a ''less stringent restriction'' than the 1-day-per-week requirement. Three of the commenters specifically suggested the Department might use other ''metrics[,] includ[ing] percentage of hours or days per contract,'' in lieu of the 1-day-per-week requirement. Another commenter similarly suggested that the Department might ''establish a 'minimum' amount of time'' that each joint employer must employ the pertinent H–2A workers during the entire period of employment.

A workers' rights advocacy organization supported holding all entities that file a joint employer application under § 655.131(b) accountable for any violation committed by one. It suggested that the Department provide greater clarity that all named employers are accountable as joint employers for any violations committed by one during the period of employment listed on the job order, ''not just the dates in which H–2A workers completed work owned or operated by a particular employer.'' As explained above, the liability of named joint employers is not dependent on the dates on which H–2A workers complete work for a particular named joint employer.

The Department declines to adopt some commenters' recommendation to place no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H–2A workers sponsored under such an application. The purpose of the

Department's proposal in § 655.131(b), which it is electing to retain in this final rule, is to permit small growers that have a need for H–2A workers but cannot guarantee full-time employment on their own to join together to meet the full-time-job requirement for hiring H–2A workers. Placing no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H–2A workers sponsored under such an application would undercut this purpose by permitting employers that, individually, can guarantee full-time employment to use § 655.131(b).

Some commenters specifically requested that the Department modify § 655.131(b) to expressly allow use of the provision by joint employers that would provide sequential full-time employment to H–2A workers. As the Department noted in the NPRM, individual employers that can provide full-time employment to H–2A workers can file an individual application under § 655.130 for the individual employer's period of need. In such a case, a joint employment relationship is unnecessary because the employer may file an application for the period of time for which full-time employment is offered. The Department accordingly has concluded that it is appropriate to limit applications under § 655.131(b) to those instances in which no co-applicant can provide full-time employment to H–2A workers. Therefore, the Department declines to adopt the commenters' recommendation to place no limits on the number of hours each joint employer filing an application under § 655.131(b) may employ H–2A workers sponsored under such an application.

While the Department has decided to place numerical limits on the number of hours H–2A workers under a § 655.131(b) application can work for a joint employer, it has closely considered many commenters' suggestion that the proposed 1 day per workweek requirement unduly restricts employer flexibility. It has accordingly sought to determine if there is another less rigid metric that would provide employers greater flexibility and at the same time preserve § 655.131(b)'s purpose to accommodate small growers that cannot alone guarantee full-time employment but wish to use the program. With that dual purpose in mind, the Department has modified § 655.131(b), as proposed in the NPRM, to eliminate the requirement that all H–2A workers must work for each employer for at least 7 hours in each workweek. This final rule allows employers to schedule H–2A workers at their discretion, so long as no single joint employer obtains more than a total of 34 hours of work in any workweek from all of the H–2A employees it employs. This provision provides maximum flexibility to joint employers in assigning H–2A employees under the rule, while helping to ensure that only employers that cannot provide full-time employment, defined in § 655.135(f) as 35 hours a week, will file under this provision. By limiting the total number of hours of employment of all H–2A workers to no more than 34 hours of work per week for each joint employer, the rule limits the use of this provision to those employers that have a need for part-time work. Employers with a need for 35 hours of work a week or more will be able to guarantee full-time work and will be able to file under the standard process. Those employers that are able to guarantee full-time work will have no need to use this provision, which, as noted above, is designed for applicants that are unable to provide full-time work, and without this provision would be ineligible for the H–2A program.

Finally, the Department notes that the January 2021 draft final rule would have adopted § 655.131(b) as proposed in the NPRM, with the addition of a new § 655.131(b)(1)(ii) and (iii), which would have provided that no employer would employ any H–2A worker for fewer than 7 hours in a pay period and more than 28 hours in any workweek. The January 2021 draft final rule also would have adopted a new § 655.131(b)(1)(iv), which would have provided that the employer, together with its co-applicants, would employ each H–2A worker for at least 70 hours in each 2-week pay period. However, those provisions would have added unnecessary restrictions on the scheduling of H–2A workers while failing to limit joint employment under this provision to employers with a part-time need. Accordingly, and for the reasons discussed above, those provisions were not adopted in this final rule.

3. Section 655.132, H–2A Labor Contractor Filing Requirements; and 29 CFR 501.9, Enforcement of Surety Bond

The NPRM proposed amendments to these sections to clarify and enhance requirements governing the submission of *Applications for Temporary Employment Certification* by employers operating as H–2ALCs, including substantive revisions to the standards by which these employers must demonstrate proof of their ability to discharge their financial obligations in the form of a surety bond. The Department received many comments on the proposed amendments to this section. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several revisions, as discussed below.

Because the Department added a provision at § 655.130(e) to address the geographic scope of *Applications for Temporary Employment Certification,* generally, language addressing that topic was no longer necessary in § 655.132 and retaining it in this section could create confusion. An H–2ALC application and job order continue to be limited to places of employment within a single AIE, except as otherwise permitted by this subpart (*e.g.,* § 655.215(b)(1)). However, by moving the language to § 655.130(e), the Department's proposal clarified that this same limitation applies to all applications and job orders, absent an explicit exception in this subpart. As a result, the Department proposed to eliminate paragraph (a) and redesignate the contents of paragraph (b) of the 2010 H–2A Final Rule, which list the enhanced documentation requirements for H–2ALCs, as paragraphs (a) through (e).

As explained in the NPRM, the Department has determined the enhanced documentation requirements for H–2ALCs continue to be necessary in order to protect the safety and security of workers and ensure basic program requirements are met, particularly given the increased use of the H–2A program by H–2ALCs and the relatively complex and transient nature of their business operations.[95] In proposed paragraph (e)(1), the Department maintained the current rule's requirement that an H–2ALC provide proof that any housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and is certified by the SWA. In proposed paragraph (e)(2), the Department proposed to replace the term ''the worksite'' with ''all place(s) of employment'' to clarify that transportation provided by the fixed-site agricultural business between the workers' living quarters and all

[95] Based on an analysis of *Applications for Temporary Employment Certification* processed for FY 2014 and 2017, the number of applications filed by H–2ALCs more than doubled from 660 (FY 2014) to 1,410 (FY 2017), and the number of worker positions certified for H–2ALCs nearly tripled from approximately 24,900 (FY 2014) to 72,400 (FY 2017). Between FY 2014 and 2017, the average annual increase in H–2ALC applications requesting temporary labor certification was 29 percent, compared to only 18 percent for agricultural associations and 11 percent for individual farms and ranches.

locations where work is performed must comply with the requirements of this section. Additionally, the Department corrected the reference for workers' compensation coverage of transportation from § 655.125(h) to § 655.122(h).

The Department has adopted paragraphs (e)(1) and (2) as proposed, with minor changes to paragraph (e)(2) for clarification. As discussed above in the preamble to § 655.122(h), the Department has made a minor revision to § 655.132(e)(2) to clarify that 29 CFR 500.104 and 500.105 do not both apply simultaneously to all vehicles. Instead, 29 CFR 500.104 and 500.105 apply alternatively depending upon the type of vehicle used, the distance of the trip, and whether the vehicle is being used for a day-haul operation. Accordingly, under this paragraph, H–2ALCs will continue to include in or with their *Applications for Temporary Employment Certification,* at the time of filing, the information and documentation listed in redesignated paragraphs (a) through (e) to demonstrate compliance with regulatory requirements.

Many commenters addressed the presence of H–2ALCs in the H–2A program, rather than the Department's proposed amendments to § 655.132. Immigration, public policy, and workers' rights advocacy organizations, trade associations, and an international recruiter raised concerns about H–2ALCs' lack of transparency and about farmers using H–2ALCs as a shield to escape responsibility and maintain lower wages. A workers' rights advocacy organization and numerous farmworkers asserted H–2ALCs offer lower wages, provide reduced or nonexistent benefits, more frequently present challenging or unsafe working conditions, make travel difficult, and provide less certainty regarding work start dates. One farm owner pointed out there is a critical need for H–2ALCs, especially when a crop's harvest or hauling season is very short. These comments provide context for suggestions in this section and others. In addition, the Department will continue to examine the role of H–2ALCs in the H–2A program to determine whether further regulation of H–2ALCs beyond these filing requirements and surety bond requirement (discussed below) is necessary to protect H–2A and U.S. farmworkers.

One commenter mistakenly thought the Department proposed to remove paragraph (a) of the 2010 H–2A Final Rule from this subpart; the commenter expressed concern H–2ALCs would no longer be limited to places of employment within one AIE on a single *Application for Temporary Labor Certification,* in most cases. The Department repeats that this requirement was moved to § 655.130(e), not removed from the subpart entirely.

A workers' rights advocacy organization expressed support for the revisions to paragraph (e)(2), and it agreed that the changes proposed by the Department are helpful and clarify regulatory requirements.

Although the Department did not propose changes to any of the H–2ALC documentation requirements listed in this section except the surety bond requirement, which is addressed below, a few commenters suggested revisions to the MSPA FLC registration paragraph and process, content requirements for an H–2ALC's work contracts with fixed-site growers, and other additional documentation requirements. An agent requested the Department incorporate the enumerated exceptions to MSPA registration listed at 29 CFR 500.0 through 500.271 in paragraph (b) of this section, a revision the commenter asserted would clarify who qualifies for an exception under MSPA and would ensure proper application of the MSPA registration requirement. Also related to MSPA and FLC registration, an employer recommended that the Department create an online system for employers. The Department respectfully declines. Repetition of MSPA registration exceptions is not warranted and could create confusion, as these exceptions, and any clarification of these exceptions, fall outside this subpart. Similarly, creation of a MSPA registration online system is outside the scope of this rulemaking.

A workers' rights advocacy organization suggested the Department require fixed-site growers to acknowledge their understanding of program and legal requirements when signing work contracts with an H–2ALC, while a trade association suggested the Department require H–2ALCs to provide a signed joint liability agreement for every farm to which they will supply labor. The Department appreciates these suggestions but declines to add these documentation requirements at § 655.132. Except when an agricultural association signs on behalf of its employer-members that are named in a master *Application for Temporary Employment Certification,* each employer of the workers sought must review and sign declarations attesting to the accuracy of the job information and compliance with applicable laws and regulations. To the extent these suggestions raise issues of joint employment and joint liability, those issues are addressed in the Department's discussion of proposed revisions to the definition of joint employment at § 655.103. Finally, such additional documentation requirements were not presented for public notice and comment and, therefore, are beyond the scope of this rulemaking.

However, with regard to the information H–2ALCs provide on the Form ETA–790A to identify their clients (*i.e.,* the growers who contract with the H–2ALC to provide labor or services for their agricultural operations), the Department clarifies that an H–2ALC must identify each fixed-site agricultural business to which it will provide labor or services, as provided in § 655.132(a) of this final rule and collected in an addendum to the Form ETA–790A, by providing the agricultural business's full legal name and full trade names or ''Doing Business As'' names (DBAs) (if applicable). Full disclosure of legal and trade names or DBAs is consistent with the Department's requirements for employer and agricultural association names on the Form ETA–790A. In addition, full disclosure of business names both apprises prospective applicants of the work to be performed and supports the Department's efforts to protect workers.

The workers' rights advocacy organization also suggested the Department require additional recruitment-related documentation of H–2ALCs, such as evidence the H–2ALC recruited all U.S. workers, FLCs, and crew leaders employed directly by the fixed-site grower in the prior year. In response to the comment, the Department addressed this issue in the discussion of an employer's contact with former U.S. workers under § 655.153, and in relation to the definition of joint employment at § 655.103.

In proposed paragraph (c), the Department retained the requirement that an H–2ALC submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations in the form of a surety bond. This bonding requirement, which became effective in 2009, was created because the Department's experience indicated that H–2ALCs can be transient and undercapitalized, thus making it difficult to recover the wages and benefits owed to their workers when violations are found.[96] By ensuring that

[96] *See* 2008 H–2A Final Rule, 73 FR 77110, 77163; *see also* 2010 H–2A Final Rule, 75 FR 6884, 6941 (''The Department's enforcement experience has found that agricultural labor contractors are more often in violation of applicable labor standards than fixed-site employers. They are also less likely to

these employers can meet their payroll and other program obligations, the Department is better able to prevent program abuse and limit any adverse effect on U.S. workers. *See* 20 CFR 655.132(b)(3); 29 CFR 501.9. Following a final finding of violation, the WHD Administrator may make a claim to the surety for payment of wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced, up to the face amount of the bond. 29 CFR 501.9(b).

Based on its experience implementing the bonding requirement and enforcement experience with H–2ALCs, the Department proposed revisions intended to clarify and streamline the existing requirements and strengthen the Department's ability to collect on such bonds. To address the large proportion of the surety bonds submitted by H–2ALCs that do not meet the requirements of 29 CFR 501.9, the Department proposed moving the substantive requirements governing the content of H–2ALC surety bonds to 20 CFR 655.132(c) so that these requirements can be found in the same section as other requirements for the *Application for Temporary Employment Certification.* The Department also proposed to expand the capabilities of the online application system (historically the iCERT Visa Portal System (iCERT) and now the FLAG system) to permit electronic execution and delivery of surety bonds both as a means to address the issue of noncompliant bonds and to streamline its review of bond submissions. Under this proposal, electronic surety bonds will eventually be required for all H–2ALCs subject to the Department's mandatory e-filing requirement. However, until such time as the Department's proposed process for accepting electronic surety bonds is operational, the Department will accept the submission of an electronic (*i.e.,* scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the temporary agricultural labor certification is issued. To ensure that the original bond is received during this time period, the Department proposed to revise § 655.182 to specify that failure to timely submit a compliant, original surety bond constitutes a substantial violation, providing grounds for debarment or revocation of the temporary agricultural labor certification.

To further improve compliance with the bonding requirement and streamline its review, the Department proposed to adopt a bond form with standardized language. Currently, the bonds received by the Department vary in wording and form, making it difficult to ensure that the bonds are sufficient and resulting in confusion regarding the legal requirements. The language used in the Department's proposed bond form, ETA–9142A—Appendix B, which was included in the Paperwork Reduction Act (PRA) package of the NPRM, largely incorporated the existing bond requirements with certain clarifications for the regulated community and minor changes. For example, the proposed bond language clarified that the wages and benefits owed to workers may include the assessment of interest. Similarly, the proposal clarified the time period during which liability on the bond accrues (''liability period''), as distinguished from the time period in which the Department may seek payment from the surety under the bond (''claims period''). The Department proposed changing the bond requirement to cover not only liability incurred during the period of the temporary agricultural labor certification, but also liability incurred during any extension of the temporary agricultural labor certification, thus eliminating the need for H–2ALCs to amend the applicable bond or seek an additional bond (*i.e.,* automatically extending the liability period to reflect any extension of the temporary agricultural labor certification). Additionally, the Department proposed extending and simplifying the claims period from ''no less than 2 years'' to 3 years. Because this standardized language provides more specificity as to the length of the claims period, the Department proposed omitting language permitting the cancellation or termination of the claims period with 45 days' written notice. The Department explained that some sureties have mistakenly interpreted this language as permitting the early termination of bonds during the period in which liability accrues.

Additionally, the Department proposed adjustments to the required bond amounts because current bond amounts, which range from $5,000 to $75,000 depending on the number of H–2A workers to be employed under the applicable temporary agricultural labor certification, often are insufficient to cover the wages and benefits owed by labor contractors. The Department proposed two distinct changes to the required bond amount computation.

First, it proposed adjusting the required bond amounts annually to account for wage growth as measured by increases in the AEWR. Specifically, the Department proposed adjusting the existing required bond amounts proportionally on an annual basis to the degree that a nationwide average AEWR exceeds $9.25, the wage rate used to establish new bond amounts in the Department's 2009–2010 rulemaking. 2009 H–2A NPRM, 74 FR 45906, 45925; 2010 H–2A Final Rule, 75 FR 6884, 6941. The ''average AEWR'' used in this adjustment would be calculated and published when the Department calculates and publishes the AEWR by State in accordance with § 655.120(b).

Second, in response to dramatic increases in the crew sizes certified in the last decade, the Department proposed increasing the required bond amounts for temporary agricultural labor certifications covering a significant number of H–2A workers. Currently, the highest bond amount, $75,000, applies to temporary agricultural labor certifications covering 100 or more H–2A workers. Under the proposal, the bond amount applicable to temporary agricultural labor certifications covering 100 or more H–2A workers (determined by adjusting $75,000 to account for wage growth, as discussed above) is used as a starting point and is increased for each additional set of 50 H–2A workers. The interval by which the bond amount increases is based on an approximation of wages earned by 50 workers over a 2-week period, also updated annually to reflect increases in the AEWR. The NPRM included examples demonstrating this calculation. 84 FR 36168, 36204–36205.[97]

The Department received only one comment addressing its proposal to move the substantive requirements governing the content of H–2ALC surety bonds to § 655.132(c). A coalition of workers' rights advocacy organizations supported this proposal characterizing it as ''a helpful, clarifying change.'' Likewise, those who commented on the Department's proposal to permit the electronic execution and delivery of surety bonds supported this proposal.

meet their obligations to their workers than fixed-site employers.'').

[97] In addition, the Department noted that under its proposal to expand the definition of agriculture in § 655.103 to include reforestation and pine straw activities, employers in these industries may have qualified as H–2ALCs and been required to comply with the surety bond requirements. Because the Department declines to adopt this proposal, as discussed *supra,* comments addressing the application of the bonding requirement to the reforestation and pine straw industries are not discussed herein.

The Department hereby adopts these two proposals without modification. As the Department is in the process of developing a functional capability for accepting electronic surety bonds, it reminds the regulated community that until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may, pursuant to § 655.132(c)(3)(ii), submit an electronic (*i.e.,* scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the temporary agricultural labor certification is issued. Failure to timely submit a compliant, original surety bond has been added to § 655.182(d) and will constitute a violation that may provide grounds for debarment or revocation of the temporary agricultural labor certification. Further, the Department clarifies that it will generally consider such a failure as demonstrating a lack of good faith under § 655.182(e)(4), making such a violation, by itself, a substantial violation meriting debarment or revocation.

With respect to the Department's proposal to require the use of a bond form with standardized language, namely the proposed Form ETA–9142A—Appendix B, a coalition of workers' rights advocacy organizations supported the proposal, explaining that it would ''promote efficiency during the review process and greater compliance with surety bond requirements.'' An employers' agent similarly supported this proposal. This agent, as well as a trade association representing the surety industry, noted that insurers and sureties should have the opportunity to review the Department's proposed standardized bond language. However, another employers' agent opposed the ''one size fits all approach'' of using standardized bond language, arguing that ''parties to the instrument, as private parties engaging in an arm's length transaction, should have the contractual freedom to include additional protections, in amount or subject matter than called for under the regulations within one instrument.'' This commenter did not express specific concerns relating to the provisions of proposed Form ETA–9142A—Appendix B.

After considering these comments, the Department adopts its proposal to require the use of a standardized bond form. The Department notes that the language in the Department's proposed bond form, Form ETA–9142A—Appendix B, was included in the PRA package of the NPRM. Further, to the extent that this proposed language differs in substance from the current bond requirements at 29 CFR 501.9, these differences were detailed in the NPRM. *See* 84 FR 36168, 36203–36205. An H–2ALC surety bond is a contract governed by Federal regulation between three parties: the H–2ALC, the surety, and the Department. As such, private parties to such a contract should not expect unfettered contractual freedom. The use of standardized bond language is necessary for the Department to ensure that the bonds submitted by H–2ALCs comply with the regulatory requirements and will facilitate processing efficiency as the Department will not be required to review bonds that vary considerably in wording and form. This is no different from the Department's use of other standardized forms that make up the *Application for Temporary Employment Certification* and which become binding on the H–2A employer. Further, the use of a standard bond form does not prevent the H–2ALC and surety from entering into a separate contract, provided, of course, that such contract does not alter the parties' obligations vis-à-vis the Department, limit in any way the Department's ability to collect on a bond, or undermine the purposes of the bonding requirement and/or H–2A requirements generally.

The Department also received comments addressing the specific language and/or requirements proposed in the NPRM and incorporated into the proposed Form ETA–9142A—Appendix B. For example, the Department's proposed bond language retained the requirement that a surety pay sums for wages and benefits owed to H–2A workers, workers in corresponding employment, and U.S. workers improperly rejected from employment, laid off, or displaced based on a final decision finding a violation or violations of 20 CFR part 655, subpart B, or 29 CFR part 501, but clarified that the wages and benefits owed may include the assessment of interest. In response, an employers' agent stated that it ''disagreed with interest being attached to the scope of coverage without quantification.'' The Department notes that an assessment of interest may be required to make an employee whole, and both WHD and the Department's administrative tribunals permit, and in some cases require, the assessment of interest on back wages. The required rate of interest is determined by law and is specified in WHD's determination letters and final orders, as well as administrative case law.[98] Further, a surety's liability on any particular bond is capped at the face value of that bond; thus, any assessment of interest included for wages and benefits will not increase the potential liability of the surety. Accordingly, the Department adopts this proposed language as written.

The Department received several comments addressing its proposals to clarify the time period during which liability on the bond accrues (''liability period''), as distinguished from the time in which the Department may bring a claim (''claims period''); to automatically include in the liability period any extensions of the applicable temporary agricultural labor certification; to extend the claims period for filing a claim; and to omit the provision permitting a surety to cancel a bond with 45 days' written notice. A coalition of workers' rights advocacy organizations supported the proposals noting that these would promote efficiency. Two trade associations and one employer opposed the proposal to extend and simplify the time period in which a claim can be filed against a surety from the current claims period of ''no less than 2 years'' to 3 years, based on the mistaken understanding that this will increase a surety's total liability to three times the face value of the bond.

This confusion articulated in the comments is precisely why the Department sought to clarify and further distinguish the time period in which liability on the bond accrues from the time period in which the Department may bring a claim. As explained in the NPRM, extending the claims period to 3 years (tolled by the commencement of any enforcement action) does not extend the accrual of liability. 84 FR 36168, 36204. Instead, it merely allows the Department more time to complete its investigations while retaining the ability to seek recovery from the surety. The surety's liability for a particular bond is still limited to the face value of that bond.

A trade association representing the surety industry opposed the proposal to eliminate language permitting sureties to cancel a bond with 45 days' written notice, stating that this will increase the surety's risk in writing the bond and make it more difficult for employers to qualify for such a bond. It explained that ''[i]t is critically important for a surety to maintain the ability to cancel bond coverage if the bonded employer is found to be in violation of the terms of its agreement with the surety or if the

[98] Interest assessed by WHD is governed by 31 U.S.C. 3717. Interest assessed by the Department's administrative tribunals is governed by *Doyle* v. *Hydro Nuclear Servs.,* Nos. 99–041, 99–042, and 00–012, 2000 WL 694384, at *16–17 (ARB May 17, 2000).

bonded employer's ability to perform the bonded obligations has materially changed and the surety is no longer able to offer security.''

The Department appreciates this concern; however, as explained in the NPRM, this provision was never intended to permit a surety to cancel the bond during the liability period while the temporary agricultural labor certification is still in effect. Instead, it was intended as a means of ending the open-ended period in which claims could be filed by the Department. 84 FR 36168, 36204. Because the Department now extends and simplifies the claims period from ''no less than 2 years'' to 3 years (tolled by any enforcement action), there is no longer a need for this provision. Consistent with § 501.9(d), currently, WHD does not permit the cancellation of bonds prior to 2 years from the expiration of the temporary agricultural labor certification (tolled by any enforcement action). Moreover, during the tenure of this requirement, the Department has received few, if any, requests from sureties seeking to cancel a bond while the temporary agricultural labor certification was still in effect. The surety bond is an essential component of an H–2ALC's *Application for Temporary Employment Certification,* necessary to demonstrate an applicant's ability to discharge its financial obligations under the H–2A program. Accordingly, the Department believes that it is appropriate for the bond submitted with the *Application for Temporary Employment Certification* to cover liability accrued during the entirety of the temporary agricultural labor certification and declines to add a mechanism by which sureties can terminate the accrual of liability during this period.

After carefully considering these comments, the Department adopts its proposals to clarify and distinguish the liability and claims periods, to automatically include in the liability period any extensions of the applicable temporary agricultural labor certification, to extend the claims limitations period to 3 years, and to omit as unnecessary the provision permitting a surety to cancel a bond with 45 days' written notice, as proposed in the NPRM.

Numerous comments from workers' rights advocacy organizations noted that improvements are needed to help victimized workers access surety bond funds. Specifically, a joint comment of 42 workers' rights advocacy organizations suggested that the Department revise the language of proposed § 655.132(c) to make bonds payable either to the WHD Administrator or to workers who have received a judgment against the H–2ALC for violations of the temporary agricultural labor certification and job order, either through private litigation or State agency action, on the grounds that WHD does not have adequate resources to enforce all actions against H–2A employers. The Department declines to adopt this suggestion in this final rule. Permitting individual claimants to make demands on the bonds could lead to circumstances in which bond funds are depleted before the WHD Administrator completes an investigation and are not distributed proportionally among affected workers.

The vast majority of bond-related comments focused on the Department's proposed adjustments to the required bond amounts to account for wage growth, as measured by increases in the AEWR, and to reflect dramatic increases in the crew sizes being certified. In general, workers' rights advocacy organizations supported the proposed adjustments, characterizing the proposal as a ''modest improvement[,] . . . important because H–2ALCs are often undercapitalized and unable to pay back workers for labor violations.'' Numerous workers' rights advocacy organizations supported the proposal but described the increases as insufficient. A coalition of 42 workers' rights advocacy organizations submitted a joint comment explaining that surety bond amounts are often insufficient to cover even unreimbursed inbound transportation expenses, let alone unpaid wages and other costs impermissibly borne by workers, and cited as support several prominent investigations in which WHD found that workers were entitled to wages and benefits exceeding the required surety bond amounts. This coalition supported increases to account for wage growth and increasingly large temporary agricultural labor certifications, but stated that, at a minimum, bond amounts should be sufficient to cover the costs of inbound and outbound transportation. Similarly, a commenter from academia supported these increases.

In contrast, employers, employers' agents, and trade associations typically opposed these increases to the required bond amounts. For instance, an employers' agent urged the Department to maintain the existing bond amounts stating that these amounts are sufficient to ensure that H–2ALCs are able to discharge their financial obligations. A trade association stated that the proposed increases are ''unnecessary and punitive'' and would have the effect of harming the larger and better-capitalized labor contractors. These commenters also stated that the Department failed to demonstrate the insufficiency of current bond amounts through data. Rather than adjust required bond amounts based on increases in the average AEWR and to account for temporary agricultural labor certifications covering 150 or more workers, this commenter suggested making across-the-board increases of 30 percent to the required bond amounts. Two trade associations and an employer stated that the surety bonds are more akin to bail bonds than insurance policies because bonding companies do not rely on the reinsurance market to mitigate losses and instead scrutinize an applicant's assets when evaluating the potential risk associated with a bond; they recommended proceeding with caution until a market emerges in which a surety can better mitigate its risk. Several commenters stated that increases in bond amounts may make it impossible for some H–2ALCs to obtain bonds. Others stated that the methodology for calculating the required bond amounts is ''unnecessarily complex.'' A public policy organization recommended that the Department reduce the bond amounts required of H–2ALCs for which the Department has not submitted a surety bond claim in the previous 5 years.

Commenters with ties to the shearing industry, including a State agency, trade associations, several employers, and an agent, stated that the increased bond amounts would prove difficult for the industry as it tends to operate with very small crew sizes. For example, several commenters explained employers in this industry may employ fewer than 25 H–2A workers in a given year, but because these workers are employed under multiple temporary agricultural labor certifications, these employers are required to obtain significantly more in total bonds than those who employ the same number of workers under a single temporary agricultural labor certification. These commenters also stated that some sureties are hesitant to issue multiple bonds for the same employer and suggested allowing employers to maintain a single bond for multiple temporary agricultural labor certifications filed over the course of a year.

A trade association representing the surety industry concurred in the Department's proposal to increase bond amounts as needed to accurately reflect the risk associated with wage requirements but noted that this may make it difficult for certain employers to obtain these bonds. This commenter

explained that employers may need to provide more detailed financial disclosures, tax returns, and/or credit scores to qualify for higher bond amounts and, in some cases, collateral may be required.

Finally, an insurance provider and an employer both noted that the Department's proposed methodology does not account for differences in the length of time H–2A workers will be employed and proposed that required bond amounts be set at five percent of an employer's estimated gross payroll for its H–2A workers. As an alternative, the insurance provider suggested that back wages could be paid from an employer-funded trust administered by the Department.

After carefully considering comments pertaining to the appropriate amount of surety to be required of H–2ALCs, the Department adopts the methodology for determining required bond amounts detailed in the NPRM, with one modification. Under the proposal in the NPRM, to calculate the required bond amount for a temporary agricultural labor certification, the Department would start with a base bond amount (equal to the amount of the bond required under the 2010 H–2A Final Rule) and adjust proportionally on an annual basis to the degree that a nationwide average AEWR exceeds $9.25, *i.e.,* by multiplying the base by the average AEWR and dividing that number by $9.25. The Department stated that, until the Department published an average AEWR, it would use a simple average of the 2018 AEWRs, which it calculated to be $12.20. However, given the increase in the AEWR since the publication of the NPRM, the Department has concluded that, until the Department publishes a different average AEWR, bond amounts will initially be calculated using an average AEWR of $14.28, based on the simple average of the 2021 AEWRs. The average AEWR will be adjusted when the underlying AEWRs are adjusted. Thus, for a temporary agricultural labor certification covering 100 H–2A workers, the Department will calculate the required bond amount according to the following formula:

$75,000 (base amount) × $14.28 ÷ $9.25 = $115,784 (updated bond amount).

The Department has determined that further modification of the NPRM's methodology for determining required bond amounts is unwarranted at this time. The Department declines to adopt a commenter's suggestion that it use an across-the-board increase, rather than requiring additional incremental surety amounts for temporary agricultural labor certifications covering 150 or more H–2A workers, as an across-the-board increase would not fairly account for the proportionally greater back wage liability associated with larger crew sizes. As the Department noted in the NPRM, the current bond framework, which the commenter's suggestion would perpetuate, ''disproportionately advantages larger H–2ALCs while providing diminishing levels of protection for employees of such contractors.'' *See* 84 FR 36168, 36205.

Likewise, the Department disagrees with commenters arguing that bond amounts should not be increased. Based on the Department's enforcement experience, bond amounts are often insufficient to cover the amount of wages and benefits owed by H–2ALCs, limiting the Department's ability to seek back wages for workers. *Id.* at 36204. Indeed, as bond amounts have remained the same since 2010, these amounts do not reflect subsequent wage growth or the dramatic increase in the number of workers covered by temporary agricultural labor certifications. *Id.* at 36204–36205. The Department believes that requiring additional surety for such temporary agricultural labor certifications is not punitive but rather necessary to ensure fairness among labor contractors and for workers. The Department recognizes that some H–2ALCs may not have sufficient financial resources and/or creditworthiness to obtain the higher required surety bond amounts and, as a result, will be unable to employ 150 or more H–2A workers under a single temporary agricultural labor certification. The Department notes that the purpose of the surety bond requirement is to ensure that labor contractors will be able to discharge their financial responsibilities, including meeting their payroll and other program obligations. To the extent that some labor contractors lack the financial resources and/or creditworthiness to obtain the requisite bonds, it may be appropriate for these contractors to hire fewer workers.[99] Accordingly, this final rule adopts the Department's proposal under which the bond amount applicable to temporary agricultural labor certifications covering 100 or more H–2A workers is used as a starting point and is increased for each additional set of 50 H–2A workers. The interval by which the bond amount increases will be based on the amount of wages earned by 50 workers over a 2-week period and, in its initial implementation, will be calculated using an average AEWR of $14.28 as demonstrated:

$14.28 (Average AEWR) × 80 hours × 50 workers = $57,120 in additional bond for each additional 50 H–2A workers over 100.

Thus, under this final rule, a temporary agricultural labor certification covering a crew of 275 H–2A workers will require additional surety of $171,360. This amount is calculated by determining the number of additional full sets of 50 workers beyond the first 100 workers covered by the temporary agricultural labor certification and then multiplying this number by the amount of additional surety required per each set of additional 50 workers (275 − 100 = 175; 175÷50 = 3.5; this is three additional sets of 50 workers; 3 × $57,120 = $171,360). This additional surety will be added to the bond amount required for temporary agricultural labor certifications of 100 or more H–2A workers resulting in a required bond amount of $287,144 ($115,784 required for temporary agricultural labor certifications of 100 or more H–2A workers + $171,360 in additional surety).

The Department declines proposals to consider additional variables, such as the costs of inbound and outbound transportation or estimated gross payroll, or to replace the average AEWR with another measure of wages in its methodology for determining required bond amounts. While these proposals may in some instances permit the required bond amounts to more closely account for the potential back wage liability for particular temporary agricultural labor certifications, these would unduly complicate the calculation and review of the required bond amounts and slow the Department's processing of H–2A applications. The Department believes at this time that the methodology included in the final rule is sufficient to address most monetary violations, including those stemming from a failure to provide inbound and outbound transportation, and thus to limit program abuse and any resulting adverse effect on U.S. workers. The Department will continue to monitor the efficacy of the surety bond requirements and will propose revisions to these requirements as needed to assure that bond amounts are sufficient.

Likewise, the Department declines the proposal from commenters with ties to the shearing industry to allow such

[99] Several commenters, though not those from the surety or insurance industries, stated that bonding companies do not rely on the reinsurance market and thus have no way in which to mitigate losses. While some sureties may choose not to rely on reinsurance, the Department notes this is by no means uniform in the industry.

employers to maintain a single bond covering all temporary agricultural labor certifications in a given year, as doing so would require the Department, when reviewing applications from H–2ALCs, to check all prior applications filed during the year to ensure that the bond is sufficient to cover both the current application and prior applications, potentially slowing down the approval of such applications.[100]

The Department also declines to replace the surety bond requirement with an employer-funded trust. Unlike the bonding requirement, which helps to ensure that an H–2ALC is in compliance with its program obligations, *see* 2008 H–2A Final Rule, 73 FR 77110, 77163 (citing 8 U.S.C. 1188(g)(2)), the payment of back wages from an employer-funded trust would distribute responsibility for an H–2ALC's noncompliance among all contributing employers, including those who meet their program obligations, and may not provide as robust a deterrent against individual noncompliance as surety bonds. Further, the creation of such a trust would require considerable initial funding, as well as Department resources, which could undermine the recovery of back wages in the short-term.

Finally, the Department declines to offer discounted bond amounts for those H–2ALCs for which the Department has not submitted surety bond claims in the previous 5-year period. Because WHD investigates only a fraction of the H–2ALCs that operate in a given year, the fact that WHD has not pursued an H–2ALC's surety for the collection of unpaid back wages or found violations in the previous 5 years is not an indication of compliance or decreased potential liability. The length of the Department's administrative appeals process and any ensuing Federal court litigation means that a noncompliant employer could litigate a back wage award for years to avoid losing such a discount, potentially incentivizing appeals. Further, the surety may consider an H–2ALC's record of compliance when determining the premiums to be charged.

[100] While the January 2021 draft final rule would have responded to these concerns by creating a lower tier of bonds with a proportionally lower bond amount for temporary agricultural labor certifications covering fewer than 10 workers, after further review, the Department has decided against creating a separate bond tier for temporary agricultural labor certifications covering fewer than 10 H–2A workers because doing so would create a risk that workers employed under such temporary agricultural labor certifications will be left without sufficient recompense in the event that their H–2ALC employers fail to satisfy their financial obligations.

4. Section 655.133, Requirements for Agents

The NPRM did not propose changes to the requirements for agents to provide, at the time of filing, a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer as well as a copy of the agent's MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* that identifies the specific farm labor contracting activities the agent is authorized to perform. Therefore, this final rule retains the current requirements without change.

5. Section 655.134, Emergency Situations

The NPRM proposed minor amendments to this section to clarify procedures for accepting an emergency *Application for Temporary Employment Certification* filed by employers and to conform with other procedural changes proposed in the NPRM and adopted in this final rule. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM, except for technical corrections for clarity.

Paragraph (a) of § 655.134 addresses the function of the emergency situations provision, while paragraph (b) addresses what an employer must submit to the NPC when filing an *Application for Temporary Employment Certification* and requesting a waiver of the filing timeframe due to an emergency situation. To better focus paragraphs (a) and (b) by topic, the Department proposed to move a parenthetical example of ''good and substantial cause'' from paragraph (a) to paragraph (b), where the regulation provides a nonexclusive list of factors that may constitute good and substantial cause. In addition, the Department proposed to expand the nonexclusive list of factors to include additional examples, such as the substantial loss of U.S. workers due to Acts of God or a similar unforeseeable man-made catastrophic event (such as a hazardous materials emergency or government-controlled flooding).

One commenter noted the list of required documents in paragraph (b) was unclear and suggested the Department revise the wording or punctuation to avoid confusion about whether the Department meant to exclude only the first item in the list after the word ''except'' (*i.e.,* evidence of a job order submitted pursuant to § 655.121) or all of the items after the word ''except.'' The Department appreciates this suggestion and has revised the punctuation of this list of required documents to clarify that the only evidence excepted is a job order submitted pursuant to § 655.121. Under most circumstances, an employer using the emergency situations procedures would not need to submit a job order in advance of its *Application for Temporary Employment Certification;* therefore, there would not be evidence of a pre-filing job order. However, all other documentation required at the time of filing under § 655.130(a) is required at the time of filing under § 655.134. In addition, an employer's emergency waiver request submission must include a completed job order on the Form ETA–790/790A, including all required addenda, and a statement justifying the request for a waiver of the normal filing timeframe requirement.

In paragraph (c), the Department also proposed changes to simplify the emergency application filing process for employers, provide greater clarity with respect to the procedures for handling such applications, and conform to other changes proposed in this rulemaking. For example, the Department proposed to eliminate the language referring to concurrent submission of the emergency situations filing to the NPC and SWA, as under this final rule employers submit job orders to the NPC and the NPC electronically transmits them to the SWA; the same process applies to emergency situations job orders.

Further, the Department proposed language to clarify the transmittal and review procedures. The CO will promptly transmit a copy of the job order to the SWA serving the AIE for review. The SWA will review the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F,[101] and § 655.122, and, within 5 calendar days of receiving the job order from the CO, the SWA will inform the CO of any deficiencies found. Based on the information provided by the SWA and the CO's own concurrent review, the CO will make a decision to issue a NOD under § 655.141 or a NOA under § 655.143; and, then, the CO will make a final determination

[101] In the proposed regulatory text, the Department inadvertently referenced only the job order content review at § 653.501(c), rather than 20 CFR part 653, subpart F, in its entirety. To ensure SWA review of job orders submitted through the emergency situations provision is complete (*e.g.,* includes a nondiscrimination content check under § 653.501(d)(3)) and consistent with review of job orders under § 655.121, as intended, paragraph (c)(1) has been revised to conform with § 655.121(c)(3). *See* 84 FR 36168, 36205 (NPRM noting proposed change to paragraph (c) ''makes the process for filing job orders in emergency situations consistent with the process for filing job orders under proposed § 655.121'').

in accordance with §§ 655.160 through 655.167.

Finally, if the employer's submission did not justify waiver of the filing timeframe and/or the CO determined there is not sufficient time to undertake an expedited test of the labor market, the CO's NOD would include the reason(s) why the waiver request cannot be granted and provide the employer with an opportunity to submit a modified job order that brings the requested workers' start date into compliance with the non-emergency filing timeframe requirement at § 655.121(b) (*i.e.,* first date of need must be no less than 60 days from the submission date).

A workers' rights advocacy organization objected to the existence of the emergency situations waiver, on principle, and to the extent it is continued in this final rule, urged the Department to limit its use. The workers' rights advocacy organization expressed concern the emergency situations waiver request process undermines the SWA's ability to evaluate job orders and assess U.S. worker availability, thereby undermining the Department's statutory obligation. The Department appreciates the commenter's concern and recognizes that a correction to paragraph (c)(1) is necessary to ensure SWA review of job orders submitted through the emergency situations provision is complete (*e.g.,* includes a nondiscrimination content check under § 653.501(d)(3)) and consistent with review of job orders under § 655.121, as intended. Therefore, paragraph (c)(1) has been revised in this final rule to clarify that the SWA's review encompasses 20 CFR part 653, subpart F, in its entirety, rather than only the job order content requirements at § 653.501(c). The revisions adopted in this final rule make the SWA's involvement in reviewing the job order clear. *See* § 655.134(c)(1). Further, even where an employer justifies its request as a qualifying emergency situation, if the CO determines there is insufficient time to appropriately test the domestic labor market on an expedited basis and satisfy the Department's statutory obligation, the CO will not approve the employer's emergency situations waiver request.

Commenters, including trade associations and agents, generally supported the proposed revisions to § 655.134. A trade association expressed appreciation for the Department's simplification and clarification of emergency situations waiver request procedures, noting that time is critical in emergency situations. This commenter specifically expressed support for the inclusion of an opportunity for the employer to modify its application or job order to bring it into compliance with non-emergency timeframe requirements in lieu of denial.

Among commenters who generally supported the proposed revisions to § 655.134, a couple objected to replacement of the term ''unforeseen'' with ''unforeseeable,'' which they viewed as a possible change in the standard of review and a higher threshold for employers to meet. However, the Department did not intend to create any material change in the regulatory standard though the use of the term ''unforeseeable.'' Rather, the revision is necessary to establish greater consistency—and avoid potential misunderstanding—between the H–2A standard for emergency situation waivers and a similar provision contained in the 2015 H–2B IFR at § 655.17; the Department does not have a different foreseeability standard in H–2A than H–2B and using different terms could suggest that possibility.[102]

A workers' rights advocacy organization expressed concern ''unforeseeable changes in market conditions'' and ''similar conditions that are wholly outside of the employer's control'' are terms that are ''too broad and too vague and might encompass situations which would not warrant . . . a waiver'' of the normal timeframe and the resulting abbreviated U.S. worker recruitment period. For example, this commenter worried that normal but unpredictable market fluctuations could qualify as an emergency situation. However, normal market fluctuations, despite being individually unpredictable, are a foreseeable aspect of conducting business. As demonstrated in the nonexclusive list of situations that might justify an emergency situations waiver, the Department envisions circumstances which are unforeseeable and wholly outside of the employer's control.

[102] Pursuant to § 655.17(b), the employer may request a waiver of the required time period(s) for filing an *H–2B Application for Temporary Employment Certification* based on good and substantial cause that ''may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God, or a similar unforeseeable man-made catastrophic event (such as an oil spill or controlled flooding) that is wholly outside of the employer's control, unforeseeable changes in market conditions, or pandemic health issues.'' 2015 H–2B IFR, 80 FR 24042, 24116–24117.

6. Section 655.135, Assurances and Obligations of H–2A Employers

a. Paragraph (c), Recruitment Requirements

Although the Department proposed no changes to paragraph (c) in the NPRM, the Department is revising it in this final rule, as necessary, to reorganize the mandatory recruitment obligation provisions. As previously discussed in this preamble, commenters expressed concern about the placement of mandatory recruitment obligations in the proposed optional pre-filing recruitment provision at § 655.123. In addition, after considering comments, the Department decided not to adopt the proposed pre-filing recruitment provision, as explained above. To retain the mandatory recruitment obligation provisions and clarify their applicability to all employers engaged in recruitment under this subpart, the Department relocated the mandatory recruitment obligations paragraphs proposed at § 655.123(d) and (e) to § 655.135(c). In this final rule, proposed paragraph (c) of § 655.135 is now paragraph (c)(1), and proposed paragraphs § 655.123(d) and (e) are now paragraphs § 655.135(c)(2) and (3). This reorganization retains the requirement that an employer, in all cases, must accept and hire all qualified, available U.S. worker applicants through the end of the recruitment period set forth in § 655.135(d) and, if an employer requires interviews, the employer must conduct those interviews in a way that imposes little or no cost on U.S. worker applicants and ensures no less favorable treatment than that offered to H–2A workers.

b. Paragraph (d), 30-Day Rule

Under the 2010 H–2A Final Rule, employers of H–2A workers are required to hire any qualified, eligible U.S. worker who applies for the employer's job opportunities during the first 50 percent of the work contract period (''50 percent rule''), unless an exemption for certain small employers applies. In the NPRM, the Department proposed to replace the 50 percent rule with a 30-day rule. The proposed 30-day rule would have required employers to provide employment to any qualified, eligible U.S. worker who applied for the job opportunity until 30 calendar days from the employer's first date of need on the certified *Application for Temporary Employment Certification,* including any approved modifications. For those employers who would have chosen to stagger the entry of H–2A workers into the United States under proposed § 655.130(f), the Department proposed to extend the mandatory hiring period

through the last date on which the employer expected a foreign worker to enter the country, or apply the 30-day period, if longer. The proposed change to the mandatory hiring period was intended to strike an appropriate balance between the need to ensure U.S. workers' access to H–2A job opportunities and employer burdens and operational disruptions caused by hiring U.S. workers mid-season. As explained in the NPRM, the 30-day rule proposal was based on the Department's analysis of hiring practices indicating relatively few U.S. workers applied or were referred for job opportunities after the initial 30-day period. The Department determined that this finding, in conjunction with other proposed changes, such as the proposed staggered entry provision and related mandatory hiring period, justified a change from the 50 percent rule to reduce administrative and employer burdens. *See* 84 FR 36168, 36207. The Department invited stakeholders to comment with data illustrating the costs and benefits of the 50 percent rule, particularly by providing comprehensive studies of the frequency with which H–2A employers hire U.S. workers pursuant to the 50 percent rule. However, the comments received, both in support of and in opposition to the proposal, were largely anecdotal.

After consideration of all comments, the Department has decided, for the reasons explained below, not to adopt the proposed 30-day rule and, instead, will retain the 50 percent rule from the 2010 H–2A Final Rule, as discussed below.

The Department received several comments strongly opposing the proposed 30-day rule and elimination of the 50 percent rule, including comments from many workers' rights and immigration advocacy organizations, several State employment agencies, two U.S. Senators, a U.S. Representative, a public policy organization, a labor union, a trade association, an international recruiting company, and a commenter from academia. The commenters' primary concern was that the proposal would reduce employers' obligations to recruit and hire U.S. workers, thus reducing U.S. workers' access to these jobs. A U.S. Representative asserted the proposal would ''undermine[ ] long-standing protections that help ensure employers are not incentivized to hire guest workers, who are vulnerable to exploitation and abuse due to their temporary immigration status, over domestic workers.'' Quoting a district court decision, a workers' rights advocacy organization opposed to the proposal noted that the 50 percent rule is a vital ''safety net to protect the jobs of citizens'' that ensures protections for ''small groups of available domestic employees who might not be known to [the Department] at the time of the initial certification . . . .''

Several commenters emphasized the importance of the 50 percent rule to U.S. agricultural workers who seek employment in a job opportunity more than 30 days after the start date for various reasons related to unexpected events, migratory labor patterns, differing dates of seasonal need, and interest in improved pay and benefits. A workers' rights advocacy organization noted that ''uncertainty of agriculture caused by unexpected severe weather conditions'' causes hardships for agricultural workers and asserted that under the proposed shortened recruitment period, workers displaced by crop loss would ''have fewer alternative options,'' and workers displaced after a natural disaster would have greater difficulty finding substitute employment. Another workers' rights advocacy organization stated that the 50 percent rule would protect U.S. worker job opportunities in the event an employer's worker(s) leaves the job early, but after 30 days have elapsed, ''due to being injured, getting ill, having a family emergency, or any other eventuality.'' A third workers' rights advocacy organization stated that elimination of the 50 percent rule ''would make it difficult for [workers] . . . to change places of employment in cases of employer abuse.'' A workers' rights advocacy organization stated that the presence of U.S. workers at a worksite forces an H–2A employer to compete with other employers and makes it more likely that abusive H–2A employers will be exposed. Another advocacy organization expressed concern that the shortened recruitment period would reduce the period of time during which a U.S. worker may leave current employment to accept an H–2A job that pays a ''higher wage and provides free transportation and housing if applicable . . . instead of settling for a non-H–2A job that may have lower pay and no legal requirement to provide transportation, housing, or other protections such as workers compensation.'' One commenter asserted the proposal would make it easier for agricultural employers to avoid their obligations to U.S. farmworkers, including unionized farmworkers, by engaging in intentionally ''ineffective recruitment'' and ''refus[ing] to hire qualified U.S. workers.'' Other commenters stated that the proposal would increase recruitment efforts within a reduced window for Migrant Services Outreach Workers and asserted the longer recruitment period allows workers to overcome employer attempts to discourage domestic farmworkers from applying or shut them out entirely.

Several workers' rights and immigration advocacy organizations and a labor union noted that ''[o]n many farms, hiring continues beyond the first day of work before the peak of the harvest season.'' One of these commenters stated that ''[s]ome U.S. workers work in agricultural jobs for part of the year, work in other industries such as construction and retail for a certain period of the year, and then return to agricultural jobs.'' The commenter added that ''[s]ome local areas of employment and migrant streams involve contiguous states'' and agricultural workers ''alter their migration patterns depending on the terms and conditions of employment.'' A State employment agency asserted that ''limiting the availability of the job order to 30 days after the Date of Need (DON) will effectively limit the ability of U.S. workers to follow the crops as in the past.'' A workers' rights advocacy organization noted that ''[i]n areas where migration is typical, crews are called to work in stages,'' with the number of crews ''increas[ing] at peak season,'' and reduction in the post-certification recruitment period would displace ''[w]orkers who have reported for and worked in these jobs for years'' by permitting employers ''to reject U.S. workers who report to work on the exact date they had begun work the year before, which could be after the 30-day deadline.''

Some commenters who opposed the proposal took issue with the hiring practices data the Department cited in the NPRM. A workers' rights advocacy organization also commented that the Department's data assume that the SWAs are properly implementing the 50 percent rule, but there are multiple instances where the SWAs miscalculate the 50 percent rule period and shorten the recruitment period. Other commenters generally emphasized the continuing importance of the SWA referral process. One of these commenters cited a 2018 monitor advocate report indicating SWAs referred more than 35,000 U.S. workers for H–2A job opportunities in 2015. A State employment agency asserted the data on which the Department relied were insufficient to justify elimination of the 50 percent rule because it examined ''only 20 percent of the selected H–2A applications audited.'' A

workers' rights advocacy organization asserted the decision to eliminate the 50 percent rule was arbitrary and capricious because the Department failed ''to present any evidence of disruption caused by the 50 [percent] rule'' and failed to account for employers discouraging U.S. workers from applying for jobs. Two U.S. Senators expressed concern that the ''lack of any data in the NPRM reflecting the lengths of work contracts'' prevented the public from ''sufficiently respond[ing] to the potential effects of the Department's proposal'' and ''exacerbates the concern . . . that eliminating the 50 percent rule will harm U.S. workers.''

The Senators also asserted ''the Department fail[ed] to provide any quantitative analysis and offer[ed] generalized assertions to support its claim that the employer costs of compliance with the 50 percent rule outweigh the benefit to U.S. workers.'' Similarly, a State agency that urged the Department to maintain the 50 percent rule noted the requirement is longstanding and ''the data shows there have been minimal disruptions to agricultural employers.'' Some commenters said that the rationale for eliminating the 50 percent rule was faulty because if the number of workers applying during the 50 percent rule period are low, then the cost to employers is negligible. Many workers' rights advocacy organizations agreed and cited to the early congressional study indicating the 50 percent rule not only provides an important protection for U.S. workers but does so with minimal burden to employers. Several of these commenters noted the report's conclusion that ''[i]n comparing the tangible benefits and costs alone, the benefits of the 50 Percent Rule outweigh the costs'' and that ''the costs of the 50 Percent Rule have been minimal and that the Rule has not had any particular negative impacts on either growers or U.S. workers.'' Other commenters pointed to the Department's 2010 H–2A Final Rule, which concluded that the 50 percent rule's benefits to workers outweighed the costs to employers, and that there was a lack of definitive data cutting in either direction.

In contrast, many commenters, including trade associations, employers, agents, individual commenters, a State agency, and a public policy organization, expressed support for the proposal. Some stated that few workers apply beyond the first 30 days, so the impact on U.S. workers would be minimal. Others stated that the proposal also would provide employers with more certainty and reduced costs. Another stated that it was difficult to train workers who are hired months after the season starts, and others said the proposal would reduce workplace disruptions caused by hiring new workers later in the contract period. Some stated that it was very difficult for agricultural employers to find domestic workers for these jobs. A State agency commented that the proposal would allow States to conduct concentrated recruitment of domestic workers at the beginning of the period of need. Some commenters added that the proposal provides a clear, bright-line rule as to employers' hiring obligations. An employer commented that once harvest begins, workers change location every 30 to 45 days, and most U.S. workers hired under the rule refuse to travel, so their employment is short term. Another commenter said that the proposal would be beneficial to H–2A workers who may be displaced by domestic workers well into the contract.

Some commenters who expressed support for the proposal to replace the 50 percent rule also suggested that the Department should further reduce the period during which employers must hire U.S. workers. Commenters suggested that the Department require employers to hire U.S. workers during a set period, pre-season, ending no later than when the H–2A workers depart from their home country to travel to the United States (*i.e.,* coinciding with the end of the employer's positive recruitment period under § 655.143(b)(3)). Other commenters suggested that the Department adopt the H–2B rule that requires recruitment until 21 days before the first date of the need (§ 655.40(c)). Alternatively, one commenter suggested that, given the shorter time period involved in the H–2A filing process, the Department could adopt a modified version of the H–2B rule's recruitment period by reducing the recruitment period to as little as 7 to 10 days before the first date of need. An agent commented that the job order should stay open for the entire recruitment period unless the employer notifies the Department that all jobs have been filled, at which time, the job order should be closed. The commenter also suggested that the job order should be reopened if workers are needed at any time during the contract period.

An agent also objected to the proposal insofar as it eliminated the ''small employer exemption'' to the rule, which excused certain small businesses from any hiring obligation after the end of the positive recruitment period and encouraged the Department to retain the existing small employer exemption framework with the proposed 30-day rule. The commenter stated that it was unreasonable to require a small employer to continue recruiting U.S. workers even 30 days into the season, because smaller operations do not enjoy the same margins for error and cannot easily absorb workforce disruptions during the season. Additionally, the commenter stated that the Department failed to explain why the exemption should be removed from the regulations. Another commenter stated that the small employer exemption was important to maintain.

The Department takes seriously its obligation to protect workers in the United States from potential adverse impact resulting from the employment of H–2A workers and appreciates the many comments it received on the proposed change to the post-certification mandatory hiring period. After careful consideration of all comments, and in light of the substantial concerns expressed by immigration and workers' rights advocacy organizations, U.S. Senators and Representatives, State employment agencies, and others, the Department has decided not to adopt the proposed 30-day rule. Instead, the Department will retain the 50 percent rule it has applied nearly continuously for decades.

The Department notes, first, that in reaching its decision to retain the longstanding 50 percent rule, it was not persuaded by the congressionally required study to which several commenters referred, as that study was commissioned by the Secretary of Labor in 1990 and focused on the impact of the 50 percent rule in only two States—Virginia and Idaho. *See* 2008 H–2A NPRM, 73 FR 8538, 8553. The research firm that produced the study interviewed only 66 growers, constituting only 0.1 percent of Virginia and Idaho's 64,346 farms at the time of the study. The study's age and small size render it an unreliable measure of the current impact of the 50 percent rule. The reasoning in the 2010 H–2A Final Rule also was similarly not determinative here—in that rule, the Department reinstated the 50 percent rule because of a lack of definitive data. 2010 H–2A Final Rule, 75 FR 6884, 6922.

Since then, the Department has conducted its own analysis of hiring practices, as noted in the NPRM. Based on a small set of recruitment reports obtained through the audit examination process, the hiring practices data cited in the NPRM demonstrate that most U.S. workers who apply for agricultural jobs do so before the start of the work contract. Based on these data, the

Department considered adopting the reduced recruitment period in the January 2021 draft final rule but acknowledged that some U.S. workers apply for these jobs after the employer's first date of need. Specifically, the Department's analysis of certified H–2A applications covering more than 33,510 jobs indicated that 3,392 U.S. workers applied for the available job opportunities at some point from the beginning of the employer's H–2A recruitment efforts through 50 percent of the work contract period and 16 percent of these U.S. workers applied and/or were hired more than 30 days after the start date of work.

Although the vast majority of workers who apply after the start date of work apply during the first 30 days of a work contract, the Department acknowledges that the analysis is based on a limited set of data available from employer recruitment reports selected for audit examination. After further consideration of comments and the available data, the Department agrees with commenters who note the burden the 50 percent rule imposes on employers in those limited cases where U.S workers apply beyond the proposed 30-day period is minimal and outweighed by the interests of the hundreds or potentially thousands of domestic migrant and seasonal farmworkers who may want to apply for the job opportunity more than 30 days after the first date of need. The 50 percent rule was initially a creation of the INA and designed to enhance domestic worker access to job opportunities for which H–2A workers were recruited. The Department believes any burden on employers as a result of the 50 percent rule is outweighed by the interests of the Department in ensuring U.S. workers are provided fair notice of H–2A job opportunities and are not denied employment if they are qualified and available within an adequate period of time after the employer's start date.

Additionally, the Department shares the concerns of commenters that changing the hiring period through this final rule could reduce U.S. workers' ability to access temporary and seasonal job opportunities and would raise the prospect of adverse impact resulting from the employment of H–2A workers. Furthermore, as several commenters pointed out, due to the nature of agricultural work, U.S. workers may need to seek new employment because of crop loss, or may need flexibility to follow crops as one work contract ends and another begins. These comments are consistent with comments from employers and associations that noted agricultural employers rarely need their entire workforce at the beginning of the season, but instead need a steadily increasing number of workers as the harvest intensifies. Both the proposed 30-day rule and the longstanding 50 percent rule weigh the same factors: on the one hand, ensuring U.S. worker applicants have a fair opportunity to apply for job opportunities so that they are not displaced by foreign workers; and on the other, recognizing the practical realities of agricultural work and the need to administer the INA in a way that is fair and reasonable for all affected parties, including employers. After considering the merits of the proposal and the significant number of comments expressing substantial concerns with a shorter hiring period, the Department has concluded that retaining the 50 percent rule best balances the objectives of ensuring the H–2A program operates in a way that is fair to all parties and provides adequate protections for U.S. workers, consistent with the Department's statutory mandate.

The Department is sensitive to the concerns regarding the impact on small businesses and appreciates the agent's comment regarding the small employer exemption. In light of the Department's decision to retain the 50 percent rule, and further consideration of the regulatory history, the Department has decided to retain the small employer exemption in this final rule.[103] In 1986, the IRCA added the 50 percent rule to the INA as a temporary 3-year statutory requirement, which included an exemption for employers who, among other requirements, ''did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in section 203(u) of title 29.'' 8 U.S.C. 1188(c)(3)(B)(iii). That exemption was included in the Department's 1987 H–2A IFR. 52 FR 20496, 20520. Although the statutory 50 percent rule and exemption were temporary, the corresponding requirements in the 1987 regulations had no expiration date. *See* 55 FR 29356, 29357 (July 19, 1990). In 1990, ETA published an IFR to continue the 50 percent rule, and included the small employer exemption. *Id.* at 29358. In 2008, the Department eliminated the 50 percent rule and created a 5-year transitional period during which employers were required to hire U.S. workers for 30 days after the employer's first date of need. 2008 H–2A Final Rule, 73 FR 77110, 77128. The 30-day requirement did not include an exemption for small businesses, and the final rule offered no explanation for the omission. In 2010, the Department reinstated the 50 percent rule, including the small employer exemption, stating that the exemption ''minimize[s] the adverse effect on those operations least able to absorb additional workers.'' 2009 H–2A NPRM, 74 FR 45906, 45917. In light of the Department's decision to retain the longstanding 50 percent rule, the Department also is retaining the small employer exemption in this final rule.

In addition to the comments addressed above, the Department also received a few comments addressing issues beyond the scope of the proposal to replace the 50 percent rule with the 30-day rule. One commenter said that worker referrals preceding the date of need should not automatically reduce the number of H–2A workers certified in the application, and the employer should have the discretion to either reduce the number of H–2A positions or hire both domestic referrals and H–2A workers. Another commenter suggested that to mitigate the inconvenience of hiring U.S. workers after the start of the contract, the Department should facilitate the placement of displaced H–2A workers in immediate, subsequent H–2A employment elsewhere. Another suggested treating H–2A workers in the country the same as U.S. workers for purposes of recruitment, which would require employers to prove that no H–2A workers already in the country are available to fill the positions. However, these suggestions are beyond the scope of this rulemaking.

The Department also invited comments on the proposed recruitment period for employers who chose to stagger the entry of H–2A workers. However, as the Department has decided not to adopt the proposed staggered entry provision, the issue of the related recruitment period is moot.

Accordingly, under this final rule, unless the small employer exemption applies, an employer granted temporary agricultural labor certification must continue to provide employment to any qualified, eligible U.S. worker who applies until 50 percent of the period of the work contract has elapsed, and an employer must update the recruitment report for each U.S. worker who applies through the entire recruitment period.

c. Paragraph (k), Contracts With Third Parties Comply With Prohibitions

The Department received a few comments regarding this provision of the NPRM, which the Department considered. The Department now adopts

[103] The January 2021 draft final rule would have eliminated the small employer exemption because the mandatory hiring period under the 30-day rule would have been shorter than under the 50 percent rule.

the language proposed without change. The current regulation requires employers to contractually forbid any engaged foreign labor contractor or recruiter (or their agents) from seeking or receiving payments or other compensation from prospective workers; the employer must provide documentation of the prohibition upon request. In the NPRM, the Department proposed to amend § 655.135(k) to clarify that employers engaging any foreign labor contractor or recruiter ''must contractually prohibit in writing'' the foreign labor contractor or recruiter, or any agent of such contractor or recruiter, from seeking or receiving payments from prospective employees. As explained in the NPRM, the Department has specified the contractual language that employers must use to satisfy this requirement for employers' convenience and to facilitate consistent and uniform compliance. 84 FR 36168, 36208.

The revision makes it clear that foreign labor contractors or recruiters and their agents are not to receive remuneration from prospective employees recruited in exchange for access to a job opportunity or any activity related to obtaining H–2A labor certification. To help monitor compliance with this prohibition, the Department has retained the requirement that employers make these written contracts or agreements available upon request by the CO or another Federal party.

A farmer and agent opposed the proposal because they believed the existing regulation was sufficient and that employers should be able to draft their own language prohibiting fees. The agent argued further that requiring specific contractual language could expose employers to a nonsubstantive violation, and furthermore that the Department had not provided a reason that the existing regulation was problematic. The Department understands employers' interest in drafting their own contractual language. However, the Department nonetheless has determined that it is necessary to require the specific language set forth in this provision to facilitate uniform application and compliance with the regulatory requirement. The previous regulatory requirement left room for employers to write language that may not have been clear or may not have conveyed the prohibition correctly. The language adopted in § 655.135(k) should serve to remove any doubt concerning contractual parties' obligations under § 655.135(k), and it makes it easier for employers to comply with the regulation.

An international recruitment company, trade associations, and advocacy organizations explained that the Department has failed to prevent recruitment fees from being charged to foreign workers in the past, and that this has caused such foreign workers to be vulnerable to unlawful conduct and debts. One of the advocacy organizations opposed any changes that would lower wages or reduce worker protections or reduce Department oversight. The Department, in requiring the addition of this specific language under § 655.135(k) clarifies the existing legal requirements. The Department acknowledges that, while organizations or people have nonetheless collected recruitment fees in violation of existing law, the change adopted in this final rule relates only to the addition of specific language in order to facilitate consistent and uniform compliance. Furthermore, the Department's processes and procedures meant to enforce this requirement are still in place.

While noting that it approved of the additional contractual language proposed, one of the workers' rights advocacy organizations went on to explain that this prohibition for third parties causes employers to intentionally remain ignorant of the recruitment process. It argued that workers are discouraged from coming forward for fear they will be denied a visa and fear of retaliation or blacklisting from recruiters and employers. The organization explained that unlawful conduct surrounding recruitment leads to debt for workers and human trafficking, and then detailed numerous examples from case law to support the assertion that recruiters are not abiding by the current regulations and are abusing foreign workers. The organization put forth numerous suggestions relating to increased enforcement and transparency regarding the recruitment process and increased worker protections. The Department appreciates the concerns the workers' rights advocacy organization has raised regarding the treatment of workers. Although several of the suggestions are beyond the scope of this rulemaking, the Department has addressed related concerns in other relevant sections of this final rule. For example, the Department has retained the current regulations' anti-retaliation provision and has added debarment of agents and attorneys for their own misconduct in this final rule. *See* 20 CFR 655.135(h) and 655.182; 29 CFR 501.20. The Department also believes the addition of the required contractual language is an important step toward ensuring that employers do not remain ignorant of the prohibitions and that any agreement with a third party clearly articulates the prohibitions.

An agent suggested the regulation be revised further and argued that the employer's inclusion of this contractual language should be a ''legal safe harbor'' to any claim brought against it to recover recruitment fees unless there is clear and convincing evidence that the employer knew or participated in the prohibited fees being requested. Through the proposed language in § 655.135(k), the Department did not propose such a ''legal safe harbor,'' and was not attempting to affect the legal rights parties may have in any private civil claims. To the contrary, as the Department has previously made clear in both the 2008 and 2010 prior rulemakings, these contractual terms must be bona fide. 75 FR 6926. Creating a ''legal safe harbor'' could potentially undermine an employer's incentive to assure the bona fides of the contractual provisions, thereby undermining these important worker protections. Accordingly, the Department declines to incorporate such a provision.

7. Section 655.136, Withdrawal of an Application for Temporary Employment Certification and Job Order

As discussed earlier in this preamble under § 655.124, the Department proposed to reorganize all withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* and job order is located in the section of the rule where an employer at that stage of the labor certification process would look for such a provision. Accordingly, the NPRM proposed revisions to move the withdrawal provisions at § 655.172(b) of the 2010 H–2A Final Rule to this new section, and to clarify the timeframe and procedures by which an employer may request withdrawal. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed to move the content of § 655.172(b) of the 2010 H–2A Final Rule to a new provision at § 655.136 located in the ''*Application for Temporary Employment Certification* Filing Procedures'' portion of the regulation, which begins at § 655.130. As a result of this relocation, the withdrawal provisions relating to an *Application for Temporary Employment Certification* that is in process at the

NPC and the associated job order would be located in a section of the rule where the regulated community would be more readily able to locate and understand the actions required for withdrawal at that stage of processing.

In addition, the Department proposed to remove language limiting withdrawal to the period after formal acceptance and expand this period to any time before the CO makes a final determination. This revision would allow employers to notify the NPC at any time after submitting an *Application for Temporary Employment Certification* of their desire to end processing of the application and job order. Finally, the Department proposed under § 655.136(b) to clarify that employers must submit withdrawal requests in writing to the NPC, identifying the *Application for Temporary Employment Certification* and job order to be withdrawn and stating the reason(s) for requesting withdrawal; however, the Department did not change the employer's obligations to workers recruited in connection with the *Application for Temporary Employment Certification* and associated job order, as these obligations attach at recruitment and continue after withdrawal.

The Department received no comments objecting to the proposed reorganization of the job order withdrawal provision from § 655.172(b) to § 655.136. One trade association supported a proposal to permit withdrawal any time after submission and up to the point of the CO's final determination. Two commenters objected to requiring employers to comply with their obligations under the *Application for Temporary Employment Certification* and related job order after withdrawal, apparently without regard to the timing of withdrawal. Consistent with discussion in the preamble for § 655.124, these comments objecting to an employer's continuing obligations after withdrawal are outside of the scope of the proposed change at § 655.136. The Department's proposal was limited only to reorganizing the existing withdrawal provision from § 655.172(b) to § 655.136 and minor clarifying edits, such as adding ''and job order'' to the statement of the employer's continuing obligation to comply with the terms and conditions of employment after withdrawal with respect to all workers recruited in connection with that *Application for Temporary Employment Certification,* which includes the related job order. Accordingly, the Department is adopting § 655.136, as proposed, without change.

D. Processing of Applications for Temporary Employment Certification

1. Section 655.140, Review of Applications

The NPRM proposed minor amendments to this section to conform existing procedures to other proposed changes, such as changes involving electronic filing and expansion of the first actions available to the CO after initial review of the *Application for Temporary Employment Certification,* job order, and any supplementary documentation necessary to issuance of a Final Determination. The Department received a few comments on this provision. After reviewing these comments, the Department has decided to adopt this provision as proposed in the NPRM, although first actions available to the CO will not include certification, as a result of the Department's decision not to adopt the pre-filing positive recruitment proposal at § 655.123, as discussed below.

In paragraph (a), the Department proposed to expand the first actions available to the CO after initial review of the *Application for Temporary Employment Certification,* job order, and any necessary supplementary documentation for compliance with all requirements under the subpart. In addition to the two first action options available to the CO under the 2010 H–2A Final Rule (*i.e.,* issuance of a NOA under § 655.143, if the application meets acceptance requirements, or issuance of a NOD under § 655.141, if the application contained deficiencies), the Department proposed that the CO could issue a Final Determination under § 655.160 as the first action. As explained in the NPRM, in combination with the pre-filing positive recruitment proposal at § 655.123, the proposed revision to § 655.140(a) would permit the CO to either certify or deny an *Application for Temporary Employment Certification* as the first action. The CO could issue a temporary agricultural labor certification as the first action if the employer satisfied all criteria for certification at the time of the CO's initial review, which could be possible for an employer who engaged in the proposed pre-filing recruitment option at § 655.123. Or, the CO could issue a denial as the first action if an application was incurably deficient at the time of filing, such as an application filed by a debarred employer.

The Department received a comment from a trade association that expressed support for the proposal, stating the ability to issue a Final Determination would expedite the application process in certain situations. An employer made a general comment expressing concern about the Department's requirement that employers cure deficiencies through the NOD process before the CO accepts an application for further processing, asserting that inconsistent identification of deficiencies could create processing delays for some applications. The Department appreciates the commenter's concern; however, the Department did not propose to change the criteria for the CO's decision to issue a NOD. The CO makes every effort to identify and address deficiencies consistently across applications and cannot accept an application for further processing and recruitment until all deficiencies related to effective recruitment of U.S. workers are resolved. The Department intended to expand the range of actions available to a CO by adding the option to issue a Final Determination under § 655.160 as the first action; the criteria for the CO's decision to issue a NOD remains unchanged.

This final rule adopts proposed paragraph (a) without change. Although the Department's decision not to adopt optional pre-filing recruitment removes certification as a possible first action, a Final Determination remains an available option for the CO's first action because the CO may deny an *Application for Temporary Employment Certification* as the first action if the application is incurably deficient. Alternatively, the CO may issue a NOD that provides the employer with an opportunity to cure deficiencies in the application or a NOA that accepts the application for further processing and recruitment.

The Department also proposed minor revisions to paragraph (b) explicitly addressing electronic communication, both to permit the CO to send electronic notices and requests to the employer and to permit the employer to send electronic responses to these notices and requests. The Department proposed to retain the option to use traditional methods that ensure next-day delivery because these methods will remain necessary in limited cases, such as when the employer is unable to file or communicate electronically. The same trade association expressed support for this proposed revision, stating that electronic submissions are more efficient. Therefore, this final rule adopts proposed paragraph (b) without change.

2. Section 655.141, Notice of Deficiency

The NPRM proposed amendments to this section to remove the option for employers to request expedited administrative review or a de novo

hearing of a NOD, and to clarify that an employer may submit a modified job order in response to a NOD and may appeal a denial issued by the CO of a modified application. The Department received some comments on this provision. After carefully reviewing these comments, the Department has decided not to make any changes to the proposed regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed removing language from paragraph (b) to conform to the language of the INA, which requires expedited administrative review, or a de novo hearing at the employer's request, only for a denial of certification or a revocation of such certification. *See* 8 U.S.C. 1188(e)(1). Because a NOD is not a denial or revocation of certification and is, instead, an opportunity for employers to provide information or cure deficiencies before the CO makes a final determination, the Department's proposal better aligns with the statutory requirements under the INA. 84 FR 36168, 36209.

Some commenters expressed general opposition to the proposed changes to paragraph (b) without further explanation. A commenter stated the proposal would complicate the program and make it more costly but did not explain why this would be the case. The Department disagrees with these assertions. As noted below, the Department believes that this change will simplify and streamline the temporary agricultural labor certification process. One commenter mistakenly believed the Department had justified this proposal on the basis of consistency with the H–2B program, but this was not a stated reason for the proposal. Other commenters believed they would not be able to fix errors in their filings or alert the CO to an addendum mistakenly not included in their original filing without the ability to appeal a NOD. However, the ability to appeal a NOD to BALCA is not required to address these issues. The employer can instead respond to the NOD with the necessary modification(s), correction(s), or omitted document(s). Specifically, under § 655.141, the employer retains the opportunity to respond to the NOD with additional information or documentation, including an amended job order, to address the identified deficiency or deficiencies in its application.

Another set of commenters claimed removing the option to appeal a NOD to BALCA could delay the temporary agricultural labor certification process. Many commenters did not explain why they believed that delays would occur as a result of the Department's proposed change. Two employers, however, provided more specific information. One employer stated the failure to include a document listing their proposed worksites as an attachment to a prior application delayed the arrival of their workers under the Department's subsequent certification. The other employer noted that their agent quickly resolved previous NODs and asserted that losing the ability to request NOD review would slow the process because they would have to produce a ''new and amended'' job order. Neither commenter explained how the ability to appeal a NOD to BALCA would prevent delay, especially when the opportunity to correct deficient applications continues to be available pursuant to § 655.141 and employers still must produce documentation, such as job orders, that meet all regulatory requirements.

Some commenters stated they would be unable to expeditiously defend their application when a NOD is issued and would have to comply with the NOD or wait to appeal after a denial, risking extra expenses or a potential delay in worker arrivals. One of these commenters suggested the ability to appeal both NODs and denials is a more efficient use of the employer's and the Department's time. However, employers do not need to appeal a NOD in order to submit additional documents or otherwise address the identified deficiencies. As explained above, employers can provide these documents in their response to the NOD. In fact, the Department anticipates that the changes in this final rule will expedite resolution of the majority of applications and decrease expenses by providing one clear, singular route for resolving information and documentation issues that prevent acceptance and certification of *Applications for Temporary Employment Certification* or job orders. Based on OFLC's experience administering the H–2A program, the appeal of a NOD to BALCA tends to add more time to case processing than a CO's efforts to resolve remaining issues in a NOD response through mechanisms such as subsequent NODs or other communication that this final rule explicitly authorizes in § 655.142(a). Under this final rule, the Department preserves the enhanced need for timeliness in agriculture by simplifying the steps in the adjudication of H–2A applications. Rather than allowing an appeal of a NOD to BALCA, which, even if successful, could lead to subsequent NODs, appeal of those NODs, and then a CO's denial and an appeal of that denial (*i.e.,* separate appeals of multiple issues), this final rule consolidates consideration of remaining issues or deficiencies into one appeal of the CO's determination. Notably, as explained in the NPRM, this approach provides the CO and employer more opportunities to resolve deficiencies that prevent acceptance or certification of *Applications for Temporary Employment Certification* or job orders and better ensures that only those issues that the CO and employer cannot resolve are subject to appeal before BALCA. *See* 84 FR 36168, 36209. The appeal process continues to include an expedited administrative review procedure, or an expedited de novo hearing at the employer's request, of the denial in recognition of the INA's concern for prompt processing of H–2A applications.

An agent stated no data were provided on the rate of certifications following appeals of NODs that underwent BALCA review and suggested these data be used to determine whether to adopt the proposal. OFLC does not produce data on this rate. Moreover, the Department does not believe these data would be instructive of whether to adopt its proposal. Regardless of whether an application receives a NOA after an appeal of a NOD or after resolution with the CO, the post-NOA requirements that must be met for certification, such as recruitment requirements, are the same. These post-NOA requirements for certification do not typically relate to the deficiencies that would be raised in a NOD, thus the rate at which an application is certified following the appeal of a NOD is irrelevant. Another commenter claimed that, based on the small number of BALCA decisions out of the total number of H–2A applications filed each year, the current process should be preserved. This comment is unclear because the figures provided by the commenter do not distinguish between appeals from a NOD versus appeals from a denial of an application. To the extent the commenter is asserting an appeal of a NOD should be preserved because of the limited number of BALCA rulings related to these appeals, there could be several reasons for this number that are unrelated to the ability to appeal a NOD, including that many employers receive a NOA in the first instance or choose to respond to the NOD instead of appealing.

Some commenters suggested the change may eliminate an opportunity for dialogue between the Department and the employer prior to a final

determination. However, as explained above, the appeal of a NOD is not the only opportunity for the employer to engage in dialogue with the Department prior to a final determination. Employers have the option of responding to the NOD and working with the CO to resolve the deficiencies identified in the NOD. Several commenters believed the proposal would limit employers' due process or result in undesired outcomes due to errors by the agency. The Department believes the proposed change continues to guard against the latter because employers can still request review before an administrative tribunal of a CO's denial of an application. Employers also continue to decide whether they wish to seek review in the form of administrative review or a de novo hearing. In this way, the proposed change retains the due process protections afforded employers under sec. 218(e)(1) of the INA and better conforms with these statutory requirements. *See* 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review, or, at the employer's request, a de novo hearing, of a denial of certification or a revocation of such certification). And, as is the case now, employers may appeal this administrative decision or seek other appropriate relief in Federal court.

An agent suggested that, in cases where the CO believes the employer will likely agree to the modification requirements, the NOD should provide the employer the option to accept the proposed changes by checking a box in iCERT or its successor (FLAG) instead of filing a formal NOD response. While there are circumstances when OFLC may address certain minor issues without the issuance of a formal NOD and response, the Department declines to adopt the agent's suggestion to create this separate procedure for two reasons. First, it would necessitate judgment calls on whether the employer is likely to consent to the required modifications. Second, the Department's electronic filing system is designed to prevent submission of obviously deficient, incomplete applications, which should reduce the need for the CO to issue nonsubstantive NODs.[104]

The NPRM also proposed adding language to § 655.141(b)(3) to clarify that the employer may submit a modified job order in response to a NOD. This proposal conforms paragraph (b)(3) with other paragraphs in § 655.141, which allow the CO to issue a NOD for job order deficiencies and provide the employer an opportunity to submit a modified job order to cure these deficiencies. A commenter suggested that where the CO is unable to make a determination at least 30 days before an employer's date of need, paragraph (b)(3) should include language requiring the Department to notify the employer or agent of the reason. However, this comment is beyond the scope of the Department's proposal and cannot be implemented through this rulemaking. Because no commenter raised issues with the proposed language in paragraph (b)(3), the Department adopts this paragraph without change.

Lastly, the NPRM proposed to remove language in § 655.141(b)(5) that purports to prohibit the employer from appealing the denial of a modified application.[105] This clarification aligns § 655.141 with § 655.142(c), which permits the appeal from a denial of a modified application. The Department received two comments, both supporting the proposal. This final rule therefore adopts paragraph (b)(5) as proposed.

3. Section 655.142, Submission of Modified Applications

The NPRM proposed to amend this section to clarify the standards and procedures that govern the employer's submission of a modified *Application for Temporary Employment Certification* or job order. The Department received one comment on this provision; after reviewing this comment, the Department has decided not to make any changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The provisions in this section govern the employer's response to a NOD issued pursuant to § 655.141. The Department proposed revisions to paragraph (a) to clarify that an employer may submit a modified job order in response to a NOD, not only a modified *Application for Temporary Employment Certification.* This change conforms this section to the provisions at § 655.141 that permit the CO to issue a NOD for *Application for Temporary Employment Certification* and/or job order deficiencies. In addition, the Department proposed to revise paragraph (a) to explicitly authorize the CO to issue multiple NODs, if necessary, to provide the CO with additional flexibility to resolve deficiencies that would otherwise prevent acceptance of an *Application for Temporary Employment Certification* and job order.[106] For example, this may be necessary if the CO discovers a deficiency while reviewing submissions by the employer, such as an employer's response to a NOD that raises other issues that require the CO to request additional modifications.

In paragraph (b), the Department proposed clarifying revisions to explain the circumstances under which the CO will deny an *Application for Temporary Employment Certification* after reviewing an employer's NOD response(s). If the modified *Application for Temporary Employment Certification* or job order does not cure the deficiencies the CO identified or otherwise fails to satisfy the criteria required for certification, the CO will issue a denial following the procedure outlined in § 655.164.

Otherwise, the Department retained without change the provisions in paragraph (a) that allowed the CO to postpone issuing a final determination for 1 calendar day (up to a maximum of 5 calendar days) for each day an employer fails to submit a timely response to a NOD and, if the employer fails to submit a response within 12 calendar days after the NOD was issued, to deem the *Application for Temporary Employment Certification* abandoned. The Department also retained without change the provisions in paragraph (c) describing the opportunity to appeal the CO's denial of a modified *Application for Temporary Employment Certification.*

The Department did not receive comments opposed to the proposed changes in this section. One trade association expressed support for the changes, stating that they would reduce the burden on employers to resolve problems with the job order and would expedite application processing once problems are resolved. Therefore, the Department has adopted § 655.142 as proposed, without change.

4. Section 655.143, Notice of Acceptance

The NPRM proposed to amend this section to clarify current policy and ensure the NOA content requirements and timeline for issuance conforms to

[104] *See* 84 FR 36168, 36198 (noting OFLC's technology system will not permit electronic submissions where required fields and documentation have not been completed or uploaded and saved).

[105] The purpose of § 655.141(b)(5) in the current regulations is to address situations where the employer fails to respond to the NOD or appeal and, accordingly, ''abandons'' the application. The Department has retained the relevant language in what will now be § 655.141(b)(4): ''if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification.*'' 84 FR 36168, 36276.

[106] The Department also explained that this revision mirrors language included at § 655.32(a) of the 2015 H–2B IFR. *See* 80 FR 24042, 24122.

other changed proposed in the NPRM, such as labor supply State determinations and requiring the CO to transmit the job order to the SWAs for interstate circulation. The Department received some comments on the changes proposed to this provision. As discussed below, in this final rule, the Department has made additional revisions to further clarify the NOA content requirements and conform this section both to regulatory changes adopted in the 2019 H–2A Recruitment Final Rule and the Department's decision not to adopt the pre-filing positive recruitment options proposed at § 655.123.

The Department proposed no substantive changes to the notification timeline in paragraph (a). The proposed regulatory language included a technical revision to remove ''are complete and'' for clarity and to conform the language with the Department's proposal in paragraph (b) to codify the current practice under which the CO issues a NOA when an *Application for Temporary Employment Certification* and job order is complete and compliant for recruitment purposes, even though requirements for certification that are unrelated to recruitment (*e.g.,* final housing approval) may not have been completed yet. In addition, the Department proposed to revise the list of NOA content requirements to conform to other proposed changes in the NPRM. After considering comments on the Department's proposals, and to conform this section to changes made through the 2019 H–2A Recruitment Final Rule, the Department has retained paragraph (a) without change but further revised paragraph (b) of this section, as discussed below.

To avoid making unnecessary changes from the 2010 H–2A Final Rule, the Department has further reorganized the content of paragraph (b). Paragraphs (b)(1) through (3) now correspond to topics addressed in those paragraphs in the 2010 H–2A Final Rule: paragraph (b)(1) addresses interstate clearance of the job order, with revisions to conform with the NPC's electronic transmission of the job order to the SWAs; paragraph (b)(2) addresses the employer's positive recruitment and recruitment report obligations, with revisions to conform with the Department's decisions discussed in §§ 655.123 and 655.154 of this preamble (*i.e.,* not to adopt the proposed optional positive pre-filing recruitment provision and to require the NOA to provide instructions to the employer regarding additional positive recruitment requirements, if any, and related documentation retention requirements) and changes implemented through the 2019 H–2A Recruitment Final Rule; and paragraph (b)(3) addresses the positive recruitment period, with a proposed technical revision to cite to § 655.158 rather than repeat its content. In addition, the Department has redesignated the remaining paragraphs listed under paragraph (b). Paragraph (b)(4), which appeared as paragraph (b)(3) in the NPRM, requires the NOA to list outstanding documents and assurances required for certification. Paragraph (b)(5), which appeared as proposed paragraph (b)(4) in the NPRM, requires the NOA to notify the employer of the timeline for the CO's final determination and adopts the proposed allowance for the CO to hold final determination inside the 30 days before the employer's start date if the application is not certifiable by the 30-day mark but is expected to be certified before the employer's first date of need.

Finally, this final rule adds a new paragraph (b)(6) to accommodate a new provision added by the 2019 H–2A Recruitment Final Rule at paragraph (b)(5), effective October 21, 2019. Under paragraph (b)(6), the NOA will direct the SWA to provide written notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather, when appropriate to the job opportunity and AIE.

A workers' rights advocacy organization expressed concern about the CO issuing a NOA where the employer's application is complete and compliant for recruitment purposes but the employer has not submitted all documentation required for certification. The Department believes the commenter may have misunderstood the provision and thought the CO's issuance of a NOA in such circumstances would result in a temporary agricultural labor certification despite the employer's failure to submit all required documentation. In fact, what was proposed is effectively how the current process works. The CO's issuance of a NOA does not guarantee the employer will receive labor certification and does not absolve the employer of any recruitment requirements or documentation requirements in these cases. However, issuance of a NOA allows positive recruitment of U.S. workers to begin as early as possible—as soon as the application is complete and compliant for recruitment purposes. For example, positive recruitment may begin while the employer is making a housing repair the SWA identified during inspection. The employer can only receive certification after it has submitted all documentation and assurances necessary for certification, including the SWA's housing certification. Therefore, in this final rule, paragraph (b)(4) allows the CO to issue a NOA listing any documentation or assurances that the CO has not yet received and without which certification will not be issued.

An employer and a trade association generally supported the Department's proposal to include an allowance for the CO not to issue a final determination 30 days before the employer's first date of need under one additional circumstance—when an *Application for Temporary Employment Certification* does not meet the requirements for certification on the 30th day before the first date of need but is expected to meet such requirements before the first date of need. The commenters asked the Department to clearly indicate this exception is limited to circumstances where CO must place a hold on an application that otherwise would be denied in order to afford the employer additional time to satisfy certification requirements. The Department appreciates the comment, which reflects the Department's intent as discussed in the NPRM, but does not believe it is necessary to revise this section further. The proposed language, which is adopted in this final rule at paragraph (b)(5), clearly limits the CO's authority to issue a Final Determination within 30 days of an employer's first date of need to the two scenarios specified: an employer's untimely modification under § 655.142 and when the CO holds an application that cannot be certified at the 30-day mark but is expected to be certifiable before the employer's first date of need.

5. Section 655.144, Electronic Job Registry

The NPRM proposed minor amendments to this section to ensure the standards and procedures for posting the approved job order on the electronic job registry conforms with other changes proposed in the NPRM and is consistent with the Department's current practices. The Department received a few comments on this provision; after reviewing these comments, the Department has decided not to make any substantive changes to the regulatory text proposed in the NPRM. Therefore, as discussed below, the Department is adopting this provision as proposed in the NPRM.

In paragraph (a), the Department is deleting an obsolete sentence that stated job orders would be posted on the

electronic job registry after the Department initiated operation of the electronic job registry; as the electronic job registry is now fully operational, this sentence is no longer necessary. The Department is making two minor revisions to paragraph (b). First, rather than retaining both a detailed description of the period during which a job order will be posted on the electronic job registry and a reference to the regulatory provision where the primary description of that recruitment period is found (§ 655.135(d)), the Department is retaining only the reference to § 655.135(d). This approach is consistent with other similar revisions to simplify the regulation as a whole. Second, the Department proposed to add the phrase ''in active status'' to clarify job orders must remain in active status on the electronic job registry until the end of the recruitment period set forth in § 655.135(d). As discussed in the preamble to the NPRM as well as in the preamble to the 2019 H–2A Recruitment Final Rule, after the job order has served as an electronic recruitment tool on the electronic job registry during the recruitment period at § 655.135(d), the job order's status on the electronic job registry will change to ''inactive'' so that the information on the job order will still be available for public research and access. *See* 84 FR 36168, 36210; 2019 H–2A Recruitment Final Rule, 84 FR 49439, 49444.

The Department received two comments on this section regarding the collection and public availability of information related to H–2A job opportunities. A State government agency suggested the Department leverage the electronic job registry to collect additional demographic information, including the work location of foreign workers and the concentration of certified applications and workers. A workers' rights advocacy organization urged the Department to expand and enhance publicly available information for a variety of purposes, including increasing transparency and effective monitoring and enforcement. The commenter asked the Department to make all job and employer information, across all forms and in supporting documentation, publicly available and accessible, in particular, to potential workers and their advocates. The commenter expressed concern about the speed with which the Department would post job orders to the electronic job registry and potential difficulties with public access to older job orders, in particular, as the result of the Department's transition between electronic systems.

The Department agrees it is important to collect H–2A program information and make it available to the public, which it currently accomplishes through the Disclosure Data section of the OFLC website. The Department will continue to collect detailed program information, including information about work locations and certification statistics sortable by occupation, and publish this information on the OFLC website. In early 2020, the Department significantly expanded the scope of labor certification decision data available to the public through the Disclosure Data section of the OFLC website. However, the Department declines to collect additional demographic information beyond that already required for program purposes because the labor certification stage of the immigration process involves the prospective recruitment of unnamed U.S. or foreign workers by an employer for often large numbers of job vacancies. Further, the intended use of the information published on the Department's electronic job registry differs from the intended use of OFLC's Disclosure Data. The electronic job registry is a recruitment tool designed for broad dissemination of available temporary or seasonal job opportunities to U.S. workers. As such, the electronic job registry provides information for job seekers, including work locations, duties to be performed, qualifications required, and dates of employment.

As of December 27, 2019, the Department has transitioned the electronic job registry to a new web-based platform, *SeasonalJobs.dol.gov. SeasonalJobs.dol.gov* is a mobile-friendly online portal that leverages the latest technologies to automate the electronic advertising of H–2A job opportunities and ensures copies of H–2A job orders are promptly available for public examination. The portal is designed to help U.S. workers identify and apply for open seasonal and temporary job opportunities using robust and personalized search capabilities. In addition, the portal makes it easier to integrate employment postings with third-party job search websites to make the posted job order information more accessible to job seekers. As a publicly available resource, any interested party may search and review posted job opportunities.

6. Section 655.145, Amendments to Applications for Temporary Labor Certification

The NPRM proposed minor amendments to this section that contains the standards and procedures by which an employer may submit a written request to the CO to amend its *Application for Temporary Employment Certification* in order to increase the number of workers or make minor changes to the period of employment. Specifically, paragraph (b) contained technical corrections to replace references to the terms ''job site'' or ''place of work'' with the proposed term ''place of employment'' as defined under proposed revisions to § 655.103. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department received a few comments that presented situations in which an employer might want to correct typographical errors or make other changes to its application to respond to changes in market conditions after submission. As discussed in the preamble for § 655.121(e)(2), allowing applicants to request corrections to applications without restrictions would run counter to the Department's efforts to modernize the temporary agricultural labor certification process. The 2010 H–2A Final Rule at § 655.145, to which changes have not been proposed, allows an applicant to request amendments to increase the number of workers or to make minor changes to the period of employment, which could be due to changes in market conditions or for other reasons. In addition, an employer may request modifications to its job order under § 655.121(e)(2) before submitting its *Application for Temporary Employment Certification.* Should an employer want to make changes to its application other than those permitted under these amendment provisions, the employer will need to file a new *Application for Temporary Employment Certification* to accommodate the changes needed. Depending on the circumstances, the new application may qualify as an emergency situation filing under § 655.134, which allows for waiver of the normal filing timeframe requirements for reasons including ''good and substantial cause (which may include unforeseen changes in market conditions).''

As for typographical errors, the Department reminds applicants to thoroughly review each application prior to submission, as they alone are responsible for ensuring an application is complete and accurate at the time of submission; the CO is not responsible for correcting an employer's typographical errors. While some typographical errors may not impact the

CO's final determination, if a typographical error creates a substantive issue that is apparent to the CO (*e.g.,* an offered wage that is lower than required), the CO will issue a NOD requiring the employer to modify the application to address the deficiency. In situations where a typographical error mischaracterizes or misrepresents the job opportunity available in a way that does not create a regulatory deficiency that would trigger a NOD and the deficiency cannot be corrected during processing, the employer would be required to file a new *Application for Temporary Employment Certification* to accurately reflect the job opportunity for which it requests temporary labor certification to employ H–2A workers.

E. Post-Acceptance Requirements

1. Section 655.150, Interstate Clearance of Job Order

The Department proposed to retain this section authorizing the interstate clearance of an employer's approved job order with three minor amendments to conform with changes proposed to other provisions in the NPRM. After considering the comments it received in connection with this provision, the Department has adopted as final the proposed revised § 655.150 with one technical amendment, which is discussed below. Related comments, such as those regarding the NPC's role in transmitting job orders to SWAs and electronic transmission of those job orders, are addressed in the preamble discussion of § 655.121. Similarly, comments regarding the Department's proposal to revise the recruitment period at § 655.135(d) are addressed in the preamble discussion of § 655.135(d), and comments regarding the Department's proposed process through which the OFLC Administrator will designate labor supply States or suggested additional changes to positive recruitment obligations are discussed in the preamble to § 655.154.

As established under the 2010 H–2A Final Rule, after receiving the CO's NOA under § 655.143, the SWA transmits the job order beyond the AIE and intrastate clearance, as directed in the NOA, at minimum, to all other States listed in the job order as anticipated worksites. Each SWA that receives the job order must keep the job order on its active file until the end of the recruitment period at § 655.135(d) and refer each qualified U.S. worker who applied during that period to the employer.

In the NPRM, the Department first proposed that the NPC, rather than the SWA, would transmit the employer's job order to each additional SWA under § 655.150, consistent with the Department's proposed revisions to § 655.121. Second, the Department proposed to add language specifying that the NPC will transmit the approved job order to each State that the OFLC Administrator designates as labor supply State(s), if applicable, consistent with the Department's proposal at § 655.154(d). Finally, consistent with proposed revisions to other sections of the regulatory text, the Department proposed to simplify the language in paragraph § 655.150(b) by including a citation to the recruitment period at § 655.135(d), rather than restating the language in the regulatory text under this paragraph.

Two State government commenters suggested that the Department require employers to input job order information into SWAs' online labor exchanges and/or other online recruitment tools, which they viewed as consistent with the Department's adoption of electronic filing and sensitive to State resources and system investments. One of these commenters further asked the Department to clarify that employer identity information is not suppressed (*i.e.,* withheld) in H–2A job orders, unlike non-H–2A job orders subject to § 653.501; the commenter thought such clarification would relieve SWAs of the task of manually entering that information in job order postings in the State labor exchange system.

The Department is sensitive to SWA resource concerns, but the Department declines to impose a duplicative job order data entry requirement on employers. Such a requirement is inconsistent with the Department's goals stated in the NPRM to eliminate redundancies, reduce or avoid duplication of burden on employers, and ensure a single point of entry for employers to access the H–2A program. Under this final rule, the employer will enter the job order information into the Department's centralized electronic system, to which the SWAs have access and from which the SWAs can retrieve the entirety of the job order data—including employer identity information—for use in processing the job order and posting on their State labor exchange systems for intrastate clearance. To the extent these comments suggest the Department should require employers to conduct additional positive recruitment or post jobs electronically in SWA recruitment tools beyond the State labor exchange system, the Department respectfully declines to make any changes in response. The topic of employers' electronic advertising obligations was addressed in the Department's 2019 H–2A Recruitment Final Rule and is outside the scope of this rulemaking. As explained in the 2019 H–2A Recruitment Final Rule, the Department intended for the NPC's posting of the job order in the Department's enhanced electronic job registry system, as required under § 655.144, to facilitate broad electronic dissemination of the approved job opportunity. The electronic job registry system makes a standard set of job data available to third-party job search websites, which could include SWA online resources, allowing those job listing websites ''to execute web-scraping protocols that extract new H–2A job opportunities from *SeasonalJobs.dol.gov* and index them for advertising to U.S. workers.'' 2019 H–2A Recruitment Final Rule, 84 FR 49439, 49445.

After consideration of these comments, the Department is adopting the proposed revisions to § 655.150, with one correction. The Department decided to revise paragraph (a) in this final rule to retain the phrase ''at minimum'' from the 2010 H–2A Final Rule's paragraph (a). This phrase was inadvertently removed in the proposed paragraph. Reinserting this phrase is necessary to avoid an unintended and inappropriate gap in job order circulation. For example, a job opportunity may be located in an AIE that crosses State lines; however, all places of employment the employer listed are located in only one of the States in the AIE. To appropriately test the domestic labor market, the job order must be circulated to all SWAs with jurisdiction over the AIE, not only the one SWA with jurisdiction over the places of employment listed. Retaining ''at minimum'' provides clarity and the necessary flexibility for the NPC and SWAs to ensure appropriate recruitment through the labor exchange system and does so without added burden to the employer. As a result, under this final rule, ''at minimum,'' the CO will transmit the job order for interstate clearance to the SWA in each State listed in the job order as an anticipated place of employment and the SWA in each State designated by the OFLC Administrator as a State of traditional or expected labor supply for job opportunity under § 655.154(d).

2. Section 655.153, Contact With Former U.S. Workers

The NPRM proposed minor amendments to this section containing the standards and procedures by which employers contact U.S. workers they employed in the occupation at the place of employment during the previous year to solicit their return to the job. *See*

2010 H–2A Final Rule, 75 FR 6884, 6929. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities. The obligation also aims to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H–2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM. Therefore, this final rule retains this section from the NPRM without change.

Section 655.153 requires an employer to contact, by mail or other effective means (*e.g.,* phone or email), U.S. workers it employed in the occupation at the place of employment during the previous year to solicit their return to the job. *See* 2010 H–2A Final Rule, 75 FR 6884, 6929. This obligation aims to ensure that these U.S. workers, who likely have an interest in these job opportunities, receive notice of the job opportunities. It additionally aims to prevent the employer from effectively displacing qualified and available U.S. workers by seeking H–2A workers. An employer, however, need not contact those U.S. workers it dismissed for cause or those who abandoned the worksite.

The Department proposed in the NPRM to add language to § 655.153 requiring an employer to provide the notice described in § 655.122(n) [107] to the NPC with respect to a U.S. worker who abandoned employment or was terminated for cause in the previous year. The proposal also required an employer to provide the notice in a manner consistent with the NPC **Federal Register** notice issued under § 655.122(n).[108] The Department intended the proposal to ensure that there would be virtually contemporaneous documentation to support an employer asserting that a U.S. worker abandoned employment or that it terminated the U.S. worker for cause. Under the proposal, the employer would have to contact former U.S. workers who abandoned employment or were terminated for cause if, while subject to H–2A program requirements, it failed to provide notice in the required manner.

The Department may not certify an application unless the prospective employer has engaged in positive recruitment efforts of able, willing, and qualified U.S. workers available to perform the work. *See* 8 U.S.C. 1188(b)(4). The prospective employer's positive recruitment obligation is distinct from, and in addition to, its obligation to circulate the job through the SWA system. *Id.* E.O. 13788 requires the Department, consistent with applicable law, to protect the economic interests of U.S. workers. *See* 82 FR 18837 (Apr. 21, 2017), secs. 2(b) and 5. The requirement to notify the Department of abandonment and termination for cause protects the interests of able, willing, and qualified U.S. workers who might be available to perform the agricultural work, consistent with the INA. In addition, the notice could assist growers in the event U.S. workers who have abandoned employment or been terminated for cause later assert the employer failed to contact them as required by § 655.153.

As the Department provided in the NPRM, the notice obligation should not increase the existing regulatory burden. Section 655.122(n) currently permits an employer to avoid the responsibility to satisfy the three-fourths guarantee as well as its return transportation and subsistence payment obligations when a U.S. worker voluntarily abandons employment or the employer terminates the worker for cause if the employer notifies the NPC not later than 2 working days after the abandonment or termination. Employers already have a strong financial incentive to submit this notice to avoid responsibility for the three-fourths guarantee and return transportation and subsistence costs. The requirement to submit the notice to avoid § 655.153's contact obligation is thus unlikely to change the current regulatory burden on employers.

As noted above, § 655.153 currently permits employers to contact U.S. workers by mail or other effective means. In the NPRM, the Department reaffirmed that phone and email contact continue to be effective means to contact U.S. workers. The Department received no comments that suggested that permitting employers to contact U.S. workers by phone or email would be inconsistent with program requirements or undermine the interests of U.S. workers. Thus, the Department again reaffirms that contact by phone or email is permissible.

In the NPRM, the Department observed that employers that are new to the program have employed U.S. workers in the occupation at the place of employment during the previous year. Further, there may be instances in which a regular user of the H–2A program might employ U.S. workers in the pertinent occupation at the place of employment to provide agricultural services and use the H–2A program again in the succeeding year.

The NPRM clarified that in each of these instances, § 655.153 requires these employers to contact the U.S. workers employed in the previous year. This obligation applies to entities that employed U.S. workers in the previous year under the common law definition of employer incorporated in § 655.103(b). The NPRM included the following example to demonstrate an instance in which a grower that employed U.S. workers under the common law in the previous year would assume an obligation to contact those U.S. workers under § 655.153 in the current year. Assume a grower used FLCs to provide U.S. workers during the previous year and then applied to employ H–2A workers in the following year. If the grower employed the U.S. workers under the common law of agency as a joint employer with a FLC in the previous year, then § 655.153 would require the employer to contact those U.S. workers in the following year.

The Department received numerous comments concerning this clarification, particularly related to a possible employer's obligation to contact workers that an H–2ALC or FLC employed in the previous year. Multiple institutional commenters, as well as individual commenters, opposed the application of § 655.153's contact obligation to U.S. workers an H–2ALC or FLC employed in the previous year. It appears, however, that these commenters misunderstood the scope of the Department's clarification. These commenters thought the clarification included an obligation to contact the U.S. workers who an H–2ALC or FLC employed at a grower's worksite in the previous year even when the grower did not (jointly) employ such U.S. workers under the common law definition of employer. The Department hereby reaffirms, consistent with the language of the existing regulation and the preamble in the NPRM, that its proposal in the NPRM did not require U.S. worker contact when the grower had no employment relationship under the common law definition of employer

[107] Under § 655.122(n), a worker's abandonment of employment or termination for cause relieves an employer of responsibility for subsequent transportation and subsistence costs and the obligation to meet the three-fourths guarantee for that worker, and, in the case of a U.S. worker, to contact that worker under § 655.153, if the employer provides notice to the ETA NPC of the abandonment or termination. In the case of an H–2A worker, notification to DHS is also required pursuant to 8 CFR 214.2(h)(5)(vi)(B)(*1*).

[108] *See* Notice, *Information about the DOL Notification Process for Worker Abandonment, or Termination for Cause for H–2A Temporary Agricultural Labor Certifications,* 76 FR 21041 (Apr. 14, 2011).

with the U.S. worker in the previous year. Thus, if the H–2ALC or FLC with whom the grower contracted in the previous year was the only employer of the U.S. workers that worked at the grower's farm, the grower has no contact obligation under § 655.153 in the subsequent year. The Department's proposal merely clarified that when the grower jointly employed the U.S. workers in the previous year, it must contact those U.S. workers it jointly employed.

These commenters also contended that the contracts between growers and H–2ALCs/FLCs regularly contain provisions prohibiting growers from ''poaching'' the labor contractors' workers. They accordingly submitted that the clarification will disrupt the parties' contractual relations. One commenter submitted that farmers ''will increasingly be unable to find FLCs willing to work for them because the [FLC] will want to avoid having his workers poached by his clients,'' and that growers will not use labor contractors because ''they will be concerned about breach of contract liability resulting from their required attempts to poach the [FLCs'] employees.'' Another commenter remarked that the proposed requirement should be clarified such that contact with former workers must only occur in situations when a written agreement exists between a farmer and a contractor that specifies joint employment status, to avoid the perception of ''poaching.''

A few commenters that opposed the clarification appear to evince a clearer understanding that its scope only includes growers that employed U.S. workers in the previous year. A joint comment contended that the clarification ''appears to be the first instance'' in which the Department is applying § 655.153 to workers employed by labor contractors. The commenters interpreted the provision to apply only to ''*former* [workers]'' and not to ''*joint* [workers employed by] the H–2A applicant and [FLCs]. If the Agency intended for joint employees to be contacted, it would have included specific language identifying joint [workers] within the regulation'' (emphasis in original). Another comment provided that § 655.153 does not reference workers employed jointly by a grower and FLC, adding that the clarification would ''require applicants to do more than is required by statute and regulations.''

Similar to the other commenters, the joint comment also explained that the proposal would seriously disrupt the relationship between growers and FLCs, particularly the requirement that growers seek, in the joint comment's words, to ''steal'' labor contractors' workers.

Finally, one commenter reiterated the concerns of the commenters described above, adding that application of the proposal is likely to result in labor contractors relying more frequently on H–2A workers rather than U.S. workers. The commenter also proposed ''at a minimum'' that the regulatory language be ''revise[d] . . . to state explicitly that the obligation to contact former employees only extends to the employer's own employees, not the employees of an FLC utilized by the employer, unless the FLC operates as a joint employer with the employer.''

This commenter's description captures precisely what the Department proposed in the NPRM. An employer's obligation to contact U.S. workers employed in the previous year extends solely to U.S. workers the employer itself employed in the previous year. Thus, if the employer jointly employed the U.S. workers on its farm in the same occupation with an FLC in the previous year, then § 655.153, as currently written, requires the employer to contact the U.S workers. However, the contact obligation does not apply to U.S. workers an FLC alone employed in the previous year, using the common law definition of employer, even if the FLC employed the U.S. workers to perform services on the grower's farm. The Department does not believe, as a commenter has suggested, that it is necessary to add language to § 655.153 specifying that an employer must contact U.S. workers it jointly employed in the previous year. An entity that jointly employs workers is the ''employer'' of such workers. The current language of § 655.153 accordingly compels an H–2A employer that jointly employed U.S. workers in the occupation at the place of employment in the previous year to contact such workers.

The Department is therefore not adopting the broader request of some commenters to exempt entirely an employer from § 655.153's contact obligation when the employer jointly employed the pertinent U.S. workers with an FLC/H–2ALC in the previous year. Adoption of the commenters' request would be inconsistent with the current language of § 655.153, which ensures that a prospective H–2A employer must contact *all* U.S. workers it employed in the job in the previous year before hiring H–2A workers to perform such work in the current year. Requiring employers to contact their own U.S. workers effectuates the statutory obligation of prospective H–2A employers to engage in ''positive recruitment efforts'' for qualified U.S. workers (8 U.S.C. 1188(b)(4)), provides job opportunities to specific U.S. workers who have recently performed the job at the pertinent location for the employer, and helps fulfill the Department's obligation to certify an application only when there are not sufficient qualified workers to perform the agricultural work. *See* 8 U.S.C. 1188(a)(1)(A).

As mentioned above, multiple commenters objected to the proposal based on the potential for interference with the contractual obligation growers have historically assumed to refrain from hiring workers employed by their FLCs/H–2ALCs. However, as noted below, this is not a new requirement and the Department's prior enforcement has not resulted in the kinds of problems envisioned by the commenters. This is likely because, as previously stated, the Department's clarification does not require prospective H–2A employers to contact workers the employers did *not* employ in the previous year. Moreover, Congress clearly intended to ensure prospective employers recruit qualified, available U.S workers to perform the work prior to the employment of H–2A workers. This clarification helps to fulfill that intent.

The commenters that suggested that this is the first time the Department is seeking to hold a grower responsible to contact U.S. workers it jointly employed in the previous year with a labor contractor are incorrect. The Department has pursued this approach successfully in Federal litigation.[109]

As the Department noted in the NPRM, in the event that the grower has not kept payroll records for such U.S. workers, the regulations implementing MSPA require FLCs to furnish the grower with a copy of all payroll records, including the workers' names and permanent addresses. Growers must maintain these records for 3 years. *See* 29 CFR 500.80(a) and (c). These records should provide the employer with contact information for the pertinent U.S. workers.

The Department noted in the NPRM that it would not require employers that did not participate in the H–2A program in the previous year to provide the NPC the notice described in § 655.122(n) (in order to avoid the obligation to contact U.S. workers the employer terminated

[109] *See Scalia* v. *Munger Bros.*, Case No. 2:19–cv–02320 (E.D.CA. Nov. 19, 2019) (Consent Judgment and Order in which Defendants agreed to ''contact and offer employment to all U.S. workers that worked for Defendants the previous year, including those hired through FLCs'').

for cause in the previous year or who abandoned the employment in the previous year). The Department received no comments warranting the reversal of this position. The Department accordingly adopts it.

Another commenter suggested that the threshold for determining abandonment based on failure to report should be a ''more reasonable'' 3 days, not the ''excessive'' 5 days proposed, because 3 days is ''a standard in the agricultural industry'' and a longer period without a replacement worker could put perishable commodities at risk. The Department, however, did not propose and thus declines to make any change to its longstanding standard for determining whether a worker has abandoned employment.

Finally, the proposed rule clarified that the employer's contact with former U.S. workers must occur during the positive recruitment period (*i.e.,* while the employer's job order is circulating with the SWAs in the interstate clearance system and terminating on the date workers depart for the place of employment, as determined under § 655.158) by including a reference to § 655.158. The Department received no comments warranting the reversal of this proposal. The Department accordingly adopts it.

3. Section 655.154, Additional Positive Recruitment

In the NPRM, the Department proposed amendments to this section to clarify the standards and procedures by which the Department identifies States of traditional or expected labor supply for recruiting U.S. workers. The Department received some comments on this section, a few of which necessitated additional revisions in this final rule to clearly describe the traditional or expected labor supply State determination process and the recruitment required, both on the employer's behalf and through employer action, as well as a minor change to paragraph (a), consistent with changes to recruitment methods in the 2019 H–2A Recruitment Final Rule that impacted this section. These revisions are discussed below.

The INA requires employers to engage in positive recruitment of U.S. workers within a multi-State region of traditional or expected labor supply where the Secretary finds that there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work at the time and place needed. *See* 8 U.S.C. 1188(b)(4). The Department satisfies this statutory requirement and the broader statutory obligation regarding U.S. worker availability through a combination of recruitment activities, including posting the job opportunity on an electronic job registry (§ 655.144), interstate clearance of the job order through the SWAs (§ 655.150), employer contact with former U.S. workers (§ 655.153), and additional positive recruitment (§ 655.154). The additional positive recruitment required of the employer under § 655.154 is discrete from, but occurs concurrently with, the multi-State recruitment the Department and SWAs conduct on behalf of the employer (*i.e.,* electronic recruitment under § 655.144 and interstate employment service system recruitment under § 655.150).

At the NPRM stage of this rulemaking, the Department was separately engaged in rulemaking that sought to modernize positive recruitment requirements, which culminated in the 2019 H–2A Recruitment Final Rule that became effective after the NPRM was published. That rulemaking addressed an employer's statutory requirement to engage in positive recruitment of U.S. workers, generally, and resulted in the rescission of §§ 655.151 and 655.152, which involved print newspaper advertisements, and the enhancement of the Department's electronic job registry and related electronic recruitment on the employer's behalf. As explained in the 2019 H–2A Recruitment Final Rule, the Department determined that advertisement of the employer's job opportunity through the Department's electronic job registry under § 655.144 will be sufficient, in most cases, to satisfy the employer's multi-State recruitment obligations under § 655.154. However, in that rulemaking, the Department did not revise the additional positive recruitment obligations provision at § 655.154 or propose to codify the underlying process for designating labor supply States where the job order must be circulated and, within designated labor supply States, areas in which additional employer-conducted positive recruitment would be appropriate for the CO to order, as a means of reaching qualified U.S. workers who would make themselves available for job opportunities like the employer's.

The NPRM proposed amendments to this section to clarify the standards and procedures by which the Department identifies States of traditional or expected labor supply for recruiting U.S. workers. By proposing to add a new paragraph (d), the Department sought to provide more public transparency in the process for designating traditional or expected labor supply States and for determining whether and what additional positive recruitment should be required in those States as a condition of granting temporary agricultural labor certification. Specifically, the Department proposed to shift the responsibility for designating traditional or expected labor supply States and determining the particular methods of positive recruitment required within those States, if any, from the CO to the OFLC Administrator. Further, the OFLC Administrator would base traditional or expected labor supply State determinations primarily on information received from SWAs within the preceding 120 days and provide public notice by posting the determinations annually on OFLC's public website. In addition to providing more public transparency, advance notice of labor supply State designations provides greater predictability for employers in advance of receiving instructions from the CO in the NOA.

Given both the 2019 H–2A Recruitment Final Rule's changes to positive recruitment requirements and the Department's consideration of comments submitted in response to the NPRM, the Department has further revised § 655.154 in this final rule to clearly describe the traditional or expected labor supply State determination process and the recruitment required—both on the employer's behalf and through employer action—to ensure an adequate test of the domestic labor market for the job opportunity. For example, the Department removed redundant language in paragraph (a) that described the nature of traditional or expected labor supply States and added a reference in that paragraph to the labor supply State determination process provision at paragraph (d). The resulting language clarifies that an employer's positive recruitment obligations under § 655.154 will be satisfied, in most cases, through the Department's broad dissemination of job information through the Department's electronic job registry. In addition, the Department revised paragraphs (c) and (d) to clarify the information included in the labor supply State determination that the OFLC Administrator will post on OFLC's website and its use. The Department has considered whether OFLC Administrator's annual determination should provide advance, public notice of additional positive recruitment requirements on OFLC's website, including instructions on the precise nature of the additional recruitment, in order to accommodate employers that chose to begin

recruitment prior to receiving the NOA under proposed § 655.123. After careful consideration, this final rule provides that the OFLC Administrator's annual determination under revised paragraph (d) identifies both designated labor supply State(s) where the job order must be transmitted under § 655.150(a) for interstate clearance and area(s) of labor supply within a designated State, if any, where an employer may be required to conduct additional positive recruitment to reach qualified U.S. workers who would make themselves available for the job opportunity. Consistent with the Department's decision not to adopt the proposed optional pre-filing recruitment provision, this final rule does not require the Administrator's annual determination to specify the precise nature of additional positive recruitment and the documentation or other supporting evidence that must be maintained by the employer. Instead, revised paragraph (c) of this final rule clarifies that the employer will receive instructions in the CO's NOA regarding any additional positive recruitment requirements applicable to its job opportunity, which conforms with revisions at § 655.143(b)(2) and is consistent with the process in the 2010 H–2A Final Rule.

Several commenters supported the proposal as a means of enhancing the transparency and consistency of traditional or expected labor supply State determinations. Other commenters expressed concern regarding particular aspects of the proposal, as discussed below. One commenter urged the Department to eliminate the traditional or expected labor supply State designation process and related recruitment requirements entirely or use the State determination approach in the 2008 H–2A Final Rule. The Department appreciates the comments but is unable to eliminate a requirement that is mandated by statute. Regarding the comment to adopt the determination approach in the 2008 H–2A Final Rule, the commenter did not fully explain their understanding of that labor supply State designation process and the reasoning for re-instituting those recruitment requirements; however, in the preamble to the 2008 H–2A Final Rule, the Department discussed requiring affirmative employer action in labor supply States only where the Department had made a factual determination that information it received justified a particular type of additional recruitment in a particular area. *See* 2008 H–2A Final Rule, 73 FR 77110, 77132. The Department believes the commenter's suggestion is addressed in this final rule, which requires affirmative action by the employer only where the OFLC Administrator identifies a particular area within a State based on specific, credible information about the availability of qualified U.S. workers and appropriate means of recruiting those workers. In addition, as discussed in the 2019 H–2A Recruitment Final Rule, ''[§] 655.154 does not afford the CO unlimited discretion; rather, it authorizes the CO to order the recruitment necessary to ensure an adequate test of the domestic labor market for the employer's job opportunity, after taking into account the location and characteristics of the position.'' 84 FR 49439, 49450.

Two workers' rights advocacy organizations noted that the Department's proposal placing the labor supply State determination process at paragraph (d) effectively replaced the Proof of Recruitment provision at § 655.154(d) in the 2010 H–2A Final Rule and expressed concern the Department had not retained the Proof of Recruitment provision in a different location. The commenters believed removing this provision would hinder the Department's ability to enforce the H–2A regulations because it would eliminate the CO's authority to specify the documentation or supporting evidence an employer must retain to prove compliance with the additional positive recruitment requirements. Although the document retention provision at § 655.167 already requires employers to retain evidence of compliance with § 655.154, the Department agrees with the commenters that the rule should address the type of evidence an employer is required to retain to show compliance with particular recruitment efforts required in designated traditional or expected labor supply States. The Department has determined that including such a provision provides greater clarity and predictability to employers, who want to properly document compliance, and facilitates its effective and consistent enforcement of this regulatory requirement. Therefore, the Department has revised paragraph § 655.143(b)(2) in this final rule to provide that the CO's NOA will specify the documentation or other supporting evidence to be maintained by the employer to demonstrate compliance with positive recruitment requirements.

One workers' rights advocacy organization expressed concern and opposed the proposed traditional or expected labor supply State designation process because it would diminish the role of the SWAs because assigning the responsibility of making these State determinations to the OFLC Administrator would allow the OFLC Administrator to consider information from sources other than the SWA. The commenter was also concerned the proposed regulatory language would reduce the period of labor market information considered from 6 months to 120 days, and also expressed the language was vague and did not specify the sources of information the OFLC Administrator may consider or the weight given to the information from sources other than the SWA.

The Department believes the commenter's concerns are unwarranted. As is the case under the 2010 H–2A Final Rule, the Department anticipates the SWAs will continue to be the primary source of information regarding traditional or expected labor supply States based on their knowledge and expertise in local labor markets. The proposed determination process was not intended to diminish the role of the SWAs or substantively change the nature of information upon which traditional or expected labor supply designations will be based. Under the 2010 H–2A Final Rule, the CO's determination is based primarily on information about labor supply trends and information regarding interstate referral activities observed by the SWAs. The Department intended to formalize the existing communication between SWAs and OFLC, while making the process more transparent and predictable to employers seeking to employ H–2A workers.

In the 2010 H–2A Final Rule, the Department also explained that it continues to welcome information on labor supply from SWAs, employers, and workers' rights advocacy organizations to assist in its decisions on the best sources of labor and related recruitment activities to be required of employers. *See* 75 FR 6884, 6930; *see also* 2019 H–2A Recruitment Final Rule, 84 FR 49439, 49450 (explaining the Department most often obtains information from the SWAs, but ''continues . . . to invite stakeholders to submit information on areas of traditional or expected labor supply and effective means of recruiting U.S. workers in those areas''). The NPRM and this final rule merely reiterate the Department's longstanding policy to consider reliable information from appropriate sources that may be helpful in determining States of traditional or expected labor supply. Appropriate sources may include, for example, information from other State or Federal agencies or information the Department receives from other relevant stakeholders, such as organizations that

provide employment and training services to workers who are likely to apply for agricultural job opportunities. Similarly, the proposal in the NPRM stated the OFLC Administrator's determination would be based primarily upon information provided within 120 calendar days preceding the determination.

The Department's decision to base traditional or expected labor supply State determinations primarily on information provided within 120 calendar days preceding the determination reflects that although, based on the Department's experience, these designations have not changed significantly from year to year because the information the Department receives does not change significantly from year to year, the designations should be informed by the most current information available. Notably, this provision does not limit the collection of information to the 120-day period preceding the OFLC Administrator's determination. For example, information gathered over a 6- or 9-month period and submitted to the OFLC Administrator within the 120-day period before the OFLC Administrator's determination can reflect current labor market activities across a wide range of seasonal agricultural production cycles and appropriately inform the annual determination process. This process prioritizes current information, without excluding older information that is relevant to the determination.

The Department anticipates the majority of the information published in the OFLC Administrator's annual determination will inform the CO's transmission of the job order for interstate clearance under § 655.150, rather than impose additional employer-conducted recruitment requirements under § 655.154. For example, if the Georgia SWA informs the OFLC Administrator that it receives interstate referrals, generally, from the Florida SWA, the OFLC Administrator would designate Florida as a labor supply State for Georgia in the labor supply State determination posted on OFLC's website; however, this information, alone, would not support additional employer-conducted recruitment requirements in Florida without greater specificity from either SWA regarding the appropriate and effective means of recruiting qualified U.S. workers. Accordingly, when applying the posted labor supply State determination during application processing, the CO would transmit all job orders involving places of employment in Georgia to the Florida SWA for posting on its intrastate public job listing system; the CO would not instruct the employer to conduct additional positive recruitment activities in Florida. However, if the OFLC Administrator received more specific, credible information about effective recruitment methods, such as information specific as to the type of qualified workers available (*e.g.,* tomato harvest workers), the area within the State where the workers may be found (*e.g.,* Immokalee, Florida), and the methods for apprising the workers of a job opportunity (*e.g.,* posting with a particular community organization engaged with those workers), the OFLC Administrator's annual determination of labor supply States would identify this area and type of worker for additional recruitment and the CO's NOA would include specific recruitment instructions and document retention information applicable to employers in Georgia that are seeking tomato harvest workers.

The additional positive recruitment requirement will be effective on the date of publication for any employer that has not yet commenced positive recruitment. As the Department decided not to adopt the proposed optional pre-filing positive recruitment provision, discussed in the preamble to § 655.123, this means that, once published, the additional positive recruitment requirements posted are in effect for any employer to whom the NPC has not yet issued a NOA in accordance with § 655.143. One commenter remarked on the provision retained from the 2010 H–2A Final Rule at paragraph (b) that requires an employer's additional positive recruitment efforts be no less than the kind and degree of recruitment efforts the employer ''made'' to obtain foreign workers. The commenter recommended the Department change the word ''made'' to the future tense ''makes'' to avoid suggesting that foreign labor recruitment precedes U.S. worker recruitment. The Department has revised this provision to ''may make'' to clarify that the nature of the employer's foreign worker recruitment efforts, not the timing of those efforts, is the subject of this provision.

One workers' rights advocacy organization reiterated its comment, submitted in connection with an H–2B program rulemaking, in which it urged the Department to require employers to conduct positive recruitment in labor surplus areas designated by the Department. As with comments discussed in §§ 655.151 and 655.152, this comment relates to a topic addressed in the 2019 H–2A Recruitment Final Rule and, therefore, it is outside the scope of the current rulemaking. However, as discussed in the 2019 H–2A Recruitment Final Rule, by requiring the CO to post H–2A job orders on the Department's electronic job registry at *SeasonalJobs.dol.gov,* each H–2A job opportunity will be advertised broadly and disseminated to U.S. workers, including those in labor surplus areas. Further, to the extent a labor surplus in a particular State results in a trend of labor referrals to other States or submission of specific information provided to the OFLC Administrator regarding workers in a particular area who, if apprised, would make themselves available for work elsewhere, the labor supply State designation process will provide for additional recruitment in that State.

The Department also received comments from a State governor and an individual commenter suggesting the Department expand H–2A program recruitment requirements to include an H–2ALC's clients (*i.e.,* the growers who contract with the H–2ALC to provide labor or services for their agricultural operations). One of these commenters explained that local workers would respond to recruitment for employment with a local grower but not for employment with an unfamiliar H–2ALC. The other commenter expressed concern with growers contracting with out-of-State H–2ALCs, who will bring H–2A workers into the State, rather than in-State FLCs, who employ local workers. These commenters urged the Department to expand an H–2ALC's recruitment obligations to include recruitment requirements for its client growers. One suggested the Department require an H–2ALC to demonstrate that its client grower unsuccessfully solicited bids from contractors that do not use H–2A workers before contracting with an H–2ALC seeking a temporary labor certification, while the other suggested the Department require both the client grower and the H–2ALC to satisfy H–2A recruitment requirements.

The Department declines to expand H–2A recruitment requirements to parties other than an employer filing an *Application for Temporary Employment Certification* or impose additional positive recruitment requirements on out-of-State H–2ALCs generally. The Department believes that an employer's satisfaction of the several methods of recruitment required in the H–2A regulations will ensure an effective test of the labor market. The Department requires all employers to conduct recruitment through SWA circulation of job orders, a process that encompasses various SWA recruitment activities, and through advertisements posted on the Department's electronic job registry,

which broadly disseminates job opportunity information on the internet. In addition, the H–2A regulations permit the CO to order specific additional positive recruitment activities, on a case-by-case basis, if the Department receives information that indicates these activities are necessary to effectively disseminate information about the job opportunity to U.S. workers.

4. Section 655.155, Referrals of U.S. Workers

The NPRM did not propose amendments to this section containing the standards by which SWAs refer qualified, able, willing, and available U.S. workers for employment in the H–2A program. The Department received some comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM. Therefore, this final rule retains this section from the NPRM without change.

The comments received on this section generally urged the Department to require additional SWA screening of the workers referred to employers through the employment services system. They suggested, for example, SWAs ''vet'' self-referring applicants and refer only U.S. workers who specifically request agricultural work. One stated that few referred workers are actually interested in the jobs to which they have been referred and considering uninterested workers is time consuming and costly for employers. In addition, these commenters suggested that SWAs verify the employment eligibility of each worker and confirm the worker is available for the entire period of employment before referring the worker to the employer.

The Department respectfully declines to revise this section. Not only are these suggestions outside the scope of this rulemaking, but the Department discussed suggestions like these at length in the preamble to the 2010 H–2A Final Rule when declining to adopt them in that rulemaking. *See* 75 FR 6884, 6905–6906. The Department's position in this rulemaking remains the same as in 2010. Accordingly, the Department has decided to maintain § 655.155 in this final rule without change.

5. Section 655.156, Recruitment Report

The NPRM proposed amendments to this section to simplify the regulatory text related to an employer's obligation to report on its efforts to recruit U.S. workers, conform the regulatory text to other changes proposed in the NPRM, and clarify the content requirements for the recruitment report. The Department received a few comments on this provision, none of which necessitated substantive changes to the regulatory text from the NPRM. However, in response to a comment related to paragraph (b) of this section, the Department has made revisions to clarify that an employer must produce its updated recruitment report to the Department and not to any other Federal agency that might request it without independent investigative or other authority to do so. The Department also made clarifying edits to paragraph (a), as discussed below. Finally, the Department also revised this section to conform to the Department's decision not to adopt the proposed staggered entry and optional pre-filing recruitment provisions in this final rule, and made minor technical edits to conform to the terminology used in § 655.153. Otherwise, this final rule adopts the proposed changes from the NPRM.

In the NPRM, the Department proposed to remove language in paragraph (a) related to the timing of the employer's initial recruitment report submission, as this timing requirement was addressed at proposed § 655.123(d) for those employers who engage in optional pre-filing positive recruitment and at § 655.143(b)(2) for those employers who receive a NOA, which will contain instructions regarding pre-certification recruitment report submission. Consistent with the Department's decision not to adopt proposed § 655.123, as discussed above, paragraph (a) in this final rule retains the 2010 H–2A Final Rule language requiring employers to submit the recruitment report on a date specified by the CO in the NOA. In addition, the Department has made a technical correction to paragraph (a) so that this paragraph refers to the NOA provisions at § 655.143, rather than the NOD provisions at § 655.141.

In addition, the Department proposed to add language in paragraphs (a)(1) and (3) to make explicit the required content of a recruitment report. A recruitment report describes a particular recruitment activity clearly when it identifies the specific, proper name of the recruitment source—rather than only the general type of recruitment source (*e.g.,* ''web page'' or ''online job board'')—and provides the date(s) of advertisement for that recruitment source. In addition, a recruitment report clearly describes the employer's satisfaction of its obligation under § 655.153 to contact former U.S. workers when it either (1) affirmatively states the employer has no former U.S. workers to contact; or (2) states that, before submitting the recruitment report, the employer contacted former U.S. workers and describes the means the employer used to make that contact. In this final rule, the Department has made clarifying revisions to paragraphs (a)(1) and (3). In paragraph (a)(1), the Department revised ''date'' to ''date(s),'' to clarify that the recruitment report must identify the date—or range of dates—of each recruitment activity, which may be different for each recruitment activity. In addition, the Department revised paragraph (a)(3) to clarify that an employer's statement in its recruitment report about contacting former U.S. workers must identify the date(s) of contact, as well as the means of contact, when describing the employer's contact with such workers.

Two workers' rights advocacy organizations suggested the Department add to the recruitment report content requirements in paragraph (a). One suggested the Department align the H–2A and H–2B regulations by requiring H–2A recruitment reports to confirm (1) community-based organization(s) designated by the CO were contacted, if applicable; (2) additional recruitment was conducted, as directed by the CO; and (3) the bargaining representative was contacted, if applicable, and by what means, or that the employer posted the availability of the job opportunity to all employees in the job classification and area in which the work will be performed by the foreign workers. The other commenter thought the recruitment report should include a description of the employer's recruitment of H–2A workers, including the resources expended in such efforts; a description of the recruitment activities of non-H–2A employers in the AIE for the occupation; and information about how the employer checks worker qualifications, if applicable. Paragraph (a)(1) already requires the employer to identify in the recruitment report each recruitment source used and the date(s) of recruitment using that source. This recruitment report content requirement encompasses all recruitment activities the CO identifies in the NOA. The Department appreciates the opportunity to clarify that paragraph (a)(1) requires an employer's recruitment report to confirm contact with a community-based organization or any other additional recruitment activity directed in the NOA, if applicable. However, the Department declines to revise paragraph (a)(1) further at this time.

The Department declines to add in this rulemaking the suggested H–2B recruitment and recruitment report content requirements, or the additional content related to recruitment efforts

outside of the employer's own efforts to recruit and hire U.S. workers. Neither adopting the H–2B program's general requirement to contact a bargaining representative or post notice at the place of employment, nor including content in the recruitment report beyond the employer's own efforts to recruit and hire U.S. workers during the H–2A recruitment period were proposed for public comment. As such, expanding the recruitment report content requirements in the manner suggested is outside the scope of this rulemaking.

One of these commenters also urged the Department to make significant additional changes to the recruitment requirements and recruitment report procedures, beyond those the Department proposed for public comment. For example, the commenter suggested the Department require employers to submit a recruitment report before certification is granted and, again, on the first date of need. In addition, the commenter suggested that the Department transmit the recruitment report to the SWA to solicit the case-by-case analysis of the employer's recruitment efforts, as compared with those of non-H–2A employers in the area, and the location of historical and/or current labor supply patterns to inform additional positive recruitment activities under § 655.154(b). This commenter also suggested the Department ask the SWA to provide a list of all U.S. worker referrals to each job so the Department can review both the SWA's list and the employer's list and contact all listed workers to verify the accuracy of the employer's report. The commenter further suggested a website portal be created to allow workers to report unlawful rejections. These suggestions also are beyond the scope of this rulemaking and would require public notice and solicitation of comments. However, the Department reminds concerned parties that workers may call WHD's hotline at (466) 487–9243 (this is not a toll-free number) or 1 (866) 4US–WAGE (toll-free number) and/or contact their local district WHD office to file a complaint if they believe they have been unlawfully rejected. In addition, workers may call other federal agencies that enforce anti-discrimination laws if they believe an H–2A employer has unlawfully rejected them. For example, workers can call the Immigrant and Employee Rights Section of DOJ's Civil Rights Division at 1 (800) 255–7688 if they believe an H–2A employer rejected them or fired them because of their citizenship, immigration status, or national origin.

The Department also proposed revisions to paragraph (b), the provision addressing the employer's obligation to update its recruitment report throughout the positive recruitment period at § 655.135(d) and submit it for review, if requested. An agent remarked on the revised language that would expand an employer's obligation to produce its recruitment report, beyond the Department, to ''any other Federal agency.'' The commenter expressed concern such information sharing could have a ''significant chilling effect on workers'' and is beyond the Department's statutory authority. The Department has determined that further revision to paragraph (b) is necessary to more clearly reflect the Department's intent. The Department intended to retain the requirement for an employer to produce its recruitment report to the Department, upon the Department's request, not to any Federal agency that might request it without independent authority to do so. In addition, the Department's intention was to clarify that the information sharing provision at § 655.130(f) in this final rule applies to recruitment reports the Department may share with other Federal agencies with authority to enforce compliance with program requirements as appropriate for investigative and enforcement purposes.

The Department agrees the proposed language in paragraph (b) was overbroad and could be misunderstood or misused, resulting in the sharing of an employer's recruitment report with a Federal agency not involved in H–2A program enforcement and integrity activities or for purposes other than program-related investigative or enforcement purposes. The Department's rationale for revising both §§ 655.130(f) and 655.156(b) to more clearly address intergovernmental information sharing, and the parameters for such sharing, along with this commenter's related concerns, are discussed in the preamble to § 655.130(f). Accordingly, the Department has revised paragraph (b) to require employers to produce recruitment reports only to the Department (*e.g.,* OFLC or WHD) and only upon the Department's request, and to clarify that the same scope of information sharing applies to recruitment reports as applies to information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures such as audits. Otherwise, the Department has adopted this section as proposed in the NPRM, without change.

6. Sections 655.157, Withholding of U.S. Workers Prohibited, and 655.158, Duration of Positive Recruitment

The NPRM proposed minor amendments to these sections in the form of technical corrections for conformity within the subpart. The Department received no comments related to the prohibition of withholding U.S. workers at § 655.157 and only one comment expressing general support regarding the duration of positive recruitment at § 655.158, which the Department had retained from the 2010 H–2A Final Rule. Therefore, this final rule adopts the proposed changes to these sections from the NPRM without change.

F. Labor Certification Determinations

1. Section 655.161, Criteria for Certification

The NPRM proposed minor amendments to this section to clarify existing rules and procedures. In paragraph (a), the Department proposed to use a clear statement that the employer must comply with all applicable requirements of 20 CFR parts 653 and 654 and all requirements of 20 CFR part 655, subpart B, that are necessary for certification, without the nonexclusive list of those requirements that appeared in the 2010 H–2A Final Rule. Similarly, the Department's proposed revisions to paragraph (b) simplified regulatory language to more clearly state that the CO will count as available any U.S. worker whom the employer must consider and whom the employer has not rejected for a lawful, job-related reason. The Department received no comments on the proposed amendments to the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change.

2. Section 655.162, Approved Certification

The NPRM proposed minor amendments to this section to modernize and simplify the Department's issuance of temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS, while maintaining program integrity. The Department received a few supportive comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

Under this final rule, the Department will issue temporary agricultural labor certifications electronically using a Final Determination notice that

confirms certification and contains succinct, essential information about the certified application. The CO will send the Final Determination notice, as well as a copy of the certified *Application for Temporary Employment Certification* and job order, both to the employer and USCIS using an electronic method designated by the OFLC Administrator.[110] In cases where an employer is permitted to file by mail as set forth in § 655.130(c), the Department will deliver certification documentation to the employer using a method that normally assures next-day delivery. The Department will send the same information to USCIS, using the same electronic method used to transmit the temporary agricultural labor certification to the employer, regardless of the employer's method of filing. Finally, consistent with current practice, the Department will send a copy of the certification documentation to the employer and, if applicable, to the employer's agent or attorney.

3. Section 655.164, Denied Certification

The NPRM proposed minor amendments to this section to modernize the Department's issuance of Final Determination notices that deny temporary agricultural labor certifications and to simplify the regulatory text by replacing details about the procedure for appealing a Final Determination with references to § 655.171, the section of the regulation containing the standards and procedures for appeals. The Department received a few supportive comments on this provision, none of which necessitated changes to the regulatory text. Therefore, this provision remains unchanged from the NPRM.

4. Section 655.165, Partial Certification

The NPRM proposed minor amendments to this section to modernize the Department's issuance of partial temporary agricultural labor certifications to employers and the delivery of those certifications to USCIS, in addition to other amendments conforming to proposed changes in other sections of the regulation. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department received no comments expressing opposition to the proposed changes, but it did receive comments from two employers and an agent expressing opposition to the general practice of issuing partial temporary agricultural labor certifications. Two of these commenters stated that the Department should not reduce a temporary agricultural labor certification by the number of U.S. workers hired if the employer attests that it still has a need for the full number of requested H–2A workers, notwithstanding the hiring of any U.S. workers. The commenters believed this approach would be helpful to employers where conditions change and would not adversely affect the wages or working conditions of U.S. workers, as the employer's obligation to hire qualified and available U.S. workers and displace an H–2A worker to accommodate the hiring of a U.S. worker, if necessary, would continue throughout the recruitment period. One of these commenters acknowledged that § 655.166 permits a redetermination based on unavailability of U.S. workers but asserted that process is time consuming and costs the employer additional filing fees to submit amended petitions with USCIS. This commenter suggested that it would be more effective and efficient to discontinue issuing partial temporary agricultural labor certifications and rely on the employer's attestation to continue hiring any qualified and available U.S. workers.

The Department appreciates the commenter's suggestion, but the Department did not propose such a change, nor suggest it was open to considering comments on this issue in the NPRM. Therefore, this comment is beyond the scope of this rulemaking and the Department has adopted the proposed changes to § 655.165 without amendment.

5. Section 655.166, Requests for Determinations Based on Nonavailability of U.S. Workers

The NPRM proposed minor amendments to this section to modernize the Department's receipt and issuance of redetermination decisions, consistent with the electronic filing and certification procedures proposed in §§ 655.130 and 655.162, in addition to other technical amendments to simplify the provision generally. The Department received no comments on the proposed amendments to the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change.

6. Section 655.167, Document Retention Requirements of H–2A Employers

The NPRM proposed minor amendments to this section to clarify under paragraph (c)(1) that employers must document compliance with each recruitment step applicable to the *Application for Temporary Employment Certification.* The Department also proposed to add a new paragraph at (c)(7) clarifying that if a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, as set forth in § 655.122(n), employers must retain records demonstrating they notified the NPC and DHS. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. However, as discussed below, the Department believes it is necessary to make minor conforming amendments due to prior revisions currently in effect based on the Department's 2019 H–2A Recruitment Final Rule and one technical revision.

The Department received two comments objecting to the requirement that employers retain records associated with notifying the NPC and DHS of workers who abandon employment or are terminated for cause. These commenters asserted such a requirement created an unnecessary burden because the three-fourths guarantee and return transportation obligations already provide an adequate incentive for employers to provide timely notice to the Department. One of the commenters also asserted the Department lacked authority to impose the requirement, as proposed, and that USCIS must engage in its own rulemaking if it wishes to require employers to retain this documentation.

The Department appreciates the comments received, but respectfully disagrees. As explained below and in the preamble for §§ 655.122(n), 655.141, and 655.153, the requirement to retain documentation demonstrating the employer provided notice of abandonment or termination is necessary for the Department's administration and enforcement of the temporary agricultural labor certification program; thus, the imposition of such recordkeeping obligations is within the Department's authority under the INA. As stated in the NPRM, the Department encounters H–2A employers that claim to have properly notified the NPC regarding workers who have abandoned employment or have been terminated for cause, but the employers frequently cannot produce records of such notification when requested. Requiring

[110] When an employer submits the petition to USCIS, it must comply with DHS regulations and USCIS petition form instructions, which may include printing and submitting a copy of the temporary agricultural labor certification.

each employer to maintain records of the notification to the NPC, and to DHS in the case of a worker in H–2A nonimmigrant status, supports the Department's enforcement policy of investigating claims of abandonment or termination. Further, retention of these records also may benefit the employer. For example, in the event a U.S. worker who abandoned employment or whom the employer terminated for cause later claims the employer failed to make contact to solicit their return to work, the employer's retained record of its contemporaneous notice to the NPC could demonstrate that the employer was not required to contact that particular U.S. worker under § 655.153. In addition, the Department is not imposing a record retention requirement on behalf of DHS; DHS already has a record retention obligation in this context. *See,* 8 CFR 214.2(h)(5)(vi)(B)(*2*).

In addition, the Department does not believe the requirement will impose a significant burden on employers. As the commenters noted, many employers already provide the Department notice of abandonment or termination to take advantage of incentives provided in §§ 655.122(n) and 655.153; for these employers, the only change is a requirement to add a copy of the notice to the employer's document retention file. In the NPRM, the Department assessed the proposed burden of this recordkeeping requirement and determined the total annual cost, among just over 4,900 employers, would range from $10,890 in 2020 to $15,988 in 2029. The Department believes the minimal burden imposed on employers by this recordkeeping requirement is outweighed by the Department's interest in ensuring program integrity.

Therefore, the Department has adopted the proposed changes to § 655.167, with additional revisions necessary to conform to a change adopted in § 655.175 of this final rule and the current provisions in effect, which were revised as a result of the 2019 H–2A Recruitment Final Rule, and to remove an unnecessary parenthesis. Accordingly, this final rule reflects the elimination of paragraph (c)(1)(ii) of the 2010 H–2A Final Rule—the document retention requirements associated with print newspaper advertisements—and the redesignation of paragraphs (c)(1)(iii) and (iv) as paragraphs (c)(1)(ii) and (iii), which the 2019 H–2A Recruitment Final Rule made effective October 21, 2019.

G. Post-Certification

1. Section 655.170, Extensions

The NPRM did not propose changes to the standards and procedures by which an employer may apply to the CO for a short- or long-term extension to its certified *Application for Temporary Employment Certification.* However, the Department is making one minor technical amendment under paragraph (b) to replace the term ''12 months'' with ''1 year'' as the maximum period for a long-term extension, except in extraordinary circumstances, to ensure greater consistency with the use of that same term adopted under § 655.103(d) of this final rule

2. Section 655.171, Appeals

The NPRM proposed substantive amendments to this section containing the standards and procedures by which an employer may request an administrative review or a de novo hearing before an ALJ regarding a decision issued by the CO, where authorized under this subpart. As discussed in detail below, the Department received numerous comments opposing all or some of the proposed changes to § 655.171. After carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with several minor revisions, as discussed below. Such revisions include the addition of regulatory language the Department adopted in a different final rule, *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), and other modifications that either respond to concerns raised by commenters or provide further clarity. Some comments simply opposed all changes regarding the appeals section without explanation, and do not necessitate changes to the regulatory text. Other comments referenced § 655.171 but appear to address changes related to § 655.141; the Department has already addressed those comments in the section of the preamble addressing § 655.141.

a. Discretionary Review by the Secretary

Between the publication of the proposed rule at 84 FR 36168 (July 26, 2019) and this final rule, the Department published *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), which affected the language of this section. The current iteration of § 655.171, with the changes effectuated by the *Rules Concerning Discretionary Review by the Secretary,* is different from the iteration of § 655.171 that was in effect when the proposed rule was published. Specifically, the *Rules Concerning Discretionary Review by the Secretary* removed the language in paragraphs (a) and (b)(2) that stated the decision of the ALJ was the final decision of the Secretary, and it added language, pursuant to 29 CFR 18.95 stating that the Secretary could assume jurisdiction over a ''case for which a de novo hearing is sought or handled under 20 CFR 655.171(b),'' after the BALCA had issued a decision. 29 CFR 18.95(b)(2).

In the NPRM, the Department had already proposed removing language from the prior regulations that stated the ALJ's decision is the final decision of the Secretary. This language was thought to be unnecessary in light of the Office of Administrative Law Judge's (OALJ) Rules of Practice and Procedure for Administrative Hearings, which state that the ALJ's decision is the final agency action for purposes of judicial review when the applicable statute or regulation does not provide for a review procedure, as here. *See* 29 CFR 18.95; 20 CFR 655.171. The removal of the ''final decision'' language was consistent with the H–2B regulations, which lack similar language, and does not affect the issue of whether the parties may appeal to the ARB, which is governed by other authorities issued by the Department. *See* 20 CFR 655.61; Secretary's Order 02–2012, Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FR 69378 (Nov. 16, 2012). However, because the aforementioned *Rules Concerning Discretionary Review by the Secretary* removed this language from the regulations, the issue of the removal of the language is now moot.

The Department has merged the language added to this subsection by the issuance of *Rules Concerning Discretionary Review by the Secretary* with the originally proposed text.

b. Request for Review

The prior text of § 655.171 outlined the procedure by which an employer may request administrative review, the timeline for doing so, and how the ALJ must make a decision. General information on the request for review was previously located in sections of the H–2A regulations that discussed the CO's authority and procedure for issuing a specific decision (*e.g.,* denied certification). *See, e.g.,* § 655.164. As proposed in the NPRM, the Department has amended the regulations so that the language regarding the requests for review are located in one location. The language conforms with the corresponding appeals section in the H–2B regulations to the extent possible to

provide consistency across the programs.

To clarify an employer's existing administrative exhaustion obligations, the NPRM specified in paragraph (a) that when a hearing or administrative review of a CO's decision is authorized in this subpart, an employer must request such review in accordance with § 655.171 in order to exhaust its administrative remedies. No comments were received on the text regarding the administrative remedies, and the Department has adopted this language unchanged from the NPRM.

The newly added paragraph (a) describes the content of the request for review and the procedures for its submission. This language was drawn from the H–2B procedures at § 655.61 as well as the already existing text in the H–2A regulations. In paragraph (a)(1), the Department proposed to extend the time in which an employer may file a request for review from 7 calendar days to within 10 business days of the date of the CO's decision to more closely align with the timeframe to request review under the H–2B regulations. It also proposed that the request for review must be received by—rather than sent to—the Chief ALJ and the CO within 10 business days of the CO's decision. The Department believes that specifying a time for receipt of the request for review is reasonable because it enables the Department to more easily determine if a request was filed in a timely manner. The longer period of time provided to file a request for review allows the employer more time to develop a robust request, which, in the case of a request for administrative review, will also serve as the employer's brief to the OALJ. To this end, the Department has included in the regulations that the request must include the specific factual issues the employer seeks to have examined as part of its appeal. Having this information allows for the prompt and fair processing of appeals by providing the ALJ and the CO adequate notice regarding the nature of the appeal. One commenter supported the proposal to determine timeliness based on the receipt of the request for review. The Department received no comments that opposed the changes in paragraph (a)(1), and therefore the Department has adopted the proposed language unchanged from the NPRM.

In paragraph (a)(1), the Department has also added the phrase ''[e]xcept as provided in § 655.181(b)(3).'' Upon review of the proposed §§ 655.171 and 655.181, it became apparent that the regulatory text, as drafted, contained confusing information regarding the timelines for submitting appeal requests. This added phrase makes clear that § 655.181(b)(3), while referencing § 655.171, does not change the existing timelines to file appeal requests under § 655.181.

In paragraph (a)(4), the Department proposed including language that the request for review clearly state whether the employer is requesting administrative review or a de novo hearing. The Department has found that in the past, some requests did not identify the type of review sought by the employer, which would result in delays (as the ALJ asked for clarification) or a type of review not desired by the employer (as the ALJ presumed the employer requested a hearing). The Department also proposed that the case will proceed as a request for administrative review if the request does not clearly state the employer is seeking a hearing. *See* 8 U.S.C. 1188(e)(1) (noting the regulations must provide for expedited administrative review or, at the employer's request, for a de novo hearing).

The Department received a few comments regarding this proposal. One commenter supported the change and stated that this will expedite the appeals process by avoiding ambiguity. Another commenter opposed the proposal and characterized it as placing a burden on the employer to identify the type of review requested. Another commenter asked for clarification on whether an employer had to go through administrative review before it could ask for a de novo hearing. The Department disagrees with the characterization that articulating which type of appeal an employer desires is a burden. The INA requires the regulations provide for an expedited procedure for review, ''or, at the applicant's request,'' a de novo hearing. 8 U.S.C. 1188(e)(1). The employer may request whichever it prefers. The Department agrees with the comment that the proposed change will improve judicial efficiency and provide for more orderly and consistent administration of appeal proceedings, and therefore has adopted the proposed language. Finally, in response to the commenter seeking clarification, an employer does not need to go through administrative review before asking for a hearing. Therefore, the Department has adopted the proposed language unchanged from the NPRM.

In paragraph (a)(7), the Department proposed to clarify that where the request is for administrative review, the request may only contain evidence that was before the CO at the time of their decision. This language has been adopted unchanged from the NPRM. The Department included this language in paragraph (a), which tracks language in the administrative review section (paragraph (d)), so that employers or their representative(s) can prepare their requests accordingly. The Department has also included language that an employer may submit new evidence with its request for a de novo hearing, which will be considered by the ALJ if the new evidence is introduced during the hearing. The Department included this language in paragraph (a), which tracks language in the de novo hearing section (paragraph (e)), so that employers or their representative(s) can assemble their requests and prepare their cases accordingly. Comments regarding evidence submission are discussed in the administrative review and de novo hearing sections below.

c. Administrative File

Proposed paragraphs (b) and (c) drew on existing language in the H–2A regulations and language from the H–2B appeals procedures to reorganize information on the administrative file and the assignment of the case into separate sections. Though not proposed in the NPRM, the Department has decided to change how it refers to the ''administrative file'' or ''appeal file.'' Both terms have been used. To be consistent, the Department will simply refer to the document that OFLC compiles and transmits as the ''administrative file.'' This is a nonsubstantive change that is made only to provide clarity in the regulation.

The Department proposed paragraph (b) to specify that the CO would send a copy of the OFLC administrative file to the Chief ALJ as soon as practicable. One commenter approved of this additional language but suggested that the regulations go further and require that the administrative file be transmitted within a specific timeframe. This commenter also suggested that because applications are filed electronically, a 48- or 72-hour deadline for transmittal should be feasible. Another commenter suggested that compiling the administrative file was simply a matter of printing it. The Department understands the concern for expediency and the sensitive timing of these cases, but compiling the administrative file is not as simple as suggested. As with any type of government or court record, the administrative file must be assembled and reviewed for accuracy and completeness. Because the length of this process is dependent on a variety of factors, including the length of the record, the Department has determined

that a specific timeframe is not practicable. The Department believes adding the language that the CO will send the administrative file as soon as practicable balances expediency with the realities of agency resources and therefore has adopted the proposed language that the file must be sent as soon as practicable.

A number of commenters believed that the administrative file would not be transmitted to the employer. This is not the case. The current regulations do not explicitly state that the administrative file will be sent to the employer and the NPRM mirrored that same language. However, in response to these concerns, the text of paragraph (b) has been amended to state that the CO will transmit the administrative file to the Chief ALJ as well as to the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel).

d. Assignment

In paragraph (c), the Department proposed language to clarify that the ALJ assigned to the case may be a single member or a three-member panel of the BALCA. The proposed amendments to paragraphs (b) and (c) mirror the wording and organization of the appeals section in the H–2B regulations. *See* § 655.61(b) and (d). The Department did not receive any comments regarding paragraph (c) and has adopted the paragraph as proposed.

e. Administrative Review

The prior regulations regarding administrative review give only a brief overview of the process. In the NPRM, the Department proposed adding a specific briefing schedule, explaining the standard and scope of review, and providing a revised timeline for decisions in cases of administrative review. The Department received numerous comments on these changes. After carefully considering these comments, the Department has decided to substantially adopt the proposed language. The changes made, and the reasons for making those changes, are discussed below.

In paragraph (d)(1), the Department outlined a briefing schedule; numerous commenters opposed the proposed change. Some argued that the counsel for the CO would have an advantage in the appeal process. One commenter suggested that this was because counsel would be able to respond item-by-item to the arguments made by the employers. One commenter was concerned that because the counsel for the CO has 7 days after receiving the administrative file to submit a brief, and because there is no set deadline for when the administrative file must be transmitted to the counsel for the CO, the counsel for the CO would have significantly more time to write a brief than the employer. Some commenters expressed opposition on the grounds that employers would not have the administrative file with them when writing their briefs, as the brief must be submitted with the request for review. While many of those commenters who expressed opposition on this ground believed they would never receive the administrative file, which is not the case, the concern that they would have to write a brief without the administrative file is noted. Some suggested that not having concurrent briefing would slow down the process of review.

The Department understands the commenters' concerns about timing and fairness. As noted in the NPRM, because there was no regulatory briefing schedule, concurrent or otherwise, there was often inconsistency among cases, and neither party knew when briefs would be due until an ALJ issued an order. Also, it was not uncommon that, due to the practice of simultaneous briefing, issues raised by the employer were not addressed by the counsel for the CO. A set briefing schedule will ensure consistency of deadlines between cases and thus efficiency in the appeals process. The CO filing a brief in response to the employer's brief allows for a complete set of arguments, as appropriate, which, in turn, more effectively assists the ALJ's decision-making process. Through this updated rule, the employer has been given 10 business days, instead of 7 calendar days, to file its request for review. This provides the employer with ample time to write a brief in support of its case and provides the employer as much, if not more, time than the CO to draft and file its brief.

The Department does not agree that the counsel for the CO will have an advantage over the employer with respect to the briefing schedule. The administrative file contains documents the employer has submitted to OFLC with its applications, and it contains communication back and forth between OFLC and the employer. The employer should therefore have the vast majority, if not all, of the documents contained in the administrative file at the time it files its request for review. Furthermore, the administrative file must be assembled and transmitted to the parties ''as soon as practicable.'' A nonconcurrent briefing structure may extend the timeline for adjudication of an appeal, but the Department nonetheless believes that the benefit of a set time schedule for briefing, and the benefits of having a complete set of arguments, ultimately provide a more efficient and reliable process.

The Department invited the public to comment on other ways it could address a briefing procedure while still ensuring expedited review. The public submitted no such proposals, except to argue that no change should be made and that the Department should keep concurrent briefing. However, as stated, the regulations did not establish a briefing schedule. To the extent that the argument to ''keep'' concurrent briefing is a proposal, the Department explained in the proposal and above why it has decided to adopt the proposed approach.

In paragraph (d)(2), the Department has set out clearly the standard of review for administrative review cases. The Department did not receive comments on the proposed paragraph (d)(2) and the Department has adopted this section as proposed. The Department has incorporated the arbitrary and capricious standard of review into requests for administrative review, codifying a well-established and longstanding interpretation of the standard of review for such requests. *See, e.g., J and V Farms, LLC,* 2016–TLC–00022, at 3 & n.2 (Mar. 7, 2016).

In paragraph (d)(3), the Department has included language providing that the scope of administrative review is limited to evidence in the OFLC administrative file that was before the CO when the CO made their decision. The Department included this language because the administrative file may contain new evidence submitted by the employer to the CO after the CO has issued their decision, such as when the employer submits a request for review with new evidence, or a corrected recruitment report with new information, after the CO has denied certification. Although such evidence is in the administrative file, this change was proposed to clarify that the ALJ may not consider this new evidence because it was not before the CO at the time of the CO's decision. Despite some commenters' assertion that the Department is removing the ability to submit new evidence on administrative review, this amendment incorporates legal principles already in existence for H–2A cases, namely, that administrative review is limited to the written record and written submissions, ''which may not include new evidence.'' § 655.171(a). A de novo hearing is the

only avenue by which an employer may introduce new evidence.

The Department has adopted the substance of paragraph (d)(3) but has reorganized the wording of this paragraph for clarity. The language now mirrors more closely the similar language in paragraph (e)(2). The Department has also added for clarity the fact that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, ''except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95.'' This concluding phrase was not in the NPRM, nor was it in the amended language of § 655.171 in the *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608). However, the principle that the Secretary may assume jurisdiction over cases in which administrative review was requested is contained within the *Rules Concerning Discretionary Review by the Secretary* and is now a part of the current regulations. 29 CFR 18.95(b)(1) states that a decision by the BALCA constitutes the final administrative decision except in cases over which the Secretary has assumed jurisdiction, which include ''any case for which administrative review is sought or handled in accordance with 20 CFR 655.171(a).'' The addition of the language in paragraph (d)(3) codifies the principle of 29 CFR 18.95(b)(1) in this section of the regulations. This also makes the language more consistent with similar language located in paragraph (e)(2).

In proposed paragraph (d)(4), the Department has modified the timeline in which the ALJ should issue a decision from 5 business days to 10 business days after receipt of the OFLC administrative file, or within 7 business days of the submission of the CO's brief, whichever is later. This schedule conforms to the timeline in the H–2B appeals procedures while continuing to provide for an expedited review procedure. *See* § 655.61(f). No comments were received on paragraph (d)(4). The Department has made one change to proposed paragraph (d)(4) for clarity. The paragraph had modified the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H–2B regulations, namely, the employer, the CO, and counsel for the CO. *See* § 655.61(f). In this final rule, the Department has added text to clarify that the employer's attorney or agent (if applicable) will also receive the decision.

f. De Novo Hearing

The Department proposed changes related to the de novo hearing process. After carefully considering the comments it received on this proposal, the Department has decided to adopt the proposed language, with minimal changes, as discussed below.

In paragraph (e)(1)(ii), the Department proposed changing the time in which an expedited hearing must occur from 5 to 14 business days after the ALJ's receipt of the OFLC administrative file. This proposed change was based on the Department's administrative experience, and it was intended to allow the parties reasonable time to adequately prepare for a hearing while effectuating the INA's concern for prompt processing of H–2A applications.

Some commenters opposed the proposal that the hearing must occur within 14 business days of the ALJ's receipt of the administrative file rather than within 5 business days. One explained that because there was no time certain for the CO to send the administrative file to the Chief ALJ and related parties, extending the time for a hearing could cause ''irreparable harm'' to employers while they wait. The commenter further argued that this time extension combined with the 10 calendar days in which the ALJ may issue an opinion, along with alleged delays by DHS and DOS, means that it is unlikely an employer will have its workers by its start date of need.

The Department understands the concerns regarding timing and expediency but has adopted the language as proposed. As stated in the NPRM, the experience of the Department is that scheduling a hearing within 5 business days is very difficult for not only the parties, but also the ALJ. The extension of time is meant to provide more preparation time, flexibility, and time for the parties to potentially settle the case. The Department believes that holding a hearing within 14 business days is still working within an expedited timeline. To the extent commenters suggested late arrival of workers is caused by alleged delays from DHS or DOS, those comments cannot be resolved by this regulatory process and are not within the Department's purview.

In paragraph (e)(1)(iii), the Department had proposed to provide the ALJ broad discretion to limit discovery and the filing of pre-hearing motions in a way that contributes to a fair hearing while not unduly burdening the parties. As is the case with the 2010 H–2A Final Rule, 29 CFR part 18 governs rules of procedure during the hearing process, subject to certain exceptions discussed in this section and part 18. Although 29 CFR 18.50 through 18.65. permits an ALJ to exercise discretion in matters of discovery, the Department's language makes explicit the ALJ's broad discretion to limit discovery and the filing of pre-hearing motions in the circumstances of a hearing under the H–2A program. The Department has included this language because in the H–2A program, the time to hold a hearing and to issue a decision following that hearing are expedited. This expedited timeline makes the need for limits on requests for discovery and the filing of pre-hearing motions is particularly pronounced. The administrative procedures in 29 CFR part 18, and particularly the sections on discovery and motions, were not specifically designed for the H–2A program, nor for situations that require an accelerated adjudication process, as is required by the H–2A program. As such, the Department has provided the ALJ with broad discretion to restrict discovery and the filing of pre-hearing motions to situations where they are needed to ensure fundamental fairness and expeditious proceedings. One commenter sought clarification regarding the ALJ's discretion and asked if this text was a change to current practice. The proposed regulation was not a change to current practice, but rather a codification of the same. No other comments were received in relation to this subsection and the Department has adopted it as proposed.

In paragraph (e)(1)(iv), the Department proposed a 10-calendar-day timeframe in which an ALJ must issue a decision after a hearing. The Department invited the public to comment on whether this time period should be modified, but no proposals were received. The Department has adopted the language as proposed.

In paragraph (e)(1)(v), the Department clarified that for cases in which the employer waives its right to a hearing, the proper standard and scope of review is the standard and scope used for administrative review. Under the INA, the regulations must provide for expedited administrative review or, at the employer's request, a de novo hearing. *See* 8 U.S.C. 1188(e)(1). If the employer requests a de novo hearing but then waives its right to such a hearing, the case reverts to administrative review. In that circumstance, the standard and scope of review for administrative review applies. Similarly, should an ALJ determine that a case does not contain disputed material facts to warrant a hearing, review must proceed under the standard

and scope used in cases of administrative review. As no comments were received on this clarification, the Department has adopted the language as proposed.

In paragraph (e)(2), the Department has articulated the standard and scope of review for de novo hearings. The Department has clarified that the ALJ will review the evidence presented during the hearing and the CO's decision de novo. This standard of review recognizes that new evidence may be introduced during the hearing and allows the ALJ, as permitted under sec. 218(e)(1) of the INA, to review such evidence and other evidence introduced during the hearing de novo. *See* 8 U.S.C. 1188(e)(1) (noting regulations shall provide for a de novo administrative hearing at the applicant's request). Similarly, the INA permits the ALJ to review the CO's decision de novo when the employer requests a de novo administrative hearing. *See id.* This is the standard of review under the INA, and the Department has codified it in the regulations so that the standard is clearly and consistently applied. As no comments were received regarding the standard of review, the Department has adopted the language as proposed.

The Department has recognized that there may be instances when the issues to be resolved are purely legal, or when only limited factual matters are necessary to resolve the issues in the case. Paragraph (e)(2) has been revised to address this possibility and provide that the ALJ may resolve the issues following a hearing based only on the disputed factual issues, if any. Two commenters suggested that the proposed language would limit the issues an ALJ could review and adjudicate. This was not the intention, and the language in this rule simply codifies an already existing practice. Currently, the OALJ already relies on mechanisms, including, but not limited to, status conferences and pre-hearing exchanges, to determine which issues raised in the request for review can be resolved as a matter of law and which issues involve disputed material facts requiring the introduction of new evidence during a hearing. Should an ALJ determine that an issue is purely legal and does not contain disputed material facts to warrant a hearing, review must proceed under the standard and scope used in cases of administrative review. The wording of this language has been slightly revised in this final rule for clarity, but the substance remains the same as it was in the NPRM.

The Department proposed and subsequently adopted language that states that if new evidence is submitted with a request for de novo hearing, and the ALJ determines that a hearing is warranted, the new evidence submitted with the request for review must be introduced during the hearing to be considered by the ALJ. This allows for the introduction of new evidence, and for the de novo review of that evidence by the ALJ, while ensuring new evidence submitted with a request for review is subject to the same procedures that apply to new evidence introduced during a hearing, such as the opportunity for cross-examination and rebuttal.

Finally, as part of its efforts to conform this section with the appeals section in the H–2B regulations, the Department has moved the language that the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95, from proposed paragraph (e)(3) to proposed paragraph (e)(2), which addresses the standard and scope of review.

In paragraph (e)(3), the Department has adopted changes regarding the issuance of the decision for a de novo hearing as proposed with only the one minor change. Paragraph (e)(3) had modified the individuals and entities that receive the ALJ's decision to align with the recipients of ALJ decisions under the H–2B regulations, namely, the employer, the CO, and counsel for the CO. *See* 20 CFR 655.61(f). In this final rule, the Department, in paragraph (e)(3), has added that employer's attorney or agent (if applicable) will also receive the decision.

g. Other Comments

Finally, there were some general comments, which the Department addresses here. As discussed below, the Department has not made any changes in response to these comments. One commenter proposed that the CO be prohibited from denying applications that are similar to previously approved applications unless the CO provides notice to employers that, as the commenter characterized it, those previously approved temporary agricultural labor certifications could no longer be ''relied upon'' for future applications. The Department declines to adopt this suggestion. The Department rejects the suggestion that previously approved applications mandate approval in the future. Each application for a temporary agricultural labor certification must be processed on its own merits, and each must be processed according to the time and place for which the job opportunity will take place. *See* 8 U.S.C. 1188(a) and (b) (noting that a temporary agricultural labor certification certifies, among other things, that there are ''not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition''). The regulatory appeals process provides an adequate opportunity for employers to seek review of the CO's decisions, as is required by statute. 8 U.S.C. 1188(e)(1). To the extent that this commenter alleged that previous applications may have been processed or adjudicated outside a regulatory timeline, such an allegation falls outside the scope of this rule to address specific prior applications or appeals.

One commenter expressed concern that the Department would eliminate the opportunity to appeal from an ALJ's temporary agricultural labor certification decision to the Department's ARB. However, employers did not previously have the ability to appeal a temporary agricultural labor certification decision to the ARB, nor was such an option proposed in the NPRM.

One commenter suggested that the Department establish a system by which employers could seek out advisory opinions, which could be adjudicated through the appellate system, and which would clarify the Department's interpretation of the regulations. This submitted comment is beyond the scope of the proposed rule and cannot be implemented through this regulatory rulemaking.

3. Section 655.172, Post-Certification Withdrawals

The NPRM proposed technical amendments to this section to relocate the job order withdrawal provision from § 655.172(a) to § 655.124, in addition to amendments to relocate the *Application for Temporary Employment Certification* withdrawal provision from § 655.172(b) to § 655.136, as discussed above in the preamble for those sections. The Department proposed to reorganize these withdrawal provisions so that, for example, the procedure for withdrawing the *Application for Temporary Employment Certification* is located in the section of the rule where an employer at that stage of the temporary agricultural labor certification process would look for such a provision. The Department also proposed language in this section reiterating current requirements that withdrawal does not nullify an employer's obligation to comply with all the terms and conditions of employment

under the certified *Application for Temporary Employment Certification.*

The Department received no comments on the proposed amendments to reorganize the withdrawal provisions in the regulatory text. Therefore, this final rule adopts the proposed changes from the NPRM without change. Accordingly, an employer seeking withdrawal of a certified *Application for Temporary Employment Certification* must submit a withdrawal request, in writing, to the NPC. In the withdrawal request, the employer must identify the temporary agricultural labor certification to be withdrawn and state the reason(s) for the employer's request. Similar to the withdrawal provisions at §§ 655.124 and 655.136, this section adopts the proposed language to reiterate that the withdrawal of a temporary agricultural labor certification does not nullify an employer's obligations to comply with the terms and conditions of employment under the certification with respect to all workers recruited in connection with the application and job order.

The Department received two comments stating that employers should not be bound to comply with obligations under the *Application for Temporary Employment Certification* and related job order after withdrawal, apparently without regard to the timing of withdrawal. These comments have already been addressed above in the section of the preamble related to § 655.124.

4. Section 655.173, Setting Meal Charges; Petition for Higher Meal Charges

The NPRM proposed minor amendments to this section that contains the methodology for setting the annual rates at which an employer may charge workers for meals and the procedures by which an employer may request approval from the CO for a higher meal charge amount. The Department received a few comments related only to the proposal to establish a ceiling on the meal charge amount the CO may approve. As discussed in detail below and after carefully considering these comments, the Department has decided to largely adopt the regulatory text proposed in the NPRM, with revisions to remove language related to establishing a maximum higher meal charge amount.

As provided in § 655.122(g), employers must provide each worker three meals a day or furnish free and convenient cooking and kitchen facilities so that the worker can prepare meals. If an employer provides workers with three meals per day, rather than providing them with free and convenient cooking and kitchen facilities, the employer may not charge workers more than the allowable meal charge set by the Department's regulations at § 655.173(a) for providing those meals, unless and until the CO authorizes the employer to charge a higher amount pursuant to § 655.173(b).

The Department proposed no changes to the existing methodology used to annually adjust the standard amount an employer may charge workers for providing them with three meals per day. The Department proposed to update the amount stated in paragraph (a) to reflect the current standard meal charge amount in effect (*i.e.,* $14.00 per day) and to more clearly characterize it as the starting point for future annual updates. 85 FR 16133 (Mar. 20, 2020). In addition, the Department proposed to make the annual adjustments effective on a date no more than 14 calendar days after publication in the **Federal Register**, to provide employers a brief period for adjustment to the updated rate, consistent with the Department's proposed approach to wage rate updates. *See, e.g.,* § 655.120(b)(3). The Department did not receive comments on these revisions to paragraph (a). However, consistent with the Department's reasoning and decision not to adopt an adjustment period of up to 14 calendar days for both AEWR updates and prevailing wage updates, the Department has not adopted the proposed adjustment period for meal charge updates. Therefore, apart from a grammatical edit and removal of the proposed 14-day adjustment period, the Department has adopted paragraph (a) without change in this final rule.

In paragraph (b), the Department proposed to retain the basic process an employer may follow to petition the CO for authorization to charge workers more than the standard meal charge set under paragraph (a), with revisions for clarity and to address situations in which an employer's higher meal charge petition is based on its use of a third party to provide meals to workers (*e.g.,* hiring a food truck to prepare and deliver meals or engaging restaurants near the housing or place of employment to provide meals). In paragraph (b)(1), the Department clarified that the CO will deny the employer's petition, in whole or in part, if the documentation the employer submits to the CO does not justify the higher meal charge requested, with paragraph (c) retaining the employer's option to appeal.

In paragraph (b)(1)(i), the Department retained the 2010 H–2A Final Rule's documentation requirements for employers that directly provide meals to workers (*i.e.,* through its own kitchen facilities and cooks), with clarification that the employer's documentation must include only permitted costs. The Department proposed a new paragraph (b)(1)(ii) to address documentation requirements applicable to employers that provide meals to workers through a third party. Specifically, the employer's documentation must identify each third party engaged to prepare meals, describe how the employer's agreement with each third party will fulfill the employer's obligation to provide three meals a day to workers, and document each third party's charges to the employer for the meals to be provided. The employer must retain records of payments to the third party and deductions from a worker's pay, as provided in § 655.167(b). Finally, the employer, or anyone affiliated with the employer, is prohibited from receiving a direct or indirect benefit from a higher meal charge to a worker. The Department did not receive comments on these proposals and is adopting them without change in this final rule.

In paragraph (b)(2), the Department clarified the effective date and scope of validity of an approved higher meal charge petition. In addition to waiting for the CO's approval, which may specify a later effective date, an employer must disclose to workers any change in the meal charge or deduction before it may begin charging the higher rate. Further, the Department clarified that the CO's approval of a higher meal charge is valid only for the meal provision arrangement presented in the higher meal charge petition and only for the meal charge amount the CO approved. If the approved meal provision arrangement changes, the employer would not be permitted to charge workers more than the standard meal charge set under paragraph (a) until the employer repeated the higher meal charge petition process for the new meal provision arrangement and received the CO's authorization to charge a higher amount. The Department did not receive comments on these revisions and is adopting them without change in this final rule.

Finally, the Department also proposed to reintroduce an objective ceiling on meal charges through a maximum higher meal charge amount. In part, the Department thought an upper limit on meal charges could help to ensure that an employer's choice to engage a third party to provide three meals a day to workers would not unreasonably reduce workers' wages. The maximum higher meal charge amount the Department proposed was derived from the last

maximum allowable higher meal charge amount published in the **Federal Register** and effective in 2008, updated using the same methodology as in paragraph (a). The Department invited comments on methods for processing and evaluating higher meal charge requests involving third party prepared meals, including alternative methods for determining and updating a higher meal charge ceiling that would not inhibit the provision of sufficient, adequate meals and will not reduce workers' wages without justification.

The Department received several comments from trade associations, agents, and an employer that expressed strong opposition to the proposal to impose a ceiling for higher meal charge petitions. The commenters generally viewed the ceiling as ''artificial.'' Some expressed concern that the maximum rate proposed would often be below actual meal costs, with one asserting that such a limitation would result in some employers providing smaller and lower quality meals to their workers to stay within budget. Another agent saw no added benefit from a maximum amount because higher meal charge requests are subject to the CO's approval, so there is no need to place an arbitrary limit on the CO's discretion. The Department did not receive comments suggesting alternative methods to determine an appropriate higher meal charge limitation.

After consideration of the comments received, the Department has decided not to adopt the proposed ceiling on the meal charge amount the CO may approve and, therefore, has revised paragraphs (b) introductory text and (b)(1) to remove language related to a maximum higher meal charge amount. The Department appreciates and shares commenters' concerns that the proposal would not adequately account for various factors that could influence the costs of employer-provided meals, such as the variance of food costs across localities or the need to accommodate a worker's dietary restrictions, and could result in employers providing smaller and lower quality meals to their workers to stay within budget in certain circumstances. The Department also agrees the proposal would have placed an unnecessarily rigid limitation on the CO's discretion and might have prevented the CO from approving higher meal charge requests even in cases where the employer provides ample documentation of actual costs, compelling justification for the higher meal charge, and solid evidence the employer could not have provided adequate meals at a lower cost.

The Department has therefore determined that the reasonable approach, at this time, is to allow the CO to determine whether to approve higher meal charge petitions, on a case-by-case basis, based on the CO's evaluation of the employer's documentation. Particularly in meal arrangements involving third-party preparers, the CO will consider whether the employer has demonstrated it cannot provide the required meals for the standard costs permitted by paragraph (a) and the higher meal charge requested, based on the meal provision arrangements presented in the petition, is necessary, not merely convenient or a means of reducing an employer's housing costs (*e.g.,* when motel rooms with kitchenettes are available at a higher rate). In administering this final rule, the Department will continue to consider ways to best protect workers from improper deductions, while also providing sufficient discretion to the CO and adequately accounting for the various factors that may influence the cost of employer-provided meals.

One State government commenter reiterated a comment submitted in connection with the meal provision obligation at § 655.122, stating that even where an employer provides three meals per day that satisfy minimum Federal standards, a worker may need to supplement those meals through individually purchased and stored food to satisfy nutritional and caloric needs and urging the Department to allow this practice. A pattern of workers finding it necessary to supplement employer-provided meals might suggest that the employer's meals are insufficient and its meal provision arrangement should be reevaluated. However, where an employer is providing sufficient meals and workers wish to supplement those meals with additional food (*e.g.,* snacks), the Department notes that nothing in the regulations prohibits or prevents workers from purchasing, storing, and eating food not provided by the employer.

5. Section 655.174, Public Disclosure

The NPRM did not propose changes to the longstanding practice of providing publicly accessible information about users of the H–2A program on the OFLC website. Therefore, this final rule retains the current requirements.

6. Section 655.175, Post-Certification Amendments

The 2010 H–2A Final Rule does not permit amendments to an application after the CO issues a Final Determination. Thus an employer that experiences changed circumstances after certification is required to submit a new and substantially similar *Application for Temporary Employment Certification* and job order. The NPRM proposed to add a new provision permitting an employer to request minor amendments to the places of employment listed in the certified *Application for Temporary Employment Certification* and job order under limited circumstances and subject to certain conditions. The proposal was intended to recognize that an employer may experience changed circumstances, wholly outside of their control, after certification, necessitating adjustments to certain aspects of the anticipated work plan. The Department's proposed provision would have allowed for narrowly tailored post-certification amendments to alleviate the burdens with filing and processing a new *Application for Temporary Employment Certification* and provide employers with a certain degree of flexibility to more quickly respond to changing needs, without compromising the H–2A program's integrity or changing the terms and conditions of employment to which the employer already attested. The Department received a significant number of comments on this provision. After careful consideration of comments, the Department has decided not to adopt the proposed post-certification amendments provision at § 655.175, as discussed in detail below.

The majority of comments from employers, associations, and agents that addressed the proposed post-certification amendment provision expressed general support and viewed this provision as a practical, reasonable administrative improvement that would simplify the H–2A program, reduce burdens on employers by providing flexibility to accommodate changed circumstances after certification within limits appropriate to protect program integrity, and improve the accuracy of information available to the Department regarding worker location, especially in the case of workers that travel from site to site when employed by FLCs or itinerant employers. An agent explained that requiring an employer to file a new application to add a place of employment within the certified AIE is burdensome and restrictive because the employer has already completed a labor market test for that area and the period of need. Several of the comments provided examples of the types of circumstances in which a post-certification amendment would help producers stay in compliance with the

rule while adapting to on-the-ground conditions. For example, situations like late snow, drought, or excessive rain may prevent access to rangeland, or wildfire or drought may alter or eliminate vegetation on the rangeland, such that ranchers must relocate herds, on short notice, to other rangeland with vegetation of sufficient quality and quantity available for grazing. Other examples commenters cited included severe adverse weather, changes in vegetative growing conditions, sudden presence of predators, disaster situations, and unanticipated planting to replace lost crops. An agent requested the Department include examples, unrelated to weather, constituting good and substantial cause. Commenters provided non-weather examples including wildfires, predators, and inability to access certain locations due to route conditions, which are discussed above.

The Department also received a significant number of comments from workers' rights advocacy organizations, labor unions, State agencies, and elected officials expressing concerns about the proposed post-certification amendments provision. Commenters expressed concern that this provision would provide employers with unilateral ability to make mid-season changes to the terms and conditions of employment, which they asserted is unfair to workers who are not able to negotiate or appeal changes made after the job begins. These commenters also expressed concerns that the proposal might jeopardize the labor market test, create occupational instability, complicate wage determinations, hinder the work of workers' rights advocacy organizations, lead to worker exploitation, disadvantage employers that do not employ H–2A workers, and result in employer abuse of the attestation-based process.

In response to the Department's request for comments on ways to balance employers' need to adapt quickly to changed circumstances with the Department's need to protect program integrity, a workers' rights advocacy organization asserted that the timeline for processing an *Application for Temporary Employment Certification* is already short enough to accommodate an employer's need to adapt to changing circumstances. The commenter asserted the proposal would violate the Department's statutory obligation by relying on employer assurances that they met all program requirements, including those vital to workers' rights (*e.g.,* workers' compensation and wage rate for a new State). Two U.S. Senators requested the Department abandon the proposal, asserting the Department can balance its goals within the current regulatory framework, specifically the pre-certification amendment provision at § 655.145 and the emergency situations waiver provision at § 655.134. In contrast, a few trade associations thought the proposal was sufficiently limited to allow employers to react quickly to unforeseen circumstances without compromising the integrity of the temporary agricultural labor certification.

A workers' rights advocacy organization asserted that the Department had not provided sufficient data or rationale to explain how this proposal furthers regulatory or statutory goals. This commenter also stated that even if the employer provides a copy of the amended temporary agricultural labor certification to workers, H–2A workers who are told to work at different worksites, possibly in different States, may not be certain that the work is permitted under their H–2A visa. This commenter also believed the proposed post-certification amendment process would be abused by H–2ALCs and would permit employers to use the process as a ''tool to further their illegal preference for H–2A workers.''

Some commenters asserted the proposal conflicted with workers' need to know the job terms before accepting an H–2A job opportunity, which could negatively affect U.S. workers' access to jobs and deter them from applying. Two U.S. Senators and one of the workers' rights advocacy organizations asserted the employment of foreign workers at worksites not disclosed to U.S. workers would not only disadvantage U.S. workers, but may increase the risk of exploitation, trafficking, and labor abuses. The senators further asserted that, in conjunction with the Department's proposal to determine the AEWR for specific occupations, post-certification amendments to worksites would unnecessarily complicate wages for employers and workers, greatly increasing the risk of workers being paid an incorrect wage. The senators also believed the proposal unnecessarily increased the administrative burden on employers and defeated the Department's objective of simplifying the H–2A program.

Some commenters viewed post-certification changes to worksites as compounding their general concerns about the labor market test, the proposed option for staggered start dates, and the proposed 30-day period replacing the 50 percent rule. Two workers' rights advocacy organizations expressed concern the proposal did not require additional recruitment. One of the commenters asserted workers must know where they will be required to work in order to assess housing, transportation, terrain, facilities, quality of crops, and other factors that affect workers' interest in potential employment. This commenter expressed particular concern about situations in which the certified AIE crosses State lines because the proposal would not require the employer to conduct additional positive recruitment in the new State or allow the SWA in the new State to evaluate the job order and availability of workers, which it feared would result in lost job opportunities for U.S. workers.

A State governor expressed concern the proposal could create hardships for U.S. workers who have to find their way to the new worksite or risk being fired, which they believed would be a particular concern in a situation where the employer has a ''no rehire policy'' and might invoke the policy to refuse to hire those workers who had to quit or were fired for refusing to report to an additional work location. One of the workers' rights advocacy organization commenters expressed concern about U.S. workers who might lose jobs at the added place of employment, such as former workers with seniority at that worksite who might not be contacted to determine whether they are available for the job. The commenter expressed particular concern about situations in which an H–2ALC adds a place of employment where workers were directly hired by the farmer in prior years.

A State governor and one of the workers' rights advocacy organizations feared that the proposal would permit misuse of the program by employers, such as reforestation contractors, employing workers in many locations, because these employers might test the labor market in one AIE, but actually employ workers in another area. The governor further expressed concern the proposal would not provide the SWA sufficient time to test the labor market for domestic workers in the new locations because amendments to worksites after certification would require changes to the job order in the SWA system, as well as changes to recruitment posters and advertising that the SWA creates to notify the community of the jobs available. The governor also noted domestic workers at the new locations will need to be made aware of the change in order to know if they are in corresponding employment under the H–2A certification.

In addition to comments expressing support or opposition to the proposed

post-certification amendments, the Department received several comments requesting specific changes to the proposal or suggesting alternatives to one or more aspects of the proposal. Comments from employers, associations, and agents generally urged the Department to expand the scope of post-certification amendments, ease the proposed restrictions on the amendments, and clarify requirements for approval of amendment requests. Some commenters mistakenly believed the provision would permit employers to increase the number of workers and add work locations after certification as they acquire additional work (*e.g.,* new contracts or fields) in the normal course of business. Several commenters also urged the Department to provide additional guidance and clarity regarding various aspects of the proposed provision. An international recruitment company asked the Department to define more clearly the terms ''minor changes,'' ''good and substantial cause,'' ''circumstance(s) underlying the request,'' ''reasonably foreseen,'' ''wholly outside the employer's control,'' and ''material terms and conditions.'' An agent and two farm owners urged the Department to be flexible in evaluating ''good and substantial cause,'' expressing concern that if an employer's burden of proof is too high it could render post-certification amendments unworkable. One of these commenters believed the Department should apply a more flexible definition of ''good and substantial cause'' than it applies to emergency situation requests under § 655.134.

Regarding the time provided for the CO to review these requests, several commenters simply stated post-certification amendment requests should be processed as quickly as possible or otherwise without delay. An international recruiting company suggested employers submit real-time updates regarding the workers' location to the NPC, rather than submitting individual requests and waiting up to 3 days for CO approval. In contrast, a workers' rights advocacy organization opposed the proposed 3-business-day review period, asserting this would not provide sufficient time to review the request and assess the effect on the labor market test.

The Department also received comments addressing time limitations on post-certification amendment requests. A workers' rights advocacy organization argued if the Department adopts a post-certification amendment provision, the amendments must be limited to a post-certification time period shorter than 30 days after certification, the shortest period the Department mentioned as an option in the NPRM. An individual commenter suggested the Department either permit post-certification amendments until 50 percent of the work contract period has elapsed or extend the employer's hiring obligation to 30 days after any amendment to the temporary agricultural labor certification. In contrast, a few trade associations urged the Department to permit employers ''ample'' time to submit post-certification amendments requests because the circumstances necessitating these amendments are not bound by any regulatory limit and can happen at any time.

After careful consideration of all comments, as stated above, the Department has decided not to adopt the post-certification amendment provision in this final rule. Although the Department did not intend for the proposed provision to have permitted post-certification amendments that changed the terms and conditions of employment (*e.g.,* adding places of employment in a different AIE than certified), the Department recognizes commenters' concerns. The Department is sensitive to the concerns about the potential for changed terms and conditions of employment and ensuring U.S. workers' access to job opportunities. The Department agrees that permitting employers to add places of employment beyond the AIE and the States certified would change the terms and conditions of employment without CO review, could permit employers to use the post-certification amendment process in a way that undermines the Department's underlying finding regarding U.S. worker availability, and could require the employer to secure additional documentation of the type that would have been subject to the CO's review during application processing (*e.g.,* evidence of workers' compensation compliance in the new State and, potentially, housing). These types of changes are beyond the scope of what the Department believes is appropriate to permit under a post-certification, expedited review process. The Department appreciates the concerns of a workers' rights advocacy organization and State governor regarding potential job losses for workers with seniority at that worksite who might not be contacted to determine whether they are available for the job and workers who may be unable or unwilling to report to a new worksite. The Department agrees an effective post-certification amendment provision should require the employer to contact former U.S. workers for each added place of employment and solicit their return to the job opportunity and that the post-certification amendment process may require a carefully tailored expedited process to guarantee employers engage in such contact. The Department also appreciates and agrees with commenters' concern about the necessity of providing sufficient time to assess the effect of the amendment on the labor market test. Finally, the Department appreciates the State governor's comment expressing concern regarding the process for apprising corresponding workers at new worksites of their rights and protections and the Department agrees that an effective post-certification amendment provision must more clearly address employers' obligation to reevaluate whether its workers are engaged in corresponding employment and timely disclose to workers approved amendments to the work contract, in compliance with § 655.122(q).

While the Department understands the importance of providing flexibilities that permit employers and associations to quickly respond to exigent circumstances requiring minor amendments to places of employment after their applications are certified, the Department has determined that the proposal would require significant revisions to provide greater clarity to employers and ensure post-certification amendments do not adversely affect workers similarly employed in the AIE and those U.S. workers seeking employment. In light of the substantial and numerous commenter concerns, the Department does not believe the proposal, even with significant revisions, will satisfy the policy considerations underlying this final rule. Notwithstanding, as noted by the U.S. Senators and workers' rights advocacy organization commenters, the Department agrees that the existing regulations already provide a limited degree of flexibility to employers to react to exigencies and changing circumstances. Accordingly, the Department declines to adopt the proposal in the NPRM at this time. Under this final rule, as under the 2010 H–2A Final Rule, the employer may request certain amendments under the provisions set forth at § 655.145, in situations where the employer could foresee the need for amendment after filing, but prior to the CO issuing a Final Determination, and, if necessary, may file a new *Application for Temporary Employment Certification,* using the emergency situations procedures at

§ 655.134 to address changes not permitted under § 655.145. For example, if unusually heavy storms and rains occur after the employer submits its *Application for Temporary Employment Certification,* the employer can assess impacts on crop conditions and its temporary need and may determine it is appropriate to reduce staffing levels for the job opportunity described on the pending *Application for Temporary Employment Certification* and file an emergency situation *Application for Temporary Employment Certification* to address its need for labor or services under the new circumstances at other place(s) of employment or with adjusted duties.

The Department will continue to consider how best to accommodate the needs of employers to make minor post-certification amendments to places of employment due to unforeseen circumstances over which the employer has no control, while also sufficiently limiting the scope of these amendments to ensure employers provide effective notice of job opportunities to non-H–2A workers—both former U.S. workers and workers in corresponding employment at each place of employment added to the temporary agricultural labor certification—and guarantee changes to specific work locations are minimal for workers, terms and conditions of employment remain unchanged, and the underlying labor market test for the AIE remains valid for the certification.

H. Integrity Measures

1. Section 655.180, Audit

The NPRM proposed minor amendments to this section to clarify the procedures by which OFLC conducts audits of applications for which temporary agricultural labor certifications have been granted. The Department received a few comments on this provision, none of which necessitated changes to the regulatory text. Therefore, as discussed below, this provision remains unchanged from the NPRM.

The Department proposed five revisions to this section in the NPRM. First, the Department proposed revisions to paragraphs (b)(1) and (2) to clarify that audit letters will specify the documentation that employers must submit to the NPC, and that such documentation must be sent to the NPC not later than the due date specified in the audit letter, which will be no more than 30 calendar days from the date the audit letter is issued. Second, in paragraph (b)(2), the Department proposed to revise the timeliness measure from the date the NPC receives the employer's audit response to the date the employer submits its audit response. This change is more consistent with other filing requirements contained in this final rule and better ensures employers' ability to timely submit their responses. Third, the Department proposed to revise paragraph (b)(3) to clarify that partial audit compliance does not prevent revocation or debarment. Rather, employers must fully comply with the audit process in order to avoid revocation under § 655.181(a)(3) or debarment under § 655.182(d)(1)(vi) based on a finding that the employer impeded the audit. Fourth, the Department proposed to add language to paragraph (c) to codify the current practice of a CO issuing more than one request, and sometimes multiple requests, for supplemental information if the circumstances warrant. This practice ensures that employers have every opportunity to comply fully with audit requests and that the CO's audit findings are based on the best record possible. Finally, the Department proposed revisions in paragraph (d) to clarify the referrals a CO may make as a result of audit, including updating the name of the office within the DOJ, Civil Rights Division, Immigrant and Employee Rights Section, that will receive referrals related to discrimination against eligible U.S. workers.

The Department received two comments expressing general support for the proposed changes and one comment suggesting that only WHD conduct audit examinations of certified *Applications for Temporary Employment Certification.* Although the Department appreciates the suggestion, the NPRM did not propose changes related to which agency would conduct audit examinations. Therefore, this suggestion is outside the scope of this rulemaking.

2. Section 655.181, Revocation

The NPRM proposed minor amendments to paragraph (b)(2) of this section to clarify that if an employer does not appeal a Final Determination to revoke a temporary agricultural labor certification according to the procedures in proposed § 655.171, that determination will become the final agency action. The Department proposed to remove language referring to the timeline for filing an appeal, as that information was provided in proposed § 655.171. The Department received some comments generally supporting these proposals, and no comments in opposition. However, as explained below, the Department has decided not to adopt the proposed revisions in this final rule.

The proposed deletion of paragraph (b)(2)'s current 10-calendar-day timeline for appealing, combined with the proposed retention of paragraph (b)(2)'s reference to the appeal procedures of § 655.171, would have resulted in an unintended change in paragraph (b)(2)'s appeal timeline. The Department did not intend to change any of the current timelines in paragraph (b). This final rule therefore retains the timelines stated in current paragraphs (b)(1) and (2), both of which now reference paragraph (b)(3). Paragraph (b)(3), in turn, retains a reference to the appeal procedures of § 655.171, but now clarifies that while the appeal *procedures* of § 655.171 apply to any appeals filed under paragraph (b)(1) or (2), the *timelines* to file an appeal, as stated in paragraphs (b)(1) and (2), continue to apply.

Additionally, the Department has removed language from the proposed paragraph (b)(3), stating that the ALJ's decision is the final agency action, in light of an intervening change to the current paragraph (b)(3). As discussed elsewhere, between the publication of the 2019 proposed rule at 84 FR 36168 and this final rule, the Department published *Rules Concerning Discretionary Review by the Secretary* (85 FR 30608), which affected the language of this section. The current iteration of § 655.181(b)(3), with the changes made by the *Rules Concerning Discretionary Review by the Secretary,* is different than the iteration of § 655.181(b)(3) that was in effect when the NPRM was published. Specifically, the *Rules Concerning Discretionary Review by the Secretary* removed the language in paragraph (b)(3) that stated the decision of the ALJ was the final decision of the Secretary, consistent with the principle that the Secretary could assume jurisdiction over a de novo appeal pursuant to 29 CFR 18.95. Section 655.171 of this final rule contains language implementing that principle, which § 655.181(b)(3), in turn, incorporates by stating that the appeal procedures of § 655.171 apply.

3. Section 655.182, Debarment; 29 CFR 501.16, Sanctions and Remedies—General; 29 CFR 501.19, Civil Money Penalty Assessment; 29 CFR 501.20, Debarment and Revocation; 29 CFR 501.21, Failure To Cooperate With Investigations; 29 CFR 501.41, Decision and Order of Administrative Law Judge; 29 CFR 501.42, Procedures for Initiating and Undertaking Review; 29 CFR 501.43, Responsibility of the Office of Administrative Law Judges; 29 CFR 501.44, Additional Information, if Required; and 29 CFR 501.45, Decision of the Administrative Review Board

The NPRM proposed amendments to the debarment provision in § 655.182 to improve integrity and compliance with program requirements, and to establish consistency in holding program violators accountable among the H–2A regulations and the other labor certification programs administered by the Department. The NPRM also proposed amendments to WHD's debarment provision at 29 CFR 501.20 to conform with the proposed changes to 20 CFR 655.182(a) regarding the ability to debar an agent or attorney, and their successors in interest, based on the agent's or attorney's own substantial violations. The Department received some comments on these provisions, none of which necessitated substantive changes to the regulatory text. As noted above, the Department has revised § 655.182(h) to confirm its approach to debarment of associations, employer-members of associations, and joint employers. Therefore, as discussed below, these provisions remain substantively unchanged from the NPRM.

The Department proposed to revise § 655.182 to clarify that if an employer, agent, or attorney is debarred from participation in the H–2A program, the employer, agent, or attorney, or their successors in interest, may not file future *Applications for Temporary Employment Certification* during the period of debarment. Under the proposal, if such an application is filed, the Department will deny the application without review, rather than issuing a NOD before denying the application, as it does under the current regulations.

The Department also proposed to revise § 655.182 to allow for the debarment of agents or attorneys, and their successors in interest, based on their own misconduct. Since the 2008 H–2A Final Rule, the H–2A regulations have allowed the Department to debar an agent or attorney based on its participation in the employer's substantial violation. *See* § 655.182(b); 2010 H–2A Final Rule, 75 FR 6884, 6936–6937; 2008 H–2A Final Rule, 73 FR 77110, 77188. As explained in the NPRM, the proposed revisions would allow the Department to hold agents and attorneys of the employer accountable for their own substantial violation(s), as well as for their participation in the employer's substantial violation(s), as that term is defined in § 655.182(d). The Department also proposed conforming revisions to the definition of ''successor in interest'' in § 655.103(b) to reflect that a debarred agent's or attorney's successor in interest may be held liable for the debarred agent's or attorney's violation. The Department has adopted these changes as proposed. However, the Department has made one additional, minor revision to § 655.182(b), consistent with revisions to § 655.103(b), to clarify that neither a debarred employer, agent or attorney, nor a successor in interest to a debarred employer, agent or attorney may file an H–2A application.

The Department received one comment expressing support for the first proposal and several comments expressing general support for the second. Some commenters expressed concern, however, that the Department would not seek to debar the employer where the Department is pursuing debarment of an agent or attorney based on the agent's or attorney's own misconduct. The Department believes these concerns are misplaced. Under the changes adopted in this final rule, the Department may pursue debarment against the agent or attorney for their own misconduct in those rare instances where the Department determines the agent or attorney commits a substantial violation that the Department finds it cannot or, in its discretion, should not, attribute to the employer. The Department anticipates that, in most instances, it would be appropriate to debar the employer as well as the agent or attorney, because the ultimate responsibility for ensuring compliance with the program rests with the participating employer.

Some agent commenters objected to statements in the NPRM that expressed the Department's concern with the role of agents in the H–2A program. The Department's intent was simply to note that, in its experience, the participation of agents in the program can, but certainly does not always, undermine program compliance.

The Department received several other comments about the debarment provisions that were unrelated to the changes the NPRM proposed, and therefore are beyond the scope of the current rulemaking. For instance, some employer and employer association commenters requested changes to ease the standard for debarment, such as requesting a *de minimis* exception from the kinds of violations that would lead to debarment from the H–2A program. Save for the addition of an H–2ALC's failure to submit an original surety bond at § 655.182(d)(2) (discussed in the surety bond section above), the Department proposed no changes to the kinds of violations that are sufficient to warrant debarment, and thus the Department cannot consider this recommendation in the current rulemaking. The Department notes, however, that the Department considers debarment only in the case of substantial violations, as required by the statute. *See* 8 U.S.C. 1188(b)(2)(A).

Another commenter opposed shared debarment authority between WHD and OFLC. This comment is outside the scope of the current rulemaking, as the NPRM did not propose changes to the Department's longstanding practice, reflected in the associated regulations, that both WHD and OFLC have debarment authority.

A workers' rights advocacy organization commented that the proposed changes were insufficient to address perceived shortcomings to the H–2A debarment procedures. Specifically, the commenter noted a need to improve the debarment procedures' treatment of successors in interest and cited specific enforcement efforts as demonstrative of the limitations of the regulation's current provision. The commenter also advocated that the Department's debarment procedures should promote employee participation in WHD investigations. The Department appreciates these comments but notes that the suggestions are not within the scope of the current rulemaking, as the Department did not propose any changes to the debarment procedures generally. As noted above, however, the Department proposed and is adopting as final conforming revisions to the definition of ''successors in interest'' in § 655.103(b) to reflect the changes detailed above.

I. Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Operations

The NPRM proposed amendments to certain provisions in this section largely to conform the labor certification process for temporary agricultural employment in range sheep herding, goat herding, and production of livestock operations to other changes proposed in the NPRM. The Department

received many comments on this section; the vast majority of which were outside the scope of this rulemaking and none of which necessitated substantive changes to the regulatory text. Therefore, as discussed in detail below, the provisions contained in this section remain unchanged from the NPRM except for minor technical or clarifying changes.

1. Modernizing Recruitment Requirements

Between the publication of the 2019 proposed rule at 84 FR 36168 and this final rule, the Department published the 2019 H–2A Recruitment Final Rule that amended § 655.225 by removing paragraph (d) and redesignating paragraph (e) as paragraph (d). This final rule incorporates those changes.

2. Regulatory Revisions Implemented by This Final Rule

As proposed in the NPRM, the Department has revised §§ 655.200 through 655.235 to conform to the other revisions in this final rule. Minor changes include replacing a dash between two sections with the word ''through'' (*e.g.,* replacing ''§§ 655.200–655.235'' with ''§§ 655.200 through 655.235'') for technical consistency with other sections of this final rule. The Department received no comments regarding these minor changes, or the substantive changes discussed below, and therefore has adopted all proposed revisions in §§ 655.200 through 655.235. Aside from technical changes, the Department has made one minor change to the proposed text in § 655.215(b)(1), which is discussed further below.

The Department has revised § 655.205 to reflect revisions to the normal job order filing procedures in § 655.121 and to clarify variances from § 655.121 that remain for job opportunities involving herding or production of livestock on the range.

In addition, consistent with the Department's reasoning and decision not to adopt the transition period for an employer to implement a new higher AEWR proposed in § 655.120(b), the Department did not adopt similar transition period language proposed in § 655.211(a)(2). The final rule requires an employer to start paying the higher rate on the effective date published in the **Federal Register**. The Department has also added the phrase ''at least'' to § 655.211 to clarify that employers must pay at least the rate required by the regulations, but as the regulations are meant to provide a minimum, employers may of course choose to offer and pay a higher rate. The phrase also provides consistency with §§ 655.120 and 655.210(g).

The Department has also simplified and revised § 655.215(b) introductory text and (b)(1) to conform to other revisions in this final rule. In paragraph (b) introductory text, detailed language about additional required information is obsolete, as the job order Form ETA–790/790A addenda include data fields for employers to provide detailed information about the job opportunity. The obsolete language was removed.

As the language promulgated in the Department's 2015 H–2A Herder Final Rule could have been interpreted to permit an *Application for Temporary Employment Certification* for herding or production of livestock on the range to cover multiple AIEs in more than two contiguous States but not a smaller geographic area, such as multiple AIEs within one State, the Department has included one minor change to language in paragraph (b)(1) for clarity. *See* 2015 H–2A Herder Final Rule, 80 FR 62958, 62998, 63068. Specifically, an *Application for Temporary Employment Certification* may cover multiple AIEs in one State, or multiple AIEs in two or more contiguous States. Accordingly, the text in this final rule has been revised to make clear that an ''*Application For Temporary Employment Certification* and job order may cover multiple [AIEs] *in* one or more contiguous States,'' as opposed to saying ''*and* one or more contiguous [S]tates'' as originally proposed (emphasis added).

Trade associations, an agent, and individual employers suggested removing the ''contiguous State'' restriction, stating that this limitation hinders access to job opportunities. However, the Department's proposed revisions for this subpart were meant to serve as clarification only, and the Department did not propose substantive changes to the regulatory requirements. Therefore, the comments requesting that the Department remove the ''contiguous State'' restriction are outside the scope of this rulemaking.

In addition to minor revisions to § 655.220(b) and (c) for consistency within this final rule, the Department has revised paragraph (b) to reflect the centralization of job order dissemination from the NPC to the SWAs as set forth in § 655.121. Consistent with § 655.121, after the content of a job order for herding or production of livestock on the range has been approved, the NPC will transmit the job order to all applicable SWAs to begin recruitment. The Department also recently rescinded, in the separate 2021 H–2A Herder Final Rule, the 364-day provision that governed the adjudication of temporary need for employers of sheep and goat herders (§ 655.215(b)(2)) to ensure the Department's adjudication of temporary or seasonal need is conducted in the same manner for all H–2A applications. The text at § 655.215(b)(2) in this rule has been updated to reflect this recission.

Finally, the Department has made minor revisions in § 655.225(b) and (d) to simplify the language and reflect procedural changes made elsewhere in this final rule, such as revisions to the duration of the recruitment period at § 655.135(d).

3. Other Comments

A significant number of comments from a trade association, individual employers, and other commenters urged the Department to reconsider the wage rate methodology for herding and range livestock opportunities. However, the Department explicitly stated in the NPRM that it was not reconsidering, and therefore not seeking public comment on, this wage rate methodology. 84 FR 36168, 36220–36221. As a result, the comments regarding the wage rate methodology for herding and range livestock job opportunities are outside the scope of this rulemaking and will not be addressed further.

An immigration advocacy group, trade associations, and individual employers and other commenters expressed concerns and suggested changes regarding housing, the frequency of record keeping, the frequency of pay for employees, and the cost and profitability of business. A trade association and individual employers offered a number of suggested changes, which included the Department putting all forms and procedures online, providing for reimbursement for in-bound travel, allowing for a wage credit, and removing overtime pay statutes for sheepherders. However, the Department did not propose changes regarding these substantive issues and, thus, the comments are outside the scope of this rulemaking. With regard to removing or exempting specific occupations from statutory requirements, the suggestion would require a legislative change.

Other comments from a trade association, a State agricultural department, and individual employers and other commenters were general in nature and discussed the industry overall and expressed concern about the viability of their businesses moving forward. The Department understands the industry has concerns; however, these aforementioned comments and

suggestions are not within the scope of this rulemaking.

J. Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, and Custom Combining

1. Section 655.300, Scope and Purpose

The NPRM proposed to establish certain variances to the procedures for temporary agricultural labor certification for employers who seek to hire H–2A workers in animal shearing, commercial beekeeping, and custom combining to address the unique occupational characteristics of these occupations. To date, the Department has processed *Applications for Temporary Employment Certification* in these occupations using TEGLs specific to each of these occupations, which specify applicable variances from H–2A program requirements.[111]

In order to employ H–2A workers under these procedures, an employer's job opportunity must be in one of the covered occupations and must involve agricultural work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple contiguous States. Unless otherwise specified in these variances, set forth in new §§ 655.300 through 655.304, employers must also comply with all H–2A requirements in §§ 655.100 through 655.185, including payment of at least the highest applicable wage rate, determined in accordance with § 655.122(l) for all hours worked.[112]

The Department is adopting the variances proposed in the NPRM with minor revisions and technical changes. The Department received many comments on the proposed procedures in §§ 655.300 through 655.304. All of the commenters supported the proposed incorporation of variances for the commercial beekeeping, animal shearing, and custom combining occupations in the Department's H–2A regulations.

Some commenters requested additional variances not proposed in the NPRM. Several employer commenters requested a variance from the H–2A wage requirements in the case of job opportunities that involve animal shearing. The commenters stated that employers of animal shearers generally pay per piece or head, not hourly, and need a regional or national piece rate prevailing wage for shearers. The Department notes that the H–2A program does not prohibit the payment of a piece rate to covered workers, so long as the piece rate is accurately disclosed and the worker's average hourly earnings for the pay period equal at least the highest of the AEWR, prevailing hourly wage, agreed-upon collective bargaining rate, or the Federal or State minimum wage. Indeed, historical prevailing wage rates for animal shearing have often been published as piece rates. Additionally, the Department believes that the prevailing wage methodology adopted in this final rule at § 655.120(c)(1) adequately addresses the needs of animal shearing employers and removes the need for the prevailing wage variance specified in the TEGL. The TEGL permitted use of a prevailing piece rate finding from an adjoining or proximate State or based on aggregated survey data for the occupation in a region to address situations such as inadequate sample sizes that would otherwise prevent a prevailing piece rate finding in a particular State.[113] Under this final rule, a prevailing wage survey may cover a regional area, where appropriate, based on the factors at § 655.120(c)(1)(vi).[114] Because the prevailing wage methodology adopted in this final rule accommodates the potential for a regional survey, a specific variance is no longer required to address situations in which a statewide survey fails to generate a prevailing piece rate wage result for this occupation. In addition, as a prevailing wage survey may set a prevailing wage by the piece rate based on employer responses, a specific variance is not required to accommodate piece rates. Regardless, the Department notes that this final rule does not require employers to change their existing payment practices, as the obligation to pay at least the amount required by § 655.122(l) continues unchanged.

A workers' rights advocacy organization submitted a comment that mentions reports of violations regarding the adequate payment for compensable time for workers employed as animal shearers and custom combining workers for travel time. In response, the Department reiterates that employers must account for all hours worked by the employee in meeting their wage obligations in § 655.122(l). As previously noted, in determining compensable hours worked under the H–2A Program, the Department applies FLSA hours worked principles. The principles applied in determining compensable hours worked are explained in more detail in 29 CFR part 785. As such, the Department reminds employers that any employee performing work while traveling (*e.g.,* driving a combine or employer housing between locations, or transporting other workers along an itinerary) constitutes hours worked. *See* § 785.41. Additionally, certain transportation time may constitute hours worked for passengers. *See* §§ 785.33 through 785.41.

Some commenters requested a meal allowance credit towards the wage rate for workers in herding and range livestock production occupations. As explained in the preamble to the NPRM, however, the Department is not reconsidering and thus did not seek comment on the wage rate methodology for herding and range livestock production job opportunities. These comments are outside the scope of this rulemaking.

2. Section 655.301, Definition of Terms

The NPRM proposed definitions for the occupations subject to the procedures in §§ 655.300 through 655.304. As discussed below, the Department is adopting § 655.301 from

[111] *See* TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?docn=3041*; TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043*; TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040.* The NPRM also proposed to incorporate reforestation and pine straw activities into the H–2A program. Those activities have been considered under the H–2B program, and variances for the unique characteristics of those activities are provided for in TEGL No. 27–06, *Special Guidelines for Processing H–2B Temporary Labor Certification in Tree Planting and Related Reforestation Occupations* (June 12, 2007), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=2446.* However, following a consideration of the public submissions, and as discussed in the preamble to § 655.103(c), above, this final rule does not incorporate reforestation and pine straw activities into the H–2A program, and thus no specific variances are included for these activities.

[112] Compliance with § 655.122(l), as revised by this rule, requires an employer to ''pay the worker at least the AEWR; a prevailing wage, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.''

[113] *See* TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program,* Attachment A, Section I.A (June 14, 2011).

[114] In the NPRM, the Department expressed its intent to codify existing practice, including regional surveys where appropriate, through § 655.120(c)(1)(vi). 84 FR 36168, 36187.

the NPRM with clarifying and conforming changes. Commenters generally supported the proposed definitions. A workers' rights advocacy organization recommended adding a sentence to the definition of commercial beekeeping stating that the definition includes work performed under the supervision of either a fixed-site farmer/rancher or an itinerant beekeeping employer providing services to a fixed-site farmer/rancher, purportedly to ''ensure accurate coverage of all applicable job opportunities.'' However, the commenter did not provide any explanation as to why the identity of the supervisor of an itinerant beekeeping worker is relevant to coverage of applicable job opportunities. The Department declines to adopt the commenter's proposal. Some commenters argued that itinerant beekeepers have been erroneously subject to the MSPA FLC registration requirements. The Department disagrees. Beekeepers providing pollination services on land that they do not own or operate are subject to MSPA FLC registration requirements. Moreover, the Department did not propose any substantive changes to § 655.132's requirement that H–2ALCs submit a copy of their MSPA registration certificate ''if required by MSPA.'' These comments are therefore outside the scope of this rulemaking.

A workers' rights advocacy organization proposed expanding the definition of ''custom combining''—though it did not provide a rationale for doing so—to cover additional types of equipment beyond that used in combining, and additional worksites beyond those covered by the definition of agriculture. The Department rejects the proposal. To avoid the possibility that readers will construe the definition more broadly than intended, the Department has deleted the following terms from the proposed definition of ''custom combining'' ''associated with'' and ''including.'' The Department also has made other minor revisions for clarity, such as specifying that the type of equipment involved in the covered activities is combine equipment.

Several trade associations suggested that the NPRM inadvertently omitted certain aspects of custom combining, such as custom harvesters that harvest not only grain but also silage for livestock feed. The omission was not inadvertent. Harvesting silage does not require a combine, but rather a chopper or mower, and therefore falls outside the definition of custom combining. The TEGL was intended to cover only custom combining harvesters, as evidenced by the regulation authorizing promulgation of the TEGLs (*i.e.,* § 655.102, which authorized special procedures for processing H–2A applications for, among other things, ''custom combine harvesting crews'').[115] The definition adopted in this final rule clarifies that intent.

In proposing the occupational definitions at § 655.301, the Department acknowledged that some of the listed activities may not otherwise constitute agricultural work under the current definition of agricultural labor or services in § 655.103(c) but are a necessary part of performing this work on an itinerary (*e.g.,* transporting equipment from one field to another). *See* 84 FR 36168, 36222. Accordingly, and solely for the purposes of the proposed variances in §§ 655.300 through 655.304, the Department explained that it would include these activities in the occupational definitions. *Id.* The Department did not receive any comments opposing the inclusion of specific activities listed in the proposed definitions. However, the Department acknowledges that only duties that fall within the definition of agricultural labor or services under § 655.103(c) may be certified under the H–2A program. Additionally, an application for a job opportunity that contains non-agricultural duties, or a combination of agricultural and non-agricultural duties, could not otherwise be certified. *See generally* § 655.161(a); 2010 H–2A Final Rule, 75 FR 6884, 6888. Accordingly, the Department clarifies in this final rule that, under the variances adopted in §§ 655.300 through 655.304, the activities included in the occupational definitions at § 655.301 are eligible for certification under the H–2A program. The Department therefore has made a technical, conforming revision to add new paragraph § 655.103(c)(5), which expressly provides that, for the purposes of § 655.103(c), agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304.

[115] In light of this final rule's promulgation of specific variances to the procedures for H–2A temporary labor certification as necessary to address the unique occupational characteristics of animal shearing, commercial beekeeping, and custom combining for employers who seek to hire temporary agricultural foreign workers in these occupations, the rule also repeals § 655.102's authorization of the TEGLs, and it replaces it with a new § 655.102 that provides a transitional period for the orderly and seamless implementation of these variances in lieu of the TEGLs.

3. Section 655.302, Contents of Job Orders

a. Paragraph (a), Content of Job Offers

A workers' rights advocacy organization expressed general support for proposed § 655.302, but they recommended that job orders be required to include additional information about workers' compensation, rates of pay, the offered wage, and productivity standards for each State in which work will be performed. No change is required to address this comment. Unless a specific variance under § 655.302 is applicable and provides otherwise, an employer's job order must still comply with each of the content requirements at § 655.122. *See* § 655.302(a). For example, in order to satisfy its obligation to provide workers' compensation insurance coverage for injury and disease ''arising out of and in the course of the worker's employment'' and ''for the entire period of employment'' under § 655.122(e), an employer requiring work in multiple States (including a single AIE that crosses State lines) must satisfy this obligation in each State in which work will be performed. Similarly, § 655.122(c) and (l) require the employer to disclose the wage rate(s) offered and productivity standards in the job order. The Department's modernized job order form, Form ETA–790A, facilitates full disclosure of job offer information.

b. Paragraph (b), Job Qualifications and Requirements

A workers' rights advocacy organization opposed the Department's proposal to allow a job offer for the animal shearing and custom combining occupations to include a statement that applicants must possess up to 6 months of experience in similar occupations, and for the commercial beekeeping occupation to include a statement that applicants must possess up to 3 months of experience in similar occupations. The Department is retaining the NPRM proposal. The proposal was consistent with the TEGLs for these occupations. This final rule does not mandate that employers seeking workers for these occupations require such experience; rather, this final rule recognizes that such experience is consistent with the experience employers normally choose to require for these occupations, as has been observed in filings with OFLC. These occupations typically involve specialized skills (*e.g.,* operating heavy equipment; using shearing tools quickly and close to an animal's skin without injury; or detecting and addressing bee health issues). The regulatory text specifies the maximum amount of

experience that an employer may require absent an affirmative demonstration that such experience is a normal and accepted requirement. This provision does not mean an employer must require the maximum amount of experience in the job order—it simply sets a ceiling for what are considered to be normal requirements. Further, in the event that a SWA or OFLC CO obtains information indicating that the amount of experience required by the employer is not usual for a given State, AIE, or job opportunity, nothing in this rule precludes the SWA and/or OFLC from assessing the normalcy of the experience requirement under § 655.122(b).

The same commenter also requested that § 655.302(b) be revised to remove the verifiable experience requirement because such requirements are used as a barrier to exclude U.S. workers, but they are rarely applied to foreign workers. The Department does not believe that this change is necessary. The Department's regulations have long prohibited the preferential treatment of H–2A workers over other workers, including by prohibiting the imposition on U.S. workers of any restrictions or obligations that will not be imposed on the employer's H–2A workers. *See* § 655.122(a)(1). These protections continue to apply under this final rule. Employers should therefore ensure that any restrictions or obligations imposed on U.S. applicants are also imposed on H–2A workers, and the employer retains records of the imposition of these restrictions or obligations in the event of an audit by OFLC or enforcement by WHD.

An employer commenter opposed the provision in § 655.302(b) permitting beekeeping employers to specify in the job order that applicants must possess a valid driver's license or be able to obtain such a license no later than 30 days after the worker's arrival to the place of employment. The commenter noted that beekeeping employers do not require all workers to drive and when they do, it is often not possible to obtain a license within 30 days. This comment seemed to misunderstand the nature of the provision in § 655.302(b). Nothing in the regulation would require an employer to impose a driver's license requirement or to require workers to obtain a license within 30 days for every job order. On the contrary, only to the extent beekeeping employers choose to require that workers possess a driver's license, § 655.302(b) provides that the job offer may require that applicants either possess a driver's license or be able to obtain one within 30 days. However, nothing in § 655.302(b) would prevent an employer from allowing applicants more than 30 days to obtain a driver's license.

c. Paragraph (c), Communication Devices

Pursuant to § 655.122(f), employers must provide each worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. Due to the potentially remote, isolated, and unique nature of the work to be performed by workers in animal shearing and custom combining occupations, the NPRM proposed to require the employer to provide each worker, without charge or deposit charge, effective means of communicating with persons capable of responding to the worker's needs in case of an emergency. The proposed requirement is consistent with that same requirement in place for workers primarily engaged in the herding and production of livestock on the range under the H–2A program, *see* § 655.210(d)(2), as well as those currently in place in the TEGLs for these occupations. Therefore, as discussed below, the Department is adopting paragraph (c) from the NPRM with a change for flexibility.

Several employer and association commenters opposed the requirement to provide communication devices for each worker in an animal shearing and custom combining crew. The commenters argued that crews in these occupations do not generally perform work in areas that are as remote and isolated as workers engaged in herding and production of livestock on the range. They also noted that workers generally have their own communication devices, so there is no need for the employer to bear the cost of providing a device to each worker. A workers' rights advocacy organization, on the other hand, argued that communication devices should be provided for all workers in those occupations, as well as for workers in commercial beekeeping occupations.

In light of the comments, the Department has decided to modify the NPRM proposal. This final rule requires the employer to provide at least one communication device to each animal shearing and custom combining crew (*i.e.,* group of workers working together as a unit). The Department's intent is to ensure that each worker have a meaningful way to seek assistance in case of emergencies. The Department's interest in ensuring meaningful access to communication devices may be accomplished by requiring one communication device per crew. Each worker in the crew must have meaningful access to that device in the case of an emergency. To have meaningful access, each worker in the crew must be notified as to the location of the communication device at all times (*e.g.,* stored in a particular vehicle or equipment), trained in operation of the device (*e.g.,* informed of any passcodes), and be free to use the device to contact first responders or other emergency responders directly, without first contacting the employer or crew leader. Employers must have the ability to address language barriers in the event of an emergency. Employers can address language barriers by having on-call staff or otherwise making available (*e.g.,* through a conference call), a person capable of speaking the worker's language and communicating the worker's needs, or by using translation technology (*e.g.,* computer software, translation devices). This modification strikes a balance between the need to ensure that workers have access to a communication device for emergencies, while heeding the employer commenters' arguments that workers in the animal shearing and custom combining occupations usually work as a crew, and therefore individual devices are not necessary. Additionally, the Department agrees that, in contrast to herding and livestock workers on the range, these occupations are more likely to be working on farms and ranches, rather than in remote areas. However, the relatively less remote nature of the worksites characterizing these occupations (when compared to range herding and production of livestock) does not obviate the need for communication devices; this work can be dangerous and may occur in remote areas, thus necessitating that workers have the ability to call for help in case of an emergency.

The Department does not believe communication devices should be mandated for commercial beekeepers, contrary to the suggestion by a workers' rights advocacy organization. The TEGL for that occupation does not currently include such a requirement because workers in that occupation generally work in less remote locations where phones are more easily accessible.

The NPRM also posed questions about whether the regulation should identify other specific tools the employer must provide to each worker in the covered occupations. A workers' rights advocacy organization requested that the Department modify the proposed § 655.302(c) to include an explicit, nonexclusive list of such items that are typically required by the nature of the work under this subpart, to ensure employers provide the tools, supplies,

and equipment necessary for workers to do the job. Employer association commenters opposed the requirement that employers provide all tools, but they provided little detail regarding the tools that employers should not be required to provide to workers in commercial beekeeping and custom combining occupations.

This final rule retains the proposal in the NPRM, which does not identify the specific tools the employer must provide to workers in the covered occupations. There is much variability in the tools necessary to perform the work in these occupations, and they may vary by employer, region, and type of work.

Employer association commenters in the animal shearing occupations opposed the requirement that the employer provide all tools to shearing workers, arguing that shearing workers generally have their own set of shears and that requiring the employer to provide them would be burdensome and unnecessary. The requirement to provide all necessary tools to workers is not unique to animal shearing employers, as all H–2A employers must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned. *See* § 655.122(f). In addition, the Department's regulation at § 655.122(p) prohibits an employer from making an unlawful deduction that is primarily for the benefit or convenience of the employer. Because all tools, supplies, and equipment required to perform the duties assigned are primarily for the benefit of the employer, these tools must be provided to the worker free of charge. *See* 29 CFR 531.3(d)(2). While employers must provide tools free of charge to workers, workers may choose to use their own tools if that is their preference.

d. Paragraph (d), Housing

The NPRM proposed that for job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304. This final rule retains the requirement in this section. The specific housing requirements for these occupations are discussed below in the preamble to § 655.304.

4. Section 655.303, Procedures for Filing Applications for Temporary Employment Certification

The NPRM proposed that employers in the covered occupations continue to satisfy the regular requirements for filing an *Application for Temporary Employment Certification* under §§ 655.130 through 655.132, and that, consistent with the TEGLs, employers seeking workers in the covered occupations continue to provide the specific locations, estimated start and end dates, and, if applicable, names for each farm or ranch for which work will be performed. The NPRM, however, proposed an exception to the geographic limitations in §§ 655.130 through 655.132 for applications subject to the procedures in §§ 655.300 through 655.304. This exception allows such agricultural work to be performed on a scheduled itinerary covering multiple AIEs, including in multiple contiguous States. Further, the NPRM proposed an additional exception for applications in the commercial beekeeping occupation. Consistent with the current TEGL for that occupation, the NPRM proposed allowing such applications to include one noncontiguous State at the beginning and end of the period of employment for retrieving bee colonies from and returning them to their overwintering location. Commenters expressed general support for the procedures in § 655.303. Therefore, as discussed below, this final rule retains the proposal in the NPRM with minor technical revisions.

Several employers and employer associations and agent commenters opposed the NPRM's proposal that applications for the covered occupations limit itineraries to contiguous States. Some of the employer and association commenters opposed the proposal on the basis that it would be a change from the geographic scope permitted under current practice and that the change would not permit them to continue performing the job duties associated with these occupations. Other commenters expressed concern that the proposal was limited to a starting State and its contiguous States only, which was not the intent of the proposal. The Department's use of the term ''contiguous'' was not intended to anchor all States on the itinerary to the starting State. Rather, the proposal was intended to permit covered employers to file applications with an itinerary spanning multiple States so long as each of the States included in the itinerary shared a border with another State on the itinerary. In other words, the Department intended to describe an itinerary covering a contiguous grouping of States akin, but not limited, to recognized regional groupings of States (*e.g.,* USDA farm production regions). For example, an animal shearing application could include an itinerary with work to be performed in California, Oregon, Idaho, and Utah; but not California, Oregon, Idaho, and Colorado, as Colorado is not contiguous to any of the other States on the itinerary. A beekeeping application could include an itinerary with work in Texas, North Dakota, and South Dakota; or Texas, California, and Oregon; but not Texas, North Dakota, and California. Where an employer has planned work in groups of States that are not contiguous, or for beekeeping employers that are not contiguous apart from the overwintering State, the employer must file more than one *Application for Temporary Employment Certification,* where each satisfies the contiguous State itinerary requirement.

In adopting the NPRM proposal regarding contiguous States, the Department expects that most participating employers will be able to continue filing applications with minimal or no changes to current practice. Employers generally limit the time and distances between work locations on the itinerary, both for their own profitability and to satisfy wage and hour guarantees to workers. Further, the distances that can be covered within one itinerary are limited by the seasonality of the need for the duties to be performed. Therefore, employers typically file applications in which work will be performed along a contiguous-State route, involving a grouping of States.

Contrary to some commenters' suggestion, the limitation serves to advance legitimate Departmental goals while recognizing the need for employers in the covered occupations to have ample flexibility to follow an itinerary over a large geographic area. This final rule serves to ensure that applications reflect bona fide job opportunities for full-time, temporary work through the employer's asserted period of need. An employer must have sufficient evidence of the work it expects to perform across the itinerary at the time it submits its *Application for Temporary Employment Certification.* Long distances between places of employment on an itinerary suggest a lack of full-time work throughout the work contract. Although the three-fourths guarantee provides an assurance to workers of the minimum hours and wages they can expect under the work contract, that guarantee is intended to address the normal variability of weather, crop readiness, and other circumstances in agricultural work. The three-fourths guarantee is not intended to allow an employer to include periods without work, as would be the case during travel between distant places of employment. The Department further notes that the limitation in § 655.303 is

consistent with the requirement in § 655.215(b)(1) for herding and range livestock applications.

In addition, under the applicable hours worked principles, only certain time spent traveling between worksites constitutes compensable hours worked. *See* 29 CFR part 785. Because it is possible that time spent traveling between worksites would not constitute compensable hours worked for many H–2A and corresponding workers, permitting itineraries to include noncontiguous States (apart from those necessary for overwintering bees) could result in several non-compensable hours worked for these workers during longer trips.

Employer and employer association commenters expressed concern that the proposed § 655.303 would change current practice under the TEGLs by requiring an employer to file one H–2A application for each crew of itinerant workers. Those commenters noted that under current practice, employers with multiple crews sometimes operate along a single itinerary, traveling to separate locations when needed, and requested additional flexibility in the number of itineraries that may be filed under a single application. They stated that switching workers between crews sometimes becomes necessary—for example, if a worker is sick and another worker is needed to fill in to complete a job.

The NPRM proposal was intended to be consistent with the procedures and policy established in the TEGLs. In the TEGLs, the Department permitted a variance from § 655.132(a) to allow, for example, an itinerant animal shearing employer ''who desires to employ one or more nonimmigrant workers on an itinerary'' to submit ''a planned itinerary of work in multiple [S]tates.'' [116] The NPRM inadvertently introduced confusion by using the term ''crew,'' rather than ''itinerary,'' though no distinction from current practice was intended. The Department understands that employers may divide workers into various crews, with all of the crews performing work along the same planned route, with different crews working at different farms or ranches within the same area or some crews moving ahead of others to the next location on the planned route. Depending on agricultural needs (*e.g.,* farm size and/or crop conditions) at each farm or ranch, the number of workers or crews needed at each worksite may vary. As long as all of the workers covered by the application were performing labor or services along the same planned route, the Department would consider the employer to have one itinerary, even if the workers might be assigned to different particular contracts along that route. This understanding is consistent with a non-itinerant H–2ALC employing workers performing work at different locations within a single AIE.

To the extent employers in the covered occupations present work itineraries that contain different planned routes for some of the workers, they would be required to file more than one *Application for Temporary Employment Certification.* However, to the extent employers present an itinerary that contains one planned route for all of the workers, in which some workers are briefly assigned to different farm contracts, they will be able to file one *Application for Temporary Employment Certification.* For example, where an employer assigns some workers to farm contracts along one travel route and other workers to farm contracts along a different travel route, and the two groups of workers travel and work separately throughout the period of employment (or during all but a few occasions, such as for a particularly large job or at the beginning or end of the employer's period of need), the employer has two distinct itineraries that cannot be combined on a single *Application for Temporary Employment Certification.* In contrast, an employer has a single itinerary and can file one *Application for Temporary Employment Certification* where its planned route involves all of the workers traveling together or along the same path and working in the same general areas at approximately the same times. The fact that some workers are assigned to one client farm and other workers are assigned to a different client farm in the same AIE does not create a separate itinerary. Likewise, and absent some countervailing information suggesting truly distinct itineraries, an employer has one itinerary and can file one *Application for Temporary Employment Certification* in situations where some workers remain longer in one location on the employer's planned route performing their assigned farm contracts than other workers and some workers travel ahead to begin to work on other farm contracts at the next location on the employer's planned route.

In light of the above clarification regarding the intended meaning, this final rule retains the proposal in the NPRM with minor technical revisions.

Employer association commenters also asked that DOL make available the application procedure in § 655.205 to applications that involve animal shearing. This change is unnecessary as an animal shearing employer—or any other employer—with an emergency situation justifying waiver of the normal filing timeframes can file its application under § 655.134.

5. Section 655.304, Standards for Mobile Housing

As discussed below, the Department is adopting § 655.304 from the NPRM with some changes. Due to the unique nature of animal shearing and custom combining occupations, the NPRM proposed to permit employers to provide mobile housing for workers engaged in these occupations. The Department chose not to permit commercial beekeeping employers to provide mobile housing for workers engaged in that occupation. This approach is consistent with the relevant TEGLs.[117] The NPRM included proposed standards for mobile housing for workers engaged in the animal shearing and custom combining occupations, which largely incorporated the housing standards in the TEGLs, with two key exceptions.

First, the TEGL for workers engaged in animal shearing occupations expressly provides that an animal shearing contractor may lease a mobile unit owned by a crew member or other person or make some other type of ''allowance'' to the unit owner. Under the proposed rule, such an arrangement with a crew member (*e.g.,* employee) is not permitted. Employer and employer association commenters opposed this proposal, opining that it appeared the Department is attempting to require employees to live in employer-furnished housing and forbidding workers from living and traveling in their own lodging, if so preferred. The Department is not prohibiting workers from choosing to live and travel in their own mobile housing unit, if so preferred. As

[116] *See* TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program,* Attachment B, Sections I.B. and II.B (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf.*

[117] *See* TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program,* Attachment B (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL17-06-Ch1.pdf;* TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program,* Attachment A (June 14, 2011), *https://wdr.doleta.gov/directives/attach/TEGL/TEGL16-06-Ch1.pdf;* TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program,* Attachment A (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3043.*

commenters noted, all workers are free to decline employer-provided housing; however, WHD's enforcement experience indicates that most workers tend not to reject this housing, and any investigation will closely review whether the worker's rejection of the housing was truly voluntary. However, the INA requires every H–2A employer to furnish housing at no cost to workers. *See* 8 U.S.C. 1188(c)(4). Consistent with this statutory requirement, it is the employer's obligation to offer and furnish such housing at no cost to the worker; permitting an employer to rely on the workers to provide their own such housing, including through a lease agreement, is inconsistent with this statutory requirement.

Second, the proposed standards deviated from the TEGLs' approach of permitting employers of animal shearing and custom combining workers to provide housing that met the range housing standards (§ 655.235) at all times. In contrast, the NPRM proposed to allow such employers to comply with the range housing standards only when the housing is located on the range and proposed mobile housing standards to be used when the housing is not on the range. A workers' rights advocacy organization commenter stated that, with a small modification, the proposed mobile housing standards would be sufficient to meet the mobile housing needs of workers employed in animal shearing and custom combining occupations even when the housing is located on the range. Some commenters also expressed concern that it might not be clear which housing standards would apply in certain situations.

Upon further consideration, the Department has decided to modify § 655.304 to require employers seeking workers in the animal shearing and custom combining occupations to provide housing that complies with the mobile housing standards in § 655.304 regardless of where the housing is located, except as provided below. Thus, employers seeking workers in the covered occupations will generally not be permitted to comply with the range housing standards (§ 655.235) even when the housing is located on the range. For the most part, employers seeking workers in the animal shearing and custom combining occupations will be able to provide housing consistent with the mobile housing standards.

To account for the occasional instances where employers in the covered occupations provide housing located on the range in locations where compliance with all of the mobile housing standards is not feasible, this final rule establishes a procedure to permit employers to request a variance from the mobile housing standards that would allow them to instead comply with a specific range housing standard for the limited time the housing is in that particular location on the range. There are minor distinctions between the mobile housing standards in § 655.304 and the range housing standards in § 655.235. Those distinctions are only appropriately invoked in a small subset of instances where the work is so remote that the mobile housing standard is not feasible for the covered occupations. Similar to the procedure in § 655.235(b)(4) and (l), employers may request a variance from the CO at the time of the application by:

- Identifying the particular mobile housing standard(s) in § 655.304, and attesting that compliance with the standard(s) is not feasible;
- Identifying the range location(s) where it is unable to meet the particular mobile housing standard(s) in § 655.304;
- Identifying the anticipated dates when the mobile unit(s) will be in those locations;
- Identifying the corresponding range housing standard(s) in § 655.235, and attesting that it will comply with such standard(s); and,
- Attesting to the reason(s) why the particular mobile housing standard(s) in § 655.304 cannot be met.

If the CO approves one or more variances to the mobile housing standards at § 655.304, the approval will specify the locations, dates, and specific variances approved. The variance procedure in § 655.304(a)(1) therefore eliminates any potential confusion about which housing standards would apply in any given situation. Further, this final rule will allow the Department to monitor the use of mobile housing, while maintaining employer flexibility where necessary.

Accordingly, this final rule also does not adopt the NPRM's proposal at § 655.304(a)(1) (consistent with animal shearing TEGL) to apply the range housing inspection procedures to mobile housing units used on the range. Instead, the inspection procedures at § 655.122(d)(6) apply to all mobile units used to house workers engaged in occupations subject to the procedures in §§ 655.300 through 655.304, except those covered by the exception at § 655.304(a)(2). Before issuing any temporary labor certification for workers engaged in custom combining or animal shearing work covered by the procedures at §§ 655.300 through 655.304, and who will be housed in mobile units, the CO must receive a housing certification based on an inspection conducted by the SWA or that of another local, State, or Federal authority acting on behalf of the SWA—or, under the exception at § 655.304(a)(2), an authorized representative of the Federal or provincial government of Canada—reflecting the certifying authority's knowledge of the employer's planned use of the housing, confirming that all of the employer's mobile units have been inspected, consistent with the requirements of § 655.122(d)(6), and certified as meeting applicable housing standards.[118] The Department has made conforming revisions to § 655.122(d)(2), as discussed above.

If a mobile unit does not satisfy the housing standards at § 655.304(c) through (p) as a self-contained unit, the employer may satisfy those standards by providing supplemental facilities at each location on the itinerary to ensure that the housing standards at § 655.304(c) through (p) are satisfied throughout the work contract period. *See* § 655.304(b).

Some employer and employer association commenters, who generally opposed the obligation to provide housing at no cost to H–2A workers and workers in corresponding employment, also opposed specific aspects of the mobile housing standards, such as an employer's responsibility for the cost of laundering workers' clothes. The Department notes that an employer's obligation to provide housing at no cost to the workers extends to all required amenities within the housing, regardless of the housing standards applicable. For example, an employer cannot charge the worker for a bed or for a window because the housing standards require these basic amenities. Similarly, the employer cannot charge the worker for the laundry facilities provided, because housing standards require laundry facilities. When the housing provided does not have laundry facilities, and the

[118] One workers' rights advocacy organization commented that because it is ''possible that worksites of intended employment may include provincial land owned or operated by Canadian employers,'' this final rule should be extended to cover such worksites. This comment appears to be based on an inaccurate reading of the custom combine TEGL. TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011), *https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=3040.* That TEGL acknowledges that worksites located in the United States may be owned or operated by Canadian employers, and therefore states that if such employers provide mobile housing units or other similar vehicles, those employers must submit an inspection report of such vehicles conducted by an authorized representative of the Canadian Federal or provincial government. Nothing in this final rule permits worksites of intended employment to be located in Canada.

employer meets the obligation to provide laundry facilities by providing transportation to a laundromat, the employer must pay for laundering expenses. On the other hand, where an employer has provided functional laundry facilities but the employee chooses to go to a laundromat, the employer has complied with its obligation and is not responsible for laundering expenses.

A commenter also raised a concern regarding the impact that use and transportation of heating equipment may have on wilderness areas and proposed revisions to § 655.304 to note compliance with the Wilderness Act is required. Because the employer is already required to comply with all applicable laws, a provision specifying that compliance with a particular law is not necessary.

VI. Discussion of Revisions to 29 CFR Part 501

In the NPRM, the Department proposed revisions to its regulations at 29 CFR part 501, which sets forth the responsibilities of WHD to enforce the legal, contractual, and regulatory obligations of employers under the H–2A program. The Department proposed these amendments concurrent with and in order to complement the changes that ETA proposed to its certification procedures in 20 CFR part 655, subpart B. Where the Department has adopted changes to 20 CFR part 655, subpart B, as discussed in the above section-by-section analysis of that subpart, the Department has adopted the relevant complementary and conforming revisions to this part.

In addition, since publication of the NPRM and through other rulemakings, the Department has revised the regulations in 29 CFR part 501 addressing the amounts and methods of payment of civil money penalties, and the timing and finality of decisions of the ARB. This final rule reflects these intervening rulemakings, as discussed below.

A. Conforming Changes

As discussed in the NPRM, the Department proposed various revisions to 29 CFR part 501 that conformed to proposed revisions to 20 CFR part 655, subpart B. Where the Department has adopted proposed changes to 20 CFR part 655, subpart B, as discussed in the above section-by-section analysis of that subpart, the Department has adopted the appropriate complementary and conforming revisions to this part. These conforming revisions include, among others, clarification of the delegated authority of, and division of responsibilities between, ETA and WHD under the H–2A program in § 501.1, and the addition or revision of certain definitions of terms in § 501.3. Any comments received on these proposed revisions, and any changes adopted in this final rule, are discussed above in the section-by-section analysis of 20 CFR part 655, subpart B.

B. Section 501.9, Enforcement of Surety Bond

The Department proposed revisions to WHD's surety bond provision at 29 CFR 501.9 as described fully in the discussion of 20 CFR 655.132 above. As detailed above, the Department has adopted its proposed changes to 20 CFR 655.132, with certain revisions. Those revisions, however, do not necessitate changes to proposed 29 CFR 501.9. Accordingly, this final rule adopts 29 CFR 501.9 as proposed in the NPRM, without substantive change.

C. Section 501.20, Debarment and Revocation

The Department proposed revisions to WHD's debarment provisions at 29 CFR 501.20 to maintain consistency with the proposed changes to 20 CFR 655.182(a), which would permit the Department to debar an agent or employer for substantially violating a term or condition of the temporary agricultural labor certification. The section also has been revised to make clear that joint employers under 20 CFR 655.131(b) are subject to debarment only for participation in a debarrable violation. The Department has responded to the comments received on these proposed changes in the above discussion of 20 CFR 655.182(a) and 655.131(b). Accordingly, this final rule adopts proposed 29 CFR 501.20 without substantive change.

D. Terminology and Technical Changes

In addition to proposed revisions to conform to the terminology and technical changes proposed to 20 CFR part 655, subpart B, the Department proposed minor changes throughout this part to correct typographical errors and improve clarity and readability. Such changes are nonsubstantive and do not change the meaning of the current text. For example, the Department proposed throughout part 501 to replace the phrase ''the regulations in this part'' with the phrase ''this part.'' The Department received no comments on these proposed revisions and accordingly adopts them without change in this final rule. The Department has made additional technical, nonsubstantive changes throughout this part and 20 CFR part 655, subpart B, for accuracy and clarity. For example, the Department has replaced the phrase ''hereunder'' in § 501.5 with a specific reference to the relevant authority and made technical changes to the cross-references in § 655.135(h).

E. Intervening Rulemakings

Since publication of the NPRM, the Department has revised the regulations in 29 CFR part 501 on three occasions. First, on November 7, 2019, the Department published a final rule revising certain of its regulations governing the payment and collection of civil money penalties, including those under the H–2A program at § 501.22, by allowing for the payment of civil money penalties through an electronic payment alternative, and otherwise amending the regulations to ensure uniform payment instructions. *See Authorizing Electronic Payments of Civil Money Penalties,* 84 FR 59928 (Nov. 7, 2019). These revisions are reflected in this final rule at § 501.22.

Next, on January 15, 2020, the Department published a final rule to adjust for inflation the civil money penalties assessed or enforced by the Department, including the H–2A civil money penalties listed in § 501.19, pursuant to and as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Inflation Adjustment Act). *See Department of Labor Federal Civil Penalties Inflation Adjustment Act Annual Adjustments for 2020,* 85 FR 2293 (Jan. 15, 2020).

Relatedly, the Department received three comments on the NPRM opposing what these commenters perceived to be discretionary changes in the civil money penalty amounts currently reflected in § 501.19(b). As noted above, however, the Department issued its annual inflation adjustment to civil money penalty amounts for 2020, as required by the Inflation Adjustment Act, after publication of the NPRM. This final rule reflects the current, appropriate civil money penalty amounts at § 501.19. The Department will continue to annually adjust these amounts for inflation, as required by the Inflation Adjustment Act.

Finally, on May 20, 2020, the Department published a final rule to, among other changes and together with Secretary's Order 01–2020, establish a new discretionary review process and make technical changes to Departmental regulations governing the timing and finality of decisions of the ARB, including those under the H–2A

program at § 501.45. *See Rules Concerning Discretionary Review by the Secretary,* 85 FR 30608. These technical revisions are reflected in this final rule at § 501.45.

VII. Administrative Information

A. Executive Orders 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review)

Under E.O. 12866, the OMB's Office of Information and Regulatory Affairs (OIRA) determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. Section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) has an annual effect on the economy of $100 million or more, or adversely affects in a material way a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the E.O. The OMB's OIRA has determined that this final rule is a significant regulatory action, although it is not an economically significant action, under E.O. 12866 sec 3(f)(4) and, accordingly, OMB has reviewed this final rule. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), OIRA has designated this rule as not a ''major rule,'' as defined by 5 U.S.C. 804(2).

E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Public Comments

One commenter stated they no longer understood the rationale behind the move to e-filing and did not identify an analysis of the costs and benefits associated with the proposed changes to e-filing in the NPRM.

The NPRM stated that mandating e-filing would reduce costs and burdens for most employers (and the Department), reduce the frequency of delays related to filing applications and supporting documentation by mail, improve the consistency and quality of information collected, and promote administrative efficiency and accountability. The costs of e-filing were determined to be non-quantifiable due to a lack of information to determine whether the six percent of employers who currently choose not to e-file are doing so as a matter of preference or because they are incapable of doing so due to a lack of equipment or ability. The cost savings portion of the e-filing requirement is quantifiable and is presented in the regulatory impact analysis below.

One commenter said that the proposal seeks to shift costs from employers to H–2A workers by requiring employers to reimburse travel costs only from the U.S. consulate, rather than from the workers' home communities.

Under the NPRM, the provision to define ''the place from which the worker departed'' as the U.S. embassy or consulate for certain H–2A workers was intended to provide workers, employers, and the Department with a consistent point from where costs can be calculated. In this final rule there is no longer a change to how travel costs are reimbursed. Travel costs will continue to be reimbursed from the place of worker recruitment which may or may not be the worker's home community. Consequently, there is no shift in cost burdens from employers to H–2A workers because the Department has decided to retain the current regulatory requirement.

Outline of the Analysis

Section VII.A.1 describes the need for this final rule, and section VII.A.2 describes the process used to estimate the costs and cost savings of the rule and the general inputs used, such as wages and number of affected entities. Section VII.A.3 explains how the provisions of this final rule will result in quantifiable costs and cost savings and presents the calculations the Department used to estimate them. In addition, section VII.A.3 describes the qualitative costs, cost savings, and benefits of this final rule. Section VII.A.4 summarizes the estimated first-year and 10-year total and annualized costs, cost savings, and net costs of this final rule. Finally, section VII.A.5 describes the regulatory alternatives that were considered during the development of this final rule.

Summary of the Analysis

The Department estimates that this final rule will result in costs and cost savings. As shown in Exhibit 1, this final rule is expected to have an annualized quantifiable cost of $2.75 million and a total 10-year quantifiable cost of $19.29 million at a discount rate of seven percent.[119] This final rule is estimated to have annualized quantifiable cost savings of $0.16 million and total 10-year quantifiable cost savings of $1.12 million at a discount rate of seven percent.[120] The Department estimates that this final rule would result in an annualized net quantifiable cost of $2.59 million and a total 10-year net cost of $18.17 million, both at a discount rate of seven percent and expressed in 2021 dollars.[121]

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE

[2021 $millions]

	Costs	Cost savings	Net costs [122]
Undiscounted 10-Year Total	$26.51	$1.51	$25.00
10-Year Total with a Discount Rate of 3%	22.96	1.32	21.64
10-Year Total with a Discount Rate of 7%	19.29	1.12	18.17
10-Year Average	2.65	0.15	2.50

[119] This final rule will have an annualized cost of $2.69 million and a total 10-year cost of $22.96 million at a discount rate of three percent in 2021 dollars.

[120] This final rule will have an annualized cost savings of $0.15 million and a total 10-year cost savings of $1.32 million at a discount rate of three percent in 2021 dollars.

[121] This final rule will have an annualized net cost of $2.54 million and a total 10-year cost of $21.64 million at a discount rate of three percent in 2021 dollars.

EXHIBIT 1—ESTIMATED MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE—Continued

[2021 $millions]

	Costs	Cost savings	Net costs [122]
Annualized at a Discount Rate of 3%	2.69	0.15	2.54
Annualized with at a Discount Rate of 7%	2.75	0.16	2.59

The total cost of this final rule is associated with rule familiarization and recordkeeping requirements for all H–2A employers,[123] as well as increases in the amount of surety bonds required for H–2ALCs. The two largest contributors to the cost savings of this final rule are the electronic submission of applications and application signatures, including the use of electronic surety bonds, and the electronic sharing of job orders submitted to the NPC with the SWAs. See the costs and cost savings subsections of section VII.A.3 (Subject-by-Subject Analysis) below for a detailed explanation.

The Department was unable to quantify some cost, cost savings, and benefits of this final rule. The Department describes them qualitatively in section VII.A.3 (Subject-by-Subject Analysis).

1. Need for Regulation

The Department has determined that new rulemaking is necessary to modernize the H–2A program. The Department is updating its regulations to ensure that employers can access agricultural labor while maintaining the program's strong protections for the workforce. The changes adopted in this final rule will streamline the Department's review of H–2A applications and enhance WHD's enforcement capabilities, thereby reducing workforce instability that can hinder the growth and productivity of our nation's farms, while allowing aggressive enforcement against program fraud and abuse that undermine the interests of workers. Among other changes to achieve these goals, the Department has decided to (1) require mandatory e-filing and accept electronic signatures; (2) update surety bond requirements and clarify recordkeeping requirements; and (3) revise the debarment language to allow the Department to debar agents and attorneys, and their successors in interest, based on their own substantial violations.

2. Analysis Considerations

The Department estimated the costs and cost savings of this final rule relative to the existing baseline (*i.e.,* the current practices for complying, at a minimum, with the H–2A program as currently codified at 20 CFR part 655, subpart B, and 29 CFR part 501). This existing baseline is consistent with the 2010 H–2A Final Rule.

In accordance with the regulatory analysis guidance articulated in OMB's Circular A–4 and consistent with the Department's practices in previous rulemakings, this regulatory analysis focuses on the likely consequences of this final rule (*i.e.,* costs and cost savings that accrue to entities affected). The analysis covers 10 years (from 2022 through 2031) to ensure it captures major costs and cost savings that accrue over time. The Department expresses all quantifiable impacts in 2021 dollars and uses discount rates of three and seven percent, pursuant to Circular A–4.

Exhibit 2 presents the number of affected entities that are expected to be affected by this final rule. The number of affected entities is calculated using OFLC certification data from Fiscal Year (FY) 2016 through 2020.[124] The Department provides these estimates and uses them throughout this analysis to estimate the costs and cost savings of this final rule.

EXHIBIT 2—AVERAGE ANNUAL NUMBER OF AFFECTED ENTITIES BY TYPE

[FY 2016–2020]

Entity type	Number
H–2A Applications Processed	11,527
Unique H–2A Applicants	8,204
Certified H–2A Employers	7,596
Certified H–2A Workers	184,323

a. Growth Rate

The Department estimated growth rates for applications processed and applications certified, and workers certified based on FY 2012–2020 H–2A program data, presented in Exhibit 3. Estimation of the growth rates for labor contractors is limited to FY 2013–2020 data.

EXHIBIT 3—HISTORICAL H–2A PROGRAM DATA

FY	Applications processed	Applications certified	Workers certified	Labor contractors
2012	5,459	5,278	85,248	.....
2013	5,973	5,706	98,814	284
2014	6,726	6,476	116,689	340
2015	7,567	7,194	139,725	388
2016	8,684	8,297	165,741	415
2017	10,097	9,797	199,924	483
2018	11,698	11,319	242,853	566
2019	13,095	12,626	258,446	588
2020	14,063	13,552	275,430	715

[122] Net Costs = [Total Costs]—[Total Cost Savings]

[123] The Department does not consider the cost of H–2A employers learning how to e-file. Based on H–2A certification data from FY 2019, 94.1 percent of applications are submitted electronically. Almost of all the remaining 5.9 percent of H–2A applicants have access to email, so very few applicants will need to learn how to e-file.

[124] Only three quarters of FY 2021 data were available at the time of analysis. To the extent that the COVID–19 pandemic impacted H–2A applications or workers, the inclusion of FY 2020 data allows for some impacts to be captured. However, in FY 2020 Q1–Q3, there were 223,263 certified workers, and in FY 2021 Q1–Q3, there were 247,969 certified workers, indicating that FY 2021 is continuing the historical trend of year-over-year increases in workers certified and that the pandemic may have minimal impacts on program trends.

The geometric growth rate for certified H–2A workers using the program data in Exhibit 3 is calculated as 17.2 percent. This growth rate, applied to the analysis timeframe of 2022 to 2031, would result in more H–2A certified workers than projected BLS workers in the relevant H–2A SOC codes.[125] Therefore, to estimate realistic growth rates for the analysis, the Department applied an autoregressive integrated moving average (ARIMA) model to the FY 2012–2020 H–2A program data to forecast workers, applications, and labor contractors estimate geometric growth rates based on the forecasted data. The Department ran multiple ARIMA models on each set of data and used common goodness of fit measures to determine how well each ARIMA model fit the data.[126] Multiple models yielded indistinctive measures of goodness of fit. Therefore, each model was used to project workers and applications through 2031. Then, a geometric growth rate was calculated using the forecasted data from each model and an average was taken across each model.

The growth rate in certified employers was estimated by calculating the geometric growth rate using data from the analysis period (FY 2016–FY 2020).

The resulting growth rates used in the analysis are presented in Exhibit 4. The estimated growth rates were applied to the estimated costs and cost savings of this final rule to forecast participation in the H–2A program.

EXHIBIT 4—ESTIMATED H–2A GROWTH RATES

Growth Rate	Value (percent)
H–2A applications processed growth rate	3.1
H–2A applications certified growth rate	4.5
H–2A workers certified growth rate	5.6
H–2A certified labor contractor employer growth rate	7.3
H–2A certified employer growth rate	3.8

b. Estimated Number of Workers and Change in Hours

The Department presents the estimated average number of workers and the change in hours required to comply with this final rule for each activity in section VII.A.3 (Subject-by-Subject Analysis). For some activities, such as rule familiarization and application submission, all applicants will experience a change. For other activities, this final rule will affect only certified H–2A employers or H–2A certified labor contractors. These numbers are derived from OFLC certification data for the years 2016 through 2020 and represent an average of the fiscal years.[127] To calculate these estimates, the Department estimated the average amount of time (in hours) needed for each activity to meet the new requirements relative to the baseline.

c. Compensation Rates

In section VII.A.3 (Subject-by-Subject Analysis), the Department presents the costs, including labor, associated with the implementation of the provisions of this final rule. Exhibit 5 presents the hourly compensation rates for the occupational categories expected to experience a change in the number of hours necessary to comply with this final rule. The Department used the mean hourly wage rate for private sector human resources specialists[128] [129] and the wage rate for Federal employees at the NPC (Grade 12, Step 5).[130] Wage rates are adjusted to reflect total compensation, which includes nonwage factors such as overhead and fringe benefits (*e.g.,* health and retirement benefits). For all labor groups (*i.e.,* private sector, and Federal Government), we use an overhead rate of 17 percent[131] and a fringe benefits rate based on the ratio of average total compensation to average wages and salaries in June 2021. For the private sector employees, we use a fringe benefits rate of 42 percent.[132] For the Federal Government, we use a fringe benefits rate of 63 percent.[133] We then multiply the loaded wage factor by the corresponding occupational category wage rate to calculate an hourly compensation rate. The Department used the hourly compensation rates presented in Exhibit 5 throughout this analysis to estimate the labor costs for each provision.

EXHIBIT 5—COMPENSATION RATES

[2021 Dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Private Sector Employees					
Human Resources (HR) Specialist	N/A	$34.33	$14.25 ($34.33 × 0.42)	$5.84 ($34.33 × 0.17)	$54.42

[125] Comparing BLS 2029 projections for combined agricultural workers with a 15.8 percent growth rate of H–2A workers yields estimated H–2A workers that are about 107 percent greater than BLS 2029 projections. The projected workers for the agricultural sector were obtained from BLS's Occupational Projections and Worker Characteristics, which may be accessed at *https://www.bls.gov/emp/tables/occupational-projections-and-characteristics.htm.*

[126] The Department estimated models with different lags for autoregressive and moving averages, and orders of integration: ARIMA(0,2,0); (0,2,1); (0,2,2); (1,2,1); (1,2,2); (2,2,2). For each model we used the Akaike Information Criteria (AIC) goodness of fit measure.

[127] The total unique H–2A applicants in 2016, 2017, 2018, 2019, and 2020 were 7,446, 7,798. 8,580, 9,382, and 7,815, respectively. The total certified H–2A employers in 2016, 2017, 2018, 2019, and 2020 were 6,713, 7,187, 7,902, 8,391, and 7,785, respectively.

[128] BLS, *Occupational Employment and Wage Estimates, May 2020: 13–1071 Human Resources Specialists, https://www.bls.gov/oes/current/oes131071.htm* (last modified Mar. 31, 2021).

[129] Because the Occupational Employment Statistics wage rate is in 2020 dollars, the Department inflated it to 2021 dollars using the ECI to be consistent with the rest of the analysis, which is in 2021 dollars.

[130] Office of Personnel Management, *Salary Table 2020–CHI: Incorporating the 1% General Schedule Increase and a Locality Payment of 28.59% for the Locality Pay Area of Chicago-Naperville, IL–IN–WI* (Jan. 2021), *https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2021/CHI_h.pdf.*

[131] Cody Rice, U.S. Environmental Protection Agency, *Wage Rates for Economic Analyses of the Toxics Release Inventory Program* (June 10, 2002), *https://www.regulations.gov/document?D=EPA-HQ-OPPT-2014-0650-0005.*

[132] BLS, *Employer Costs for Employee Compensation, https://www.bls.gov/news.release/ecec.toc.htm* (last modified Sept. 16, 2021) (ratio of total compensation to wages and salaries for all private industry workers).

[133] DOL, *DOL-Only Performance Accountability, Information, and Reporting System; OMB Control No. 1205–0521* (2018), *https://www.reginfo.gov/public/do/* PRAViewDocument?ref_nbr=201802–1205–003.

EXHIBIT 5—COMPENSATION RATES—Continued

[2021 Dollars]

Position	Grade level	Base hourly wage rate (a)	Loaded wage factor (b)	Overhead costs (c)	Hourly compensation rate d = a + b + c
Federal Government Employees					
NPC Staff	12	$46.67	$29.40 ($46.67 × 0.63)	$7.93 ($46.67 × 0.17)	$84.01

3. Subject-by-Subject Analysis

The Department's analysis below covers the estimated costs and cost savings of this final rule. The Department emphasizes that many of the provisions in this final rule are existing requirements in the statute, regulations, or regulatory guidance. This final rule codifies these practices under one set of rules; therefore, they are not considered ''new'' burdens resulting from this final rule. Accordingly, the regulatory analysis focuses on the costs and cost savings that can be attributed exclusively to the new requirements in this final rule.

a. Costs

The following sections describe the costs of this final rule.

Quantifiable Costs

i. Rule Familiarization

When this final rule takes effect, H–2A employers will need to familiarize themselves with the new regulations. Consequently, this will impose a one-time cost in the first year.

To estimate the first-year cost of rule familiarization, the Department applied the growth rate of H–2A applications processed (3.1 percent) to the number of unique H–2A applications (8,204) to determine the annual number H–2A applications impacted in the first year. The number of H–2A applications (8,462) was multiplied by the estimated amount of time required to review the rule (1 hour).[134] [135] This number was then multiplied by the hourly compensation rate of Human Resources Specialists ($54.42 per hour). This calculation results in a one-time undiscounted cost of $460,502 in the first year after this final rule takes effect. This one-time cost yields a total average annual undiscounted cost of $46,050. The annualized cost over the 10-year period is $53,985 and $65,565 at discount rates of three and seven percent, respectively.

ii. Surety Bond Amounts

An H–2ALC is required to submit with its *Application for Temporary Employment Certification* proof of its ability to discharge its financial obligations under the H–2A program in the form of a surety bond. *See* 20 CFR 655.132(b)(3); 29 CFR 501.9. Based on the Department's experience implementing the bonding requirement and its enforcement experience with H–2ALCs, the Department is updating its regulations. These updates are intended to clarify and streamline the existing requirement while strengthening the Department's ability to collect on such bonds. Further, the Department is adjusting the required bond amounts to reflect updates to the AEWR and to address the increasing number of temporary agricultural labor certifications that cover a significant number of workers under a single application and surety bond.

Currently, the required bond amounts range from $5,000 to $75,000, depending on the number of H–2A workers employed by the H–2ALC under the temporary agricultural labor certification. For temporary agricultural labor certifications covering fewer than 25 workers, the required bond amount is currently $5,000. For temporary agricultural labor certifications covering 25–49 workers, 50–74 workers, 75–99 workers, and 100 or more workers, the required bond amounts are $10,000, $20,000, $50,000, and $75,000, respectively. Under this final rule, the Department will adjust the required bond amounts proportionally to the degree that a national average AEWR exceeds $9.25 using the current bond amounts as the base amounts for this adjustment. The Department will calculate and publish an average AEWR when it calculates and publishes AEWR in accordance with § 655.120. The average AEWR will be calculated as a simple average of the AEWR applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and, until the Department publishes a different average AEWR, bond amounts will be calculated using an average AEWR of $14.28. To calculate the updated bond amounts, the Department will multiply the base amounts by the average AEWR and divide that number by $9.25. For instance, for a temporary agricultural labor certification covering 100 workers, the required bond amount would be calculated by the Department using the following formula:

$75,000 (base amount) × ($14.28 ÷ $9.25) = $115,784 (updated bond amount).

When the Department publishes a different average AEWR, that amount would replace $14.28 in this calculation and the calculations that follow.

The Department also is increasing the required bond amounts for temporary agricultural labor certifications covering 150 or more workers. For such temporary agricultural labor certifications, the bond amount applicable to certifications covering 100 or more workers is used as a starting point and is increased for each additional set of 50 workers. The interval by which the bond amount increases will be based on the amount of wages earned by 50 workers over a 2-week period and, in its initial implementation, would be calculated using an average AEWR of $14.28 as demonstrated:

$14.28 (Average AEWR) × 80 hours × 50 workers = $57,120 in additional bond for each additional 50 workers over 100.

For a crew of 275 workers, additional surety of $171,360 would be required. This amount is calculated by determining the number of additional full sets of 50 workers beyond the first 100 workers covered by the temporary agricultural labor certification and then multiplying this number by the amount of additional surety required per each set of additional 50 workers (275 − 100 = 175; 175 ÷ 50 = 3.5; this is 3 additional sets of 50 workers; 3 × $57,120 = $171,360). As explained above, this additional surety is added to the bond

[134] This estimate reflects the nature of this final rule. As a rulemaking to amend to parts of an existing regulation, rather than to create a new rule, the 1-hour estimate assumes a high number of readers familiar with the existing regulation.

[135] Differences in the calculation of applications may occur due to the rounding of growth rate figures.

amount required for temporary agricultural labor certifications of 100 or more workers, resulting in a required bond amount of $287,144 ($115,784) for certifications of 100 or more workers + $171,360 in additional surety).

While this may represent a significant increase in the face value of the required bond, the Department understands that employer premiums for FLC surety bonds generally range from one to four percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better).[136]

For this analysis, the Department assumes that the bond premium faced by H–2ALCs will be four percent. To calculate the costs of the increase in the required bond amounts, the Department first calculated the average number of H–2ALCs in FY 2016 to 2020 and the current required bond amounts. Also, the Department calculated the average number of additional sets of 50 workers in FY 2016 to 2020. Next, the Department calculated the required bond amounts for each category of number of workers using the average AEWR of $14.28, as well as the bond amount for each set of additional 50 workers per H–2ALC. Exhibit 6 presents these calculations.

EXHIBIT 6—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H–2ALCs in FY 16–20	Proposed required bond amount	Change in required bond amount	Cost increase (or decrease)
1–24	$5,000	315	$7,718.92	$2,718.92	$108.76
25–49	10,000	71	15,437.84	5,437.84	217.51
50–74	20,000	51	30,875.68	10,875.68	435.03
75–100	50,000	32	77,189.19	27,189.19	1,087.57
More than 100	75,000	135	115,783.78	40,783.78	1,631.35
Each Additional Set of 50 Workers Greater than 100	N/A	[a] 607	57,120.00	57,120.00	2,284.80

[a] This value represents the total number of additional sets of 50 for H–2ALCs with more than 100 workers.

For H–2ALCs with temporary agricultural labor certifications covering 1 to 24 workers the Department calculated the first-year cost by multiplying the average number of H–2ALCs in FY 2016 to 2020 with certifications covering 1 and 24 workers (315 H–2ALCs) by the change in the required bond amount ($2,718.92) and the assumed bond premium (four percent). The Department calculated this for each additional category of number of workers. Additionally, the Department calculated the total cost due to the required bond amounts for additional sets of 50 workers by multiplying the average additional sets of 50 workers (607 sets) in the FY 2016 to 2020 by the required bond amount ($57,120) and the assumed bond premium (four percent). To project the costs of this final rule these calculations were repeated in each year from 2022 through 2031.

After calculating annual total costs, the geometric growth rate of H–2ALCs (7.3 percent) was applied to account for anticipated increased H–2A applicants. The increased costs for each size category were summed to obtain the total annual costs resulting from the change in bond premiums. This calculation yields an average annual undiscounted cost of $2.58 million.

The estimated total cost from the required bond amounts over the 10-year period is $25.76 million undiscounted, or $22.25 million and $18.62 million at discount rates of three and seven percent, respectively. The annualized cost over the 10-year period is $2.61 million and $2.65 million at discount rates of three and seven percent, respectively.

iii. Recordkeeping

Earnings Records

This final rule requires an H–2A employer to maintain a worker's actual permanent home address, email address, and phone number(s), which are usually in the worker's country of origin. This information will greatly assist the Department in contacting an H–2A worker in the worker's home country, should the Department need to do so to conduct employee interviews as part of an investigation, to secure employee testimony during litigation, or to distribute back wages.

To calculate the estimated recordkeeping costs associated with collecting and maintaining this information, the Department first multiplied the number of certified H–2A employers (7,596 employers) by the 3.8 percent annual growth rate of certified H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the estimated time required to collect and maintain this information (2 minutes) to obtain the total amount of recordkeeping time required. The Department then multiplied this estimate by the hourly compensation rate for Human Resources Specialists ($54.42 per hour). This yields an annual cost ranging from $14,298 in 2022 to $19,955 in 2031.

Abandonment of Employment or Termination for Cause

This final rule revises § 655.122(n) to require an employer to maintain records of notification detailed in the same section for not less than 3 years from the date of the temporary agricultural labor certification. An employer is relieved from the requirements relating to return transportation and subsistence costs and three-fourths guarantee when the employer notifies the NPC (and the DHS in case of an H–2A worker), in a timely manner, if a worker voluntarily abandons employment before the end of the contract period or is terminated for cause. Additionally, the employer is not required to contact its former U.S. workers, who abandoned employment or were terminated for cause, to solicit their return to the job.

To estimate the recordkeeping costs associated with maintaining records of these notifications, the Department first multiplied the number of certified H–2A employers (7,596) by the 3.8 percent annual growth rate of certified H–2A employers to determine the annual impacted population of H–2A employers. The impacted number was then multiplied by the assumed percentage of employers per year that

[136] The Department reviewed premium rates on the websites of companies that offer FLC bonds and, as noted in the NPRM, found that employer premiums generally range from one to four percent on the standard bonding market (*i.e.,* contractors with fair/average credit or better). 84 FR 36168, 36205, 36233. The Department assumed contractors would have fair/average credit and so used a premium of four percent to approximate the rate on the high side for premiums on the standard bond market. *Id.*

will have 1 or more workers abandon employment or be terminated for cause (70 percent). This amount was then multiplied by the estimated time required to maintain these records (2 minutes) to estimate the total amount of recordkeeping time required. This total time was then multiplied by the hourly compensation rate for Human Resources Specialists ($54.42 per hour). This yields an annual cost ranging from $10,009 in 2022 to $13,968 in 2031.

Total Recordkeeping Costs

The total cost from the recordkeeping requirements over the 10-year period is estimated at $288,778 undiscounted, or $251,445 and $212,599 at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is $29,477 and $30,269 at discount rates of three and seven percent, respectively.

Non-Quantifiable Costs

i. Housing

This final rule implements changes to the standards applicable to employers who choose to meet their H–2A housing obligations by providing rental and/or public accommodations. Under this final rule, the Department identified specific OSHA temporary labor camp standards that are applicable to rental or public accommodations. Where local health and safety standards for rental and/or public accommodations exist, the local standards apply in their entirety. However, if the local standards do not address one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant State standards on those issues will apply. If both the local and State standards are silent on one or more of the issues addressed in the OSHA health and safety standards listed in the regulation, the relevant OSHA health and safety standards will apply. If there are no applicable local or State standards at all, only the OSHA health and safety standards listed in the regulation will apply. OSHA temporary labor camp standards that are not specifically mentioned in § 655.122(d)(1)(ii) will not be applicable to rental or public accommodations.

Generally, under the 2010 H–2A Final Rule, only certain rental and/or public accommodations are subject to the OSHA housing standards. As such, employers who are not currently subject to the OSHA standards are likely to experience costs related to ensuring their chosen rental and/or public accommodations comply with those standards. For example, employers that currently require workers to share beds will be required to provide each worker with a separate bed. To comply with this final rule, such employers may be required to book additional rooms or provide different housing. The Department is unable to quantify an estimated cost due to a lack of data as to the number of employers that would be required to change current practices under this final rule. The Department invited comment on this analysis for relevant data or information that would allow for a quantitative analysis of possible costs in this final rule and received none.

ii. Requirement To File Electronically

During FY 2019, about six percent of employers choose not to file electronically. Under this final rule, employers will have two options—to file electronically or to file a request for accommodation because they are unable or limited in their ability to use or access electronic forms as result of a disability or lack of access to e-filing. Despite the vast majority of employers choosing to currently file electronically, the Department has not estimated costs for employers' time and travel to file electronically when they otherwise would not have. The Department believes these costs will be very small.

The Department also has not estimated any costs for accommodation requests. The Department expects to receive very few, if any, mailed-in accommodation requests. In its H–1B program, which has mandatory e-filing—albeit from a very different set of industry—the Department has not received any requests for accommodation due to a disability. Of the handful of internet access requests received annually, none were approved, as the requestors had public access nearby. For those requesting an accommodation in H–2A, the Department estimates that the cost to apply would be *de minimis,* consisting of the time and cost of a letter, printing out, and completing the forms.

b. Cost Savings

The following sections describe the cost savings of this final rule.

Quantifiable Cost Savings

i. Electronic Processing and Process Streamlining

The Department is modernizing and clarifying the procedures by which an employer files a job order and an *Application for Temporary Employment Certification* for H–2A workers under §§ 655.121 and 655.130 through 655.132. The NPC will electronically share job orders with SWAs, which will result in both a material cost and a time cost savings for employers.

To ensure the most efficient processing of all applications, the Department must receive a complete application for review. Based on the Department's experience administering the H–2A program under the current rule, a common reason for issuing a NOD on an employer's application includes failure to complete all required fields on a form, failure to submit one or more supporting documents required by the regulation at the time of filing, or both. These incomplete applications create unnecessary processing delays for both the NPC and employers. In order to address this concern, this final rule requires an employer to submit the *Application for Temporary Employment Certification* and all required supporting documentation using an electronic method(s) designated by the OFLC Administrator, unless the employer cannot file electronically due to disability or lack of internet access. The FLAG system used by the OFLC will not permit an employer to submit an application until the employer completes all required fields on the forms and uploads and saves to the pending application an electronic copy of all required documentation, including a copy of the job order submitted in accordance with § 655.121. The Department estimates that 94 percent of applications are currently filed electronically and that this final rule would significantly increase the number of employers who submit electronic applications. This would result in material and time cost savings for employers. Electronic processing would also result in a time cost savings for the NPC. This final rule also provides that employers may file only one *Application for Temporary Employment Certification* for place(s) of employment contained within a single AIE covering the same occupation or comparable work by an employer for each period of employment, which will reduce the number of overall applications submitted. Finally, this final rule permits the use of electronic signatures as a valid form of the employer's original signature and, if applicable, the original signature of the employer's authorized attorney or agent.

To estimate the material cost savings to employers due to electronic processing, the Department assumed that this final rule would result in six percent of H–2A employers switching to electronic processing of applications. The Department applied the growth rate of H–2A applications (3.1 percent) to the number of H–2A applications processed (11,527) to determine the

annual impacted number of applications. The Department then multiplied the percentage estimated to switch to electronic processing of applications (six percent) by the annual number of impacted H–2A applications to obtain the number of employers who would no longer be submitting by mail. For each application, a material cost was calculated by summing the price of a stamp ($0.58), the price of an envelope ($0.04), and the total cost of paper ($0.61). The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.01) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $993.

The total material cost savings from electronic processing over the 10-year period is estimated at $9,933 undiscounted, or $8,662 and $7,338 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is $1,015 and $1,045 at discount rates of three and seven percent, respectively.

To estimate the time cost savings to employers due to electronic processing, the Department again estimated the number of affected applications by multiplying the assumed percentage of employers that would switch to electronic applications (six percent) by the total number of annually impacted H–2A applications. The Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($54.42 per hour). This time cost savings was then multiplied by the estimated number of applications expected to switch to electronic submission. This yields average annual undiscounted cost savings of $3,657.

The total time cost savings from electronic processing over the 10-year period is estimated at $36,566 undiscounted, or $31,886 and $27,011 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is $3,738 and $3,846 at discount rates of three and seven percent, respectively.

To estimate the material cost savings to employers due to the NPC sharing job orders with the SWAs electronically, the Department assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, a material cost was calculated by summing the price of a stamp ($0.58), the price of an envelope ($0.04), and the total cost of paper ($0.61). The total cost of paper was calculated by multiplying the cost of a sheet of paper ($0.01) by the number of pages in the application (100 pages). The per-application costs were then multiplied by the number of applications who would no longer be submitting by mail. This yields average annual undiscounted cost savings of $16,836.

The total material cost savings over the 10-year period is estimated at $168,361 undiscounted, or $146,812 and $124,368 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is $17,211 and $17,707 at discount rates of three and seven percent, respectively.

To estimate the time cost savings to employers resulting from the NPC electronically sharing job orders with the SWAs, the Department again assumed that 100 percent of unique H–2A applicants would be affected. For each annually impacted H–2A application, the Department assumed that the time savings due to electronic submission (rather than sealing and mailing an envelope) would be 5 minutes. The time cost savings were calculated by multiplying 5 minutes in hours (0.083 hours) by the hourly compensation rate for Human Resources Specialists ($54.42 per hour). This cost savings was then multiplied by the estimated number of applications switching to electronic submission. This yields average annual undiscounted cost savings of $61,976.

The total time cost savings over the 10-year period is estimated at $619,762 undiscounted, or $540,438 and $457,818 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is $63,356 and $65,183 at discount rates of three and seven percent, respectively.

The Department assumes that the DOL staff will save approximately 1 hour for each application that is now submitted electronically. To calculate the time cost savings to the Federal Government due to electronic processing, the Department first calculated the number of employers that would now submit electronically by multiplying the assumed percentage (six percent) by the total number of annually impacted H–2A applications. This cost savings was then multiplied by the per-application time cost savings, calculated by multiplying the time savings (1 hour) by the hourly compensation rate for DOL staff ($84.01 per hour). This yields average annual undiscounted cost savings of $68,008.

The total time cost savings over the 10-year period is estimated at $680,079 undiscounted, or $593,034 and $502,374 at discount rates of three and seven percent, respectively. The annualized cost savings over the 10-year period is $69,522 and $71,527 at discount rates of three and seven percent, respectively.

Non-Quantifiable Cost Savings

i. Cost Savings From Efficiencies Associated With Receiving More Complete and Accurate Applications

The Department is modernizing the process by which H–2A employers submit job orders to the SWAs and applications to the Department through e-filing and requiring the designation of a valid email address for sending and receiving official correspondence during application processing, except where the employer has limited ability to use or access electronic forms as result of a disability or lacks access to e-filing.

The Department believes that transitioning to electronic submissions would result in additional cost savings to employers and to the NPC from the cost savings described above. Currently, submissions that are incomplete or obviously inaccurate upon their receipt result in a NOD on the employer's application. As a result, employers who submit incomplete applications must start the submission process from the beginning. This can lead to costly delays for employers, as well as costly processing time for the NPC.

The requirement for electronic submissions would reduce the number of instances where incomplete applications are submitted because employers have not fully completed the form prior to submitting it. E-filing permits automatic notification that an application is incomplete or obviously inaccurate and provides employers with an immediate opportunity to correct the errors or upload missing documentation. Additionally, the adoption of electronic submissions should reduce the amount of time it takes to correct errors because entries can simply be deleted, rather than requiring the production of new copies of the form after an error is detected.

For the NPC, electronic filing and communications will improve the quality of information collected from employers, reduce administrative costs of communicating with employers to resolve obvious errors or receive complete information, and reduce the frequency of delays related to application processing.

ii. Cost Savings From Efficiencies Created by Acceptance of Electronic Signatures

The Department will enable employers, agents, and attorneys to use electronic methods to sign or certify any document required under this subpart using a valid electronic signature method. The current practice of accepting electronic (scanned) copies of original signatures on documents has generated efficiencies in the application process, and the Department believes leveraging modern technologies to accept electronic signature methods can achieve even greater efficiencies and result in cost savings to employers and the NPC.

Accepting electronic signature methods as a means of complying with original signature requirements for the H–2A program will reduce the costs for employers associated with printing, mailing, or delivering original signed paper documents or scanned copies of original signatures on documents to the NPC. Additionally, electronic signature methods give employers and their authorized attorneys or agents greater flexibility to conduct business with the Department—at any time and at any location with an internet connection—rather than needing to be located in a physical office. This frees valuable time for conducting other business tasks.

The NPC anticipates additional cost savings from use of electronic signature methods. The acceptance of documents containing electronic signatures will facilitate the NPC's use of a more centralized document storage capability to access documents more efficiently during application processing, saving time and expense.

iii. Cost Savings From Efficiencies Created by the Use of Electronic Surety Bonds

The Department also is developing a process for accepting electronic surety bonds through the FLAG system and is requiring the use of a standardized bond form. The Department believes that these changes will result in a cost savings to H–2ALCs and the NPC. Currently all H–2ALCs, even the majority that submit other components of their applications electronically, must submit original paper surety bonds before the temporary agricultural labor certifications can be issued. Accepting original electronic surety bonds will reduce the costs associated with mailing or delivering the original surety bonds to the NPC and the costs for NPC to transfer these bonds to WHD for enforcement purposes. Additionally, using a standardized bond form will reduce the likelihood of errors and the amount of time required for the NPC to review the bonds for compliance.

c. Qualitative Benefits Discussion

i. Surety Bonds

The changes to the surety bond requirement, including the use of electronic surety bonds and a standardized bond form, will also result in unquantifiable benefits to the H–2ALCs in the form of a more streamlined application process with fewer delays. Accepting electronic surety bonds will mean that the NPC receives the required original bond with the rest of the application, and it will no longer be necessary to wait for the bond to arrive by mail or other delivery before issuing the temporary agricultural labor certification.

Further, these changes and the changes to the required bond amounts will enhance WHD's enforcement capabilities by making it more certain that there will be a sufficient, compliant bond available to redress potential violations. This will advance the Department's goal of aggressively enforcing against program fraud and abuse that undermine the interests of U.S. workers.

4. Summary of the Analysis

Exhibit 8 summarizes the estimated total costs and cost savings of this final rule over the 10-year analysis period. The change in the surety bond amounts has the largest effect as a cost.

EXHIBIT 8—ESTIMATED 10-YEAR MONETIZED COSTS AND COST SAVINGS OF THIS FINAL RULE BY PROVISION

[2021 $Millions]

Provision	Total cost	Total cost savings
Surety Bond	$25.76	
Record Keeping	0.29	
Rule Familiarization	0.46	
Electronic Processing and Process Streamlining Cost		$1.51
Undiscounted 10-Year Total	26.51	1.51
10-Year Total with a Discount Rate of 3%	22.96	1.32
10-Year Total with a Discount Rate of 7%	19.29	1.12

Exhibit 9 summarizes the estimated total costs and cost savings of this final rule over the 10-year analysis period.

The Department estimates the annualized costs of this final rule at $2.75 million and the annualized cost savings at $0.16 million, at a discount rate of seven percent. The Department estimates that this final rule would result in annualized net quantifiable costs of $2.59 million and total 10-year net costs of $18.17 million, both at a discount rate of seven percent and expressed in 2021 dollars. The Department believes that the qualitative benefits outweigh the quantified net costs of this rule.

EXHIBIT 9—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COSTS OF THIS FINAL RULE

[2021 $Millions]

	Costs	Costs savings	Net costs
2022	$2.32	$0.13	$2.19
2023	2.00	0.14	1.86
2024	2.14	0.14	2.00
2025	2.30	0.14	2.15
2026	2.46	0.15	2.32
2027	2.64	0.15	2.49

EXHIBIT 9—ESTIMATED MONETIZED COSTS, COST SAVINGS, AND NET COSTS OF THIS FINAL RULE—Continued

[2021 $Millions]

	Costs	Costs savings	Net costs
2028	2.84	0.16	2.68
2029	3.04	0.16	2.88
2030	3.26	0.17	3.09
2031	3.50	0.17	3.33
Undiscounted 10-Year Total	26.51	1.51	25.00
10-Year Total with a Discount Rate of 3%	22.96	1.32	21.64
10-Year Total with a Discount Rate of 7%	19.29	1.12	18.17
10-Year Average	2.65	0.15	2.50
Annualized with a Discount Rate of 3%	2.69	0.15	2.54
Annualized with a Discount Rate of 7%	2.75	0.16	2.59

5. Regulatory Alternatives

The Department considered two alternatives to the chosen approach for surety bonds. First the Department considered, as the first alternative, starting with the current (2010) bond amounts and then adjusting for wage growth as estimated by change in the average AEWR and for very large crew sizes by requiring additional surety for each additional 50 workers sought. This is the same approach as this final rule's surety bond structure except this alternative would replace the category for H–2ALCs requesting fewer than 25 workers with two categories: one with a lower required bond amount for H–2ALCs requesting fewer than 10 workers and another with the same required bond amount as this final rule for H–2ALCs requesting 10 to 24 workers. This would provide some relief to H–2ALCs who use between one and nine workers. It would have the same remaining categories as in this final rule. The Department estimated the cost of this alternative using the same method as in this final rule. Exhibit 10 summarizes the cost increases for this alternative.

EXHIBIT 10—COST INCREASES DUE TO CHANGES IN REQUIRED BOND AMOUNTS

Number of workers	Existing required bond amount	Average number of H–2ALCs in FY 16–19	Proposed required bond amount	Change in required bond amount	Cost increase
1–9	$5,000	196	$3,087.57	−$1,912.43	−$76.50
10–24	5,000	120	7,718.92	2,718.92	108.76
25–49	10,000	71	15,437.84	5,437.84	217.51
50–74	20,000	51	30,875.68	10,875.68	435.03
75–100	50,000	32	77,189.19	27,189.19	1,087.57
More than 100	75,000	135	115,783.78	40,783.78	1,631.35
Each Additional Set of 50 Workers Greater than 100	N/A	[a] 607	57,120.00	57,120.00	2,284.80

The total estimated cost of the first alternative over the 10-year period is $25.22 million undiscounted, or $21.78 million and $18.23 million at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is $2.55 million and $2.60 million at discount rates of three and seven percent, respectively. The Department prefers the approach used in this final rule because it maintains a high proportion of sufficient bonds.

Under the second regulatory alternative the Department considered, the Department would base required bond amounts on estimated gross payroll based on the number of workers, applicable wage rates, and length of certification; then require a surety bond equaling five percent of this value. Under this alternative, the bond computation would account for more factors that potentially impact an H–2ALC's back wage liability and would thus be application-specific.

The Department calculates the cost of this second alternative by first estimating gross payroll (*i.e.,* number of workers × applicable wage rate × number of weekly hours × number of weeks in season) for each temporary agricultural labor certification and then taking the applicable percentage—five percent. The difference in bond amounts required under this alternative, then, is for each temporary agricultural labor certification the difference between the bond an H–2ALC would pay under the 2010 H–2A Final Rule (between $5,000 and $75,000 based on number of workers) and the calculated alternative surety bond. Then, the assumed bond premium (four percent) is applied to calculate the cost for each temporary agricultural labor certification from FY 2016 to FY 2020 and the cost across certifications is summed for an annual total cost. To project the annual cost of this second alternative, the growth rate of H–2ALCs (7.3 percent) is applied to the average annual total cost from FY 2016 to FY 2020.

The estimated total cost of the second alternative over the 10-year period is $6.46 million undiscounted, or $5.58 million and $4.67 million at discount rates of three and seven percent, respectively. The annualized cost of the 10-year period is $654,196 and $664,778 at discount rates of three and seven percent, respectively. The Department prefers the chosen surety bond approach because it is expected to result in a higher proportion of sufficient bonds, thus providing greater protection for workers, while being easier to understand and administer because the bond amounts do not need to be calculated for every temporary agricultural labor certification.

Exhibit 11 summarizes the estimated costs associated with the three considered surety bond approaches.

EXHIBIT 11—ESTIMATED MONETIZED COSTS OF THIS FINAL RULE AND REGULATORY ALTERNATIVES

[2021 $Millions]

	Final rule	Regulatory alternative 1	Regulatory alternative 2
Total 10-Year Cost	$25.76	$25.21	$6.46
Total with 3% Discount	22.25	21.78	5.58
Total with 7% Discount	18.62	18.22	4.67
Annualized Cost with 3% Discount	2.61	2.55	0.65
Annualized Cost with 7% Discount	2.65	2.59	0.66

B. Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Executive Order 13272 (Proper Consideration of Small Entities in Agency Rulemaking)

The RFA, 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (Mar. 29, 1996), hereafter jointly referred to as the RFA, requires Federal agencies engaged in rulemaking to assess the impact of regulations that will have a significant economic impact on a substantial number of small entities.

The Department believes that this final rule will not have a significant economic impact on a substantial number of small entities. Based on this determination, the Department certifies that this final rule does not have a significant economic impact on a substantial number of small entities. Therefore, a final regulatory flexibility analysis updating the initial regulatory flexibility analysis included in the NPRM is not required. The factual basis for this certification is set forth below and is based on the Department's analysis of each actual individual small entity impacted by this final rule.

1. Description of the Number of Small Entities to Which This Final Rule Will Apply

a. Definition of Small Entity

The RFA defines a ''small entity'' as a (1) small not-for-profit organization, (2) small governmental jurisdiction, or (3) small business. The Department used the entity size standards defined by the Small Business Administration (SBA), in effect as of August 19, 2019, to classify entities as small.[137] SBA establishes separate standards for individual 6-digit North American Industry Classification System (NAICS) industry codes, and standard cutoffs are typically based on either the average number of employees, or the average annual receipts. For example, small businesses are generally defined as having fewer than 500, 1,000, or 1,250 employees in manufacturing industries and less than $7.5 million in average annual receipts for nonmanufacturing industries. However, some exceptions do exist, the most notable being that depository institutions (including credit unions, commercial banks, and noncommercial banks) are classified by total assets (small defined as less than $550 million in assets). Small governmental jurisdictions are another noteworthy exception. They are defined as the governments of cities, counties, towns, townships, villages, school districts, or special districts with populations of less than 50,000 people.[138]

b. Number of Small Entities

The Department collected NAICS code, employment, and annual revenue data for unique entities in the certification data, from the business information provider Data Axle, and merged those data into the H–2A disclosure data for FY 2020 and FY 2021. This process allowed the Department to identify the number and type of small entities in the H–2A disclosure data as well as their annual revenues.

The Department identified 9,927 unique employers (excluding labor contractors). Of those 9,927 employers, the Department was able to obtain data matches of revenue and employees for 2,615 H–2A employers in the FY 2020 and FY 2021 certification data. Of those 2,615 employers, the Department determined that 2,105 were small (80.5 percent). These unique small entities had an average of 11 employees and average annual revenue of approximately $3.62 million. Of these small unique entities, 2,085 of them had revenue data available from Data Axle.

The Department identified 1,344 unique employers that are labor contractors. Of those 1,344 labor contractors, the Department was able to obtain data matches of revenue and employees for 152 H–2ALCs in the FY 2020 and FY 2021 certification data. Of those 152 labor contractors, the Department determined that 137 were small (90.1 percent). These unique small labor contractors had an average of 15 employees and average annual revenue of approximately $3.81 million. Of these small unique labor contractors, 134 of them had revenue data available from Data Axle.

The Department's analysis of the impact of this proposed rule on small entities is based on the number of small unique entities (2,242 small entities with revenue data = 2,085 small non-labor contractor entities and 134 small labor contractor entities). The remaining unmatched entities are assumed to have impacts similar to these matched entities. To provide clarity on the agricultural industries impacted by this regulation, Exhibit 12 shows the number of unique non-H–2ALC small entity employers with temporary agricultural labor certifications in FY 2020 to 2021 within the top-10 NAICS code at the 6-digit. Exhibit 13 shows the number of unique H–2ALC small entity employers with temporary agricultural labor certifications in FY 2020 to 2021 within the top-10 NAICS code at the 6-digit.

EXHIBIT 12—NUMBER OF H–2A SMALL NON-LABOR CONTRACTOR EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
111998	All Other Miscellaneous Crop Farming	611	29
444220	Nursery, Garden Center, and Farm Supply Stores	162	8

[137] SBA, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Aug. 2019), *https://www.sba.gov/document/support--table-size-standards.*

[138] *See https://advocacy.sba.gov/resources/the-regulatory-flexibility-act* for details.

EXHIBIT 12—NUMBER OF H–2A SMALL NON-LABOR CONTRACTOR EMPLOYERS BY NAICS CODE—Continued

6-Digit NAICS	Description	Number of employers	Percent
561730	Landscaping Services	134	6
445230	Fruit and Vegetable Markets	127	6
424480	Fresh Fruit and Vegetable Merchant Wholesalers	84	4
111339	Other Noncitrus Fruit Farming	78	4
112990	All Other Animal Production	57	3
424930	Flower, Nursery Stock, and Florists' Supplies Merchant Wholesalers	51	2
424910	Farm Supplies Merchant Wholesalers	41	2
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	39	2
Other NAICS		721	34

EXHIBIT 13—NUMBER OF H–2A SMALL LABOR CONTRACTOR EMPLOYERS BY NAICS CODE

6-Digit NAICS	Description	Number of employers	Percent
484230	Specialized Freight (except Used Goods) Trucking, Long-Distance	11	8
236115	New Single-Family Housing Construction (except For-Sale Builders)	11	8
111998	All Other Miscellaneous Crop Farming	10	7
115115	FLCs and Crew Leaders	8	6
561311	Employment Placement Agencies	7	5
115113	Crop Harvesting, Primarily by Machine	7	5
541110	Offices of Lawyers	6	4
445230	Fruit and Vegetable Markets	5	4
115112	Soil Preparation, Planting, and Cultivating	5	4
115116	Farm Management Services	4	3
Other NAICS		62	46

2. Projected Impacts to Affected Small Entities

The Department has estimated the incremental costs for small businesses from the baseline [139] of this final rule. We estimated the costs of (a) new surety bond amounts required for H–2ALCs based on the number of H–2A employees; (b) recordkeeping costs associated with maintaining records of employee's home address in their respective home countries; (c) recordkeeping costs incurred by the abandonment or dismissal with cause of employees; and (d) time to read and review this final rule. The cost estimates included in this analysis for the provisions of this final rule are consistent with those presented in the E.O. 12866 section.

The Department estimates that small businesses not classified as H–2ALCs, 2,085 unique employers, would incur a one-time cost of $54.42 to familiarize themselves with the rule and an annual cost of $3.59 associated with recordkeeping requirements.[140] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department is unable to quantify these costs savings due to data limitations concerning the proportion of small businesses who currently select to file electronically. However, the Department conservatively estimates this cost as de minimis by excluding them from the unquantified cost savings discussed in the previous section. In total, the Department estimates that small businesses not classified as labor contractors will incur a total first-year cost of $58.01 (= $54.42 + $3.59). The Department uses the first-year cost estimate because it is the highest cost incurred by businesses over the analysis timeframe.

This final rule includes the provision pertaining to surety bonds that applies to only H–2ALCs, so the Department estimates the impact on those entities separately. *See* § 655.132(c). To estimate the impact of this final rule on these entities, the Department used the SBA size standards to classify 151 H–2ALCs as small employers. These small entities averaged 15 employees, 48 certified workers, and annual revenues of approximately $3.81 million.

The Department estimates that the average small H–2ALC would incur a one-time cost of $54.42 to familiarize itself with the rule, annual costs of $3.59 associated with recordkeeping requirements, and calculated the increase in required surety bond amounts based on the number of certified workers associated with the average temporary agricultural labor certification for each H–2ALC.[141] While the Department estimates that small businesses would also incur annual cost savings associated with the electronic processing of applications, the Department ignores those cost savings for purposes of the RFA analysis. In total, the Department estimates that each small business classified as an H–2ALC will incur a total first-year cost of $275.52 (= $54.42 + $3.59 + $217.51).

The Department determined the proportion of each small entity's total revenue that would be affected by the costs of this final rule to determine if this final rule would have a significant and substantial impact on small business. The cost impacts included the

[139] 2010 H–2A Final Rule, 75 FR 6884; TEGL No. 17–06, Change 1, *Special Procedures: Labor Certification Process for Employers in the Itinerant Animal Shearing Industry under the H–2A Program* (June 14, 2011); TEGL No. 33–10, *Special Procedures: Labor Certification Process for Itinerant Commercial Beekeeping Employers in the H–2A Program* (June 14, 2011); TEGL No. 16–06, Change 1, *Special Procedures: Labor Certification Process for Multi-State Custom Combine Owners/Operators under the H–2A Program* (June 14, 2011).

[140] $54.42 = 1 hr × $54.42, where $54.42 is the fully loaded wage rate for an HR Specialist. Recordkeeping requirements include the following: $1.80 to collect and maintain records of workers' email address and phone number(s) home and $1.80 to maintain records of notification to the NPC (and DHS) of employment abandonment or termination for cause.

[141] For example, an H–2ALC with a temporary agricultural labor certification for 48 workers is estimated to face a cost of $217.51, the annual incremental cost per H–2ALC with 25 to 49 H–2A workers.

estimated first-year costs and the wage burden cost introduced by this final rule. The Department used a total cost estimate of 3 percent of revenue as the threshold for a significant individual impact and set a total of 15 percent of small businesses incurring a significant impact as the threshold for a substantial impact on small business. A threshold of three percent of revenues has been used in prior rulemakings for the definition of significant economic impact.[142] This threshold is also consistent with that sometimes used by other agencies.[143] Of the 2,085 unique small non-labor contractor employers with work occurring in 2020–2021 and revenue data, 100 percent of employers had less than 3 percent of their total revenue affected. Of the 134 small labor contractors with work occurring in 2020–2021 and revenue data, 97 percent of labor contractors had less than 3 percent of their total revenue affected. Exhibit 14 is a breakdown of small employers by the proportion of revenue affected by the costs of this final rule.

EXHIBIT 14—COST IMPACTS AS A PROPORTION OF TOTAL REVENUE FOR SMALL ENTITIES

Proportion of revenue impacted	Non-labor contractors by NAICS code					
	111998	444220	561730	445230	All other	Total
<1%	611 (100.0%)	162 (100.0%)	134 (100.0%)	127 (100.0%)	1051 (100.0%)	2085 (100.0%)
1%–2%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
2%–3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
3%–4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
4%–5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
>5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
Total >3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
	Labor contractors by NAICS code					
<1%	11 (100.0%)	11 (100.0%)	9 (100.0%)	8 (100.0%)	87 (92.6%)	126 (94.7%)
1%–2%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	2 (2.1%)	2 (1.5%)
2%–3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (1.1%)	1 (0.8%)
3%–4%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	1 (1.1%)	1 (0.8%)
4%–5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)
>5%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	3 (3.2%)	3 (2.3%)
Total >3%	0 (0.0%)	0 (0.0%)	0 (0.0%)	0 (0.0%)	4 (4.3%)	4 (3.0%)

C. Paperwork Reduction Act

In order to meet its statutory responsibilities under the INA, the Department collects information necessary to render determinations on requests for temporary agricultural labor certification, which allow employers to bring foreign labor into the United States on a seasonal or other temporary basis under the H–2A program. The Department uses the collected information to determine if employers are meeting their statutory and regulatory obligations. This information is subject to the PRA, 44 U.S.C. 3501 *et seq.* A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by OMB under the PRA and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid Control Number. *See* 5 CFR 1320.5(a) and 1320.6. The Department has OMB approval for its H–2A program information collection under Control Number 1205–0466.

In accordance with the PRA, the information collection requirements that must be implemented as a result of this regulation must receive approval from OMB. Therefore, the Department submitted a clearance package in connection with the NPRM that contained proposed revisions to the information collection pending OMB approval under 1205–0466.[144] In this package, the Department proposed changes to the forms used to collect required information (*i.e.,* Forms ETA–9142A and appendices; Form ETA–790/790A and addenda; and Form ETA–232 [145]) to conform to proposed revisions to the Department's H–2A regulations and introduced a new surety bond form, Form ETA–9142A, Appendix B, *H–2A Labor Contractor Surety Bond,* to facilitate satisfaction of an existing filing requirement for H–2ALC employers. These proposed modifications reflected the regulatory changes in the NPRM, such as consistent use of defined terms, revised assurances, elimination of ''no'' check boxes where such a response equates to a noncompliant filing, and adding fields to confirm, for example, submission of the new electronic surety bond form and the employer's participation in optional pre-filing recruitment, if applicable. In addition, the Department's package

[142] *See, e.g.,* NPRM, *Increasing the Minimum Wage for Federal Contractors,* 79 FR 60634 (Oct. 7, 2014) (establishing a minimum wage for contractors); Final Rule, *Discrimination on the Basis of Sex,* 81 FR 39108 (June 15, 2016).

[143] *See, e.g.,* Final Rule, *Medicare and Medicaid Programs; Regulatory Provisions to Promote Program Efficiency, Transparency, and Burden Reduction; Part II,* 79 FR 27106 (May 12, 2014) (Department of Health and Human Services rule stating that under its agency guidelines for conducting regulatory flexibility analyses, actions that do not negatively affect costs or revenues by more than three percent annually are not economically significant).

[144] The Department had requested OMB's approval of revisions to the information collection tools to modernize and streamline the forms and electronic filing process. OMB approved the request under 1205–0466 on August 22, 2019.

[145] As explained in the NPRM, through this rulemaking, the Department will revise and consolidate the collection of information through the Form ETA–232/232A, which is a collection of information from SWAs, not employers, that is currently authorized under OMB Control Number 1205–0017, into the agency's primary H–2A information collection requirements under OMB Control Number 1205–0466. The SWAs will use the new Form ETA–232, *Domestic Agricultural In-Season Wage Report,* to report to OFLC the results of wage surveys in compliance with the revised PWD methodology in this final rule, which OFLC will use to establish prevailing wage rates for the H–2A program. This consolidation and revision will align all data collection for the H–2A program under a single OMB-approved ICR.

contained proposed revisions to the information collection to reflect new collections (*e.g.,* notice of intent to stagger entry of H–2A workers under the option proposed at § 655.130(f)). Although the information collection requirements in this rulemaking fall under OMB Control Number 1205–0537, OMB authorized the NPRM Information Collection Request (ICR) as OMB Control Number 1205–0537, approved on October 20, 2019, due to the Department's separate pending ICR under OMB Control Number 1205–0466, which OMB subsequently approved on August 22, 2019.[146] The public was given 60 days to comment on the information collection.

The Department did not receive comments on the ICR itself; however, commenters addressed aspects of the information collection while discussing the proposed regulations. After considering public comments submitted in response to the NPRM, the Department modified the proposed regulations, as discussed in the preamble above, and the information collection in this ICR. The information collection changes to implement this final rule must be assessed under the PRA. For administrative purposes only, the Department is submitting this ICR under control number 1205–0537, the control number OMB assigned to the clearance package approved in connection with the NPRM. Once all of the outstanding actions are complete, the Department intends to submit a nonmaterial change request to transfer the burden from this OMB Control Number (1205–0537) to the existing OMB control number for the H–2A Foreign Labor Certification Program (1205–0466) and proceed to discontinue the use of this OMB Control Number 1205–0537.

In response to comments, the Department made additional modifications to the forms implemented with this final rule to clarify requirements, reflect the provisions of this final rule (*e.g.,* prevailing wage survey methodology), and conform to similar collections (*e.g.,* manner of collecting name information). In addition to editing language on the forms, the Department modified some data collection fields after considering public comments. Many commenters addressed the Department's proposal to collect information about an employer's intent to stagger entry of H–2A workers through a notice submitted to the NPC, which would require an employer to submit a narrative notice to the NPC and could be difficult to disclose to prospective U.S. worker applicants during recruitment. The estimated burden hours for employers had changed from the estimate provided for the NPRM, reflecting the Department's decision not to adopt three optional information collections proposed in the NPRM. First, the Department did not adopt the proposal to allow an employer the option of staggering the entry of some of its H–2A workers under a single temporary agricultural labor certification. Second, the Department did not adopt the proposal to allow an employer the option of engaging in pre-filing recruitment activities. Third, the Department did not adopt the proposal to allow an employer to request post-certification changes to specific worksites in the AIE where H–2A workers are authorized to work. These decisions eliminated the related notification and document retention burden that had been included in the estimated burden hours of the NPRM. In addition, several comments addressing joint employment scenarios indicated that a change to the manner in which the Department collects information about the role of agricultural associations in filing H–2A applications on behalf of their employer-members and, generally, when joint employment is involved could increase clarity for filers. The Department modified this collection on the Form ETA–9142A by separating one item in Section A into two parts to more clearly collect information about the type of employer filing (*i.e.,* individual employer or joint employers) and, if applicable, the role of the agricultural association in the filing. Further, many comments addressed the Department's housing inspection and compliance requirements, in part, expressing concern about the complexity of those requirements and evidence of compliance with applicable standards. In response to these comments, the Department revised Form ETA–790A and ETA–790A, Addendum B, to refocus the fields related to housing type and compliance.

As a result, the forms implemented with this final rule align information collection requirements with the Department's regulation and continue the ongoing efforts to provide greater clarity to employers on regulatory requirements, standardize and streamline information collection to reduce employer time and burden preparing applications, and promote greater efficiency and transparency in the review and issuance of labor certification decisions under the H–2A visa program. Overall, these revisions discussed above decrease public burden to respond to the information collection required under this final rule from that proposed in connection with the NPRM by 5 minutes.

This final rule adopts more robust information requirements for requests for administrative review, as explained in the preamble discussion of § 655.171, which merit increasing the burden estimate for employers who appeal final determinations. As a result, this final rule increases the public time burden related to appeal by 40 minutes; thus, the estimated time burden related to appeals is now estimated at 1 hour (60 minutes). In addition to this final rule, the Department issued a companion 2020 H–2A AEWR Final Rule governing the methodology for establishing the AEWR (85 FR 70445), which appeared at paragraphs (b)(1), (2), and (5) of the NPRM. The revised methodology simplifies the process of determining the hourly AEWR applicable to an employer's job opportunity and, therefore, reduces the time burden of determining the offered wage by 3 minutes, a burden accounted for in this ICR, although it is not currently a burden felt by employers due to the 2020 H–2A AEWR Final Rule injunction discussed above.

The information collection change in requirements associated with this final rule are summarized as follows:

Title: H–2A Temporary Agricultural Employment Certification Program.

Agency: DOL–ETA.

Type of Review: New Information Collection Request.

OMB Control Number: 1205–0537.

Affected Public: Individuals or Households, Private Sector—businesses or other for-profits, Government, State, Local, and Tribal Governments.

Form(s): ETA–9142A, *H–2A Application for Temporary Employment Certification;* ETA–9142A—*Appendix A;* ETA–9142A—*Appendix B, H–2A Labor Contractor Surety Bond;* ETA–9142A—*H–2A Approval Final Determination: Temporary Agricultural Labor Certification;* ETA–790/790A, *H–2A Agricultural Clearance Order;* ETA–790/790A—*Addendum A;* ETA–790/790A—*Addendum B;* ETA–790/790A—*Addendum C;* ETA–232, *Domestic Agricultural In-Season Wage Report.*

Total Annual Respondents: 11,702.

Annual Frequency: On Occasion.

Total Annual Responses: 373,176.

Estimated Time per Response (averages):

—Forms ETA–9142A, Appendix A, Appendix B—3.05 hours per response.

[146] OMB Control Number 1205–0466 is subsequently up for renewal again. The ICR expires on August 31, 2022.

—Forms ETA–790/790A—0.70 hours per response.
—Form ETA–232—3.30 hours per response.

Estimated Total Annual Burden Hours: 72,803.

Total Annual Burden Cost for Respondents: $0.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104–4, codified at 2 U.S.C. 1501 *et seq.*) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. UMRA requires Federal agencies to assess a regulation's effects on State, local, and tribal governments, as well as on the private sector, except to the extent the regulation incorporates requirements specifically set forth in law. Title II of the UMRA requires each Federal agency to prepare a written statement assessing the effects of any regulation that includes any Federal mandate in a proposed or final agency rule that may result in $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. A Federal mandate is any provision in a regulation that imposes an enforceable duty upon State, local, or tribal governments, or upon the private sector, except as a condition of Federal assistance or a duty arising from participation in a voluntary Federal program.

This final rule does not result in unfunded mandates for the public or private sector because private employers' participation in the program is voluntary, and State governments are reimbursed for performing activities required under the program. The requirements of title II of the UMRA, therefore, do not apply, and the Department has not prepared a statement under the UMRA.

E. Executive Order 13132 (Federalism)

This final rule would not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with sec. 6 of E.O. 13132,[147] it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

The Department has reviewed this final rule in accordance with E.O. 13175 [148] and has determined that it does not have tribal implications. This final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and tribal governments.

List of Subjects

20 CFR Part 653

Agriculture, Employment, Equal employment opportunity, Grant programs—labor, Migrant labor, Reporting and recordkeeping requirements.

20 CFR Part 655

Administrative practice and procedure, Foreign workers, Employment, Employment and training, Enforcement, Forest and forest products, Fraud, Health professions, Immigration, Labor, Passports and visas, Penalties, Reporting and recordkeeping requirements, Unemployment, Wages, Working conditions.

29 CFR Part 501

Administrative practice and procedure, Agricultural, Aliens, Employment, Housing, Housing standards, Immigration, Labor, Migrant labor, Penalties, Transportation, Wages.

For the reasons stated in the preamble, the Department of Labor amends 20 CFR parts 653 and 655 and 29 CFR part 501 as follows:

Title 20—Employees' Benefits

PART 653—SERVICES OF THE WAGNER-PEYSER ACT EMPLOYMENT SERVICE SYSTEM

■ 1. The authority citation for part 653 continues to read as follows:

Authority: Secs. 167, 189, 503, Public Law 113–128, 128 Stat. 1425 (Jul. 22, 2014); 29 U.S.C. chapter 4B; 38 U.S.C. part III, chapters 41 and 42.

■ 2. Amend § 653.501 by revising the first sentence and adding a sentence following the first sentence of paragraph (c)(2)(i) to read as follows:

§ 653.501 Requirements for processing clearance orders.

* * * * *

(c) * * *

(2) * * *

(i) The wages offered are not less than the applicable prevailing wages, as defined in § 655.103(b) of this chapter, or the applicable Federal or State minimum wage, whichever is higher. The working conditions offered are not less than the prevailing working conditions among similarly employed farmworkers in the area of intended employment. * * *

* * * * *

PART 655—TEMPORARY EMPLOYMENT OF FOREIGN WORKERS IN THE UNITED STATES

■ 3. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(E)(iii), 1101(a)(15)(H)(i) and (ii), 8 U.S.C. 1103(a)(6), 1182(m), (n), and (t), 1184(c), (g), and (j), 1188, and 1288(c) and (d); sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2102 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; sec. 412(e), Pub. L. 105–277, 112 Stat. 2681 (8 U.S.C. 1182 note); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); 29 U.S.C. 49k; Pub. L. 107–296, 116 Stat. 2135, as amended; Pub. L. 109–423, 120 Stat. 2900; 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(6)(iii); and sec. 6, Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

Subpart A issued under 8 CFR 214.2(h).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; and 8 CFR 214.2(h).

Subpart E issued under 48 U.S.C. 1806.

Subparts F and G issued under 8 U.S.C. 1288(c) and (d); sec. 323(c), Pub. L. 103–206, 107 Stat. 2428; and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b) and (b)(1), 1182(n), and (t), and 1184(g) and (j); sec. 303(a)(8), Pub. L. 102–232, 105 Stat. 1733, 1748 (8 U.S.C. 1101 note); sec. 412(e), Pub. L. 105–277, 112 Stat. 2681; 8 CFR 214.2(h); and 28 U.S.C. 2461 note, Pub. L. 114–74 at section 701.

Subparts L and M issued under 8 U.S.C. 1101(a)(15)(H)(i)(c) and 1182(m); sec. 2(d), Pub. L. 106–95, 113 Stat. 1312, 1316 (8 U.S.C. 1182 note); Pub. L. 109–423, 120 Stat. 2900; and 8 CFR 214.2(h).

■ 4. Revise subpart B to read as follows:

Subpart B—Labor Certification Process for Temporary Agricultural Employment in the United States (H–2A Workers)

Sec.

655.100 Purpose and scope of this subpart.
655.101 Authority of the agencies, offices, and divisions in the Department of Labor.
655.102 Transition procedures.

[147] E.O. 13132, *Federalism,* 64 FR 43255 (Aug. 10, 1999).

[148] E.O. 13175, *Consultation and Coordination with Indian Tribal Governments,* 65 FR 67249 (Nov. 9, 2000).

655.103 Overview of this subpart and definition of terms.

Pre-Filing Procedures

655.120 Offered wage rate.
655.121 Job order filing requirements.
655.122 Contents of job offers.
655.123 [Reserved]
655.124 Withdrawal of a job order.

Application for Temporary Employment Certification Filing Procedures

655.130 Application filing requirements.
655.131 Agricultural association and joint employer filing requirements.
655.132 H–2A labor contractor filing requirements.
655.133 Requirements for agents.
655.134 Emergency situations.
655.135 Assurances and obligations of H–2A employers.
655.136 Withdrawal of an *Application for Temporary Employment Certification* and job order.

Processing of Applications for Temporary Employment Certification

655.140 Review of applications.
655.141 Notice of deficiency.
655.142 Submission of modified applications.
655.143 Notice of acceptance.
655.144 Electronic job registry.
655.145 Amendments to *Applications for Temporary Employment Certification.*

Post-Acceptance Requirements

655.150 Interstate clearance of job order.
655.151–655.152 [Reserved]
655.153 Contact with former U.S. workers.
655.154 Additional positive recruitment.
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655.156 Recruitment report.
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Labor Certification Determinations

655.160 Determinations.
655.161 Criteria for certification.
655.162 Approved certification.
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655.165 Partial certification.
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655.167 Document retention requirements of H–2A employers.

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655.170 Extensions.
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655.173 Setting meal charges; petition for higher meal charges.
655.174 Public disclosure.

Integrity Measures

655.180 Audit.
655.181 Revocation.
655.182 Debarment.
655.183 Less than substantial violations.
655.184 Applications involving fraud or willful misrepresentation.
655.185 Job service complaint system; enforcement of work contracts.

Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations

655.200 Scope and purpose of herding and range livestock regulations in this section and §§ 655.201 through 655.235.
655.201 Definition of herding and range livestock terms.
655.205 Herding and range livestock job orders.
655.210 Contents of herding and range livestock job orders.
655.211 Herding and range livestock wage rate.
655.215 Procedures for filing herding and range livestock *Applications for Temporary Employment Certification.*
655.220 Processing herding and range livestock *Applications for Temporary Employment Certification.*
655.225 Post-acceptance requirements for herding and range livestock.
655.230 Range housing.
655.235 Standards for range housing.

Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

655.300 Scope and purpose.
655.301 Definition of terms.
655.302 Contents of job orders.
655.303 Procedures for filing *Applications for Temporary Employment Certification.*
655.304 Standards for mobile housing.

§ 655.100 Purpose and scope of this subpart.

(a) *Purpose.* (1) A temporary agricultural labor certification issued under this subpart reflects a determination by the Secretary of Labor (Secretary), pursuant to 8 U.S.C. 1188(a), that:

(i) There are not sufficient able, willing, and qualified United States (U.S.) workers available to perform the agricultural labor or services of a temporary or seasonal nature for which an employer desires to hire temporary foreign workers (H–2A workers); and

(ii) The employment of the H–2A worker(s) will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) This subpart describes the process by which the Department of Labor (Department or DOL) makes such a determination and certifies its determination to the Department of Homeland Security (DHS).

(b) *Scope.* This subpart sets forth the procedures governing the labor certification process for the temporary employment of foreign workers in the H–2A nonimmigrant classification, as defined in 8 U.S.C. 1101(a)(15)(H)(ii)(a). It also establishes standards and obligations with respect to the terms and conditions of the temporary agricultural labor certification with which H–2A employers must comply, as well as the rights and obligations of H–2A workers and workers in corresponding employment. Additionally, this subpart sets forth integrity measures for ensuring employers' continued compliance with the terms and conditions of the temporary agricultural labor certification.

§ 655.101 Authority of the agencies, offices, and divisions in the Department of Labor.

(a) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(b) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 29 CFR part 501, and this subpart (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. The regulations governing WHD's investigatory and enforcement functions, including those related to the enforcement of temporary agricultural labor certifications issued under this subpart, are in 29 CFR part 501.

(c) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to § 655.182 and 29 CFR 501.20.

§ 655.102 Transition procedures.

(a) The National Processing Center (NPC) shall continue to process an *Application for Temporary Employment Certification* submitted prior to November 14, 2022, in accordance with 20 CFR part 655, subpart B, in effect as of November 13, 2022.

(b) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after November 14, 2022, and that has a first date of need no later than February 12, 2023, in accordance with 20 CFR part

655, subpart B, in effect as of November 13, 2022.

(c) The NPC shall process an *Application for Temporary Employment Certification* submitted on or after November 14, 2022, and that has a first date of need later than February 12, 2023, in accordance with all job order and application filing requirements under this subpart.

§ 655.103 Overview of this subpart and definition of terms.

(a) *Overview.* In order to bring nonimmigrant workers to the United States to perform agricultural work, an employer must first demonstrate to the Secretary that there are not sufficient U.S. workers able, willing, and qualified to perform the work in the area of intended employment at the time needed and that the employment of foreign workers will not adversely affect the wages and working conditions of workers in the United States similarly employed. This subpart describes a process by which the DOL makes such a determination and certifies its determination to the DHS.

(b) *Definitions.* For the purposes of this subpart:

Act. The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ). A person within the Department's Office of Administrative Law Judges appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of OFLC Administrator and WHD Administrator in this paragraph (b).

Adverse effect wage rate (AEWR). The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this subpart with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment (AIE). The geographic area within normal commuting distance of the place of employment for which temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place of employment, or quality of the regional transportation network). If a place of employment is within an MSA, including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this subpart. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, or the Executive Office for Immigration Review or DHS under 8 CFR 292.3 or 1003.101, may represent an employer under this subpart.

Average adverse effect wage rate (average AEWR). The simple average of the adverse effect wage rates (AEWR) applicable to the SOC 45–2092 (Farmworkers and Laborers, Crop, Nursery, and Greenhouse) and published by the OFLC Administrator in accordance with § 655.120. An average AEWR remains valid until replaced with an adjusted average AEWR.

Board of Alien Labor Certification Appeals (BALCA or Board). The permanent Board established by part 656 of this chapter, chaired by the Chief Administrative Law Judge (Chief ALJ), and consisting of Administrative Law Judges (ALJs) appointed pursuant to 5 U.S.C. 3105 and designated by the Chief ALJ to be members of Board of Alien Labor Certification Appeals (BALCA or Board).

Certifying Officer (CO). The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the national CO. Other COs may be designated by the OFLC Administrator to also make the determinations required under this subpart.

Chief Administrative Law Judge (Chief ALJ). The chief official of the Department's Office of Administrative Law Judges or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security (DHS). The Department of Homeland Security, as established by 6 U.S.C. 111.

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) Is a person on whose behalf an *Application for Temporary Employment Certification* is filed.

Employment and Training Administration (ETA). The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations in 8 CFR chapter I, subchapter B, for the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer requires the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this subpart; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor (H–2ALC). Any person who meets the definition of employer under this subpart and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this subpart, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

H–2A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form and/or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

H–2A worker. Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the State Workforce Agency (SWA) on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the NPC.

Joint employment. (i) Where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under § 655.131(b) are, at all times, joint employers of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Master application. An *Application for Temporary Employment Certification* filed by an association of agricultural producers as a joint employer with its employer-members. A master application must cover the same occupations or comparable agricultural employment; the first date of need for all employer-members listed on the *Application for Temporary Employment Certification* may be separated by no more than 14 calendar days; and may cover multiple areas of intended employment within a single State but no more than two contiguous States.

Metropolitan Statistical Area (MSA). A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC). The offices within OFLC in which the COs operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification (OFLC). OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OFLC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Positive recruitment. The active participation of an employer or its authorized hiring agent, performed under the auspices and direction of OFLC, in recruiting and interviewing individuals in the area where the employer's job opportunity is located, and any other State designated by the Secretary as an area of traditional or expected labor supply with respect to

the area where the employer's job opportunity is located, in an effort to fill specific job openings with U.S. workers.

Prevailing practice. A practice engaged in by employers, that:

(i) Fifty percent or more of employers in an area and for an occupation engage in the practice or offer the benefit; and

(ii) This 50 percent or more of employers also employs 50 percent or more of U.S. workers in the occupation and area (including H–2A and non-H–2A employers) for purposes of determinations concerning the provision of family housing, and frequency of wage payments, but non-H–2A employers only for determinations concerning the provision of advance transportation and the utilization of labor contractors.

Prevailing wage. A wage rate established by the OFLC Administrator for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area based on a survey conducted by a State that meets the requirements in § 655.120(c).

Secretary of Homeland Security. The chief official of DHS, or the Secretary of Homeland Security's designee.

Secretary of Labor (Secretary). The chief official of the Department, or the Secretary's designee.

State Workforce Agency (SWA). State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 et seq., to administer the State's public labor exchange activities.

Strike. A concerted stoppage of work by employees as a result of a labor dispute, or any concerted slowdown or other concerted interruption of operation (including stoppage by reason of the expiration of a collective bargaining agreement).

Successor in interest. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 29 CFR part 501, or this subpart, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, and all supporting documentation, with respect to an employer seeking to file an H–2A Petition with DHS to employ one or more foreign nationals as an H–2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and this subpart.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services (USCIS). An operational component of DHS.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD). The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 29 CFR part 501, and this subpart.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

WHD Administrator. The primary official of WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 29 CFR part 501, or this subpart. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(c) *Definition of agricultural labor or services.* For the purposes of this subpart, agricultural labor or services, pursuant to 8 U.S.C. 1011(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (c)(1) through (3) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (c) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or

maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (c)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (c)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (c)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Logging employment is operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites.

(5) *Employment as defined and specified in §§ 655.300 through 655.304.* For the purpose of paragraph (c) of this section, agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in §§ 655.300 through 655.304.

(d) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

Pre-Filing Procedures

§ 655.120 Offered wage rate.

(a) *Employer obligation.* Except for occupations covered by §§ 655.200 through 655.235, to comply with its obligation under § 655.122(l), an employer must offer, advertise in its recruitment, and pay a wage that is at least the highest of:

(1) The AEWR;

(2) A prevailing wage rate, if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of paragraph (c) of this section;

(3) The agreed-upon collective bargaining wage;

(4) The Federal minimum wage; or

(5) The State minimum wage.

(b) *AEWR determinations.*

(1) [Reserved]

(2) The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, the AEWRs for each State as a notice in the **Federal Register**.

(3) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is higher than the highest of the previous AEWR, a prevailing wage for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and geographic area, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least the updated AEWR upon the effective date of the updated AEWR published in the **Federal Register**.

(4) If an updated AEWR for the occupational classification and geographic area is published in the **Federal Register** during the work contract, and the updated AEWR is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(5) [Reserved]

(c) *Prevailing wage determinations.*

(1) The OFLC Administrator will issue a prevailing wage for a crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity if all of the following requirements are met:

(i) The SWA submits to the Department a wage survey for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity and a Form ETA–232 providing the methodology of the survey;

(ii) The survey was independently conducted by the State, including any State agency, State college, or State university;

(iii) The survey covers work performed in a single crop activity or

agricultural activity and, if applicable, a distinct work task or tasks performed in that activity;

(iv) The surveyor either made a reasonable, good faith attempt to contact all employers employing workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area surveyed or contacted a randomized sample of such employers, except where the estimated universe of employers is less than five. Where the estimated universe of employers is less than five, the surveyor contacted all employers in the estimated universe;

(v) The survey reports the average wage of U.S. workers in the crop activity or agricultural activity and distinct work task(s), if applicable, and geographic area using the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey;

(vi) The survey covers an appropriate geographic area based on available resources to conduct the survey, the size of the agricultural population covered by the survey, and any different wage structures in the crop activity or agricultural activity within the State;

(vii) Where the estimated universe of U.S. workers is at least 30, the survey includes the wages of at least 30 U.S. workers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of U.S. workers is less than 30, the survey includes the wages of all such U.S. workers;

(viii) Where the estimated universe of employers is at least five, the survey includes wages of U.S. workers employed by at least five employers in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. Where the estimated universe of employers is less than five, the survey includes wages of U.S. workers employed by all such employers; and

(ix) Where the estimated universe of employers is at least 4, the wages paid by a single employer represent no more than 25 percent of the sampled wages in the unit of pay used to compensate the largest number of U.S. workers whose wages are reported in the survey. This paragraph (c)(1)(ix) does not apply where the estimated universe of employers is less than four.

(2) A prevailing wage issued by the OFLC Administrator will remain valid for 1 year after the wage is posted on the OFLC website or until replaced with an adjusted prevailing wage, whichever comes first, except that if a prevailing wage that was guaranteed on the job order expires during the work contract, the employer must continue to guarantee at least the expired prevailing wage rate.

(3) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is higher than the highest of the AEWR, a previous prevailing wage for the geographic area and crop activity or agricultural activity or, if applicable, a distinct work task or tasks performed in that activity, the agreed-upon collective bargaining wage, the Federal minimum wage, or the State minimum wage, the employer must pay at least that higher prevailing wage upon the Department's notice to the employer of the new prevailing wage.

(4) If a prevailing wage for the geographic area and crop activity or agricultural activity and distinct work task(s), if applicable, is adjusted during a work contract, and is lower than the rate guaranteed on the job order, the employer must continue to pay at least the rate guaranteed on the job order.

(d) *Appeals.* (1) If the employer does not include the appropriate offered wage rate on the *Application for Temporary Employment Certification,* the CO will issue a Notice of Deficiency (NOD) requiring the employer to correct the wage rate.

(2) If the employer disagrees with the wage rate required by the CO, the employer may appeal only after the *Application for Temporary Employment Certification* is denied, and the employer must follow the procedures in § 655.171.

§ 655.121 Job order filing requirements.

(a) *What to file.* (1) Prior to filing an *Application for Temporary Employment Certification,* the employer must submit a completed job order, Form ETA–790/790A, including all required addenda, to the NPC designated by the OFLC Administrator, and must identify it as a job order to be placed in connection with a future *Application for Temporary Employment Certification* for H–2A workers. The employer must include in its submission to the NPC a valid Federal Employer Identification Number (FEIN) as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(2) Where the job order is being placed in connection with a future master application to be filed by an agricultural association as a joint employer with its employer-members, the agricultural association may submit a single job order to be placed in the name of the agricultural association on behalf of all employers named on the job order and the future *Application for Temporary Employment Certification.*

(3) Where the job order is being placed in connection with a future application to be jointly filed by two or more employers seeking to jointly employ a worker(s) (but is not a master application), any one of the employers may submit a single job order to be placed on behalf of all joint employers named on the job order and the future *Application for Temporary Employment Certification.*

(4) The job order must satisfy the requirements for agricultural clearance orders set forth in 20 CFR part 653, subpart F, and the requirements set forth in § 655.122.

(b) *Timeliness.* The employer must submit a completed job order to the NPC no more than 75 calendar days and no fewer than 60 calendar days before the employer's first date of need.

(c) *Location and method of filing.* The employer must submit a completed job order to the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any job order submitted using a method other than the designated electronic method(s), unless the employer submits the job order by mail as set forth in § 655.130(c)(2) or requests a reasonable accommodation as set forth in § 655.130(c)(3).

(d) *Original signature.* The job order must contain an electronic (scanned) copy of the original signature of the employer or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized agent or attorney.

(e) *SWA review.* (1) Upon receipt of the job order, the NPC will transmit an electronic copy of the job order to the SWA serving the area of intended employment for intrastate clearance. If the job opportunity is located in more than one State within the same area of intended employment, the NPC will transmit the job order to any one of the SWAs having jurisdiction over the place(s) of employment.

(2) The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and this subpart, and will work with the employer to address any noted deficiencies. The SWA must notify the employer in writing of any deficiencies in its job order not later than 7 calendar days from the date the SWA received the job order. The SWA notification will state the reason(s) the job order fails to meet the applicable

requirements, state the modification(s) needed for the SWA to accept the job order, and offer the employer an opportunity to respond to the deficiencies within 5 calendar days from the date the notification was issued by the SWA. Upon receipt of a response, the SWA will review the response and notify the employer in writing of its acceptance or denial of the job order within 3 calendar days from the date the response was received by the SWA. If the employer's response is not received within 12 calendar days after the notification was issued, the SWA will notify the employer in writing that the job order is deemed abandoned, and the employer will be required to submit a new job order to the NPC meeting the requirements of this section. Any notice sent by the SWA to an employer that requires a response must be sent using methods to assure next day delivery, including email or other electronic methods, with a copy to the employer's representative, as applicable.

(3) If, after providing responses to the deficiencies noted by the SWA, the employer is not able to resolve the deficiencies with the SWA, the employer may file an *Application for Temporary Employment Certification* pursuant to the emergency filing procedures contained in § 655.134, with a statement describing the nature of the dispute and demonstrating compliance with its requirements under this section. In the event the SWA does not respond within the stated timelines, the employer may use the emergency filing procedures noted in the preceding sentence. The CO will process the emergency *Application for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167.

(f) *Intrastate clearance.* Upon its acceptance of the job order, the SWA must promptly place the job order in intrastate clearance and commence recruitment of U.S. workers. Where the employer's job order references an area of intended employment that falls within the jurisdiction of more than one SWA, the originating SWA will notify the NPC that a copy of the approved job order must be forwarded to the other SWAs serving the area of intended employment. Upon receipt of the SWA notification, the NPC will promptly transmit an electronic copy of the approved job order to the other SWAs serving the area of intended employment.

(g) *Duration of job order posting.* The SWA must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(h) *Modifications to the job order.* (1) Prior to the issuance of a final determination on an *Application for Temporary Employment Certification,* the CO may require modifications to the job order when the CO determines that the offer of employment does not contain all the minimum benefits, wages, and working condition provisions. Such modifications must be made, or certification will be denied pursuant to § 655.164.

(2) The employer may request a modification of the job order, Form ETA–790/790A, prior to the submission of an *Application for Temporary Employment Certification.* However, the employer may not reject referrals against the job order based upon a failure on the part of the applicant to meet the amended criteria, if such referral was made prior to the amendment of the job order. The employer may not request a modification of the job order on or after the date of filing an *Application for Temporary Employment Certification.*

(3) The employer must provide all workers recruited in connection with the *Application for Temporary Employment Certification* with a copy of the modified job order or work contract which reflects the amended terms and conditions, on the first day of employment, in accordance with § 655.122(q), or as soon as practicable, whichever comes first.

§ 655.122 Contents of job offers.

(a) *Prohibition against preferential treatment of H–2A workers.* The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers. This does not relieve the employer from providing to H–2A workers at least the same level of minimum benefits, wages, and working conditions that must be offered to U.S. workers consistent with this section.

(b) *Job qualifications and requirements.* Each job qualification and requirement listed in the job offer must be bona fide and consistent with the normal and accepted qualifications required by employers that do not use H–2A workers in the same or comparable occupations and crops. Either the CO or the SWA may require the employer to submit documentation to substantiate the appropriateness of any job qualification specified in the job offer.

(c) *Minimum benefits, wages, and working conditions.* Every job order accompanying an *Application for Temporary Employment Certification* must include each of the minimum benefit, wage, and working condition provisions listed in paragraphs (d) through (q) of this section.

(d) *Housing*—(1) *Obligation to provide housing.* The employer must provide housing at no cost to the H–2A workers and those workers in corresponding employment who are not reasonably able to return to their residence within the same day. Housing must be provided through one of the following means:

(i) *Employer-provided housing.* Employer-provided housing must meet the full set of the DOL Occupational Safety and Health Administration (OSHA) standards set forth at 29 CFR 1910.142, or the full set of standards at §§ 654.404 through 654.417 of this chapter, whichever are applicable under § 654.401 of this chapter. Requests by employers whose housing does not meet the applicable standards for conditional access to the interstate clearance system will be processed under the procedures set forth at § 654.403 of this chapter; or

(ii) *Rental and/or public accommodations.* Rental or public accommodations or other substantially similar class of habitation must meet local standards for such housing. In the absence of applicable local standards addressing those health or safety concerns otherwise addressed by the DOL OSHA standards at 29 CFR 1910.142(b)(2) (minimum square footage); (b)(3) (beds, cots, or bunks, and suitable storage facilities); (b)(9) (minimum square footage in a room where workers cook, live, and sleep); (b)(10) (where the employer chooses to meet its meal obligations under paragraph (g) of this section by furnishing free and convenient cooking and kitchen facilities to the workers, the provision of stoves, sanitary kitchen facilities); (b)(11) (heating, cooking, and water heating equipment installed properly); (c) (water supply); (d)(1) (adequate toilet facilities); (d)(9) (adequate toilet paper); (d)(10) (toilets kept in sanitary condition); (f) (laundry, handwashing, and bathing facilities); (g) (lighting); (h)(2) (garbage containers kept clean); (h)(3) (garbage containers emptied when full, but at least twice a week); and (j) (insect and rodent control), State standards addressing

such concerns will apply. In the absence of applicable local or State standards addressing such concerns, the relevant DOL OSHA standards at 29 CFR 1910.142(b)(2), (3), (9), (10), and (11), (c), (d)(1), (9), and (10), (f), (g), (h)(2) and (3), and (j) will apply. Any charges for rental housing must be paid directly by the employer to the owner or operator of the housing.

(2) *Standards for range and mobile housing.* An employer employing workers under §§ 655.200 through 655.235 must comply with the housing requirements in §§ 655.230 and 655.235. An employer employing workers under §§ 655.300 through 655.304 must comply with the housing standards in § 655.304.

(3) *Deposit charges.* Charges in the form of deposits for bedding or other similar incidentals related to housing must not be levied upon workers. However, employers may require workers to reimburse them for damage caused to housing by the individual worker(s) found to have been responsible for damage that is not the result of normal wear and tear related to habitation.

(4) *Charges for public housing.* If public housing provided for migrant agricultural workers under the auspices of a local, county, or State government is secured by the employer, the employer must pay any charges normally required for use of the public housing units directly to the housing's management.

(5) *Family housing.* When it is the prevailing practice in the area of intended employment and the occupation to provide family housing, it must be provided to workers with families who request it.

(6) *Compliance with applicable standards*—(i) *Timeliness.* The determination as to whether housing provided to workers under this section meets the applicable standards must be made not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.*

(ii) *Certification of employer-provided housing.* The SWA (or another local, State, or Federal authority acting on behalf of the SWA) with jurisdiction over the location of the employer-provided housing must inspect and provide to the employer and CO documentation certifying that the employer-provided housing is sufficient to accommodate the number of workers requested and meets all applicable standards under paragraph (d)(1)(i) of this section.

(iii) *Certification of rental and/or public accommodations.* The employer must provide to the CO a written statement, signed and dated, that attests that the accommodations are compliant with the applicable standards under paragraph (d)(1)(ii) of this section and are sufficient to accommodate the number of workers requested. This statement must include the number of bed(s) and room(s) that the employer will secure for the worker(s). If applicable local or State rental or public accommodation standards under paragraph (d)(1)(ii) of this section require an inspection, the employer also must submit to the CO a copy of the inspection report or other official documentation from the relevant authority. If the applicable standards do not require an inspection, the employer's written statement must confirm that no inspection is required.

(iv) *Certified housing that becomes unavailable.* If after a request to certify housing, such housing becomes unavailable for reasons outside the employer's control, the employer may substitute other rental or public accommodation housing that is in compliance with the local, State, or Federal housing standards applicable under this section. The employer must promptly notify the SWA in writing of the change in accommodations and the reason(s) for such change and provide the SWA evidence of compliance with the applicable local, State, or Federal safety and health standards, in accordance with the requirements of this section. If, upon inspection, the SWA determines the substituted housing does not meet the applicable housing standards, the SWA must promptly provide written notification to the employer to cure the deficiencies with a copy to the CO. An employer's failure to provide housing that complies with the applicable standards will result in either a denial of a pending *Application for Temporary Employment Certification* or revocation of the temporary agricultural labor certification granted under this subpart.

(e) *Workers' compensation.* (1) The employer must provide workers' compensation insurance coverage in compliance with State law covering injury and disease arising out of and in the course of the worker's employment. If the type of employment for which the certification is sought is not covered by or is exempt from the State's workers' compensation law, the employer must provide, at no cost to the worker, insurance covering injury and disease arising out of and in the course of the worker's employment that will provide benefits at least equal to those provided under the State workers' compensation law for other comparable employment.

(2) Prior to issuance of the temporary agricultural labor certification, the employer must provide the CO with proof of workers' compensation insurance coverage meeting the requirements of this paragraph (e), including the name of the insurance carrier, the insurance policy number, and proof of insurance for the entire period of employment, or, if appropriate, proof of State law coverage.

(f) *Employer-provided items.* The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required to perform the duties assigned.

(g) *Meals.* The employer either must provide each worker with three meals a day or must furnish free and convenient cooking and kitchen facilities to the workers that will enable the workers to prepare their own meals. Where the employer provides the meals, the job offer must state the charge, if any, to the worker for such meals. The amount of meal charges is governed by § 655.173. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

(h) *Transportation; daily subsistence*—(1) *Transportation to place of employment.* If the employer has not previously advanced such transportation and subsistence costs to the worker or otherwise provided such transportation or subsistence directly to the worker by other means and if the worker completes 50 percent of the work contract period, the employer must pay the worker for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment. When it is the prevailing practice of non-H–2A agricultural employers in the occupation in the area to do so, or when the employer extends such benefits to similarly situated H–2A workers, the employer must advance the required transportation and subsistence costs (or otherwise provide them) to workers in corresponding employment who are traveling to the employer's worksite. The amount of the transportation payment must be no less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved. The amount of the daily subsistence payment must be at least as much as the employer would

charge the worker for providing the worker with three meals a day during employment (if applicable), but in no event less than the amount permitted under § 655.173(a). Note that the FLSA applies independently of the H–2A requirements and imposes obligations on employers regarding payment of wages.

(2) *Transportation from place of employment.* If the worker completes the work contract period, or if the employee is terminated without cause, and the worker has no immediate subsequent H–2A employment, the employer must provide or pay for the worker's transportation and daily subsistence from the place of employment to the place from which the worker, disregarding intervening employment, departed to work for the employer. If the worker has contracted with a subsequent employer who has not agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the employer must provide or pay for such expenses. If the worker has contracted with a subsequent employer who has agreed in such work contract to provide or pay for the worker's transportation and daily subsistence expenses from the employer's worksite to such subsequent employer's worksite, the subsequent employer must provide or pay for such expenses. The employer is not relieved of its obligation to provide or pay for return transportation and subsistence if an H–2A worker is displaced as a result of the employer's compliance with the 50 percent rule as described in § 655.135(d) with respect to the referrals made after the employer's date of need.

(3) *Transportation between living quarters and place of employment.* The employer must provide transportation between housing provided or secured by the employer and the employer's place of employment at no cost to the worker.

(4) *Employer-provided transportation.* All employer-provided transportation must comply with all applicable local, State, or Federal laws and regulations, and must provide, at a minimum, the same transportation safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841, 29 CFR 500.104 or 500.105, and 29 CFR 500.120 through 500.128. The job offer must include a description of the modes of transportation (*e.g.,* type of vehicle) that will be used for inbound, outbound, daily, and any other transportation. If workers' compensation is used to cover transportation in lieu of vehicle insurance, the employer must either ensure that the workers' compensation covers all travel or that vehicle insurance exists to provide coverage for travel not covered by workers' compensation and it must have property damage insurance.

(i) *Three-fourths guarantee*—(1) *Offer to worker.* The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any.

(i) For purposes of this paragraph (i)(1) a workday means the number of hours in a workday as stated in the job order and excludes the worker's Sabbath and Federal holidays. The employer must offer a total number of hours to ensure the provision of sufficient work to reach the three-fourths guarantee. The work hours must be offered during the work period specified in the work contract, or during any modified work contract period to which the worker and employer have mutually agreed and that has been approved by the CO.

(ii) The work contract period can be shortened by agreement of the parties only with the approval of the CO. In the event the worker begins working later than the specified beginning date of the contract, the guarantee period begins with the first workday after the arrival of the worker at the place of employment, and continues until the last day during which the work contract and all extensions thereof are in effect.

(iii) Therefore, if, for example, a work contract is for a 10-week period, during which a normal workweek is specified as 6 days a week, 8 hours per day, the worker would have to be guaranteed employment for at least 360 hours (10 weeks × 48 hours/week = 480 hours × 75 percent = 360). If a Federal holiday occurred during the 10-week span, the 8 hours would be deducted from the total hours for the work contract, before the guarantee is calculated. Continuing with the above example, the worker would have to be guaranteed employment for 354 hours (10 weeks × 48 hours/week = (480 hours − 8 hours (Federal holiday)) × 75 percent = 354 hours).

(iv) A worker may be offered more than the specified hours of work on a single workday. For purposes of meeting the guarantee, however, the worker will not be required to work for more than the number of hours specified in the job order for a workday, or on the worker's Sabbath or Federal holidays. However, all hours of work actually performed may be counted by the employer in calculating whether the period of guaranteed employment has been met. If during the total work contract period the employer affords the U.S. or H–2A worker less employment than that required under this paragraph (i)(1), the employer must pay such worker the amount the worker would have earned had the worker, in fact, worked for the guaranteed number of days. An employer will not be considered to have met the work guarantee if the employer has merely offered work on three-fourths of the workdays if each workday did not consist of a full number of hours of work time as specified in the job order.

(2) *Guarantee for piece rate paid worker.* If the worker is paid on a piece rate basis, the employer must use the worker's average hourly piece rate earnings or the required hourly wage rate, whichever is higher, to calculate the amount due under the guarantee.

(3) *Failure to work.* Any hours the worker fails to work, up to a maximum of the number of hours specified in the job order for a workday, when the worker has been offered an opportunity to work in accordance with paragraph (i)(1) of this section, and all hours of work actually performed (including voluntary work over 8 hours in a workday or on the worker's Sabbath or Federal holidays), may be counted by the employer in calculating whether the period of guaranteed employment has been met. An employer seeking to calculate whether the number of hours has been met must maintain the payroll records in accordance with this subpart.

(4) *Displaced H–2A worker.* The employer is not liable for payment of the three-fourths guarantee to an H–2A worker whom the CO certifies is displaced because of the employer's compliance with its obligation to hire U.S. workers who apply or are referred after the employer's date of need described in § 655.135(d) with respect to referrals made during that period.

(5) *Obligation to provide housing and meals.* Notwithstanding the three-fourths guarantee contained in this section, employers are obligated to provide housing and meals in accordance with paragraphs (d) and (g) of this section for each day of the contract period up until the day the workers depart for other H–2A employment, depart to the place outside of the United States from which the worker came, or, if the worker voluntarily abandons employment or is terminated for cause, the day of such abandonment or termination.

(j) *Earnings records.* (1) An employer must keep accurate and adequate records with respect to each worker's earnings, including, but not limited to, field tally records, supporting summary payroll records, and records showing the nature and amount of the work performed; the number of hours of work offered each day by the employer (broken out by hours offered both in accordance with and over and above the three-fourths guarantee at paragraph (i)(3) of this section); the hours actually worked each day by the worker; the time the worker began and ended each workday; the rate of pay (both piece rate and hourly, if applicable); the worker's earnings per pay period; the worker's permanent address and, when available, the worker's permanent email address and phone number(s); and the amount of and reasons for any and all deductions taken from the worker's wages. In the case of H–2A workers, the permanent address must be the worker's permanent address in the worker's home country.

(2) Each employer must keep the records required by paragraph (j) of this section, including field tally records and supporting summary payroll records, safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. All records must be available for inspection and transcription by the Secretary or a duly authorized and designated representative, and by the worker and representatives designated by the worker as evidenced by appropriate documentation (an Entry of Appearance as Attorney or Representative, Form G–28, signed by the worker, or an affidavit signed by the worker confirming such representation). Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available for inspection and copying within 72 hours following notice from the Secretary, or a duly authorized and designated representative, and by the worker and designated representatives as described in this paragraph (j)(2).

(3) To assist in determining whether the three-fourths guarantee in paragraph (i) of this section has been met, if the number of hours worked by the worker on a day during the work contract period is less than the number of hours offered, as specified in the job offer, the records must state the reason or reasons therefore.

(4) The employer must retain the records for not less than 3 years after the date of the certification.

(k) *Hours and earnings statements.* The employer must furnish to the worker on or before each payday in one or more written statements the following information:

(1) The worker's total earnings for the pay period;

(2) The worker's hourly rate and/or piece rate of pay;

(3) The hours of employment offered to the worker (showing offers in accordance with the three-fourths guarantee as determined in paragraph (i) of this section, separate from any hours offered over and above the guarantee);

(4) The hours actually worked by the worker;

(5) An itemization of all deductions made from the worker's wages;

(6) If piece rates are used, the units produced daily;

(7) Beginning and ending dates of the pay period; and

(8) The employer's name, address, and FEIN.

(l) *Rates of pay.* Except for occupations covered by §§ 655.200 through 655.235, the employer must pay the worker at least the AEWR; a prevailing wage if the OFLC Administrator has approved a prevailing wage survey for the applicable crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity, meeting the requirements of § 655.120(c); the agreed-upon collective bargaining rate; the Federal minimum wage; or the State minimum wage rate, whichever is highest, for every hour or portion thereof worked during a pay period.

(1) The offered wage may not be based on commission, bonuses, or other incentives, unless the employer guarantees a wage paid on a weekly, semi-monthly, or monthly basis that equals or exceeds the AEWR, prevailing wage rate, the Federal minimum wage, the State minimum wage, or any agreed-upon collective bargaining rate, whichever is highest; or

(2) If the worker is paid on a piece rate basis and at the end of the pay period the piece rate does not result in average hourly piece rate earnings during the pay period at least equal to the amount the worker would have earned had the worker been paid at the appropriate hourly rate:

(i) The worker's pay must be supplemented at that time so that the worker's earnings are at least as much as the worker would have earned during the pay period if the worker had instead been paid at the appropriate hourly wage rate for each hour worked;

(ii) The piece rate must be no less than the prevailing piece rate for the crop activity or agricultural activity and, if applicable, a distinct work task or tasks performed in that activity in the geographic area if one has been issued by the OFLC Administrator; and

(iii) If the employer who pays by the piece rate requires one or more minimum productivity standards of workers as a condition of job retention, such standards must be specified in the job offer and be no more than those required by the employer in 1977, unless the OFLC Administrator approves a higher minimum, or, if the employer first applied for temporary agricultural labor certification after 1977, such standards must be no more than those normally required (at the time of the first *Application for Temporary Employment Certification*) by other employers for the activity in the area of intended employment.

(m) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly or according to the prevailing practice in the area of intended employment, whichever is more frequent. Employers must pay wages when due.

(n) *Abandonment of employment or termination for cause.* If a worker voluntarily abandons employment before the end of the contract period, or is terminated for cause, and the employer notifies the NPC, and DHS in the case of an H–2A worker, in writing or by any other method specified by the Department in a notice published in the **Federal Register** or specified by DHS not later than 2 working days after such abandonment occurs, the employer will not be responsible for providing or paying for the subsequent transportation and subsistence expenses of that worker under this section, and that worker is not entitled to the three-fourths guarantee described in paragraph (i) of this section, and, in the case of a U.S. worker, the employer will not be obligated to contact that worker under § 655.153. Abandonment will be deemed to begin after a worker fails to report to work at the regularly scheduled time for 5 consecutive working days without the consent of the employer. The employer is required to maintain records of such notification to the NPC, and DHS in the case of an H–2A worker, for not less than 3 years from the date of the certification.

(o) *Contract impossibility.* If, before the expiration date specified in the work contract, the services of the worker are no longer required for reasons beyond the control of the employer due to fire, weather, or other Act of God that makes the fulfillment of the contract impossible, the employer may terminate the work contract. Whether such an

event constitutes a contract impossibility will be determined by the CO. In the event of such termination of a contract, the employer must fulfill a three-fourths guarantee for the time that has elapsed from the start of the work contract to the time of its termination, as described in paragraph (i)(1) of this section. The employer must make efforts to transfer the worker to other comparable employment acceptable to the worker, consistent with existing immigration law, as applicable. If such transfer is not affected, the employer must:

(1) Return the worker, at the employer's expense, to the place from which the worker (disregarding intervening employment) came to work for the employer, or transport the worker to the worker's next certified H–2A employer, whichever the worker prefers;

(2) Reimburse the worker the full amount of any deductions made from the worker's pay by the employer for transportation and subsistence expenses to the place of employment; and

(3) Pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Daily subsistence must be computed as set forth in paragraph (h) of this section. The amount of the transportation payment must not be less (and is not required to be more) than the most economical and reasonable common carrier transportation charges for the distances involved.

(p) *Deductions.* (1) The employer must make all deductions from the worker's paycheck required by law. The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck. All deductions must be reasonable. The employer may deduct the cost of the worker's transportation and daily subsistence expenses to the place of employment which were borne directly by the employer. In such circumstances, the job offer must state that the worker will be reimbursed the full amount of such deduction upon the worker's completion of 50 percent of the work contract period. However, an employer subject to the FLSA may not make deductions that would violate the FLSA.

(2) A deduction is not reasonable if it includes a profit to the employer or to any affiliated person. A deduction that is primarily for the benefit or convenience of the employer will not be recognized as reasonable and therefore the cost of such an item may not be included in computing wages. The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. The principles applied in determining whether deductions are reasonable and payments are received free and clear, and the permissibility of deductions for payments to third persons are explained in more detail in 29 CFR part 531.

(q) *Disclosure of work contract.* The employer must provide to an H–2A worker not later than the time at which the worker applies for the visa, or to a worker in corresponding employment not later than on the day work commences, a copy of the work contract between the employer and the worker in a language understood by the worker as necessary or reasonable. For an H–2A worker going from an H–2A employer to a subsequent H–2A employer, the copy must be provided not later than the time an offer of employment is made by the subsequent H–2A employer. For an H–2A worker that does not require a visa for entry, the copy must be provided not later than the time of an offer of employment. At a minimum, the work contract must contain all of the provisions required by this section. In the absence of a separate, written work contract entered into between the employer and the worker, the work contract at a minimum will be the terms of the job order and any obligations required under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

§ 655.123 [Reserved]

§ 655.124 Withdrawal of a job order.

(a) The employer may withdraw a job order if the employer no longer plans to file an *Application for Temporary Employment Certification.* However, the employer is still obligated to comply with the terms and conditions of employment contained in the job order with respect to all workers recruited in connection with that job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the job order and stating the reason(s) for the withdrawal.

Application for Temporary Employment Certification Filing Procedures

§ 655.130 Application filing requirements.

All employers who desire to hire H–2A foreign agricultural workers must apply for a certification from the Secretary by filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator. This section provides the procedures employers must follow when filing.

(a) *What to file.* An employer that desires to apply for temporary agricultural labor certification of one or more nonimmigrant workers must file a completed *Application for Temporary Employment Certification,* all supporting documentation and information required at the time of filing under §§ 655.131 through 655.135, and, unless a specific exemption applies, a copy of Form ETA–790/790A, submitted as set forth in § 655.121(a). The *Application for Temporary Employment Certification* must include a valid FEIN as well as a valid place of business (physical location) in the United States and a means by which it may be contacted for employment.

(b) *Timeliness.* A completed *Application for Temporary Employment Certification* must be filed no less than 45 calendar days before the employer's first date of need.

(c) *Location and method of filing*—(1) *Electronic filing.* The employer must file the *Application for Temporary Employment Certification* and all required supporting documentation with the NPC using the electronic method(s) designated by the OFLC Administrator. The NPC will return without review any application submitted using a method other than the designated electronic method(s), unless the employer submits the application in accordance with paragraph (c)(2) or (3) of this section.

(2) *Filing by mail.* Employers that lack adequate access to electronic filing may file the application by mail. The employer must indicate that it is filing by mail due to lack of adequate access to electronic filing. The OFLC Administrator will identify the address to which such filing must be mailed by public notice(s) and by instructions on DOL's website.

(3) *Reasonable accommodation.* Employers who are unable or limited in their ability to use and/or access the electronic *Application for Temporary Employment Certification,* or any other form or documentation required under this subpart, as a result of a disability may request a reasonable

accommodation to enable them to participate in the H–2A program. An employer in need of such an accommodation may contact the NPC in writing to the address designated in a notice published in the **Federal Register** or 202–513–7350 (this is not a toll-free number), or for individuals with hearing or speech impairments, 1–877–889–5627 (this is the TTY toll-free Federal Information Relay Service number) for assistance in using, accessing, or filing any form or documentation required under this subpart, including the *Application for Temporary Employment Certification.* All requests for an accommodation should include the employer's name, a detailed description of the accommodation needed, and the preferred method of contact. The NPC will respond to the request for a reasonable accommodation within 10 business days of the date of receipt.

(d) *Original signature.* The *Application for Temporary Employment Certification* must contain an electronic (scanned) copy of the original signature of the employer (and that of the employer's authorized attorney or agent if the employer is represented by an attorney or agent) or a verifiable electronic signature method, as directed by the OFLC Administrator. If submitted by mail, the *Application for Temporary Employment Certification* must bear the original signature of the employer and, if applicable, the employer's authorized attorney or agent.

(e) *Scope of applications.* (1) Except as otherwise permitted by this subpart, all places of employment on an *Application for Temporary Employment Certification* must be within a single area of intended employment. Where a job opportunity involves work at multiple places of employment after the workday begins, the *Application for Temporary Employment Certification* may include places of employment outside of a single area of intended employment only as is necessary to perform the duties specified in the *Application for Temporary Employment Certification,* and provided that the worker can reasonably return to the worker's residence or the employer-provided housing within the same workday.

(2) An employer may file only one *Application for Temporary Employment Certification* covering the same area of intended employment, period of employment, and occupation or comparable work to be performed.

(f) *Information dissemination.* Information received in the course of processing *Applications for Temporary Employment Certification* or in the course of conducting program integrity measures such as audits may be forwarded from OFLC to WHD or any other Federal agency, as appropriate, for investigative or enforcement purposes.

§ 655.131 Agricultural association and joint employer filing requirements.

(a) *Agricultural association filing requirements.* If an agricultural association files an *Application for Temporary Employment Certification,* in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply.

(1) The agricultural association must identify in the *Application for Temporary Employment Certification* for H–2A workers whether it is filing as a sole employer, a joint employer, or an agent. The agricultural association must retain documentation substantiating the employer or agency status of the agricultural association and be prepared to submit such documentation in response to a NOD from the CO prior to issuing a Final Determination, or in the event of an audit or investigation.

(2) The agricultural association may file a master application on behalf of its employer-members. The master application is available only when the agricultural association is filing as a joint employer. An agricultural association may submit a master application covering the same occupation or comparable work available with a number of its employer-members in multiple areas of intended employment, as long as the first dates of need for each employer-member named in the *Application for Temporary Employment Certification* are separated by no more than 14 calendar days and all places of employment are located in no more than two contiguous States. The agricultural association must identify in the *Application for Temporary Employment Certification* by name, address, total number of workers needed, period of employment, first date of need, and the crops and agricultural work to be performed, each employer-member that will employ H–2A workers.

(3) An agricultural association filing a master application as a joint employer may sign the *Application for Temporary Employment Certification* on behalf of its employer-members. An agricultural association filing as an agent may not sign on behalf of its employer-members but must obtain each employer-member's signature on the *Application for Temporary Employment Certification* prior to filing.

(4) If the application is approved, the agricultural association, as appropriate, will receive a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

(b) *Joint employer filing requirements.* (1) If an employer files an *Application for Temporary Employment Certification* on behalf of one or more other employers seeking to jointly employ H–2A workers in the same area of intended employment, in addition to complying with all the assurances, guarantees, and other requirements contained in this subpart and in part 653, subpart F, of this chapter, the following requirements also apply:

(i) The *Application for Temporary Employment Certification* must identify the name, address, and the crop(s) and agricultural work to be performed for each employer seeking to jointly employ the H–2A workers;

(ii) No single joint employer may employ an H–2A worker, or any combination of H–2A workers, for more than a total of 34 hours in any workweek; and

(iii) The *Application for Temporary Employment Certification* must be signed and dated by each joint employer named in the application, in accordance with the procedures contained in § 655.130(e). By signing the *Application for Temporary Employment Certification,* each joint employer named in the application attests to the conditions of employment required of an employer participating in the H–2A program, and assumes full responsibility for the accuracy of the representations made in the *Application for Temporary Employment Certification* and for compliance with all of the assurances and obligations of an employer in the H–2A program at all times during the period the *Application for Temporary Employment Certification* is valid; and

(2) If the application is approved, the joint employer who submits the *Application for Temporary Employment Certification* will receive, on behalf of the other joint employers, a Final Determination certifying the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162.

§ 655.132 H–2A labor contractor filing requirements.

An H–2A labor contractor (H–2ALC) must meet all of the requirements of the definition of *employer* in § 655.103(b) and comply with all the assurances, guarantees, and other requirements contained in this part, including

§ 655.135, and in part 653, subpart F, of this chapter. The H–2ALC must include in or with its *Application for Temporary Employment Certification* at the time of filing the following:

(a) The name and location of each fixed-site agricultural business to which the H–2ALC expects to provide H–2A workers, the expected beginning and ending dates when the H–2ALC will be providing the workers to each fixed site, and a description of the crops and activities the workers are expected to perform at such fixed site.

(b) A copy of the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) Farm Labor Contractor (FLC) Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the H–2ALC is authorized to perform as an FLC.

(c) Proof of its ability to discharge financial obligations under the H–2A program by including with the *Application for Temporary Employment Certification* an original surety bond meeting the following requirements.

(1) *Requirements for the bond.* The bond must be payable to the Administrator, Wage and Hour Division, United States Department of Labor, 200 Constitution Avenue NW, Room S–3502, Washington, DC 20210. Consistent with the enforcement procedure set forth at 29 CFR 501.9(b), the bond must obligate the surety to pay any sums to the WHD Administrator for wages and benefits, including any assessment of interest, owed to an H–2A worker or to a worker engaged in corresponding employment, or to a U.S. worker improperly rejected or improperly laid off or displaced, based on a final decision finding a violation or violations of this part or 29 CFR part 501 relating to the labor certification the bond is intended to cover. The aggregate liability of the surety shall not exceed the face amount of the bond. The bond must remain in full force and effect for all liabilities incurred during the period of the labor certification, including any extension thereof. The bond may not be cancelled absent a finding by the WHD Administrator that the labor certification has been revoked.

(2) *Amount of the bond.* Unless a higher amount is sought by the WHD Administrator pursuant to 29 CFR 501.9(a), the required bond amount is the base amount adjusted to reflect the average AEWR, as defined in § 655.103, and further adjusted if the labor certification will be used for the employment of 150 or more workers.

(i) The base amounts are $5,000 for a labor certification for which an H–2ALC employs fewer than 25 workers; $10,000 for a labor certification for which an H–2ALC employs 25 to 49 workers; $20,000 for a labor certification for which an H–2ALC employs 50 to 74 workers; $50,000 for a labor certification for which an H–2ALC employs 75 to 99 workers; and $75,000 for a labor certification for which an H–2ALC employs 100 or more workers.

(ii) The bond amount is calculated by multiplying the base amount by the average AEWR in effect at the time of bond submission, as provided in paragraph (c)(3) of this section, and dividing by $9.25. Thus, the required bond amounts will vary based on changes in the average AEWR.

(iii) For a labor certification for which an H–2ALC employs 150 or more workers, the bond amount applicable to the certification of 100 or more workers is further adjusted for each additional 50 workers as follows: the bond amount is increased by a value which represents 2 weeks of wages for 50 workers, calculated using the average AEWR (*i.e.,* 80 hours × 50 workers × Average AEWR); this increase is applied to the bond amount for each additional group of 50 workers.

(iv) The required bond amounts shall be calculated and published in the **Federal Register** after the OFLC Administrator has calculated the average AEWR or any adjustment thereto.

(3) *Form of the bond and method of filing.* The bond shall consist of an executed Form ETA–9142A—Appendix B, and must contain the name, address, phone number, and contact person for the surety, and valid documentation of power of attorney. The bond must be filed using the method directed by the OFLC Administrator at the time of filing:

(i) *Electronic surety bonds.* When the OFLC Administrator directs the use of electronic surety bonds, this will be the required method of filing bonds for all applications subject to mandatory electronic filing. Consistent with the application filing requirements of § 655.130(c) and (d), the bond must be completed, signed by the employer and the surety using a verifiable electronic signature method, and submitted electronically with the *Application for Temporary Employment Certification* and supporting materials unless the employer is permitted to file by mail or a different accommodation under § 655.130(c)(2) or (3).

(ii) *Electronic submission of copy.* Until such time as the OFLC Administrator directs the use of electronic surety bonds, employers may submit an electronic (scanned) copy of the surety bond with the application, provided that the original bond is received within 30 days of the date that the labor certification is issued.

(iii) *Mailing original bond with application.* For applications not subject to mandatory electronic filing due under § 655.130(c)(2) or (3), employers may submit the original bond as part of its mailed, paper application package, or consistent with the accommodation provided.

(d) Copies of the fully-executed work contracts with each fixed-site agricultural business identified under paragraph (a) of this section.

(e) Where the fixed-site agricultural business will provide housing or transportation to the workers, proof that:

(1) All housing used by workers and owned, operated, or secured by the fixed-site agricultural business complies with the applicable standards as set forth in § 655.122(d) and certified by the SWA; and

(2) All transportation between all places of employment and the workers' living quarters that is provided by the fixed-site agricultural business complies with all applicable local, State, or Federal laws and regulations and must provide, at a minimum, the same vehicle safety standards, driver licensure, and vehicle insurance as required under 29 U.S.C. 1841 and 29 CFR 500.104 or 500.105 and 500.120 through 500.128, except where workers' compensation is used to cover such transportation as described in § 655.122(h).

§ 655.133 Requirements for agents.

(a) An agent filing an *Application for Temporary Employment Certification* on behalf of an employer must provide a copy of the agent agreement or other document demonstrating the agent's authority to represent the employer.

(b) In addition the agent must provide a copy of the MSPA FLC Certificate of Registration, if required under MSPA at 29 U.S.C. 1801 *et seq.,* identifying the specific farm labor contracting activities the agent is authorized to perform.

§ 655.134 Emergency situations.

(a) *Waiver of time period.* The CO may waive the time period for filing for employers who did not make use of temporary foreign agricultural workers during the prior year's agricultural season or for any employer that has other good and substantial cause, provided the CO has sufficient time to test the domestic labor market on an expedited basis to make the determinations required by § 655.100.

(b) *Employer requirements.* The employer requesting a waiver of the required time period must submit to the

NPC: all documentation required at the time of filing by § 655.130(a), except evidence of a job order submitted pursuant to § 655.121; a completed job order on the Form ETA–790/790A and all required addenda; and a statement justifying the request for a waiver of the time period requirement. The statement must indicate whether the waiver request is due to the fact that the employer did not use H–2A workers during the prior year's agricultural season or whether the request is for good and substantial cause. If the waiver is requested for good and substantial cause, the employer's statement must also include detailed information describing the good and substantial cause that has necessitated the waiver request. Good and substantial cause may include, but is not limited to, the substantial loss of U.S. workers due to Acts of God or similar unforeseeable man-made catastrophic events (*e.g.,* a hazardous materials emergency or government-controlled flooding), unforeseeable changes in market conditions, pandemic health issues, or similar conditions that are wholly outside of the employer's control.

(c) *Processing of emergency applications.* (1) Upon receipt of a complete emergency situation(s) waiver request, the CO promptly will transmit a copy of the job order to the SWA serving the area of intended employment. The SWA will review the contents of the job order for compliance with the requirements set forth in 20 CFR part 653, subpart F, and § 655.122. If the SWA determines that the job order does not comply with the applicable criteria, the SWA must inform the CO of the noted deficiencies within 5 calendar days of the date the job order is received by the SWA.

(2) The CO will process emergency *Applications for Temporary Employment Certification* in a manner consistent with the provisions set forth in §§ 655.140 through 655.145 and make a determination on the *Application for Temporary Employment Certification* in accordance with §§ 655.160 through 655.167. The CO may notify the employer, in accordance with the procedures contained in § 655.141, that the application cannot be accepted because, pursuant to paragraph (a) of this section, the request for emergency filing was not justified and/or there is not sufficient time to test the availability of U.S. workers such that the CO can make a determination on the *Application for Temporary Employment Certification* in accordance with § 655.161. Such notification will so inform the employer of the opportunity to submit a modified *Application for Temporary Employment Certification* and/or job order in accordance with the procedures contained in § 655.142.

§ 655.135 Assurances and obligations of H–2A employers.

An employer seeking to employ H–2A workers must agree as part of the *Application for Temporary Employment Certification* and job offer that it will abide by the requirements of this subpart and make each of the following additional assurances:

(a) *Non-discriminatory hiring practices.* The job opportunity is, and through the period set forth in paragraph (d) of this section must continue to be, open to any qualified U.S. worker regardless of race, color, national origin, age, sex, religion, handicap, or citizenship status. Rejections of any U.S. workers who applied or apply for the job must be only for lawful, job-related reasons, and those not rejected on this basis have been or will be hired. In addition, the employer has and will continue to retain records of all hires and rejections as required by § 655.167.

(b) *No strike or lockout.* The place(s) of employment for which the employer is requesting a temporary agricultural labor certification does not currently have employees on strike or being locked out in the course of a labor dispute.

(c) *Recruitment requirements*—(1) *General requirements.* The employer has and will continue to cooperate with the SWA by accepting referrals of all eligible U.S. workers who apply (or on whose behalf an application is made) for the job opportunity until the end of the period as specified in paragraph (d) of this section and must independently conduct the positive recruitment activities, as specified in § 655.154, until the date on which the H–2A workers depart for the place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

(2) *Interviewing U.S. workers.* Employers that wish to require interviews must conduct those interviews by phone or provide a procedure for the interviews to be conducted in the location where the U.S. worker is being recruited so that the worker incurs little or no cost due to the interview. Employers cannot provide potential H–2A workers with more favorable treatment than U.S. workers with respect to the requirement for, and conduct of, interviews.

(3) *Qualified and available U.S. workers.* The employer must consider all U.S. applicants for the job opportunity until the end of the recruitment period, as set forth in § 655.135(d). The employer must accept and hire all applicants who are qualified and who will be available for the job opportunity. U.S. applicants can be rejected only for lawful, job-related reasons, and those not rejected on this basis will be hired.

(d) *Fifty percent rule.* From the time the foreign workers depart for the employer's place of employment, the employer must provide employment to any qualified, eligible U.S. worker who applies to the employer until 50 percent of the period of the work contract has elapsed. Start of the work contract timeline is calculated from the first date of need stated on the *Application for Temporary Employment Certification,* under which the foreign worker who is in the job was hired. This paragraph (d) will not apply to any employer who certifies to in the *Application for Temporary Employment Certification* that the employer:

(1) Did not, during any calendar quarter during the preceding calendar year, use more than 500 man-days of agricultural labor, as defined in 29 U.S.C. 203(u);

(2) Is not an employer-member of an association that has petitioned for certification under this subpart for its employer-members; and

(3) Has not otherwise associated with other employers who are petitioning for temporary foreign workers under this subpart.

(e) *Compliance with applicable laws.* During the period of employment that is the subject of the *Application for Temporary Employment Certification,* the employer must comply with all applicable Federal, State, and local laws and regulations, including health and safety laws. In compliance with such laws, including the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110–457, 18 U.S.C. 1592(a), the employer may not hold or confiscate workers' passports, visas, or other immigration documents. H–2A employers may also be subject to the FLSA. The FLSA operates independently of the H–2A program and has specific requirements that address payment of wages, including deductions from wages, the payment of Federal minimum wage and payment of overtime.

(f) *Job opportunity is full-time.* The job opportunity is a full-time temporary position, calculated to be at least 35 hours per workweek.

(g) *No recent or future layoffs.* The employer has not laid off and will not lay off any similarly employed U.S. worker in the occupation that is the subject of the *Application for Temporary Employment Certification* in the area of intended employment except for lawful, job-related reasons within 60 days of the first date of need, or if the employer has laid off such workers, it has offered the job opportunity that is the subject of the *Application for Temporary Employment Certification* to those laid-off U.S. worker(s) and the U.S. worker(s) refused the job opportunity, was rejected for the job opportunity for lawful, job-related reasons, or was hired. A layoff for lawful, job-related reasons such as lack of work or the end of the growing season is permissible if all H–2A workers are laid off before any U.S. worker in corresponding employment.

(h) *No unfair treatment.* The employer has not and will not intimidate, threaten, restrain, coerce, blacklist, discharge or in any manner discriminate against, and has not and will not cause any person to intimidate, threaten, restrain, coerce, blacklist, or in any manner discriminate against, any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(2) Instituted or caused to be instituted any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188; or

(5) Exercised or asserted on behalf of themself or others any right or protection afforded by 8 U.S.C. 1188 or this subpart or any Department regulation in this chapter or 29 CFR part 501 promulgated under 8 U.S.C. 1188.

(i) *Notify workers of duty to leave United States.* (1) The employer must inform H–2A workers of the requirement that they leave the United States at the end of the period certified by the Department or separation from the employer, whichever is earlier, as required under paragraph (i)(2) of this section, unless the H–2A worker is being sponsored by another subsequent H–2A employer.

(2) As explained further in the DHS regulations, a temporary agricultural labor certification limits the validity period of an H–2A Petition. *See* 8 CFR 214.2(h)(5)(vii). A foreign worker may not remain beyond their authorized period of stay, as determined by DHS, nor beyond separation from employment prior to completion of the H–2A contract, absent an extension or change of such worker's status under the DHS regulations. *See* 8 CFR 214.2(h)(5)(viii)(B).

(j) *Comply with the prohibition against employees paying fees.* The employer and its agents have not sought or received payment of any kind from any employee subject to 8 U.S.C. 1188 for any activity related to obtaining H–2A labor certification, including payment of the employer's attorney fees, application fees, or recruitment costs. For purposes of this paragraph (j), payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor. The provision in this paragraph (j) does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees.

(k) *Contracts with third parties to comply with prohibitions.* The employer must contractually prohibit in writing any foreign labor contractor or recruiter (or any agent of such foreign labor contractor or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H–2A workers to seek or receive payments or other compensation from prospective employees. The contract must include the following statement: ''Under this agreement, [name of foreign labor contractor or recruiter] and any agent or employee of [name of foreign labor contractor or recruiter] are prohibited from seeking or receiving payments from any prospective employee of [employer name] at any time, including before or after the worker obtains employment. Payments include but are not limited to any direct or indirect fees paid by such employees for recruitment, job placement, processing, maintenance, attorney fees, agent fees, application fees, or any fees related to obtaining H–2A labor certification.'' This documentation is to be made available upon request by the CO or another Federal party.

(l) *Notice of worker rights.* The employer must post and maintain in a conspicuous location at the place of employment, a poster provided by the Secretary in English, and, to the extent necessary, any language common to a significant portion of the workers if they are not fluent in English, which sets out the rights and protections for workers employed pursuant to 8 U.S.C. 1188.

§ 655.136 Withdrawal of an *Application for Temporary Employment Certification* and job order.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order at any time before the CO makes a determination under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the *Application for Temporary Employment Certification* and job order and stating the reason(s) for the withdrawal.

Processing of Applications for Temporary Employment Certification

§ 655.140 Review of applications.

(a) *NPC review.* The CO will promptly review the *Application for Temporary Employment Certification* and job order for compliance with all applicable program requirements, including compliance with the requirements set forth in this subpart, and make a decision to issue a NOD under § 655.141, a Notice of Acceptance (NOA) under § 655.143, or a Final Determination under § 655.160.

(b) *Mailing and postmark requirements.* Any notice or request sent by the CO(s) to an employer requiring a response will be sent electronically or via traditional methods to assure next day delivery using the address, including electronic mail address, provided on the *Application for Temporary Employment Certification.* The employer's response to such a notice or request must be filed electronically or via traditional methods to assure next day delivery. The employer's response must be sent by the date due or the next business day if the due date falls on a Sunday or Federal holiday.

§ 655.141 Notice of deficiency.

(a) *Notification timeline.* If the CO determines the *Application for*

Temporary Employment Certification or job order is incomplete, contains errors or inaccuracies, or does not meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of this notification will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice will:

(1) State the reason(s) the *Application for Temporary Employment Certification* or job order fails to meet the criteria for acceptance;

(2) Offer the employer an opportunity to submit a modified *Application for Temporary Employment Certification* or job order within 5 business days from date of receipt stating the modification that is needed for the CO to issue the NOA;

(3) State that the CO's determination on whether to grant or deny the *Application for Temporary Employment Certification* will be made not later than 30 calendar days before the first date of need, provided that the employer submits the requested modification to the *Application for Temporary Employment Certification* or job order within 5 business days and in a manner specified by the CO; and

(4) State that if the employer does not comply with the requirements of § 655.142, the CO will deny the *Application for Temporary Employment Certification.*

§ 655.142 Submission of modified applications.

(a) *Submission requirements and certification delays.* If in response to a NOD the employer chooses to submit a modified *Application for Temporary Employment Certification* or job order, the CO's Final Determination will be postponed by 1 calendar day for each day that passes beyond the 5 business-day period allowed under § 655.141(b) to submit a modified *Application for Temporary Employment Certification* or job order, up to a maximum of 5 calendar days. The CO may issue one or more additional NODs before issuing a Final Determination. The *Application for Temporary Employment Certification* will be deemed abandoned if the employer does not submit a modified *Application for Temporary Employment Certification* or job order within 12 calendar days after the NOD was issued.

(b) *Provisions for denial of modified Application for Temporary Employment Certification.* If the modified *Application for Temporary Employment Certification* or job order does not cure the deficiencies cited in the NOD(s) or otherwise fails to satisfy the criteria required for certification, the CO will deny the *Application for Temporary Employment Certification* in accordance with the labor certification determination provisions in § 655.164.

(c) *Appeal from denial of modified Application for Temporary Employment Certification.* The procedures for appealing a denial of a modified *Application for Temporary Employment Certification* are the same as for a non-modified *Application for Temporary Employment Certification* as long as the employer timely requests an expedited administrative review or de novo hearing before an ALJ by following the procedures set forth in § 655.171.

§ 655.143 Notice of acceptance.

(a) *Notification timeline.* When the CO determines the *Application for Temporary Employment Certification* and job order meet the requirements set forth in this subpart, the CO will notify the employer within 7 calendar days of the CO's receipt of the *Application for Temporary Employment Certification.* A copy of the notice will be sent to the SWA serving the area of intended employment.

(b) *Notice content.* The notice must:

(1) Authorize conditional access to the interstate clearance system and direct each SWA receiving a copy of the job order to commence recruitment of U.S. workers as specified in § 655.150;

(2) Direct the employer to engage in positive recruitment of U.S. workers under §§ 655.153 and 655.154 and to submit a report of its positive recruitment efforts meeting the requirements of § 655.156. If the OFLC Administrator's annual determination of labor supply States under § 655.154 requires the employer to engage in a specific additional positive recruitment activity in a labor supply State, the NOA will describe the precise nature of the additional positive recruitment required and will specify the documentation or other supporting evidence that must be maintained by the employer as proof that positive recruitment requirements were met;

(3) State that positive recruitment is in addition to and will occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and will terminate on the date specified in § 655.158;

(4) State any other documentation or assurances needed for the *Application for Temporary Employment Certification* to meet the requirements for certification under this subpart;

(5) State that the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need, except as provided for under § 655.142 for modified *Applications for Temporary Employment Certification* or when the *Application for Temporary Employment Certification* does not meet the requirements for certification but is expected to before the first date of need; and

(6) Where appropriate to the job opportunity and area of intended employment, direct the SWA to provide written notice of the job opportunity to organizations that provide employment and training services to workers likely to apply for the job and/or to place written notice of the job opportunity in other physical locations where such workers are likely to gather.

§ 655.144 Electronic job registry.

(a) *Location of and placement in the electronic job registry.* Upon acceptance of the *Application for Temporary Employment Certification* under § 655.143, the CO will promptly place for public examination a copy of the job order on an electronic job registry maintained by the Department, including any required modifications approved by the CO, as specified in § 655.142.

(b) *Length of posting on electronic job registry.* Unless otherwise provided, the Department will keep the job order posted on the electronic job registry in active status until the end of the recruitment period, as set forth in § 655.135(d).

§ 655.145 Amendments to *Applications for Temporary Employment Certification.*

(a) *Increases in number of workers.* The *Application for Temporary Employment Certification* may be amended at any time before the CO's certification determination to increase the number of workers requested in the initial *Application for Temporary Employment Certification* by not more than 20 percent (50 percent for employers requesting less than 10 workers) without requiring an additional recruitment period for U.S. workers. Requests for increases above the percent prescribed, without additional recruitment, may be approved by the CO only when the employer demonstrates that the need for additional workers could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. All requests for increasing the

number of workers must be made in writing.

(b) *Minor changes to the period of employment.* The *Application for Temporary Employment Certification* may be amended to make minor changes in the total period of employment. Changes will not be effective until submitted in writing and approved by the CO. In considering whether to approve the request, the CO will review the reason(s) for the request, determine whether the reason(s) are on the whole justified, and take into account the effect any change(s) would have on the adequacy of the underlying test of the domestic labor market for the job opportunity. An employer must demonstrate that the change to the period of employment could not have been foreseen, and the crops or commodities will be in jeopardy prior to the expiration of an additional recruitment period. If the request is for a delay in the first date of need and is made after workers have departed for the employer's place of employment, the CO may only approve the change if the employer includes with the request a written assurance signed and dated by the employer that all workers who are already traveling to the place of employment will be provided housing and subsistence, without cost to the workers, until work commences. Upon acceptance of an amendment, the CO will submit to the SWA any necessary modification to the job order.

Post-Acceptance Requirements

§ 655.150 Interstate clearance of job order.

(a) *CO approves for interstate clearance.* The CO will promptly transmit a copy of the approved job order for interstate clearance, at minimum, to all States listed in the job order as anticipated place(s) of employment and all other States designated by the OFLC Administrator as States of traditional or expected labor supply for the anticipated place(s) of employment under § 655.154(d).

(b) *Duration of posting.* Each of the SWAs to which the CO transmits the job order must keep the job order on its active file until the end of the recruitment period, as set forth in § 655.135(d), and must refer each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

§§ 655.151–655.152 [Reserved]

§ 655.153 Contact with former U.S. workers.

The employer must contact, by mail or other effective means, U.S. workers employed by the employer in the occupation at the place of employment during the previous year and solicit their return to the job. This contact must occur during the period of time that the job order is being circulated by the SWA(s) for interstate clearance under § 655.150 and before the date specified in § 655.158. Documentation sufficient to prove contact must be maintained in the event of an audit or investigation. An employer has no obligation to contact U.S. workers it terminated for cause or who abandoned employment at any time during the previous year if the employer provided timely notice to the NPC of the termination or abandonment in the manner described in § 655.122(n).

§ 655.154 Additional positive recruitment.

(a) *Where to conduct additional positive recruitment.* In addition to the CO's posting of the job opportunity on an electronic job registry in accordance with § 655.144, the employer must conduct positive recruitment as required by the OFLC Administrator's determination of traditional or expected labor supply States, which is published annually in accordance with paragraph (d) of this section.

(b) *Additional requirements should be comparable to non-H–2A employers in the area.* The location(s) and method(s) of the positive recruitment required of the employer must be no less than the normal recruitment efforts of non-H–2A agricultural employers of comparable or smaller size in the area of intended employment, taking into consideration the kind and degree of recruitment efforts which the employer may make to obtain foreign workers.

(c) *Nature of the additional positive recruitment.* The OFLC Administrator's labor supply State determination will identify areas of labor supply within a State, and the NOA issued under § 655.143 will describe the precise nature of the additional positive recruitment required of the employer, if any. The employer will not be required to conduct positive recruitment in more than three States for each area of intended employment listed on the employer's *Application for Temporary Employment Certification* and job order.

(d) *Determination of labor supply States.* (1) The OFLC Administrator will make an annual determination with respect to each State whether there are other traditional or expected labor supply States and, within a traditional or expected labor supply State, areas in which there are a significant number of qualified U.S. workers who, if recruited, would be willing to make themselves available for work in that State. The OFLC Administrator will publish the determination annually on OFLC's website.

(2) The determination will become effective on the date of publication on OFLC's website for employers who have not commenced positive recruitment under this subpart and will remain valid until the OFLC Administrator publishes a new determination.

(3) The determination as to whether any State is a source of traditional or expected labor supply to another State will be based primarily upon information provided by the SWAs to the OFLC Administrator within 120 calendar days preceding the determination.

§ 655.155 Referrals of U.S. workers.

SWAs may only refer for employment individuals who have been apprised of all the material terms and conditions of employment and have indicated, by accepting referral to the job opportunity, that they are qualified, able, willing, and available for employment.

§ 655.156 Recruitment report.

(a) *Requirements of a recruitment report.* The employer must prepare, sign, and date a written recruitment report. The recruitment report must be submitted on a date specified by the CO in the NOA set forth in § 655.143 and contain the following information:

(1) Identify the name of each recruitment source and date(s) of advertisement;

(2) State the name and contact information of each U.S. worker who applied or was referred to the job opportunity up to the date of the preparation of the recruitment report, and the disposition of each worker;

(3) Confirm that former U.S. workers were contacted, with a description by what means they were contacted and the date(s) of such contact, or state there are no former U.S. workers to contact; and

(4) If applicable, for each U.S. worker who applied for the position but was not hired, explain the lawful job-related reason(s) for not hiring the U.S. worker.

(b) *Duty to update recruitment report.* The employer must continue to update the recruitment report until the end of the recruitment period, as set forth in § 655.135(d). The updated report must be made available in the event of a post-certification audit or upon request by the Department. The Department may share recruitment report information with any other Federal agency, as set forth in § 655.130(f).

§ 655.157 Withholding of U.S. workers prohibited.

(a) *Filing a complaint.* Any employer who has reason to believe that a person

or entity has willfully and knowingly withheld U.S. workers prior to the arrival at the place of employment of H–2A workers in order to force the hiring of U.S. workers during the recruitment period, as set forth in § 655.135(d), may submit a written complaint to the CO. The complaint must clearly identify the person or entity who the employer believes has withheld the U.S. workers, and must specify sufficient facts to support the allegation (*e.g.,* dates, places, numbers and names of U.S. workers) which will permit an investigation to be conducted by the CO.

(b) *Duty to investigate.* Upon receipt, the CO must immediately investigate the complaint. The investigation must include interviews with the employer who has submitted the complaint, the person or entity named as responsible for withholding the U.S. workers, and the individual U.S. workers whose availability has purportedly been withheld.

(c) *Duty to suspend the recruitment period.* Where the CO determines, after conducting the interviews required by paragraph (b) of this section, that the employer's complaint is valid and justified, the CO will immediately suspend the applicable recruitment period, as set forth in § 655.135(d), to the employer. The CO's determination is the final decision of the Secretary.

§ 655.158 Duration of positive recruitment.

Except as otherwise noted, the obligation to engage in positive recruitment described in §§ 655.150 through 655.154 will terminate on the date H–2A workers depart for the employer's place of employment. Unless the SWA is informed in writing of a different date, the date that is the third day preceding the employer's first date of need will be determined to be the date the H–2A workers departed for the employer's place of employment.

Labor Certification Determinations

§ 655.160 Determinations.

Except as otherwise noted in this section, the CO will make a determination either to grant or deny the *Application for Temporary Employment Certification* not later than 30 calendar days before the first date of need identified in the *Application for Temporary Employment Certification.* An *Application for Temporary Employment Certification* that is modified under § 655.142 or that otherwise does not meet the requirements for certification in this subpart is not subject to the 30-day timeframe for certification.

§ 655.161 Criteria for certification.

(a) The criteria for certification include whether the employer has complied with the applicable requirements of parts 653 and 654 of this chapter, and all requirements of this subpart, which are necessary to grant the labor certification.

(b) In making a determination as to whether there are insufficient U.S. workers to fill the employer's job opportunity, the CO will count as available any U.S. worker referred by the SWA or any U.S. worker who applied (or on whose behalf an application is made) directly to the employer, whom the employer has not rejected for a lawful, job-related reason.

§ 655.162 Approved certification.

If temporary agricultural labor certification is granted, the CO will send a Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order to the employer and a copy, if applicable, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice and a copy of the certified *Application for Temporary Employment Certification* and job order by means normally assuring next day delivery. The CO will send the certified *Application for Temporary Employment Certification* and job order, including any approved modifications, directly to USCIS using an electronic method(s) designated by the OFLC Administrator.

§ 655.163 Certification fee.

A determination by the CO to grant an *Application for Temporary Employment Certification* in whole or in part will include a bill for the required certification fees. Each employer of H–2A workers under the *Application for Temporary Employment Certification* (except joint employer agricultural associations, which may not be assessed a fee in addition to the fees assessed to the employer-members of the agricultural association) must pay in a timely manner a non-refundable fee upon issuance of the certification granting the *Application for Temporary Employment Certification* (in whole or in part), as follows:

(a) *Amount.* The *Application for Temporary Employment Certification* fee for each employer receiving a temporary agricultural labor certification is $100 plus $10 for each H–2A worker certified under the *Application for Temporary Employment Certification,* provided that the fee to an employer for each temporary agricultural labor certification received will be no greater than $1,000. There is no additional fee to the association filing the *Application for Temporary Employment Certification.* The fees must be paid by check or money order made payable to United States Department of Labor. In the case of an agricultural association acting as a joint employer applying on behalf of its H–2A employer-members, the aggregate fees for all employers of H–2A workers under the *Application for Temporary Employment Certification* must be paid by one check or money order.

(b) *Timeliness.* Fees must be received by the CO no more than 30 calendar days after the date of the certification. Non-payment or untimely payment may be considered a substantial violation subject to the procedures in § 655.182.

§ 655.164 Denied certification.

If temporary agricultural labor certification is denied, the CO will send a Final Determination notice to the employer and a copy, if appropriate, to the employer's agent or attorney using an electronic method(s) designated by the OFLC Administrator. For employers permitted to file by mail as set forth in § 655.130(c), the CO will send the Final Determination notice by means normally assuring next day delivery. The Final Determination notice will:

(a) State the reason(s) certification is denied, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the denial under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the denial is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification.*

§ 655.165 Partial certification.

The CO may issue a partial certification, reducing either the period of employment or the number of H–2A workers being requested or both for certification, based upon information the CO receives during the course of processing the *Application for Temporary Employment Certification,* an audit, or otherwise. The number of workers certified will be reduced by one for each U.S. worker who is able, willing, and qualified, and who will be available at the time and place needed and has not been rejected for lawful, job-related reasons, to perform the labor

or services. If a partial labor certification is issued, the CO will send the Final Determination notice approving partial certification using the procedures at § 655.162. The Final Determination notice will:

(a) State the reason(s) the period of employment and/or the number of H–2A workers requested has been reduced, citing the relevant regulatory standards;

(b) Offer the employer an opportunity to request an expedited administrative review or a de novo administrative hearing before an ALJ of the partial certification under § 655.171; and

(c) State that if the employer does not request an expedited administrative judicial review or a de novo hearing before an ALJ in accordance with § 655.171, the partial certification is final, and the Department will not accept any appeal on that *Application for Temporary Employment Certification*.

§ 655.166 Requests for determinations based on nonavailability of U.S. workers.

(a) *Standards for requests.* If a temporary agricultural labor certification has been partially granted or denied based on the CO's determination that able, willing, available, eligible, and qualified U.S. workers are available, and, on or after 30 calendar days before the first date of need, some or all of those U.S. workers are, in fact, no longer able, willing, eligible, qualified, or available, the employer may request a new temporary agricultural labor certification determination from the CO. Prior to making a new determination, the CO will promptly ascertain (which may be through the SWA or other sources of information on U.S. worker availability) whether specific able, willing, eligible and qualified replacement U.S. workers are available or can be reasonably expected to be present at the employer's establishment within 72 hours from the date the employer's request was received. The CO will expeditiously, but in no case later than 72 hours after the time a complete request (including the signed statement included in paragraph (b) of this section) is received, make a determination on the request under paragraph (c) of this section. An employer may appeal a denial of such a determination in accordance with the procedures contained in § 655.171.

(b) *Unavailability of U.S. workers.* The employer's request for a new determination must be made directly to the CO in writing using an electronic method(s) designated by the OFLC Administrator, unless the employer requests to file the request by mail as set forth in § 655.130(c). If the employer requests the new determination by asserting solely that U.S. workers have become unavailable, the employer must submit to the CO a signed statement confirming such assertion. If such signed statement is not received by the CO within 72 hours of the CO's receipt of the request for a new determination, the CO will deny the request.

(c) *Notification of determination.* If the CO determines that U.S. workers have become unavailable and cannot identify sufficient available U.S. workers who are able, willing, eligible, and qualified or who are likely to become available, the CO will grant the employer's request for a new determination on the *Application for Temporary Employment Certification* in accordance with the procedures contained in § 655.162 or § 655.165. However, this does not preclude an employer from submitting subsequent requests for new determinations, if warranted, based on subsequent facts concerning purported nonavailability of U.S. workers or referred workers not being eligible workers or not able, willing, or qualified because of lawful, job-related reasons.

§ 655.167 Document retention requirements of H–2A employers.

(a) *Entities required to retain documents.* All employers must retain documents and records demonstrating compliance with this subpart.

(b) *Period of required retention.* Records and documents must be retained for a period of 3 years from the date of certification of the *Application for Temporary Employment Certification* or from the date of determination if the *Application for Temporary Employment Certification* is denied or withdrawn.

(c) *Documents and records to be retained by all employers.* All employers must retain:

(1) Proof of recruitment efforts, including:

(i) Job order placement as specified in § 655.121;

(ii) Contact with former U.S. workers as specified in § 655.153; and

(iii) Additional positive recruitment efforts as specified in § 655.154.

(2) Substantiation of information submitted in the recruitment report prepared in accordance with § 655.156, such as evidence of nonapplicability of contact of former employees as specified in § 655.153.

(3) The final recruitment report and any supporting resumes and contact information as specified in § 655.156(b).

(4) Proof of workers' compensation insurance or State law coverage as specified in § 655.122(e).

(5) Records of each worker's earnings as specified in § 655.122(j).

(6) The work contract or a copy of the *Application for Temporary Employment Certification* as defined in 29 CFR 501.10 and specified in § 655.122(q).

(7) If applicable, records of notice to the NPC and DHS of the abandonment of employment or termination for cause of a worker as set forth in § 655.122(n).

(d) *Additional retention requirement for agricultural associations filing an Application for Temporary Employment Certification.* In addition to the documents specified in paragraph (c) of this section, associations must retain documentation substantiating their status as an employer or agent, as specified in § 655.131.

Post-Certification

§ 655.170 Extensions.

An employer may apply for extensions of the period of employment in the following circumstances.

(a) *Short-term extension.* Employers seeking extensions of 2 weeks or less of the certified *Application for Temporary Employment Certification* must apply directly to DHS for approval. If granted, the *Application for Temporary Employment Certification* will be deemed extended for such period as is approved by DHS.

(b) *Long-term extension.* Employers seeking extensions of more than 2 weeks may apply to the CO. Such requests must be related to weather conditions or other factors beyond the control of the employer (which may include unforeseen changes in market conditions). Such requests must be supported in writing, with documentation showing that the extension is needed and that the need could not have been reasonably foreseen by the employer. The CO will notify the employer of the decision in writing if time allows, or will otherwise notify the employer of the decision. The CO will not grant an extension where the total work contract period under that *Application for Temporary Employment Certification* and extensions would last longer than 1 year, except in extraordinary circumstances. The employer may appeal a denial of a request for an extension by following the procedures in § 655.171.

(c) *Disclosure.* The employer must provide to the workers a copy of any approved extension in accordance with § 655.122(q), as soon as practicable.

§ 655.171 Appeals.

(a) *Request for review.* Where authorized in this subpart, an employer seeking review of a decision of the CO must request an administrative review

or de novo hearing before an ALJ of that decision to exhaust its administrative remedies. In such cases, the request for review:

(1) Except as provided in § 655.181(b)(3), must be received by the Chief ALJ, and the CO who issued the decision, within 10 business days from the date of the CO's decision;

(2) Must clearly identify the particular decision for which review is sought;

(3) Must include a copy of the CO's decision;

(4) Must clearly state whether the employer is seeking administrative review or a de novo hearing. If the request does not clearly state the employer is seeking a de novo hearing, then the employer waives its right to a hearing, and the case will proceed as a request for administrative review;

(5) Must set forth the particular grounds for the request, including the specific factual issues the requesting party alleges needs to be examined in connection with the CO's decision in question;

(6) May contain any legal argument that the employer believes will rebut the basis of the CO's action, including any briefing the employer wishes to submit where the request is for administrative review;

(7) May contain only such evidence as was actually before the CO at the time of the CO's decision, where the request is for administrative review; and

(8) May contain new evidence for the ALJ's consideration, where the request is for a de novo hearing, provided that the new evidence is introduced at the hearing.

(b) *Administrative file.* After the receipt of the request for review, the CO will send a copy of the OFLC administrative file to the Chief ALJ, the employer, the employer's attorney or agent (if applicable), and the Associate Solicitor for Employment and Training Legal Services, Office of the Solicitor, U.S. DOL (counsel), as soon as practicable by means normally assuring next-day delivery.

(c) *Assignment.* The Chief ALJ will immediately assign an ALJ to consider the particular case, which may be a single member or a three-member panel of the BALCA.

(d) *Administrative review*—(1) *Briefing schedule.* If the employer wishes to submit a brief on appeal, it must do so as part of its request for review. Within 7 business days of receipt of the OFLC administrative file, the counsel for the CO may submit a brief in support of the CO's decision and, if applicable, in response to the employer's brief.

(2) *Standard of review.* The ALJ must uphold the CO's decision unless shown by the employer to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

(3) *Scope of review.* The ALJ will consider the documents in the OFLC administrative file that were before the CO at the time of the CO's decision and any written submissions from the parties or amici curiae that do not contain new evidence. The ALJ may not consider evidence not before the CO at the time of the CO's decision, even if such evidence is in the administrative file. After due consideration, the ALJ will affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95.

(4) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the employer's attorney or agent (if applicable), the CO, and counsel for the CO within 7 business days of the submission of the CO's brief or 10 business days after receipt of the OFLC administrative file, whichever is later, using means normally assuring next-day delivery.

(e) *De novo hearing*—(1) *Conduct of hearing.* Where the employer has requested a de novo hearing the procedures in 29 CFR part 18 apply to such hearings, except that:

(i) The appeal will not be considered to be a complaint to which an answer is required;

(ii) The ALJ will ensure that the hearing is scheduled to take place within 14 business days after the ALJ's receipt of the OFLC administrative file, if the employer so requests, and will allow for the introduction of new evidence during the hearing as appropriate;

(iii) The ALJ may authorize discovery and the filing of pre-hearing motions, and so limit them to the types and quantities which in the ALJ's discretion will contribute to a fair hearing without unduly burdening the parties;

(iv) The ALJ's decision must be rendered within 10 calendar days after the hearing; and

(v) If the employer waives the right to a hearing, such as by asking for a decision on the record, or if the ALJ determines there are no disputed material facts to warrant a hearing, then the standard and scope of review for administrative review applies.

(2) *Standard and scope of review.* The ALJ will review the evidence presented during the hearing and the CO's decision de novo. The ALJ may determine that there are no issues of material fact, or only some issues of material fact, for which there is a genuine dispute, and may subsequently limit the hearing to only issues of material fact for which there is a genuine dispute. If new evidence is submitted with a request for a de novo hearing, and the ALJ subsequently determines that a hearing is warranted, the new evidence provided with the request must be introduced at the hearing to be considered by the ALJ. After a de novo hearing, the ALJ must affirm, reverse, or modify the CO's decision, or remand to the CO for further action, except in cases over which the Secretary has assumed jurisdiction pursuant to 29 CFR 18.95.

(3) *Decision.* The decision of the ALJ must specify the reasons for the action taken and must be immediately provided to the employer, the employer's attorney or agent (if applicable), the CO, and counsel for the CO by means normally assuring next-day delivery.

§ 655.172 Post-certification withdrawals.

(a) The employer may withdraw an *Application for Temporary Employment Certification* and the related job order after the CO grants certification under § 655.160. However, the employer is still obligated to comply with the terms and conditions of employment contained in the *Application for Temporary Employment Certification* and job order with respect to all workers recruited in connection with that application and job order.

(b) To request withdrawal, the employer must submit a request in writing to the NPC identifying the certification and stating the reason(s) for the withdrawal.

§ 655.173 Setting meal charges; petition for higher meal charges.

(a) *Meal charges.* An employer may charge workers up to $14.00 per day for providing them with three meals. The maximum charge allowed by this paragraph (a) will be changed annually by the same percentage as the 12-month percentage change for the Consumer Price Index for all Urban Consumers for Food between December of the year just concluded and December of the year prior to that. The annual adjustments will be effective on the date of their publication by the OFLC Administrator in the **Federal Register**. When a charge or deduction for the cost of meals would bring the employee's wage below the minimum wage set by the FLSA at 29 U.S.C. 206, the charge or deduction must meet the requirements of the FLSA

at 29 U.S.C. 203(m), including the recordkeeping requirements found at 29 CFR 516.27.

(b) *Petitions for higher meal charges.* The employer may file a petition with the CO to request approval to charge more than the applicable amount set under paragraph (a) of this section.

(1) *Filing a higher meal charge request.* To request approval to charge more than the applicable amount set under paragraph (a) of this section, the employer must submit the documentation required by either paragraph (b)(1)(i) or (ii) of this section. A higher meal charge request will be denied, in whole or in part, if the employer's documentation does not justify the higher meal charge requested.

(i) *Meals prepared directly by the employer.* Documentation submitted must include only the cost of goods and services directly related to the preparation and serving of meals, the number of workers fed, the number of meals served, and the number of days meals were provided. The cost of the following items may be included in the employer's charge to workers for providing prepared meals: food; kitchen supplies other than food, such as lunch bags and soap; labor costs that have a direct relation to food service operations, such as wages of cooks and dining hall supervisors; fuel, water, electricity, and other utilities used for the food service operation; and other costs directly related to the food service operation. Charges for transportation, depreciation, overhead, and similar charges may not be included. Receipts and other cost records for a representative pay period must be retained and must be available for inspection for a period of 3 years.

(ii) *Meals provided through a third party.* Documentation submitted must identify each third party that the employer will engage to prepare meals, describe how the employer will fulfill its obligation to provide three meals per day to workers through its agreement with the third party, and document the third party's charge(s) to the employer for the meals to be provided. Neither the third party's charge(s) to the employer nor the employer's meal charge to workers may include a profit, kick back, or other direct or indirect benefit to the employer, a person affiliated with the employer, or to another person for the employer's benefit. Receipts and other cost records documenting payments made to the third party that prepared the meals and meal charge deductions from employee pay must be retained for the period provided in § 655.167(b) and must be available for inspection by the CO and WHD during an investigation.

(2) *Effective date and scope of validity of a higher meal charge approval.* The employer may begin charging the higher rate upon receipt of approval from the CO, unless the CO sets a later effective date in the decision, and after disclosing to workers any change in the meal charge or deduction. A favorable decision from the CO is valid only for the meal provision arrangement documented under paragraph (b)(1) of this section and the approved higher meal charge amount. If the approved meal provision arrangement changes, the employer may charge no more than the maximum permitted under paragraph (a) of this section until a new petition for a higher meal charge based on the new arrangement is approved.

(3) *Appeal rights.* In the event the employer's petition for a higher meal charge is denied in whole or in part, the employer may appeal the denial. Appeals will be filed with the Chief ALJ, pursuant to § 655.171.

§ 655.174 Public disclosure.

The Department will maintain an electronic file accessible to the public with information on all employers applying for temporary agricultural labor certifications. The database will include such information as the number of workers requested, the date filed, the date decided, and the final disposition.

Integrity Measures

§ 655.180 Audit.

The CO may conduct audits of applications for which certifications have been granted.

(a) *Discretion.* The CO has the sole discretion to choose the certified applications selected for audit.

(b) *Audit letter.* Where an application is selected for audit, the CO will issue an audit letter to the employer and a copy, if appropriate, to the employer's agent or attorney. The audit letter will:

(1) Specify the documentation that must be submitted by the employer;

(2) Specify a date, no more than 30 calendar days from the date the audit letter is issued, by which the required documentation must be sent to the CO; and

(3) Advise that failure to fully comply with the audit process may result in the revocation of the certification or program debarment.

(c) *Supplemental information request.* During the course of the audit examination, the CO may request supplemental information and/or documentation from the employer in order to complete the audit. If circumstances warrant, the CO can issue one or more requests for supplemental information.

(d) *Potential referrals.* In addition to measures in this subpart, the CO may decide to provide the audit findings and underlying documentation to DHS, WHD, or other appropriate enforcement agencies. The CO may refer any findings that an employer discouraged an eligible U.S. worker from applying, or failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 655.181 Revocation.

(a) *Basis for DOL revocation.* The OFLC Administrator may revoke a temporary agricultural labor certification approved under this subpart, if the OFLC Administrator finds:

(1) The issuance of the temporary agricultural labor certification was not justified due to fraud or misrepresentation in the application process;

(2) The employer substantially violated a material term or condition of the approved temporary agricultural labor certification, as defined in § 655.182;

(3) The employer failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, audit (as discussed in § 655.180), or law enforcement function under 8 U.S.C. 1188, 29 CFR part 501, or this subpart; or

(4) The employer failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 29 CFR part 501, or this subpart.

(b) *DOL procedures for revocation—*

(1) *Notice of Revocation.* If the OFLC Administrator makes a determination to revoke an employer's temporary agricultural labor certification, the OFLC Administrator will send to the employer (and its attorney or agent) a Notice of Revocation. The Notice will contain a detailed statement of the grounds for the revocation, and it will inform the employer of its right to submit rebuttal evidence or to appeal as provided in this paragraph (b)(1) and in paragraph (b)(3) of this section. If the employer does not file rebuttal evidence or an appeal within 14 calendar days of the date of the Notice of Revocation, the Notice is the final agency action and will take effect immediately at the end of the 14-day period.

(2) *Rebuttal.* The employer may submit evidence to rebut the grounds stated in the Notice of Revocation within 14 calendar days of the date the

Notice is issued. If rebuttal evidence is timely filed by the employer, the OFLC Administrator will inform the employer of the OFLC Administrator's final determination on the revocation within 14 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the certification should be revoked, the OFLC Administrator will inform the employer of its right to appeal as provided in this paragraph (b)(2) and in paragraph (b)(3) of this section. If the employer does not appeal the OFLC Administrator's final determination within 10 calendar days, it will become the final agency action.

(3) *Appeal.* An employer may appeal a Notice of Revocation, or a final determination of the OFLC Administrator after the review of rebuttal evidence, according to the appeal procedures of § 655.171. In such cases, the appeal must be received by the Chief ALJ, and the OFLC Administrator, within the time periods established in paragraphs (b)(1) and (2) of this section.

(4) *Stay.* The timely filing of rebuttal evidence or an administrative appeal will stay the revocation pending the outcome of those proceedings.

(5) *Decision.* If the temporary agricultural labor certification is revoked, the OFLC Administrator will send a copy of the final agency action to DHS and the Department of State (DOS).

(c) *Employer's obligations in the event of revocation.* If an employer's temporary agricultural labor certification is revoked, the employer is responsible for:

(1) Reimbursement of actual inbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(1);

(2) The worker's outbound transportation and subsistence expenses, as if the worker meets the requirements for payment under § 655.122(h)(2);

(3) Payment to the worker of the amount due under the three-fourths guarantee as required by § 655.122(i); and

(4) Any other wages, benefits, and working conditions due or owing to the worker under this subpart.

§ 655.182 Debarment.

(a) *Debarment of an employer, agent, or attorney.* The OFLC Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney, from participating in any action under 8 U.S.C. 1188, this subpart, or 29 CFR part 501 subject to the time limits set forth in paragraph (c) of this section, if the OFLC Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers; workers in corresponding employment; or U.S. workers improperly rejected for employment, or improperly laid off or displaced.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or by any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the term limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The OFLC Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney may be debarred under this subpart for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or 29 CFR part 501, or an audit under § 655.180;

(vii) Employing an H–2A worker outside the area of intended employment, in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of § 655.135(j) or (k);

(ix) A violation of any of the provisions listed in 29 CFR 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected;

(2) The employer's failure to pay a necessary certification fee in a timely manner;

(3) The H–2ALC's failure to submit an original surety bond meeting the requirements of § 655.132(c) within 30 days of the date the temporary agricultural labor certification was issued or failure to submit additional surety within 30 days of a finding under 20 CFR 501.9(a) that the face value of the bond is insufficient;

(4) Fraud involving the *Application for Temporary Employment Certification;* or

(5) A material misrepresentation of fact during the application process.

(e) *Determining whether a violation is substantial.* In determining whether a violation is so substantial as to merit debarment, the factors the OFLC Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 29 CFR part 501, or this subpart;

(2) The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 29 CFR part 501, and this subpart;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188; and

(7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(f) *Debarment procedure*—(1) *Notice of Debarment.* If the OFLC Administrator makes a determination to debar an employer, agent, or attorney, the OFLC Administrator will send the party a Notice of Debarment. The Notice will state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, and it will inform the party subject to the Notice of its right to submit rebuttal evidence or to request a debarment hearing. If the

party does not file rebuttal evidence or request a hearing within 30 calendar days of the date of the Notice of Debarment, the Notice will be the final agency action and the debarment will take effect at the end of the 30-day period.

(2) *Rebuttal.* The party who received the Notice of Debarment may choose to submit evidence to rebut the grounds stated in the Notice within 30 calendar days of the date the Notice is issued. If rebuttal evidence is timely filed, the OFLC Administrator will issue a final determination on the debarment within 30 calendar days of receiving the rebuttal evidence. If the OFLC Administrator determines that the party should be debarred, the OFLC Administrator will inform the party of its right to request a debarment hearing according to the procedures of paragraph (f)(3) of this section. The party must request a hearing within 30 calendar days after the date of the OFLC Administrator's final determination, or the OFLC Administrator's determination will be the final agency action and the debarment will take effect at the end of the 30-calendar-day period.

(3) *Hearing.* The recipient of a Notice of Debarment may request a debarment hearing within 30 calendar days of the date of a Notice of Debarment or the date of a final determination of the OFLC Administrator after review of rebuttal evidence submitted pursuant to paragraph (f)(2) of this section. To obtain a debarment hearing, the debarred party must, within 30 calendar days of the date of the Notice or the final determination, file a written request to the Chief Administrative Law Judge, United States Department of Labor, 800 K Street NW, Suite 400–N, Washington, DC 20001–8002, and simultaneously serve a copy to the OFLC Administrator. The debarment will take effect 30 calendar days from the date the Notice of Debarment or final determination is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment or final determination. The timely filing of a request for a hearing stays the debarment pending the outcome of the hearing. Within 10 calendar days of receipt of the request for a hearing, the OFLC Administrator will send a certified copy of the ETA case file to the Chief ALJ by means normally assuring next day delivery. The Chief ALJ will immediately assign an ALJ to conduct the hearing. The procedures in 29 CFR part 18 apply to such hearings, except that the request for a hearing will not be considered to be a complaint to which an answer is required.

(4) *Decision.* After the hearing, the ALJ must affirm, reverse, or modify the OFLC Administrator's determination. The ALJ will prepare the decision within 60 calendar days after completion of the hearing and closing of the record. The ALJ's decision will be provided immediately to the parties to the debarment hearing by means normally assuring next day delivery. The ALJ's decision is the final agency action, unless either party, within 30 calendar days of the ALJ's decision, seeks review of the decision with the Administrative Review Board (ARB).

(5) *Review by the ARB.* (i) Any party wishing review of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. The ARB will decide whether to accept the petition within 30 calendar days of receipt. If the ARB declines to accept the petition, or if the ARB does not issue a notice accepting a petition within 30 calendar days after the receipt of a timely filing of the petition, the decision of the ALJ will be deemed the final agency action. If a petition for review is accepted, the decision of the ALJ will be stayed unless and until the ARB issues an order affirming the decision. The ARB must serve notice of its decision to accept or not to accept the petition upon the ALJ and upon all parties to the proceeding.

(ii) Upon receipt of the ARB's notice to accept the petition, the Office of Administrative Law Judges will promptly forward a copy of the complete hearing record to the ARB.

(iii) Where the ARB has determined to review such decision and order, the ARB will notify each party of the issue(s) raised, the form in which submissions must be made (*e.g.,* briefs or oral argument), and the time within which such presentation must be submitted.

(6) *ARB decision.* The ARB's decision must be issued within 90 calendar days from the notice granting the petition and served upon all parties and the ALJ. If the ARB fails to issue a decision within 90 calendar days from the notice granting the petition, the ALJ's decision will be the final agency decision.

(g) *Concurrent debarment jurisdiction.* OFLC and WHD have concurrent jurisdiction to impose a debarment remedy under this section or under 29 CFR 501.20. When considering debarment, OFLC and WHD may inform one another and may coordinate their activities. A specific violation for which debarment is imposed will be cited in a single debarment proceeding. Copies of final debarment decisions will be forwarded to DHS promptly.

(h) *Debarment of associations, employer-members of associations, and joint employers.* If the OFLC Administrator determines that an individual employer-member of an agricultural association, or a joint employer under § 655.131(b), has committed a substantial violation, the debarment determination will apply only to that employer-member unless the OFLC Administrator determines that the agricultural association or another agricultural association member or joint employer under § 655.131(b), participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) or joint employer(s) under § 655.131(b), as well.

(i) *Debarment involving agricultural associations acting as joint employers.* If the OFLC Administrator determines that an agricultural association acting as a joint employer with its employer-members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the OFLC Administrator determines that the employer-member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its employer-members during the period of the debarment.

(j) *Debarment involving agricultural associations acting as sole employers.* If the OFLC Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

§ 655.183 Less than substantial violations.

(a) *Requirement of special procedures.* If the OFLC Administrator determines that a less than substantial violation has occurred but has reason to believe that past actions on the part of the employer (or agent or attorney) may have had and may continue to have a chilling or otherwise negative effect on the recruitment, employment, and retention of U.S. workers, the OFLC Administrator may require the employer to conform to special procedures before

and after the temporary agricultural labor certification determination. These special procedures may include special on-site positive recruitment and streamlined interviewing and referral techniques. The special procedures are designed to enhance U.S. worker recruitment and retention in the next year as a condition for receiving a temporary agricultural labor certification. Such requirements will be reasonable; will not require the employer to offer better wages, working conditions, and benefits than those specified in § 655.122; and will be no more than deemed necessary to assure employer compliance with the test of U.S. worker availability and adverse effect criteria of this subpart.

(b) *Notification of required special procedures.* The OFLC Administrator will notify the employer (or agent or attorney) in writing of the special procedures that will be required in the coming year. The notification will state the reasons for the imposition of the requirements, state that the employer's agreement to accept the conditions will constitute inclusion of them as bona fide conditions and terms of a temporary agricultural labor certification, and will offer the employer an opportunity to request an administrative review or a de novo hearing before an ALJ. If an administrative review or de novo hearing is requested, the procedures prescribed in § 655.171 will apply.

(c) *Failure to comply with special procedures.* If the OFLC Administrator determines that the employer has failed to comply with special procedures required pursuant to paragraph (a) of this section, the OFLC Administrator will send a written notice to the employer, stating that the employer's otherwise affirmative H–2A certification determination will be reduced by 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year. Notice of such a reduction in the number of workers requested will be conveyed to the employer by the OFLC Administrator in a written temporary agricultural labor certification determination. The notice will offer the employer an opportunity to request administrative review or a de novo hearing before an ALJ. If administrative review or a de novo hearing is requested, the procedures prescribed in § 655.171 will apply, provided that if the ALJ affirms the OFLC Administrator's determination that the employer has failed to comply with special procedures required by paragraph (a) of this section, the reduction in the number of workers requested will be 25 percent of the total number of H–2A workers requested (which cannot be more than those requested in the previous year) for a period of 1 year.

§ 655.184 Applications involving fraud or willful misrepresentation.

(a) *Referral for investigation.* If the CO discovers possible fraud or willful misrepresentation involving an *Application for Temporary Employment Certification,* the CO may refer the matter to DHS and the Department's Office of the Inspector General for investigation.

(b) *Sanctions.* If WHD, a court, or DHS determines that there was fraud or willful misrepresentation involving an *Application for Temporary Employment Certification* and certification has been granted, a finding under this paragraph (b) will be cause to revoke the certification. The finding of fraud or willful misrepresentation may also constitute a debarrable violation under § 655.182.

§ 655.185 Job service complaint system; enforcement of work contracts.

(a) *Filing with DOL.* Complaints arising under this subpart must be filed through the Job Service Complaint System, as described in 20 CFR part 658, subpart E. Complaints involving allegations of fraud or misrepresentation must be referred by the SWA to the CO for appropriate handling and resolution. Complaints that involve work contracts must be referred by the SWA to WHD for appropriate handling and resolution, as described in 29 CFR part 501. As part of this process, WHD may report the results of its investigation to the OFLC Administrator for consideration of employer penalties or such other action as may be appropriate.

(b) *Filing with the Department of Justice.* Complaints alleging that an employer discouraged an eligible U.S. worker from applying, failed to hire, discharged, or otherwise discriminated against an eligible U.S. worker, or discovered violations involving the same, will be referred to the U.S. Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section, in addition to any activity, investigation, and/or enforcement action taken by ETA or a SWA. Likewise, if the Immigrant and Employee Rights Section becomes aware of a violation of the regulations in this subpart, it may provide such information to the appropriate SWA and the CO.

Labor Certification Process for Temporary Agricultural Employment in Range Sheep Herding, Goat Herding, and Production of Livestock Occupations

§ 655.200 Scope and purpose of herding and range livestock regulations in this section and §§ 655.201 through 655.235.

(a) *Purpose.* The purpose of this section and §§ 655.201 through 655.235 is to establish certain procedures for employers who apply to the Department to obtain labor certifications to hire temporary agricultural foreign workers to perform herding or production of livestock on the range, as defined in § 655.201. Unless otherwise specified in this section and §§ 655.201 through 655.235, employers whose job opportunities meet the qualifying criteria under this section and §§ 655.201 through 655.235 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to this section and §§ 655.201 through 655.235.* The procedures in this section and §§ 655.201 through 655.235 apply to job opportunities with the following unique characteristics:

(1) The work activities involve the herding or production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock), as defined under § 655.201;

(2) The work is performed on the range for the majority (meaning more than 50 percent) of the workdays in the work contract period. Any additional work performed at a place other than the range must constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock); and

(3) The work activities generally require the workers to be on call 24 hours per day, 7 days a week.

§ 655.201 Definition of herding and range livestock terms.

The following are terms that are not defined in §§ 655.100 through 655.185 and are specific to applications for labor certifications involving the herding or production of livestock on the range.

Herding. Activities associated with the caring, controlling, feeding, gathering, moving, tending, and sorting of livestock on the range.

Livestock. An animal species or species group such as sheep, cattle, goats, horses, or other domestic hooved animals. In the context of §§ 655.200 through 655.235, livestock refers to those species raised on the range.

Production of livestock. The care or husbandry of livestock throughout one or more seasons during the year, including guarding and protecting livestock from predatory animals and poisonous plants; feeding, fattening, and watering livestock; examining livestock to detect diseases, illnesses, or other injuries; administering medical care to sick or injured livestock; applying vaccinations and spraying insecticides on the range; and assisting with the breeding, birthing, raising, weaning, castration, branding, and general care of livestock. This term also includes duties performed off the range that are closely and directly related to herding and/or the production of livestock. The following are non-exclusive examples of ranch work that is closely and directly related: repairing fences used to contain the herd; assembling lambing jugs; cleaning out lambing jugs; feeding and caring for the dogs that the workers use on the range to assist with herding or guarding the flock; feeding and caring for the horses that the workers use on the range to help with herding or to move the sheep camps and supplies; and loading animals into livestock trucks for movement to the range or to market. The following are examples of ranch work that is not closely and directly related: working at feedlots; planting, irrigating and harvesting crops; operating or repairing heavy equipment; constructing wells or dams; digging irrigation ditches; applying weed control; cutting trees or chopping wood; constructing or repairing the bunkhouse or other ranch buildings; and delivering supplies from the ranch to the herders on the range.

Range. The range is any area located away from the ranch headquarters used by the employer. The following factors are indicative of the range: it involves land that is uncultivated; it involves wide expanses of land, such as thousands of acres; it is located in a remote, isolated area; and typically range housing is required so that the herder can be in constant attendance to the herd. No one factor is controlling, and the totality of the circumstances is considered in determining what should be considered range. The range does not include feedlots, corrals, or any area where the stock involved would be near ranch headquarters. Ranch headquarters, which is a place where the business of the ranch occurs and is often where the owner resides, is limited and does not embrace large acreage; it only includes the ranchhouse, barns, sheds, pen, bunkhouse, cookhouse, and other buildings in the vicinity. The range also does not include any area where a herder is not required to be available constantly to attend to the livestock and to perform tasks, including but not limited to, ensuring the livestock do not stray, protecting them from predators, and monitoring their health.

Range housing. Range housing is housing located on the range that meets the standards articulated under § 655.235.

§ 655.205 Herding and range livestock job orders.

An employer whose job opportunity has been determined to qualify for the procedures in §§ 655.200 through 655.235 is not required to comply with the job order filing timeframe requirements in § 655.121(a) and (b) or the job order review process in § 655.121(e) and (f). Rather, the employer must submit the job order along with a completed *Application for Temporary Employment Certification,* as required in § 655.215, to the designated NPC for the NPC's review.

§ 655.210 Contents of herding and range livestock job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* The job offer must include a statement that the workers are on call for up to 24 hours per day, 7 days per week and that the workers spend the majority (meaning more than 50 percent) of the workdays during the contract period in the herding or production of livestock on the range. Duties may include activities performed off the range only if such duties constitute the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). All such duties must be specifically disclosed on the job order. The job offer may also specify that applicants must possess up to 6 months of experience in similar occupations involving the herding or production of livestock on the range and require reference(s) for the employer to verify applicant experience. An employer may specify other appropriate job qualifications and requirements for its job opportunity. Job offers may not impose on U.S. workers any restrictions or obligations that will not be imposed on the employer's H–2A workers engaged in herding or the production of livestock on the range. Any such requirements must be applied equally to both U.S. and foreign workers. Each job qualification and requirement listed in the job offer must be bona fide, and the CO may require the employer to submit documentation to substantiate the appropriateness of any other job qualifications and requirements specified in the job offer.

(c) *Range housing.* The employer must specify in the job order that range housing will be provided. The range housing must meet the requirements set forth in § 655.235.

(d) *Employer-provided items.* (1) The employer must provide to the worker, without charge or deposit charge, all tools, supplies, and equipment required by law, by the employer, or by the nature of the work to perform the duties assigned in the job offer safely and effectively. The employer must specify in the job order which items it will provide to the worker.

(2) Because of the unique nature of the herding or production of livestock on the range, this equipment must include effective means of communicating with persons capable of responding to the worker's needs in case of an emergency including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order:

(i) The type(s) of electronic communication device(s) and that such device(s) will be provided without charge or deposit charge to the worker during the entire period of employment; and

(ii) If there are periods of time when the workers are stationed in locations where electronic communication devices may not operate effectively, the employer must specify in the job order, the means and frequency with which the employer plans to make contact with the workers to monitor the worker's well-being. This contact must include either arrangements for the workers to be located, on a regular basis, in geographic areas where the electronic communication devices operate effectively, or arrangements for regular, pre-scheduled, in-person visits between the workers and the employer, which may include visits between the workers and other persons designated by the employer to resupply the workers' camp.

(e) *Meals.* The employer must specify in the job offer and provide to the worker, without charge or deposit charge:

(1) Either three sufficient meals a day, or free and convenient cooking facilities and adequate provision of food to

enable the worker to prepare their own meals. To be sufficient or adequate, the meals or food provided must include a daily source of protein, vitamins, and minerals; and

(2) Adequate potable water, or water that can be easily rendered potable and the means to do so. Standards governing the provision of water to range workers are also addressed in § 655.235(e).

(f) *Hours and earnings statements.* (1) The employer must keep accurate and adequate records with respect to the worker's earnings and furnish to the worker on or before each payday a statement of earnings. The employer is exempt from recording the hours actually worked each day, the time the worker begins and ends each workday, as well as the nature and amount of work performed, but all other regulatory requirements in § 655.122(j) and (k) apply.

(2) The employer must keep daily records indicating whether the site of the employee's work was on the range or off the range. If the employer prorates a worker's wage pursuant to paragraph (g)(2) of this section because of the worker's voluntary absence for personal reasons, it must also keep a record of the reason for the worker's absence.

(g) *Rates of pay.* The employer must pay the worker at least the monthly AEWR, as specified in § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof.

(1) The offered wage shall not be based on commissions, bonuses, or other incentives, unless the employer guarantees a wage that equals or exceeds the monthly AEWR, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action, or any agreed-upon collective bargaining rate, whichever is highest, and must be paid to each worker free and clear without any unauthorized deductions.

(2) The employer may prorate the wage for the initial and final pay periods of the job order period if its pay period does not match the beginning or ending dates of the job order. The employer also may prorate the wage if a worker is voluntarily unavailable to work for personal reasons.

(h) *Frequency of pay.* The employer must state in the job offer the frequency with which the worker will be paid, which must be at least twice monthly. Employers must pay wages when due.

§ 655.211 Herding and range livestock wage rate.

(a) *Compliance with rates of pay.* (1) To comply with its obligation under § 655.210(g), an employer must offer, advertise in its recruitment, and pay each worker employed under §§ 655.200 through 655.235 a wage that is at least the highest of the monthly AEWR established under this section, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by Federal or State law or judicial action.

(2) If the monthly AEWR established under this section is adjusted during a work contract, and is higher than both the agreed-upon collective bargaining wage and the applicable minimum wage imposed by Federal or State law or judicial action in effect at the time the work is performed, the employer must pay at least that adjusted monthly AEWR upon the effective date of the updated monthly AEWR published by the Department in the **Federal Register**.

(b) *Publication of the monthly AEWR.* The OFLC Administrator will publish, at least once in each calendar year, on a date to be determined by the OFLC Administrator, an update to the monthly AEWR as a document in the **Federal Register**.

(c) *Monthly AEWR rate.* (1) The monthly AEWR shall be $7.25 multiplied by 48 hours, and then multiplied by 4.333 weeks per month; and

(2) Beginning for calendar year 2017, the monthly AEWR shall be adjusted annually based on the Employment Cost Index (ECI) for wages and salaries published by the Bureau of Labor Statistics (BLS) for the preceding October-October period.

(d) *Transition rates.* (1) For the period from November 16, 2015, through calendar year 2016, the Department shall set the monthly AEWR at 80 percent of the result of the formula in paragraph (c) of this section.

(2) For calendar year 2017, the Department shall set the monthly AEWR at 90 percent of the result of the formula in paragraph (c) of this section.

(3) For calendar year 2018 and beyond, the Department shall set the monthly AEWR at 100 percent of the result of the formula in paragraph (c) of this section.

§ 655.215 Procedures for filing herding and range livestock *Applications for Temporary Employment Certification.*

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.200 through 655.235, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification* and job order.

(1) The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous States.

(2) An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States with different first dates of need. Unless modifications to a sheep or goat herding or production of livestock job order are required by the CO or requested by the employer, pursuant to § 655.121(h), the agricultural association is not required to re-submit the job order during the calendar year with its *Application for Temporary Employment Certification.*

§ 655.220 Processing herding and range livestock *Applications for Temporary Employment Certification.*

(a) *NPC review.* Unless otherwise specified in §§ 655.200 through 655.235, the CO will review and process the *Application for Temporary Employment Certification* and job order in accordance with the requirements outlined in §§ 655.140 through 655.145, and will work with the employer to address any deficiencies in the job order in a manner consistent with §§ 655.140 through 655.141.

(b) *Notice of acceptance.* Once the job order is determined to meet all regulatory requirements, the NPC will issue a NOA consistent with § 655.143(b), provide notice to the employer authorizing conditional access to the interstate clearance system, and transmit an electronic copy of the approved job order to each SWA with jurisdiction over the anticipated place(s) of employment. The CO will direct the SWA to place the job order promptly in clearance and commence recruitment of U.S. workers. Where an agricultural association files as a joint employer and submits a single job order on behalf of its employer-members, the CO will transmit a copy of the job order to the SWA having jurisdiction over the location of the agricultural association, those SWAs having jurisdiction over other States where the work will take place, and to the SWAs in all States designated under § 655.154(d), directing each SWA to place the job order in

intrastate clearance and commence recruitment of U.S. workers.

(c) *Electronic job registry.* Under § 655.144(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, the Department will keep the job order posted on the OFLC electronic job registry until the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order.

§ 655.225 Post-acceptance requirements for herding and range livestock.

(a) Unless otherwise specified in this section, the requirements for recruiting U.S. workers by the employer and SWA must be satisfied, as specified in §§ 655.150 through 655.158.

(b) Pursuant to § 655.150(b), where a single job order is approved for an agricultural association filing as a joint employer on behalf of its employer-members with different first dates of need, each of the SWAs to which the job order was transmitted by the CO or the SWA having jurisdiction over the location of the agricultural association must keep the job order on its active file the end of the recruitment period, as set forth in § 655.135(d), has elapsed for all employer-members identified on the job order, and must refer to the agricultural association each qualified U.S. worker who applies (or on whose behalf an application is made) for the job opportunity.

(c) Any eligible U.S. worker who applies (or on whose behalf an application is made) for the job opportunity and is hired will be placed at the location nearest to them absent a request for a different location by the U.S. worker. Employers must make reasonable efforts to accommodate such placement requests by the U.S. worker.

(d) An agricultural association that fulfills the recruitment requirements for its employer-members is required to maintain a written recruitment report containing the information required by § 655.156 for each individual employer-member identified in the application or job order, including any approved modifications.

§ 655.230 Range housing.

(a) Housing for work performed on the range must meet the minimum standards contained in §§ 655.235 and 655.122(d)(2).

(b) The SWA with jurisdiction over the location of the range housing must inspect and certify that such housing used on the range is sufficient to accommodate the number of certified workers and meets all applicable standards contained in § 655.235. The SWA must conduct a housing inspection no less frequently than once every three calendar years after the initial inspection and provide documentation to the employer certifying the housing for a period lasting no more than 36 months. If the SWA determines that an employer's housing cannot be inspected within a 3-year timeframe or, when it is inspected, the housing does not meet all the applicable standards in § 655.235, the CO may deny the H–2A application in full or in part or require additional inspections, to be carried out by the SWA, in order to satisfy the regulatory requirement.

(c)(1) The employer may self-certify its compliance with the standards contained in § 655.235 only when the employer has received a certification from the SWA for the range housing it seeks to use within the past 36 months.

(2) To self-certify the range housing, the employer must submit a copy of the valid SWA housing certification and a written statement, signed and dated by the employer, to the SWA and the CO assuring that the housing is available, sufficient to accommodate the number of workers being requested for temporary agricultural labor certification, and meets all the applicable standards for range housing contained in § 655.235.

(d) The use of range housing at a location other than the range, where fixed-site employer-provided housing would otherwise be required, is permissible only when the worker occupying the housing is performing work that constitutes the production of livestock (which includes work that is closely and directly related to herding and/or the production of livestock). In such a situation, workers must be granted access to facilities, including but not limited to toilets and showers with hot and cold water under pressure, as well as cooking and cleaning facilities, that would satisfy the requirements contained in § 655.122(d)(1)(i). When such work does not constitute the production of livestock, workers must be housed in housing that meets all the requirements of § 655.122(d).

§ 655.235 Standards for range housing.

An employer employing workers under this section and §§ 655.200 through 655.230 may use a mobile unit, camper, or other similar mobile housing vehicle, tents, and remotely located stationary structures along herding trails, which meet the following standards:

(a) *Housing site.* Range housing sites must be well drained and free from depressions where water may stagnate.

(b) *Water supply.* (1) An adequate and convenient supply of water that meets the standards of the State or local health authority must be provided.

(2) The employer must provide each worker at least 4.5 gallons of potable water, per day, for drinking and cooking, delivered on a regular basis, so that the workers will have at least this amount available for their use until this supply is next replenished. Employers must also provide an additional amount of water sufficient to meet the laundry and bathing needs of each worker. This additional water may be non-potable, and an employer may require a worker to rely on natural sources of water for laundry and bathing needs if these sources are available and contain water that is clean and safe for these purposes. If an employer relies on alternate water sources to meet any of the workers' needs, it must take precautionary measures to protect the worker's health where these sources are also used to water the herd, dogs, or horses, to prevent contamination of the sources if they collect runoff from areas where these animals excrete.

(3) The water provided for use by the workers may not be used to water dogs, horses, or the herd.

(4) In situations where workers are located in areas that are not accessible by motorized vehicle, an employer may request a variance from the requirement that it deliver potable water to workers, provided the following conditions are satisfied:

(i) It seeks the variance at the time it submits its *Application for Temporary Employment Certification*;

(ii) It attests that it has identified natural sources of water that are potable or may be easily rendered potable in the area in which the housing will be located, and that these sources will remain available during the period the worker is at that location;

(iii) It attests that it shall provide each worker an effective means to test whether the water is potable and, if not potable, the means to easily render it potable; and

(iv) The CO approves the variance.

(5) Individual drinking cups must be provided.

(6) Containers appropriate for storing and using potable water must be provided and, in locations subject to freezing temperatures, containers must be small enough to allow storage in the housing unit to prevent freezing.

(c) *Excreta and liquid waste disposal.* (1) Facilities, including shovels, must be provided and maintained for effective

disposal of excreta and liquid waste in accordance with the requirements of the State health authority or involved Federal agency; and

(2) If pits are used for disposal by burying of excreta and liquid waste, they must be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with State and local health and sanitation requirements.

(d) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition and must provide shelter against the elements to occupants;

(2) Housing, other than tents, must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering;

(3) Each housing unit must have at least one window that can be opened or skylight opening directly to the outdoors; and

(4) Tents appropriate to weather conditions may be used only where the terrain and/or land use regulations do not permit the use of other more substantial housing.

(e) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(5) A heater may be used in a tent if the heater is approved by a testing service and if the tent is fireproof.

(f) *Lighting.* (1) In areas where it is not feasible to provide electrical service to range housing units, including tents, lanterns must be provided (kerosene wick lights meet the definition of lantern); and

(2) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit, including tents.

(g) *Bathing, laundry, and hand washing.* Bathing, laundry, and hand washing facilities must be provided when it is not feasible to provide hot and cold water under pressure.

(h) *Food storage.* When mechanical refrigeration of food is not feasible, the worker must be provided with another means of keeping food fresh and preventing spoilage, such as a butane or propane gas refrigerator. Other proven methods of safeguarding fresh foods, such as dehydrating or salting, are acceptable.

(i) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation; and

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(j) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, including tents, for storing garbage and other refuse; and

(2) Provision must be made for collecting or burying refuse, which includes garbage, at least twice a week or more often if necessary, except where the terrain in which the housing is located cannot be accessed by motor vehicle and the refuse cannot be buried, in which case the employer must provide appropriate receptacles for storing the refuse and for removing the trash when the employer next transports supplies to the location.

(k) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.

(l) *Sleeping facilities.* A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement, unless a variance is requested from and granted by the CO. When filing an application for certification and only where it is demonstrated to the CO that it is impractical to provide a comfortable and clean bed, cot, or bunk, with a clean mattress, for each range worker, the employer may request a variance from this requirement to allow for a second worker to join the range operation. Such a variance must be used infrequently, and the period of the variance will be temporary (*i.e.,* the variance shall be for no more than 3 consecutive days). Should the CO grant the variance, the employer must supply a sleeping bag or bed roll for the second occupant free of charge or deposit charge.

(m) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable State or local fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Housing units for range use must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Tents are not required to have a second means of escape, except when large tents with walls of rigid material are used.

(5) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the range housing.

Labor Certification Process for Temporary Agricultural Employment in Animal Shearing, Commercial Beekeeping, Custom Combining, and Reforestation Occupations

§ 655.300 Scope and purpose.

(a) *Purpose.* The purpose of this section and §§ 655.301 through 655.304 is to establish certain procedures for employers who apply to the DOL to obtain labor certifications to hire temporary agricultural foreign workers to perform animal shearing, commercial beekeeping, and custom combining, as defined in this subpart. Unless otherwise specified in this section and §§ 655.301 through 655.304, employers whose job opportunities meet the qualifying criteria under this section and §§ 655.301 through 655.304 must fully comply with all of the requirements of §§ 655.100 through 655.185; part 653, subparts B and F, of this chapter; and part 654 of this chapter.

(b) *Jobs subject to this section and §§ 655.301 through 655.304.* The procedures in this section and §§ 655.301 through 655.304 apply to job

opportunities for animal shearing, commercial beekeeping, and custom combining, as defined under § 655.301, where workers are required to perform agricultural work on a scheduled itinerary covering multiple areas of intended employment.

§ 655.301 Definition of terms.

The following terms are specific to applications for labor certifications involving animal shearing, commercial beekeeping, and custom combining.

Animal shearing. Activities associated with the shearing and crutching of sheep, goats, or other animals producing wool or fleece, including gathering, moving, and sorting animals into shearing yards, stations, or pens; placing animals into position, whether loose, tied, or otherwise immobilized, prior to shearing; selecting and using suitable handheld or power-driven equipment and tools for shearing; shearing animals with care according to industry standards; marking, sewing, or disinfecting any nicks and cuts on animals due to shearing; cleaning and washing animals after shearing is complete; gathering, storing, loading, and delivering wool or fleece to storage yards, trailers or other containers; and maintaining, oiling, sharpening, and repairing equipment and other tools used for shearing. Transporting equipment and other tools used for shearing qualifies as an activity associated with animal shearing for the purposes of this definition only where such activities are performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew. Wool or fleece grading, which involves examining, sorting, and placing unprocessed wool or fleece into containers according to government or industry standards, qualifies as activity associated with animal shearing for the purposes of this definition only where such activity is performed by workers who are employed by the same employer as the animal shearing crew and who travel and work with the animal shearing crew.

Commercial beekeeping. Activities associated with the care or husbandry of bee colonies for producing and collecting honey, wax, pollen, and other products for commercial sale or providing pollination services to agricultural producers, including assembling, maintaining, and repairing hives, frames, or boxes; inspecting and monitoring colonies to detect diseases, illnesses, or other health problems; feeding and medicating bees to maintain the health of the colonies; installing, raising, and moving queen bees; splitting or dividing colonies, when necessary, and replacing combs; preparing, loading, transporting, and unloading colonies and equipment; forcing bees from hives, inserting honeycomb of bees into hives, or inducing swarming of bees into hives of prepared honeycomb frames; uncapping, extracting, refining, harvesting, and packaging honey, beeswax, or other products for commercial sale; cultivating bees to produce bee colonies and queen bees for sale; and maintaining and repairing equipment and other tools used to work with bee colonies.

Custom combining. Activities for agricultural producers consisting of: operating self-propelled combine equipment (*i.e.,* equipment that reaps or harvests, threshes, and swath or winnow the crop); performing manual or mechanical adjustments to combine equipment, including cutters, blowers and conveyers; performing safety checks on self-propelled combine equipment; and maintaining and repairing equipment and other tools for performing swathing or combining work; and, where performed by workers employed by the same employer as the custom combining crew and who work and travel with the custom combining crew: transporting harvested crops to elevators, silos, or other storage areas, and transporting combine equipment and other tools used for custom combining work from one field to another. Neither the planting and cultivation of crops and related activities, nor component parts of custom combining not performed by the harvesting entity (*e.g.,* grain cleaning), are considered custom combining for the purposes of this definition.

§ 655.302 Contents of job orders.

(a) *Content of job offers.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for job orders established under § 655.121 and for the content of job offers established under part 653, subpart F, of this chapter and § 655.122.

(b) *Job qualifications and requirements.* (1) For job opportunities involving animal shearing, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must possess experience with an industry shearing method or pattern, must be willing to join the employer at the time the job opportunity is available and at the place the employer is located, and must be available to complete the scheduled itinerary under the job order. U.S. applicants whose experience is based on a similar or related industry shearing method or pattern must be afforded a break-in period of no less than 5 working days to adapt to the employer's preferred shearing method or pattern.

(2) For job opportunities involving commercial beekeeping, the job offer may specify that applicants must possess up to 3 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must not have bee, pollen, or honey-related allergies, must possess a valid commercial U.S. driver's license or be able to obtain such license not later than 30 days after the first workday after the arrival of the worker at the place of employment, must be willing to join the employer at the time and place the employer is located, and must be available to complete the scheduled itinerary under the job order.

(3) For job opportunities involving custom combining, the job offer may specify that applicants must possess up to 6 months of experience in similar occupations and require reference(s) for the employer to verify applicant experience. The job offer may also specify that applicants must be willing to join the employer at the time and place the employer is located and must be available to complete the scheduled itinerary under the job order.

(4) An employer may specify other appropriate job qualifications and requirements for its job opportunity, subject to § 655.122(a) and (b).

(c) *Employer-provided communication devices.* For job opportunities involving animal shearing and custom combining, the employer must provide to at least one worker per crew, without charge or deposit charge, effective means of communicating with persons capable of responding to the workers' needs in case of an emergency, including, but not limited to, satellite phones, cell phones, wireless devices, radio transmitters, or other types of electronic communication systems. The employer must specify in the job order the type(s) of electronic communication device(s) and that such devices will be provided without charge or deposit charge to at least one worker per crew during the entire period of employment.

(d) *Housing.* For job opportunities involving animal shearing and custom combining, the employer must specify in the job order that housing will be provided as set forth in § 655.304.

§ 655.303 Procedures for filing *Applications for Temporary Employment Certification.*

(a) *Compliance with §§ 655.130 through 655.132.* Unless otherwise specified in §§ 655.300 through 655.304, the employer must satisfy the requirements for filing an *Application for Temporary Employment Certification* with the NPC designated by the OFLC Administrator as required under §§ 655.130 through 655.132.

(b) *What to file.* An employer must file a completed *Application for Temporary Employment Certification.* The employer must identify each place of employment with as much geographic specificity as possible, including the names of each farm or ranch, their physical locations, and the estimated period of employment at each place of employment where work will be performed under the job order.

(c) *Scope of applications.* The *Application for Temporary Employment Certification* and job order may cover multiple areas of intended employment in one or more contiguous States. An *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping may include one noncontiguous State at the beginning and end of the period of employment for the overwintering of bee colonies.

(d) *Agricultural association filings.* An agricultural association filing as a joint employer may submit a single job order and master *Application for Temporary Employment Certification* on behalf of its employer-members located in more than two contiguous States. An agricultural association filing as a joint employer may file an *Application for Temporary Employment Certification* and job order for opportunities involving commercial beekeeping including one noncontiguous State at the beginning and end of the period of employment for the overwintering of bee colonies.

§ 655.304 Standards for mobile housing.

(a) *Use of mobile housing.* An employer employing workers engaged in animal shearing or custom combining under this section and §§ 655.301 through 655.303 may use a mobile unit, camper, or other similar mobile housing unit that complies with all of the following standards, except as provided in paragraph (a)(1) or (2) of this section:

(1) In situations where the mobile housing unit will be located on the range (as defined in § 655.201) to enable work to be performed on the range, and where providing housing that meets each of the standards for mobile housing in this section is not feasible, an employer may request a variance from the particular mobile housing standard(s) with which compliance is not feasible. The CO will specify the locations, dates, and specific variances, if approved. The following conditions must be satisfied for an employer to obtain a variance:

(i) The employer seeks the variance at the time it submits its *Application for Temporary Employment Certification;*

(ii) The employer identifies the particular mobile housing standard(s), and attests that compliance with the standard(s) is not feasible;

(iii) The employer identifies the location(s) in which the particular mobile housing standard(s) cannot be met;

(iv) The employer identifies the anticipated dates that the mobile housing unit will be in those location(s);

(v) The employer identifies the corresponding range housing standard(s) in § 655.235 that will be met instead, and attests that it will comply with such standard(s);

(vi) The employer attests to the reason why the particular mobile housing(s) standard cannot be met; and,

(vii) The CO approves the variance.

(2) A Canadian employer performing custom combining operations in the United States whose mobile housing unit is located in Canada when not in use must have the housing unit inspected and approved by an authorized representative of the Federal or provincial government of Canada, in accordance with inspection procedures and applicable standards for such housing under Canadian law or regulation.

(b) *Compliance with mobile housing standards.* The employer may comply with the standards for mobile housing in this section in one of two ways:

(1) The employer may provide a mobile housing unit that complies with all applicable standards; or

(2) The employer may provide a mobile housing unit and supplemental facilities (*e.g.,* located at a fixed housing site) if workers are afforded access to all facilities contained in these standards.

(c) *Housing site.* (1) Mobile housing sites must be well drained and free from depressions where water may stagnate. They shall be located where the disposal of sewage is provided in a manner that neither creates, nor is likely to create, a nuisance or a hazard to health.

(2) Mobile housing sites shall not be in proximity to conditions that create or are likely to create offensive odors, flies, noise, traffic, or any similar hazards.

(3) Mobile housing sites shall be free from debris, noxious plants (*e.g.,* poison ivy, etc.), and uncontrolled weeds or brush.

(d) *Drinking water supply.* (1) An adequate and convenient supply of potable water that meets the standards of the local or State health authority must be provided.

(2) Individual drinking cups must be provided.

(3) A cold water tap shall be available within a reasonable distance of each individual living unit when water is not provided in the unit.

(4) Adequate drainage facilities shall be provided for overflow and spillage.

(e) *Excreta and liquid waste disposal.* (1) Toilet facilities, such as portable toilets, recreational vehicle (RV) or trailer toilets, privies, or flush toilets, must be provided and maintained for effective disposal of excreta and liquid waste in accordance with the requirements of the applicable local, State, or Federal health authority, whichever is most stringent.

(2) Where mobile housing units contain RV or trailer toilets, such facilities must be connected to sewage hookups whenever feasible (*i.e.,* in campgrounds or RV parks).

(3) If wastewater tanks are used, the employer must make provisions to regularly empty the wastewater tanks.

(4) If pits are used for disposal by burying of excreta and liquid waste, they shall be kept fly-tight when not filled in completely after each use. The maintenance of disposal pits must be in accordance with local and State health and sanitation requirements.

(f) *Housing structure.* (1) Housing must be structurally sound, in good repair, in a sanitary condition, and must provide shelter against the elements to occupants.

(2) Housing must have flooring constructed of rigid materials easy to clean and so located as to prevent ground and surface water from entering.

(3) Each housing unit must have at least one window or a skylight that can be opened directly to the outdoors.

(g) *Heating.* (1) Where the climate in which the housing will be used is such that the safety and health of a worker requires heated living quarters, all such quarters must have properly installed operable heating equipment that supplies adequate heat. Where the climate in which the housing will be used is mild and the low temperature for any day in which the housing will be used is not reasonably expected to drop below 50 degrees Fahrenheit, no separate heating equipment is required as long as proper protective clothing and bedding are made available, free of charge or deposit charge, to the workers.

(2) Any stoves or other sources of heat using combustible fuel must be installed and vented in such a manner as to prevent fire hazards and a dangerous concentration of gases. If a solid or liquid fuel stove is used in a room with wooden or other combustible flooring, there must be a concrete slab, insulated metal sheet, or other fireproof material on the floor under each stove, extending at least 18 inches beyond the perimeter of the base of the stove.

(3) Any wall or ceiling within 18 inches of a solid or liquid fuel stove or stove pipe must be made of fireproof material. A vented metal collar must be installed around a stovepipe or vent passing through a wall, ceiling, floor, or roof.

(4) When a heating system has automatic controls, the controls must be of the type that cuts off the fuel supply when the flame fails or is interrupted or whenever a predetermined safe temperature or pressure is exceeded.

(h) *Electricity and lighting.* (1) Barring unusual circumstances that prevent access, electrical service or generators must be provided.

(2) In areas where it is not feasible to provide electrical service to mobile housing units, lanterns must be provided (*e.g.,* battery operated lights).

(3) Lanterns, where used, must be provided in a minimum ratio of one per occupant of each unit.

(i) *Bathing, laundry, and hand washing.* (1) Bathing facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per day.

(2) Laundry facilities, supplied with hot and cold water under pressure, shall be provided to all occupants no less frequently than once per week.

(3) Alternative bathing and laundry facilities must be available to occupants at all times when water under pressure is unavailable.

(4) Hand washing facilities must be available to all occupants at all times.

(j) *Food storage.* (1) Provisions for mechanical refrigeration of food at a temperature of not more than 45 degrees Fahrenheit must be provided.

(2) When mechanical refrigeration of food is not feasible, the employer must provide another means of keeping food fresh and preventing spoilage (*e.g.,* a butane or propane gas refrigerator).

(k) *Cooking and eating facilities.* (1) When workers or their families are permitted or required to cook in their individual unit, a space must be provided with adequate lighting and ventilation, and stoves or hotplates.

(2) Wall surfaces next to all food preparation and cooking areas must be of nonabsorbent, easy to clean material. Wall surfaces next to cooking areas must be made of fire-resistant material.

(l) *Garbage and other refuse.* (1) Durable, fly-tight, clean containers must be provided to each housing unit, for storing garbage and other refuse.

(2) Provision must be made for collecting refuse, which includes garbage, at least twice a week or more often if necessary for proper disposal in accordance with applicable local, State, or Federal law, whichever is most stringent.

(m) *Insect and rodent control.* Appropriate materials, including sprays, and sealed containers for storing food, must be provided to aid housing occupants in combating insects, rodents, and other vermin.

(n) *Sleeping facilities.* (1) A separate comfortable and clean bed, cot, or bunk, with a clean mattress, must be provided for each person, except in a family arrangement.

(2) Clean and sanitary bedding must be provided for each person.

(3) No more than two deck bunks are permissible.

(o) *Fire, safety, and first aid.* (1) All units in which people sleep or eat must be constructed and maintained according to applicable local or State fire and safety law.

(2) No flammable or volatile liquid or materials may be stored in or next to rooms used for living purposes, except for those needed for current household use.

(3) Mobile housing units must have a second means of escape through which the worker can exit the unit without difficulty.

(4) Adequate, accessible fire extinguishers in good working condition and first aid kits must be provided in the mobile housing.

(p) *Maximum occupancy.* The number of occupants housed in each mobile housing unit must not surpass the occupancy limitations set forth in the manufacturer specifications for the unit.

■ 5. Revise 29 CFR part 501 to read as follows:

Title 29—Labor

PART 501—ENFORCEMENT OF CONTRACTUAL OBLIGATIONS FOR TEMPORARY AGRICULTURAL WORKERS ADMITTED UNDER SECTION 218 OF THE IMMIGRATION AND NATIONALITY ACT

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Authority: 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188; 28 U.S.C. 2461 note; and sec. 701, Pub. L. 114–74, 129 Stat. 584.

Subpart A—General Provisions

§ 501.0 Introduction.

The regulations in this part cover the enforcement of all contractual obligations, including requirements under 8 U.S.C. 1188 and 20 CFR part 655, subpart B, applicable to the

employment of H–2A workers and workers in corresponding employment, including obligations to offer employment to eligible United States (U.S.) workers and to not lay off or displace U.S. workers in a manner prohibited by the regulations in this part or 20 CFR part 655, subpart B.

§ 501.1 Purpose and scope.

(a) *Statutory standards.* The standard in 8 U.S.C. 1188 provides that:

(1) An H–2A Petition to import an H–2A worker, as defined at 8 U.S.C. 1188, may not be approved by the Secretary of the Department of Homeland Security (DHS) unless the petitioner has applied for and received a temporary agricultural labor certification from the Secretary of Labor (Secretary). The temporary agricultural labor certification establishes that:

(i) There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the H–2A Petition; and

(ii) The employment of the H–2A worker in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(2) The Secretary is authorized to take actions that assure compliance with the terms and conditions of employment under 8 U.S.C. 1188, the regulations at 20 CFR part 655, subpart B, or the regulations in this part, including imposing appropriate penalties, and seeking injunctive relief and specific performance of contractual obligations. *See* 8 U.S.C. 1188(g)(2).

(b) *Authority and role of the Office of Foreign Labor Certification.* The Secretary has delegated authority to the Assistant Secretary for the Employment and Training Administration (ETA), who in turn has delegated that authority to the Office of Foreign Labor Certification (OFLC), to issue certifications and carry out other statutory responsibilities as required by 8 U.S.C. 1188. Determinations on an *Application for Temporary Employment Certification* are made by the OFLC Administrator who, in turn, may delegate this responsibility to designated staff, *e.g.,* a Certifying Officer (CO).

(c) *Authority of the Wage and Hour Division.* The Secretary has delegated authority to the Wage and Hour Division (WHD) to conduct certain investigatory and enforcement functions with respect to terms and conditions of employment under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part (''the H–2A program''), and to carry out other statutory responsibilities required by 8 U.S.C. 1188. Certain investigatory, inspection, and law enforcement functions to carry out the provisions under 8 U.S.C. 1188 have been delegated by the Secretary to the WHD. In general, matters concerning the obligations under a work contract between an employer of H–2A workers and the H–2A workers and workers in corresponding employment are enforced by WHD, including whether employment was offered to U.S. workers as required under 8 U.S.C. 1188 or 20 CFR part 655, subpart B, or whether U.S. workers were laid off or displaced in violation of program requirements under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Included within the enforcement responsibility of WHD are such matters as the payment of required wages, transportation, meals, and housing provided during the employment. WHD has the responsibility to carry out investigations, inspections, and law enforcement functions and in appropriate instances to impose penalties, to debar from future certifications, to recommend revocation of existing certification(s), and to seek injunctive relief and specific performance of contractual obligations, including recovery of unpaid wages and reinstatement of laid off or displaced U.S. workers.

(d) *Concurrent authority.* OFLC and WHD have concurrent authority to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

(e) *Effect of regulations.* The enforcement functions carried out by WHD under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part apply to the employment of any H–2A worker and any other worker in corresponding employment as the result of any *Application for Temporary Employment Certification* processed under 20 CFR 655.102(c).

§ 501.2 Coordination between Federal agencies.

(a) Complaints received by ETA or any State Workforce Agency (SWA) regarding contractual H–2A labor standards between the employer and the worker will be immediately forwarded to the appropriate WHD office for appropriate action under the regulations in this part.

(b) Information received in the course of processing applications, program integrity measures, or enforcement actions may be shared between OFLC and WHD or, where applicable to employer enforcement under the H–2A program, other Departments or agencies as appropriate, including the Department of State (DOS) and DHS.

(c) A specific violation for which debarment is imposed will be cited in a single debarment proceeding. OFLC and WHD may coordinate their activities to achieve this result. Copies of final debarment decisions will be forwarded to DHS promptly.

§ 501.3 Definitions.

(a) *Definitions of terms used in this part.* The following defined terms apply to this part:

Act. The Immigration and Nationality Act, as amended (INA), 8 U.S.C. 1101 *et seq.*

Administrative Law Judge (ALJ). A person within the Department of Labor's (Department or DOL) Office of Administrative Law Judges (OALJ) appointed pursuant to 5 U.S.C. 3105.

Administrator. See definitions of OFLC Administrator and WHD Administrator in this paragraph (a).

Adverse effect wage rate (AEWR). The annual weighted average hourly wage for field and livestock workers (combined) in the States or regions as published annually by the U.S. Department of Agriculture (USDA) based on its quarterly wage survey.

Agent. A legal entity or person, such as an association of agricultural employers, or an attorney for an association, that:

(i) Is authorized to act on behalf of the employer for temporary agricultural labor certification purposes;

(ii) Is not itself an employer, or a joint employer, as defined in this part with respect to a specific application; and

(iii) Is not under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review, or DHS under 8 CFR 292.3 or 1003.101.

Agricultural association. Any nonprofit or cooperative association of farmers, growers, or ranchers (including, but not limited to, processing establishments, canneries, gins, packing sheds, nurseries, or other similar fixed-site agricultural employers), incorporated or qualified under applicable State law, that recruits, solicits, hires, employs, furnishes, houses, or transports any worker that is subject to 8 U.S.C. 1188. An agricultural association may act as the agent of an employer, or may act as the sole or joint employer of any worker subject to 8 U.S.C. 1188.

Applicant. A U.S. worker who is applying for a job opportunity for which an employer has filed an *Application for Temporary Employment Certification* and job order.

Application for Temporary Employment Certification. The Office of Management and Budget (OMB)-approved Form ETA–9142A and appropriate appendices submitted by an employer to secure a temporary agricultural labor certification determination from DOL.

Area of intended employment (AIE). The geographic area within normal commuting distance of the place of employment for which the temporary agricultural labor certification is sought. There is no rigid measure of distance that constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (*e.g.,* average commuting times, barriers to reaching the place of employment, or quality of the regional transportation network). If a place of employment is within a Metropolitan Statistical Area (MSA), including a multi-State MSA, any place within the MSA is deemed to be within normal commuting distance of the place of employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a place of employment outside of an MSA may be within normal commuting distance of a place of employment that is inside (*e.g.,* near the border of) the MSA.

Attorney. Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, or commonwealth of the United States, or the District of Columbia (DC). Such a person is also permitted to act as an agent under this part. No attorney who is under suspension, debarment, expulsion, or disbarment from practice before any court, the Department, the Executive Office for Immigration Review under 8 CFR 1003.101, or DHS under 8 CFR 292.3 may represent an employer under this part.

Certifying Officer (CO). The person who makes a determination on an *Application for Temporary Employment Certification* filed under the H–2A program. The OFLC Administrator is the National CO. Other COs may be designated by the OFLC Administrator to also make the determination required under 20 CFR part 655, subpart B.

Chief Administrative Law Judge (Chief ALJ). The chief official of the Department's OALJ or the Chief ALJ's designee.

Corresponding employment. The employment of workers who are not H–2A workers by an employer who has an approved *Application for Temporary Employment Certification* in any work included in the job order, or in any agricultural work performed by the H–2A workers. To qualify as corresponding employment, the work must be performed during the validity period of the job order, including any approved extension thereof.

Department of Homeland Security (DHS). The Department of Homeland Security, as established by 6 U.S.C. 111.

Employee. A person who is engaged to perform work for an employer, as defined under the general common law of agency. Some of the factors relevant to the determination of employee status include: the hiring party's right to control the manner and means by which the work is accomplished; the skill required to perform the work; the source of the instrumentalities and tools for accomplishing the work; the location of the work; the hiring party's discretion over when and how long to work; and whether the work is part of the regular business of the hiring party. Other applicable factors may be considered and no one factor is dispositive.

Employer. A person (including any individual, partnership, association, corporation, cooperative, firm, joint stock company, trust, or other organization with legal rights and duties) that:

(i) Has an employment relationship (such as the ability to hire, pay, fire, supervise, or otherwise control the work of employee) with respect to an H–2A worker or a worker in corresponding employment; or

(ii) Files an *Application for Temporary Employment Certification* other than as an agent; or

(iii) Is a person on whose behalf an *Application of Temporary Employment Certification* is filed.

Employment and Training Administration (ETA). The agency within the Department that includes OFLC and has been delegated authority by the Secretary to fulfill the Secretary's mandate under the INA and DHS' implementing regulations in 8 CFR chapter I, subchapter B, from the administration and adjudication of an *Application for Temporary Employment Certification* and related functions.

Federal holiday. Legal public holiday as defined at 5 U.S.C. 6103.

First date of need. The first date the employer requires the labor or services of H–2A workers as indicated in the *Application for Temporary Employment Certification.*

Fixed-site employer. Any person engaged in agriculture who meets the definition of an employer, as those terms are defined in this part; who owns or operates a farm, ranch, processing establishment, cannery, gin, packing shed, nursery, or other similar fixed-site location where agricultural activities are performed; and who recruits, solicits, hires, employs, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part as incident to or in conjunction with the owner's or operator's own agricultural operation.

H–2A labor contractor (H–2ALC). Any person who meets the definition of employer under this part and is not a fixed-site employer, an agricultural association, or an employee of a fixed-site employer or agricultural association, as those terms are used in this part, who recruits, solicits, hires, employs, furnishes, houses, or transports any worker subject to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

H–2A Petition. The USCIS Form I–129, Petition for a Nonimmigrant Worker, with H Supplement or successor form or supplement, and accompanying documentation required by DHS for employers seeking to employ foreign persons as H–2A nonimmigrant workers.

H–2A worker. Any temporary foreign worker who is lawfully present in the United States and authorized by DHS to perform agricultural labor or services of a temporary or seasonal nature pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), as amended.

Job offer. The offer made by an employer or potential employer of H–2A workers to both U.S. and H–2A workers describing all the material terms and conditions of employment, including those relating to wages, working conditions, and other benefits.

Job opportunity. Full-time employment at a place in the United States to which U.S. workers can be referred.

Job order. The document containing the material terms and conditions of employment that is posted by the SWA on its interstate and intrastate job clearance systems based on the employer's *Agricultural Clearance Order* (Form ETA–790/ETA–790A and all appropriate addenda), as submitted to the National Processing Center.

Joint employment. (i) Where two or more employers each have sufficient definitional indicia of being a joint employer of a worker under the common law of agency, they are, at all times, joint employers of that worker.

(ii) An agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is, at all times, a joint employer of all the H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment. An employer-member of

an agricultural association that files an *Application for Temporary Employment Certification* as a joint employer is a joint employer of the H–2A workers sponsored under the joint employer *Application for Temporary Employment Certification* along with the agricultural association during the period that the employer-member employs the H–2A workers sponsored under the *Application for Temporary Employment Certification.*

(iii) Employers that jointly file a joint employer *Application for Temporary Employment Certification* under 20 CFR 655.131(b) are, at all times, joint employers of all H–2A workers sponsored under the *Application for Temporary Employment Certification* and all workers in corresponding employment.

Metropolitan Statistical Area (MSA). A geographic entity defined by OMB for use by Federal statistical agencies in collecting, tabulating, and publishing Federal statistics. A Metropolitan Statistical Area contains a core urban area of 50,000 or more population, and a Micropolitan Statistical Area contains an urban core of at least 10,000 (but fewer than 50,000) population. Each metropolitan or micropolitan area consists of one or more counties and includes the counties containing the core urban area, as well as any adjacent counties that have a high degree of social and economic integration (as measured by commuting to work) with the urban core.

National Processing Center (NPC). The offices within OFLC in which the Cos operate and which are charged with the adjudication of *Applications for Temporary Employment Certification.*

Office of Foreign Labor Certification (OFLC). OFLC means the organizational component of ETA that provides national leadership and policy guidance, and develops regulations and procedures to carry out the responsibilities of the Secretary under the INA concerning the admission of foreign workers to the United States to perform work described in 8 U.S.C. 1101(a)(15)(H)(ii)(a).

OFLC Administrator. The primary official of OFLC, or the OFLC Administrator's designee.

Period of employment. The time during which the employer requires the labor or services of H–2A workers as indicated by the first and last dates of need provided in the *Application for Temporary Employment Certification.*

Piece rate. A form of wage compensation based upon a worker's quantitative output or one unit of work or production for the crop or agricultural activity.

Place of employment. A worksite or physical location where work under the job order actually is performed by the H–2A workers and workers in corresponding employment.

Secretary of Labor (Secretary). The chief official of the Department, or the Secretary's designee.

State Workforce Agency (SWA). State government agency that receives funds pursuant to the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.,* to administer the State's public labor exchange activities.

Successor in interest. (i) Where an employer, agent, or attorney has violated 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, and has ceased doing business or cannot be located for purposes of enforcement, a successor in interest to that employer, agent, or attorney may be held liable for the duties and obligations of the violating employer, agent, or attorney in certain circumstances. The following factors, as used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Readjustment Assistance Act, may be considered in determining whether an employer, agent, or attorney is a successor in interest; no one factor is dispositive, but all of the circumstances will be considered as a whole:

(A) Substantial continuity of the same business operations;

(B) Use of the same facilities;

(C) Continuity of the work force;

(D) Similarity of jobs and working conditions;

(E) Similarity of supervisory personnel;

(F) Whether the former management or owner retains a direct or indirect interest in the new enterprise;

(G) Similarity in machinery, equipment, and production methods;

(H) Similarity of products and services; and

(I) The ability of the predecessor to provide relief.

(ii) For purposes of debarment only, the primary consideration will be the personal involvement of the firm's ownership, management, supervisors, and others associated with the firm in the violation(s) at issue.

Temporary agricultural labor certification. Certification made by the OFLC Administrator, based on the *Application for Temporary Employment Certification,* job order, and all supporting documentation, with respect to an employer seeking to file an H–2A Petition with DHS to employ one or more foreign nationals as an H–2A worker, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(a) and (c), and 1188, and 20 CFR part 655, subpart B.

United States. The continental United States, Alaska, Hawaii, the Commonwealth of Puerto Rico, and the territories of Guam, the U.S. Virgin Islands, and the Commonwealth of the Northern Mariana Islands.

U.S. Citizenship and Immigration Services (USCIS). An operational component of DHS.

U.S. worker. A worker who is:

(i) A citizen or national of the United States;

(ii) An individual who is lawfully admitted for permanent residence in the United States, is admitted as a refugee under 8 U.S.C. 1157, is granted asylum under 8 U.S.C. 1158, or is an immigrant otherwise authorized by the INA or DHS to be employed in the United States; or

(iii) An individual who is not an unauthorized alien, as defined in 8 U.S.C. 1324a(h)(3), with respect to the employment in which the worker is engaging.

Wage and Hour Division (WHD). The agency within the Department with authority to conduct certain investigatory and enforcement functions, as delegated by the Secretary, under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part.

Wages. All forms of cash remuneration to a worker by an employer in payment for labor or services.

WHD Administrator. The primary official of the WHD, or the WHD Administrator's designee.

Work contract. All the material terms and conditions of employment relating to wages, hours, working conditions, and other benefits, including those required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. The contract between the employer and the worker may be in the form of a separate written document. In the absence of a separate written work contract incorporating the required terms and conditions of employment, agreed to by both the employer and the worker, the work contract at a minimum will be the terms and conditions of the job order and any obligations required under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) *Definition of agricultural labor or services.* For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938, as amended (FLSA), at 29 U.S.C. 203(f); the pressing of apples for cider on a farm; or logging employment. An occupation included

in either statutory definition is agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed in paragraphs (b)(1) through (3) of this section.

(1) *Agricultural labor.* (i) For the purpose of paragraph (b) of this section, agricultural labor means all service performed:

(A) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife;

(B) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane, if the major part of such service is performed on a farm;

(C) In connection with the production or harvesting of any commodity defined as an agricultural commodity in sec. 15(g) of the Agricultural Marketing Act, as amended, 12 U.S.C. 1141j, or in connection with the ginning of cotton, or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, used exclusively for supplying and storing water for farming purposes;

(D) In the employ of the operator of a farm in handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, in its unmanufactured state, any agricultural or horticultural commodity; but only if such operator produced more than one-half of the commodity with respect to which such service is performed;

(E) In the employ of a group of operators of farms (other than a cooperative organization) in the performance of service described in paragraph (b)(1)(i)(D) of this section but only if such operators produced all of the commodity with respect to which such service is performed. For purposes of this paragraph (b)(1)(i)(E), any unincorporated group of operators shall be deemed a cooperative organization if the number of operators comprising such group is more than 20 at any time during the calendar year in which such service is performed;

(F) The provisions of paragraphs (b)(1)(i)(D) and (E) of this section shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption; or

(G) On a farm operated for profit if such service is not in the course of the employer's trade or business or is domestic service in a private home of the employer.

(ii) As used in this section, the term ''farm'' includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(2) *Agriculture.* For purposes of paragraph (b) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 12 U.S.C. 1141j(g), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See* 29 U.S.C. 203(f), as amended. Under 12 U.S.C. 1141j(g), agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and gum rosin. In addition, as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

(3) *Apple pressing for cider.* The pressing of apples for cider on a farm, as the term farm is defined and applied in sec. 3121(g) of the Internal Revenue Code at 26 U.S.C. 3121(g), or as applied in sec. 3(f) of the FLSA at 29 U.S.C. 203(f), pursuant to 29 CFR part 780.

(4) *Logging employment.* Logging employment is operations associated with felling and moving trees and logs from the stump to the point of delivery, such as, but not limited to, marking danger trees, marking trees or logs to be cut to length, felling, limbing, bucking, debarking, chipping, yarding, loading, unloading, storing, and transporting machines, equipment and personnel to, from, and between logging sites.

(5) *Employment as defined and specified in 20 CFR 655.300 through 655.304.* For the purpose of paragraph (b) of this section, agricultural labor or services includes animal shearing, commercial beekeeping, and custom combining activities as defined and specified in 20 CFR 655.300 through 655.304.

(c) *Definition of a temporary or seasonal nature.* For the purposes of this subpart, employment is of a seasonal nature where it is tied to a certain time of year by an event or pattern, such as a short annual growing cycle or a specific aspect of a longer cycle, and requires labor levels far above those necessary for ongoing operations. Employment is of a temporary nature where the employer's need to fill the position with a temporary worker will, except in extraordinary circumstances, last no longer than 1 year.

§ 501.4 Discrimination prohibited.

(a) A person may not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any person who has:

(1) Filed a complaint under or related to 8 U.S.C. 1188 or this part;

(2) Instituted or caused to be instituted any proceedings related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(3) Testified or is about to testify in any proceeding under or related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(4) Consulted with an employee of a legal assistance program or an attorney on matters related to 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(5) Exercised or asserted on behalf of themself or others any right or protection afforded by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

(b) Allegations of discrimination against any person under paragraph (a) of this section will be investigated by WHD. Where WHD has determined through investigation that such allegations have been substantiated, appropriate remedies may be sought. WHD may assess civil money penalties, seek injunctive relief, and/or seek additional remedies necessary to make the worker whole as a result of the discrimination, as appropriate, initiate debarment proceedings, and recommend to OFLC revocation of any

such violator's current temporary agricultural labor certification. Complaints alleging discrimination against workers or immigrants based on citizenship or immigration status may also be forwarded by WHD to the Department of Justice, Civil Rights Division, Immigrant and Employee Rights Section.

§ 501.5 Waiver of rights prohibited.

A person may not seek to have an H–2A worker, a worker in corresponding employment, or a U.S. worker improperly rejected for employment or improperly laid off or displaced waive any rights conferred under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Any agreement by a worker purporting to waive or modify any rights given to said person under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part shall be void as contrary to public policy except as follows:

(a) Waivers or modifications of rights or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part in favor of the Secretary shall be valid for purposes of enforcement; and

(b) Agreements in settlement of private litigation are permitted.

§ 501.6 Investigation authority of the Secretary.

(a) *General.* The Secretary, through WHD, may investigate to determine compliance with obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, either pursuant to a complaint or otherwise, as may be appropriate. In connection with such an investigation, WHD may enter and inspect any premises, land, property, housing, vehicles, and records (and make transcriptions thereof), question any person, and gather any information as may be appropriate.

(b) *Confidential investigation.* WHD shall conduct investigations in a manner that protects the confidentiality of any complainant or other person who provides information to the Secretary in good faith.

(c) *Report of violations.* Any person may report a violation of the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part to the Secretary by advising any local office of the SWA, ETA, WHD, or any other authorized representative of the Secretary. The office or person receiving such a report shall refer it to the appropriate office of WHD for the geographic area in which the reported violation is alleged to have occurred.

§ 501.7 Cooperation with Federal officials.

All persons must cooperate with any Federal officials assigned to perform an investigation, inspection, or law enforcement function pursuant to 8 U.S.C. 1188 and this part during the performance of such duties. WHD will take such action as it deems appropriate, including initiating debarment proceedings, seeking an injunction to bar any failure to cooperate with an investigation, and/or assessing a civil money penalty therefor. In addition, WHD will report the matter to OFLC, and may recommend to OFLC that the person's existing temporary agricultural labor certification be revoked. In addition, Federal statutes prohibiting persons from interfering with a Federal officer in the course of official duties are found at 18 U.S.C. 111 and 114.

§ 501.8 Accuracy of information, statements, and data.

Information, statements, and data submitted in compliance with 8 U.S.C. 1188 or this part are subject to 18 U.S.C. 1001, which provides, with regard to statements or entries generally, that whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals, or covers up a material fact by any trick, scheme, or device, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

§ 501.9 Enforcement of surety bond.

Every H–2A labor contractor (H–2ALC) must obtain a surety bond demonstrating its ability to discharge financial obligations as set forth in 20 CFR 655.132(c).

(a) Notwithstanding the required bond amounts set forth in 20 CFR 655.132(c), the WHD Administrator may require that an H–2ALC obtain a bond with a higher face value amount after notice and opportunity for hearing when it is shown based on objective criteria that the amount of the bond is insufficient to meet potential liabilities.

(b) Upon a final decision reached pursuant to the administrative proceedings of subpart C of this part, including any timely appeal, or resulting from an enforcement action brought directly in a District Court of the United States finding a violation or violations of 20 CFR part 655, subpart B, or this part, the WHD Administrator may make a written demand on the surety for payment of any wages and benefits, including the assessment of interest, owed to an H–2A worker, a worker engaged in corresponding employment, or a U.S. worker improperly rejected or improperly laid off or displaced. The WHD Administrator shall have 3 years from the expiration of the labor certification, including any extension thereof, to make such written demand for payment on the surety. This 3-year period for making a demand on the surety is tolled by commencement of any enforcement action of the WHD Administrator pursuant to § 501.6, § 501.15, or § 501.16 or the commencement of any enforcement action in a District Court of the United States.

Subpart B—Enforcement

§ 501.15 Enforcement.

The investigation, inspection, and law enforcement functions to carry out the provisions of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, as provided in this part for enforcement by WHD, pertain to the employment of any H–2A worker, any worker in corresponding employment, or any U.S. worker improperly rejected for employment or improperly laid off or displaced. Such enforcement includes the work contract provisions as defined in § 501.3(a).

§ 501.16 Sanctions and remedies—general.

Whenever the WHD Administrator believes that 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including, but not limited to, the following:

(a)(1) Institute appropriate administrative proceedings, including: the recovery of unpaid wages (including recovery of recruitment fees paid in the absence of required contract clauses (*see* 20 CFR 655.135(k)); the enforcement of provisions of the work contract, 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the assessment of a civil money penalty; make whole relief for any person who has been discriminated against; reinstatement and make whole relief for any U.S. worker who has been improperly rejected for employment, or improperly laid off or displaced; or debarment for up to 3 years.

(2) The remedies referenced in paragraph (a)(1) of this section will be sought either directly from the employer, agent, or attorney, or from its successor in interest, as appropriate. In the case of an H–2ALC, the remedies will be sought from the H–2ALC directly and/or monetary relief (other than civil money penalties) from the insurer who issued the surety bond to

the H–2ALC, as required by 20 CFR part 655, subpart B, and § 501.9.

(b) Petition any appropriate District Court of the United States for temporary or permanent injunctive relief, including to prohibit the withholding of unpaid wages and/or for reinstatement, or to restrain violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, by any person.

(c) Petition any appropriate District Court of the United States for an order directing specific performance of covered contractual obligations.

§ 501.17 Concurrent actions.

OFLC has primary responsibility to make all determinations regarding the issuance, denial, or revocation of a labor certification as described in 20 CFR part 655, subpart B, and § 501.1(b). WHD has primary responsibility to make all determinations regarding the enforcement functions as described in § 501.1(c). The taking of any one of the actions referred to above shall not be a bar to the concurrent taking of any other action authorized by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. OFLC and WHD have concurrent jurisdiction to impose a debarment remedy pursuant to 20 CFR 655.182 and § 501.20.

§ 501.18 Representation of the Secretary.

The Solicitor of Labor, through authorized representatives, shall represent the WHD Administrator and the Secretary in all administrative hearings under 8 U.S.C. 1188 and this part.

§ 501.19 Civil money penalty assessment.

(a) A civil money penalty may be assessed by the WHD Administrator for each violation of the work contract, or the obligations imposed by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part. Each failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment required by 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part constitutes a separate violation.

(b) In determining the amount of penalty to be assessed for each violation, the WHD Administrator shall consider the type of violation committed and other relevant factors. The factors that the WHD Administrator may consider include, but are not limited to, the following:

(1) Previous history of violation(s) of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(2) The number of H–2A workers, workers in corresponding employment, or U.S. workers who were and/or are affected by the violation(s);

(3) The gravity of the violation(s);

(4) Efforts made in good faith to comply with 8 U.S.C. 1188, 20 CFR part 655, subpart B, and this part;

(5) Explanation from the person charged with the violation(s);

(6) Commitment to future compliance, taking into account the public health, interest, or safety, and whether the person has previously violated 8 U.S.C. 1188; and

(7) The extent to which the violator achieved a financial gain due to the violation(s), or the potential financial loss or potential injury to the worker(s).

(c) A civil money penalty for each violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part will not exceed $1,898 per violation, with the following exceptions:

(1) A civil money penalty for each willful violation of the work contract or a requirement of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, or for each act of discrimination prohibited by § 501.4 shall not exceed $6,386;

(2) A civil money penalty for a violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker shall not exceed $63,232 per worker; and

(3) A civil money penalty for a repeat or willful violation of a housing or transportation safety and health provision of the work contract, or any obligation under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, that proximately causes the death or serious injury of any worker, shall not exceed $126,463 per worker.

(4) For purposes of paragraphs (c)(2) and (3) this section, the term *serious injury* includes, but is not limited to:

(i) Permanent loss or substantial impairment of one of the senses (sight, hearing, taste, smell, tactile sensation);

(ii) Permanent loss or substantial impairment of the function of a bodily member, organ or mental faculty, including the loss of all or part of an arm, leg, foot, hand, or other body part; or

(iii) Permanent paralysis or substantial impairment that causes loss of movement or mobility of an arm, leg, foot, hand, or other body part.

(d) A civil money penalty for failure to cooperate with a WHD investigation shall not exceed $6,386 per investigation.

(e) A civil money penalty for laying off or displacing any U.S. worker employed in work or activities that are encompassed by the approved *Application for Temporary Employment Certification* for H–2A workers in the area of intended employment either within 60 calendar days preceding the first date of need or during the validity period of the job order, including any approved extension thereof, other than for a lawful, job-related reason, shall not exceed $18,970 per violation per worker.

(f) A civil money penalty for improperly rejecting a U.S. worker who is an applicant for employment, in violation of 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, shall not exceed $18,970 per violation per worker.

§ 501.20 Debarment and revocation.

(a) *Debarment of an employer, agent, or attorney.* The WHD Administrator may debar an employer, agent, or attorney, or any successor in interest to that employer, agent, or attorney from participating in any action under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, subject to the time limits set forth in paragraph (c) of this section, if the WHD Administrator finds that the employer, agent, or attorney substantially violated a material term or condition of the temporary agricultural labor certification, with respect to H–2A workers, workers in corresponding employment, or U.S. workers improperly rejected for employment, or improperly laid off or displaced, by issuing a Notice of Debarment.

(b) *Effect on future applications.* No application for H–2A workers may be filed by a debarred employer, or any successor in interest to a debarred employer, or by an employer represented by a debarred agent or attorney, or by any successor in interest to any debarred agent or attorney, subject to the time limits set forth in paragraph (c) of this section. If such an application is filed, it will be denied without review.

(c) *Statute of limitations and period of debarment.* (1) The WHD Administrator must issue any Notice of Debarment not later than 2 years after the occurrence of the violation.

(2) No employer, agent, or attorney, or their successors in interest, may be debarred under this part for more than 3 years from the date of the final agency decision.

(d) *Definition of violation.* For the purposes of this section, a violation includes:

(1) One or more acts of commission or omission on the part of the employer or the employer's agent which involve:

(i) Failure to pay or provide the required wages, benefits, or working conditions to the employer's H–2A

workers and/or workers in corresponding employment;

(ii) Failure, except for lawful, job-related reasons, to offer employment to qualified U.S. workers who applied for the job opportunity for which certification was sought;

(iii) Failure to comply with the employer's obligations to recruit U.S. workers;

(iv) Improper layoff or displacement of U.S. workers or workers in corresponding employment;

(v) Failure to comply with one or more sanctions or remedies imposed by the WHD Administrator for violation(s) of contractual or other H–2A obligations, or with one or more decisions or orders of the Secretary or a court under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part;

(vi) Impeding an investigation of an employer under 8 U.S.C. 1188 or this part, or an audit under 20 CFR part 655, subpart B;

(vii) Employing an H–2A worker outside the area of intended employment, or in an activity/activities not listed in the job order or outside the validity period of employment of the job order, including any approved extension thereof;

(viii) A violation of the requirements of 20 CFR 655.135(j) or (k);

(ix) A violation of any of the provisions listed in § 501.4(a); or

(x) A single heinous act showing such flagrant disregard for the law that future compliance with program requirements cannot reasonably be expected.

(2) In determining whether a violation is so substantial as to merit debarment, the factors set forth in § 501.19(b) shall be considered.

(e) *Procedural requirements.* The Notice of Debarment must be in writing, must state the reason for the debarment finding, including a detailed explanation of the grounds for and the duration of the debarment, must identify appeal opportunities under § 501.33 and a timeframe under which such rights must be exercised and must comply with § 501.32. The debarment will take effect 30 calendar days from the date the Notice of Debarment is issued, unless a request for review is properly filed within 30 calendar days from the issuance of the Notice of Debarment. The timely filing of an administrative appeal stays the debarment pending the outcome of the appeal as provided in § 501.33(d).

(f) *Debarment of associations, employer-members of associations, and joint employers.* If, after investigation, the WHD Administrator determines that an individual employer-member of an agricultural association, or a joint employer under 20 CFR 655.131(b), has committed a substantial violation, the debarment determination will apply only to that employer-member unless the WHD Administrator determines that the agricultural association or another agricultural association member or joint employer under 20 CFR 655.131(b), participated in the violation, in which case the debarment will be invoked against the agricultural association or other complicit agricultural association member(s) or joint employer under 20 CFR 655.131(b) as well.

(g) *Debarment involving agricultural associations acting as sole employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a sole employer has committed a substantial violation, the debarment determination will apply only to the agricultural association and any successor in interest to the debarred agricultural association.

(h) *Debarment involving agricultural associations acting as joint employers.* If, after investigation, the WHD Administrator determines that an agricultural association acting as a joint employer with its employer-members has committed a substantial violation, the debarment determination will apply only to the agricultural association, and will not be applied to any individual employer-member of the agricultural association. However, if the WHD Administrator determines that the employer-member participated in, had knowledge of, or had reason to know of the violation, the debarment may be invoked against the complicit agricultural association member as well. An agricultural association debarred from the H–2A temporary labor certification program will not be permitted to continue to file as a joint employer with its employer-members during the period of the debarment.

(i) *Revocation.* WHD may recommend to the OFLC Administrator the revocation of a temporary agricultural labor certification if WHD finds that the employer:

(1) Substantially violated a material term or condition of the approved temporary agricultural labor certification;

(2) Failed to cooperate with a DOL investigation or with a DOL official performing an investigation, inspection, or law enforcement function under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; or

(3) Failed to comply with one or more sanctions or remedies imposed by WHD, or with one or more decisions or orders of the Secretary or a court order secured by the Secretary under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part.

§ 501.21 Failure to cooperate with investigations.

(a) No person shall refuse to cooperate with any employee of the Secretary who is exercising or attempting to exercise this investigative or enforcement authority.

(b) Where an employer (or employer's agent or attorney) does not cooperate with an investigation concerning the employment of an H–2A worker, a worker in corresponding employment, or a U.S. worker who has been improperly rejected for employment or improperly laid off or displaced, WHD may make such information available to OFLC and may recommend that OFLC revoke the existing certification that is the basis for the employment of the H–2A workers giving rise to the investigation. In addition, WHD may take such action as appropriate, including initiating proceedings for the debarment of the employer, agent, or attorney from future certification for up to 3 years, seeking an injunction, and/or assessing civil money penalties against any person who has failed to cooperate with a WHD investigation. The taking of any one action shall not bar the taking of any additional action.

§ 501.22 Civil money penalties—payment and collection.

Where a civil money penalty is assessed in a final order by the WHD Administrator, by an ALJ, or by the Administrative Review Board (ARB), the amount of the penalty must be received by the WHD Administrator within 30 days of the date of the final order. The person assessed such penalty shall remit the amount thereof, as finally determined, to the Secretary. Payment shall be made by certified check or money order made payable and delivered or mailed according to the instructions provided by the Department; through the electronic pay portal located at *www.pay.gov* or any successor system; or by any additional payment method deemed acceptable by the Department.

Subpart C—Administrative Proceedings

§ 501.30 Applicability of procedures and rules in this subpart.

The procedures and rules contained in this subpart prescribe the administrative process that will be applied with respect to a determination to assess civil money penalties, debar, or increase the amount of a surety bond and which may be applied to the enforcement of provisions of the work contract, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this

part, or to the collection of monetary relief due as a result of any violation. Except with respect to the imposition of civil money penalties, debarment, or an increase in the amount of a surety bond, the Secretary may, in the Secretary's discretion, seek enforcement action in a District Court of the United States without resort to any administrative proceedings.

Procedures Relating to Hearing

§ 501.31 Written notice of determination required.

Whenever the WHD Administrator decides to assess a civil money penalty, debar, increase a surety bond, or proceed administratively to enforce contractual obligations, or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part, including for the recovery of the monetary relief, the person against whom such action is taken shall be notified in writing of such determination.

§ 501.32 Contents of notice.

The notice required by § 501.31 shall:

(a) Set forth the determination of the WHD Administrator including the amount of any monetary relief due or actions necessary to fulfill a contractual obligation or obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, or this part; the amount of any civil money penalty assessment; whether debarment is sought and if so its term; and any change in the amount of the surety bond, and the reason or reasons therefor.

(b) Set forth the right to request a hearing on such determination.

(c) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the WHD Administrator shall become final and unappealable.

(d) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 501.33.

§ 501.33 Request for hearing.

(a) Any person desiring review of a determination referred to in § 501.32, including judicial review, shall make a written request for an administrative hearing to the official who issued the determination at the WHD address appearing on the determination notice, no later than 30 calendar days after the date of issuance of the notice referred to in § 501.32.

(b) No particular form is prescribed for any request for hearing permitted by this part. However, any such request shall:

(1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

(c) The request for such hearing must be received by the official who issued the determination, at the WHD address appearing on the determination notice, within the time set forth in paragraph (a) of this section. Requests may be made by certified mail or by means normally assuring overnight delivery.

(d) The determination shall take effect on the start date identified in the written notice of determination, unless an administrative appeal is properly filed. The timely filing of an administrative appeal stays the determination pending the outcome of the appeal proceedings, provided that any surety bond remains in effect until the conclusion of any such proceedings.

Rules of Practice

§ 501.34 General.

(a) Except as specifically provided in this part, the *Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges* established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings described in this part.

(b) As provided in the Administrative Procedure Act, 5 U.S.C. 556, any oral or documentary evidence may be received in proceedings under this part. The Federal Rules of Evidence and 29 CFR part 18, subpart B, will not apply, but principles designed to ensure production of relevant and probative evidence shall guide the admission of evidence. The ALJ may exclude evidence that is immaterial, irrelevant, or unduly repetitive.

§ 501.35 Commencement of proceeding.

Each administrative proceeding permitted under 8 U.S.C. 1188 and the regulations in this part shall be commenced upon receipt of a timely request for hearing filed in accordance with § 501.33.

§ 501.36 Caption of proceeding.

(a) Each administrative proceeding instituted under 8 U.S.C. 1188 and the regulations in this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows: In the Matter of ___, Respondent.

(b) For the purposes of such administrative proceedings, the WHD Administrator shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

Referral for Hearing

§ 501.37 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 501.33, the WHD Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or the Regional Solicitor for the Region in which the action arose, will, by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing signed by the person requesting such hearing or the authorized representative of such person, to the Chief ALJ, for a determination in an administrative proceeding as provided in this subpart. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under 29 CFR part 18 or this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the WHD Administrator upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 501.38 Notice of docketing.

Upon receipt of an Order of Reference, the Chief ALJ shall appoint an ALJ to hear the case. The ALJ shall promptly notify all interested parties of the docketing of the matter and shall set the time and place of the hearing. The date of the hearing shall be not more than 60 calendar days from the date on which the Order of Reference was filed.

§ 501.39 Service upon attorneys for the Department of Labor—number of copies.

Two copies of all pleadings and other documents required for any administrative proceeding provided in this subpart shall be served on the attorneys for DOL. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, and one copy on

the attorney representing the Department in the proceeding.

Procedures Before Administrative Law Judge

§ 501.40 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the ALJ, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the ALJ; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the ALJ; or

(2) Inform the ALJ that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the ALJ, within 30 calendar days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

Post-Hearing Procedures

§ 501.41 Decision and order of Administrative Law Judge.

(a) The ALJ will prepare, within 60 calendar days after completion of the hearing and closing of the record, a decision on the issues referred by the WHD Administrator.

(b) The decision of the ALJ shall include a statement of the findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may affirm, deny, reverse, or modify, in whole or in part, the determination of the WHD Administrator. The reason or reasons for such order shall be stated in the decision.

(c) The decision shall be served on all parties and the ARB.

(d) The decision concerning civil money penalties, debarment, monetary relief, and/or enforcement of other contractual obligations under 8 U.S.C. 1188, 20 CFR part 655, subpart B, and/or this part, when served by the ALJ shall constitute the final agency order unless the ARB, as provided for in § 501.42, determines to review the decision.

Review of Administrative Law Judge's Decision

§ 501.42 Procedures for initiating and undertaking review.

(a) A respondent, WHD, or any other party wishing review, including judicial review, of the decision of an ALJ must, within 30 calendar days of the decision of the ALJ, petition the ARB to review the decision. Copies of the petition must be served on all parties and on the ALJ. If the ARB does not issue a notice accepting a petition for review of the decision within 30 calendar days after receipt of a timely filing of the petition, or within 30 calendar days of the date of the decision if no petition has been received, the decision of the ALJ will be deemed the final agency action.

(b) Whenever the ARB, either on the ARB's own motion or by acceptance of a party's petition, determines to review the decision of an ALJ, a notice of the same shall be served upon the ALJ and upon all parties to the proceeding.

§ 501.43 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the ARB's notice to accept the petition, the OALJ will promptly forward a copy of the complete hearing record to the ARB.

§ 501.44 Additional information, if required.

Where the ARB has determined to review such decision and order, the ARB will notify each party of:

(a) The issue or issues raised;

(b) The form in which submissions must be made (*e.g.,* briefs or oral argument); and

(c) The time within which such presentation must be submitted.

§ 501.45 Decision of the Administrative Review Board.

The ARB's decision shall be issued within 90 days from the notice granting the petition and served upon all parties and the ALJ.

Record

§ 501.46 Retention of official record.

The official record of every completed administrative hearing provided by the regulations in this part shall be maintained and filed under the custody and control of the Chief ALJ, or, where the case has been the subject of administrative review, the ARB.

§ 501.47 Certification.

Upon receipt of a complaint seeking review of a decision issued pursuant to this part filed in a District Court of the United States, after the administrative remedies have been exhausted, the Chief ALJ or, where the case has been the subject of administrative review, the ARB shall promptly index, certify, and file with the appropriate District Court of the United States, a full, true, and correct copy of the entire record, including the transcript of proceedings.

Martin J. Walsh,

Secretary of Labor.

[FR Doc. 2022–20506 Filed 10–6–22; 8:45 am]

BILLING CODE 4510–FP–P

FEDERAL REGISTER

Vol. 87 Wednesday,
No. 196 October 12, 2022

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Finding for the Gopher Tortoise Eastern and Western Distinct Population Segments; Proposed Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R4–ES–2009–0029; FF09E21000 FXES1111090FEDR 223]

Endangered and Threatened Wildlife and Plants; Finding for the Gopher Tortoise Eastern and Western Distinct Population Segments

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notification of findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce findings on the status of the gopher tortoise (*Gopherus polyphemus*) rangewide and in the eastern (east of the Mobile and Tombigbee Rivers) and western (west of the Mobile and Tombigbee Rivers) portions of the range under the Endangered Species Act of 1973, as amended (Act). After a review of the best available scientific and commercial information, we find that listing the gopher tortoise as an endangered or a threatened species rangewide is not warranted. We find that the gopher tortoise in the eastern portion of its range and the gopher tortoise in the western portion of its range meet the criteria of separate distinct population segments (DPS), as defined by our Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act. We determine the Eastern DPS of the gopher tortoise is not warranted for listing at this time. Further, we confirm that the Western DPS of the gopher tortoise meets the definition of a threatened species. Additionally, this notice serves as our completed 5-year review of the Western DPS of the gopher tortoise. We ask the public to submit to us any new information that becomes available concerning the threats to the gopher tortoise or its habitat at any time.

DATES: The finding announced in this document was made on October 12, 2022.

ADDRESSES: This finding is available on the internet at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2009–0029. Supporting information that we developed for this finding including the species status assessment report, peer review, and future condition modeling, are found in the decision file available at *https://www.regulations.gov* at Docket No. FWS–R4–ES–2009–0029 and on the Service's website at *https://www.fws.gov/office/florida-ecological-services/library,* and is available for public inspection, by appointment, during normal business hours at the U.S. Fish and Wildlife Service, Florida Field Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256. Please submit any new information or materials concerning this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Lourdes Mena, Division Manager, Florida Classification and Recovery, U.S. Fish and Wildlife Service, Florida Ecological Services Field Office, 7915 Baymeadows Way, Suite 200, Jacksonville, FL 32256–7517; telephone 904–731–3134; or James Austin, Acting Field Supervisor, Mississippi Ecological Services Field Office, 6578 Dogwood View Parkway, Jackson, MS 39213; telephone 601–321–1129. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TTDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Previous Federal Actions

On July 7, 1987, the gopher tortoise (*Gopherus polyphemus*) was listed under the Act as a threatened species (52 FR 25376) in the western portion of its range, from the Tombigbee and Mobile Rivers in Alabama west to southeastern Louisiana on the lower Gulf Coastal Plain. On January 18, 2006, we received a petition dated January 13, 2006, from Save Our Big Scrub, Inc. and Wild South requesting that the population of the gopher tortoise in the eastern portion of its range be listed as a threatened species under the Act and critical habitat be designated. On September 9, 2009, we published a 90-day finding (74 FR 46401) that the petition contained substantial information indicating that listing may be warranted for the eastern population of the gopher tortoise. On July 27, 2011, we published a 12-month finding (76 FR 45130) on the petition to list the gopher tortoise in the eastern portion of its range, and, in that finding, we evaluated the status of the gopher tortoise in the western portion of its range. We reaffirmed that the gopher tortoise warranted listing as a threatened species in the western portion of its range. We found the gopher tortoise in the eastern portion of its range was warranted for listing but precluded by higher priority listing actions (warranted but precluded finding).

The species was placed on the candidate list (our list of species that have been found to warrant listing, but which are precluded by higher priority listing actions) and received a listing priority number of 8 based on the magnitude and immediacy of the threats. The eastern population of gopher tortoise was included in subsequent annual candidate notices of review (CNORs) (76 FR 66370, October 26, 2011; 77 FR 69994, November 21, 2012; 78 FR 70104, November 22, 2013; 79 FR 72450, December 5, 2014; 80 FR 80584, December 24, 2015; 81 FR 87246, December 2, 2016; 84 FR 54732, October 10, 2019; 85 FR 73164, November 16, 2020; 87 FR 26152, May 3, 2022).

On April 1, 2021, the Center for Biological Diversity (CBD) filed a complaint alleging our ''warranted but precluded'' finding for the eastern population of the gopher tortoise violated the Act because we were not making ''expeditious progress'' in adding qualified species to the lists of endangered or threatened species and because we had not shown that the immediate proposal of the eastern population of the gopher tortoise was precluded by higher priority actions consistent with 16 U.S.C. 1533(b)(3)(B)(iii). On April 26, 2022, the Service entered into a court-approved settlement agreement with CBD requiring the Service to submit either a warranted or a not warranted finding for the eastern population of gopher tortoise to the **Federal Register** by September 30, 2022.

On June 20, 2019, we initiated a 5-year review for the western population of the gopher tortoise (84 FR 28850), and this document completes our status review under section 4(c)(2) of the Act. See *https://ecos.fws.gov/ecp/species/C044* for the species profile for the gopher tortoise.

Supporting Documents

A species status assessment (SSA) team prepared an SSA report for the gopher tortoise. The SSA team was composed of Service biologists, in consultation with other species experts. The SSA report represents compilations of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions

under the Act, we sought the expert opinions of seven appropriate specialists regarding the gopher tortoise SSA. We received responses from two peer reviewers. We coordinated with the nine Tribal nations in the range of the species early in the SSA process for the gopher tortoise, including the Catawba Nation, the Jena Band of Choctaw Indians, the Tunica-Biloxi Indian Tribe, the Miccosukee Tribe of Indians, the Seminole Tribe of Florida, the Chitimacha Tribe of Louisiana, the Coushatta Tribe of Louisiana, the Mississippi Band of Choctaw Indians, and the Poarch Band of Creek Indians. We sent the draft SSA report for review to 10 Tribes (with the addition of the Cherokee Nation).

Background

Species Information

In this section, we present an overview of the biological information for gopher tortoise. A more thorough review of the taxonomy, species description, life history, species needs, and ecology of the gopher tortoise is presented in detail in the SSA report (Service 2022, pp. 24–45).

Taxonomy and Species Description

The gopher tortoise is the only tortoise (family Testudinidae) east of the Mississippi River; one of six species in the genus *Gopherus* in North America (Ernst and Lovich 2009, p. 581; Edwards et al. 2016, p. 131). The scientific name, *Gopherus polyphemus,* has remained unchanged since it was first described by F.M. Daudin in 1802. There is no taxonomic distinction between the gopher tortoise in the western and eastern portions of its range or at any level of geographic subdivision. However, genetic differences do occur in populations across the range of the species. Genetic variation across the range is best explained by the geographic features of the Apalachicola-Chattahoochee River system and the Mobile and Tombigbee Rivers in Alabama (Osentoski and Lamb 1995, p. 709; Clostio et al. 2012, pp. 613–625; Ennen et al. 2012, pp. 110–122; Gaillard et al. 2017, p. 497) (see Genetics section below for more information).

The gopher tortoise is larger than any other terrestrial turtle in the Southeast and is characterized by a domed, dark brown to grayish-black carapace (upper shell) and a yellowish plastron (lower shell). Adult gopher tortoises are typically 10 to 12 inches (in) (25.4 to 30.5 centimeters (cm)) long and weigh 9 to 13 pounds (4 to 6 kilograms) (Ernst et al. 1994, p. 466; Ashton and Ashton 2008, p. 17; Bramble and Hutchison 2014, p. 4). Hatchlings are up to 2 in (5 cm) in length, with a somewhat soft, yellow-orange shell. When young, female gopher tortoises may be smaller than males, but, as adults, female tortoises are generally larger than males. Females have a flat plastron, while that of males is more concave. Male gopher tortoises can also be distinguished by a larger gland under the chin and a longer throat projection. As a fossorial species, its hind feet are elephantine or stumpy, and the forelimbs are shovel-like, with claws used for digging.

Range and Distribution

The gopher tortoise occurs in the Southeastern Atlantic and Gulf Coastal Plains from southern South Carolina, west through Georgia, the Florida panhandle, Alabama, and Mississippi to eastern Louisiana, and south through peninsular Florida (Auffenberg and Franz 1982, p. 95). The current range of the gopher tortoise generally aligns with the species' historical range and the historical range of the longleaf pine ecosystem (Auffenberg and Franz 1982, pp. 99–120). The eastern portion of the gopher tortoise's range includes Alabama (east of the Tombigbee and Mobile Rivers), Florida, Georgia, and southern South Carolina. The western portion of the range includes areas west of the Tombigbee River in Alabama, Mississippi, and Louisiana.

The gopher tortoise is more widespread and abundant in the eastern portion of its range, particularly in central and north Florida and eastern and southern Georgia. These areas in Florida and Georgia make up the core of the species' distribution (Tuberville et al. 2009, p. 12). The best available information indicates gopher tortoises occur on approximately 844,812 acres (ac) (341,883 hectares (ha)) across the species' range (areal extent of populations as delineated for our analysis below in Analysis Unit and Population Delineation*).* An additional 16,338,932 ac (6,612,131 ha) of potential habitat has been identified by a species-specific habitat suitability model (Crawford et al. 2020, entire; Service 2022, pp. 122–126). For the SSA assessment, potential habitat is described as suitable habitat with unknown gopher tortoise presence outside delineated local gopher tortoise populations but within the species' current range. Rangewide, approximately 80 percent of potential gopher tortoise habitat occurs in private ownership, with the remainder owned or managed by local, State, Federal, or private conservation entities (Wear and Greis 2013, p. 103; Natural Resources Conservation Service (NRCS) 2018, p. 2).

Life History

The gopher tortoise's life history is characterized by a late age of reproductive maturity, low reproductive output (fecundity), and long lifespan, which make this long-lived species more vulnerable to demographic perturbations and slower to rebound from impacts to populations (Lohoefener and Lohmeier 1984, p. 2; Service 2013, p. 21; Tuberville et al. 2014, p. 1151). Gopher tortoises reach reproductive maturity between 9 and 20 years of age, although reproductive maturity is determined by size rather than age. Growth rates and sizes at sexual maturity vary among populations and habitat quality (Landers et al. 1982, pp. 104–105; Mushinsky et al. 1994, pp. 123–125).

Gopher tortoises generally breed from May through October; however, the gopher tortoise populations in south Florida have an extended reproductive season (Landers et al. 1980, p. 355; McRae et al. 1981, pp. 172–173; Taylor 1982, entire; Diemer 1992a, pp. 282–283; Ott-Eubanks et al. 2003, p. 317; Moore et al. 2009, p. 391). The warmer weather in south Florida is associated with year-round courtship behavior, greater site productivity, and larger clutches leading to production of young over a much longer time period than populations farther north (Ashton et al. 2007, p. 359; Moore et al. 2009, p. 391). Female gopher tortoises usually lay eggs from mid-May through mid-July, and incubation lasts 80–110 days (Diemer 1986, p. 127). Rangewide, average clutch size varies from 4–8 eggs per clutch, with clutches in the western portion of the range averaging lower with 4.8–5.6 eggs per clutch (Seigel and Hurley 1993, p. 6; Seigel and Smith 1996, pp. 10–11; Tuma 1996, pp. 22–23; Epperson and Heise 2003, pp. 318–321; Ashton et al. 2007, p. 357). Sex determination is temperature dependent for gopher tortoises, with lower temperatures producing more males and higher temperatures producing more females. The pivotal temperature for a 1:1 sex ratio has been observed to be 29.3 degrees Celsius (°C) (84.7 degrees Fahrenheit (°F)) (DeMuth 2001, pp. 1612–1613). The lifespan of gopher tortoises is generally estimated at 50–80 years.

The gopher tortoise's diet reflects that of a generalist herbivore (*e.g.,* eating mainly grasses, plants, fallen flowers, fruits, and leaves) and may also include insects and carrion (Auffenberg and Iverson 1979, p. 558; Landers 1980, p. 9; Garner and Landers 1981, p. 123;

Wright 1982, p. 25; Macdonald and Mushinsky 1988, pp. 349–351; Birkhead et al. 2005, pp. 146, 155; Mushinsky et al. 2006, p. 480; Richardson and Stiling 2019, pp. 387–388). Gopher tortoises prefer grassy, open-canopy microhabitats, and their population density directly relates to the density and diversity of herbaceous biomass and a lack of canopy (Auffenberg and Iverson 1979, p. 558; Landers and Speake 1980, p. 522; Wright 1982, p. 22; Stewart et al. 1993, p. 79; Breininger et al. 1994, p. 63; Boglioli et al. 2000, p. 703; Ashton and Ashton 2008, p. 78).

Habitat

Gopher tortoise habitat comprises well-drained, sandy soils (needed for burrowing, sheltering, and nest construction/breeding), with an open canopy, sparsely vegetated midstory, and abundant herbaceous groundcover (for feeding). Soil characteristics are an important component of gopher tortoise habitat and affect burrow density and extent. The soils in the eastern portion of the range are characterized by a higher sand content, although the percentage of sand varies by habitat type (*i.e.,* coastal soils often contain more sand than more inland upland soils) (Auffenberg and Franz 1982, pp. 98–105, 113–118, 120–121). In the western portion of the range, soils are loamy and contain more clay, and xeric (dry) conditions are less common west of the Florida panhandle (Lohoefener and Lohmeier 1981, p. 240; Auffenberg and Franz 1982, pp. 114–115; Mann 1995, pp. 10–11; Craul et al. 2005, pp. 11–13). Higher clay content in soils may contribute to lower abundance and density of tortoises (Means 1982, p. 524; Wright 1982, p. 21; Ultsch and Anderson 1986, p. 790; Estes and Mann 1996, p. 24; Smith et al. 1997, p. 599; Jones and Dorr 2004, p. 461).

Historically, gopher tortoise's habitats were open pine forests, savannahs, and xeric grasslands. Today, upland natural vegetative communities, including longleaf pine (*Pinus palustris*) and other open pine systems, sandhill, xeric (dry) oak (*Quercus* spp.) uplands, xeric hammock, xeric Florida scrub, and maritime scrub coastal habitats, most often provide the conditions necessary (*e.g.,* open canopy and abundant herbaceous groundcover) to support gopher tortoises (Auffenberg and Franz 1982, p. 99; Diemer 1986, p. 126; Diemer 1987, pp. 73–74; Breininger et al. 1994, p. 60). In addition to the upland natural communities, some ruderal (disturbed) habitat may also provide the open canopy or sunny conditions and herbaceous groundcover needed by gopher tortoises (Auffenberg and Franz 1982, p. 99; Howell et al. 2020, p. 1). An open canopy allows sunlight to reach the forest floor to stimulate the growth and development of herbaceous groundcover and provide warmth for basking and egg incubation (Landers 1980, pp. 6, 8; Landers and Speake 1980, p. 522; Lohoefener and Lohmeier 1981, entire; Auffenberg and Franz 1982, pp. 98–99, 104–107, 111, 120; Boglioli et al. 2000, p. 703; Rostal and Jones 2002, p. 485; Jones and Dorr 2004, p. 461; McDearman 2006, p. 2; McIntyre et al. 2019, p. 287). When canopies become too dense in an area, gopher tortoises move into ruderal habitats such as roadsides with more herbaceous ground cover, lower tree cover, and sun exposure (Garner and Landers 1981, p. 122; McCoy et al. 1993, p. 38; Baskaran et al. 2006, p. 346). Ruderal habitats may also include utility rights-of-way, edges, fencerows, pasturelands, and planted pine stands.

Historically, open-canopied southern pine forests were maintained by frequent, lightning-generated fires. Currently, a variety of land management practices including prescribed fire, grazing, mowing, roller chopping, timber harvesting, and selective herbicide application, are used in the restoration, enhancement, and maintenance of gopher tortoise habitats (Cox et al. 2004, p. 10; Ashton and Ashton 2008, p. 78; Georgia Department of Natural Resources (GDNR) 2014, unpaginated; Rautsaw et al. 2018, p. 141). These habitat management activities implemented singularly or in combination (*e.g.,* roller chopping followed by prescribed fire) are used to restore and maintain the open canopy, sparsely vegetated midstory, and abundant herbaceous groundcover conditions needed by gopher tortoises.

Gopher tortoise burrows are central to normal feeding, breeding, and sheltering activity. Gopher tortoises can excavate many burrows over their lifetime and often use several each year. Burrows typically extend 15 to 25 feet (ft; 4.6 to 7.6 meters (m)), can be up to 12 ft (3.7 m) deep, and provide shelter from predators, winter cold, fire, and summer heat (Hansen 1963, p. 359; Landers 1980, p. 6; Wright 1982, p. 50; Diemer 1986, p. 127; Boglioli 2000, p. 699). Tortoises spend most of their time within burrows and emerge during the day to bask, feed, and reproduce (Service 2022, p. 28). During the cool weather dormant season, gopher tortoises throughout most of the range shelter within their burrows, become torpid, do not eat, and rarely emerge, except on warm days to bask in sunlight at the burrow entrance (Service 2013, p. 21).

As a keystone species (which is a species that has a disproportionately large effect on its natural environment relative to its abundance), gopher tortoise burrow systems provide benefits to the landscape and return leached nutrients to the soil surface; increase habitat heterogeneity; shelter seeds from fires; and provide resources and refugia for other species (Auffenberg and Weaver 1969, p. 191; Landers 1980, pp. 2, 515; Kaczor and Hartnett 1990, pp. 107–108). An estimated 60 vertebrates and 302 invertebrates, including the threatened Eastern indigo snake, the gopher mouse, the six-lined roadrunner, the gopher frog, the cave cricket, and casual visitants, such as the tiger beetle, skunk, opossum, and rattlesnakes, share tortoise burrows (Jackson and Milstrey 1989, p. 87).

Genetics

Genetic flow in gopher tortoise populations is known to be influenced by distance, geographic features, and human influence by transporting tortoises across the range. Several studies show genetic assemblages across the geographic range, but these studies have not been entirely congruent in their delineations of western and eastern genetic assemblages (Osentoski and Lamb 1995, p. 713; Clostio et al. 2012, pp. 617–620; Ennen et al. 2012, pp. 113–120; Gaillard et al. 2017, pp. 501–503). Recent microsatellite analysis suggests there are five main genetic groups delineated by the Tombigbee and Mobile Rivers, Apalachicola and Chattahoochee Rivers, and the transitional areas between several physiographic province sections of the Coastal Plains (*i.e.,* Eastern Gulf, Sea Island, and Floridian) (figure 1) (Gaillard et al. 2017, pp. 505–507).

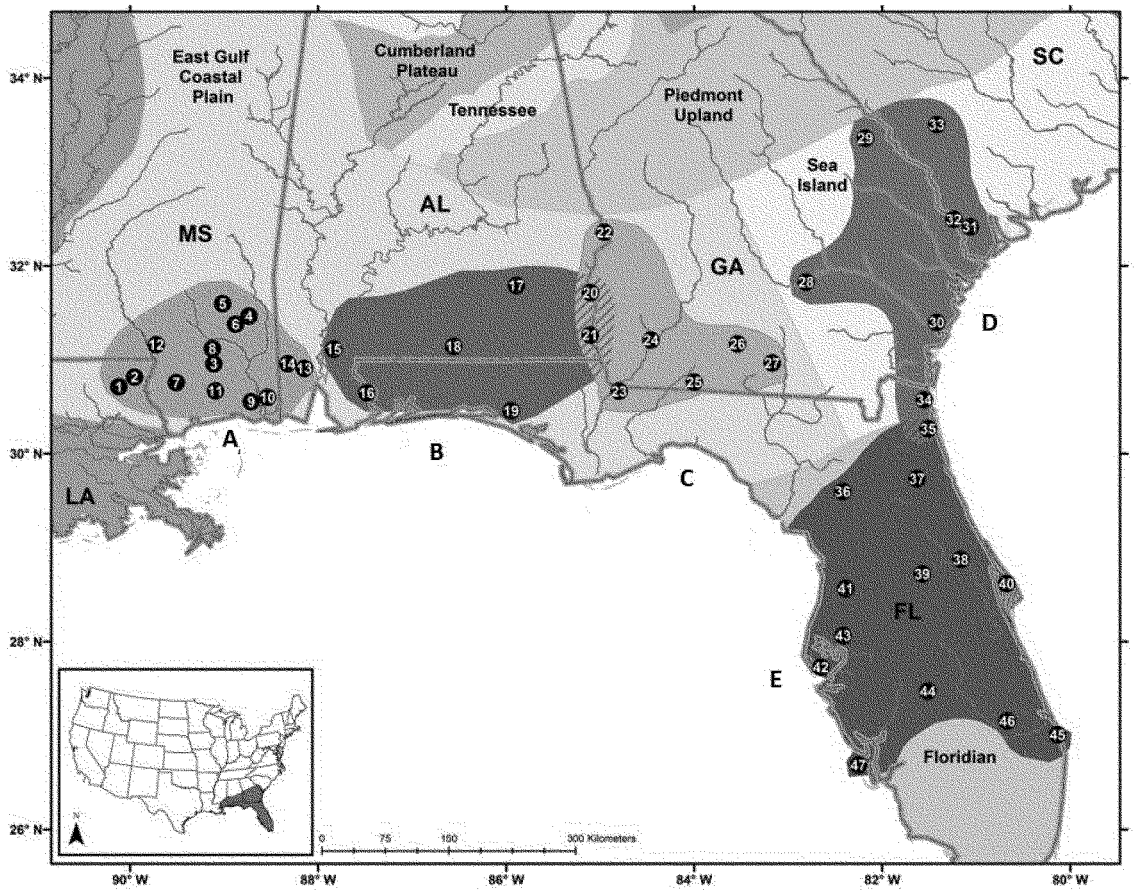

Figure 1. Sampling locations and subsequent genetics units from genetics study of gopher tortoises shown in relation to physiographic province sections of the U.S. Coastal Plains.
The shaded areas around sampling sites represent their assignment to one of the five genetic groups as follows: (A) Western (portions of Louisiana, Mississippi, and western Alabama); (B) Central (portions of Alabama, the panhandle of Florida, and extreme western Georgia); (C) West Georgia (western Georgia); (D) East Georgia (eastern Georgia); and (E) Florida (peninsular Florida). (Figure from Gaillard et al. 2017.)

The last decade of genetic research has shown that genetic diversity exists among individuals in a population, among populations, and across the range (Ennen et al. 2010, entire; Clostio et al. 2012, entire; Gaillard et al. 2017, entire). The most recent rangewide genetic analysis confirmed that the edges (periphery) of the range have lower levels of genetic diversity relative to the core but also showed genetic mixing at the borders between units (Gaillard et al. 2017, p. 507). Evidence of tortoises with ancestry from different genetic sites is most likely due to the decades of tortoises being moved by humans as part of various formal and informal translocation and population augmentation efforts as well as non-conservation, human-mediated movements (see Translocation and Headstarting, below) (Gaillard et al. 2017, pp. 504–505). In addition, contemporary gene flow is asymmetric across the gopher tortoise range as a result of recent migrations affecting changes in genetic diversity. For example, gene flow is higher from the Central to Western genetic regions and from the Florida panhandle to the East Georgia genetic region, while the Florida panhandle area has low genetic flow with the West Georgia genetic region (Gaillard et al. 2017, pp. 504–509). In general, migration rates between genetic regions were low, with the highest proportion of movements and genetic exchange from within the same genetic unit (Gaillard et al. 2017, pp. 505–506).

Home Range and Movement

As mentioned previously, gopher tortoises often use several burrows per year. The burrows of a gopher tortoise represent the general boundaries of a home range, which is the area used for feeding, breeding, and sheltering (McRae et al. 1981, p. 176). Gopher tortoise home ranges tend to vary in size depending on habitat quality, with larger areas in lower quality habitat (Auffenberg and Iverson 1979, pp. 559–561; Castellon et al. 2012, p. 159; Guyer et al. 2012, p. 130). Home ranges are larger in the western portion of the gopher tortoise range than those typically observed for tortoises in Alabama (east of the Tombigbee and Mobile Rivers), Georgia, South Carolina, and Florida, and this variation is most likely due to habitat quality differences (Lohoefener and Lohmeier 1984, pp. 1–25; Epperson and Heise 2003, p. 315; Tuberville et al. 2005, p. 356; Richter et al. 2011, p. 408). Males typically have larger home ranges and tend to travel farther distances than females; this is primarily for breeding opportunities and related to burrow density and social hierarchical behaviors (McRae et al. 1981, p. 175; Guyer et al. 2012, pp. 129–

132; Castellon et al. 2018, pp. 11–12). For example, average home ranges in Mississippi, Alabama, Florida, and Georgia have varied from 0.1 to 39.8 ac (0.04 to 16.1 hectares ha) (McRae et al. 1981, pp. 175–176; Diemer 1992b, pp. 160–161; Tuma 1996, pp. 28–43; Ott-Eubanks et al. 2003, pp. 315–316; Guyer et al. 2012, pp. 128–129; Castellon et al. 2018, p. 17).

Just as gopher tortoise home ranges are larger in lower quality habitat, gopher tortoise movements also increase as herbaceous biomass and habitat quality decrease and tortoises must search farther for adequate resources (Auffenberg and Iverson 1979, p. 558; Auffenberg and Franz 1982, p. 121; Castellon et al. 2018, p. 18). As distances increase between gopher tortoise burrows, isolation among gopher tortoises also increases due to the decreasing rate of visitation and breeding by males to females (Boglioli et al. 2003, p. 848; Guyer et al. 2012, p. 131). Most breeding populations have been found to consist of burrows no greater than about 549 ft (167 m) apart, although males may move up to 1,640 ft (500 m) for mating opportunities (Guyer and Johnson 2002, pp. 6–8; Ott-Eubanks et al. 2003, p. 320; Guyer et al. 2012, p. 131).

Population Dynamics

At the landscape scale, the gopher tortoise requires large swaths of interconnected, high-quality habitat patches to support healthy populations. Large swaths of high-quality habitat provide habitat connectivity for gopher tortoise life-history needs of dispersal (immigration and emigration), breeding, and foraging. Interconnected, high-quality habitat that supports gopher tortoise requirements influences population dynamics and demographics through the carrying capacity of the area and opportunities for genetic exchange.

As long-lived animals, gopher tortoises naturally experience delayed sexual maturity, low reproductive rates, high mortality at young ages and small size-classes, and relatively low adult mortality. Factors affecting population growth, decline, and dynamics include the number or proportion of annually breeding and egg-laying females (breeding population size), clutch size, nest depredation rates, egg hatching success, mortality (hatchling–yearling, juvenile–subadult, adult), the age or size at first reproduction, age- or stage-class population structure, maximum age of reproduction, and immigration and emigration rates.

Gopher tortoise population dynamics are sensitive to demographic changes in adult, hatchling, and juvenile survival (Gibbons 1987, entire; Congdon et al. 1993, entire; Heppell 1998, entire; Epperson and Heise 2001, entire; Miller 2001, entire; Wester 2005, entire; McDearman 2006, p. 7). Hatchling survivorship is the most critical life history stage due to the high mortality in this life stage (Tuberville et al. 2009, p. 33). For example, a simulated 5 percent decrease in hatchling mortality shifted the population growth rate from slowly declining (1.5 percent decrease) to slowly increasing (1.1 percent increase) and eliminated the probability of extinction within 200 years (Tuberville et al. 2009, p. 33). Changes in other vital parameters, including age of first reproduction and average clutch size, also affect population growth, although generally not to the extent of hatchling and juvenile mortality (McDearman 2006, pp. 7, 20).

Demographic factors have been evaluated in population viability analysis (PVA) studies to estimate the probabilities of gopher tortoise population extinction over time and the important factors affecting the species' viability (Cox et al. 1987, pp. 24–34; Lohoefener and Lohmeier 1984, entire; Cox 1989, p. 10; Epperson and Heise 2001, pp. 37–39; Miller 2001, entire; Wester 2005, pp. 16–20; McDearman 2006, entire; Tuberville et al. 2009, entire; Folt et al. 2022, entire). The number of gopher tortoises required for a population to remain on the landscape for 200 years varies from 50 to 200 individuals depending on habitat and management conditions (Cox et al. 1987, pp. 27–29; Cox et al. 1994, p. 29). Although populations as small as 50 tortoises have exhibited positive growth rates and are projected to remain on the landscape in the future in some PVA models, the inclusion of threats such as upper respiratory tract disease (URTD) or fire ant (*Conomyrma* spp., *Solenopsis invicta*) predation led to population decline and eventual extirpation of these smaller populations in these models (Miller 2001, pp. 13, 26–27; McDearman 2006, pp. 6–7). In models that resulted in projected gopher tortoise population declines of 1 to 3 percent per year, the factors that affected gopher tortoise population growth rates included the geographic location of the population and habitat quality (Tuberville et al. 2009, pp. 17–22). Populations of at least 100 gopher tortoises were found to be reasonably resilient to variations in habitat quality; however, larger populations of at least 250 tortoises were needed to remain on the landscape in lower quality habitat (Tuberville et al. 2009, p. 19).

A minimum viable population (MVP) in terms of acceptable benchmarks for the purpose of conservation and recovery efforts of gopher tortoise has been established by the Gopher Tortoise Council (GTC; GTC 2013, entire). Viability, as defined in the MVP, is valuable for conservation planning purposes and differs from the definition of viability used in the SSA (Service 2022, p. 20). The GTC adopted the definition of a viable tortoise population as consisting of at least 250 adult tortoises, at a density of at least 0.4 tortoises per ha, with an even sex ratio, and evidence of all age classes present, on a property with at least 247 ac (100 ha) of high-quality habitat managed for the benefit of the gopher tortoise (GTC 2013, pp. 2–3). Within our SSA report and this document, we use the GTC's definition of a ''viable population.'' A primary support population was defined as consisting of 50–250 adult gopher tortoises. Primary support populations may improve viability through habitat restoration, natural recruitment increases, or population augmentation. A secondary support population was defined as fewer than 50 tortoises that have more constraints to reach sufficient viability, but are important for education, community interest, and augmentation, and can maintain sufficient viability to remain on the landscape in the long term with rigorous habitat management and/or connectivity with other populations (GTC 2014, p. 4). It should be noted that smaller support populations may remain on the landscape for a long period of time under high-quality habitat conditions but are more vulnerable to stochastic events than populations that meet the MVP threshold (Miller 2001, p. 28; GTC 2014, p. 4; Folt et al. 2021, entire). We rely on these defined population benchmarks in our assessment of gopher tortoise viability, as described below in *Current Condition.*

Regulatory and Analytical Framework

Regulatory Framework

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for threatened and endangered species. In 2019, jointly with the National Marine Fisheries Service, the Service issued final rules that revised the regulations in 50 CFR parts 17 and 424 regarding how we add, remove, and reclassify threatened and endangered species and the criteria for designating listed species' critical

habitat (84 FR 45020 and 84 FR 44752; August 27, 2019). At the same time the Service also issued final regulations that, for species listed as threatened species after September 26, 2019, eliminated the Service's general protective regulations automatically applying to threatened species the prohibitions that section 9 of the Act applies to endangered species (collectively, the 2019 regulations).

However, on July 5, 2022, the U.S. District Court for the Northern District of California vacated the 2019 regulations (*Center for Biological Diversity* v. *Haaland,* No. 4:19–cv–05206–JST, Doc. 168 (N.D. Cal. July 5, 2022) (*CBD* v. *Haaland*)), reinstating the regulations that were in effect before the effective date of the 2019 regulations as the law governing species classification and critical-habitat decisions. Accordingly, in developing the analysis contained in this finding, we applied the pre-2019 regulations, which may be reviewed in the 2018 edition of the Code of Federal Regulations at 50 CFR 424.11(d). Those pre-2019 regulations did not include provisions clarifying the meaning of ''foreseeable future,'' so we applied a 2009 Department of the Interior Solicitor's opinion (M–37021, ''The Meaning of 'Foreseeable Future' in Section 3(2) of the Endangered Species Act'' (Jan. 16, 2009) (M–37021). Because of the ongoing litigation regarding the court's vacatur of the 2019 regulations, and the resulting uncertainty surrounding the legal status of the regulations, we also undertook an analysis of whether the finding would be different if we were to apply the 2019 regulations. That analysis, which we described in a separate memo in the decisional file and posted on *https://www.regulations.gov,* concluded that we would have reached the same finding if we had applied the 2019 regulations because, based on the modeling and scenarios evaluated, we considered our ability to make reliable predictions in the future and the uncertainty in how and to what degree the gopher tortoise could respond to those risk factors in this timeframe. We determined that this timeframe represents a period of time for which we can reliably predict both the threats to the species and the species' response to those threats under the 2019 regulations. We also find this determination to be ''rooted in the best available data that allow predictions into the future'' and extend as far as those predictions are ''sufficiently reliable to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act'' in accordance with the 2009 Solicitor's Opinion.

On September 21, 2022, the U.S. Circuit Court of Appeals for the Ninth Circuit stayed the district court's July 5, 2022, order vacating the 2019 regulations until a pending motion for reconsideration before the district court is resolved (*In re: Cattlemen's Ass'n,* No. 22–70194). The effect of the stay is that the 2019 regulations are currently the governing law. Because a court order requires us to submit this finding to the **Federal Register** by September 30, 2022, it is not feasible for us to revise the finding in response to the Ninth Circuit's decision. Instead, we hereby adopt the analysis in the separate memo that applied the 2019 regulations as our primary justification for the finding. However, due to the continued uncertainty resulting from the ongoing litigation, we also retain the analysis in this preamble that applies the pre-2019 regulations and we conclude that, for the reasons stated in our separate memo analyzing the 2019 regulations, this finding would have been the same if we had applied the pre-2019 regulations.

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

(A) The present or threatened destruction, modification, or curtailment of its habitat or range;

(B) Overutilization for commercial, recreational, scientific, or educational purposes;

(C) Disease or predation;

(D) The inadequacy of existing regulatory mechanisms; or

(E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species' continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

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

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

The Act does not define the term ''foreseeable future,'' which appears in the statutory definition of ''threatened species.'' Because the decision in *CBD* v. *Haaland* vacated our 2019 regulations regarding the foreseeable future, we refer to a 2009 Department of the Interior Solicitor's opinion entitled ''The Meaning of 'Foreseeable Future' in Section 3(20) of the Endangered Species Act'' (M–37021). That Solicitor's opinion states that the foreseeable future ''must be rooted in the best available data that allow predictions into the future'' and extends as far as those predictions are ''sufficiently reliable to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.'' Id. at 13.

It is not always possible or necessary to define the foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species'

biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Analytical Framework

The SSA report documents the results of our comprehensive biological review of the best scientific and commercial data regarding the status of the species, including an assessment of the potential threats to the species. The SSA report does not represent our decision on whether the species should be proposed for listing as an endangered or threatened species under the Act. However, it does provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket FWS–R4–ES–2009–0029 on *https://www.regulations.gov* and at *https://www.fws.gov/office/florida-ecological-services/library.*

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

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

Summary of Biological Status and Threats

In this discussion, we review the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. The following discussions include evaluations of the following threats and associated sources influencing the gopher tortoise and its habitat: (1) Habitat loss, degradation, and fragmentation, (2) climate change, and (3) insufficient and/or incompatible habitat management. Other factors influencing gopher tortoise viability include road mortality, disease, harvest and rattlesnake roundups, predation, nonnative invasive species, and conservation measures, including relocation, translocation, and headstarting programs. Conservation of habitat through land acquisition and conservation actions on public and private lands and the retention of private forest lands reduces the severity of some of these threats by providing protection of habitat across the landscape, maintaining connectivity between habitat patches, and increasing the opportunity for beneficial habitat management actions. In this section, we describe the threats that influence the species' current and future conditions and conservation measures that may mitigate those threats. Additional information may be found in the SSA report (Service 2022, pp. 46–102).

Habitat Loss, Degradation, and Fragmentation

Habitat loss, degradation, and fragmentation have affected the gopher tortoise and its habitat. The gopher tortoise was historically associated with fire-dependent longleaf pine ecosystems. Longleaf pine communities declined to less than 3 million ac (1.2 million ha) by the 20th century from a historical estimate of 92 million ac (37 million ha) due to forest clearing and conversion for agriculture, conversion from longleaf to other pine species, and development (Frost 1993, p. 20; Ware et al. 1993, p. 447; Landers et al. 1995, p. 39). As a result of fire suppression and exclusion in many areas, approximately two to three percent of longleaf pine ecosystems remain in relatively natural condition (Frost 1993, p. 17; Simberloff 1993, p. 3; Jose et al. 2007, p. ix; Jensen et al. 2008, p. 16; Oswalt et al. 2012, p. 7). Although historically associated with longleaf pine communities, the species currently occurs in open canopy stands of several southern pine species.

Currently, habitat loss, degradation, and fragmentation caused by a variety of sources across the species' range continue to negatively affect gopher tortoise viability. Urbanization and development, major road construction, incompatible and/or insufficient habitat management, and certain types of agriculture negatively impact the gopher tortoise and its habitat (Auffenberg and Franz 1982, pp. 105, 112; Lohoefener and Lohmeier 1984, pp. 2–6; Diemer 1986, p. 128; Diemer 1987, pp. 74–75; Hermann et al. 2002, pp. 294–295; Enge et al. 2006, p. 4). While large-scale development of solar farms may impact the gopher tortoise and its habitat in connection with other threats, we have determined that solar energy development is not a key factor influencing the species' viability at this time (Ong et al. 2013, p. iv; Service 2022, p. 52). Invasive species introduced as a result of habitat fragmentation or urbanization can influence gopher tortoises either through predation or alterations to habitat structure and function (Mann 1995, p. 24; Lippincott 1997, pp. 48–65; Basiotis 2007, p. 24; Engeman et al. 2009, p. 84; Engeman et al. 2011, p. 607; Dziadzio et al. 2016, p. 531; Bartoszek et al. 2018, pp. 353–354). Climate change has the potential to negatively impact habitat through the loss of habitat due to sea level rise, limitations on number of suitable burn days due to changes in temperature, precipitation, increased flooding due to predicted increases in the severity of hurricanes, and human migration from inundated coastal areas to inland areas, with subsequent impacts to gopher tortoises (Ruppert et al. 2008, p. 127; Castellon et al. 2018, pp. 11–14; Hayhoe et al. 2018, entire; Kupfer et al. 2020, entire). Although habitat management and climate change influence gopher tortoise habitat and contribute to habitat loss, fragmentation, and degradation, they are discussed as separate factors, below. In this section, we discuss below the primary sources (Urbanization and Development, Road Effects and Mortality) for habitat loss, fragmentation, and degradation.

Urbanization and Development

At a landscape scale, the gopher tortoise needs large swaths of interconnected, high-quality habitat patches to support viable populations.

Within these large swaths of high-quality habitat on the landscape, gopher tortoises require habitat connectivity for dispersal (immigration and emigration), breeding, and foraging. Urbanization and development of the landscape fragments and replaces natural areas with artificial structures, impervious surfaces, and lawns and gardens containing nonnative plant species; this activity impacts gopher tortoise populations that rely on a mosaic of interconnected uplands (Sutherland 2009, p. 35). Development and urbanization can also impact gopher tortoise populations on conservation lands (lands in public or private ownership managed for conservation under a management plan) by disrupting habitat connectivity across the landscape and disrupting habitat management activities on conservation lands, particularly through the reduction of prescribed fire activities. Urbanization and development impacts to individuals, populations, and habitats have been documented, although not specifically quantified in terms of survival, recruitment, and health of gopher tortoises prior to our SSA. Our modeling for the future condition analysis in the SSA includes urbanization projected by the SLEUTH model as part of the threats scenarios as described in *Future Condition* (Service 2022, pp. 144–175; Folt et al. 2022, entire).

Human population growth is a primary driver of urbanization and subsequent habitat fragmentation that is impacting gopher tortoises rangewide. Rangewide, Alabama, Florida, Georgia, Louisiana, and South Carolina have experienced population growth from 3 to 15 percent since 2010, while Mississippi has experienced a 6 percent decrease in human population. Population growth from 2 to 13.4 percent is projected to occur in each State rangewide from 2020 to 2030 (Blanchard 2007, p. 7; FEDR 2021, unpaginated; Culverhouse College of Business 2021, unpaginated; Georgia Census 2021, unpaginated; Population Projections 2005, unpaginated; U.S. Census Bureau 2021, unpaginated). As the human population continues to grow in the Southeast, development is expected to increase demand for forest resources and lead to habitat fragmentation and degradation of forests through the conversion of high-quality gopher tortoise habitat to lands in forest production that may not be managed in a way compatible with gopher tortoise needs. Forest loss and fragmentation reduce the ecological function and connectivity essential for the dispersal of gopher tortoises across the landscape (Guyer et al. 2012, p. 131; Jones and Dorr 2004, p. 461).

Gopher tortoises can occur in residential areas despite the fact that these areas are typically of lower habitat quality. However, conversion of gopher tortoise habitat to residential areas results in mortality of gopher tortoises when individuals are entombed in burrows during construction activities. In the western portion of the range where the species is federally listed, individual gopher tortoises are translocated from development sites to avoid mortality from land development activities. Since 2007, the Florida Fish and Wildlife Conservation Commission (FWC) requires developers to relocate tortoises out of harm's way, either onsite or at an approved recipient site (FWC 2007, p. 10). Other States (Georgia, Alabama, and South Carolina) have some measure of legal protection for gopher tortoises, though gopher tortoise burrows are not protected uniformly across the range. When notified, these States work with developers to minimize impacts when tortoises occur on development sites.

Human development of the landscape (*i.e.,* urbanization) affects terrestrial wildlife communities in the Southeastern United States, including gopher tortoise populations that often rely on upland habitats that are popular sites for urban development or agriculture. Gopher tortoise populations on protected and managed lands are somewhat buffered from habitat loss as a result of urbanization, but landscape-level connectivity is negatively affected. Urbanization and development have influenced the gopher tortoise and its habitat historically, and we expect these effects to continue in the future. This threat is present across the range of the species, although populations near already urbanized areas and areas of projected development are more affected. For example, in Florida, urban growth and development is identified as one of the primary threats to gopher tortoises (Auffenberg and Franz 1982, p. 112; Diemer 1986, p. 128; Diemer 1987, pp. 74–75; Enge et al. 2006, p. 4). Georgia is also anticipated to experience dramatic human population increases (Georgia Census 2021, unpaginated), leading to subsequent development and potential loss of gopher tortoise habitat.

Road Effects and Mortality

Roads pose a barrier to gopher tortoise movement, fragment habitat, isolate areas of habitat, and increase mortality of gopher tortoises (Andrews and Gibbons 2005, p. 772; Hughson and Darby 2013, pp. 227–228). Roads that bisect habitat pose a hazard to gopher tortoises by forcing individuals into unsuitable areas and onto highways (Diemer 1987, p. 75; Mushinsky et al. 2006, p. 38). Roads occurring within or adjacent to tortoise habitat impact gopher tortoises, because tortoises are attracted to road shoulders where open-canopy, grassy areas are maintained (Steen and Gibbs 2004, entire; Steen et al. 2006, p. 271). Gopher tortoises appear to use roadsides independently of larger habitat patches, treating them as areas for residency as opposed to travel corridors among other habitat patches (Rautsaw et al. 2018, p. 141). Gopher tortoise nests in roadsides are more susceptible to predators, such as raccoons (*Procyon lotor*), which are common in ecological edges and fragmented, suburban landscapes (Hoffman and Gottschang 1977, p. 633; Wilcove 1985, pp. 1213–1214). The installation of wildlife barrier fences along roadways has the potential to minimize gopher tortoise road mortality. While barrier fencing along roads may reduce road mortality, fencing may also further limit the movement of gopher tortoises.

While road mortality occurs in gopher tortoise populations, the extent to which it affects populations or the species is not well documented. There are no current rangewide monitoring efforts for gopher tortoise road mortality. Florida is the only state that has a database for reporting sick, injured, or dead tortoises; of tortoises reported to the Florida FWC as sick, injured, or dead, 41 percent were found injured or dead on roads (CCA 2018, p. 95).

As development and subsequent habitat loss and fragmentation occurs, gopher tortoises will disperse to find better quality habitat, putting individual gopher tortoises at risk of road mortality. Impacts to habitat and road mortality are expected to increase as road densities and traffic volumes increase and habitat patches become more isolated and more difficult to manage (Enge et al. 2006, p. 10). Highway mortality of gopher tortoises will be highest where there are improved roads adjacent to gopher tortoise populations. Increased traffic on new or expanded roads adjacent to a gopher tortoise population will expose individuals to direct mortality from vehicles and potentially to increased predation. In addition, gopher tortoises in the vicinity of urban areas will be particularly vulnerable (Mushinsky et al. 2006, p. 362), especially in areas with heavy traffic patterns or high speed limits. The threat posed by roads is ongoing and is expected to continue, particularly in peninsular Florida and

urban centers in coastal portions of Georgia, Alabama, and Mississippi, where human populations are likely to increase as seen in urban modeling projections using SLEUTH (Terando et al. 2014, entire).

Agricultural Lands

Agricultural lands are an important component of land use activities in the gopher tortoise range. Agricultural lands on suitable soils are 6 times less likely to have burrows and contain 20 times fewer gopher tortoise burrows than open pine sites (Hermann et al. 2002, pp. 294–295). Gopher tortoises do not use the poor-quality habitat in annually tilled fields that do not provide necessary forage (Auffenberg and Franz 1982, p. 105). However, adult tortoises will return to abandoned agricultural fields in a few years when the land is dominated by perennial herbaceous species and remain until succession results in closed canopy conditions that do not provide the species' requirements (Auffenberg and Franz 1982, pp. 105, 107–108). Accordingly, habitat that is normally suitable for gopher tortoise but that is cleared for agricultural activities is not suitable for gopher tortoise use while it is in production or until forage and soil conditions provide gopher tortoise requirements for feeding, nesting, and sheltering.

Cropland (*i.e.,* agriculture) in the gopher tortoise range is projected to decline by 19 percent from 1997 to 2060 (Wear and Greis 2013, p. 45). Restoration of abandoned agricultural fields with appropriate soils into potential gopher tortoise habitat is feasible and has been accomplished through the U.S. Department of Agriculture Conservation Reserve Program (CRP). For example, in the eastern portion of the gopher tortoise range, over 10.5 million acres were reported as enrolled in CRP from 2000 to 2019 in counties with gopher tortoise occurrences (USDA 2020, unpaginated). Although not all of these lands are expected to support gopher tortoise or fall into potential habitat, we expect these restoration actions will improve gopher tortoise habitat. However, at this time, we cannot project the extent to which abandoned agricultural fields will be restored to a level of suitability necessary to support gopher tortoise populations.

Solar Farms

As interest in renewable energy increases, the development of solar farms across the gopher tortoise's range in the Southeast is also increasing, particularly in Florida and South Carolina (EIA 2021, unpaginated). A primary concern regarding large-scale deployment of solar energy is the potentially significant land use requirements, habitat fragmentation, possible exclusion of gopher tortoises as a result of fencing, and the need to relocate tortoises from solar farm sites prior to construction (Ong et al. 2013, p. iv). Some solar utility developers and companies recognize the potential to impact the gopher tortoise and its habitats and work with conservation organizations to avoid and minimize impacts via strategic siting assessments (NASA Develop 2018, unpaginated). The best available science indicates it is not a key factor in species viability, although information quantifying the extent and magnitude of the impact of solar farms on the gopher tortoise is limited.

Climate Change

The effects of changing climate conditions have influenced and are expected to continue to influence gopher tortoises and their habitat. In the Southeastern United States, the impacts of climate change are currently occurring in the form of sea level rise and extreme weather events (Carter et al. 2018, p. 749). Changes in temperatures are projected to result in more frequent drought, more extreme heat (increases in air and water temperatures), increased heavy precipitation events (*e.g.,* flooding), more intense storms (*e.g.,* frequency of major hurricanes increases), and rising sea level and accompanying storm surge (Intergovernmental Panel on Climate Change (IPCC) 2022, entire). Higher temperatures and an increase in the duration and frequency of droughts are projected to increase the occurrence of wildfires and reduce the effectiveness of prescribed fires (Carter et al. 2018, pp. 773–774).

Predicted increases in temperature across the gopher tortoise's range due to climate change are expected to affect the species' life history characteristics and demography through skewed sex ratios, larger clutch sizes, increased hatchling success, and larger hatchling size (DeMuth 2001, p. 1614; Ashton et al. 2007, pp. 355–362; Hunter et al. 2021, pp. 215, 221–224). Although these life history and demographic effects may not initially appear to have negative impacts, we do not have available modeling to project the effects of these changes on gopher tortoise demography in terms of forage availability, carrying capacity of areas where the gopher tortoise occurs, or other life history and demographic changes. However, the gopher tortoise may ameliorate these effects by selection of cooler nest sites and altering timing of nesting to earlier in the season (Czaja et al. 2020, entire). Some populations of gopher tortoises already exhibit both of these behaviors (Ashton and Ashton 2008, entire; Moore et al. 2009, entire; Craft 2021, pp. 42–45).

Frequency of severe hurricanes is predicted to increase in the future (IPCC 2022, entire; Carter et al. 2018, entire). Gopher tortoise burrows, particularly those in coastal ecosystems, will be impacted by flooding after a hurricane, causing abandonment, though the burrow may become usable again (Waddle et al. 2006, pp. 281–283; Castellon et al. 2018, pp. 11–14; Falk 2018, entire). In addition, overwash of coastal dunes may result in ''salt burn'' and loss of coastal vegetation, temporarily reducing forage availability in coastal natural communities used by gopher tortoises.

Predicted changes in rangewide temperature and precipitation due to climate change will reduce the number of days with suitable conditions for prescribed burns needed to manage gopher tortoise habitat in the future compared to current conditions (Kupfer et al. 2020, entire). This reduction in prescribed fire, combined with the effects of urbanization, will further restrict the ability to manage gopher tortoise habitat with prescribed fire. In addition to the constrained ability to implement prescribed fire in the future, modeling for the Southeastern United States projects an increased wildfire risk and a longer fire season, with at least a 30 percent increase in lightning-ignited wildfire from 2011 to 2060 (Vose et al. 2018, p. 239).

Sea level rise associated with climate change is expected to affect coastal populations of gopher tortoises through subsequent inundation and loss of habitat in coastal areas. As sea levels continue to rise, coastal water levels—from the mean to the extreme—are growing deeper and reaching farther inland along most U.S. coastlines (Sweet et al. 2022, p. 28). Global mean sea level has risen 7 to 8 in (16 to 21 cm) since 1900, with about half of that rise occurring since 1993 (Hayhoe et al. 2018, p. 85). In areas of the Southeastern United States, tide gauge analysis reveals as much as 1 to 3 ft (0.30 to 0.91 m) of local relative sea level rise in the past 100 years (Carter et al. 2018, p. 757). The future estimated amount that sea level will rise varies based on the responses of the climate system to warming and human-caused emissions (Hayhoe et al. 2018, p. 85). The amount of gopher tortoise habitat predicted to be lost within a given population due to

sea level rise depends on the location of the population and site-specific characteristics. Populations affected by habitat loss and degradation due to saltwater inundation and vegetation changes are expected to experience reduced abundance and resiliency. In addition, impacts to gopher tortoises and their habitat are expected due to the relocation of people from flood-prone coastal areas to inland areas, including the relocation of millions of people to currently undeveloped interior natural areas (Stanton and Ackerman 2007, p. 15; Ruppert et al. 2008, p. 127).

The effects of climate change are projected to impact the gopher tortoise and its habitat. These impacts will be direct through loss of individuals and indirect through the loss of habitat due to sea level rise, lack of habitat management due to reduction in burn days, increased flooding, and human migration from inundated coastal areas to inland areas (Ruppert et al. 2008, p. 127; Castellon et al. 2018, pp. 11–14; Hayhoe et al. 2018, entire; Kupfer et al. 2020, entire). Despite the recognition of climate effects on ecosystem processes, there is some uncertainty about the timing of these effects for the Southeastern United States and how the gopher tortoise will respond to these changes. Factors associated with a changing climate may act as risk multipliers by increasing the risk and severity of other threats, as described in *Synergistic and Cumulative Effects,* below.

Habitat Management

As mentioned previously, the gopher tortoise needs large swaths of interconnected, high-quality habitat patches with open canopy and abundant herbaceous groundcover to support viable populations, and a variety of land management practices are used in the restoration, enhancement, and maintenance of gopher tortoise habitats. Insufficient habitat management (*e.g.,* no prescribed fire program) has been identified as a major threat to the gopher tortoise (Smith et al. 2006, pp. 326–327). High-quality gopher tortoise habitat will require prescribed fire only at regular intervals, while areas of degraded or low-quality gopher tortoise habitat will require more active habitat management (*e.g.,* multiple habitat management tools including mechanical and chemical treatments in conjunction with the reintroduction of prescribed fire to restore natural conditions). However, not all habitat management activities are uniformly beneficial to the gopher tortoise. In general, management actions that minimize soil disturbance, protect burrows, and maintain a diversity of groundcover plants, to ensure that sufficient sunlight reaches the ground, are beneficial to the gopher tortoise. Conversely, actions that cause significant soil disturbances or result in the loss of diverse groundcover are detrimental to the species. A variety of habitat management methods are implemented rangewide at varying degrees across land ownership and use types (*e.g.,* conservation land, commercial forestry, family-owned lands, etc.). Prescribed fire, selective use of herbicide, mechanical vegetation management (*e.g.,* roller chopping and mowing), and timber harvest are valuable management techniques in the restoration, management, and maintenance of gopher tortoise habitat and are frequently used in combination to achieve habitat condition goals.

The regular application of prescribed fire is important for the maintenance of habitat conditions required by the gopher tortoise. When applied at appropriate intervals, prescribed fire reduces shrub and hardwood encroachment, and stimulates growth of forage plants such as grasses, forbs, and legumes, particularly when applied during the growing season (Thaxton and Platt 2006, p. 1336; FWC 2007, p. 32; Iglay et al. 2014, pp. 39–40; Fill et al. 2017, pp. 156–157). In addition, a more open canopy and midstory created with the use of prescribed fire allows for proper incubation of eggs and thermal regulation (basking) of tortoises. Without habitat management including fire management, gopher tortoises may abandon an area of previously suitable habitat after as little as 20 years of fire exclusion (Ashton et al. 2008, p. 528). In the future, reduced habitat management is expected to result in habitat degradation or loss, negatively impacting the gopher tortoise.

Mechanical or chemical (herbicide) management techniques may be needed to reduce hardwood competition to levels where prescribed fire can be effective and are increasingly important for areas where prescribed fire use is not a viable option, such as habitat in urbanized areas (Ashton and Ashton 2008, p. 78; Miller and Chamberlain 2008, pp. 776–777; Jones et al. 2009, p. 1168; Iglay et al. 2014, p. 40; Platt et al. 2015, p. 913; Greene et al. 2020, p. 50). Habitat management using mechanical means can be effective in reducing shrub and tree density to promote conditions favorable to herbaceous vegetation. Mechanical treatments are used in habitat restoration, site preparation to promote pine seedling survival and growth, maintenance, and in other agricultural and forestry endeavors. Mechanical vegetation management examples include mulching/chipping, subsoiling, shearing, stumping, root raking into piles or windrows, roller chopping, discing, and bedding. Depending on management objectives and treatment type, mechanical site preparation may result in substantial soil disturbance affecting soil structure and chemistry and may increase invasive species on a site (Hobbs and Huenneke 1992, pp. 324–325; Jack and McIntyre 2017, p. 189). Heavy equipment used to manage gopher tortoise habitat may also cause impacts to gopher tortoise through crushing or damage to burrows (Landers and Buckner 1981, pp. 1–7; Greene et al. 2020, p. 54). Some land managers incorporate best management practices for gopher tortoise habitat into their management plans, including a buffer distance around burrows to minimize disturbance and hazards (Smith et al. 2015, pp. 459–460).

Mechanical vegetation management followed by herbicide application is used as a short-term option to maintain habitat in areas where fire use is restricted. Herbicide can reduce midstory vegetation growth resulting in more sunlight reaching the ground. Although mechanical vegetation management is effective in reducing the vertical structure and overgrowth in the mid- and overstories, mechanical treatments alone do not replicate the stimulation of plant growth, flowering, and seed release, and soil nutrient cycling provided by fire (Dean et al. 2015, pp. 55–56). Best conservation practices for mechanical and herbicide management practices in gopher tortoise habitat are available for landowners and managers and are increasingly implemented (FWC 2013, entire; Service 2013, entire; GDNR 2014, entire; Florida Department of Agriculture and Consumer Services (FDACS) 2014, entire; FDACS 2015, entire; Jack and McIntyre 2017, p. 200).

Forest (Timber) Management

Management of forests, either public or private, influences habitat where gopher tortoises occur or habitat that may be suitable for gopher tortoises. Although specific forest or timber management techniques vary by site, management goals, and ownership, we summarize the influence of forest or timber management in general on gopher tortoise below. More details and information on this influence may be found in the SSA section 3.8.4 Timber Management (Service 2022, pp. 76–79).

Not all forested lands provide appropriate conditions for gopher tortoises. However, forests on lands with suitable soils and compatible forest

management objectives in the gopher tortoise range can be managed in such a way as to provide the open canopy and the dense herbaceous groundcover conditions needed for gopher tortoise viability. Some types of timber and gopher tortoise habitat management include the reduction of hardwood competition. This activity results in reduced tree density and increased sunlight, promoting herbaceous forage proliferation and suitable conditions for gopher tortoise basking and egg incubation (NRCS 2020, entire). Several management practices associated with working forests, such as planting densities, rotation length, and time until first and subsequent thinning(s), have a direct influence on whether these lands provide and maintain habitat for the species. Gopher tortoises occur in production pine forests with suitable conditions, although at lower densities than reported in other cover types, and densities may be below the threshold necessary to sustain a viable population (Diemer-Berish et al. 2012, pp. 51–52; Wigley et al. 2012, p. 42; Greene et al. 2019, p. 51). In pine forests managed for timber or pulp (typically slash or loblolly pine) where suitable conditions are not maintained, gopher tortoises more frequently abandoned burrows and emigrated from low-quality habitat conditions associated with closed canopy pine plantations (Diemer 1992a, p. 288; Aresco and Guyer 1999, p. 32). Most modern forests managed more intensely for traditional wood products (*i.e.,* timber, pulp) incorporate management strategies to maintain open canopy conditions for much of the life of a commercial stand (Weatherford et al. 2020, p. 4). For private lands, programs such as forest certifications (*e.g.,* Sustainable Forestry Initiative (SFI) or Forest Stewardship Council) and the development of diversified markets for forest products have increased forest management practices that benefit gopher tortoises (Greene et al. 2019, p. 201; Greene et al. 2020, p. 55).

Public lands managed for multiple use or conservation objectives that include timber production employ some of the same habitat management techniques and additionally may be guided by land management plans or forest plans. The Forest and Rangeland Renewable Resources Planning Act (16 U.S.C. 36), as amended by the National Forest Management Act of 1976 (16 U.S.C. 1600–1614), requires that each National Forest (NF) be managed under a forest plan that is revised every 10 years. Forest plans provide an integrated framework for analyzing and approving projects and programs, including conservation of listed species. Several National Forests (*e.g.,* Ocala NF, Desoto NF, Conecuh NF, Apalachicola NF, etc.) occur within the current range of the gopher tortoise, providing important habitat conservation for the species. Identification and implementation of land management and conservation measures to benefit gopher tortoises vary among National Forests, but generally include habitat restoration and management objectives and maintaining buffers around gopher tortoise burrows during various forest management activities.

However, not all public or private lands are managed to these standards, and incompatible practices and insufficient management continue to affect gopher tortoise habitat and influence gopher tortoise viability. Reductions in required groundcover forage may be caused by nearly complete groundcover weed control, high seedling stocking rates, or short timber rotations with a minimal proportion of the rotation being open canopied. In addition, exclusion of prescribed fire and dense hardwood midstory encroachment within open canopied forests degrade habitat through suppression of groundcover and loss of open areas for burrowing and movement.

Historical declines of longleaf forests are well established, with estimates of 95 percent loss from the historical estimate of 88 million ac (35.6 million ha) (Oswalt et al. 2012, p. 13). However, the magnitude and extent of insufficient and incompatible forestry and timber management currently occurring on the landscape and impacting gopher tortoise populations and habitat has not been quantified. Rangewide, approximately 80 percent of potential gopher tortoise habitat occurs in private ownership, with the remainder owned or managed by local, State, Federal, or private conservation entities (Wear and Greis 2013, p. 103; Natural Resources Conservation Service (NRCS) 2018, p. 2). Private landowners hold more than 86 percent of forests in the South and produce nearly all of the forest investment and timber harvesting in the region (Most of the potential gopher tortoise habitat is privately held, and much of this is in silviculture. Rangewide conservation and management efforts between private landowners and conservation agencies, such as best conservation practices for gopher tortoises developed by States and conservation incentive programs and partnerships, promote compatibility between timber and gopher tortoise management; these are further described in *Conservation Efforts and Regulatory Mechanisms,* below. We have included the best available information regarding gopher tortoises in timber production pine forests in our SSA; however, to date, systematic surveys in pine forests intensively managed for timber and pulp products across the range of the gopher tortoise have not been conducted.

Other Factors—Disease, Predation, Harvest and Roundups, Nonnative Invasive Species

Disease

A number of diseases, including fungal, viral, bacterial, and parasitic diseases, have been documented in gopher tortoises (Ashton and Ashton 2008, pp. 39–41; Johnson et al. 2008, entire; Myers et al. 2009, p. 582; Desiderio et al. 2021, entire). Upper Respiratory Tract Disease (URTD) resulting from two bacterial species (*Mycoplasma agassizii* and *M. testudineum*) has been documented throughout much of the tortoise's range (McLaughlin 1997, p. 6; Gates et al. 2002, entire; Rabatsky and Blihovde 2002, entire; Dziadzio et al. 2018, entire; Goessling et al. 2019, pp. 5–6). While large-scale die-offs due to URTD appear to be rare, correlations between exposure to *Mycoplasma* spp. and population declines are variable among populations (McCoy et al. 2007, p. 173). URTD has been linked to several large mortality events (defined as the loss of greater than 3 percent of adults in 1 year) in Florida with an estimated loss of 25–50 percent of the adult population in one event and 35 to 125 adults in other events (McLaughlin 1997, p. 6; Gates et al. 2002, entire; Rabatsky and Blihovde 2002, entire; Dziadzio et al. 2018, entire). However, tortoises have natural antibodies to *Mycoplasma* spp., and these natural immune mechanisms may explain why die-offs are less prevalent rangewide than may be expected from the degree of seroprevalence in gopher tortoise populations (Hunter et al. 2008, p. 464; Gonynor and Yabsley 2009, pp. 1–2; Sandmeier et al. 2009, pp. 1261–1262). In addition, URTD may result in altered movement (*e.g.,* increased dispersal) and behavior (*e.g.,* changes to basking) among gopher tortoises (McGuire et al. 2014, pp. 750–754; Goessling et al. 2017, p. 488). Tortoises dispersing long distances increase their likelihood of encountering a road (*i.e.,* a barrier), potentially limiting spread of disease but increasing risk of road mortality. The magnitude of threat that URTD poses to gopher tortoise populations and tortoise demographics is currently

unknown, but the best available science indicates it is not a key factor in species viability (Karlin 2008, p. 145).

Predation

Gopher tortoise nest predation varies annually and across sites, ranging from approximately 45 to 90 percent in a given year (Landers et al. 1980, p. 358; Wright 1982, p. 59; Marshall 1987, pp. 29–32). Gopher tortoises are most susceptible to predation within their first year of life, primarily within 30 days of hatching (Pike and Seigel 2006, p. 128; Smith et al. 2013, pp. 4–5). Overall annual hatchling survival has been estimated to be approximately 13 percent (Perez-Heydrich et al. 2012, p. 342). Raccoons (*P. lotor*) are the most frequently reported predator of nests and juvenile gopher tortoises (Landers et al. 1980, p. 358; Butler and Sowell 1996, p. 456). However, 25 species—12 mammals, 5 birds, 6 reptiles, and 2 invertebrates—are known to be predators of eggs, emerging neonates, hatchlings, and older tortoises (Ashton and Ashton 2008, p. 27). Adult gopher tortoises are less likely to experience predation compared to hatchlings and eggs, but predation by canines (*e.g.,* domestic dogs, coyotes, foxes) and humans has occurred (Causey and Cude 1978, pp. 94–95; Taylor 1982, p. 79; Hawkins and Burke 1989, p. 99, Mann 1995, p. 24). Some predation can be attributed to habitat fragmentation and edge effects, roads and infrastructure, increased availability of food for predators in proximity to human-inhabited areas, reduction or elimination of top canid carnivores, ecological perturbations allowing predator range expansion, and domestic animals associated with humans (Stiles and Jones 1998, p. 343; Crooks and Soule 1999, entire; Wetterer and Moore 2005, pp. 352–353).

As mentioned previously, the gopher tortoise is a long-lived species that naturally experiences high levels of mortality in early life stages. However, as urbanization increases in the future, we expect that higher levels of hatchling and juvenile mortality associated with increased predation near anthropogenic sites will have a negative impact on gopher tortoise recruitment in affected populations.

Harvest and Rattlesnake Roundups

Historical harvest of gopher tortoises for consumption has influenced gopher tortoise populations in the past, particularly in portions of the Florida panhandle (Lohoefener and Lohmeier 1984, pp. 1–30; Mann 1995, p. 18; Estes and Mann 1996, p. 21; Tuma and Sanford 2014, pp. 145–146). Although this practice is now uncommon, localized harvest still occurs in some rural areas (Rostal et al. 2014, p. 146). Although loss of individuals may impact affected populations, we have determined that harvest is not a significant species-level threat to the gopher tortoise (Service 2022, p. 63).

Historically, multiple rattlesnake roundups were held throughout the Southeast (Means 2009, p. 132). Snakes were collected by blowing fumes of noxious liquids (''gassing'') in gopher tortoise burrows to collect snakes for these roundups. Gassing of inhabited burrows negatively impacts the resident tortoise, though research that quantifies mortality associated with this practice is limited (Means 2009, p. 139). The practice of gassing tortoise burrows is now prohibited across the species' range. Gopher tortoise mortality due to rattlesnake collection is primarily historical and is not likely a significant current influence on populations, as only one roundup still takes place in Alabama and the use of gasoline or other chemical or gaseous substances to drive snakes from burrows is now prohibited across the Southeast (Alabama Regulation 220–2–.11, Georgia codes sections 27–1–130 and 27–3–130, Florida Administrative Code 68A–4.001(2), and Mississippi Code R 5–2.2 B). Therefore, harvest and take resulting from rattlesnake roundups are considered historical threats to the species, and the best available science indicates these are not current threats to the species.

Nonnative Invasive Species—Flora and Fauna

The spread of nonnative invasive plant species alters and degrades gopher tortoise habitat by reducing forage quality and quantity and the availability of burrowing and nesting locations, and ultimately influences gopher tortoise viability. Some species postulated to impact tortoise habitat include kudzu (*Pueraria montana*), Chinese privet (*Ligustrum sinense*), Callery pear (*Pyrus calleryana*), natal grass (*Melinis repens*), and Japanese climbing fern (*Lygodium japonicum*), though quantified impacts of these species on tortoises are unknown. One species known to impact gopher tortoise use of habitat is cogongrass (*Imperata cylindrica*), a prolific invasive that occurs throughout much of the gopher tortoise's range. Unlike other invasive plant species in upland communities, cogongrass can rapidly spread following disturbances including prescribed fire (Yager et al. 2010, entire; Holzmueller and Jose 2011, pp. 436–437). It can quickly form a tall, dense ground cover with a dense rhizome layer and can outcompete native vegetation (Dozier et al. 1998, pp. 737–740; Mushinsky et al. 2006, p. 360; Minogue et al. 2018, pp. 1–4). Widespread areas of dense cogongrass could result in habitat loss as gopher tortoises do not use these areas, nor do they consume cogongrass (Basiotis 2007, p. 21). Cogongrass can also decrease gopher tortoise habitat quality by reducing forage quality and quantity and the availability of burrowing and nesting locations (Lippincott 1997, pp. 48–65; Basiotis 2007, p. 24).

Nonnative invasive fauna can also negatively influence the gopher tortoise and its habitat. Throughout the gopher tortoise's range, the red imported fire ant (*Solenopsis invicta*) occurs in disturbed soil in upland habitats (Wetterer and Moore 2005, p. 352; Shearin 2011, pp. 22, 30; USDA 2017, unpaginated). Fire ants are not able to breach gopher tortoise eggs, but the ants will depredate hatchlings (Mann 1995, p. 24; Butler and Hull 1996, p. 17; Epperson and Heise 2003, p. 320; Diffie et al. 2010, p. 295; Dziadzio et al. 2016, pp. 531, 536). Fire ants are aggressive, and their stings can result in direct mortality and reduced survival by limiting growth, altering behavior, and changing foraging patterns of hatchlings (Wilcox and Giuliano 2014, pp. 3–4; Dziadzio et al. 2016, pp. 532–533). In the western portion of the range, gopher tortoise conservation banks and other related sites must include fire ant monitoring and control as part of their management plan to reduce the effects of predation on tortoise eggs and hatchlings (74 FR 46401, September 9, 2009).

The nine-banded armadillo (*Dasypus novemcinctus*), Argentine black and white tegu (*Salvator merianae*), Burmese python (*Python bivittatus*), and black spiny-tailed iguana (*Ctenosaura similis*) use gopher tortoise burrows and are known predators of tortoise eggs (Service 2022, pp. 68–69). Frequent damage to gopher tortoise burrows by wild pigs (*Sus scrofa*), domestic dogs (*Canis lupus familiaris*), and possibly domestic cats (*Felis catus*) may impact some gopher tortoises as well.

The current impact of these nonnative invasive floral and faunal species on gopher tortoise appears low at the species level. Although impacts to individuals and populations have been documented to occur, we did not find nonnative invasive species to be a key factor in gopher tortoise viability.

Conservation Efforts and Regulatory Mechanisms

In this section, we describe key protections and conservation efforts

provided by various Federal and State entities, private landowners, and nongovernmental organizations. Additional information regarding conservation efforts and Federal and State protections may be found is the SSA report (Service 2022, pp. 79–102).

Federal and State Protections

In addition to the protections provided to the gopher tortoise in the listed portion of the range under sections 7 and 10 of the Act, we implement conservation delivery tools and programs that aid in the conservation of listed and at-risk species, such as the gopher tortoise, on non-Federal lands. Cooperative conservation programs such as the Partners for Fish and Wildlife Program provide technical and financial assistance to private landowners and others for the conservation of wildlife and associated habitat. Between 2010 and 2019, under the Partners for Fish and Wildlife Program, approximately 65,000 ac (26,305 ha) of restoration and enhancement activities were implemented in gopher tortoise habitat on private lands in Alabama, Florida, Georgia, and Mississippi (Service 2020, unpaginated).

The Gopher Tortoise Conservation and Crediting Strategy (Strategy) is a conservation initiative designed to balance military mission activities and gopher tortoise conservation on Department of Defense (DoD) lands in the Southeast (Service 2017, entire); see below under Conservation Lands for further discussion about DoD lands. The Service-approved Strategy establishes the framework for determining credit for DoD conservation actions and is intended to achieve a net conservation benefit to the species. It focuses on identification, prioritization, management, and protection of viable gopher tortoise populations and the best remaining habitat. It provides guidelines designed to result in an increase in the size and/or carrying capacity of populations while promoting the establishment of new populations through increased habitat connectivity or translocation of gopher tortoises (Service 2017, entire).

The U.S. Department of Agriculture Natural Resources Conservation Service (NRCS) offers technical and financial assistance to help agricultural producers voluntarily implement conservation activities and practices that benefit the gopher tortoise. The gopher tortoise is identified as a target species eligible for conservation funding in the national Working Lands for Wildlife partnership, which is a collaborative approach to conserving habitat on working lands. In addition, the NRCS works to restore longleaf pine across its historical range through the Longleaf Pine Initiative. Between 2012 and 2021, private landowners across the range of the species have received assistance to implement management practices that benefit gopher tortoises and gopher tortoise habitat on 943,740ac (381,918ha) through NRCS programs.

Each State within the range of the gopher tortoise provides some measure of protection for the species. The States of Florida, Georgia, and South Carolina provide protection for the gopher tortoise through the requirement of land management plans for State lands. The gopher tortoise is protected by regulation as a non-game species in Alabama, is State-listed as threatened in Florida, Georgia, and Louisiana, and is State-listed as endangered in Mississippi and South Carolina. Gopher tortoise protections vary by State; however, laws within most States in the range focus on prohibitions against the take, possession, export/sale, and killing of gopher tortoises. States in the gopher tortoise range also implement conservation programs in partnership with private landowners. For example, Florida's Landowner Assistance Program assists private landowners with plans to improve their wildlife habitat through the development of 10-year management plans on an estimated 44,000 ac (17,806 ha) of gopher tortoise habitat per year (FWC 2020b, p. 6). Florida has also developed the Gopher Tortoise Management and Gopher Tortoise Permitting Guidelines to guide gopher tortoise recovery efforts and regulatory actions (FWC 2007, revised 2012, entire; FWC 2008, revised July 2020; entire). Florida regulations also require that construction or other activities that disturb gopher tortoise burrows must obtain a relocation permit and that the impacts be considered and mitigated.

Translocation and Headstarting

Gopher tortoises have been considered one of the most translocated species in the Southeast, and translocation is commonly used as a conservation strategy to mitigate the loss of tortoises from land under development (Dodd and Seigel 1991, p. 340). Displaced tortoises are often translocated to suitable habitat to reestablish extirpated populations or augment existing populations (Griffith et al. 1989, p. 477). Numerous studies have attempted to evaluate the success of gopher tortoise translocation and improve its efficacy. However, gopher tortoise life history characteristics (*e.g.,* long-lived, slow-growing, and slow to reach maturity) make it difficult to determine if translocations result in sufficiently viable tortoise populations since the typical monitoring periods are shorter than the generation time for the species. Gopher tortoises disperse at a high rate in the year following translocation; however, soft-releases, or the temporary penning of gopher tortoises within a recipient area, are highly effective at limiting dispersal post-translocation (Tuberville et al. 2005, pp. 353–354; Tuberville et al. 2008, pp. 2694–2695; Bauder et al. 2014, pp. 1449–1450). Translocation is successful at removing tortoises from immediate danger due to development (Tuberville et al. 2005, p. 356; Tuberville et al. 2008, p. 2695).

Gopher tortoise relocation and translocation practices are being implemented and included as guidance across the range of the species (Service 2022, pp. 85–87). The primary goals for recipient sites are to prevent the loss of tortoises and retain the existing tortoises; and while habitat is lost on the development site, recipient sites can contribute to habitat conservation if sites receive long-term protection and subsequent habitat management. These sites can provide high conservation value by restocking tortoises to appropriately suitable lands where populations have previously been depleted. However, this practice could result in an overall net loss of habitat if not implemented in conjunction with acquisition and additional protection of habitat when needed. Additional information regarding specific translocation efforts in each State may be found in the SSA report (Service 2022, pp. 83–87).

Headstarting, or the process of hatching and/or rearing juvenile turtles in captivity through their most vulnerable period, has shown success as a technique to boost depleted gopher tortoise populations (Holbrook et al. 2015, pp. 542–543; Tuberville et al. 2015, pp. 467–468; Spencer et al. 2017, p. 1341; Quinn et al. 2018, p. 1552; Tuberville et al. 2021, p. 92). Headstarting has been explored as a management tool for the gopher tortoise with increasing recognition of its potential role, particularly when used in concert with other management actions (Spencer et al. 2017, entire; Quinn et al. 2018, pp. 1552–1553). For example, the gopher tortoise headstarting program at Camp Shelby in Forrest County, Mississippi (funded by the Mississippi Army National Guard and in partnership with The Nature Conservancy) has been ongoing since 2013 and has shown initial success with headstarted juveniles surviving at a

much higher rate than their wild counterparts (70–80 percent versus 30 percent for wild 2- to 3-year-old tortoises). Similar survival rates were noted in post-release monitoring of headstarted yearling gopher tortoises in Georgia and South Carolina (Tuberville et al. 2015, entire).

Other Conservation Mechanisms

In the eastern portion of the range, the gopher tortoise is included in a candidate conservation agreement (CCA) (revised 2018) with State, nongovernmental and private organizations and in a candidate conservation agreement with assurances (CCAA) (2017) with Camp Blanding Joint Training in Florida. These Service-approved agreements outline management actions that landowners implement to benefit the gopher tortoise and its habitat across the candidate range. We developed the 2013 Rangewide Conservation Strategy for the Gopher Tortoise to guide conservation of the gopher tortoise by our partners, including States within gopher tortoise range, the Service, and other public and private entities to collect and share information on gopher tortoise threats, outline highest priority conservation actions, and identify organizations best suited to undertake those conservation actions (Service 2013, entire).

In Florida, where the greatest number of tortoises have been identified, several additional conservation efforts are ongoing. The Forestry Wildlife Best Management Practices for State Imperiled Species and the Agriculture Wildlife Best Management Practices for State Imperiled Species were developed in 2014 and 2015, respectively, to enhance silviculture's contribution to the conservation of wildlife, provide guidance to landowners who chose to implement these voluntary practices, and reduce take of gopher tortoises (FDACS 2015, entire). By 2021, landowners provided notice of intention to FWC to implement forestry best management practices (BMPs) on more than 3.7 million ac (1.5 million ha) and conservation practices on approximately 425,031 ac (172,004 ha) of agricultural lands in Florida (FWC 2020a, unpaginated; FWC 2021, p. 1). FWC also provides technical assistance to private and industry landowners to implement beneficial management and/or mitigation activities across 40 counties through other programs and agreements (FWC 2020b, p. 2; FWC 2021, p. 1).

There are numerous other gopher tortoise conservation tools and guides, including several in the core of the species' range in Georgia. For example, the Best Conservation Practices for Gopher Tortoise Habitat on Working Forest Landscapes was developed to assist in best conservation practices for the creation and maintenance of gopher tortoise habitat in the candidate portion of the range (GDNR et al. 2018, entire). Additionally, Forest Management Practices to Enhance Habitat for the Gopher Tortoise details the essentials of managing habitat for gopher tortoises, including prescribed fire, timber harvest, and selective herbicide use (GDNR 2014, unpaginated). Further, the Georgia Gopher Tortoise Initiative is an extension of the Georgia Department of Natural Resource's long-standing effort in conserving longleaf pine systems. The initiative is a collaborative effort between several public and private entities and is geared towards the protection, restoration, and long-term management of gopher tortoise habitat.

Implemented rangewide, America's Longleaf Restoration Initiative is a collaborative effort involving multiple public and private partners actively supporting efforts to restore and conserve longleaf pine ecosystems with a goal to increase longleaf coverage on the landscape to 8.0 million ac (3.2 million ha) (ALRI 2021, unpaginated). Several local implementation teams work across the gopher tortoise range to help restore longleaf pine on habitat where gopher tortoises occur.

Conservation Lands

The conservation of multiple large, contiguous tracts of habitat provides the connectivity and landscape heterogeneity requirements to support gopher tortoise viability. Gopher tortoise habitat occurs across a wide range of lands in public ownership with varying levels of management. An estimated 1.7 million ac (688,000 ha) of potential gopher tortoise habitat occurs on protected lands including lands in Federal, State, and local government, nongovernmental organization, and private ownership (*e.g.,* conservation easements) throughout the species' range.

Managing publicly owned lands in a way that benefits the gopher tortoise is an important mechanism for reducing the effects of habitat loss, fragmentation, and degradation on the species. Habitat management occurring on public conservation lands is often accomplished via natural resource planning instruments (*e.g.,* land management plans, comprehensive conservation plans, resource management plans, etc.). Each State in the gopher tortoise's range has statutory authority to acquire land for conservation purposes. Since publication of the 12-month finding (76 FR 45130, July 27, 2011), all States within the species' range have made concerted efforts to protect gopher tortoise habitat and potential gopher tortoise habitat via strategic land acquisition. Between 2011 and 2019, Alabama, Florida, Georgia, and South Carolina have reported fee-simple acquisition of approximately 42,000 ac (16,996 ha) of potential gopher tortoise habitat with an additional approximately 78,000 ac (31,565 ha) acquired in conservation easements (CCA 2019, pp. 52–73). Federal entities including the U.S. Air Force, the U.S. Forest Service, and the Service recorded an additional 2,740 ac (1,109 ha) of potential gopher tortoise habitat acquired and approximately 24,000 ac (9,712 ha) of conservation easements acquired (CCA 2019, pp. 52–73).

Several National Wildlife Refuges (NWRs) (*e.g.,* Merritt Island NWR, Lake Wales Ridge NWR, Lower Suwannee NWR, St. Marks NWR) occur within the range of the gopher tortoise, providing important habitat conservation for the species. Management activities included in NWR Comprehensive Conservation Plans that influence gopher tortoises include habitat restoration activities such as prescribed fire, pine thinning, and other mechanical vegetation management for restoring desired vegetative conditions in pine and scrub systems, and tortoise management and monitoring actions based on priorities of the refuge and available resources.

Rangewide, the gopher tortoise occurs on 31 DoD installations, with potential habitat on additional installations (DoD 2022, p. 4). Many of these installations specifically include gopher tortoise habitat and population management prescriptions and goals within their individual integrated natural resources management plans (INRMPs) prepared in conjunction with the Service. Most INRMPs also include land management for other upland species that benefit gopher tortoise habitat (and gopher tortoises) as well. Rangewide, approximately 830,000 ac (335,889 ha) of potential gopher tortoise habitat occur on military installations. Limited information is currently available regarding the condition of this potential habitat and the extent to which these areas are occupied by gopher tortoises.

National Forest (NF) plans provide an integrated framework for analyzing and approving projects and programs, including conservation of listed species. Several National Forests (*e.g.,* Ocala NF, Desoto NF, Conecuh NF, Apalachicola NF, etc.) occur within the range of the gopher tortoise and provide important habitat conservation for the species. Identification and implementation of

land management and conservation measures to benefit gopher tortoises vary among NFs, but generally include habitat restoration and management objectives and maintaining buffers around gopher tortoise burrows during various forest management activities. For example, the Desoto NF recently completed a 10-year Collaborative Forest Landscape Restoration Program, during which actions to restore longleaf pine were implemented on 374,000 ac (151,352 ha) of NF lands. In addition, the Desoto NF has prioritized any management treatment that contributes to improvement of gopher tortoise, as set forth in their Mission, Vision, and Operational Strategy (USFS 2020, entire).

Private Lands Conservation Efforts

Most forested land within the gopher tortoise range is privately owned. Privately owned lands account for approximately 80 percent of potential gopher tortoise habitat, of which approximately half are managed for forest production (NRCS 2018, p. 2; Greene et al. 2019, p. 201). Across the gopher tortoise range, large working forests account for over 6 million ac (2.4 million ha) of forest land, representing a significant land use with the potential to influence gopher tortoise resiliency and viability (Weatherford et al. 2020, p. 3). While not all working forest lands include appropriate habitat conditions for gopher tortoises, approximately 2.78 million ac (1.12 million ha) of suitable soil types and 2.98 million ac (1.21 million ha) of open pine conditions are estimated to occur on private forest lands (NCASI 2021, p. 1). We included the best available data on gopher tortoise observations between 1977 and 2019 on private forest lands in our SSA (Weatherford et al. 2020, pp. 9–11; Service 2022, pp. 95–99). These observations occur on Member Company lands that are part of the National Council for Air and Stream Improvement and landowners may implement conservation measures including those outlined in the Sustainable Forestry Initiative guidelines.

While working to meet a range of objectives, including timber production, many larger private working forests also accomplish conservation within a broad network of collaboration with Federal, State, and local government agencies, universities, and nongovernmental organizations. For example, forest landowners may create and maintain areas of open pine conditions, conduct gopher tortoise burrow surveys, conduct research, and implement BMPs that benefit the gopher tortoise. In addition, forest certification programs, such as the Sustainable Forestry Initiative (SFI) and Forest Stewardship Council, require participants to adhere to a set of principles including providing wildlife habitat to conserve biological diversity (Weatherford et al. 2020, p. 11). Adhering to these principles likely provides a benefit to maintaining suitable gopher tortoise habitat in private working forests. An estimated 13.7 million ac (5.5 million ha) within the gopher tortoise's range are certified through SFI, although the proportion of certified acres that include gopher tortoise populations or their current habitat is unknown (SFI 2021, unpaginated). Other forest certifications, including the American Tree Farm System, are authorized by the Program for the Endorsement of Forest Certification, a third-party audited certification system.

The largest forest landowner group in the United States is the family forest landowners, controlling approximately 87 percent of forest land in the South (Oswalt et al. 2014, p. 6). The American Forest Foundation works with smaller, family forest landowners and has partnered with the Service's Partners for Fish and Wildlife Program to develop habitat improvement plans as part of a 10-year agreement. Since 2017, the partnership has implemented habitat management activities on more than 3,500 ac (1,416 ha) and identified 762 gopher tortoises, including 2 populations that meet the MVP criteria (AFF 2021, unpaginated).

Additionally, The Longleaf Alliance works with private landowners and other partners across the range of the gopher tortoise to restore and maintain habitat as an essential part of their larger focus in restoring the longleaf pine ecosystem. Through The Longleaf Alliance, in 2019, landowners implemented more than 55,000 ac (22,258 ha) of prescribed fire within gopher tortoise habitat, in addition to longleaf pine plantings, groundcover restoration, and invasive plant management efforts (SERPPAS 2020, p. 17).

Other private conservation efforts include several privately owned tracts of land managed as mitigation/conservation areas for gopher tortoises in both Mississippi and Alabama, which provide suitable habitat, protection, and habitat management. Four conservation areas in Alabama are managed through Service-approved habitat conservation plans, while the Mississippi conservation bank follows national mitigation banking guidelines for maintaining optimal habitat, including aggressive prescribed fire and longleaf restoration programs.

Synergistic and Cumulative Effects

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

Several factors influencing gopher tortoise viability are synergistic and related. Urbanization and development results in habitat loss, fragmentation, and degradation through land use change and increased road infrastructure. The anthropogenic changes associated with urbanization and development also affect the gopher tortoise through the introduction of nonnative invasive species and predators. Climate change is expected to influence the gopher tortoise through several changes as described in *Climate Change,* above. Sea level rise is expected to result in an inland migration of the human population away from inundated areas, resulting in increased urbanization and developed inland areas that are currently undeveloped and potentially suitable upland habitat for gopher tortoise. In addition, changes in precipitation and temperature are expected to result in a decrease in the number of suitable burn days in gopher tortoise habitat, leading to reduced habitat management (another threat to gopher tortoise viability). Urbanization and development also limit the implementation of prescribed burns as a habitat management tool due to safety concerns and proximity to inhabited areas.

Influences on the gopher tortoise that are not considered key factors influencing the species' status may exacerbate the effects of urbanization, climate change, and habitat management in affected gopher tortoise

populations. Conservation of habitat through land acquisition and conservation actions on public and private lands and the retention of private forest lands reduces the severity of some of these threats by providing protection of habitat across the landscape, maintaining connectivity between habitat patches, and increasing the opportunity for beneficial habitat management actions now and into the future.

Summary of Factors Influencing the Species

The best available information regarding the gopher tortoise and its habitat indicates that habitat loss, degradation, and fragmentation (due to land use changes from urbanization), climate change, insufficient and/or incompatible habitat management, and conservation actions are the most significant factors influencing gopher tortoise viability. Urbanization results in a range of impacts that either remove, degrade, or fragment remaining habitat, or impact gopher tortoises directly through development. Urbanization brings road construction and expansion, which may cause direct mortality of gopher tortoises and fragment remaining habitats. In addition, this type of development may also create conditions that prove to be beneficial to invasive species, serve to increase predators, and establish inadequate conditions for fire management. Temperature increases associated with long-term climate change are likely to further constrain use of prescribed fire through a decrease in the number of suitable burn days.

Habitat loss resulting from sea level rise associated with climate change is a risk for coastal populations of gopher tortoise. Habitat management through prescribed fire and other methods is important to maintaining suitable habitat conditions, and insufficient and/or incompatible habitat management now and in the future, especially based on projections in reduction of prescribed fire, impacts the viability of gopher tortoise populations. Conservation efforts to benefit the gopher tortoise and its habitat implemented by Federal, State, and private partners occur across the species' range and influence the gopher tortoise condition. These factors are considered to have population-level effects and were evaluated further in the current condition and future condition analysis.

Current Condition

We describe the current condition of the gopher tortoise in terms of population resiliency and species redundancy and representation. The analysis of these conservation principles to understand the species' current viability is described in more detail in the gopher tortoise SSA report (Service 2022, pp. 103–143).

Data Sources

To inform the gopher tortoise SSA, we requested, received, and reviewed a variety of data including information from State and Federal agencies, local governments, and private lands. Data received included two general types of information: spatially explicit data with location information (typically from conservation lands) and private lands data without location information. These data represent a subset of gopher tortoises likely to occur on the landscape due to the lack of a comprehensive private lands data set from systematic surveys. Data were collected using burrow surveys of various methodologies and included burrow surveys with and without burrow scoping, and line transect distance sampling (Buckland et al. 1993, entire; Thomas et al. 2010, entire); some burrow data were submitted with unknown methodology. Because data were provided by a variety of sources, contained disparate levels of data resolution, and were collected in various ways, we could not reliably determine abundance, density, habitat availability, or other metrics for all populations.

All population data provided were integral to evaluating the current condition of the gopher tortoise, although different data types come with different assumptions and limitations. Data that come from standardized and systematic surveys result in spatially explicit burrow locations and subsequent population estimates. The use of these spatially explicit data allowed us to make more reliable estimates of population size; use spatial buffering to delineate populations based on species biology; tie site-specific habitat and management factors to locations of gopher tortoises; and estimate future parameters, such as estimated future abundance of gopher tortoise populations. Most spatially explicit data (*e.g.,* burrow locations and subsequent population estimates) in our analyses came from assessments of populations on lands managed for the conservation of biodiversity or natural resources.

A large percentage of potential gopher tortoise habitat occurs on lands in private ownership. To best assess the current and future condition of the gopher tortoise, including populations on private lands, we developed a landowner questionnaire and used responses to estimate population, habitat, and management factors at a county scale to ensure privacy for respondents (Service 2022, appendix A). The vast majority of the private lands data obtained for the SSA lack a spatial component because of issues associated with confidentiality of location data; however, this concern does not preclude the use and importance of these data in the SSA. Responses represent a small percentage of private lands that currently support gopher tortoises, as many private landowners express reluctance to share gopher tortoise occurrence data. We also included information from a subsequent Florida Forestry Association questionnaire in our analyses; however, no population estimates were available for these lands, and we were unable to estimate current resiliency for populations on these properties.

Because data received from these questionnaires are not spatially explicit, there are limitations to the applicability of the data as it relates to delineation of populations, assessment of site-specific factors such as habitat quality and quantity and management regimes, and use of abundance data in projections of future scenarios. We include data from private landowners in the current condition analysis as county-level data and also categorize habitat condition based on landowner responses. The additional data we received on gopher tortoise populations on private lands when developing the SSA informed our current condition analysis of gopher tortoise viability and contributed to the understanding of species' viability.

In this finding, we present results of the current and future condition analyses for delineated spatially explicit populations as described below for clarity and comparison purposes. However, the SSA report also presents results for current conditions for county-level data following the same analysis methodology (Service 2022, pp. 130–142). We used spatially explicit data to inform the population model used to forecast future scenarios for the gopher tortoise, as described below. We did not use county-level data in our future analysis because most information in this category lacks abundance data and we could not apply spatially based modeling used in future analysis to the default county center point. We note that the data included in our current and future condition analyses represent a subset of gopher tortoises likely to occur on the landscape, as data from private lands were lacking (Service 2022, pp. 103–107). Thus, population estimates do not

represent an assessment of all populations of gopher tortoises, but rather represent information that was provided by partners through much of the species' range. Given we were able to use only a subset of populations that likely occur on the landscape, our future projections are likely an underestimate of gopher tortoises on the landscape.

Analysis Unit and Population Delineation

To assess rangewide representation for gopher tortoise, we delineated five analysis units based on genetic differences (identified in Gaillard et al. 2017, entire), physiographic regions, and the input of species experts (figure 2). The Tombigbee and Mobile Rivers act as a boundary between Unit 1 (Western) and Unit 2 (Central) analysis units, and the Apalachicola-Chattahoochee Rivers act as a boundary between Unit 2 (Central) and Unit 3 (West Georgia) analysis units. Because of the high degree of admixture and lack of well-defined boundaries found within transitional zones of physiographic regions, we used other biogeographic barriers and expert input to delineate boundaries of the following units: Unit 3, Unit 4 (East Georgia), and Unit 5 (Florida) analysis units. We used U.S. Environmental Protection Agency Level IV ecoregions to delineate the boundaries between Units 3 and 4, and Units 4 and 5 (EPA 2013, unpaginated). We used the Suwanee River to separate Units 3 and 5, as this river represents a significant barrier to dispersal, and gene flow between these two units is known to be low (Gaillard et al. 2017, p. 509). Additional details regarding the delineation of analysis units used to analyze the current and future condition of the gopher tortoise may be found in the SSA report (Service 2022, pp. 111–114).

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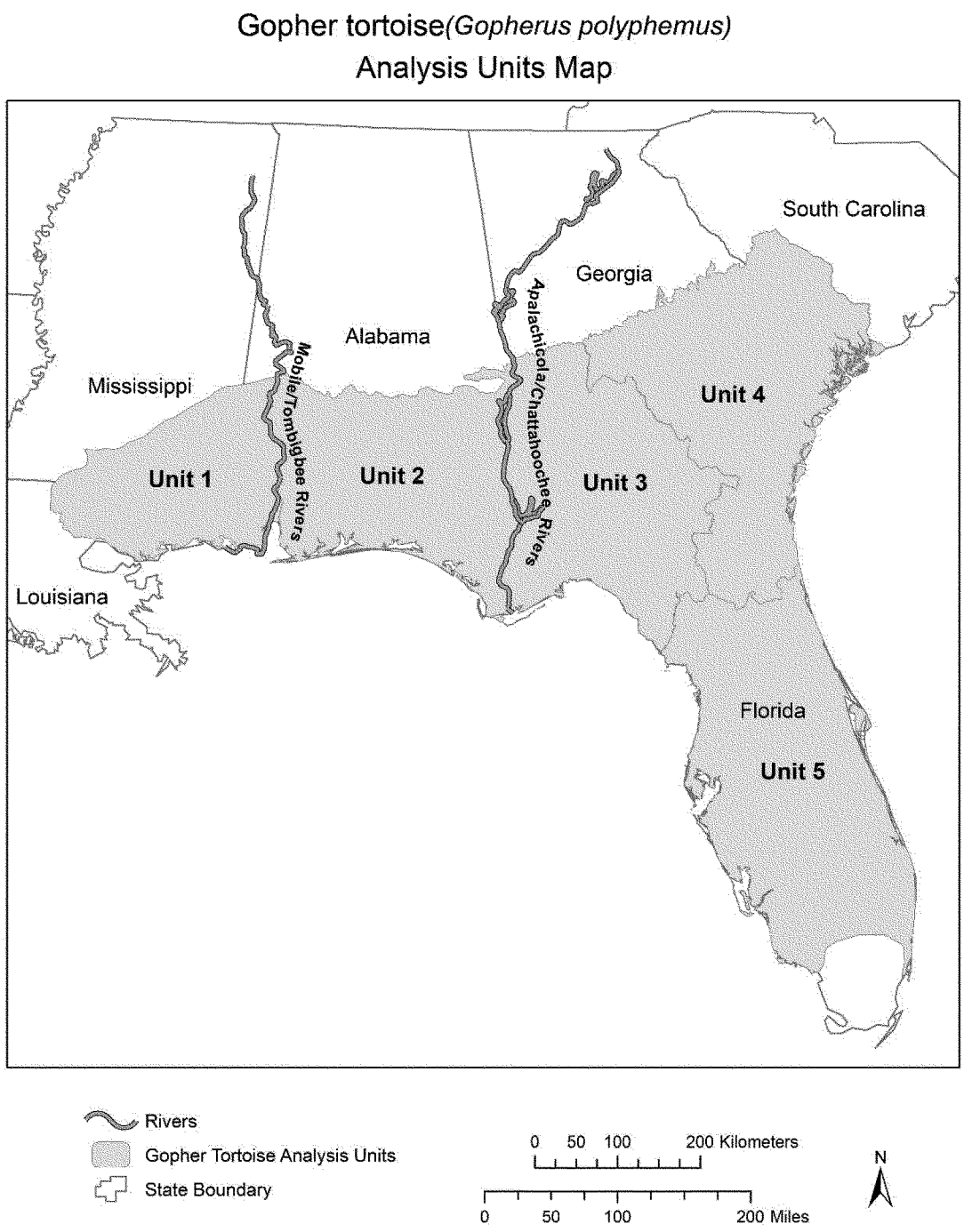

Figure 2. Analysis units used as units of representation for the gopher tortoise (Service 2022, p. 114). Analysis units include Western (Unit 1), Central (Unit 2), West Georgia (Unit 3), East Georgia (Unit 4), and Florida (Unit 5).

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In order to analyze gopher tortoise population resiliency, we defined populations for the species as contiguous areas surrounding known gopher tortoise burrows with habitat conducive to survival, movement, and interbreeding among individuals within the area. Using survey data from across the range of the gopher tortoise, we delineated populations at two spatial scales: local populations and landscape populations, as defined below.

Local populations are geographic aggregations of individuals that interact significantly with one another in social contexts making reproduction significantly greater between individuals within the aggregation than with individuals outside of the aggregation (sensu Smallwood 1999, pp. 103, 108). We operationally delineated local populations by identifying aggregations of individuals or burrows where individuals were clustered together within a 1,968-ft (600-m) buffer to the exclusion of other adjacent

individuals or burrows. Gopher tortoise habitat and demography vary across the range; therefore, the 1,968-ft (600-m) buffer represents an average and best estimate across geography and habitat variations based on a thorough literature search and species expert input (Diemer 1992b, p. 161; Guyer et al. 2012, pp. 122, 125, 132, Castellon et al. 2018, p. 17; Service 2019, entire; Greene et al. 2020, pp. 52–53). We delineated 656 local gopher tortoise populations with available spatially explicit data (table 1). We assumed that some areas were unsuitable for gopher tortoise movement or survival and considered those barriers to movement when delimiting local populations. These barriers included interstates, freeways, and expressways; major rivers and lakes; wetlands; and highly urbanized areas (USDOT 2016, unpaginated; ESRI imagery 2021, unpaginated).

Landscape populations are a series of local populations that are connected by some form of movement; individuals within a landscape population are significantly more likely to interact with other individuals within the landscape population than individuals outside of the landscape population. Gopher tortoises have been shown to move more than 4,921 feet (1,500 m) throughout multiple years, with distances as large as 8,802–15,220 feet (2,683–4,639 m) (McRae et al. 1981, p. 172; Ott-Eubanks et al. 2003, p. 317; Diemer-Berish et al. 2012, p. 52; Guyer et al. 2012, entire; Castellon et al. 2018, entire). We operationally delineated landscape populations by identifying local populations connected by habitat within an 8,202-ft (2.5-km) buffer around each local population. To be most inclusive of local populations, we selected a landscape-population buffer consistent with the longer gopher tortoise movements observed (McRae et al. 1981, p, 173; Diemer 1992b, p. 163; Bauder et al. 2014, pp. 1448–1449; Service 2019, entire). We delineated 253 landscape populations with available spatial data (table 1).

TABLE 1—SPATIALLY DELINEATED LOCAL AND LANDSCAPE POPULATIONS OF GOPHER TORTOISES BY STATE IN 2021

	Spatially delineated populations	
	Local	Landscape
Florida	316	161
Georgia	151	63
Mississippi	99	7
Alabama	77	14
Louisiana	7	5
South Carolina	6	4
Total:	656	*254

*One delineated landscape population falls in both Georgia and Florida and is reflected in both States' landscape population total.

Resiliency

Resiliency describes the ability of a species to withstand stochastic events and is associated with population size, growth rate, and habitat quality. Highly resilient populations are more likely to withstand disturbances such as random fluctuations in fecundity (demographic stochasticity), variation in mean annual temperature (environmental stochasticity), or the effects of anthropogenic activities, such as local development projects. Viability denotes a species' ability to sustain populations over a determined timeframe and is closely tied with population resiliency and species-level representation and redundancy. For gopher tortoise populations to have sufficient viability over the long term, they must have an adequate number of individuals (population size), be above a particular density (population density), and have sufficient genetic exchange between local populations to maintain genetic diversity. There must also be sufficient habitat that is beneficially managed for gopher tortoise in order to support individual and population needs. Population size and density are driven by a variety of underlying demographic parameters, including fecundity, sex ratio, and survival at various life history stages (egg, nest, hatchling, juvenile, and adult survival). Genetic diversity is primarily driven by rates of emigration and immigration between local populations.

We relied on the MVP criteria adopted by the Gopher Tortoise Council for abundance, area of managed high-quality habitat, sex ratio, evidence of recruitment, variability in size and age classes, and no major constraints to gopher tortoise movement as described above (GTC 2013, pp. 2–3). As previously mentioned, the best available data contain disparate levels of data resolution, thus we could not reliably determine abundance, density, or other metrics for all populations. Therefore, we used a burrow conversion factor for properties that provided burrow counts and locations, but did not have a corresponding abundance estimate. Although there is no single burrow conversion factor that would be appropriate for all populations across the range of the species, we selected the representative burrow conversion factor of 0.4 individuals per burrow to calculate an estimated current population size described in gopher tortoise literature (Guyer et al. 2012, pp. 127, 129–131). The burrow-to-tortoise conversion factor allows the burrow count information to give an estimate of tortoises on the landscape, although we recognize that variance in burrow abundance is related to factors other than the number of tortoises (Burke 1989, p. entire; Breininger et al. 1991, pp. 319–320; McCoy and Mushinsky 1992, pp. 402, 406).

We used estimated abundance of adult gopher tortoises in a local population as a metric for categorical levels of resiliency: high (greater than or equal to 250), moderate (51 to 249), and low (fewer than 50). These resiliency levels align with the GTC working group's categories for viable (high resiliency), primary support (moderate resiliency), and secondary support (low resiliency) populations (GTC 2014, p. 4).

Current condition abundance estimates are based only on data from spatially delineated populations (*i.e.,* do not contain county-level data or gopher tortoises that are present but not reported), and these estimates substantially underestimate the true number of gopher tortoises present across the species' range. Based on available data, there are an estimated 149,152 gopher tortoises from 656 spatially delineated local populations across the range of the species, with local populations categorized as follows: 360 in low condition, 169 in moderate condition, and 127 in high condition.

Resiliency of populations by analysis unit are described below and in table 2. Most gopher tortoises are found in the eastern portion of the range with Unit 5 (Florida) supporting 47 percent of the estimated rangewide population total, and Units 3 (West Georgia) and 4 (East Georgia) supporting 26 percent and 19 percent, respectively. Units 1 (Western) and 2 (Central) support much smaller numbers of gopher tortoises, with 2 percent and 6 percent of the estimated rangewide population total, respectively, likely driven by differences in soils, as discussed earlier in Habitat.

TABLE 2—SITE-SPECIFIC DATA POPULATION FACTORS AND CURRENT RESILIENCY FOR SPATIALLY DELINEATED LOCAL POPULATIONS OF GOPHER TORTOISE

Analysis unit	Burrows	Landscape populations	Local populations	Abundance	Current resiliency
1	8,815	13	106	3,100	Low (94), Moderate (10), High (2).
2	5,809	30	106	8,642	Low (71), Moderate (27), High (8).
3	17,867	55	109	38,947	Low (42), Moderate (24), High (43).
4	20,216	46	124	28,408	Low (35), Moderate (58), High (31).
5	24,783	109	211	70,055	Low (118), Moderate (50), High (43).
Rangewide	77,490	253	656	149,152	Low (360), Moderate (169), High (127).

We relied on gopher tortoise abundance to assess resiliency of populations as the abundance of individuals strongly reflects the condition of the habitat and implementation of beneficial management actions. We summarize our assessment of habitat condition and management actions below and provide more details regarding information used and analysis unit results in the SSA report (Service 2022, pp. 122–130). The influence of habitat size, quality, and management on the resiliency and viability of gopher tortoise populations was also described in the MVP criteria (GTC 2013, p. 2).

Habitat data were provided by a variety of sources and contain disparate levels of data resolution; thus, we could not reliably determine estimates of habitat within all populations across the range of the gopher tortoise. Estimates of habitat with known gopher tortoise occurrences (local populations) and potential habitat (outside local populations, but within the species' range) are derived from the species-specific Habitat Suitability Index (HSI) and suitable soils (Crawford et al. 2020, entire). Rangewide, we determined using the HSI that approximately 844,912 ac (341,923 ha) of suitable habitat occur within spatially explicit local populations with gopher tortoise occurrences and approximately 16,338,932 ac (6,612,131 ha) of potential habitat (suitable habitat with unknown gopher tortoise presence) occur outside delineated populations within the range of the species. Additionally, information from the landowner questionnaire was used to estimate the condition of potential habitat in each analysis unit with 24 percent of the 447,340 ac (181,032 ha) characterized as low condition, 42 percent as moderate condition, and 34 percent as high condition (Service 2022, p. 126). Estimates of habitat were not used to assess resiliency of gopher tortoise populations; only abundance was used to assess resiliency. However, estimates of potential habitat and potential habitat quality on private lands give some information regarding the extent of habitat where gopher tortoises could occur compared to the extent of habitat where occurrences are known.

To assess management of gopher tortoise habitat, we used several data sets available from multiple sources and at multiple spatial scales, and these data may include some overlap. Again, we did not use any management metrics in our resiliency assessment; only abundance was used to assess population resiliency. We determined an estimate of acres burned (prescribed fire and wildfire) using Tall Timbers Southeast fire history dataset, derived from the U.S. Geological Survey Burned Area (v2) Products (Hawbaker et al. 2020, entire) representing years 1994–2019 (Hawbaker et al. 2020, entire). Acres burned across all units have generally increased over time, with significantly more burning occurring in Unit 5 (Florida).

We also used summary data for prescribed fire and other midstory maintenance activities available from America's Longleaf Restoration Initiative (ALRI) FY2019 annual report (ALRI 2019). Florida reported by far the most acres of habitat managed for longleaf by fire and other methods, with nearly 600,000 ac (242,811 ha) treated between October 2018 and September 2019. Much of the management implemented by partners under the ALRI umbrella is likely to benefit gopher tortoise.

Next, we summarized management practices as detailed in the gopher tortoise CCA 2021 annual report, which covers management actions implemented between October 2020 and September 2021. CCA management data have the advantages of being specific to sites known to support gopher tortoises and include both prescribed fire and other beneficial practices such as chemical and mechanical treatments and invasive species control. Unfortunately, the CCA data are limited to the eastern portion of the range, and thus do not include information for the western portion. Finally, we summarized the responses to the landowner questionnaire regarding acres of prescribed fire, burn frequency, and other management practices to benefit the gopher tortoise. Most prescribed burns occurred in Units 3 (West Georgia) and 5 (Florida); burn frequency is often on a 1- to 3-year cycle; and many landowners implement additional beneficial practices (Service 2022, pp. 129–130, 133–139).

We describe the results of our analysis of the abundance (resiliency), habitat, and management metrics for each analysis unit, below. Populations described are those delineated using spatially explicit data and may underestimate the number of gopher tortoises and populations on the landscape.

Analysis Unit 1 (Western)

Based on available data, Unit 1 is composed of many small, disconnected populations and very few larger populations (106 local populations; 13 landscape populations), spread across private and public land. Abundance estimates indicate there are 94 low-, 10 moderate-, and 2 high-resiliency local populations within this unit. Camp Shelby, a DoD property, is the stronghold of Unit 1 with a population estimate of 1,003 individual gopher tortoises. Based on responses to the landowner survey, 17 properties on private lands in the unit support gopher tortoise populations, with 7 properties reporting signs of reproduction.

More than 103,000 ac (41,682 ha) of habitat occurs within gopher tortoise populations in Unit 1, with an additional 2 million ac (809,371 ha) of potential gopher tortoise habitat where gopher tortoise occurrence is unknown. The current estimates for prescribed fire implementation show that over 35,795 ac (14,485 ha) were burned within this unit in 2019, double the area burned since 1994. Over 90 percent of landowners who responded to the questionnaire report implementing prescribed fire on a 1- to 3-year rotation, with all respondents reporting implementation of additional beneficial practices for gopher tortoises.

Analysis Unit 2 (Central)

Based on available data, Unit 2 has 106 local populations and 30 landscape populations. Based on current abundance estimates, this unit is composed of 71 low-, 27 moderate-, and 8 high-resiliency local populations. The eight highly resilient populations are found on conservation lands including Fort Rucker, Conecuh NF, Apalachee Wildlife Management Area (WMA), Perdido WMA, Geneva State Forest, and an unnamed private property. Based on responses to the landowner survey, 32 properties on private lands in the unit support gopher tortoise populations with 17 properties reporting signs of reproduction.

More than 68,000 ac (27,518 ha) of habitat occurs within gopher tortoise populations in Unit 2, with an additional 3.4 million ac (1.37 million ha) of potential gopher tortoise habitat where gopher tortoise occurrence is unknown. The current estimates for prescribed fire implementation show that approximately 106,000 ac (42,896 ha) were burned in 2019, triple the area burned since 1994. Sixty percent of landowners who responded to the questionnaire report implementing prescribed fire on a 1- to 3-year rotation, with 72 percent of respondents reporting implementation of additional beneficial practices for gopher tortoises.

Analysis Unit 3 (West Georgia)

Based on available data, Unit 3 has 109 local populations and 55 landscape populations. Based on current abundance estimates, Unit 3 is composed of 42 low-, 24 moderate-, and 43 high-resiliency local populations. Of the 43 highly resilient populations, 7 populations have estimates exceeding 1,000 individuals, including Twin Rivers State Forest, Chattahoochee Fall Line WMA, River Bend WMA, Alapaha River WMA, Apalachicola NF, and the Jones Center at Ichauway. Based on responses to the landowner survey, 48 properties on private land in Unit 3 support gopher tortoise populations with 21 properties reporting signs of reproduction.

More than 220,000 ac (89,030 ha) of habitat occurs within gopher tortoise populations in Unit 3, with an additional 2.9 million ac (1.17 million ha) of potential gopher tortoise habitat where gopher tortoise occurrence is unknown. The current estimates for prescribed fire implementation show that more than 194,000 ac (78,509 ha) were burned in 2019, almost a 10-fold increase since 1994. Sixty-seven percent of landowners who responded to the questionnaire report implementing prescribed fire on a 1- to 3-year rotation, with 44 percent of respondents reporting implementing additional beneficial practices for gopher tortoises.

Analysis Unit 4 (East Georgia)

Based on available data, Unit 4 has 124 local populations and 46 landscape populations. Based on current abundance estimates, Unit 4 is composed of 35 low-, 58 moderate-, and 31 high-resiliency local populations. Of the 31 highly resilient populations, 5 populations have estimates exceeding 1,000 individuals, including Ohoopee Dunes WMA, Ralph E. Simmons State Forest, Jennings State Forest, and Fort Stewart. Based on responses to the landowner survey, 22 properties on private land in the unit support gopher tortoise populations with 11 properties reporting signs of reproduction.

More than 149,000 ac (60,298 ha) of habitat occurs within the gopher tortoise population in Unit 4, with an additional 2.7 million ac (1.09 million ha) of potential gopher tortoise habitat where gopher tortoise occurrence is unknown. The current estimates for prescribed fire implementation show that more than 161,000 ac (65,154 ha) were burned in 2019, over a 7 times increase since 1994. Fifty-three percent of landowners who responded to the questionnaire report implementing prescribed fire on a 1- to 3-year rotation, with 77 percent of respondents reporting implementing additional beneficial practices for gopher tortoises.

Analysis Unit 5 (Florida)

Based on available data, Unit 5 has 211 spatially explicit local populations and 109 landscape populations. Based on current abundance estimates, Unit 5 is composed of 118 low-, 50 moderate-, and 43 high-resiliency local populations. Of the 43 highly resilient populations, 12 populations have estimates exceeding 1,000 individuals, including Camp Blanding and Goldhead Branch State Park, Ocala NF, Chassahowitzka WMA, Ichetucknee Springs State Park, Bell Ridge Wildlife and Environmental Area, Etoniah Creek State Forest, Halpata Tastanaki and Cross Florida Greenway, Lake Louisa State Park, Kissimmee Prairie Preserve State Park, Green Swamp West Unit WMA, Withlacoochee State Forest's Citrus Tract, and Perry Oldenburg Wildlife and Environmental Area and Withlachoochee State Forest's Croom Tract. Based on responses to the landowner survey, 48 properties on private land in the unit support gopher tortoise populations with 35 properties reporting signs of reproduction.

More than 300,000 ac (121,405 ha) of habitat occurs within gopher tortoise populations in Unit 5, with an additional 5.3 million ac (2.14 million ha) of potential gopher tortoise habitat where gopher tortoise occurrence is unknown. The current estimates for prescribed fire implementation show that more than 582,368 ac (235,675 ha) were burned in 2019, a nearly 14 times increase over time since 1994. Twenty-three percent of landowners who responded to the questionnaire report implementing prescribed fire on a 1- to 3-year rotation, with 83 percent of respondents reporting implementing additional beneficial practices for gopher tortoises.

Representation and Redundancy

We evaluated current representation by examining the genetic and environmental diversity within and among populations across the species' range (Gaillard et al. 2017, entire). We report redundancy for gopher tortoise as the number and resiliency of gopher tortoise populations and their distribution within and among analysis units. Current representation and redundancy have likely decreased relative to the historical condition of the species due to loss of open pine conditions and substantial reduction in

longleaf pine ecosystems in the species' range.

The five delineated analysis units are based primarily on genetic variation in gopher tortoises across the range of the species. We expect this genetic variation to be generally indicative of the inherent adaptive capacity of the gopher tortoise as a species (Thurman et al. 2020, p. 522). In addition, the variety of environmental conditions across the species' range, particularly soil characteristics and associated life history characteristics differences between the western and eastern portions of the range, may be used as an indication of adaptive capacity for the gopher tortoise, allowing the species to withstand changing conditions (Thurman et al. 2020, p. 522). Gopher tortoise populations are distributed within and among analysis units across the species' range, contributing to potential adaptive capacity and current representation.

Currently, multiple local and landscape populations occur in all five analysis units. Although the resiliency of these populations varies across the range, all analysis units contain populations in high and moderate resiliency. Rangewide, 45 percent of spatially explicit local populations exhibit moderate or high resiliency. These populations are distributed across the range of the species, contributing to future adaptive capacity (representation) and buffering against the potential of future catastrophic events (redundancy). Because the species is widely distributed across its range, it is highly unlikely any single event would put the species as a whole at risk, although the westernmost portions of the range are likely more vulnerable to such catastrophes given that a greater percentage of the populations present in this unit are of low resiliency compared to other analysis units.

Future Condition

Future Condition Modeling

To assess future viability for the gopher tortoise, we developed an analytical framework that integrates projections from multiple models of future anthropogenic and climatic change to project future trajectories or trends of gopher tortoise populations and identify stressors with the greatest influence on future populations. The modeling framework estimates the change in population growth and number of populations while accounting for geographic variation in life history. The model links intrinsic factors (demographic vital rates) to four extrinsic anthropogenic factors that are expected to impact gopher tortoise population viability (climate warming, sea level rise, urbanization, and shifts in habitat management). We used published models describing extrinsic factors in the future to project gopher tortoise demographics under six future scenarios varying in threat magnitude and presence at three timesteps—40, 60, and 80 years in the future. A regression analysis of model outputs was used to identify threats that are predicted to have the greatest impact on gopher tortoise populations. We summarize the model framework below; additional information is available in the SSA report (Service 2022, pp. 144–159, appendix B; Folt et al. 2022, entire).

We developed a population viability analysis (PVA) framework to predict population growth and extinction risk for the gopher tortoise. For the PVA, the demography of spatially explicit local gopher tortoise populations was brought into a multi-stage, female-only model with two discrete life stages: juveniles and adults. Recruitment into the adult stage by immigration was also modeled. Specific demographic parameters including recruitment, maturity age, survival, immigration, and initial population size were modeled based on values in gopher tortoise literature (Landers et al. 1980, p. 359; Mushinsky et al. 1994, p. 123; Rostal and Jones 2002, p. 7; Ott-Eubanks et al. 2003, p. 319; Ashton et al. 2007, p. 360; Guyer et al. 2012, p. 130; Perez-Heydrich et al. 2012, p. 342; Smith et al. 2013, p. 355; Tuberville et al. 2014, p. 1155; Meshaka Jr. et al. 2019, pp. 105–106; Howell et al. 2020, entire; Folt et al. 2021, pp. 624–625, 627; Hunter and Rostal 2021, p. 661; E. Hunter unpubl. data, 2021; J. Goessling 2021, p. 141). For the demographic parameters (*e.g.,* recruitment, maturity age, survival) that vary substantially by temperature among populations, we determined the relationships between demographic rates and mean annual temperature (MAT) sourced from the WorldClim database (Hijmans 2020, entire).

We initialized the model with estimates of population size from spatially delineated populations (as described in *Current Condition*). In the future condition analysis in the SSA, we did not model local populations with fewer than three adult individuals as part of the future condition analysis as these populations do not have sufficient viability to remain on the landscape during the timeframes modeled (40, 60, and 80 years) (*i.e., these populations have reached the quasi-extinction threshold*). The process of delineating spatially explicit local populations and landscape populations for the future condition model resulted in a dataset of 626 local populations that formed 244 landscape populations with 70,600 individual (female) gopher tortoises that are included in our analysis of future conditions (Service 2022, p. 149).

A recently published peer-reviewed model uses a very similar methodology to the future condition analysis in the SSA (Folt et al. 2022, entire). The published model varied slightly from that in the SSA and did not model populations across the range with current abundance of fewer than eight individuals or fewer than three adult females. Populations with seven or fewer tortoises likely lack sufficient genetic diversity to support sufficient long-term viability (Chesser et al. 1980, entire; Frankham et al. 2011, p. 466; Folt et al. 2022, p. e02143). Both the recently published and the future condition analysis runs of the model assumed a 1:1 sex ratio and a 3:1 adult:juvenile ratio in populations and used the ratios to isolate and separate the female population into juvenile and adult components (Service 2022, p. 149; Folt et al. 2021, p. 626; Folt 2022, p. e02143). The published iteration of the model resulted in the delineation of 457 local populations that formed 202 landscape populations (metapopulations) and approximated 70,500 female tortoises (Folt et al. 2022, p. e02143). The slight variation in the published model did not substantively change the considerations in our analyses of the gopher tortoise's future condition.

Influences on Gopher Tortoise Future Viability

In coordination with scientists with expert knowledge in both gopher tortoise population biology and habitat management, we identified factors expected to influence gopher tortoise demographics in the future as described in Summary of Biological Status and Threats. We determined the key drivers of the gopher tortoise's future condition that we could incorporate into the model are climate warming, habitat management, urbanization, and sea level rise.

Climate change is predicted to drive warming temperatures and seasonal shifts in precipitation across the Southeast (Carter et al. 2018, entire). Of these two effects, warming temperatures may have the greater impact on gopher tortoises, because gopher tortoise demography is known to be sensitive to temperature gradients across the species' range. Specifically, maturity age and fecundity vary along a north-south latitudinal gradient, where warmer, southern populations have faster growth rates, younger maturity ages, and

increased fecundity relative to cooler, northern populations (Ashton et al. 2007, p. 123; Meshaka Jr. et al. 2019, pp. 105–106). We modeled how climate warming may influence gopher tortoise demography by using the estimated linear relationships of mean annual temperature with maturity age and fecundity to predict how warming temperatures experienced by populations in the future will drive concurrent changes in demography.

Although the gopher tortoise exhibits temperature-dependent sex determination, we did not include this effect in the model as gopher tortoises can modify nest site selection and timing of nesting, as discussed in chapter 3 of the SSA (Service 2022, p. 58). We also did not model any potential range expansion or contraction that could occur due to long-term climate change, because we are aware of no consensus or projection framework related to vegetative community changes and climate change projections; also, we expect any significant expansion or contraction of the gopher tortoise range is likely to occur late in or beyond our projection timeframe of 80 years.

Climate change models predict favorable burn window conditions to shift over future decades, with favorable conditions for prescribed fire increasing in the winter but decreasing in the spring and summer (Kupfer et al. 2020, pp. 769–770). Overall, projections show that seasonal shifts in favorable burn window conditions will decrease overall opportunity for management with prescribed fire. We estimated how habitat management influences gopher tortoise populations by modeling use of fire as a management tool and linking the frequency of management to adult survival (Kupfer et al. 2020, entire; Service 2022, appendix B; Folt et al. 2022, pp. 4, 8–11). We modeled four changes in the burn window based on climate shifts projected by Representative Concentration Pathway (RCP) 4.5 and RCP 8.5: (1) decreased fire, (2) very decreased fire, (3) increased fire, and (4) status quo.

Urbanization and development are expected to affect gopher tortoise populations in the future, even those on conservation lands, through reduced connectivity and effects to gene flow and population migration dynamics. Urbanization may also reduce the use of prescribed fire in an area and contribute to road mortality and the introduction of nonnative invasive species. We modeled effects of urbanization pressure on gopher tortoise populations by linking urbanization projections from the SLEUTH urbanization model to habitat management of local populations with prescribed fire and with baseline immigration rates of gopher tortoises across landscape populations (Terando et al. 2014, entire). We modeled three potential thresholds in urbanization: (1) Low urbanization where cells have a 95 percent or greater probability of being developed; (2) moderate urbanization where cells have a 50 percent or greater probability of being developed; and (3) high urbanization where cells have a 20 percent or greater probability of being developed. Modeled cells with a high probability of urbanization are likely to be urbanized under any scenario (higher certainty), while areas with a lower probability of urbanization are likely to be urbanized in scenarios with increased impacts or greater effects. Inclusion of areas with a lower chance of development leads to an overall greater area expected to be developed.

Sea level rise is expected to negatively affect gopher tortoise populations in low-lying coastal areas, such as coastal sand dune environments (Blonder et al. 2021, pp. 6–8). We modeled effects of sea level rise on gopher tortoises using three projections of sea level rise: The ''intermediate-high,'' ''high,'' and ''extreme'' projections correspond to projections from global emission scenarios RCP 6 and RCP 8.5 (IPCC 2022, entire; NOAA 2020, entire). We projected the effects of sea level rise on the gopher tortoise in the future by modeling the height above sea level of local populations and through reduced connectivity between local populations.

Future Scenarios

We developed six plausible scenarios of future climate warming, urbanization, habitat management, and sea level rise to simulate population growth and extinction risk for gopher tortoises for 40, 60, and 80 years into the future (table 3). Specifically, we created three scenarios with different levels of stressors (low stressors, medium stressors, and high stressors) that experienced habitat management consistent with contemporary target management goals. We then held the medium stressor values constant and developed three scenarios that varied in habitat management treatments, ranging from scenarios for the most habitat management to the least habitat management (table 3).

Little information is available describing gopher tortoise immigration rates in wild populations. Given the uncertainty around this parameter, we included four additional scenarios with the medium stressor values and status quo habitat management to understand the effects of varying rates of immigration on the gopher tortoise future condition.

TABLE 3—THREATS, HABITAT MANAGEMENT, AND IMMIGRATION VALUES IN THE NINE PLAUSIBLE SCENARIOS USED TO PROJECT FUTURE POPULATION GROWTH AND ABUNDANCE OF GOPHER TORTOISES

Scenarios	Stressors			Habitat management	Immigration into the population (percent)
	Climate warming (°C)	Sea level rise (m)	Probability of urbanization		
Low stressors	1.0	0.54	95 percent or greater	Status quo	1
Medium stressors	1.5	1.83	50 percent or greater	Status quo	1
High stressors	2.0	3.16	20 percent or greater	Status quo	1
Decreased management	1.5	1.83	50 percent or greater	Less fire	1
Very decreased management	1.5	1.83	50 percent or greater	Much less fire.	1
Improved management	1.5	1.83	50 percent or greater	More fire	1
No immigration	1.5	1.83	50 percent or greater	Status quo	0
Intermediate immigration	1.5	1.83	50 percent or greater	Status quo	1
High immigration	1.5	1.83	50 percent or greater	Status quo	2
Very high immigration	1.5	1.83	50 percent or greater	Status quo	4

[The first three scenarios vary the levels of stressors (climate warming, sea level rise, and urbanization), while holding habitat management and immigration constant.

The second three scenarios vary the levels of habitat management (through prescribed fire), while holding stressors and immigration constant.

The last four scenarios vary only in the level of immigration into the population and hold stressors and habitat management constant.]

To assess future resiliency, redundancy, and representation of the gopher tortoise, we used population projections to estimate changes in gopher tortoise populations in the future under each of the nine scenarios. We assessed the resiliency of future populations to changing environments by estimating persistence probability. Persistence probability is defined in this assessment as a measure of the risk of extinction and is expressed as the percent of current populations projected to occur on the landscape in a given future scenario. Although the SSA report uses the categories of ''extremely likely to persist,'' ''very likely to persist,'' ''more likely than not to persist,'' and ''unlikely to persist'' to characterize the future condition of gopher tortoise populations, these terms represent a portion of our analysis and are not fully representative of the status on the species. We will use the phrase ''remain on the landscape'' or ''not extirpated'' in this finding to indicate the modeled future condition categories of gopher tortoise populations of ''extremely likely to persist,'' ''very likely to persist,'' and ''more likely than not to persist,'' and will indicate the timeframe to which that projection applies.

We assessed redundancy by evaluating projected changes in the total number of individuals (abundance or resiliency), number of local populations, number of landscape populations, and their distribution across the landscape in the future. We summarized population trends by estimating population growth rate as increasing (greater than 1), stable (1), or decreasing (less than 1). We evaluated how representation is predicted to change in the future by examining how population growth of total population size (number of individual female gopher tortoises), number of local populations, and number of landscape populations will vary by the five population genetic groups of tortoises across the species' range.

We report the rangewide model projections for each scenario at the three future time steps, summarize the results across all populations across the species' range, and describe differences among analysis units in *Summary of Future Analysis,* below. Details regarding future projections may also be found in the SSA report and the peer-reviewed model resulting from the SSA analyses (Service 2022, pp. 159–175; Folt et al. 2022, entire).

Summary of Future Analysis

While declines in abundance and number of populations are predicted, overall projections suggest that extinction risk for the gopher tortoise is relatively low in the future. Population projections under six future scenarios (threats and management scenarios) predicted declines in the number of gopher tortoise individuals, local populations, and landscape populations at the 40-, 60-, and 80-year timesteps. Relative to current levels of total population size, projections for total population size suggested declines by 2060 (33–35 percent declines), 2080 (30–34 percent declines), and 2100 (28–33 percent declines). The declines reflect the projected loss of small gopher tortoise populations in the earlier timestep (40 years), while remaining larger populations remain on the landscape longer. The six scenarios varied little in the impact on the total number of individuals, local populations, and landscape populations within each timestep, but impacts increased in each successive timestep. In addition, the 95 percent confidence interval overlapped with 1.0 in all cases, indicating no difference in the scenarios.

Among the future scenario projections, the number of local populations and landscape populations were predicted to decline in each projection interval (40-, 60-, and 80-year timesteps). Declines in local populations and landscape populations were 47–48 percent and 25–27 percent declines among scenarios, respectively, at the 40-year timestep; 60–61 percent and 41–43 percent declines, respectively, at the 60-year timestep; and 68–70 percent and 53–57 percent declines, respectively, at the 80-year timestep. With these declines, mean projections among scenarios at the 80-year timestep indicate 47,202–50,846 adult female gopher tortoises remain on the landscape in 188–198 spatially explicit local populations across the range of the species.

The number of individuals, local populations, and landscape populations varied by analysis unit. Abundance in Units 1, 3, and 5 was projected to decline overall (27–40 percent, 51–53 percent, and 42–48 percent declines, respectively). Unit 4 was projected to experience a more modest decline (2–14 percent decrease in abundance), and Unit 2 was projected to increase in abundance. However, declines in the number of local populations are projected for all units. The predicted declines in number of local populations are greatest in Units 1, 2, and 5. More populations in Units 1 and 2 currently exhibit low resiliency, while Unit 5 contains the highest abundance and number of local populations across the range.

Threats and habitat management scenarios did not strongly affect projections of gopher tortoise total population size (number of females in the total population), or the number of local and landscape populations. No single threat scenario (low, medium, or high stressors) or management scenario (more, less, or much less management) was sufficient to prevent population declines. However, model projections did change substantially based on the immigration rate in the scenario (very high, high, intermediate, or no immigration). For example, the total population size and the number of local and landscape populations projected to remain on the landscape in 2080 under the ''medium stressors'' scenario were reduced substantially when simulated with an immigration rate of 0. Conversely, higher values for immigration (2 and 4 percent) produced projections with substantially increased total population size above initial starting population size and decreased declines in local and landscape populations. In addition to immigration, the initial total population size, areal extent of the population (ha (ac)), and predicted implementation of habitat management through prescribed fire positively affected the chance the population would remain on the landscape in the future. The declines in number of local populations occurred, in part, because many local populations (27.8 percent) had very few individuals to start with in the current conditions. Assuming a 3:1 adult to juvenile ratio and an even sex ratio, local populations with fewer than 8 individuals were functionally extirpated at the start of projections, given our quasi-extinction probability (3 or fewer adult females).

Our analysis simulated the fate of known populations largely on protected conservation lands that we expect will be managed for conservation in the future. Future condition projections based only on data from spatially delineated populations (*i.e.,* do not contain county-level data or gopher tortoises that are present, but not reported) likely substantially

underestimate the true number of gopher tortoises present across the species' range. We expect populations on managed conservation lands to be characterized by greater demographic rates and lower extinction risk relative to populations that we were unable to model in our framework (populations with no spatially explicit data). To this end, we did not project the abundance of existing populations not included in our dataset or estimate the formation of new populations outside of conservation lands. While other tortoise populations exist outside of the ones we simulated with our projection model and new tortoise populations may form due to natural dispersal and colonization dynamics, they may occur on lands lacking long-term protection from development, and we did not project those populations into the future under assumptions of land management and protection for wildlife conservation. Similarly, we could not estimate the formation of new populations outside of the sites we projected, or the migration of entire populations to new areas, because we have no guarantee of land available for the formation or migration of populations.

While the numbers of individuals, populations, and landscape populations were all expected to decline across each projection interval, overall projections suggest that extinction risk for the gopher tortoise is relatively low in the future. Of the individuals, local populations, and landscape populations modeled (a small subset of populations likely to occur across the landscape), mean projections among scenarios for 80 years in the future suggested the presence of 47,202–50,846 individuals (females only) among 188–198 local populations within 106–114 landscape populations across most of the range of the species. The presence of relatively large numbers of individuals and populations suggests resiliency of the species in the face of change, and redundancy to buffer from future catastrophic events. The spatial distribution of populations predicted to occur on the landscape in the future are distributed evenly among genetic analysis units, which suggests adaptive capacity or representation in the future as well.

Although we do not project any of the analysis units to be extirpated in any scenario, we do anticipate declines in species' representation and redundancy through the projected loss of total number of individuals and number of local and landscape populations. Gopher tortoise populations are projected to remain on the landscape in all scenarios and included timesteps in each analysis unit, providing genetic variability across the range and adaptive capacity for the species. We expect that future gopher tortoise redundancy will be somewhat reduced from current redundancy due to the loss of some local and landscape populations. For example, in Unit 1, approximately 16 percent of current populations are expected to remain on the landscape at the 80-year timestep, under the medium stressor and less management scenario. Populations in this unit are more isolated, small, and fragmented compared to the remainder of the range.

Determination of Gopher Tortoise's Status

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of ''endangered species'' or ''threatened species.'' The Act defines an ''endangered species'' as a species that is in danger of extinction throughout all or a significant portion of its range, and a ''threatened species'' as a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. The Act requires that we determine whether a species meets the definition of ''endangered species'' or ''threatened species'' because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

Status Throughout All of Its Range

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we determined that the species currently has sufficient resiliency, redundancy, and representation contributing to its overall viability across its range. The primary stressors affecting the gopher tortoise's biological status include habitat loss, degradation, and fragmentation due to land use changes from urbanization (Factor A), climate change (Factor E), and insufficient and/or incompatible habitat management (Factor E). Upper respiratory tract disease and other viral, bacterial, fungal, and parasitic infections (Factor C) affect individual gopher tortoises and can have localized effects, but these threats do not appear to have species-level impacts. Predation of eggs, hatchlings, and juvenile tortoises (Factor C) impacts some gopher tortoise populations. Overutilization for commercial or recreational purposes (harvest and rattlesnake roundups) (Factor B) of gopher tortoises was a historical threat and may affect individuals, but is not currently an impact to the species rangewide. The effects of nonnative invasive species (Factor E) on gopher tortoise habitat also negatively influence gopher tortoise viability. Conservation efforts and regulatory mechanisms are in place across the range of the species and are addressing some of the identified threats by restoring, enhancing, or providing gopher tortoise habitat, relocating tortoises, and augmenting populations through captive propagation.

Urbanization results in a range of impacts that either remove or degrade/fragment remaining habitat, or can impact gopher tortoises directly through development. Urbanization brings road construction and expansion, which may cause direct mortality of gopher tortoises. In addition, this stressor creates conditions beneficial to nonnative invasive species and predators as well as conditions that limit fire management of gopher tortoise habitat. Temperature increases associated with long-term climate change are likely to further constrain use of prescribed fire through a decrease in the number of suitable burn days. Additionally, habitat loss resulting from sea level rise associated with climate change is a risk for coastal populations of gopher tortoise.

A variety of conservation efforts to benefit the gopher tortoise and its habitat have been implemented by Federal and State agencies, nongovernmental organizations, private landowners, and partnerships across the range of the species. These conservation measures and existing regulatory mechanisms also influence gopher tortoise viability through the conservation and restoration of gopher tortoise habitat and prevention of habitat loss, particularly efforts implemented since our July 27, 2011, 12-month finding on the petition to list the eastern portion of the gopher tortoise range as threatened.

While threats have acted on the species to reduce available habitat and species abundance, the gopher tortoise occurs in the six States comprising the historical and current range of the species. In addition, based on best available information, we estimate that more than 149,000 gopher tortoises occur in 656 spatially delineated local populations across the range of the species. Approximately 38 percent of

local populations exhibit high or moderate current resiliency, and the species is widely distributed across much of its range. In addition, the 360 gopher tortoise populations in low resiliency are widely distributed across the species' range. These low-resiliency populations often occur near other local populations (within a landscape population) and contribute to the resiliency of the landscape populations and the species' redundancy and representation. Despite the historical and current loss of habitat with the open pine conditions required by the gopher tortoise, sufficient quality and quantity of habitat remains to provide adequate resiliency to contribute to the viability of the species. Although the species-level redundancy has likely decreased from historical levels due to loss of habitat and the effects to the 3Rs, the gopher tortoise retains a sufficient number of populations with high or moderate resiliency that are distributed across the range to respond to catastrophic events. The five genetic groups delineated across the species' range provide adaptive capacity and sufficient species-level representation for the gopher tortoise. Thus, after assessing the best available information, we conclude that the gopher tortoise currently exhibits levels of resiliency, redundancy, and representation such that the species is not in danger of extinction throughout all of its range.

Therefore, we proceed with determining whether the gopher tortoise is likely to become an endangered species within the foreseeable future throughout all of its range. We evaluated the future condition of the species based on projections under nine plausible scenarios. We evaluated the viability of the species under these scenarios over the foreseeable future and considered the condition of the species in relation to its resiliency, redundancy, and representation. We analyzed future conditions based on input from species experts, generation time for the species, and the confidence in predicting patterns of climate warming, sea level rise, urbanization, and habitat management, enabling us to reliably predict threats and the species' response over time. Using the best available information, we evaluated future conditions at 40, 60, and 80 years in the future. These timesteps allowed us to project relevant threats to the species in view of its life-history characteristics, including lifespan and reproduction and recruitment. Within this timeframe, these projections are sufficiently reliable to provide a reasonable degree of confidence in the predictions. Details regarding the future condition analyses are available in the SSA report and associated future condition model (Folt et al. 2022; Service 2022, appendix B).

In modeling the future condition of the species, we projected the number of individuals, local populations, and landscape populations, population growth, and the probability that populations will remain on the landscape (percent of current local populations extant on the landscape) under each scenario at timesteps 40, 60, and 80 years into the future as described in *Future Condition,* above. The projection outcomes did not differ significantly by different threat scenarios; however, immigration and management actions did affect model results. The threats included in future condition modeling are projected to result in a decline in the number of individuals, populations, and landscape populations across each projection interval. Of the individuals, local populations, and landscape populations modeled (a subset of populations likely to occur across the landscape), mean projections among scenarios for 80 years in the future suggested the presence of 47,202–50,846 individuals (adult females) among 188–198 local populations within 106–114 landscape populations. We recognize this is likely an underestimation of the gopher tortoise's future condition since only existing populations on protected lands were modeled. In addition, any new populations in the future (formed or translocated) were not included in this future projection modeling. Many of the populations predicted not to remain on the landscape were currently small populations. Although the model projects declines in the future that include the loss of these smaller populations, the overall projections suggest that extinction risk for the gopher tortoise is low in the future.

Although the threats to the species of habitat loss and fragmentation due to urbanization, climate change, sea level rise, and habitat management are expected to persist in the foreseeable future and the effects of these threats on this long-lived species will continue at some level, some threats have been reduced and will continue to be reduced through implemented and ongoing conservation actions and regulatory mechanisms, as discussed above under *Conservation Efforts and Regulatory Mechanisms.* Rangewide, the future condition of the species with relatively large numbers of individuals and populations suggests resiliency to withstand stochastic environmental and demographic change, and redundancy to buffer from future catastrophic events. The spatial distribution of populations predicted to remain extant in the future is distributed among genetic analysis units, which suggests sufficient genetic representation in the future as well.

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we conclude that the risk factors acting on the gopher tortoise and its habitat, either singly or in combination, are not of sufficient imminence, scope, or magnitude to rise to the level to indicate that the species is in danger of extinction now (an endangered species), or likely to become endangered within the foreseeable future (a threatened species), throughout all of its range.

Status Throughout a Significant Portion of Its Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. Having determined that the gopher tortoise is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for the gopher tortoise, we chose to address the status question first. We began by identifying any portions of the range where the biological status of the species may be different from its biological status elsewhere in its range. The range of a species can theoretically be divided into portions in an infinite number of ways, so we focus our analysis on portions of the species' range that contribute to the conservation of the species in a biologically meaningful way. For this purpose, we considered information pertaining to the geographic distribution of (a) individuals of the species, (b) the threats that the species faces, and (c) the

resiliency condition of populations. For the gopher tortoise, we considered whether the threats or their effects are occurring in any portion of the species' range such that the species is in danger of extinction now or likely to become so in the foreseeable future in that portion of the range.

We examined the following past, ongoing, and future anticipated threats: habitat loss and fragmentation due to urbanization, climate warming, sea level rise, habitat management, disease, predation, and nonnative invasive species, including cumulative effects. The location and magnitude of some threats varies across the species' range and accordingly may impact the species differently in different portions. For example, sea level rise influences gopher tortoise viability primarily in coastal areas.

Less habitat management to benefit gopher tortoise has been implemented in the western portion of the range (Units 1 and 2) compared to the remainder of the range; therefore, the effects of lack of habitat management influences gopher tortoise populations in the westernmost unit to a greater extent. Although threats to the gopher tortoise's viability differ spatially and in magnitude, we find that the overall level of threats is similar in populations or analysis units across the range of the species. These threats are certain to occur, and in those analysis units with fewer populations that exhibit predominantly low resiliency, these populations are facing the same level of threats. In those analysis units with populations that are overall less resilient compared to those in other units, we expect that a similar level of threats will have a disproportionate impact in these areas with lower resiliency populations. These low resiliency populations (or analysis units) will be impacted or have a stronger negative response to threats than moderate or high resiliency populations (or analysis units). We looked across the range of the gopher tortoise and identified three portions of the range where the biological status may be different than the rangewide status. The three areas we found to warrant further evaluation were the two westernmost analysis units corresponding to Unit 1 (Western; west of the Mobile and Tombigbee Rivers) and Unit 2 (Central; west of the Apalachicola and Chattahoochee Rivers and east of Unit 1) and Unit 5 (Florida).

The impacts of habitat loss and fragmentation, climate change, and habitat management combined with other stressors are expected to reduce the viability of the populations to withstand stochastic and catastrophic events. Although most threats occur at a similar level throughout the range of the species, the threats of habitat management and sea level rise differ across the range.

Sea level rise primarily affect populations along the coast in Unit 5 (Florida). Although sea level rise is projected to affect coastal populations of gopher tortoise, the number of populations affected varies by location and elevation of the population, site-specific characteristics, and climate change scenario. Unit 5 currently has 43 populations that exhibit high resiliency and 50 populations that exhibit moderate resiliency. Even though declines are predicted to be more significant in this unit than others, future condition modeling projects between 58 and 62 local populations and 37 to 43 landscape populations will remain on the landscape in Unit 5, including the very large populations (exceeding 1,000 individuals). The current and future condition analyses of gopher tortoise indicate sufficient resiliency, representation and redundancy in Unit 5. Given the species' current and future condition within this unit, we determined that the gopher tortoise in Unit 5 does not have a different status than the remainder of the range.

The best available information indicates that less habitat management occurs in the western portion of the range (Units 1 and 2) compared to the remainder of the range. The populations in the western two units (particularly Unit 1) are characterized by ecological and physiological characteristics that lead to lower resiliency. Populations in Units 1 (Western) and 2 (Central) experience lower abundance, smaller clutch size, lower hatch rate, slower growth, and less extensive suitable habitat leading to lower resiliency for a higher proportion of populations in the two units. In Units 1 (Western) and 2 (Central), approximately 11 and 33 percent of populations exhibit moderate or high resiliency, respectively, compared to 45 percent rangewide. A higher proportion of populations in Units 1 (Western) and 2 (Central) exhibit low resiliency, with 88 percent of populations in Unit 1 (Western) and 67 percent of populations in Unit 2 (Central) in low resiliency. Less habitat management beneficial to gopher tortoise occurs in Units 1 and 2, and the overall lower resiliency of populations in these units is lower. As a result of lower resiliency, the species' response is more pronounced, and the rangewide threats and lower levels of habitat management are having a greater impact than elsewhere in the range. Despite the lower current resiliency of populations in Units 1 (Western) and 2 (Central), the gopher tortoise is still widespread throughout this extensive geographic area and high and moderate resiliency populations also occur throughout the units. In addition, given the current population distribution across these units, it is not likely that a single catastrophic event would currently place the species from this portion of its range at risk of extinction.

Modeling of future conditions projects declines in abundance and fewer extant local and landscape populations in Units 1 (Western) and 2 (Central) compared to the rest of the range in the foreseeable future. For example, Unit 1 (Western) and Unit 2 (Central) are projected to have 15 and 14 local populations, respectively, on the landscape in 2100 under the medium stressors and less habitat management scenario. These projected declines would significantly increase the risk of extirpation of Units 1 (Western) and 2 (Central) from a catastrophic or stochastic event. Although the species currently has sufficient resiliency and distribution to withstand a stochastic or catastrophic event, projected declines in resiliency or extirpation of populations will further reduce the species redundancy and representation in this portion of the range. Given the species' future condition within these units, we have identified Units 1 (Western) and 2 (Central) of the gopher tortoise as an area that has a different status than the remainder of the range.

We then proceeded to the significance question, asking whether this portion of the range (*i.e.,* Units 1 (Western) and 2 (Central)) is significant. The Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the gopher tortoise, we considered whether this portion of the species' range is significant based on its biological importance to the overall viability of the gopher tortoise. Therefore, for the purposes of this analysis, when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the species, (2) contain high-quality or high-value habitat relative to the remaining portions of the range, for the species' continued viability in light of the existing threats, (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions, or (4)

contain a large geographic portion of the suitable habitat relative to the remaining portions of the range for the species.

We evaluated the available information about this portion of the species to assess its significance. The portion of the range that comprises Units 1 (Western) and 2 (Central) contains approximately 20 percent of the suitable habitat currently occupied by the species, with approximately 103,582 ac (41,918 ha) in Unit 1 (Western) and 68,430 ac (27,692 ha) in Unit 2 (Central). Although these units contribute to the rangewide representation and redundancy of the gopher tortoise, Units 1 (Western) and 2 (Central) do not constitute a large geographic area relative to the remaining portions of the range of the species. This portion does not contribute high-quality habitat or constitute high value habitat for gopher tortoise. The best available science indicates this portion generally contains lower quality or less extensive habitat for gopher tortoises than in the remainder of the range. In addition, this portion does not constitute an area of habitat that is essential to a specific life-history function for the species that is not found in the remainder of the range.

Overall, we found no substantial information that would indicate this portion of the gopher tortoise's range is significant in terms of the above habitat considerations. As a result, we determined that the portion comprising Units 1 (Western) and 2 (Central) does not represent a significant portion of the gopher tortoise's range. Therefore, we conclude that the species is not in danger of extinction now or likely to become so in the foreseeable future in any significant portion of its range. This finding does not conflict with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the aspects of the Final Policy's definition of ''significant'' that those court decisions held to be invalid.

We have carefully assessed the best scientific and commercial information available regarding the current and future threats to the gopher tortoise. Because the species is neither in danger of extinction now nor likely to become so in the foreseeable future throughout all or any significant portion of its range, the gopher tortoise does not meet the definition of an endangered species or threatened species. Therefore, we find that listing the gopher tortoise as an endangered or threatened species rangewide under the Act is not warranted at this time.

Distinct Population Segment (DPS) Analysis

Under the Act, we have the authority to consider for listing any species, subspecies, or, for vertebrates, any distinct population segment (DPS) of these taxa if there is sufficient information to indicate that such action may be warranted. The term ''species'' includes any subspecies of fish or wildlife or plants and any DPS of any species of vertebrate fish or wildlife that interbreeds when mature (16 U.S.C. 1532(16)). To guide the implementation of the DPS provisions of the Act, we and the National Marine Fisheries Service (National Oceanic and Atmospheric Administration—Fisheries), published the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) in the **Federal Register** on February 7, 1996 (61 FR 4722). Under our DPS Policy, we use two elements to assess whether a population segment under consideration for listing may be recognized as a DPS: (1) The population segment's discreteness from the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. If we determine that a population segment being considered for listing is a DPS, then the population segment's conservation status is evaluated based on the five listing factors established by the Act to determine if listing it as either endangered or threatened is warranted.

Based on the information available regarding potential discreteness and significance for the species, we determined it was appropriate to review the status of the gopher tortoise by conducting a DPS analysis for the species. The western portion of the gopher tortoise range (Western) where the species is currently listed as threatened (52 FR 25376, July 7, 1987)) consists of those populations of gopher tortoise found west of the Mobile and Tombigbee Rivers in Alabama, Louisiana, and Mississippi. The eastern portion of the range (Eastern), where the species was identified as a candidate in 2011, consists of those gopher tortoise populations east of the Mobile and Tombigbee Rivers in Alabama, Georgia, Florida, and South Carolina. Below, we evaluate the western and eastern portions of the gopher tortoise range as population segments to determine whether they meet the definition of a DPS under our DPS Policy.

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Figure 3. The gopher tortoise is listed as threatened under the Act in the western portion of the species' range (west of the Mobile and Tombigbee Rivers). The gopher tortoise was identified as a candidate species (listing is warranted but precluded) in the eastern portion of the species' range in 2011 (east of the Mobile and Tombigbee Rivers).

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Discreteness

Under our DPS Policy, a population segment of a vertebrate taxon may be considered discrete if it satisfies either of the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation.); or (2) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist

that are significant in light of section 4(a)(1)(D) of the Act. In determining whether the test for discreteness has been met under the DPS policy, we allow, but do not require genetic evidence to be used.

Significance

Under our DPS Policy, once we have determined that a population segment is discrete, we consider its biological and ecological significance to the larger taxon to which it belongs. This consideration may include, but is not limited to: (1) Evidence of the persistence of the discrete population segment in an ecological setting that is unusual or unique for the taxon, (2) evidence that loss of the population segment would result in a significant gap in the range of the taxon, (3) evidence that the population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range, or (4) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics. Of particular note, as we explained in our draft (76 FR 76987, December 9, 2011, p. 76998) and final (79 FR 37577, July 1, 2014, pp. 79 FR 37579, 37585) Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (SPR Policy), the definition of ''significant'' for the purpose of significant portion of the range analysis differs from the definition of ''significant'' found in our DPS Policy and used for DPS analysis. Considering the potential results of using the same standard for significance under the DPS policy to define ''significant'' in the SPR Policy led us to conclude that the two provisions cannot use the same definitions for ''significant.'' Accordingly, the analysis for ''significant'' under the DPS Policy differs from the analysis of ''significant'' under the SPR provision. While the definition contained in the SPR Policy has been vacated, our consideration of ''significant'' in the ''significant portion of its range'' provision for this analysis is also different than the standard for significance under the DPS Policy for the same reasons.

The DPS Policy requires that for a vertebrate population to meet the Act's definition of ''species,'' it must be discrete from other populations and must be significant to the taxon as a whole. The significance criterion under the DPS Policy is necessarily broad and could be met under a wider variety of circumstances even if it could not be met under the SPR Policy. For example, in this case, we determined (see section below) that the western and eastern population segments are ''significant'' for the purposes of DPS, and we did not, as discussed above, conclude that the western portion constituted a ''significant'' portion of the gopher tortoise's range.

Discreteness of the Western and Eastern Population Segments of the Gopher Tortoise Range

The western and eastern population segments of the gopher tortoise range are markedly separated from each other (other populations) geographically (physical) and genetically. The western and eastern population segments of the range are separated by the Mobile and Tombigbee Rivers. Thus, the western population segment includes all gopher tortoises occurring in southwestern Alabama, southern Mississippi, and southeastern Louisiana, and the eastern population segment includes all gopher tortoises occurring in the remainder of Alabama and all of Georgia, South Carolina, and Florida (figure 3). These rivers act as a physical impediment to crossing by gopher tortoises in either direction and represent a barrier to dispersal and gene flow. The rivers are wide and deep year-round, and human development (*e.g.,* roads and towns) is adjacent to some areas of the rivers. Due to the physical separation of these two population segments by the Mobile and Tombigbee Rivers, gopher tortoises in these portions do not, and will likely never, naturally interact with individuals or populations in the other population segment.

In terms of genetic separation, there is a phylogenetic break (difference in genetics) between the western and eastern population segments of the gopher tortoise's range (Ennen et al. 2012, pp. 113–116). Several studies show genetic assemblages across the geographic range, but these studies are not entirely congruent in their delineations of western and eastern genetic assemblages (Osentoski and Lamb 1995, p. 713; Clostio et al. 2012, pp. 617–620; Ennen et al. 2012, pp. 113–120; Gaillard et al., 2017, pp. 501–503). No shared haplotypes on a mitochondrial gene were noted in populations found on opposite sides of the Mobile and Tombigbee Rivers (Clostio et al. 2012, pp. 619–620). However, the phylogenetic break does not entirely correspond to a particular geographic barrier with some shared haplotypes found in both the western portions of the tortoise's range and the panhandle of Florida and Georgia populations in a similar study (Ennen et al. 2012, pp. 113–116). Recent microsatellite analysis suggests there are five main genetic groups in the taxon, delineated by the Tombigbee and Mobile Rivers, Apalachicola and Chattahoochee Rivers, and the transitional areas between several physiographic province sections of the Coastal Plains (*i.e.,* Eastern Gulf, Sea Island, and Floridian) (Gaillard et al. 2017, pp. 505–507).

Based on our review of the best available information, we conclude the western and eastern population segments of the gopher tortoise range are markedly separated from each other due to geographic (physical) and genetic separation. Therefore, we have determined that the western and eastern population segments of the gopher tortoise range each meet the condition of discreteness under our DPS policy.

Significance of the Western and Eastern Population Segments of the Gopher Tortoise Range

We determine that the western and eastern discrete population segments are significant based, in part, upon evidence that loss of portions would result in a significant gap in the range of the taxon. The loss of either the western or eastern population segment would result in a substantial change in the overall range and distribution of the gopher tortoise. The loss of the western portion would shift the taxon's western range boundary eastward and result in the loss of species' presence west of the Mobile and Tombigbee Rivers, which are natural barriers to the eastern portion. A loss of the eastern portion of the range would result in a significant gap in the range by losing 98 percent of the current estimated rangewide abundance (in spatially explicit populations), 88 percent of the geographic area of the range, and the core of the current species' distribution (Service 2022, pp. 119–120).

In addition, the western and eastern population segments differ markedly from each other in their genetic characteristics (unique haplotypes and pronounced nuclear differentiation), as described in *Discreteness,* above. The loss of the western population segment would result in a substantial reduction in the presence of these genetic characteristics in the species. The eastern population segment is genetically valuable to the taxon, because it contains the greatest genetic diversity and may contribute more to the overall adaptive capacity of the species. Therefore, we have determined that the western and eastern population segments differ markedly in the genetic

characteristics, and loss of this genetic diversity would likely impact the species' adaptive capacity.

Given the evidence that the western and eastern population segments would result in a significant gap in the gopher tortoise's range if lost, and that these population segments differ markedly from each other based on their genetic characteristics, we consider the western and eastern population segments to be significant to the species as a whole. Thus, the western and eastern population segments of the gopher tortoise's range meet the criteria for significance under our DPS Policy.

DPS Conclusion for the Western and Eastern Portions

Our DPS Policy directs us to evaluate the significance of a discrete population in the context of its biological and ecological significance to the remainder of the species to which it belongs. Under our DPS policy, the standard for discreteness does not require absolute separation because such separation can rarely be demonstrated for any population of organism. Based on an analysis of the best available scientific and commercial data, we conclude that the western and eastern portions of the gopher tortoise's range are discrete due to marked separation geographically, ecologically, and genetically from one another. Furthermore, we conclude that the western and eastern portions of the range are significant for the reasons described above, including that loss of either portion would result in a significant gap in the range of the taxon. Therefore, we conclude that the western and eastern portions of the gopher tortoise's range are both discrete and significant under our DPS policy, and, therefore, these populations are listable entities under the Act. We will subsequently refer to them as the Western DPS and the Eastern DPS.

As mentioned above, we have determined the gopher tortoise in the western portion of its range, the current listed entity of gopher tortoise, meets the criteria of a DPS, but the best available information does not support any taxonomic change for the species. This document does not propose a revision of the defined entity. We will take regulatory action in the future to assign the correct nomenclature to the listed entity if we deem this action to be necessary for clarity.

Based on our DPS Policy, if a population segment of a vertebrate species is both discrete and significant relative to the taxon as a whole (*i.e.,* it is a distinct population segment), its evaluation for endangered or threatened status will be based on the Act's definition of those terms and a review of the factors enumerated in section 4(a) of the Act. Having found that the western and eastern portions of the gopher tortoise's range each meet the definition of a distinct population segment, we now evaluate the status of each DPS to determine whether it meets the definition of an endangered or threatened species under the Act.

Status Throughout All of the Western DPS's Range

In the analysis above for the gopher tortoise as a whole, we have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the Western DPS (*i.e.,* Unit 1) of the species. We considered whether the Western DPS of the gopher tortoise is presently in danger of extinction throughout all of its range. As described above under *Status Throughout a Significant Portion of its Range,* the ongoing and future impacts of habitat loss and fragmentation, climate change, and habitat management in combination with secondary threats act to reduce the viability of the Western DPS. Other secondary, rangewide threats, including disease, predation, and nonnative invasive species, also have some effect on the Western DPS. However, the magnitude and impacts of these threats are exacerbated by population characteristics in this DPS.

The local gopher tortoise populations in the Western DPS are generally smaller than in the Eastern DPS; in particular, the local populations have lower abundance, decreased reproduction, and decreased recruitment compared to the remainder of the range. However, 106 spatially explicit local populations at varying levels of resiliency occur in the Western DPS and are distributed across the geographic area of the DPS. Approximately 87 percent of local populations in the Western DPS currently exhibit low resiliency, with 10 percent (12 populations) in moderate or high resiliency. Populations in the Western DPS occur in habitat that is more fragmented than in the Eastern DPS with the De Soto National Forest in southern Mississippi as one of the few extensive reaches of suitable habitat.

More than 103,000 ac (41,682 hectares) of habitat with gopher tortoise occurrences are currently known in the Western DPS with almost 2 million ac (809,371 ha) of potential habitat where gopher tortoise occupancy is unknown. The best available information indicates that less habitat management occurs in the Western DPS compared to the Eastern DPS, although fire implementation has more than doubled since 1994 (Service 2022, p. 130). Gopher tortoises are a long-lived species and populations in high (2) or moderate (10) resiliency currently occur in the Western DPS with reproduction and recruitment reported from populations on public and private lands. We expect individuals will remain on the landscape for several decades despite current and ongoing threats. Despite the lower current resiliency of populations in the Western DPS, the gopher tortoise is still widespread throughout this extensive geographic area. In addition, it is not likely that a single catastrophic event would result in the extirpation of the species from this portion, but loss of populations would reduce gopher tortoise representation and redundancy. We have determined that the Western DPS is not currently in danger of extinction throughout its range.

We next analyzed whether the Western DPS is likely to become an endangered species within the foreseeable future throughout its range. In our consideration of foreseeable future, we evaluated how far into the future we could reliably predict the threats to this unit, as well as the gopher tortoise's response to those threats. Based on the modeling and scenarios evaluated, we considered our ability to make reliable predictions in the future and the uncertainty in how and to what degree the unit could respond to those risk factors in this timeframe. We determined a foreseeable future of 80 years for the Western DPS. We analyzed future conditions based on input from species experts, generation time for the species, and the confidence in predicting patterns of climate warming, sea level rise, urbanization, and habitat management, enabling us to reliably predict threats and the species' response over time. Details regarding the future condition analyses are available in the SSA report and associated future condition model (Folt et al. 2022, SSA 2022, appendix B).

In future condition models, the populations in the Western DPS show low or no recruitment and population growth, leading to projected loss of populations, particularly small populations, in the foreseeable future. As described above, we developed nine plausible future scenarios to include varying levels of stressors and habitat management to project the future number of individuals, population growth rate, and number of local and landscape populations. The Western DPS is predicted to decline overall with reduced abundance and reductions in local and landscape populations. We included spatially explicit populations

with current population estimates of more than three tortoises in our analysis of future conditions. In the Western DPS, 102 spatially explicit local populations met this criteria and were modeled in our future condition analysis. In the moderate stressors and status quo habitat management scenario, 84 percent of modeled populations in the Western DPS are unlikely to remain on the landscape in 2100.

For example, with the exception of one population, the model projects the remaining six spatially explicit populations in Louisiana were unlikely to remain on the landscape in 80 years in the future. Mississippi was projected to lose 77 percent of current local populations, but maintain 71 percent of its landscape populations (landscape populations will be composed of fewer local populations). Further, approximately 80 percent of spatially explicit local populations in the Western DPS are projected as unlikely to remain on the landscape in 80 years under the status quo threats, less management (prescribed fire), and immigration scenario. As mentioned above, less habitat management currently occurs in the Western DPS compared to the Eastern DPS. Therefore, we expect that status quo threats (medium stressors) and less habitat management are reasonable and a plausible mechanism to project future species' condition in the Western DPS. The low resiliency of these populations significantly increases the impact of current and ongoing threats to the populations in the Western DPS. In addition to reduced resiliency, the impact of a catastrophic or stochastic event would reduce representation and redundancy in the Western DPS within the foreseeable future.

After assessing the best available information, we conclude that the Western DPS of gopher tortoise is likely to become endangered within the foreseeable future throughout the Western DPS.

Status Throughout a Significant Portion of the Western DPS's Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity* v. *Everson,* 435 F. Supp. 3d 69 (D.D.C. 2020) (*Everson*), vacated the aspect of the Final Policy on Interpretation of the Phrase ''Significant Portion of Its Range'' in the Endangered Species Act's Definitions of ''Endangered Species'' and ''Threatened Species'' (Final Policy) (79 FR 37578; July 1, 2014) that provided that the Service does not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson,* we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (that is, endangered). In undertaking this analysis for the Western DPS, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

Habitat loss, degradation and fragmentation affect gopher tortoise populations in the Western DPS at a similar level rangewide. In the Western DPS, urbanization, climate change, and incompatible and/or insufficient habitat management influence the current and future condition of the species at a level comparable to the remainder of the range across the DPS. Therefore, we found that the threats are acting on the species relatively uniformly across the Western DPS's range. However, we identified one portion of the Western DPS range where the effects may have a more pronounced effect and, accordingly, that may have a different status than the remainder of the DPS. The portion we considered was the geographic area of the Western DPS in the State of Louisiana, which has seven spatially explicit local populations and five landscape populations. The seven local populations in the Louisiana portion of the Western DPS exhibit low current resiliency. This low resiliency and limited distribution within this geographic area may increase the impact of a catastrophic or stochastic event on the representation and redundancy of the gopher tortoise in Louisiana. We have identified the Louisiana portion as one that has a different status than the remainder of the Western DPS.

We then proceeded to the significance question, asking whether this portion of the Western DPS (*i.e.,* Louisiana) is significant. The Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the Western DPS, we considered whether the Louisiana portion of the species' range may be significant based on its biological importance to the overall viability of the Western DPS. Therefore, for the purposes of this analysis, when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the Western DPS of gopher tortoise, (2) contain high-quality or high-value habitat relative to the remaining portions of the Western DPS' range, for the gopher tortoise's continued viability in light of the existing threats, (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions of the DPS, or (4) contain a large geographic portion of the suitable habitat relative to the remaining portions of the Western DPS.

This area does not act as a refugia or an important breeding area for this portion. It does not contain proportionally higher quality habitat or higher value habitat than the remainder of the DPS. It does not act as an especially important resource to a particular life-history stage for the gopher tortoise than elsewhere in the Western DPS.

Overall, there is little evidence to suggest that the Louisiana portion of the Western DPS' range has higher quality or higher value habitat or any other special importance to the species' life history in the Western DPS. In addition, this portion constitutes a small proportion of the Western DPS range (approximately 17 percent of Western DPS. Thus, based on the best available information, we find that this portion of the Western DPS's range is not significant in terms of the habitat considerations discussed above. Therefore, no portion of the Western DPS's range provides a basis for determining that it is in danger of extinction in a significant portion of its range. This finding does not conflict with the courts' holdings in *Desert Survivors* v. *Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018), and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not apply the

aspects of the Final Policy's definition of ''significant'' that those court decisions held to be invalid.

Determination of the Western DPS's Status

We have determined that the western portion of the gopher tortoise range is a valid DPS, and the Western DPS of the gopher tortoise is likely to become endangered within the foreseeable future throughout all of its range. On the basis of this status review, we continue to find the western portion (Western DPS) of the gopher tortoise is a threatened species.

Status Throughout the Eastern DPS's Range

We identified the eastern portion of the gopher tortoise range as a candidate species in the July 27, 2011, 12-month finding (76 FR 45130) and have included it in the Candidate Notices of Review in subsequent years. At the time of the 12-month finding, our assessment indicated the species was being impacted by the primary threat of habitat destruction and modification (Factor A) due to land conversion, urbanization, and habitat management. Other important threats to the species at that time included overutilization through rattlesnake roundups (Factor B), predation (Factor C), incompatible use of silvicultural herbicides (Factor E), and inadequacy of existing regulatory mechanisms (Factor D). We had determined disease (Factor C), road mortality (Factor E), and the effects of climate change (Factor E) to be additional stressors to the species.

In subsequent CNORs, we reviewed the status of the eastern portion of the range (now Eastern DPS) and described additional information and conservation actions needed. In addition, we noted that the extent to which the many potentially viable gopher tortoise populations are sufficient in number, arrangement, and security to ensure the long-term viability of the species was unknown. In development of the SSA, we compiled and analyzed the best available information including population information and conservation measures. We also developed a new population viability model based on the best available information; this model was not considered in previous CNORs or the original petition finding.

Currently, the Eastern DPS comprises the majority of gopher tortoise populations (approximately 84 percent) and habitat with known gopher tortoise occurrences (approximately 88 percent) of the gopher tortoise range, and, as such, the discussion of threats and the species' response to those threats in *Status Throughout All of Its* Range may be applied to the Eastern DPS as well. The Eastern DPS also includes the majority of spatially explicit local gopher tortoise populations across the range (84 percent or 550 populations), with 127 populations (19 percent) exhibiting high current resiliency and 169 populations (21 percent) exhibiting moderate resiliency (table 2). With many highly and moderately resilient populations widely distributed across the Eastern DPS's geographic area, the species' current level of redundancy provides the ability to withstand catastrophic events. The Eastern DPS includes four of the identified genetic groups for the species, conveying much of the species' representation and adaptive capacity. More than 741,330 ac (300,006 hectares) are currently known to be occupied by gopher tortoise in the Western DPS with more than 14.4 million ac (5.8 million ha) of potential habitat where gopher tortoise occupancy is unknown. The best available information indicates that a greater degree of habitat management occurs in the Eastern DPS compared to the Western DPS. Implementation of prescribed fire has increased from 3 to 14 times the number of acres burned in 1994, and 44 to 83 percent of landowners are carrying out additional beneficial practices for gopher tortoise (Service 2022, pp. 126–140). Therefore, the Eastern DPS is not currently in danger of extinction throughout its range.

Accordingly, we next analyze whether the Eastern DPS is likely to become an endangered species within the foreseeable future throughout its range. In our consideration of foreseeable future, we evaluated how far into the future we could reliably predict the threats to these units, as well as the gopher tortoise's response to those threats. Based on the modeling and scenarios evaluated, we considered our ability to make reliable predictions in the future and the uncertainty in how and to what degree the units could respond to those risk factors in this timeframe. We determined a foreseeable future of 80 years for the Eastern DPS. The methodology and timeframe used to determine the foreseeable future for the Eastern DPS followed the process described in *Status Throughout All of the Western DPS's Range,* above. We analyzed future conditions based on input from species experts, generation time for the species, and the confidence in predicting patterns of climate warming, sea level rise, urbanization, and habitat management, enabling us to reliably predict threats and the species' response over time. Details regarding the future condition analyses are available in the SSA report and associated future condition model (Folt *et al.* 2022, SSA 2022, appendix B).

Rangewide threats continue to impact the Eastern DPS in the future, including the key drivers of habitat loss and fragmentation due to urbanization, climate warming, sea level rise, and habitat management. Conservation efforts by Federal, State, and private partners benefit the gopher tortoise and its habitat in the Eastern DPS and these actions are expected to continue into the future. Although the Eastern DPS (Units 2, 3, 4, and 5) is projected to decrease in the number of local and landscape populations in the future, 46,176 to 49,697 individuals, 167 to 175 local populations, and 101 to 107 landscape populations are projected to remain across the Eastern DPS into the foreseeable future. These populations are distributed across the Eastern DPS in the foreseeable future similar to the current distribution.

Based on our analysis of the five factors identified in section 4(a)(1) of the Act, we conclude that the previously recognized threats to the eastern portion of the gopher tortoise range (Eastern DPS) from present or threatened destruction, modification, or curtailment of its habitat or range (Factor A) (urbanization and development, major road construction, incompatible and/or insufficient habitat management, and certain types of agriculture) are not impacting the species such that the species is in danger of extinction now or in the foreseeable future. We evaluated additional potential threats under the five listing factors stated above. In that evaluation, we found potential impacts such as URTD and other diseases (Factor C), predation (Factor C), overutilization (harvest and rattlesnake roundups) (Factor B), and nonnative invasive species (Factor E) impact individuals or populations, but do not have an impact at the species level at this time. Additionally, conservation measures and protection provided by a variety of conservation efforts to benefit the gopher tortoise and its habitat have been implemented by Federal and State agencies, nongovernmental organizations, private landowners, and partnerships across the range of the species, and we anticipate these conservation measures and protections will continue to benefit the gopher tortoise into the foreseeable future (in part due to other sensitive and federally listed species occurring in these areas). These conservation efforts and

regulatory mechanisms are in place across the range of the species and are addressing some of the identified threats by restoring, enhancing, or providing gopher tortoise habitat, relocating tortoises, and augmenting populations through captive propagation. See the SSA for a thorough discussion of all potential and current threats (Service 2022, pp. 46–102).

Conservation efforts by the Service, State agencies, nongovernmental organizations, and private groups as described in *Conservation Efforts and Regulatory Mechanisms,* above, have informed our analysis of the species' condition by providing additional information regarding species abundance, density, and habitat conditions within the range of the species. In addition, habitat restoration actions and species-specific conservation measures including translocation of individuals and improved awareness of the species' needs and threats have contributed to the improved condition of the species. In particular, Service-approved plans or other plans including the gopher tortoise CCA, CCAA, rangewide conservation strategy with the DoD, and the Gopher Tortoise Initiative have resulted in the protection of gopher tortoise habitat and populations across the range of the species. Many of the management actions and conservation easements under these plans are expected to remain in place in the future, benefiting the species. The BMPs implemented on working forests benefit the gopher tortoise and its habitat; these BMPs are expected to continue to be implemented in the future and will continue to benefit the species and its habitat.

Based on our analysis of the five factors identified in section 4(a)(1) of the Act, we conclude that the Eastern DPS is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range.

Status Throughout a Significant Portion of the Eastern DPS's Range

Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so within the foreseeable future throughout all or a significant portion of its range. Having determined that the Eastern DPS is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, we now consider whether it may be in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range—that is, whether there is any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion. Depending on the case, it might be more efficient for us to address the ''significance'' question or the ''status'' question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

In undertaking this analysis for the Eastern DPS, we chose to address the status question first. We began by identifying any portions of the range where the biological status of the species may be different from its biological status elsewhere in its range. The range of a species can theoretically be divided into portions in an infinite number of ways, so we focus our analysis on portions of the species' range that contribute to the conservation of the species in a biologically meaningful way. For this purpose, we considered information pertaining to the geographic distribution of (a) individuals of the species, (b) the threats that the species faces, and (c) the resiliency condition of populations. For the Eastern DPS, we considered whether the threats or their effects are occurring in any portion of the DPS' range such that the Eastern DPS is in danger of extinction now or likely to become so in the foreseeable future in that portion of the range.

The Eastern DPS comprises the majority of gopher tortoise populations and habitat across the range of the species, and, therefore, threats that affect the species rangewide also affect the gopher tortoise in the Eastern DPS. We evaluated the past, ongoing, and anticipated threats affecting the species including habitat loss, degradation, and fragmentation due to land use changes from urbanization, climate warming, sea level rise, and insufficient and/or incompatible habitat management. We also considered effects from URTD and other diseases, predation, overutilization, and nonnative invasive species, and cumulative effects. Conservation efforts and regulatory mechanisms also influence the gopher tortoise and its habitat in the Eastern DPS. These factors and threats influence the gopher tortoise similarly rangewide; however, we identified two portions of the Eastern DPS range where the impact of these factors may have a more pronounced effect such that it may have a different status than the remainder of the DPS. The portions we considered were the geographic area described as Unit 5 (Florida) and Unit 2 (Central; west of the Apalachicola and Chattahoochee Rivers and east of Unit 1) in the SSA report.

Sea level rise primarily affect populations along the coast in Unit 5 (Florida). Although sea level rise is projected to affect coastal populations of gopher tortoise, the number of populations affected varies by location and elevation of the population, site-specific characteristics, and climate change scenario. Of the 21 local populations occurring in coastal areas rangewide, 18 of these populations occur in Unit 5. Of these 18 coastal populations, 5 currently exhibit high resiliency and 13 exhibit moderate resiliency. Overall, Unit 5 currently has 43 populations that exhibit high resiliency and 50 populations that exhibit moderate resiliency. In our future projections, small populations in coastal areas decline in the same proportion as small populations throughout Unit 5 and rangewide. Future condition modeling projects between 58 and 62 local populations and 37 to 43 landscape populations will remain on the landscape in Unit 5, including the very large populations (exceeding 1,000 individuals). The current and future condition analyses of gopher tortoise indicate sufficient resiliency, representation and redundancy in Unit 5. Given the species' current and future condition within this unit, we determined that the gopher tortoise in Unit 5 does not have a different status than the remainder of the Eastern DPS.

As described in *Status Throughout a Significant Portion of Its Range,* populations in Unit 2 are generally less resilient and are characterized by low abundance, smaller clutch size, lower hatch rate, slower growth, and less extensive suitable habitat. Within the Eastern DPS, 26.7 percent of the populations in current low resiliency are found in Unit 2, which holds 5.9 percent of the abundance in the DPS. Although threats are similar throughout the Eastern DPS, the species' response is more pronounced in Unit 2 (Central) due to lower resiliency, and threats are having a greater impact than elsewhere in the DPS. For example, 14 local populations are projected to remain on the landscape in Unit 2 (Central) in 2100 under the medium stressors and less habitat management scenario. This projected decline in the number of populations would increase the impact of a catastrophic or stochastic event on the representation and redundancy in Unit 2 (Central) Given the species' future condition within this units, we have identified Unit 2 (Central) within

the Eastern DPS as an area that has a different status than the remainder of the Eastern DPS.

We then proceeded to the significance question, asking whether this portion of the DPS (*i.e.,* Unit 2) is significant. The Service's most recent definition of ''significant'' within agency policy guidance has been invalidated by court order (see *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018)). In undertaking this analysis for the Eastern DPS, we considered whether the Unit 2 (Central) portion of the Eastern DPS is significant based on its biological importance to the overall viability of the Eastern DPS. Therefore, for the purposes of this analysis, when considering whether this portion is significant, we considered whether the portion may (1) occur in a unique habitat or ecoregion for the DPS, (2) contain high-quality or high-value habitat relative to the remaining portions of the DPS, for the species' continued viability in light of the existing threats, (3) contain habitat that is essential to a specific life-history function for the species and that is not found in the other portions of the DPS, or (4) contain a large geographic portion of the suitable habitat relative to the remaining portions of the DPS.

Although Unit 2 (Central) contributes to the condition of the species within the Eastern DPS, it does not represent a large area of suitable habitat relative to the remainder of the Eastern DPS. Unit 2 (Central) holds approximately 9.2 percent of suitable habitat with known gopher tortoise occurrences in the Eastern DPS, and this habitat is of generally lower quality and is less extensive than in the remainder of the Eastern DPS. It does not contain proportionally higher quality habitat or higher value habitat than the remainder of the range. This area does not act as a refugia or an important breeding area for this portion. The area does not act as an especially important resource to a particular life-history stage for the gopher tortoise than elsewhere in the Eastern DPS.

Overall, there is little evidence to suggest that the geographical area of Unit 2 (Central) of the Eastern DPS's range has higher quality or higher value habitat to the species' life history in the Eastern DPS. In addition, this unit constitutes a small portion of the gopher tortoise habitat in the Eastern DPS (approximately 14 percent of this portion of the range). Thus, based on the best available information, we find that this portion of the Eastern DPS's range is not biologically significant in terms of the habitat considerations discussed above. Therefore, no portion of the Eastern DPS's range provides a basis for determining that the species is in danger of extinction now or within the foreseeable future in a significant portion of its range. This finding does not conflict with the courts' holdings in *Desert Survivors* v. *U.S. Department of the Interior,* 321 F. Supp. 3d 1011, 1070–74 (N.D. Cal. 2018) and *Center for Biological Diversity* v. *Jewell,* 248 F. Supp. 3d 946, 959 (D. Ariz. 2017) because, in reaching this conclusion, we did not need to consider whether any portions are significant and, therefore, did not apply the aspects of the Final Policy's definition of ''significant'' that those court decisions held were invalid.

Determination of the Eastern DPS's Status

Our review of the best available scientific and commercial information indicates that the Eastern DPS of the gopher tortoise does not meet the definition of an endangered species or a threatened species in accordance with sections 3(6) and 3(20) of the Act. Therefore, we find that listing the Eastern DPS of the gopher tortoise is no longer warranted for listing under the Act. With the publication of this document, the eastern portion of the gopher tortoise range (now the Eastern DPS) will be removed from the list of candidate species.

References Cited

A complete list of references cited is available on the internet at *https://www.regulations.gov* and upon request from the Florida Ecological Services Field Office (see **ADDRESSES**).

Author(s)

The primary authors of this notice are the staff members of the Florida Ecological Services Field Office and the Species Assessment Team.

Signing Authority

Martha Williams, Director of the U.S. Fish and Wildlife Service, approved this action on September 20, 2022, for publication. On September 30, 2022, Martha Williams authorized the undersigned to sign the document electronically and submit it to the Office of the Federal Register for publication as an official document of the U.S. Fish and Wildlife Service.

Madonna Baucum,

Chief, Policy and Regulations Branch, U.S. Fish and Wildlife Service.

[FR Doc. 2022–21659 Filed 10–11–22; 8:45 am]

BILLING CODE 4333–15–P

FEDERAL REGISTER

Vol. 87 Wednesday,
No. 196 October 12, 2022

Part IV

Environmental Protection Agency

40 CFR Part 49
Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–R10–OAR–2020–0361; FRL–5565–02–R10]

RIN 2012–AA02

Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to revise the Federal Air Rules for Reservations (FARR), which is a collection of Federal Implementation Plans (FIPs) under the Clean Air Act for Indian reservations in Idaho, Oregon, and Washington. The proposed revisions, the first since the FARR was promulgated in 2005, clarify aspects of the initial rules, improve implementation, reflect air quality improvement strategies similar to those implemented in neighboring jurisdictions, and add provisions to address high levels of particulate matter emissions. In addition, the EPA proposes to promulgate three new FIPs implementing the FARR, for the Snoqualmie Indian Reservation, the Cowlitz Indian Reservation, and the lands held in trust for the Samish Indian Nation. As revised, the FARR will help further protect the human health and the environment of communities in and adjacent to these Indian reservations. The FARR will continue to be implemented by the EPA or a delegated Tribal authority, until replaced by a Tribal Implementation Plan (TIP) for a particular Indian reservation.

DATES:

Comments: Comments must be received on or before January 10, 2023. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before November 14, 2022. Please refer to the **SUPPLEMENTARY INFORMATION** section (section IV.B. *Paperwork Reduction Act (PRA) of this preamble*) for additional information on submitting comments to OMB.

Public Hearing: If anyone contacts us requesting a public hearing on or before October 27, 2022, the EPA will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

ADDRESSES: You may submit your comments, identified by Docket ID No. EPA–R10–OAR–2020–0361, using the Federal eRulemaking Portal at *https://www.regulations.gov.* Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *www.regulations.gov.* The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.* See the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments. Please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section if you need assistance.

FOR FURTHER INFORMATION CONTACT: Sandra Brozusky, Air and Radiation Division, EPA Region 10, 1200 Sixth Avenue, Suite 155, Seattle, WA 98101–1128, (206) 553–5317, *brozusky.sandra@epa.gov.*

SUPPLEMENTARY INFORMATION:

Participation in virtual public hearing. As discussed in the public hearing subsection, if anyone contacts us to request a public hearing on or before October 27, 2022, a virtual hearing will be held on November 17, 2022. The opportunity for a virtual public hearing is being offered to provide interested parties the opportunity to present information and opinions to the EPA concerning our proposal.

If requested, the virtual hearing will convene at 5:30 p.m. Pacific Time and will conclude at 8:00 p.m. Pacific Time unless the number of registrants indicates more time is needed. The EPA may close a session 15 minutes after the last registered speaker has testified if there are no additional speakers. The EPA will announce further details, including whether the hearing will be held, on the virtual public hearing website at *https://www.epa.gov/farr.*

If a virtual hearing is held you can register to speak by using the online registration form available at *www.epa.gov/farr* or contact Sandra Brozusky at by email at *brozusky.sandra@epa.gov.* The EPA will post a general agenda prior to the hearing that will list registered speakers in approximate order at: *www.epa.gov/farr.*

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 5 minutes to provide oral testimony. The EPA recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at *www.epa.gov/farr.* Please monitor our website or contact Sandra Brozusky at (206) 553–5317 or by email at *brozusky.sandra@epa.gov* to determine if there are any updates. The EPA does not intend to publish a document in the **Federal Register** announcing updates.

If you require the services of a translator or a special accommodation such as audio description, please register for the hearing and describe your needs by November 1, 2022. If you need additional assistance, please contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section. The EPA may not be able to arrange accommodations without advanced notice.

Docket. The EPA has established a docket for this rulemaking under Docket ID No. EPA–R10–OAR–2020–0361. All documents in the docket are listed in *Regulations.gov.* Although listed, some information is not publicly available, *e.g.,* Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy. Publicly available docket materials are available electronically in *www.regulations.gov.*

Instructions. Direct your comments to Docket ID No. EPA–R10–OAR–2020–0361. The EPA's policy is that all

comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically any information that you consider to be CBI or other information whose disclosure is restricted by statute.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The *www.regulations.gov* website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at *https://www.epa.gov/dockets.*

Due to public health concerns related to COVID–19, the EPA Docket Center and Reading Room are open to the public by appointment only. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *www.regulations.gov.* For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

The EPA continues to carefully and continuously monitor information from the CDC, local area health departments, and our Federal partners so that we can respond rapidly as conditions change regarding COVID–19.

Submitting CBI. Do not submit information containing CBI to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. If your material cannot be submitted using *www.regulations.gov* contact the person in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Organization of this document. Throughout this document, whenever ''we,'' ''us,'' or ''our'' is used, it means the EPA. This supplementary information section is arranged as follows:

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I. Background

A. Today's Action

To better protect air quality on Indian reservations in Idaho, Oregon, and Washington, and consistent with our authority under sections 301(a) and 301(d)(4) of the Clean Air Act (CAA) and 40 CFR 49.11(a), the EPA is proposing revisions to the Federal implementation plans (FIPs) (40 CFR part 49, subpart M) and the General Rules for Application to Indian Reservations in EPA Region 10 (40 CFR part 49, subpart C). These rules, originally promulgated in 2005, are collectively known as the Federal Air Rules for Reservations or ''FARR.'' As revised, the FARR will continue to ensure that basic air quality regulations are in place to protect health and welfare on Indian reservations located in Idaho, Oregon, and Washington.

The proposed revisions are based on the EPA's and Tribes' experience in implementing the FARR since 2005, as well as changes in related Federal air quality regulations, and changes in monitored air quality. The revisions range from minor clarifications and revisions to existing rule language, to new regulations addressing additional emission sources, such as wood burning devices, that contribute to high levels of particulate matter emissions in certain areas. The minor changes to the existing FARR consist of eliminating duplicative text, correcting syntax and cross-reference errors, renumbering, minor clarification of rule language to improve consistency and implementation, and reformatting. In describing the FARR revisions in section II of this preamble, we have focused on the substantive rule changes, and do not describe in detail the editorial changes made throughout.

The proposed revisions include minor editorial changes throughout the FARR (subpart C) and FIP (subpart M) rules, in addition to substantive changes to certain provisions of the rules. As such, we are publishing with this proposal the full text of the rules as proposed to be revised, rather than only the portions of the text proposed to be revised in this action. A redline-strikeout comparison of the revised rules, as proposed, to the existing FARR and FIPs showing all proposed changes is included in the docket for this action. The EPA solicits comments on all aspects of the proposed revisions.

The EPA actively coordinated and consulted with affected Tribes in both group and individual meetings and encouraged affected Tribes to provide input to the EPA in developing these proposed revisions to ensure that Tribal considerations are properly addressed. This coordination and consultation with affected Tribes is described in the docket for this action.

B. Basis for Proposed Action

On April 8, 2005, the EPA promulgated FIPs under the CAA for 39 Indian reservations in Idaho, Oregon, and Washington to provide basic air quality regulations to protect health and

welfare (70 FR 18074). The EPA took this action under its authority in sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) to promulgate ''such Federal implementation plan provisions as are necessary or appropriate to protect air quality'' in Indian country. A key goal of the FARR was to help ensure that people living within Indian reservation boundaries receive equivalent air quality protection to those living outside of Indian reservations, as well as to ''level the playing field'' and help ensure that emissions from sources located within Indian reservations are controlled to levels similar to those of sources located outside the Indian reservations. The FARR rules were therefore substantially similar in the level of control to the neighboring State and local rules most relevant to the air polluting activities on these Indian reservations (70 FR 18074, 18077, 18091, 18093, April 8, 2005) (67 FR 11748, 11753, March 15, 2002).

The EPA has stated that it intends to carry out its authority under the CAA in Indian country in a prioritized way, beginning with sources that pose the greatest threat to public health and the environment (64 FR 8247, 8255, February 19, 1999) (67 FR 11748, 11749, March 15, 2002). The initial FIPs were the first building blocks under the CAA to address the most prevalent needs identified on Indian reservations in the Pacific Northwest. The EPA committed to revising the FARR as necessary or appropriate after gaining experience in implementing the FARR, identifying additional regulatory needs in light of changing air quality needs, and in consultation with Tribes (70 FR 18074, 18079, 18082, 18085, April 8, 2005).

This proposed rulemaking is the next step in addressing known air quality concerns on Indian reservations in the Pacific Northwest. The EPA has been implementing the FARR for over 15 years, often with the help of Tribes through formal delegations, grants, and informal assistance. Over the last several years, the EPA has actively coordinated and consulted with the Tribes in Idaho, Oregon, and Washington in developing these proposed revisions to the FARR and has sought suggestions from those responsible for implementation. The proposed revisions in this action incorporate many of these suggestions.

As with the initial promulgation of the FARR in 2005, the EPA is proposing these revisions under our authority in sections 301(a) and 301(d)(4) of the CAA and 40 CFR 49.11(a) because we have concluded that the revisions are necessary or appropriate for protecting air quality on Indian reservations in the Pacific Northwest. The proposed revisions fall into several categories. First, the EPA and the affected Tribes have identified needed clarifications of existing rule sections to ensure the FARR is implemented as intended in 2005. Second, promulgation of new requirements that apply on Indian reservations, such as the Federal Minor New Source Review Program in Indian Country (Indian Country Minor NSR Rule) (76 FR 38748, July 1, 2011) has made some provisions of the FARR obsolete or necessitated revisions. Third, the test methods and industry standards incorporated by reference into the FARR have been updated since 2005. Fourth, input from affected Tribes and the EPA's ongoing evaluation of the FARR identified particular concerns with air pollution from some unregulated sources of particulate matter, such as emissions from residential wood burning devices and certain orchard heating devices.

Finally, since promulgation of the FARR, the EPA has strengthened the National Ambient Air Quality Standards (NAAQS) and increased protection of public health and welfare from fine particle pollution by reducing the level of the NAAQS for $PM_{2.5}$ (particles less than or equal to 2.5 micrometers in aerodynamic diameter) to 35 micrograms per cubic meter ($\mu g/m^3$) for the 24-hour standard and 12 $\mu g/m^3$ for the annual standard (71 FR 61144, October 17, 2006) (78 FR 3086, January 15, 2013) [1]. The NAAQS, promulgated under section 109 of the CAA, are a key component of air quality protection under the CAA. $PM_{2.5}$ particles, measuring about 30 times less than the diameter of a human hair, are particularly harmful to human health as they can travel through the blood stream and cause significant health risks.

Since the $PM_{2.5}$ NAAQS have been revised, more Indian reservations in the Pacific Northwest are at risk of a ''nonattainment'' designation, which may result in the development and implementation of plans containing stricter air pollution reduction measures. To reduce emissions to help these areas continue to maintain the NAAQS and better protect public health and welfare on Indian reservations in the Pacific Northwest, the EPA is proposing revisions to existing rules and new rule sections to address certain previously unregulated sources of particulate matter emissions. These proposed regulations are described in more detail in Section II of this preamble.

In developing these proposed revisions, the EPA has two objectives in addition to those discussed in the previous paragraphs of this section. First, the EPA is proposing only those regulations that, to the extent practicable, minimize the implementation burdens upon the EPA and the regulated community while establishing requirements that are unambiguous and enforceable. Second, the EPA anticipates that these regulations can serve as models for Tribes as they continue to develop their own air quality programs. To that end, the regulations are designed so they can be implemented by a small air pollution agency and can be readily delegated to a Tribe for implementation.

As with the initial FARR promulgation, the EPA does not intend, nor does it expect, the proposed revisions to impose significantly different regulatory burdens upon industry or residents within Indian reservations than those imposed by the rules of State and local air agencies in the surrounding areas. Instead, the intent remains to ensure that people living within Indian reservation boundaries receive equivalent air quality protection, and that emissions from sources located within Indian reservations are controlled to levels similar to those of sources located outside the Indian reservations.

C. Areas Covered by the Rules

The FARR generally applies to any person who owns or operates an air pollution source within the exterior boundaries of an Indian reservation in Idaho, Oregon, or Washington as set forth in 40 CFR part 49, subpart M Implementation Plans for Tribes—Region X. As discussed in the Tribal Authority Rule (TAR) (63 FR 7254, 7257–58, February 12, 1998), the EPA interprets the term ''reservation'' consistent with U.S. Supreme Court case law to include both (1) lands that have been formally designated as a reservation by, for example, treaty, Federal statute, or Executive Order of the President (often referred to as ''formal reservations'') and (2) lands held in trust by the United States for the benefit of a Tribe, even if such lands have not been formally designated as a reservation (often referred to as ''informal reservations'') (40 CFR 49.2(b); see also *Arizona Public Service*

[1] The CAA requires EPA to periodically review the standards to ensure that they provide adequate health and environmental protection, and to update those standards as necessary. The EPA is currently reconsidering a previous decision to retain the PM NAAQS, which were last strengthened in 2012 and expects to issue a proposed rulemaking in 2022 and a final rule in 2023. Should the NAAQS be revised, the EPA will work with Tribes to designate Indian reservations and evaluate whether further revisions to the FARR are necessary or appropriate.

Co. v. *EPA,* 211 F.3d 1280, 1292–94 (D.C. Cir. 2000), *cert. denied,* 532 U.S. 970 (2001)). The preambles to the proposed and final FARR promulgated in 2005 indicate that the EPA intended that the FIP for a particular Tribe would apply to trust lands, even if not formally designated as a reservation (70 FR 18074, 18076–77, April 8, 2005) (67 FR 11748, 11749–11750, March 15, 2002). This intention, however, may not have been clear in light of language included in the final response to comments document for the FARR, ''Response to Comments on the March 15, 2002 Proposal for Federal Implementation Plans under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington,'' comment A.3, indicating that the EPA intended the FARR to apply only to the formally designated reservation of a particular Indian Tribe.

The EPA believes it is important to make clear that the environmental protections provided by the FARR extend to ''reservations,'' as that term has been interpreted by EPA under CAA Section 301(d)(2)(B) and the TAR, that is, including any land held in trust for a covered Tribe that has not been formally designated as a reservation. The FARR currently defines ''Indian country,'' which includes Indian reservations as one element of Indian country but does not have a stand-alone definition of ''Indian reservation.'' The EPA is proposing to add a definition of ''Indian reservation'' in the FARR that defines ''Indian reservation'' according to the language of the Indian reservation element of Indian country and is thus consistent with the definition of ''Federal Indian Reservation,'' ''Indian Reservation,'' or ''Reservation'' under the TAR (40 CFR 49.2(c)). To eliminate any questions as to where the FARR applies, the EPA proposes to include in the FARR definition of Indian reservation the following explanatory language: ''Under this definition, Indian reservations include lands held in trust by the United States government for the benefit of an Indian Tribe even if the trust lands have not been formally designated as a reservation''. The inclusion of this additional explanatory language is not intended to make the use of the term ''Indian reservation'' in the FARR differ in any respect from that term as used and defined in the TAR, but rather to ensure the meaning of the term ''Indian reservation'' under the FARR is clear to the regulated community. Because a FIP under the FARR applies ''within'' the reservation of the specified Tribe, any newly established reservation lands for the specified Tribe will become automatically subject to the FIP for that Tribe as soon as the lands obtain their reservation status. The EPA has added language to make this clear.

Recognizing the lack of clarity on these issues under the existing language in the FARR, however, the proposed revisions would establish a date after which subject sources on land held in trust for a Tribe that has not been formally designated as a reservation must meet the requirements of the FARR.[2] In general, that date will be the effective date of the final rule promulgating these revisions. However, for rules that provide a period of time before subject sources are required to comply, the compliance dates for newly subject sources will be specified in those rules. As currently is the case, however, the FARR will not apply to the reservation of a newly-recognized Indian Tribe in Idaho, Oregon, or Washington until a FIP has been promulgated for the reservation of that Tribe, which would occur only after coordination and consultation with the affected Tribe and a rulemaking with notice and an opportunity for public comment.

In addition to this clarification, the EPA is proposing to make the FARR, as revised, applicable through the promulgation of FIPs to the reservation lands of two Federally recognized Indian Tribes that did not have reservation lands when the FARR was originally promulgated in 2005. At that time, the Cowlitz Indian Tribe and the Snoqualmie Indian Tribe had both received Federal recognition but did not have reservation lands. The Cowlitz Indian Reservation was established on March 9, 2015, and covers 152 acres in Clark County, Washington (80 FR 70250, November 13, 2015). The Snoqualmie Indian Reservation was established on October 20, 2006, covering approximately 55.84 acres in King County, Washington (71 FR 63347, October 30, 2006). In anticipation of this proposed revision, the EPA met informally and had discussions with both Tribes to explain the FARR and the proposed revisions to make the FARR apply to their Indian reservations and received each Tribe's input.

The EPA is also proposing to make the FARR, as revised, applicable through the promulgation of a FIP to the lands held in trust for the Samish Indian Nation. When the FARR was promulgated in 2005, the Samish Indian Nation had received Federal recognition but did not have trust lands or a formally designated reservation. During the development of the FARR revisions, the EPA had discussions with the Samish Indian Nation about having the FARR apply to their trust lands. Applying the FARR to the lands held in trust for the Samish Indian Nation would be consistent with the clarifications discussed in this section to ensure the FARR applies to any land held in trust for a Tribe that has not been formally designated as a reservation. The specific rule sections that apply on each of these Indian reservations would be incorporated by reference into reservation specific FIPs at 40 CFR part 49, subpart M, as shown in the proposed rulemaking changes.

D. Relationship Between Part 49, Subpart C and Subpart M

The FARR has been structured with the ''modular'' approach described in the TAR to allow for both variation among Indian reservations and to facilitate the development and approval of TIPs to replace all or part of the Federal rules. Each section in subpart C, *e.g.,* 40 CFR 49.131 General Rule for open burning, is effectively a ''stand-alone'' rule. The EPA promulgated a FIP in subpart M for each reservation, and each FIP incorporates specific rule sections that are tailored on a reservation-by-reservation basis. Although most of the rules in the FIPs constitute a ''base program'' applicable to all Indian reservations in Idaho, Oregon, and Washington, some of the FIPs include ''additional'' reservation specific rules where specific needs exist or where the EPA determined, in coordination and consultation with the relevant Tribe, that a more stringent provision than would otherwise apply is appropriate. For example, the rule for particulate matter emissions from wood products industry sources was promulgated in 2005 for Indian reservations that had existing wood products industry sources or for those where such sources might be expected to locate, and where the EPA determined, in coordination and consultation with the affected Tribe, that more stringent provisions were

[2] We estimate that there are approximately 31 stationary sources, such as casinos and a coffee roaster, located on such lands covered or proposed to be covered by the FARR. We are not aware of any such sources that would require additional control or monitoring equipment to comply with the FARR, as revised. The EPA is not proposing to revise the FARR to apply to other areas of Indian country, namely, individual Indian allotment lands that are located outside the exterior boundaries of a reservation or dependent Indian communities that do not also qualify as reservations. The EPA is not currently aware of any sources on those types of land outside of reservations in Idaho, Oregon, or Washington to which the FARR need apply. If in the future, EPA becomes aware of air quality concerns for Indian country outside of ''Indian reservations'' as defined in the FARR, EPA may propose other requirements that are deemed necessary or appropriate.

appropriate (67 FR 11748, 11750–11751, 11753, 11758, March 15, 2002). The proposed revisions maintain this structure.

Table 1 lists all of the existing rules and proposed new rules under the FARR, including the ''base program'' rules that apply or are proposed to apply on all Indian reservations in Idaho, Oregon, and Washington, as well as the ''additional'' reservation specific rules that apply or are proposed to apply on some, but not all such Indian reservations (further discussed in Section II. of this preamble).

TABLE 1—BASE PROGRAM AND ADDITIONAL RULES

Section No.	Title	Base program	Additional rules
§ 49.123	General provisions	x	
§ 49.124	Rule for limiting visible emissions	x	
§ 49.125	Rule for limiting the emissions of particulate matter	x	
§ 49.126	Rule for limiting fugitive particulate matter emissions	x	
§ 49.127	Rule for woodwaste burners		x
§ 49.128	Rule for limiting particulate matter emissions from wood products industry sources		x
§ 49.129	Rule for limiting emissions of sulfur dioxide	x	
§ 49.130	Rule for limiting sulfur in fuels	x	
§ 49.131	General rule for open burning	x	
§ 49.132	Rule for large open burning permits		x
§ 49.133	Rule for agricultural burning permits		x
§ 49.134	Rule for forestry and silvicultural burning permits		x
§ 49.135	Rule for emissions detrimental to public health or welfare	x	
§ 49.137	Rule for air pollution episodes	x	
§ 49.138	Rule for the registration of air pollution sources and the reporting of emissions	x	
§ 49.139	Rule for non-Title V operating permits	x	
§ 49.140	Rule for residential wood burning devices	x	
§ 49.141	Rule for curtailment of residential wood burning devices for specific areas		x
§ 49.142	Rule for small open burning annual permits		x
§ 49.143	Permit by rule for small open burns		x

This structure also facilitates the delegation under 40 CFR 49.122 of certain FARR rules to Tribes that are building air quality programs. A delegation agreement authorizes a Tribe, with Federal assistance, to administer the Federal program, with EPA taking any appropriate enforcement. This approach allows the EPA to establish requirements tailored to local needs that can be effectively implemented through a partnership between the EPA and the Tribe. Delegation of the FARR helps Tribes gain experience in air quality management while deciding whether to adopt their own rules and regulations. To date several Tribes are assisting the EPA with implementation of one or more FARR rules under a delegation agreement with the EPA. A more detailed discussion on Tribal delegations can be found in 67 FR 11748, 11751–52, March 15, 2002. There are no substantive revisions proposed to the delegation provisions of the FARR.

The modular structure of the FARR also supports Tribes that choose to develop their own air quality program and submit it to the EPA for approval as a TIP. Under section 49.7(c) of the TAR, Tribes that are approved as meeting the eligibility criteria for Treatment as a State have the option of developing severable elements of a TIP and submitting those elements to the EPA for approval under the CAA. This allows the EPA to approve a Tribal rule covering a particular source type or activity and revoke the corresponding FARR rule from the FIP, while still leaving in place the FARR rules for other sources and/or activities. This approach allows for an easy incremental transition from Federal regulations to EPA-approved Tribal rules. As an example, on November 24, 2014, the EPA approved a TIP submitted by the Swinomish Indian Tribal Community establishing a Tribal program applicable to all persons within the exterior boundaries of the Swinomish Reservation regulating open burning (79 FR 69763, November 24, 2014). In the same action, EPA rescinded the FARR General rule for open burning (40 CFR 49.131) from the Swinomish Reservation FIP such that only the Swinomish Tribal open burning rule applies.

II. Proposed FIP Revisions

A. Proposed Revisions and New Rules

As discussed in Section I.A. of this preamble, the EPA is proposing to revise several of the rules originally promulgated in 2005 that comprised the original ''base program'' rules that apply to all Indian reservations in Idaho, Oregon, and Washington and is proposing to promulgate one new ''base program'' regulation. The EPA is also proposing to revise several of the ''additional'' reservation specific rules originally promulgated in 2005 that apply on some, but not all, Indian reservations in Idaho, Oregon, and Washington, and the EPA is proposing to promulgate several new additional rules that would only apply, in coordination and consultation with the relevant Tribes, on specific Indian reservations where the EPA finds that the rules are necessary or appropriate. See Section II.B. of this preamble for a more detailed discussion on the additional rules proposed for specific Indian reservations. Each of these proposed new sections address emission sources that contribute to high levels of particulate matter emissions and protect air quality from the potential for significant deterioration caused by the release of particulate matter.

The following paragraphs summarize the substantive proposed changes for each of the sections of the existing and new rules that will comprise the ''base program'' and the existing and new additional rules that apply only on specific Indian reservations.

Administrative Changes

The EPA has made minor administrative revisions throughout the FARR to ensure consistency in the use of terms and structure in similar provisions and to make other minor changes, where appropriate. For example, the proposed revisions replace the title of the FARR from ''General

Rules for Application to Indian Reservations in EPA Region 10'' with ''General Rules for Application to Indian Reservations in Idaho, Oregon, and Washington'' to better reflect the geographic scope of the FARR. In 40 CFR 49.121 Partial delegation of administrative authority to a Tribe, the revisions clarify that a delegation may cover all or part of an Indian Reservation. As another example, at the end of each section of the current rules is a subparagraph that lists terms used in that rule and points to 40 CFR 49.123 General provisions for the definitions of these terms. The EPA is proposing to remove these sections because this itemized list of defined terms has not proven to be helpful and in fact sometimes has contributed to confusion.

Each rule in the FARR includes a section describing the purpose of the rule. The EPA is revising the statements of purpose in some of the rules to make them consistent. The EPA has also made an administrative change in subpart M in the FIP for the Spokane Reservation. The EPA has added to subpart M language that is currently in 40 CFR part 52, subpart WW (Washington State Implementation Plan), making clear that the Spokane Indian Reservation is designated as a Class I area for the purposes of preventing significant deterioration of air quality. This proposed rulemaking does not propose changes to this designation, but instead simply adds the reference to the designation in the FIP for the Spokane Reservation because this designation affects new source review permitting on and near the Spokane Reservation.

Section 49.123 General provisions. This section contains the definitions for specific terms used in the FARR, specifies the general requirements for testing, monitoring, recordkeeping and reporting, specifies requirements for performance tests, and identifies ASTM, International (ASTM) materials that are incorporated by reference in these rules.

Definitions. The EPA is proposing to add, revise, or remove certain definitions in this section. The following new or revised terms are not discussed here but are discussed in the sections of this document that discuss the substantive revisions of the rules: the definition for *Indian reservation* is discussed in Section I.C. of this preamble and the definitions for *Cooking fire, Large open burn or burning, Non-title V operating permit, Orchard heating device, Recreational fire, and Small open burn or burning* are discussed in the relevant rule sections in Section II.A. of this preamble.

New definitions. The EPA is proposing to add several new definitions to 40 CFR 49.123 to provide for a better understanding of the existing rule language and define applicable terms used in new sections of the FARR. The EPA proposes to add the definition *Hog fuel or hogged fuel,* which means wood chips or shavings, residue from sawmills, and other wood processing residue. This is intended as a clarification of the list of items included in the definition of *wood,* to carry out the EPA's original intent and to provide a more complete understanding of the items considered wood and derivatives of wood.

To implement the authority in 40 CFR 49.129(d) authorizing the EPA to make certain changes to testing, monitoring, recordkeeping and reporting requirements under the FARR, the EPA is cross-referencing the definitions of *Intermediate change to monitoring, Major change to monitoring, Minor change to monitoring, Minor change to recordkeeping/reporting,* and *Minor change to test method* in 40 CFR 63.90, which are used for similar purposes.

With the addition of 40 CFR 49.140 Rule for residential wood burning devices and 40 CFR 49.141 Rule for curtailment of residential wood burning devices for specific areas, the EPA is also introducing a new definition for *Residential wood burning devices.* This definition, for purposes of the FARR, means any wood burning device that supplies heat to a single-family residence or is installed in an individual unit of a multiple unit structure such as a condominium, apartment, duplex, multiplex, hotel, motel, or resort. This includes but is not limited to, wood stoves, fireplaces, fireplace inserts, residential wood heaters, residential hydronic heaters, residential forced air furnaces, and residential central heaters. The EPA also added definitions for *Residential wood heater, Residential central heater, Residential forced air furnace,* and *Residential hydronic heater* by cross-referencing the definitions of these same terms in 40 CFR 60.531 and 60.5473 of the EPA New Source Performance Standards for New Residential Wood Heaters and New Residential Hydronic Heaters and Forced-Air Furnaces as amended (40 CFR part 60, subpart AAA and 40 CFR part 60, subpart QQQQ).

Revised definitions. In addition to adding new definitions, the EPA is also revising several definitions to provide clarification for better understanding and ease of implementation. The EPA is proposing to revise the definition for *Agricultural activities* to include specific examples of activities that are not considered agricultural activities (*e.g.,* hop drying in kilns and distillation of mint oil). As the EPA has previously advised the regulated community, the act of distilling mint or drying hops is not considered an agricultural activity under the FARR, and the proposed revisions help clarify this point.[3] In addition, to eliminate confusion about whether fugitive emissions from tilled land are or are not regulated, the EPA is proposing to remove the reference to tilled land as an example of fugitive dust in the *Fugitive dust* definition. Although EPA considers the tilling of land to generate fugitive dust, ''agricultural activities,'' which includes the tilling of land, are expressly exempt from 40 CFR 49.126 Rule for limiting fugitive particulate matter emissions. The EPA is revising the definition of *Grate cleaning* by clarifying that, in addition to allowing for the removal of ash from fireboxes, grate cleaning also allows for the removal of other non-combustibles (*e.g.,* rocks) from the firebox. Finally, the EPA is revising the definition of *forestry and silvicultural burns* by clarifying that the term includes prescribed fire, as that term is defined in 40 CFR 50.1(m).

Deleted definitions. The EPA is proposing to remove the definitions of *Garbage* and *Refuse* because they are no longer used to define what type of open burning is prohibited in 40 CFR 49.131. As discussed in this section, we are proposing to restructure 40 CFR 49.131 General rule for open burning by removing the list of what cannot be burned and instead providing a list of what is allowed to be burned. We are also proposing to remove the definition of *Smudge pot* because smudge pots are no longer directly referred to in the FARR. Instead, in 40 CFR 49.123 the newly proposed definition *Orchard heating device or orchard heater* includes smudge pots as an example of a type of orchard heating device.

Testing, monitoring, recordkeeping, and reporting. During the course of implementing the FARR, questions arose regarding whether Region 10 could approve alternatives or exceptions to the requirements for testing, monitoring, recordkeeping, or reporting that are specified in the FARR. Unlike some EPA rules under the CAA (*e.g.,* 40 CFR part 60, 40 CFR part 63), the FARR as originally enacted in 2005 did not include the authority or procedures for

[3] See letter from EPA Region 10 to the Administrator of the Washington Hops Commission, regarding ''Exemption for ''Agricultural Activities'' under the Federal Air Rules for Reservations (FARR),'' date February 2, 2007; letter from EPA Region 10 to the Executive Director of the Washington Mint Commission, regarding ''Exemption for ''Agricultural Activities'' under the Federal Air Rules for Reservations (FARR),'' date February 5, 2007.

requesting or approving alternatives, exceptions, waivers, and similar actions for testing, monitoring, recordkeeping, and reporting required by the FARR.

Region 10 is proposing to add such authority and procedures to 40 CFR 49.123 General Provisions. These new provisions would provide Region 10 with authorities similar to those found in 40 CFR parts 60 and 63. Specifically, the EPA proposes adding provisions to allow the approval of the use of a test method with minor changes in methodology, the approval of shorter sampling times or smaller sample volumes when necessitated by process variables or other factors, and the waiver of the requirement for source tests because the owner or operator of an affected source has demonstrated by other means to the Regional Administrator's satisfaction that the affected source is in compliance with the relevant standard. In addition, the EPA proposes adding authority to approve minor changes in methodology for the specified monitoring requirements and procedures, as well as intermediate or major changes or alternatives to any monitoring requirements or procedures. Lastly, the EPA proposes adding authority to approve minor changes to recordkeeping or reporting for the specified requirements and procedures, as well as to waive recordkeeping or reporting requirements upon written application to the Regional Administrator if, in the Regional Administrator's judgment, the affected source is achieving the relevant standard(s). A waiver of any recordkeeping or reporting requirement granted under this provision may be conditioned on other recordkeeping or reporting requirements deemed necessary by the Regional Administrator.

Performance tests. The EPA is also proposing to add general provisions that specify requirements for performance tests that apply where the applicable standard or test method does not include such requirements. These requirements specify, for example, the number of valid test runs for a performance test and are consistent with the requirements EPA includes in permits and regulations where performance testing is required.

ASTM standards. In 40 CFR 49.123(g), the EPA is proposing to update the ASTM standards that are used in and incorporated by reference in the FARR to reflect the most current version of the standards. See Section IV. of this preamble for further discussion of these revisions.

Section 49.124 Rule for limiting visible emissions. This section limits the visible emissions of air pollutants from certain air pollution sources to control emissions of particulate matter. The EPA proposes to revise this section in several respects. First, the EPA is clarifying that the rule limiting visible emissions does not apply to activities associated with single-family residences or residential buildings with four or fewer dwelling units. Although the current rule exempts furnaces and boilers used to heat single family residences and residential buildings with four or fewer dwelling units, the EPA never intended to regulate other emissions associated with residential activities, such as home workshops. The EPA is also clarifying that the rule does not apply to any particulate matter emissions from public roads and not just to fugitive dust from public roads. The EPA did not intend to regulate any emissions from public roads under the FARR. The current rule unintentionally limits the exemption to only fugitive dust. However, there are other emissions that come from roads that do not come from the tailpipe of a motor vehicle or nonroad vehicle, such as emissions associated with the application of dust suppressants. This change clarifies that all particulate emissions from public roads, not only fugitive dust, are exempt from the visible emission limit.

Second, the EPA is proposing to narrow the exemption for agricultural activities so that orchard heating devices are no longer exempt from the visible emissions limit. An orchard heating device is defined as a fuel burning device capable of being used for frost-prevention or protection in orchards, vineyards, field crops, or truck crops, and includes smudge pots and open-pot heaters. The diesel fuel sometimes used in these devices produces the thick heavy smoke that some believe prevents frost damage. Orchard heating devices are typically used in the spring when plants are budding and an atmospheric inversion traps cold air at the surface. The inversion also traps air pollutants, such as the thick smoke generated by some types of orchard heating devices, and can result in unhealthy levels of air pollution. Under the visible emissions rule currently in effect, orchard heating devices are covered by the exemption for agricultural activities because such devices are used as part of the usual and customary activities in growing crops. The EPA's ongoing evaluation of the FARR and input from Tribes on reservations where orchard heating devices are used identified concerns with air pollution from these unregulated sources of particulate matter.

This proposed revision would therefore require that visible emissions from orchard heating devices not exceed 20% opacity, averaged over any consecutive 6-minute period, and would apply to any person who owns or operates an orchard heating device. We expect that there are categories of orchard heating devices that will not be capable of complying with the 20% opacity standard and this action, if finalized, would therefore effectively prohibit the continued use of such devices. Since the FARR was promulgated in 2005, however, cleaner and more effective methods of orchard heating have become more readily available. Newer alternatives such as propane-powered fans and propane heaters are becoming accepted and reliable alternate methods of orchard heating. These cleaner devices are capable of complying with the visible emission limit and, as such, will help minimize air pollution in areas that are already dealing with high levels of $PM_{2.5}$ and PM_{10}. Other State and local air agencies have similar provisions.

To ensure current users of orchard heating devices that cannot comply with the visible emission standard have adequate time to find alternatives to the use of such devices, the proposed provision of 40 CFR 49.124 requiring that visible emissions from an orchard heating device not exceed 20% opacity would not go into effect until 3 years after this revision is finalized and becomes effective. Furthermore, to ensure that this new requirement does not cause an unreasonable burden on any person, the rule includes a provision that would allow the Regional Administrator to grant a two-year extension (with no limit on the number of extensions) provided that the person demonstrates that there is no alternative that is reasonably available that can comply with the 20% opacity limit. In the interim, the EPA intends to work with Tribal air programs to provide outreach to orchards affected by this rule and identify sources of funding that may help lower the costs for alternate methods of orchard heating.

Section 49.125 Rule for limiting emissions of particulate matter. The purpose of this section is to reduce particulate matter by setting emission limits for certain air pollution sources that operate within an Indian reservation. The EPA is proposing language to clarify that this rule only applies to emissions from a stack as defined in 40 CFR 49.123. The EPA is

also proposing to revise the list of sources specifically exempt from this rule in several respects. As with the limitation on visible emissions discussed in 40 CFR 49.124, the EPA never intended to regulate residential activities, such as home workshops under this section. We are therefore proposing to add an exemption for activities associated with single-family residences or residential buildings with four or fewer dwelling units. Second, with the clarification that this rule only applies to particulate matter emissions from a stack, the EPA has deleted open burning from the list of exempt sources, because an open burn, by definition, does not have a ''stack.'' Third, with the clarification that this rule only applies to particulate matter emissions from a stack, the EPA is adding orchard heating devices to the list of exempt sources. Unlike the Rule for Limiting Visible Emissions (40 CFR 49.124), this rule does not exempt agricultural activities. By its terms, this section applies only to stationary sources with stacks. (see 40 CFR 49.125(d)(1), (2), and (3)). Most a*gricultural activities,* as defined in the FARR, are not subject to the numeric particulate matter emission limits because such activities do not have ''stacks'' that emit air pollution. However, some orchard heating devices, although within the definition of *agricultural activities,* do have short ''stacks.'' The EPA is therefore adding orchard heating devices to the list of exemptions so that orchard heating devices will continue to be exempt from the numeric particulate matter emission limits and other requirements of this section. Given that orchard heating devices are relatively small in comparison to many other stationary sources with stacks, are portable, are used only seasonally, and that conducting source testing using the reference test methods in this section on orchard heating devices could be challenging, the EPA believes that limiting particulate matter emissions from orchard heating devices with a limitation on visible emissions under 40 CFR 49.124, rather than a limit on particulate matter emissions, is appropriate.

In addition to proposing to add these two exemptions to the applicability of this section, the EPA is updating the reference method for determining compliance to explicitly provide that EPA Methods 1 through 4, as appropriate, must be used to calculate the volumetric flow, oxygen content, and moisture content of the samples in conjunction with EPA Method 5. Although EPA Method 5 specifies when the use of EPA Methods 1 through 4 are required, the EPA is making the reference explicit in this section for ease of use. A complete description of the test methods discussed in this paragraph can be found in appendix A to 40 CFR part 60.

Finally, the EPA is proposing to correct an inadvertent error in the particulate matter emission limits that resulted from failure to use the same number of significant figures for the grams per dry standard cubic meter (g/dscm) limits and the grains per dry standard cubic feet (gr/dscf) limits. The g/dscm limits had two significant figures whereas the gr/dscf limits only had only one significant figure, which resulted in the limits being slightly different in stringency. EPA is proposing to correct this error by adding a second significant figure to the gr/dscf limits.

Section 49.126 Rule for limiting fugitive particulate matter emissions. This section limits fugitive particulate matter emissions by requiring reasonable precautions to prevent such emissions. Under the current language of the fugitive particulate matter emissions rule, it is unclear when portable sources, such as portable rock crushers and asphalt plants, are required to conduct their fugitive particulate emission surveys and prepare and update their written plans to prevent fugitive particulate matter emissions. Therefore, the EPA is proposing revisions that specify when the surveys and plans are required to be conducted and submitted for portable sources in a manner that is consistent with the temporary and transient nature of portable sources. For example, the EPA is proposing to specifically require portable sources to conduct a survey within 7 days after beginning operation at a new location and to conduct an annual survey thereafter to identify sources of fugitive particulate matter emissions. Additionally, for portable sources, the written plan specifying the reasonable precautions and procedures to prevent fugitive particulate matter emissions is required prior to beginning operation at a new location and must be updated within 7 days of a completed survey. The EPA is also clarifying that, for all other sources, the written plan to prevent fugitive emissions must be prepared within 30 days after completing the required survey. All plans for subject sources must be reviewed and updated by the owner or operator at least annually after each survey and more frequently if warranted due to changes.

The EPA is also proposing to add language to clarify that the written plan must be implemented as soon as practicable. The current rule requires a source to implement its written plan, including installing any control measures that were identified as reasonable precautions, but does not include language regarding when the plan needs to be implemented.

In addition, if the facility is required to be registered under 40 CFR 49.138, the EPA is proposing to require that a copy of the most recent fugitive particulate matter survey and current fugitive particulate matter plan be submitted with the annual registration. Under the proposed revisions, a new source or new operation will be required to submit a copy of the fugitive particulate matter survey and plan to the EPA within 90 days of beginning operation. The proposed revisions also provide that sources must maintain a copy of the survey and plan on site.

Lastly, the EPA is proposing to establish that a revision to the plan may be required if the EPA determines that the plan is not adequate to prevent or minimize fugitive particulate matter emissions. All of the proposed revisions are designed to enhance compliance and enforceability of the rule.

Section 49.127 Rule for woodwaste burners. This section phases out the operation of woodwaste burners, and in the interim limits the visible emissions from woodwaste burners. There are no proposed changes to this section except for the revisions with respect to the applicability date discussed here and non-substantive and other administrative changes discussed elsewhere in this preamble. This section continues to only apply on the Colville Reservation and on the Nez Perce Reservation, as shown in Table 2 in section B of this preamble. The effective date of this section for any lands held in trust for the Colville or Nez Perce Tribes that have not been formally designated as a reservation, will be the effective date of the final rule and, as such, any woodwaste burners that are located on such lands will be required to be dismantled within 2 years from the effective date of the final rule.

Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources. The purpose of this section is to limit the condensible particulate matter from high temperature processes at wood products facilities that would not be captured by the test method required for demonstrating compliance with the particulate matter emission limits in 40 CFR 49.125. This section only applies to emission units at wood products facilities that emit at high temperatures. Currently 40 CFR 49.128 specifies that

the reference method for determining compliance with the PM_{10} limits is EPA Method 202 in conjunction with EPA Method 201A. These methods are found in appendix M of 40 CFR part 51.

The EPA is proposing to update the reference method for determining compliance. The EPA is clarifying that EPA Methods 1 through 2H, as appropriate, must be used to calculate the volumetric flow of the samples in conjunction with EPA Methods 202 and 201A. A complete description of these additional test methods can be found in appendix A to 40 CFR part 60.

This section continues to apply on the Colville Reservation and the Nez Perce Reservation, as shown in Table 2 in Section B of this preamble. The EPA is also proposing that 40 CFR 49.128 be applied on the Coeur D'Alene Reservation because the operations of a wood products facility located on the Coeur D'Alene Reservation may contribute to elevated levels of particulate matter.

Section 49.129 Rule for limiting emissions of sulfur dioxide. This section limits the amount of sulfur dioxide (SO_2) that may be emitted from air pollution sources operating within an Indian reservation. The EPA is proposing to clarify that this rule only applies to emissions from a stack.

As under 40 CFR 49.125 and for the same reasons, we are also proposing to clarify that orchard heating devices are exempt from this section.

The EPA is also proposing to update the reference methods for determining compliance with the SO_2 emission limits established in the current rule. The EPA is clarifying that EPA Methods 1 through 4, as appropriate, must be used to calculate the volume, oxygen content and moisture content of the sample in conjunction with EPA Methods 6, 6A, 6B and 6C. A complete description of these additional test methods can be found in appendix A to 40 CFR part 60.

Section 49.130 Rule for limiting sulfur in fuels. This section limits the amount of sulfur contained in fuels that are burned at stationary sources operating within an Indian reservation to control emissions of SO_2. The EPA is proposing to update the reference methods used to determine compliance with the sulfur emission limits for fuel. We are updating the reference methods in paragraph (e) of this section to incorporate into this rule the most recent versions of the ASTM methods for determining the amount of sulfur in fuel oil or liquid fuels, coal, solid fuels, and gaseous fuels.

In addition, the EPA proposes to revise the sulfur limit for gaseous fuels by deleting the 1.1 grams per dry standard cubic meter (dscm) limit and retaining only the 400 parts per million (ppm) limit. The current rule establishes a limit for sulfur in gaseous fuels in two different sets of units (grams/dscm and ppm) that were intended to be equivalent in stringency. However, because the proper number of significant figures for the grams/dscm limit were not included when the FARR was promulgated, the two are not equivalent. This resulted in confusion as to whether sources had to comply with both limits, the more stringent limit, or a limit of their choice. The proposed revisions correct this error and make this standard consistent with the EPA's intent in promulgating this emission standard in 2005.

Finally, the EPA is proposing to remove the language in 40 CFR 49.130(f)(1)(iii) that provided sources burning coal or solid fuels the opportunity to request a waiver of the monitoring requirement or request an alternative sampling program because generally applicable language for requesting alternatives and waivers is now included in 40 CFR 49.123 General Provisions.

ASTM standards. In 40 CFR 49.130(g), the EPA is proposing to update the ASTM standards that are used in and incorporated by reference in the FARR to reflect the most current version of the standards. See Section IV. of this preamble for further discussion of these revisions.

Section 49.131 General rule for open burning. This section phases out the operation of woodwaste burners, and in the interim limits the visible emissions from woodwaste burners. There are no proposed changes to this section except for the revisions with respect to the applicability date discussed here and non-substantive and other administrative changes discussed elsewhere in this preamble. This section continues to only apply on the Colville Reservation and on the Nez Perce Reservation, as shown in Table 2 in section B of this preamble. The effective date of this section for any lands held in trust for the Colville or Nez Perce Tribes that have not been formally designated as a reservation, will be the effective date of the final rule and, as such, any woodwaste burners that are located on such lands will be required to be dismantled within 2 years from the effective date of the final rule, as well as in the following burn permit sections.[4]

Section 49.132 Rule for large open burning permits. The FARR promulgated in 2005 had a General rule for opening burning (discussed in 40 CFR 49.131), which specified conditions under which open burning could be conducted but did not require prior approval. The FARR also had a rule setting forth a program for permitting, or granting prior approval of, general open burns. This rule was designed only for Indian reservations where the EPA, in coordination and consultation with the relevant Tribe, determined that a general open burning permitting program was necessary or appropriate, and was generally expected to include a delegation of authority from the EPA to the Tribe, under 40 CFR 49.122 for implementation of the general open burning permit program (67 FR 11748, 11751, March 15, 2022). This general open burning permit rule was promulgated to apply on the Nez Perce Reservation and the Umatilla Indian Reservation. These Tribes have been implementing the rule for general open burning permits on their respective Indian reservations under a delegation with the EPA for more than 15 years.

The EPA is proposing to revise the rule for permitting general open burns by replacing it with three rules for different types of open burns and different types of open burning approval processes: 40 CFR 49.132 Rule for large open burning permits, 40 CFR 49.142 Rule for small open burning annual permits and 40 CFR 49.143 Permit by rule for small open burns. The EPA is proposing these different open burning permit options based on input from these Tribes, other Tribes that have expressed interest in seeking delegation of permitting general open burning on their Indian reservations, and the EPA's experience in working with the delegated Tribes in implementing this rule. The EPA has concluded that options that distinguish between large and small open burns and, for small open burns, allow for an annual permit or coverage under a permit by-rule better allow for the scaling of requirements to the potential air pollution impact of open burns and the resources of implementing agencies.

Only materials that may be burned under 40 CFR 49.131 General rule for open burning may be burned in a permitted large or small open burn. As under 40 CFR 49.131, compliance with the permitting requirements rests with the person who is conducting the burn as well as the owner and lessee, if any, of the property on which the burn is

[4] The EPA also notes that nothing in the FARR or the proposed revisions restricts the exclusion of air quality monitoring data influenced by exceptional events as provided in 40 CFR 50.14.

conducted to ensure parties that may be responsible for burning decisions on a given property are responsible for complying with the burn permitting rules, where applicable.

The proposed ''large open burning'' permit rule is very similar to the current general open burning permit rule in 40 CFR 49.132. The proposed revisions define a ''large open burn'' or ''large open burning'' as the open burning of a single pile of the specified materials greater than 10 feet in diameter or more than 60 feet of ditch bank or fence line vegetation. These are the criteria that have been used by the EPA and delegated Tribal authorities that have been implementing the general open burning permit program under the FARR to distinguish between large and small open burns.

As revised, this section would require that persons subject to the rule must (1) have a permit for large open burning; (2) have approval to burn on the day(s) of the burn(s); (3) ensure that the person conducting the burn is familiar with the requirements of the permit; (4) ensure that the permit is available on-site during the open burn; (5) conduct the open burn in accordance with the terms and conditions of the permit; and 6) comply with the General rule for open burning (40 CFR 49.131) or the EPA-approved Tribal open burning rules in a TIP. To ensure consistency with the use of forms under rules of the Office of Management and Budget, the revisions clarify that the application must be submitted on forms approved by the EPA. The revisions add a requirement that applications for large open burns include a description of the burning method or methods to be used, the amount of material to be burned with each method, and the means of ignition.

The proposed revisions clarify the process for getting approval to burn on the requested days under the permit. The revisions specify that the person conducting the large open burn must request approval for the burn at least one day before the burn in the manner specified in the permit. As under the current open burning permit rule, in determining whether to authorize a large open burn for a particular day or days, the Regional Administrator or delegated Tribal authority will take into consideration relevant factors including, but not limited to, the size, duration, and location of the proposed open burn; the current and projected air quality conditions; forecasted meteorological conditions; other scheduled burning activities in the surrounding area; and other factors indicating whether or not the proposed open burn can be conducted without causing or contributing to an exceedance of a national ambient air quality standard. When relevant, the Regional Administrator or delegated Tribal authority will also consider whether or not the proposed open burn can be conducted without causing or contributing to any other adverse impact on air quality. These other adverse impacts on air quality would be specific to the particular burn, such as the type of burn and its location, the local meteorology, and the areas expected to be impacted by the smoke. The EPA proposes to add a provision allowing the Regional Administrator or delegated Tribal authority to revoke the approval to burn based on changes in these air quality considerations. In such cases, the permittee would be required, after being contacted about the revocation, to immediately extinguish the fire if safe to do so, discontinue lighting the fire, and withhold additional material such that the fire burns down, as applicable.

The exemptions to the requirement to obtain a large open burning permit are generally the same as the exemptions in the General rule for open burning (40 CFR 49.131) with a few exceptions. Recreational fires meeting the definition of ''large open burn'' are exempt from permitting. In addition, agricultural burns and forestry and silvicultural burns are exempt from the Rule for large open burning permits (40 CFR 49.132).

The large open burning permit rule will continue to apply on the Nez Perce Reservation and the Umatilla Indian Reservation, as shown in Table 2 in Section B of this preamble. The EPA is also proposing that 40 CFR 49.132 be newly applied on the Yakama Reservation, as shown in Table 2 of this preamble. The EPA anticipates that the Nez Perce Tribe and the Umatilla Indian Tribe will update their EPA delegation to implement this revised rule on their respective reservations. The EPA also anticipates that the Confederated Tribes and Bands of the Yakama Nation will seek EPA delegation to implement this revised rule on their reservation.

Section 49.142 Rule for small open burning annual permits. The EPA is also proposing to establish a permitting program option requiring an annual permit for ''small open burning'' within an Indian reservation. The proposed revisions define a ''small open burn'' or ''small open burning'' as the open burning of a single pile of the specified materials that is 10 feet or less in diameter or 60 feet or less of ditch bank or fence line vegetation. These are the criteria that have been used by the EPA and delegated Tribal authorities that have been implementing the general open burning permit program under the FARR to distinguish between large and small open burns.

This proposed new rulemaking would require the owner or lessee of property on an Indian reservation where this section applies and on which small open burns will be conducted to apply for and obtain an annual permit for open burning. To ensure consistency with the use of forms under rules of the Office of Management and Budget, the proposed rulemaking specifies that the application must be submitted on forms approved by the EPA. The obligations to comply with the permit and other requirements of this section would extend to any owner and lessee of the property and any person conducting a small open burn on the property. The permit would cover all small open burns conducted at a given property for the calendar year in which it is issued, without the need to apply for and obtain a burn permit for each individual small open burn. Should the owner or lessee of the property covered by the annual permit change within the year, a new application and permit would be required.

To conduct a small open burn under this permit on any particular day, persons subject to this section must (1) ensure that the person conducting the burn is familiar with the requirements of the permit; (2) ensure that the permit is available on-site during the open burn; (3) conduct the open burn in accordance with the terms and conditions of the permit; (4) comply with the General rule for open burning (40 CFR 49.131) or the EPA-approved Tribal open burning rules in a TIP; and (5) prior to igniting a burn, check whether burning is allowed for the area on that day and complete the burning within the designated time period. The proposed exemptions are generally the same as for large open burning permits.

To determine if burning is allowed under an annual permit on any given day, the Regional Administrator or delegated Tribal authority will identify and publicize each day as a ''burn day'' or a ''no burn day'' and, for a burn day, specify the hours and the geographic area for which burning is allowed. When deciding whether to call a burn day, the Regional Administrator or delegated Tribal authority will take into consideration relevant factors, including but not limited to, the current and projected air quality conditions, the forecasted meteorological conditions, other scheduled burning activities in the surrounding area and other factors indicating whether or not open burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard.

When relevant, the Regional Administrator or delegated Tribal authority will also consider whether open burning can be conducted without causing or contributing to any other adverse impact on air quality.

A permit issued under this section expires at the end of the calendar year unless it is revoked prior to that time based on a written notice to the permit holder finding that the permit must be revoked or revised to ensure compliance with this section, 40 CFR 49.131 General rule for open burning or the applicable EPA-approved Tribal open burning rule, or to protect the public health and welfare.

This option for a single permit for all small open burns conducted on a specific property within a calendar year greatly reduces the burden on individuals who would otherwise need to apply for a permit multiple times when conducting more than one burn during the calendar year. Permit issuance once per year also reduces the workload for the EPA and delegated Tribal air programs, and in turn allows for burn approvals to be processed more quickly, benefiting all parties involved.

In coordination and consultation with the affected Tribes, the EPA is proposing that 40 CFR 49.142 apply on the Umatilla Indian Reservation, as shown in Table 2 in Section B of this preamble. This is, in essence is a continuation of the burn permit program that the Umatilla Indian Tribe has been implementing on its Reservation under a delegation with the EPA for many years. The EPA is also proposing that 40 CFR 49.142 apply on the Yakama Reservation, as shown in Table 2 of this preamble. As with the Rule for large open burning permits (40 CFR 49.132), the EPA anticipates that these Tribes will either update their EPA delegation or seek EPA delegation to implement this new section on their reservation.

Section 49.143 Permit by rule for small open burns. The EPA is also proposing another option for small open burns: a permit by rule that would apply within a specific Indian reservation. Like 40 CFR 49.142 Rule for small open burning annual permits, the obligation to submit an application (referred to in this section as a ''request for coverage'') applies to the owner or lessee of the property on which the burning will be conducted, but other compliance obligations extend to any person conducting a small open burn on an Indian Reservation where this section applies, as well as to the owner or lessee of the subject property. The proposed exemptions under both rules are also the same.

In contrast to the Rule for small open burning annual permits (40 CFR 49.142), this section would require the owner or lessee of the property on which small open burning will be conducted to submit a one-time request for approval to burn. This ''approval of coverage'' under this permit by rule would remain valid for the property until the owner or lessee changes, at which time a new request for approval of coverage would be required. Another key difference from the rule for annual permits for small open burns is that the approval under this permit by rule would be immediately effective, with no explicit approval required by the implementing agency. Note, however, that a request for approval of coverage may be denied if it is not consistent with the requirements of this section, 40 CFR 49.131 General rule for open burning or the applicable EPA-approved Tribal open burning rule. In addition, prior to conducting a burn on a given day, a person subject to this section must confirm that the day is a ''burn day,'' as further explained in the following paragraphs.

The owner or lessee of the property on which small open burns will be conducted under this permit by rule must apply for approval of coverage. To conduct a small open burn, persons subject to this section must (1) ensure that the person conducting the burn is familiar with the requirements of the approval of coverage; (2) ensure that the approval of coverage is available on-site during the open burn; (3) conduct the open burn in accordance with the approval of coverage; (4) comply with the General rule for open burning (40 CFR 49.131) or the EPA-approved Tribal open burning rules in a TIP; and (5) prior to igniting a burn, check whether burning is allowed for the area on that day and complete the burning within the designated time period.

As under the Rule for small open burning annual permits (40 CFR 49.142), to determine if burning is allowed on any given day, the Regional Administrator or delegated Tribal authority will identify and publicize each day as a ''burn day'' or a ''no burn day'' and for a burn day, specify the hours and the geographic area for which burning is allowed. When deciding whether to call a burn day, the Regional Administrator or delegated Tribal authority will take into consideration relevant factors including, but not limited to, the current and projected air quality conditions, the forecasted meteorological conditions, other scheduled burning activities in the surrounding area and other factors indicating whether or not open burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard. When relevant, the Regional Administrator or delegated Tribal authority will also consider whether open burning can be conducted without causing any other adverse impact on air quality.

This proposed rulemaking is also expected to reduce the burden on individuals of filling out multiple burn applications when conducting more than one burn during the period of property ownership, as well as the burden on the EPA and the delegated Tribe in implementing the permit program. The reduction in burden would be expected to be even greater than under the Rule for small open burning annual permits (40 CFR 49.142) because the application process is a one-time action and no action by the implementing agency is required to make the approval of coverage under the permit by rule effective as to a specified property.

In coordination and consultation with the affected Tribe, the EPA is proposing that 40 CFR 49.143 apply on the Nez Perce Reservation, as shown in Table 2 in Section B of this preamble. As with the other burn permit rules, the EPA anticipates that the Nez Perce Tribe will update their EPA delegation to implement this burn permit program on its reservation.

Section 49.133 Rule for agricultural burning permits. This section establishes a permitting program for agricultural burning within an Indian reservation. As with the previous open burning permit rules, the EPA is proposing to expand the applicability of this section to apply to lessees of land on which agricultural burning is conducted to ensure parties that may be responsible for burning decisions on a given property are responsible for complying with the requirements of this section. To ensure consistency with the use of forms under rules of the Office of Management and Budget, the revisions clarify that the application must be submitted on forms approved by EPA. The EPA is clarifying the air quality criteria considered in determining whether a burn permit will be issued consistent with the same criteria in 40 CFR 49.132 Rule for large open burning permits. Consistent with the other burn permit rules, the revisions provide that an application must be submitted at least 1 day prior to the proposed burn. The EPA is also clarifying that the permit authorizes burning only for the date(s) and time(s) specified in the permit, the procedures for obtaining approval to burn under the permit, and

that the permit may include other necessary provisions to ensure compliance with 40 CFR 49.131 General rule for open burning or the EPA-approved applicable Tribal open burning rule, as well as to protect health and welfare.

This section continues to apply on the Nez Perce Reservation and the Umatilla Indian Reservation, as shown in Table 2 in Section B of this preamble. The EPA is also proposing that 40 CFR 49.133 be newly applied on the Yakama Reservation, as shown in Table 2 of this preamble. The EPA anticipates that the Nez Perce Tribe and the Umatilla Indian Tribe will update their EPA delegations to implement this revised section on their Indian reservations. The EPA also anticipates that the Confederated Tribes and Bands of the Yakama Nation will seek EPA delegation to implement this revised section on their reservation.

Section 49.134 Rule for forestry and silvicultural burning permits. This section establishes a permitting program for forestry and silvicultural burning within an Indian reservation. The EPA is proposing the same revisions to this section as to the Rule for agricultural burning permits (40 CFR 49.133).

As discussed in section D. of this preamble, Relationship between Part 49, Subpart C and Subpart M, this rulemaking does not apply on all reservations, as does the General Rule for Open Burning (40 CFR 49.131), but instead applies on those reservations where it was determined that a permitting program, in addition to the General Rule for Open Burning (40 CFR 49.131), is appropriate to better assure that emissions from forestry and silvicultural burning do not cause or contribute to a violation of the NAAQS. Importantly, although this rule requires, where it applies, permits for prescribed fires as that term is defined in the rule for ''Treatment of Air Quality Monitoring Data Influenced by Exceptional Events'' (40 CFR 50.14), 40 CFR 49.134 is not a smoke management program, nor does it require burn managers to employ basic smoke management practices as listed in Table 1 to 40 CFR 50.14. However, as previously noted, nothing in the FARR or the proposed revisions restricts the exclusion of air quality monitoring data influenced by prescribed fires that meet the criteria set forth in 40 CFR 50.14(b)(3).

This section continues to apply on the Nez Perce Reservation and the Umatilla Indian Reservation, as shown in Table 2 in Section B of this preamble. As with the Rule for agricultural burning permits (40 CFR 49.133), the EPA anticipates that these Tribes will update their EPA delegation to implement this revised section on their Indian reservations.

Section 49.135 Rule for emissions detrimental to public health or welfare. Under this section, an owner or operator of an air pollution source is not allowed to cause or allow the emission of any air pollutants, in sufficient quantities and of such characteristics and duration, that the Regional Administrator determines (1) causes or contributes to a violation of any NAAQS, or (2) is presenting an imminent and substantial endangerment to public health or welfare, or the environment. This section provides the EPA with the authority to require the installation of air pollution controls or other measures in order to reduce emissions to protect the NAAQS or prevent imminent and substantial endangerment. The section currently allows the EPA to require such controls through either a permit to construct or a non-Title V operating permit under 40 CFR 49.139. Since the FARR was enacted, the EPA has promulgated rules for permits to construct in Indian country (the Indian Country Minor NSR rules at 40 CFR 49.151 through 49.164 and the Federal Major New Source Review Program for Nonattainment Areas in Indian Country at 40 CFR 49.166 through 49.173). Region 10 has determined that it is not appropriate to use permits to construct to implement 40 CFR 49.135 because the Indian Country Minor NSR rules apply only to projects at existing sources that increase emissions and do not include provisions for the permitting authority to require reductions in emissions when there is not a proposed modification to the existing source. Therefore, the EPA is proposing to remove permits to construct as an option for implementing this section. Requirements under this section would be established solely through issuance of a non-Title V operating permit under 40 CFR 49.139.

This provision currently provides that nothing in the provision shall be construed to impair any cause of action or legal remedy of any person, or the public, for injury or damages arising from the emission of any air pollutant in such place, manner, or amount as to constitute a common law nuisance. The EPA is proposing to revise the reference to ''common law nuisance'' to ''nuisance under any other applicable law'' to ensure this provision includes applicable statutory and regulatory nuisance provisions as well as common law nuisance.

Section 49.137 Rule for air pollution episodes. This section establishes procedures for preventing and addressing the excessive buildup of certain NAAQS pollutants within an Indian reservation to prevent the occurrence of an air pollution emergency. It establishes criteria for issuing air stagnation advisories. It also establishes air pollution action levels and the action level triggers (air quality levels) that are used for the declaration of an air pollution alert, air pollution warning, or air pollution emergency. The current air pollution action level triggers are based on 40 CFR part 51, appendix L (Example Regulations for Prevention of Air Pollution Emergency Episodes) and currently do not include action level triggers for $PM_{2.5}$.

We are proposing to revise the current action level triggers for the three action levels (air pollution alert, air pollution warning, and air pollution emergency) to align with the Air Quality Index (AQI) categories (unhealthy, very unhealthy, and hazardous) and the associated concentration thresholds. The AQI categories and concentration thresholds are found in Table 2 of 40 CFR part 58, appendix G, Uniform Air Quality Index and Daily Reporting. This revision will also add action level triggers for $PM_{2.5}$. Based on input from Tribes, and after careful consideration, the EPA is proposing this approach for several reasons. First, if the NAAQS and corresponding AQI categories and concentrations are ever revised, the more generalized language would automatically be up to date. Second, the AQI is based on short term concentrations, which are more appropriate for action level triggers. Finally, the action level triggers will now better align with the health messaging associated with the AQI categories and concentrations, which are publicly available and widely used. The EPA is also clarifying that air pollution alerts, air pollution warnings, and air pollution emergencies can be declared under situations other than just periods of stagnant air such as high wind events associated with dust storms and wildfires. Finally, the EPA is proposing revisions to update the description of the methods the EPA will consider in order to announce an air stagnation advisory, an air pollution alert, an air pollution warning, or an air pollution emergency, such as posting the announcement to Region 10's social media, and to clarify the method for terminating a declaration.

Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions. Under the current rules, any person who owns or operates a 40 CFR part 71 source, a source subject to a standard under CAA sections 111 or 112, or any other air pollution source not expressly

exempted from this section is required to annually register the source with the EPA and report emissions. This section was intended to ensure a current and accurate record of the emissions from non-trivial air pollution sources operating within an Indian reservation is developed and maintained. Subject sources were required to register by February 15, 2007, and ''new air pollution sources'' must register within 90 days after beginning operation. A ''new air pollution source'' is currently defined as a source that begins actual construction after the effective date of the original rule (70 FR 18074, June 7, 2005). Any other source is considered an existing source.

Shortly after the EPA began implementing 40 CFR 49.138, it became apparent that the rule was unintentionally overbroad. Because 40 CFR 49.138 is structured such that the 2 ton per year emissions exemption applies only to ''any other air pollution source,'' the current language could be read to require very small sources subject to CAA section 111 or section 112 standards to register. For example, the current rule language could require wood stoves and small emergency generators subject to New Source Performance Standards under section 111 to register. This section could also be read to require some sources subject to National Emission Standards for Hazardous Air Pollutants under CAA section 112 to register even though they would have no (or trivial) emissions of the air pollutants that are required to be reported under the registration rule.

To address this unintended consequence, Region 10 issued an interpretative guidance document in 2005 to clarify the EPA's expectation that non-Title V sources that were subject to CAA section 111 or 112 standards were required to register only if they had the potential to emit more than 2 tons per year of any of the listed air pollutants.[5] In this rulemaking, Region 10 is proposing to revise 40 CFR 49.138 to be consistent with this interpretation. We are proposing to remove the language that required sources subject to CAA section 111 or 112 standards to register regardless of the level of emissions and are proposing to add language that any air pollutant source that has the potential to emit more than 2 tons of the listed air pollutants is required to register unless it is covered by one of the categorical exemptions. Because the 2 ton per year criterion would be an applicability provision, we are proposing to remove that criterion from the list of exemptions.

In addition to this change, we are proposing revisions to the registration rule to be generally consistent with the applicability provisions of the Indian Country Minor NSR Rule (40 CFR 49.151 through 49.164), which was promulgated after the FARR was promulgated in 2005 and which applies to new and modified minor stationary sources and to minor modifications at existing major stationary sources where the increase in emissions is above specified thresholds. Currently, the FARR registration rule includes sources required to have40 CFR part 71 operating permits in the list of sources required to register. Since the Indian Country Minor NSR Rule was promulgated after the 2005 promulgation of the FARR, the EPA is proposing to revise the applicability criteria in 40 CFR 49.138 to include sources required to have a permit under the Indian Country Minor NSR Rule, as well as sources required to have a non-Title V operating permit under 40 CFR 49.139. These additions will help accomplish the goal of this section (ensuring a current and accurate inventory of emissions from non-trivial air pollution sources) by requiring all sources on Indian reservations that are required to have permits under the Clean Air Act to register under the FARR.

The EPA is also proposing revisions to the list of sources specifically exempt from the registration rule. The registration rule contains a list of source categories that are exempt from registration because emissions from sources in the category are likely to be trivial (*e.g.,* consumer use of office equipment and products) or because a registration program is not appropriate for sources in the category (*e.g.,* mobile sources). When the EPA promulgated the Indian Country Minor NSR Rule, it exempted from the program various emissions units and activities that were based, in part, on the FARR registration exemptions but included some additional categorical exemptions that are not currently in the FARR registration rule. See 40 CFR 49.153(c). The EPA has considered these additional categories and is proposing to add two of them to the FARR registration rule: (1) emergency generators, designed solely for the purpose of providing electrical power during outages, provided the total maximum manufacturer's site-rated horsepower of all units is below 1000; and (2) stationary internal combustion engines with a manufacturer's site rated horsepower of less than 50. Although the potential to emit pollutants of such units would likely be less than the 2 ton per year applicability threshold, adding them to the list of categorically exempted sources reduces the burden of having to do emission calculations to confirm the exemption.

Another area of revisions to this rule relates to the date by which registration is required. As discussed previously in section C of this preamble, the EPA is proposing to extend the requirements of this section to the Cowlitz Indian Reservation, the Snoqualmie Indian Reservation, and lands held in trust for the Samish Indian Nation and to clarify that this rule also applies to all lands held in trust for a Tribe in Idaho, Oregon, and Washington that have not been formally designated as a reservation. The EPA is therefore revising the registration provision to provide a date by which existing sources in such areas are required to register. Under the proposed revisions, subject sources located on the Tribal lands listed in this section in existence on the effective date of the FARR revisions would be required to register by no later than 6 months after the effective date of FARR revisions. ''New air pollution sources'' continue to be required to register within 90 days after beginning operation. The EPA has also revised the definition of ''new air pollution source'' to accommodate the additional Tribal lands proposed for coverage under these FARR revisions. All subject sources continue to be required to re-register each year and provide updates on any changes to the information provided in the previous registration and promptly report any changes in ownership, location, or operation.

The EPA is also proposing to update provisions specifying the information required to be submitted in the initial and annual registration to include more commonly used current technology (*e.g.,* email rather than facsimile, Global Positioning System coordinates rather than latitude and longitude). We are also proposing to require that the copy of the most recent fugitive particulate matter survey and current fugitive particulate matter plan be submitted with the registration to better assure compliance with the requirements of 40 CFR 49.126 Rule for limiting fugitive particulate matter emissions.

The EPA is also proposing to update the method for submitting the initial and annual registrations. Currently, all registrants can register and report either through a paper application or through the FARR Online Reporting System (FORS). The online database was

[5] ''Determining if Your Business Needs to Register with EPA as an Air Pollution Source,'' EPA Region 10 (October 5, 2005).

implemented in 2016 to simplify the registration process from year to year. Through the online database, the EPA is collecting the same information from facilities as it does from paper registrations. The benefits of the online registration include improved recordkeeping by allowing better and faster access to previous registrations, populating each annual registration with existing, basic information about the facility and decreasing the amount of time and resources needed to report emissions after initial registration. In 2016 (the emission reporting year for calendar year 2015), when FORS became the preferred method of registration, 88 facilities out of a total of 154 facilities, or 57%, registered online. In 2020 (the emission reporting year for calendar year 2019), approximately 117 facilities out of 138 facilities, or 85%, chose to register online. As the Federal government moves toward e-government, in an attempt to streamline and simplify current procedures through electronic reporting, Region 10 is proposing to require all registration information and reports be submitted online through FORS within the EPA's Central Data Exchange (CDX), at *https://cdx.epa.gov.* Exceptions will be made if a facility attains prior written approval from Region 10 to submit a paper application.

The EPA is also proposing clarifying revisions to the requirement to report any relocation of the source in 40 CFR 49.138 (d)(5). As revised, 40 CFR 49.138 makes clear that report of relocation is required whether the relocation is within, off, or onto an Indian reservation, but that more limited information is required to be reported when the source is moving to a site outside of an Indian reservation in Idaho, Oregon, and Washington. EPA notes that relocation of a source may also trigger preconstruction permitting requirements. In addition, EPA is making a revision to the report of closure to clarify that the report must include the actual emissions through the date of closure.

Finally, for sources subject to 40 CFR part 71, we are eliminating the requirement to submit information already required by 40 CFR part 71 reporting requirements. The EPA is proposing to revise 40 CFR 49.138 to clarify that the only requirements of this section applicable to 40 CFR part 71 sources are the requirement to submit estimates of total actual emissions from the air pollution source and the requirement to submit a copy of the most recent fugitive particulate matter survey and plan as required under 40 CFR 49.126. The EPA is also proposing revisions to require that 40 CFR part 71 sources report the specified information by February 15 of each year (the same date as all other sources subject to the registration rule) rather than the date that their 40 CFR part 71 reports are due. 40 CFR part 71 required reports are now often submitted online through CEDRI within the EPA's Central Data Exchange (CDX), at *https://cdx.epa.gov.* Finally, the EPA is proposing that the owner or operator of a 40 CFR part 71 source submit reports of a change in ownership and closure, as applicable, because this information is not routinely required in a 40 CFR part 71 permit.

Section 49.139 Rule for non-Title V operating permits. This section provides a permitting program to establish Federally-enforceable requirements for air pollution sources on Indian reservations. In this rulemaking, the EPA is proposing to rescind a duplicative provision of this section pertaining to certain owner-requested limits and to add administrative procedures to clarify the process for issuing or revising a permit.

This rulemaking, as currently written, provides for the issuance of a permit containing Federally-enforceable requirements in the following three situations: (1) the owner or operator of any source wishes to obtain a Federally-enforceable limitation on the source's actual emissions or potential to emit; (2) the Regional Administrator determines that additional Federally-enforceable requirements for a source are necessary to ensure compliance with the applicable implementation plan, which would include any applicable FIP or TIP; or (3) the Regional Administrator determines that additional Federally-enforceable requirements for a source are necessary to ensure the attainment and maintenance of any NAAQS or Prevention of Significant Deterioration (PSD) increment.

On July 1, 2011, the EPA promulgated the Indian Country Minor NSR Rule, which includes provisions for establishing synthetic minor permits in Indian country (40 CFR 49.158). The rule defines ''synthetic minor source'' as a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above those for major sources in 40 CFR 49.167, 40 CFR 52.21 or 40 CFR 71.2, but that has taken a restriction so that its potential to emit is less than such amounts for major sources. 40 CFR 49.152(d). In promulgating the Indian Country Minor NSR Rule, the EPA stated that sources seeking synthetic minor status within the exterior boundaries of Indian reservations in Idaho, Oregon, and Washington must apply for synthetic minor source permits under the provisions of that rule and may no longer seek limits to become a ''synthetic minor source'' under the FARR (76 FR 38748, 38749, July 1, 2011). To be consistent with the Indian Country Minor NSR Rule, the EPA is proposing to rescind the provisions of 40 CFR 49.139 that are superseded by 40 CFR 49.158 of the Indian Country Minor NSR Rule and to add language making clear that applications for owner-requested synthetic minor limits must be submitted under 40 CFR 49.158 of the Indian Country Minor NSR Rule. For the same reason, we are proposing to delete the provision that authorizes owner-requested limits to be established in permits under 40 CFR part 71 or a Tribal operating permit program approved under 40 CFR part 70. The proposed revisions will now limit the application of 40 CFR 49.139 to the owner or operator of any air pollution source who wishes to obtain a Federally-enforceable limitation on the source's emissions that cannot be obtained under the Indian Country Minor NSR Rule (40 CFR 49.151 through 49.173). Examples of such situations include federally-enforceable limits to implement netting or offsets because the Indian Country Minor NSR Rule defines ''synthetic minor source'' as including only those sources that take a limit on potential to emit ''so that its potential to emit is less than such amounts for major sources.'' 40 CFR 49.152(d).

The EPA is also proposing to broaden the applicability provisions of 40 CFR 49.139 to provide Region 10 the authority to require a source to obtain a non-Title V operating permit where the Regional Administrator determines that additional Federally-enforceable requirements are necessary to implement or ensure compliance with any other provisions of the Clean Air Act (*e.g.,* regional haze). The EPA anticipates that such situations are likely to be extremely rare. In the more than 15 years since the FARR has been in effect, the EPA has not found it necessary to require a source to obtain a permit under 40 CFR 49.139. Having that authority available through a permit issuance process, should the need arise, however, would avoid the far more resource intensive process of promulgating a source-specific FIP to address an air quality issue.

We are also proposing to revise the existing administrative procedures for issuing non-title V operating permits and to add provisions for reopening and revising such permits. The Indian Country Minor NSR rule has detailed procedures for issuing, reopening, and

revising Clean Air Act permits on Indian reservations. For administrative efficiency, the EPA is proposing to use generally the same procedures for issuing, reopening, and revising non-title V operating permits. The EPA has also added a proposed definition of ''non-title V operating permit,'' defined as a permit issued by the Regional Administrator under this section.

Section 49.140 Rule for residential wood burning devices. The EPA is proposing to add a rule regulating the installation of certain residential wood burning devices and limiting what fuels can be burned in such devices in order to control the emissions of particulate matter and other pollutants to the atmosphere. In many areas of the Pacific Northwest, smoke from residential wood burning devices is a significant source of $PM_{2.5}$ and PM_{10} emissions. Regulating residential wood burning devices and the burning in such devices therefore helps protect air quality.

The proposed rulemaking would prohibit, after the effective date of the rule, the installation of new and used residential wood heaters, hydronic heaters, forced air furnaces, or central heaters unless they have been certified by the EPA to meet the applicable particulate matter emission standards for woodfired heating devices established in the Standards of Performance for New Residential Wood Heaters (40 CFR part 60, subpart AAA) and the Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces (40 CFR part 60, subpart QQQQ) as amended in 2015 (80 FR 13672, March 16, 2015), or any later promulgation of these standards, and have a permanent label affixed to the device as provided in 40 CFR 60.536 or 40 CFR 60.5478. Certified wood burning devices generate less smoke (fewer particulates) than non-certified wood burning devices and use less wood to create heat, improving air quality in communities where people burn wood for heat. Individuals living on Indian reservations would be able to continue using uncertified and older certified residential wood heaters, hydronic heaters, forced air furnaces, or central heaters as long as the devices were installed prior to the effective date of this new rule. The proposed rulemaking is more protective of air quality and would better reduce particulate matter from residential wood burning devices in comparison to requirements in surrounding jurisdictions that allow installation of any certified residential wood burning device. The EPA is therefore also proposing, in the alternative, a rule more consistent with surrounding jurisdictions and that would prohibit the installation of new and used residential wood heaters, hydronic heaters, forced air furnaces, and central heaters unless they have been certified by the EPA to meet the applicable particulate matter emission standards for woodfired heating devices established in the Standards of Performance for New Residential Wood Heaters (40 CFR part 60, subpart AAA) and Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces (40 CFR part 60, subpart QQQQ), and have a permanent label affixed to the device as provided in 40 CFR 60.536 or 40 CFR 60.5478. In effect, the proposal in the alternative would allow the installation of any new or used residential wood heater, hydronic heater, forced air furnace, or central heater that has been certified by the EPA since subparts AAA and QQQQ were first promulgated.

The EPA is requesting comment specifically on whether the proposed rulemaking or the proposed alternative should be finalized in order to regulate the installation of new and used residential wood heaters, hydronic heaters, forced air furnaces, and central heaters on Indian reservations in Idaho, Oregon, and Washington. In taking final action, EPA will consider the input we receive regarding the benefits of enhanced environmental protection and the benefits of consistency with surrounding jurisdictions.

This proposed rulemaking would also limit materials that can be burned in all existing and newly installed types of residential wood burning devices (including fireplaces) to: (1) seasoned firewood, which is firewood that has a moisture content of 20% or less; (2) kiln dried or air dried lumber that has not been treated, impregnated, painted or coated; (3) products manufactured for the purpose of being used as a fuel for a residential wood burning device, such as wood pellets and biomass fire logs intended for burning in a wood stove or fireplace; and (4) manufactured fire starters and paper sufficient to start a fire.

These new requirements are consistent with the intent of the FARR: to ensure that residents within the boundaries of Indian reservations enjoy air quality protection similar to those existing outside reservations. Over the years, many jurisdictions on State lands outside of Indian reservations have similarly banned the installment of uncertified wood burning devices and limited material that can be burned in residential wood burning devices. This proposed section would therefore help ensure a similar degree of protection from environmental and health hazards on Indian reservations as in neighboring areas.

Section 49.141 Rule for curtailment of residential wood burning devices for specific areas. The EPA is proposing to require the curtailment of residential wood burning devices (commonly referred to as ''burn bans'') during periods of poor air quality in specific geographical areas on certain Indian reservations with demonstrated elevated concentrations of particulate matter. This prohibition would apply to wood stoves and similar wood burning devices as well as to fireplaces. In some areas of Indian reservations in Idaho, Oregon, and Washington, stagnant air and use of wood burning devices, particularly in winter, drive particulate matter concentrations to elevated levels, causing concern for human health. Fine particles can make asthma symptoms worse and trigger asthma attacks. Fine particles can also trigger heart attacks, stroke, irregular heart rhythms and heart failure, especially in people who are already at risk for these conditions. As discussed in section I.B of this preamble, $PM_{2.5}$ concentrations that exceed the NAAQS over a 3-year period can result in a ''nonattainment'' designation under the CAA, which in turn can result in more stringent air pollution reduction measures. A burn ban rule would help areas with elevated $PM_{2.5}$ levels take proactive steps to avoid a ''nonattainment'' designation. Many State and local air agencies in the Pacific Northwest have curtailment programs for residential wood heating devices with procedures, conditions, and exemptions similar to those the EPA is proposing.

This proposed curtailment program establishes two burn ban stages. During a Stage 1 ban, only EPA-certified residential wood burning devices are permitted to be used. During a Stage 2 ban, no wood burning devices, even EPA-certified devices, are permitted to be used. A residence that self-certifies that wood is the sole source of heat or that the use of an available alternative heat source would impose an economic hardship would be exempt from both stages of burn bans. This exemption would remain in effect for 5 years from the date of self-certification, unless there is a change to the qualification status of the residence covered by the exemption. A ''Self-Certification'' exemption form will be available on Region 10's website and other locations and must be completed and kept on site for any residence relying on this exemption.

The EPA is proposing a phased in approach for implementation and enforcement of this rule. The first year

after promulgation, the EPA or delegated Tribe will run a voluntary curtailment program to help familiarize homeowners with the curtailment program. The mandatory curtailment program will begin October 1st of the 2nd calendar following the year of promulgation of this rulemaking for a particular reservation. After the implementation date, the EPA and delegated tribes will continue to focus on compliance assistance work. This will be in the form of assistance, outreach, and education, in partnership with affected Tribes regarding the new rules, the process for certifying for exemption status and the adverse health effects of high particulate matter levels.

After coordination and consultation with the affected Tribes, for the reasons explained in section B of this preamble, the EPA is proposing that 40 CFR 49.141 apply on the Colville, the Nez Perce and the Yakama Reservations, as shown in Table 2 in Section B of this preamble. The EPA anticipates that each of these Tribes will seek EPA delegation to implement this section on their reservations.

B. Rules Proposed for Specific Indian Reservations

As discussed in section A of this preamble, the EPA is proposing to promulgate several rules that would only apply on specific Indian reservations where the EPA finds, in coordination and consultation with the relevant Tribes, that the rules are necessary or appropriate. This is consistent with the approach under the FARR as promulgated in 2005, in which the EPA promulgated one or more additional rules on the Colville, Nez Perce, and Umatilla Reservations. Except as otherwise noted in this section, the additional rules promulgated for the specified Indian reservations in 2005 remain in effect, to be revised as proposed in this rulemaking.

This section summarizes the new rules that the EPA proposes to apply to specified Indian reservations, as well as existing rules (in some cases with proposed revisions) that the EPA proposes to apply to additional Indian reservations. In each case, the proposed additional rules are intended to regulate activities that contribute to elevated particulate matter concentrations in areas where there are air quality concerns. As in promulgating additional rules to apply on specified Indian reservations when the FARR was promulgated in 2005, the EPA is basing the determination of whether the additional rules proposed in this action are necessary or appropriate for a particular Indian reservation on a number of factors, including the prevalence of the activity on the reservation, the significance of the resulting pollution on air quality in the area and adjacent airsheds, and whether the Tribe has Tribal laws to control this type of pollution (67 FR 11748, 11755 March 15, 2002). These proposed regulations would be part of FIPs for specific Indian reservations as specified in subpart M of this part.

For the new 40 CFR 49.141 Rule for curtailment of residential wood burning devices for specific areas, the EPA evaluated $PM_{2.5}$ air quality monitoring data on or near reservations in Idaho, Oregon, and Washington to assess which reservations had elevated wintertime $PM_{2.5}$ levels. The EPA also received input from Tribes about the prevalence of wood burning devices on their reservations, the contribution of wood burning devices on their reservations to elevated $PM_{2.5}$ levels, and existing efforts to address wood burning devices in the airsheds of concern. Based on this information, the EPA determined it is appropriate to propose to apply 40 CFR 49.141 Rule for curtailment of residential wood burning devices for specific areas, on the Colville, Nez Perce, and Yakama Reservations.

Table 2 of this section lists the ''additional'' rules the EPA is proposing to apply on five Indian reservations where the EPA has found, in coordination and consultation with the relevant Tribes, that it is appropriate to establish these specific requirements in their FIPs in order to control particulate matter pollution, as well as the additional rules that will continue to apply, as revised, on the specified Indian reservations. There are currently no additional rules that apply on the Yakama Reservation. The EPA is proposing that 40 CFR 49.132 Rule for large open burning permits, 40 CFR 49.133 Rule for agricultural burning permits, 40 CFR 49.141 Rule for curtailment of residential wood burning devices for specific areas, and 40 CFR 49.142 Rule for small open burning annual permits apply on the Yakama Reservation, as shown in Table 2. As discussed in section A of this preamble, the EPA is proposing that 40 CFR 49.128 Rule for limiting particulate matter emissions from wood products industry sources be applied on the Coeur D'Alene Reservation because the operations of a wood products facility located on the Coeur D'Alene Reservation may contribute to the elevated levels of $PM_{2.5}$ in St. Maries, Idaho.

Additional information supporting the proposed additional rules for the specified Indian reservations, shown on Table 2 and marked with an asterisk, is included in the docket for this proposal.

TABLE 2—ADDITIONAL RULES [6]

Section No.	Additional rules
Coeur D'Alene Reservation, Idaho	
§ 49.128 *	Rule for limiting particulate matter emissions from wood products industry sources.
Colville Reservation, Washington	
§ 49.127	Rule for woodwaste burners.
§ 49.128	Rule for limiting particulate matter emissions from wood products industry sources.
§ 49.141 *	Rule for curtailment of residential wood burning devices for specific areas.
Nez Perce Reservation, Idaho	
§ 49.127	Rule for woodwaste burners.
§ 49.128	Rule for limiting particulate matter emissions from wood products industry sources.
§ 49.132 †	Rule for large open burning permits.
§ 49.133	Rule for agricultural burning permits.
§ 49.134	Rule for forestry and silvicultural burning permits.
§ 49.141 *	Rule for curtailment of residential wood burning devices for specific areas.

TABLE 2—ADDITIONAL RULES[6]—Continued

Section No.	Additional rules
§ 49.143†	Permit by rule for small open burns.
Umatilla Indian Reservation, Oregon	
§ 49.132†	Rule for large open burning permits.
§ 49.133	Rule for agricultural burning permits.
§ 49.134	Rule for forestry and silvicultural burning permits.
§ 49.142†	Rule for small open burning annual permits.
Yakama Reservation, Washington	
§ 49.132*	Rule for large open burning permits.
§ 49.133*	Rule for agricultural burning permits.
§ 49.141*	Rule for curtailment of residential wood burning devices for specific areas.
§ 49.142*	Rule for small open burning annual permits.

C. Environmental Justice

On February 11, 1994, the President issued Executive Order 12898 entitled, ''Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.'' The Executive Order calls on each Federal agency to make environmental justice (EJ) a part of its mission by ''identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on people of color and low-income populations.'' On January 20, 2021, the President issued Executive Order 13985: ''Advancing Racial Equity and Support for Underserved Communities Through the Federal Government.'' [7] The Executive Order calls on each Federal agency to ''pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality.'' Additionally, the EPA expressed a commitment to conducting environmental justice analysis for rulemakings as described in the April 30, 2021 revisions to the Cross-State Air Pollution Rule (CSAPR).[8]

The EPA defines EJ as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. As outlined in the EJ Technical Guidelines, the goal of an EJ analysis is to evaluate, to the extent possible, three questions: Are there potential EJ concerns for populations living in proximity to sources affected by the rule in the baseline?; Are there potential EJ concerns for population groups of concern for the regulatory option(s) under consideration?; Are potential EJ concerns created or mitigated under the options under consideration compared to the baseline? The determination of whether there is a potential disproportionate impact that may merit Agency action is ultimately a policy judgment informed by analysis.[9] These rules are designed to protect human health and air quality resources in Indian reservations in Idaho, Oregon, and Washington. These reservations often have communities with very low per capita incomes relative to the U.S. average with large percentages of the population below the poverty line, so many communities where these rules apply tend to be communities with low income and minority populations. However, the rules will not impose any negative environmental impacts on these populations. Instead, the rules provide additional protections for communities that include overburdened populations. Because the rules will improve health and provide additional protections for such communities, the EPA has not undertaken a detailed, formal analysis of the environmental justice impacts of this action.

D. Costs and Benefits Associated With These Rules

As part of developing the proposed revisions, the EPA conducted an analysis of the expected costs should these rules be adopted. Included in the docket for this rulemaking is the Economic Impact Analysis (EIA) and the Information Collection Request (ICR) documents for the proposed revisions. The EIA was prepared to assist the EPA in estimating the costs of compliance for the proposed revisions alongside updated 2021 costs for the initial FARR. The ICR describes the recordkeeping and reporting information that will be collected under the revised FARR and related ''burden.'' ''Burden'' refers to the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions

[6] The additional rules marked with an asterisk (*) are the new or existing rules that the EPA proposes be newly applied to the specified Indian reservations in this rulemaking. With respect to the additional rules marked with a dagger (†), the large and specified small open burn permitting rules replace § 49.132, Rule for general open burning permits, which previously applied on the Nez Perce and Umatilla Reservations. Rules that are not so marked are currently in effect on the specified Indian reservations, and the EPA is proposing that the revisions to these additional rules discussed in Section II.A. of this preamble be adopted for such reservations.

[7] Available at *https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-Federal-government/,* accessed July 16, 2021.

[8] 86 FR 23054, 23162 (April 30, 2021) (''Going forward, EPA is committed to conducting environmental justice analysis for rulemakings based on a framework similar to what is outlined here, in addition to investigating ways to further weave environmental justice into the fabric of the rulemaking process including through enhanced meaningful engagement with environmental justice communities.'').

[9] According to the EPA's June 2016 *Technical Guidance for Assessing Environmental Justice in Regulatory Analysis,* page 66 and Section 2.1, the term ''disproportionate impacts'' refers to differences in impacts or risks that are extensive enough that they may merit Agency action. The determination of whether there is a disproportionate impact that may merit Agency action is a policy judgment informed by analysis of any discernable differences in anticipated impacts from the rulemaking on population groups of concern compared to all other population groups.

and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

With the exception of making orchard heating devices subject to the visible emissions limit, the EPA's preliminary conclusion is that there will be no capital costs incurred to comply with any of the new or revised rules. With respect to the geographic extension of the FARR, we are not aware of any sources in these areas that would require additional control or monitoring equipment to comply with the FARR, as revised. With respect to the open burning rules, open burning permit rules, and wood burning devices curtailment rules, we also do not expect any capital costs will be needed to comply with the proposed revisions. The EPA anticipates that 40 CFR 49.140 Rule for residential wood burning devices, which regulates the installation of used wood burning devices, would impose negligible additional costs overall. This is because, although the cost difference between an older used wood burning device and post-2015 EPA certified wood burning device could be approximately $3,500, we anticipate very few older used wood burning devices would have been installed even if the EPA did not promulgate this prohibition. This is based on information we received from Tribes during the development of the proposed rulemaking. One example provided was where a resident gives a used stove that was removed from their residence to a family member to install in a different residence or structure like a recreational cabin. Although this may occur, it is expected to be an uncommon event so our overall cost estimate is based on an average of 15 installations per year of older (pre-2015) used wood heating devices that would no longer be allowed under the proposed rulemaking. That number would be even lower under the proposed alternative, which would allow used post-1990 certified wood heating devices to be reinstalled.

In response to a request from the OMB, the EPA conducted a benefits analysis specifically looking at 40 CFR 49.141 Rule for curtailment of residential wood burning devices for specific areas. The analysis includes a conservative estimate of the monetary benefits of this proposed rulemaking based on mortality associated with $PM_{2.5}$ exposure. This estimate used data and equations prepared by the EPA for the Environmental Benefits Mapping and Analysis Program (BenMAP–CE),[10] which is the EPA's recommended tool for benefits calculations. The estimated mortality associated maximum benefit was calculated to be $27.8 million. This amount ($27.8 million) is representative of benefits over a long period of time [11] because it is based on long-term mortality from continuous $PM_{2.5}$ exposure. A copy of this analysis is the docket for this proposal.

The extension of 40 CFR 49.128 Rule for limiting particulate matter emissions from wood products industry sources to the Coeur D'Alene Reservation is not expected to result in new capital costs for the one existing facility that would be subject to the rule. This is because, based on available test data from the source in question, the emission controls that the facility is currently using to control hazardous air pollutants to comply with the NESHAP for Plywood and Composite Wood Products (40 CFR part 63, subpart DDDD) are also expected to control particulate matter emissions to below the levels required in 40 CFR 49.128.

With respect to orchard heating devices proposed to be regulated under 40 CFR 49.124 Rule for limiting visible emissions, the EPA conducted an analysis of the expected costs of complying with this rulemaking. This analysis indicates that annualized costs of a little over $1.5 million (based on one-time capital costs of up to $18.9 million amortized over 30 years) could be expected across all Indian reservations in order for orchard heating devices (including smudge pots) to comply with the visible emissions limit. These anticipated capital costs assume that 10% of all orchard lands on Indian reservations in Idaho, Oregon, and Washington will be required to purchase new equipment (*e.g.,* propane-powered fans or propane heaters) to comply with the visible emissions limit and maintain orchard heating capabilities. Note, however, that this assumption is based on limited data regarding the prevalence of smudge pots, open-pot heaters, and other orchard heating devices that burn diesel and other fuels with high visible emissions on Indian reservations in Idaho, Oregon, and Washington. The analysis also indicates that these up-front capital costs for replacement orchard heating devices will be recouped in time; the use of alternative equipment is expected to result in an annual operating cost savings of roughly $10,000 per acre due to reductions in fuel and labor costs.[12] We specifically request public comment on the EPA's economic analysis with respect to orchard heating devices, along with available data regarding the extent to which existing orchard heating devices on Indian reservations in Idaho, Oregon, and Washington are expected to be able to comply with the proposed visible emissions limit in 40 CFR 49.124; the up-front capital costs of replacing non-complying orchard heating capacity; and any expected annual cost savings from replacing non-complying orchard heating capacity with alternatives. This data will be considered in making decisions about how to regulate orchard heating devices appropriately in the final rule.

Thus, the costs estimated for these revisions to the FARR are primarily the labor costs associated with recordkeeping and reporting under the regulations. Costs for both the FARR rules currently in effect at 2021 costs and the proposed revisions to the FARR were estimated in the EIA. Cost estimates for the revisions proposed in this rulemaking include costs on those Indian reservations for which the EPA has proposed additional new rules. The total annualized labor costs and non-labor costs were estimated to be $496,252 for all rules other than 40 CFR 49.124 Rule for limiting visible emissions. Factoring in the estimated ongoing annual savings related to use of replacement orchard heating devices, the proposed revisions are estimated to result in an overall annual savings.[13]

The information relied on by the EPA for this analysis was assembled from a number of sources, including surveys of sources on the Indian reservations in Idaho, Oregon, and Washington, consultations with the sources and Tribal governments, and the EPA's experience with air quality issues in the Pacific Northwest.

III. Public Participation and Request for Comment

The proposed revisions include minor editorial changes throughout the FARR (subpart C) and FIP (subpart M) rules, in addition to substantive changes to certain provisions of the rules. As such, we are publishing with this proposal the

[10] *https://www.epa.gov/benmap.*

[11] The time period of the benefit calculation is not explicitly defined since death from chronic $PM_{2.5}$ exposure can occur years after the start of the exposure period. The EPA calculates benefits based on the Di et al. (2017) epidemiological study (*https://www.nejm.org/doi/full/10.1056/nejmoa1702747*), which focused on evaluating mortality and $PM_{2.5}$ concentrations for a 12-year period.

[12] This annual per acre cost savings results in an estimated ongoing annual savings of $55,283,273.

[13] Annual savings from the proposed revisions are estimated to be $53,266,002.

full text of the rules as proposed to be revised, rather than only the portions of the text proposed to be revised in this action. A redline-strikeout comparison of the revised rules, as proposed, to the existing FARR and FIPs showing all proposed changes is included in the docket for this action. The EPA solicits comments on all aspects of the proposed revisions. Interested parties should submit comments online and be sure to identify the appropriate docket control number (EPA–R10–OAR–2020–0361) in your correspondence. Your comments must be received by January 10, 2023 to be considered in the final action taken by the EPA.

You may also comment on this proposal by attending the public hearing, if one is held, and providing oral comments. If the EPA determines that a hearing should be held, the virtual hearing will be held on November 17, 2022.

IV. Incorporation by Reference

In this document, the EPA is proposing to include in the final rule, regulatory text that includes incorporation by reference (IBR). In accordance with requirements of 1 CFR 51.5, the EPA is proposing to IBR the following provisions as they exist on the date of final approval by the Office of the Federal Register:

- ASTM D388–19a, Standard Classification of Coals by Rank, IBR to be approved for § 49.123. This specification covers the classification of coals by rank, that is, according to their degree of metamorphism, or progressive alteration, in the natural series from lignite to anthracite;
- ASTM D396–21, Standard Specification for Fuel Oils, IBR to be approved for § 49.123. This specification covers grades of fuel oil intended for use in various types of fuel-oil-burning equipment under various climatic and operating conditions; ASTM D240–19, Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter, IBR to be approved for § 49.123. This test method covers the determination of the heat of combustion of liquid hydrocarbon fuels ranging in volatility from that of light distillates to that of residual fuels;
- ASTM D1826–94(Reapproved 2017), Standard Test Method for Calorific (Heating) Value of Gases in Natural Gas Range by Continuous Recording Calorimeter, IBR to be approved for § 49.123. This test method covers the determination with the continuous recording calorimeter of the total calorific (heating) value of fuel gas produced or sold in the natural gas range from 900 to 1200 British thermal unit/standard cubic foot;
- ASTM D5865/D5865M–19, Standard Test Method for Gross Calorific Value of Coal and Coke, IBR to be approved for § 49.123. This test method pertains to the determination of the gross calorific value of coal and coke by either an isoperibol or adiabatic combustion calorimeter;
- ASTM D2880–20, Standard Specification for Gas Turbine Fuel Oils, IBR to be approved for § 49.130. This specification covers the selection of fuels for gas turbines, excepting gas turbines used in aircraft, for the guidance of interested parties such as turbine manufacturers and the suppliers and purchasers of fuel oils;
- ASTM D4294–21, Standard Test Method for Sulfur in Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectroscopy, IBR to be approved for § 49.130. This test method covers the determination of total sulfur in petroleum and petroleum products that are single-phase and either liquid at ambient conditions, liquefiable with moderate heat, or soluble in hydrocarbon solvents;
- ASTM D6021–22, Standard Test Method for Measurement of Total Hydrogen Sulfide in Residual Fuels by Multiple Headspace Extraction and Sulfur Specific Detection, IBR to be approved for § 49.130. This test method covers a method suitable for measuring the total amount of hydrogen sulfide (H_2S) in heavy distillates, heavy distillate/residual fuel blends, or residual fuels;
- ASTM D4239–18e1, Standard Test Methods for Sulfur in the Analysis Sample of Coal and Coke Using High Temperature Tube Furnace Combustion Methods, IBR to be approved for § 49.130. This test method covers the determination of sulfur in samples of coal or coke by high-temperature tube furnace combustion;
- ASTM E775–15(Reapproved 2021), Standard Test Methods for Total Sulfur in the Analysis Sample of Refuse-Derived Fuel, IBR to be approved for § 49.130. These test methods present two alternative procedures for the determination of total sulfur in prepared analysis samples of solid refuse-derived fuel. Sulfur is included in the ultimate analysis of refuse-derived fuel;
- ASTM D1072–06(Reapproved 2017), Standard Test Method for Total Sulfur in Fuel Gases by Combustion and Barium Chloride Titration, IBR to be approved for § 49.130. This test method is for the determination of total sulfur in combustible fuel gases and is applicable to natural gases, manufactured gases, mixed gases, and other miscellaneous gaseous fuels;
- ASTM D3246–15, Standard Test Method for Sulfur in Petroleum Gas by Oxidative Microcoulometry, IBR to be approved for § 49.130. This test method covers determination of sulfur in the range from 1.5 to 100 milligram per kilogram (parts per million by mass) by weight in hydrocarbon products that are gaseous at normal room temperature and pressure;
- ASTM D4084–07(Reapproved 2017) Standard Test Method for Analysis of Hydrogen Sulfide in Gaseous Fuels (Lead Acetate Reaction Rate Method), IBR to be approved for § 49.130. This test method covers the determination of H_2S in gaseous fuels. It is applicable to the measurement of H_2S in natural gas, liquefied petroleum gas, substitute natural gas, landfill gas, sewage treatment off gasses, recycle gas, flare gasses, and mixtures of fuel gases;
- ASTM D5504–20, Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Chemiluminescence, IBR to be approved for § 49.130. This test method is primarily for the determination of speciated volatile sulfur-containing compounds in high methane content gaseous fuels such as natural gas;
- ASTM D4468–85(Reapproved 2015), Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry, IBR to be approved for § 49.130. This test method covers the determination of sulfur gaseous fuels in the range from 0.001 to 20 parts per million by volume (ppm/v);
- ASTM D2622–21, Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry, IBR to be approved for § 49.130. This test method covers the determination of total sulfur in petroleum and petroleum products that are single-phase and either liquid at ambient conditions, liquefiable with moderate heat, or soluble in hydrocarbon solvents. These materials can include diesel fuel, jet fuel, kerosene, other distillate oil, naphtha, residual oil, lubricating base oil, hydraulic oil, crude oil, unleaded gasoline, gasoline-ethanol blends, and biodiesel; and
- ASTM D6228–19, Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Flame Photometric Detection, IBR to be approved for § 49.130. This test method covers the determination of individual volatile sulfur-containing compounds in gaseous fuels by gas chromatography

with a flame photometric detector or a pulsed flame photometric detector.

These ASTM standards were developed and adopted by ASTM. This material is available for inspection by appointment at the EPA Region 10, Air and Radiation Division, 1200 Sixth Avenue, Seattle, Washington 98101 by contacting the individual listed in the **FOR FURTHER INFORMATION CONTACT** section, and is available from the sources indicated below. The ASTM standards may also be obtained from *www.astm.org* or from the ASTM at 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959.

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. OMB determined this action is significant based on a finding of novel policy issues, specifically that this action impacts Indian Tribes. Any changes made in response to OMB recommendations have been documented in the docket. The EPA prepared an economic analysis of the potential costs and benefits associated with this action. This analysis, ''Economic Impact Analysis for the Revised Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon, and Washington'' is available in the docket.

B. Paperwork Reduction Act (PRA)

OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060–0558. Information collection activities in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the PRA. The Information Collection Request (ICR) document that the EPA prepared has been assigned EPA ICR # 2730.01.

The record-keeping and reporting burden for this collection of information is described in the following paragraphs. As discussed in section C of this preamble, ''burden'' refers means to the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency.

In 2005, the EPA promulgated Federal Implementation Plans (FIPs) under the Clean Air Act (CAA) for Indian reservations located in Idaho, Oregon and Washington. The FIPs, also referred to as Federal Air Rules for Reservations (FARR), include basic air quality regulations to protect health and welfare on Indian reservations located in the Northwest. These rules are implemented by EPA Region 10 and delegated to Tribes. EPA Region 10 is proposing revisions to the FARR, including clarifying aspects of the initial rules; removing an exemption to the limiting visible emissions rule for smudge pots and adding new rules for residential solid fuel heating devices and woodstove curtailment; splitting the rule for general open burning permits into a large open burn and two small open burn permit options; removing provisions that have been superseded by provisions of the Tribal New Source Review (NSR) rule; and moving to online registration of air pollution sources and emissions reporting. In addition, EPA Region 10 is promulgating three new FIPs implementing the FARR on the Snoqualmie Indian Reservation, the Cowlitz Indian Reservation, and the lands held in trust for the Samish Indian Nation. These revisions also clarify that the FARR applies to lands held in trust for a Tribe that has not been formally designated as a reservation.

The Office of Management and Budget (OMB) approved an Information Collection Request (ICR) entitled ''Federal Implementation Plans Under the Clean Air Act for Indian Reservations in Idaho, Oregon and Washington'' (OMB Control Number 2060–0558), on November 16, 2004 for the FARR as originally promulgated in 2005. Renewals of the ICR were approved by OMB on May 23, 2008; August 3, 2011; March 16, 2015; and August 31, 2018, with the latest renewal (EPA ICR # 2020.09) submitted to OMB for review and approval and published in the **Federal Register** on 8/13/2021 (86 FR 44708). This new ICR addresses the proposed revisions to the FARR listed above and provides burden estimates for respondents to comply with the various FIP provisions required by subpart M of this part Implementation Plans for Tribes—Region 10. The rulemaking effort will utilize a new OMB control number and EPA ICR number. Any approved information collection activities associated with the final rule will be reintegrated with the base collection (under control number 2060–0558) at a later date.

Respondents/affected entities: Entities potentially affected by this action include owners and operators of emission sources in all industry groups and tribal, Federal, and local governments, landowners who conduct open burning and owners of residential wood burning devices, located in the identified Indian reservations. Categories of entities potentially affected by this proposed information collection are summarized in Table 1 in the ICR.

Respondent's obligation to respond: Respondent's obligation to respond is mandatory. See §§ 49.122, 49.126, 49.130 through 134, 49.138 through 49.142.

Estimated number of respondents: 2,731.

Frequency of response: Annual or Occasional.

Total estimated burden: 5354.5 hours (per year). Burden is defined at 5 CFR 1320.3(b).

Total estimated cost: $424,300 (per year), includes no annualized capital or operation & maintenance costs.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR part 9.

Submit your comments on the Agency's need for this information, the accuracy of the provided burden estimates and any suggested methods for minimizing respondent burden to the EPA using the docket identified at the beginning of this rule. The EPA will respond to any ICR-related comments in the final rule. You may also send your ICR-related comments to OMB's Office of Information and Regulatory Affairs using the interface at *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. OMB must receive comments no later than December 12, 2022.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. Under the RFA, ''small entity'' includes small businesses, small governments, and small organizations, as defined in 5 U.S.C. 601. The small entities subject to the requirements of this action are primarily small businesses, although there may be small organizations and small governmental jurisdictions that are impacted as well. Among individually identified entities

expected to be impacted by these rules, 108 out of 140 (77%) [14] were classified as small entities, all of which are small businesses. There are an array of different types of businesses that would be impacted. Industrial categories subject to the FARR include gasoline stations, forest products, cement, asphalt paving, automotive repair, lodging, and other sectors. None of the identified facilities expected to incur costs under these rules are believed to be owned by small governments. In addition to the identified entities, there are a number of general contractors, fire protection services, farmers, foresters, and orchardists that are expected to incur costs each year to apply for burn permits or comply with other recordkeeping and reporting requirements. We have estimated that an average of about 2,010 entities would incur costs for preparing burn permits or other requirements each year. These entities are not specifically identified so we used a conservative assumption that they are all small. They are expected to be comprised primarily of small businesses, but small governmental jurisdictions may incur costs for their fire protection services to obtain annual open burning permits to conduct trainings. Small non-profits may also be impacted. The Agency has determined that the identified small entities may experience an impact averaging about 0.1 percent of revenues, with no entities expected to incur costs greater than 1 percent of their annual revenues. Similarly, among unidentified entities that are expected to experience positive regulatory costs, the estimated costs are so low relative to typical revenues in the impacted sectors that no entities are expected to experience cost greater than 1 percent of annual revenues. Details of this analysis are presented in the EIA included in the docket. Although this proposed rulemaking will not have a significant economic impact on a substantial number of small entities, the EPA has included a number of exemptions in the rules where appropriate to reduce impacts of this rulemaking on small entities. In addition, in developing this proposal, the EPA coordinated and consulted with Tribal governments regarding the potential impacts of these rules (see Section IV.F. of this preamble). In order to better understand the implications of these rules for small entities, as part of the coordination and consultation with Tribal representatives, the EPA also explored the possible effects for small businesses operating on Tribal lands. We continue to seek information regarding the potential impacts of the proposed rulemaking on small entities and welcome comments on issues related to such impacts.

[14] This represents the number of businesses that have registered under the FARR.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of $100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The EPA has determined that this rulemaking does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. With regard to State and local governments, there is no expenditure because these rules only apply on Indian reservations. With regard to Tribal governments the proposed revisions will not have an economic impact on Tribal governments because the implementation and enforcement responsibility for the proposed revisions rests with the EPA unless a Tribe seeks delegation to implement or otherwise seeks to assist the EPA in one or more aspects of the FARR on its reservation. Thus, this rule are not subject to the requirements of sections 202 and 205 of UMRA.

As explained in the discussion of Executive Order 13175 in section F of this preamble below, we notified all potentially affected Tribal governments of the requirements in these proposed rules. Further, although there are no significant Federal intergovernmental mandates, we provided officials of all potentially affected Tribal governments an opportunity for meaningful and timely input in the development of the regulatory proposal. Finally, through consultation meetings and other forums, we will continue to keep Tribal governments involved by providing them with opportunities for learning about and receiving advice on compliance with the regulatory requirements.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action has tribal implications. However, it will neither impose substantial direct compliance costs on federally recognized tribal governments, nor preempt tribal law. The proposed revisions would significantly affect specific Indian reservations in Idaho, Oregon, and Washington by imposing necessary or appropriate air quality regulations and creating an improved level of air quality protection on the affected Indian reservations. The air quality revisions proposed here are applicable broadly to all sources within the identified Indian reservations and are not uniquely applicable to Tribal governments. Tribal governments may incur some compliance costs in meeting those requirements that apply to sources they own or operate; however, the economic impacts analysis indicates that those costs would not be substantial. Finally, although Tribal governments are encouraged to partner with the EPA on the implementation of these regulations, they are not required to do so. In addition, the EPA will seek to provide funding to Tribes that apply for delegation of the EPA's authority to administer specific rules to support their activities. Because these proposed revisions will neither impose substantial direct compliance costs on Tribal governments, nor preempt Tribal law, the requirements of sections 5(b) and 5(c) of the Executive Order do not apply to the proposed revisions.

The EPA consulted with tribal officials under the EPA Policy on Consultation and Coordination with Indian Tribes early in the process of developing this regulation to permit them to have meaningful and timely input into its development. A summary of that consultation is provided in the document, ''Coordination and Consultation Record,'' included in the docket for this notice. The proposed revisions are based on the EPA's and Tribes' experience in implementing the FARR since 2005, including instances where the FARR was not being interpreted as the EPA had intended, as well as changes in related air quality regulations and changes in air quality in some affected areas. Early on in the process, in 2010, we offered all affected Tribes the opportunity to consult on proposed revisions to the FARR, and conducted formal consultations with three Tribes in response to that offer. We also provided Tribes the opportunity early on to participate in conference calls to learn more about potential rule revision and worked

collaboratively with tribal environmental staff as we developed draft revisions.

The EPA provided drafts of the proposed FARR revisions to the leaders and environmental staff of the affected Tribes in 2016 and 2020. Several Tribes requested formal consultation in response. The EPA also conducted a webinar in 2020 to provide an overview of the latest draft revisions that 10 Tribes attended, and the EPA discussed the draft revisions with Tribal environmental staff at various points in the process. The overall response to the proposed revisions from Tribal leaders and environmental staff was generally favorable, and the EPA received valuable suggestions for improvements to the rule itself, as well as outreach and implementation for once the revisions are finalized.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866, and because the EPA does not believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. This action generally increases the level of environmental protection for affected populations (persons living on Indian reservations). The proposed revisions would provide regulatory certainty and necessary or appropriate regulation on Indian reservations, and reduce emissions from sources complying with these regulations. Consequently, the regulations are expected to result in health benefits to persons living on Indian reservations.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use

This action is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer and Advancement Act (NTTAA)

This action involves technical standards. The EPA proposes to continue using the ASTM Methods and generally accepted test methods previously promulgated by the EPA, as updated since 2005. Because these methods were used under the FARR rules as promulgated in 2005 and are still widely used by State and local agencies for determining compliance with similar rules, the EPA continues to believe these technical standards are the most appropriate and will not require any alternative technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). Section II.C. of this preamble provides additional information regarding Environmental Justice. This action generally increases the level of environmental protection for affected populations (persons living on Indian reservations). The proposed revisions would provide necessary or appropriate regulation on Indian reservations, and reduce emissions from sources complying with these regulations. Consequently, the regulations are expected to result in health benefits to persons living on Indian reservations, many of whom live in low-income and communities of color.

List of Subjects in 40 CFR Part 49

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

Dated: September 15, 2022.

Casey Sixkiller,

Regional Administrator, Region 10.

For the reasons set forth in the preamble, 40 CFR part 49 is proposed to be amended as follows:

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

■ 1. The authority citation for part 49 continues to read as follows:

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

Subpart C—General Federal implementation Plan Provisions

■ 2. Revise the undesignated heading immediately following reserved §§ 49.106 through 49.120 and §§ 49.121 through 49.139 to read as follows:

* * * * *

Sec.

General Rules for Application to Indian Reservations in Idaho, Oregon, and Washington

49.121 Introduction.
49.122 Partial delegation of administrative authority to a Tribe.
49.123 General provisions.
49.124 Rule for limiting visible emissions.
49.125 Rule for limiting the emissions of particulate matter.
49.126 Rule for limiting fugitive particulate matter emissions.
49.127 Rule for woodwaste burners.
49.128 Rule for limiting particulate matter emissions from wood products industry sources.
49.129 Rule for limiting emissions of sulfur dioxide.
49.130 Rule for limiting sulfur in fuels.
49.131 General rule for open burning.
49.132 Rule for large open burning permits.
49.133 Rule for agricultural burning permits.
49.134 Rule for forestry and silvicultural burning permits.
49.135 Rule for emissions detrimental to public health or welfare.
49.136 [Reserved]
49.137 Rule for air pollution episodes.
49.138 Rule for the registration of air pollution sources and the reporting of emissions.
49.139 Rule for non-Title V operating permits.

* * * * *

General Rules for Application to Indian Reservations in Idaho, Oregon, and Washington

§ 49.121 Introduction.

(a) *What is the purpose of §§ 49.121 through 49.143?* These sections establish emission limitations and other requirements for air pollution sources located within Indian reservations in Idaho, Oregon, and Washington that are appropriate in order to ensure a basic level of air pollution control and to protect public health and welfare.

(b) *How were these sections developed?* These sections were developed in consultation with the Indian Tribes located in Idaho, Oregon, and Washington and with input from the public and State and local governments in EPA Region 10. These sections take into consideration the current air quality situations within Indian reservations, the known sources of air pollution, the needs and concerns of the Indian Tribes in that portion of EPA Region 10, and the air quality rules in adjacent jurisdictions.

(c) *When are these sections applicable to sources on a particular Indian reservation?* These sections apply to air pollution sources on a particular Indian reservation when EPA has specifically promulgated one or more rules for that reservation in subpart M of this part. Rules will be promulgated through notice and comment rulemaking and will be specifically identified in the implementation plan for that reservation in subpart M of this part. Once EPA has promulgated one or more rules for an Indian reservation, such rules will apply

without further action to any subsequently established reservation lands of the specified Indian Tribe or Tribes.

§ 49.122 Partial delegation of administrative authority to a Tribe.

(a) *What is the purpose of this section?* The purpose of this section is to establish the process by which the Regional Administrator may delegate to an Indian Tribe partial authority to administer one or more of the Federal requirements in effect in subpart M of this part for a particular Indian reservation. The Federal requirements administered by the delegated Tribe will be subject to enforcement by EPA under Federal law. This section provides for administrative delegation and does not affect the eligibility criteria under § 49.6 for treatment in the same manner as a State.

(b) *How does a Tribe request partial delegation of administrative authority?* In order to be delegated authority to administer one or more of the Federal requirements that are in effect in subpart M of this part for a particular Indian reservation, the Tribe must submit a request to the Regional Administrator that:

(1) Identifies the specific provisions for which delegation is requested.

(2) Identifies the Indian reservation (or portion thereof) for which delegation is requested.

(3) Includes a statement by the applicant's legal counsel (or equivalent official) that includes the following information:

(i) A statement that the applicant is an Indian Tribe recognized by the Secretary of the Interior;

(ii) A descriptive statement demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area and that it meets the requirements of § 49.7(a)(2); and

(iii) A description of the laws of the Indian Tribe that provide adequate authority to carry out the aspects of the provisions for which delegation is requested.

(4) Demonstrates that the Tribe has, or will have, the technical capability and adequate resources to carry out the aspects of the provisions for which delegation is requested.

(c) *How is the partial delegation of administrative authority accomplished?* (1) A partial delegation of administrative authority agreement will set forth the terms and conditions of the delegation, will specify the provisions that the Tribe will be authorized to administer on behalf of EPA, will, if applicable, identify the portion(s) of the Indian reservation covered by the delegation, and will be entered into by the Regional Administrator and the Tribe. The Agreement will become effective upon the date that both the Regional Administrator and the Tribe have signed the agreement. Once the delegation becomes effective, the Tribe will have the authority under the Clean Air Act, to the extent specified in the agreement, for administering one or more of the Federal requirements that are in effect in subpart M of this part for the particular Indian reservation (or portion thereof) and will act on behalf of the Regional Administrator for purposes of administering such requirements.

(2) A partial delegation of administrative authority agreement may be modified, amended, or revoked, in part or in whole, by the Regional Administrator after consultation with the Tribe. Any substantive modifications or amendments will be subject to the procedures in paragraph (d) of this section.

(d) *How will any partial delegation of administrative authority be publicized?* (1) Prior to making any final decision to delegate partial administrative authority to a Tribe under this section, EPA will consult with appropriate governmental entities outside of the specified reservation and city and county governments located within the boundaries of the specified reservation.

(2) The Regional Administrator will publish a notice in the **Federal Register** informing the public of any Partial Delegation of Administrative Authority Agreement for a particular Indian reservation and will note such delegation in the applicable implementation plan for the Indian reservation in subpart M of this part. The Regional Administrator will also publish an announcement of the partial delegation agreement in local newspapers.

§ 49.123 General provisions.

(a) *Definitions.* The following definitions apply for the purposes of §§ 49.121 through 49.143. Terms not defined in this paragraph (a) have the meaning given to them in the Clean Air Act.

Actual emissions means the actual rate of emissions, in tons per year, of an air pollutant emitted from an air pollution source. For an existing air pollution source, the actual emissions are the actual rate of emissions for the preceding calendar year and must be calculated using the actual operating hours, production rates, in-place control equipment, and types of materials processed, stored, or combusted during the preceding calendar year. For a new air pollution source that did not operate during the preceding calendar year, the actual emissions are the estimated actual rate of emissions for the current calendar year.

Administrator means the Administrator of the United States Environmental Protection Agency (EPA) or an authorized representative of the Administrator.

Agricultural activities means the usual and customary activities of cultivating the soil, growing or harvesting crops, and raising livestock for use and consumption. Agricultural activities do not include manufacturing, bulk storage, preparing or handling for resale, or the formulation of any agricultural chemical. Examples of activities that are not agricultural activities include hop drying in kilns and distillation of mint oil.

Agricultural burn or agricultural burning means the open burning of vegetative debris from an agricultural activity that is necessary for disease or pest control, or for crop propagation and/or crop rotation.

Air pollutant means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and by-product material) substance or matter that is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term air pollutant is used.

Air pollution source (or source) means any building, structure, facility, installation, activity, or equipment, or combination of these, that emits, or may emit, an air pollutant.

Allowable emissions mean the emission rate of an air pollution source calculated using the maximum rated capacity of the source (unless the source is subject to Federally-enforceable limits that restrict the operating rate, hours of operation, or both) and the most stringent of the following:

(i) The applicable standards in 40 CFR parts 60, 61, 62, and 63;

(ii) The applicable implementation plan emission limitations, including those with a future compliance date; or

(iii) The emissions rates specified in Federally-enforceable permit conditions.

Ambient air means that portion of the atmosphere, external to buildings, to which the general public has access.

British thermal unit (Btu) means the quantity of heat necessary to raise the

temperature of one pound of water one degree Fahrenheit.

Clean Air Act means 42 U.S.C. 7401 *et seq.*

Coal means all fuels classified as anthracite, bituminous, sub-bituminous, or lignite in ASTM D388.

Combustion source means any air pollution source that combusts a solid fuel, liquid fuel, or gaseous fuel, or an incinerator.

Continuous emissions monitoring system (CEMS) means the total equipment used to sample, condition (if applicable), analyze, and provide a permanent continuous record of emissions.

Continuous opacity monitoring system (COMS) means the total equipment used to sample, analyze, and provide a permanent continuous record of opacity.

Cooking fire means any open burn in a fire pit or outdoor appliance for the purpose of cooking food. A cooking fire may only burn firewood, charcoal briquettes, wood pellets, wood chips, or other fuels suitable for cooking food.

Distillate fuel oil means any oil meeting the specifications of ASTM Grade 1 or Grade 2 fuel oils in ASTM D396.

Emission means a direct or indirect release into the atmosphere of any air pollutant or air pollutants released into the atmosphere.

Emission factor means an estimate of the amount of an air pollutant that is released into the atmosphere, as the result of an activity, in terms of mass of emissions per unit of activity (for example, the pounds of sulfur dioxide emitted per gallon of fuel burned).

Emission unit means any part of an air pollution source that emits, or may emit, air pollutants into the atmosphere.

Federally enforceable means all limitations and conditions that are enforceable by the Administrator.

Forestry or silvicultural activities means those activities associated with regeneration, growing, and harvesting of trees and timber including, but not limited to, preparing sites for new stands of trees to be either planted or allowed to regenerate through natural means, road construction and road maintenance, fertilization, logging operations, and forest management techniques employed to enhance the growth of stands of trees or timber.

Forestry or silvicultural burn or forestry or silvicultural burning means the open burning of vegetative debris from a forestry or silvicultural activity that is necessary for disease or pest control, reduction of fire hazard, reforestation, or ecosystem management. This includes *prescribed fire* as defined in 40 CFR 50.1(m).

Fuel means any solid, liquid, or gaseous material that is combusted in order to produce heat or energy.

Fuel oil means a liquid fuel derived from crude oil or petroleum, including distillate oil, residual oil, and used oil.

Fugitive dust means a particulate matter emission made airborne by forces of wind, mechanical disturbance of surfaces, or both. Unpaved roads and construction sites are examples of sources of fugitive dust.

Fugitive particulate matter means particulate matter emissions that do not pass through a stack, chimney, vent, or other functionally equivalent opening. Fugitive particulate matter includes fugitive dust.

Gaseous fuel means any fuel that exists in a gaseous state at standard conditions including, but not limited to, natural gas, propane, fuel gas, process gas, and landfill gas.

Grate cleaning means removing ash and other non-combustibles from fireboxes.

Hardboard means a flat panel made from wood that has been reduced to basic wood fibers and bonded by adhesive properties under pressure.

Heat input means the total gross calorific value [where gross calorific value is measured by ASTM D240, ASTM D1826, or ASTM D5865/D5865M] of all fuels burned.

Hog fuel or hogged fuel means wood chips or shavings, residue from sawmills, and other wood processing residue.

Implementation plan means a Tribal implementation plan approved by EPA pursuant to this part or 40 CFR part 51, or a Federal implementation plan promulgated by EPA in this part or in 40 CFR part 52 that applies in Indian country, or a combination of Tribal and Federal implementation plans.

Incinerator means any device, including a flare, designed to reduce the volume of solid, liquid, or gaseous waste by combustion. This includes air curtain incinerators but does not include open burning.

Indian country means:

(i) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

(ii) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State.

(iii) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian reservation, which is included in the definition of Indian country and used elsewhere in this rule, means all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation. Under this definition, Indian reservations include lands held in trust by the United States government for the benefit of an Indian Tribe even if the trust lands have not been formally designated as a reservation.

Intermediate change to monitoring means an ''intermediate change to monitoring'' as defined in 40 CFR 63.90(a).

Large open burn or large open burning means the open burning of a single pile of materials greater than 10 feet in diameter or more than 60 feet of ditch bank or fence line vegetation.

Major change to monitoring means a ''major change to monitoring'' as defined in 40 CFR 63.90(a).

Marine vessel means a waterborne craft, ship, or barge.

Minor change to monitoring means a ''minor change to monitoring'' as defined in 40 CFR 63.90(a).

Minor change to recordkeeping/reporting means a ''minor change to recordkeeping/reporting'' as defined in 40 CFR 63.90(a), except it does not include ''Changes related to compliance extensions granted pursuant to § 63.6(i)'' of this chapter.

Minor change to test method means a ''minor change to test method'' as defined in 40 CFR 63.90(a).

Mobile sources means locomotives, aircraft, motor vehicles, nonroad vehicles, nonroad engines, and marine vessels.

Motor vehicle means any self-propelled vehicle designed for transporting people or property on a street or highway.

New air pollution source means, for the purposes of the ''Rule for registration of air pollution sources and reporting of emissions'' in § 49.138, an air pollution source that begins actual construction after the dates specified in § 49.138(e)(1)(ii), (iv) or (vi), as applicable.

Noncombustibles means materials that are not flammable, capable of catching fire, or burning.

Nonroad engine means a ''nonroad engine'' as defined in 40 CFR 1068.30.

Nonroad vehicle means a vehicle that is powered by a nonroad engine and

that is not a motor vehicle or a vehicle used solely for competition.

Non-Title V operating permit means a permit issued by the Regional Administrator pursuant to § 49.139 Rule for non-Title V operating permits.

Oil-fired boiler means a furnace or boiler used for combusting fuel oil for the primary purpose of producing steam or hot water by heat transfer.

Opacity means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background. For continuous opacity monitoring systems, opacity means the fraction of incident light that is attenuated by an optical medium.

Open burn or open burning means the burning of a material that results in the products of combustion being emitted directly into the atmosphere without passing through a stack. Open burning includes burning in burn barrels.

Orchard heating device or orchard heater means a fuel burning device capable of being used for frost-prevention or protection in orchards, vineyards, field crops or truck crops. Smudge pots and open-pot heaters are types of orchard heating devices.

Owner or operator means any person who owns, leases, operates, controls, or supervises an air pollution source.

Part 71 source means any source subject to the permitting requirements of 40 CFR part 71, as provided in 40 CFR 71.3(a) and (b).

Particleboard means a matformed flat panel consisting of wood particles bonded together with synthetic resin or other suitable binder.

Particulate matter means any airborne finely divided solid or liquid material, other than uncombined water. Particulate matter includes, but is not limited to, $PM_{2.5}$ and PM_{10}.

Permit to construct or *construction permit* means a permit issued by the Regional Administrator pursuant to this part or 40 CFR part 52, or a permit issued by a Tribe pursuant to a program approved by the Administrator under 40 CFR part 51, subpart I, authorizing the construction or modification of a stationary source.

Permit to operate or *operating permit* means a permit issued by the Regional Administrator pursuant to §§ 49.139 and 49.158, 40 CFR part 71, or by a Tribe pursuant to a program approved by the Administrator under 40 CFR part 51 or 40 CFR part 70, authorizing the operation of a stationary source.

Plywood means a flat panel built generally of an odd number of thin sheets of veneers of wood in which the grain direction of each ply or layer is at right angles to the one adjacent to it.

$PM_{2.5}$ means particulate matter with an aerodynamic diameter less than or equal to 2.5 micrometers.

PM_{10} means particulate matter with an aerodynamic diameter less than or equal to 10 micrometers.

Potential to emit means the maximum capacity of an air pollution source to emit an air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the air pollution source to emit an air pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is Federally enforceable.

Press/Cooling vent means any opening through which particulate and gaseous emissions from plywood, particleboard, or hardboard manufacturing are exhausted, either by natural draft or powered fan, from the building housing the process. Such openings are generally located immediately above the board press, board unloader, or board cooling area.

Process source means an air pollution source using a procedure or combination of procedures for the purpose of causing a change in material by either chemical or physical means, excluding combustion.

Rated capacity means the maximum sustainable capacity of the equipment.

Recreational fire means a campfire or a bonfire burning materials authorized under § 49.131(d)(1)(i) and (iii) for pleasure or celebratory purposes. Cooking fires and fires used for debris disposal purposes are not considered recreational fires.

Reference method means any method of sampling and analyzing for an air pollutant as specified in the applicable section.

Regional Administrator means the Regional Administrator of EPA Region 10 or an authorized representative of the Regional Administrator.

Residential central heater means a residential wood burning device that is a ''central heater'' as defined in 40 CFR 60.5473.

Residential forced-air furnace means a residential wood burning device that is a ''residential forced-air furnace'' as defined in 40 CFR 60.5473.

Residential hydronic heater means a residential wood burning device that is a ''residential hydronic heater'' as defined in 40 CFR 60.5473.

Residential wood burning device means any wood burning device that supplies heat to a single-family residence (including a boarding house or a residence with a ''mother in law'' unit) or any wood burning device installed in an individual unit of a multiple unit structure such as a condominium, apartment, duplex, multiplex, hotel, motel, or resort. This includes, but is not limited to, wood stoves, fireplaces, fireplace inserts, residential wood heaters, residential hydronic heaters, residential forced-air furnaces, and residential central heaters.

Residential wood heater means a residential wood burning device that is a ''wood heater'' as defined in 40 CFR 60.531 or 40 CFR 60.5473.

Residual fuel oil means any oil meeting the specifications of ASTM Grade 4, Grade 5, or Grade 6 fuel oils in ASTM D396.

Small open burn or small open burning means the open burning of a single pile of materials that is 10 feet or less in diameter or 60 feet or less of ditch bank or fence line vegetation.

Solid fuel means wood, refuse, refuse-derived fuel, tires, tire-derived fuel, and other solid combustible material (other than coal), including any combination thereof.

Solid fuel-fired boiler means a furnace or boiler used for combusting solid fuel for the primary purpose of producing steam or hot water by heat transfer.

Soot blowing means using steam or compressed air to remove carbon from a furnace or from a boiler's heat transfer surfaces.

Source means the same as *air pollution source.*

Stack means any point in a source that conducts air pollutants to the atmosphere, including, but not limited to, a chimney, flue, conduit, pipe, vent, or duct, but not including a flare.

Standard conditions means a temperature of 293 degrees Kelvin (68 degrees Fahrenheit, 20 degrees Celsius) and a pressure of 101.3 kilopascals (29.92 inches of mercury).

Start-up means the setting into operation of a piece of equipment.

Stationary source means any building, structure, facility, or installation that emits, or may emit, any air pollutant.

Tempering oven means any facility used to bake hardboard following an oil treatment process.

Uncombined water means droplets of water that have not combined with hygroscopic particles or do not contain dissolved solids.

Untreated wood means wood of any species that has not been chemically impregnated, painted, coated, or similarly modified to prevent weathering and deterioration.

Used oil means petroleum products that have been recovered from another application.

Veneer means a single flat panel of wood not exceeding ¼ inch in thickness formed by slicing or peeling from a log.

Veneer dryer means equipment in which veneer is dried.

Visible emissions means air pollutants in sufficient amount to be observable to the human eye.

Wood means wood, wood residue, wood waste, hog fuel, bark, or any derivative or residue thereof, in any form, including but not limited to sawdust, sander dust, wood chips, scraps, slabs, millings, shavings, and processed pellets made from wood or other forest residues.

Wood-fired boiler means a furnace or boiler used for combusting wood for the primary purpose of producing steam or hot water by heat transfer.

Wood-fired veneer dryer means a veneer dryer that is directly heated by the products of combustion of wood in addition to, or exclusive of, steam or natural gas or propane combustion.

Woodwaste burner means a conical burner, silo burner, olivine burner, truncated cone burner, or other such woodwaste-burning device used by the wood products industry for the disposal of wood wastes.

(b) *Requirement for testing.* The Regional Administrator may require, in a permit to construct or a permit to operate, that a person demonstrate compliance with any applicable emission limitation or standard in subpart M of this part by performing a source test and submitting the test results to the Regional Administrator. A person may also be required by the Regional Administrator, in a permit to construct or permit to operate, to install and operate a COMS or a CEMS to demonstrate compliance. Nothing in subpart M of this part limits the authority of the Regional Administrator to require, in an information request pursuant to section 114 of the Clean Air Act, a person to demonstrate compliance by performing source testing, even where the source does not have a permit to construct or a permit to operate.

(c) *Requirement for monitoring, recordkeeping, and reporting.* Nothing in subpart M of this part precludes the Regional Administrator from requiring monitoring, recordkeeping, and reporting, including monitoring, recordkeeping, and reporting in addition to that already required by an applicable requirement, in a permit to construct or permit to operate in order to ensure compliance.

(d) *Alternatives to required testing, monitoring, recordkeeping and reporting.* (1) Performance tests shall be conducted, and data shall be reduced in accordance with the test methods and procedures set forth in each relevant standard, and, if required, in applicable appendices of 40 CFR parts 51, 60, 61, and 63 unless the Regional Administrator:

(i) Specifies or approves, in specific cases, the use of a test method with minor changes in methodology. Such changes may be approved in conjunction with approval of the site-specific test plan; or

(ii) Approves shorter sampling times or smaller sample volumes when necessitated by process variables or other factors; or

(iii) Waives the requirement for performance tests because the owner or operator of an affected source has demonstrated by other means to the Regional Administrator's satisfaction that the affected source is in compliance with the relevant standard.

(2) Monitoring shall be conducted as set forth in the relevant standard(s) unless the Regional Administrator:

(i) Specifies or approves the use of minor changes in methodology for the specified monitoring requirements and procedures; or

(ii) Approves the use of an intermediate or major change or alternative to any monitoring requirements or procedures.

(3) Recordkeeping or reporting shall be conducted as set forth in the relevant standard(s) unless the Regional Administrator:

(i) Specifies or approves the use of minor changes to recordkeeping/reporting for the specified requirements and procedures; or

(ii) A waiver of a recordkeeping or reporting requirement has been granted by the Regional Administrator under this paragraph:

(A) Recordkeeping or reporting requirements may be waived upon written application to the Regional Administrator if, in the Regional Administrator's judgment, the affected source is achieving the relevant standard(s). The application shall include whatever information the owner or operator considers useful to convince the Regional Administrator that a waiver of recordkeeping or reporting is warranted.

(B) A waiver of any recordkeeping or reporting requirement granted under this paragraph may be conditioned on other recordkeeping or reporting requirements deemed necessary by the Regional Administrator.

(C) Approval of any waiver granted under this section shall not abrogate the Regional Administrator's authority under the Clean Air Act or in any way prohibit the Regional Administrator from later canceling the waiver. The cancellation will be made only after notice is given to the owner or operator of the affected source.

(e) *Credible evidence.* For the purposes of submitting compliance certifications or establishing whether or not a person has violated or is in violation of any requirement, nothing in subpart M of this part precludes the use, including the exclusive use, of 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.

(f) *Performance test.* Unless otherwise specified in the applicable standard or test method: (1) Each performance test shall consist of three valid test runs using the applicable test method and each run shall be conducted for the time and under the conditions specified in the applicable standard or test method.

(2) The arithmetic mean of the results of the three valid runs shall be compared to the applicable standard for purposes of determining compliance with the applicable standard using the applicable test method.

(3) In the event that a sample is accidentally lost or conditions occur in which one of the three runs must be discontinued because of forced shutdown, failure of an irreplaceable portion of the sample train, extreme meteorological conditions, or other circumstances, beyond the owner or operator's control, compliance may, upon the Regional Administrator's written approval, be determined using the arithmetic mean of the results of the two other runs.

(g) *Incorporation by reference.* The material listed in this paragraph (g) is incorporated by reference into this section with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Contact EPA at: EPA Region 10, Air and Radiation Division, 1200 Sixth Avenue, Seattle, Washington 98101; phone: 206–553–1200; website: *www.epa.gov/aboutepa/epa-region-10-pacific-northwest.* For information on the availability of this material at NARA, email: *fr.inspection@nara.gov;* website: *www.archives.gov/federal-register/cfr/ibr-locations.html.* The material may be obtained from ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959; telephone: (610) 832–9500; email: *service@astm.org;* website: *www.astm.org.*

(1) ASTM D388–19a, Standard Classification of Coals by Rank.

(2) ASTM D396–21, Standard Specification for Fuel Oils.

(3) ASTM D240–19, Standard Test Method for Heat of Combustion of Liquid Hydrocarbon Fuels by Bomb Calorimeter.

(4) ASTM D1826–94 (Reapproved 2017), Standard Test Method for Calorific (Heating) Value of Gases in Natural Gas Range by Continuous Recording Calorimeter.

(5) ASTM D5865/D5865M–19, Standard Test Method for Gross Calorific Value of Coal and Coke.

§ 49.124 Rule for limiting visible emissions.

(a) *What is the purpose of this section?* This section limits the visible emissions of air pollutants from certain air pollution sources operating within an Indian reservation to control emissions of particulate matter to the atmosphere and ground-level concentrations of $PM_{2.5}$ and $PM_{10,}$ to detect the violation of other requirements in subpart M of this part, and to indicate whether a source is continuously maintained and properly operated.

(b) *Who is affected by this section?* This section applies to any person who owns or operates an air pollution source that emits, or could emit, particulate matter or other visible air pollutants to the atmosphere, unless exempted in paragraph (c) of this section.

(c) *What is exempted from this section?* This section does not apply to open burning; agricultural activities (except orchard heating devices); forestry and silvicultural activities; sweat houses or lodges; non-commercial smoke houses; public roads owned or maintained by any Federal, Tribal, State, or local government; emissions from fuel combustion in mobile sources; or activities associated with single-family residences or residential buildings with four or fewer dwelling units.

(d) *What are the opacity limits for air pollution sources?* (1) The visible emissions from an air pollution source must not exceed 20% opacity, averaged over any consecutive 6-minute period, unless paragraph (d)(2), (3) or (4) of this section applies to the air pollution source.

(2) The visible emissions from an air pollution source may exceed the 20% opacity limit if the owner or operator of the air pollution source demonstrates to the Regional Administrator's satisfaction that the presence of uncombined water, such as steam, is the only reason for the failure of an air pollution source to meet the 20% opacity limit.

(3) The visible emissions from an oil-fired boiler or solid fuel-fired boiler that continuously measures opacity with a COMS may exceed the 20% opacity limit during start-up, soot blowing, and grate cleaning for a single period of up to 15 consecutive minutes in any eight consecutive hours, but must not exceed 60% opacity at any time.

(4) Starting [DATE THREE YEARS AFTER THE EFFECTIVE DATE OF THE FINAL RULE], the visible emissions from an orchard heating device must not exceed 20% opacity, averaged over any consecutive 6-minute period:

(i) If orchard heating devices cannot comply with the 20% opacity limit and alternatives that are capable of complying with the 20% opacity limit are not reasonably available, the owner or operator of an orchard heating device may apply to the Regional Administrator for an extension of the three-year deadline. The application for an extension must include an explanation of why no complying alternatives are reasonably available.

(ii) If the Regional Administrator finds that there are no reasonably available complying alternatives, then a two-year extension of the deadline may be granted. There is no limit to the number of extensions that may be granted by the Regional Administrator.

(e) *What is the reference method for determining compliance?* (1) The reference method for determining compliance with the opacity limits is EPA Method 9. A complete description of this method is found in appendix A to 40 CFR part 60.

(2) An alternative reference method for determining compliance is a COMS that complies with Performance Specification 1 found in appendix B to 40 CFR part 60.

§ 49.125 Rule for limiting the emissions of particulate matter.

(a) *What is the purpose of this section?* This section limits the amount of particulate matter that may be emitted to the atmosphere from certain air pollution sources operating within an Indian reservation to control ground-level concentrations of $PM_{2.5}$ and $PM_{10.}$

(b) *Who is affected by this section?* This section applies to any person who owns or operates an air pollution source that emits, or could emit, particulate matter to the atmosphere through a stack, unless exempted in paragraph (c) of this section.

(c) *What is exempted from this section?* This section does not apply to woodwaste burners; furnaces and boilers used exclusively for space heating with a rated heat input capacity of less than 400,000 Btu per hour; non-commercial smoke houses; sweat houses or lodges; orchard heating devices; mobile sources; or activities associated with single-family residences or residential buildings with four or fewer dwelling units.

(d) *What are the particulate matter limits for air pollution sources?* (1) Particulate matter emissions from a combustion source stack (except for wood-fired boilers) must not exceed an average of 0.23 grams per dry standard cubic meter (0.10 grains per dry standard cubic foot), corrected to seven percent oxygen, during any 3-hour period.

(2) Particulate matter emissions from a wood-fired boiler stack must not exceed an average of 0.46 grams per dry standard cubic meter (0.20 grains per dry standard cubic foot), corrected to seven percent oxygen, during any 3-hour period.

(3) Particulate matter emissions from a process source stack, or any other stack not subject to paragraph (d)(1) or (2) of this section, must not exceed an average of 0.23 grams per dry standard cubic meter (0.10 grains per dry standard cubic foot), during any 3-hour period.

(e) *What is the reference method for determining compliance?* (1) The reference method for determining compliance with the particulate matter limits is EPA Method 5. A complete description of this method is found in appendix A to 40 CFR part 60.

(2) EPA Methods 1 through 4, as appropriate, must be conducted in conjunction with Method 5 to calculate the volumetric flow, oxygen content, and moisture content of the samples. A complete description of these additional test methods is found in appendix A to 40 CFR part 60.

§ 49.126 Rule for limiting fugitive particulate matter emissions.

(a) *What is the purpose of this section?* This section limits the amount of fugitive particulate matter that may be emitted to the atmosphere from certain air pollution sources operating within an Indian reservation to control ground-level concentrations of $PM_{2.5}$ and $PM_{10.}$

(b) *Who is affected by this section?* This section applies to any person who owns or operates a source of fugitive particulate matter emissions.

(c) *What is exempted from this section?* This section does not apply to open burning; agricultural activities; forestry and silvicultural activities; sweat houses or lodges; non-commercial smoke houses; public roads owned or

maintained by any Federal, Tribal, State, or local government; or activities associated with single-family residences or residential buildings with four or fewer dwelling units.

(d) *What are the requirements for sources of fugitive particulate matter emissions?* (1) The owner or operator of any source of fugitive particulate matter emissions, including any source or activity engaged in materials handling or storage, construction, demolition, or any other operation that is or may be a source of fugitive particulate matter emissions, must take all reasonable precautions to prevent fugitive particulate matter emissions and must maintain and operate the source to minimize fugitive particulate matter emissions.

(2) Reasonable precautions include, but are not limited to the following:

(i) Use, where possible, of water or chemicals for control of dust in the demolition of buildings or structures, construction operations, grading of roads, or clearing of land.

(ii) Application of asphalt, oil (but not used oil), water, or other suitable chemicals on unpaved roads, materials stockpiles, and other surfaces that can create airborne dust.

(iii) Full or partial enclosure of materials stockpiles in cases where application of oil, water, or chemicals is not sufficient or appropriate to prevent particulate matter from becoming airborne.

(iv) Implementation of good housekeeping practices to avoid or minimize the accumulation of dusty materials that have the potential to become airborne, and the prompt cleanup of spilled or accumulated materials.

(v) Installation and use of hoods, fans, and fabric filters to enclose and vent the handling of dusty materials.

(vi) Adequate containment during sandblasting or other similar operations.

(vii) Covering, at all times when in motion, open bodied trucks transporting materials likely to become airborne.

(viii) The prompt removal from paved streets of earth or other material that does or may become airborne.

(e) *Are there additional requirements that must be met?* (1) A person subject to this section must:

(i) Annually survey the air pollution source(s) during typical operating conditions and meteorological conditions conducive to producing fugitive particulate matter to determine the sources of fugitive particulate matter emissions. For new sources or new operations, a survey must be conducted within 30 days after beginning operation. For portable sources, a survey must be conducted within 7 days after beginning operation at a new location. Simultaneously document the results of the survey, including the date and time of the survey and identification of any sources of fugitive particulate matter emissions found.

(ii) If sources of fugitive particulate matter emissions are present, determine the reasonable precautions that will be taken to prevent fugitive particulate matter emissions.

(iii) Within 30 days after completing the survey, prepare a written plan that specifies the reasonable precautions that will be taken and the procedures to be followed to prevent fugitive particulate matter emissions, including appropriate monitoring and recordkeeping. For construction or demolition activities, a written plan must be prepared prior to commencing construction or demolition. For portable sources, a written plan must be prepared prior to beginning operation at a new location and the plan must be updated within 7 days after the survey required in paragraph (e)(1)(i) of this section is completed, if needed, to reflect the results of the survey. Plans must be reviewed and updated at least annually after each survey and more frequently if warranted due to changes in operations, available control methods or other relevant conditions;

(iv) If the owner or operator is required to register the facility under § 49.138:

(A) For new sources or new operations, a copy of the initial fugitive particulate matter survey and initial plan must be submitted to EPA with the initial registration, which is due within 90 days after beginning operation.

(B) For all other sources, a copy of the most recent fugitive particulate matter survey and current plan must be submitted to EPA with the annual registration required by § 49.138.

(v) Maintain a copy of the survey and plan on site;

(vi) Implement the written plan, including the installation of control measures, as expeditiously as practicable and maintain and operate the source to minimize fugitive particulate matter emissions.

(vii) Maintain records for 5 years that document the surveys and the reasonable precautions that were taken to prevent fugitive particulate matter emissions.

(2) The Regional Administrator may require the owner or operator to revise the plan if, at any time, the Regional Administrator determines that the precautions and procedures specified in the plan are not adequate to ensure that all reasonable precautions are being taken to prevent fugitive particulate matter emissions or are not adequate to ensure that the source is being maintained and operated so as to minimize fugitive particulate matter emissions.

(3) The Regional Administrator may require specific actions to prevent fugitive particulate matter emissions or impose conditions to maintain and operate the air pollution source to minimize fugitive particulate matter emissions, in a permit to construct or a permit to operate for the source.

(4) Efforts to comply with this section cannot be used as a reason for not complying with other applicable laws and ordinances.

§ 49.127 Rule for woodwaste burners.

(a) *What is the purpose of this section?* This section phases out the operation of woodwaste burners, and in the interim limits the visible emissions from woodwaste burners, within an Indian reservation to control emissions of particulate matter to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to any person who owns or operates a woodwaste burner.

(c) *What are the requirements for woodwaste burners?* (1) Except as provided by paragraph (c)(3) of this section, the owner or operator of a woodwaste burner must shut down and dismantle the woodwaste burner by no later than 2 years after the date that this section is effective for a particular Indian reservation as specified in subpart M of this part. The requirement for dismantling applies to all woodwaste burners regardless of whether or not the woodwaste burners are currently operational. Until the woodwaste burner is shut down, visible emissions from the woodwaste burner must not exceed 20% opacity, averaged over any consecutive 6-minute period.

(2) Until the woodwaste burner is shut down, only wood waste generated on-site may be burned or disposed of in the woodwaste burner.

(3) If there is no reasonably available alternative method of disposal for the wood waste other than by burning it on-site in a woodwaste burner, the owner or operator of the woodwaste burner that is in compliance with the opacity limit in paragraph (c)(1) of this section may apply to the Regional Administrator for an extension of the 2-year deadline. If the Regional Administrator finds that there is no reasonably available alternative method of disposal, then a two-year extension of the deadline may be granted. There is no limit to the number of extensions

that may be granted by the Regional Administrator.

(d) *What is the reference method for determining compliance with the opacity limit?* The reference method for determining compliance with the opacity limit is EPA Method 9. A complete description of this method is found in appendix A to 40 CFR part 60.

(e) *Are there additional requirements that must be met?* A person subject to this section must submit a plan to shut down and dismantle the woodwaste burner to the Regional Administrator within 180 days after the effective date of this section. Unless an extension has been granted by the Regional Administrator, the woodwaste burner must be shut down and dismantled within 2 years after the effective date of this section for a particular Indian reservation. The owner or operator of the woodwaste burner must notify the Regional Administrator that the woodwaste burner has been shut down and dismantled within 30 days after completion.

§ 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(a) *What is the purpose of this section?* This section limits the amount of particulate matter that may be emitted to the atmosphere from certain wood products industry sources operating within an Indian reservation to control ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to any person who owns or operates any of the following wood products industry sources:

(1) Veneer manufacturing operations;

(2) Plywood manufacturing operations;

(3) Particleboard manufacturing operations; and

(4) Hardboard manufacturing operations.

(c) *What are the PM_{10} emission limits for wood products industry sources?* These PM_{10} limits are in addition to, and not in lieu of, the particulate matter limits for combustion sources and process sources.:

(1) *Veneer dryers at veneer manufacturing operations and plywood manufacturing operations.*

(i) PM_{10} emissions from direct natural gas fired or direct propane fired veneer dryers must not exceed 0.3 pounds per 1000 square feet of veneer dried (⅜ inch basis), 1-hour average.

(ii) PM_{10} emissions from steam heated veneer dryers must not exceed 0.3 pounds per 1000 square feet of veneer dried (⅜ inch basis), 1-hour average.

(iii) PM_{10} emissions from wood fired veneer dryers must not exceed a total of 0.3 pounds per 1000 square feet of veneer dried (⅜ inch basis) and 0.2 pounds per 1000 pounds of steam generated in boilers, prorated for the amount of combustion gases routed to the veneer dryer, 1-hour average.

(2) *Wood particle dryers at particleboard manufacturing operation.* PM_{10} emissions from wood particle dryers must not exceed a total of 0.4 pounds per 1000 square feet of board produced by the plant (¾ inch basis), 1-hour average.

(3) *Press/cooling vents at hardboard manufacturing operations.* PM_{10} emissions from hardboard press/cooling vents must not exceed 0.3 pounds per 1000 square feet of hardboard produced (⅛ inch basis), 1-hour average.

(4) *Tempering ovens at hardboard manufacturing operations.* A person must not operate any hardboard tempering oven unless all gases and vapors are collected and treated in a fume incinerator capable of raising the temperature of the gases and vapors to at least 1500 degrees Fahrenheit for 0.3 seconds or longer.

(d) *What is the reference method for determining compliance?* (1) The reference method for determining compliance with the PM_{10} limits is EPA Method 202 in conjunction with Method 201A. A complete description of these methods is found in appendix M to 40 CFR part 51.

(2) EPA Methods 1 through 2H, as appropriate, must be conducted in conjunction with Methods 202 and 201A to calculate the volumetric flow of the samples. A complete description of these additional test methods is found in appendix A to 40 CFR part 60.

§ 49.129 Rule for limiting emissions of sulfur dioxide.

(a) *What is the purpose of this section?* This section limits the amount of sulfur dioxide (SO_2) that may be emitted to the atmosphere from certain air pollution sources operating within an Indian reservation to control ground-level concentrations of SO_2.

(b) *Who is affected by this section?* This section applies to any person who owns or operates an air pollution source that emits, or could emit, SO_2 through a stack to the atmosphere.

(c) *What is exempted from this section?* This section does not apply to furnaces and boilers used exclusively for space heating with a rated heat input capacity of less than 400,000 Btu per hour; orchard heating devices; or mobile sources.

(d) *What are the sulfur dioxide limits for sources?* (1) Sulfur dioxide emissions from a combustion source stack must not exceed an average of 500 parts per million by volume, on a dry basis and corrected to seven percent oxygen, during any 3-hour period.

(2) Sulfur dioxide emissions from a process source stack, or any other stack not subject to paragraph (d)(1) of this section, must not exceed an average of 500 parts per million by volume, on a dry basis, during any 3-hour period.

(e) *What are the reference methods for determining compliance?* (1) The reference methods for determining compliance with the SO_2 limits are EPA Methods 6, 6A, 6B, and 6C as specified in the applicability section of each method. A complete description of these methods is found in appendix A to 40 CFR part 60.

(2) EPA Methods 1 through 4, as appropriate, must be conducted in conjunction with the test methods in paragraph (e)(1) of this section to calculate the volume, oxygen content, and moisture content of the sample. A complete description of these additional methods can also be found in appendix A to 40 CFR part 60.

(3) An alternative reference method is a CEMS that complies with Performance Specification 2 found in appendix B to 40 CFR part 60.

§ 49.130 Rule for limiting sulfur in fuels.

(a) *What is the purpose of this section?* This section limits the amount of sulfur contained in fuels that are burned at stationary sources operating within an Indian reservation to control emissions of SO_2 to the atmosphere and ground-level concentrations of SO_2.

(b) *Who is affected by this section?* This section applies to any person who sells, distributes, uses, or makes available for use, any fuel oil, coal, solid fuel, liquid fuel, or gaseous fuel within an Indian reservation.

(c) *What is exempted from this section?* This section does not apply to gasoline and diesel fuel, such as automotive and marine diesel, regulated under 40 CFR part 80.

(d) *What are the sulfur limits for fuels?* A person must not sell, distribute, use, or make available for use any fuel oil, coal, solid fuel, liquid fuel, or gaseous fuel that contains more than the following amounts of sulfur, as determined by the appropriate reference method(s) from paragraph (e) of this section:

(1) For distillate fuel oil, 0.3 percent by weight for Grade 1 fuel oil in ASTM D396;

(2) For distillate fuel oil, 0.5 percent by weight for Grade 2 fuel oil in ASTM D396;

(3) For residual fuel oil, 1.75 percent sulfur by weight for Grades 4, 5, or 6 fuel oil in ASTM D396;

(4) For used oil, 2.0 percent sulfur by weight;

(5) For any liquid fuel not listed in paragraphs (d)(1) through (4) of this section, 2.0 percent sulfur by weight;

(6) For coal, 1.0 percent sulfur by weight;

(7) For solid fuels, 2.0 percent sulfur by weight; and

(8) For gaseous fuels, 400 ppm by volume at standard conditions.

(e) *What are the reference methods for determining compliance?* The reference methods for determining the amount of sulfur in a fuel are as follows:

(1) Sulfur content in fuel oil or liquid fuels: ASTM D2880–, D4294, and D6021;

(2) Sulfur content in coal: ASTM D4239;

(3) Sulfur content in solid fuels: ASTM E775; and

(4) Sulfur content in gaseous fuels: ASTM D1072, D3246, D4084, D5504, D4468, D2622 and D6228.

(f) *Are there additional requirements that must be met?* (1) A person subject to this section must:

(i) For fuel oils and liquid fuels, obtain, record, and keep records of the percent sulfur by weight from the vendor for each purchase of fuel. If the vendor is unable to provide this information, obtain a representative grab sample for each purchase and test the sample using the appropriate reference method from paragraph (e)(1) of this section.

(ii) For gaseous fuels, either obtain, record, and keep records of the sulfur content from the vendor, or continuously monitor the sulfur content of the fuel gas line using a method that meets the requirements of Performance Specification 5, 7, 9, or 15 (as applicable for the sulfur compounds in the gaseous fuel) of appendix B and appendix F to 40 CFR part 60. If only purchased natural gas is used, keep records showing that the gaseous fuel meets the definition of natural gas in 40 CFR 72.2.

(iii) For coal and solid fuels, either obtain, record, and keep records of the percent sulfur by weight from the vendor for each purchase of coal or solid fuel, or obtain a representative grab sample for each day of operation and test the sample using the appropriate reference method from paragraphs (e)(2) and (3) of this section. If only wood is used, keep records showing that only wood was used.

(2) Records of fuel purchases and fuel sulfur content must be kept for a period of five years from date of purchase and must be made available to the Regional Administrator upon request.

(3) The owner or occupant of a single-family residence, and the owner or manager of a residential building with four or fewer dwelling units, is not subject to the requirement to obtain and record the percent sulfur content from the vendor if the fuel used in an oil, coal, or gas furnace is purchased from a licensed fuel distributor.

(g) *Incorporation by reference.* The material listed in this paragraph (g) is incorporated by reference into this section with the approval of the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. All approved material is available for inspection at the EPA and at the National Archives and Records Administration (NARA). Contact EPA at: EPA Region 10, Air and Radiation Division, 1200 Sixth Avenue, Seattle, Washington 98101; phone: 206–553–1200; website: *www.epa.gov/aboutepa/epa-region-10-pacific-northwest.* For information on the availability of this material at NARA, email: *fr.inspection@nara.gov;* website: *www.archives.gov/federal-register/cfr/ibr-locations.html.* The material may be obtained from ASTM International, 100 Barr Harbor Drive, West Conshohocken, PA 19428–2959; telephone: (610) 832–9500; email: *service@astm.org;* website: *http://www.astm.org.*

(1) ASTM D396–21, Standard Specification for Fuel Oils.

(2) ASTM D1072–06(Reapproved 2017), Standard Test Method for Total Sulfur in Fuel Gases by Combustion and Barium Chloride Titration.

(3) ASTM D2622–21, Standard Test Method for Sulfur in Petroleum Products by Wavelength Dispersive X-ray Fluorescence Spectrometry.

(4) ASTM D2880–20, Standard Specification for Gas Turbine Fuel Oils.

(5) ASTM D3246–15, Standard Test Method for Sulfur in Petroleum Gas by Oxidative Microcoulometry.

(6) ASTM D4084–07(Reapproved 2017), Standard Test Method for Analysis of Hydrogen Sulfide in Gaseous Fuels (Lead Acetate Reaction Rate Method).

(7) ASTM D4239–18e1, Standard Test Methods for Sulfur in the Analysis Sample of Coal and Coke Using High Temperature Tube Furnace Combustion Methods.

(8) ASTM D4294–21, Standard Test Method for Sulfur in Petroleum Products by Energy-Dispersive X-ray Fluorescence Spectroscopy.

(9) ASTM D4468–85(Reapproved 2015), Standard Test Method for Total Sulfur in Gaseous Fuels by Hydrogenolysis and Rateometric Colorimetry.

(10) ASTM D5504–20, Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Chemiluminescence.

(11) ASTM D6021–22, Standard Test Method for Measurement of Total Hydrogen Sulfide in Residual Fuels by Multiple Headspace Extraction and Sulfur Specific Detection.

(12) ASTM D6228–19, Standard Test Method for Determination of Sulfur Compounds in Natural Gas and Gaseous Fuels by Gas Chromatography and Flame Photometric Detection.

(13) ASTM E775–15(Reapproved 2021), Standard Test Methods for Total Sulfur in the Analysis Sample of Refuse-Derived Fuel.

§ 49.131 General rule for open burning.

(a) *What is the purpose of this section?* This section identifies the types of materials that are allowed to be openly burned within an Indian reservation and the conditions on such burning to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}. It is EPA's goal to eliminate open burning disposal practices where alternative methods are feasible and practicable, to encourage the development of alternative disposal methods, to emphasize resource recovery, and to encourage utilization of the highest and best practicable burning methods to minimize emissions where other disposal practices are not feasible.

(b) *Who is affected by this section?* This section applies to any person who conducts open burning and to the owner and lessee, if any, of the property on which open burning is conducted.

(c) *What is exempted from this section?* The following open burns are exempted from this section:

(1) Outdoor fires set for cultural or traditional purposes;

(2) Fires set for cultural or traditional purposes within structures such as smoke houses, sweat houses, or sweat lodges;

(3) Outdoor cooking fires;

(4) Fires set as part of a firefighting strategy (*e.g.,* back burn, fire break, or safety perimeter burn), if approved by the appropriate fire safety jurisdiction and only under an emergency or incident command situation; and

(5) Except when burning is prohibited under paragraph (d)(2) or (d)(3) of this section, fires set for the disposal of diseased animals or other material by order of a public health authority.

(d) What are the requirements for open burning? (1) All open burning is prohibited except:

(i) Natural vegetation and untreated wood may be open burned.

(ii) A single-family residence or residential building with four or fewer

dwelling units may open burn paper, paper products, or cardboard generated on site.

(iii) Paper and manufactured fire starters may be used to start a fire authorized under paragraph (d)(1)(i) or (d)(1)(ii) of this section.

(iv) Open outdoor fires may be conducted by qualified personnel to train firefighters in the methods of fire suppression and firefighting techniques subject to the requirements of paragraph (e)(4) of this section.

(v) Tribal governments may conduct open outdoor fires to dispose of fireworks and associated packaging materials subject to the requirements of paragraph (e)(5) of this section.

(2) All open burning is prohibited whenever the Regional Administrator declares a burn ban due to deteriorating air quality except for burning exempt under paragraph (c)(1), (2), (3) or (4) of this section.

(i) A burn ban may be declared for an Indian reservation (or portion thereof) whenever the Regional Administrator determines that air quality levels have exceeded, or are projected to exceed within the next 72 hours, 75% of any 24-hour national ambient air quality standard for particulate matter, and these levels are projected to continue or reoccur over at least the subsequent 24 hours.

(ii) A burn ban will remain in effect until the Regional Administrator terminates the burn ban.

(iii) The Regional Administrator will post an announcement of a burn ban on the EPA Region 10 website and will consider other means to announce the burn ban, such as posting the announcement on Region 10's social media and requesting Tribes within the affected area to post the announcement on their websites. Delegated Tribes may use these and other similar means to make announcements. Announcements of the termination of a burn ban will be made in the same manner.

(3) All open burning is also prohibited whenever the Regional Administrator issues an air stagnation advisory or declares an air pollution alert, air pollution warning, or air pollution emergency pursuant to § 49.137 Rule for air pollution episodes except for burning exempt under paragraph (c)(1), (2), (3) or (4) of this section. The prohibition on open burning will remain in effect until the Regional Administrator terminates the advisory, alert, warning or emergency.

(4) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments, and other governmental entities.

(e) *Are there additional requirements that must be met?* (1) Except for burning conducted under paragraphs (e)(4) and (5) of this section and except for recreational fires, a person subject to this section must conduct open burning as follows:

(i) All materials to be openly burned must be kept as dry as possible through the use of a cover or dry storage.

(ii) Before igniting a burn, dirt and stones must be separated from the materials to be openly burned to the greatest extent practicable.

(iii) Natural or artificially induced draft must be present.

(iv) To the greatest extent practicable, materials to be openly burned must be separated from the grass or peat layer.

(v) A fire must not be allowed to smolder, unless, where applicable, the burn is permitted under § 49.132, § 49.133, or § 49.134, the permit specifically allows the fire to smolder, and the burn is actively managed to complete the burn in the shortest possible time within the time period allowed by the burn permit.

(vi) A person 18 years of age or older must be in attendance at all times during the burn.

(vii) There must be a means available for extinguishing the fire, such as water or chemical fire suppressants.

(viii) The fire must be extinguished if safe to do so, when requested to do so by the Regional Administrator based on a determination that:

(A) The open burning is causing or contributing to, or has the potential to cause or contribute to, an exceedance of a national ambient air quality standard; or

(B) When relevant, that the open burning is causing any other adverse impact on air quality.

(ix) Except for small open burns, before igniting a burn that could significantly impair visibility on roadways, the relevant transportation safety authorities must be contacted and provided an opportunity to require appropriate transportation safety measures during the burn.

(2) Except for burning exempt under paragraph (c)(1), (2), (3) or (4) of this section, open burning shall not be initiated when:

(i) The Regional Administrator has declared a burn ban under this section; or

(ii) An air stagnation advisory has been issued or an air pollution alert, air pollution warning, or air pollution emergency has been declared by the Regional Administrator under § 49.137.

(3) Except for burning exempt under paragraph (c)(1), (2), (3) or (4) of this section, when a burn ban is declared under paragraph (d)(2) of this section or an advisory is issued or declaration made under paragraph (d)(3) of this section, the open burn must be immediately extinguished if safe to do so, lighting the fire must be discontinued and additional material must be withheld from the fire so the fire burns down, as applicable.

(4) Except when burning is prohibited under paragraph (d)(2) or (3) of this section and with prior written permission from the Regional Administrator (and after obtaining a large open burning permit, if applicable under § 49.132 and if § 49.132 applies on the Reservation where the burn is occurring), open outdoor fires used by qualified personnel to train firefighters in the methods of fire suppression and firefighting techniques are allowed, subject to the following conditions:

(i) Prior to igniting any structure, the fire protection service must ensure the structure does not contain asbestos or asbestos-containing materials and must comply with subpart M of 40 CFR part 61.

(ii) Before requesting permission from the Regional Administrator, the fire protection service must notify any appropriate Tribal air pollution authority and fire safety authority and obtain any permissions or approvals required by the Tribe, and by any other governments with applicable laws and ordinances.

(iii) Prior to igniting any structure and at least 10 business days before the requested date of the training fire, the fire protection service must submit a request for permission for the training fire to the Regional Administrator that includes the following information:

(A) The name and address of the fire protection service;

(B) The name and contact information for the fire protection service trainer, including a phone number where they can be reached on the day of the training fire;

(C) The location (including the street address if available) where the training will take place;

(D) A description of what will be burned during the training;

(E) The requested date and time of the training;

(F) The results of an asbestos survey and any removal required;

(G) A copy of the Asbestos Demolition and Renovation Projects Notification required by subpart M of 40 CFR part 61; and

(H) A statement that the requestor has read and understands the open burning requirements in this section.

(iv) The fire protection service must ensure that the structure does not contain any batteries; stored chemicals such as pesticides, herbicides, fertilizers, paints, glues, sealers, tars, solvents, household cleaners, or photographic reagents; stored linoleum, plastics, rubber, tires, or insulated wire; or hazardous wastes.

(v) Written permission from the Regional Administrator for the training fire must be available on site the day of the fire.

(vi) The training fire shall not be allowed to smolder after the training session has terminated.

(5) Except when burning is prohibited under paragraph (d)(2) or (3) of this section and with prior written permission from the Regional Administrator (and after obtaining a large open burning permit, if applicable under § 49.132 and if § 49.132 applies on the Reservation where the burn is occurring), Tribal governments may conduct open outdoor fires to dispose of fireworks and associated packaging materials, subject to the following conditions:

(i) Before requesting permission from the Regional Administrator, the person who will be managing the fireworks disposal fire must notify any appropriate Tribal air pollution authority and fire safety authority and obtain any permissions or approvals required by the Tribe, and by any other governments with applicable laws and ordinances.

(ii) Prior to igniting fireworks for disposal and at least 5 business days before the requested date of the fireworks disposal fire, the Tribal government must submit a request for permission for the fireworks disposal fire to the Regional Administrator that includes the following information:

(A) The name and address of the Tribal government;

(B) The name and contact information for the person who will be on site managing the fireworks disposal fire, including a phone number where they can be reached on the day of the disposal fire;

(C) The location (including the street address if available) where the fire will occur;

(D) The requested date and time of the fire;

(E) The estimated size of the fireworks disposal burn pile or weight of materials to be burned;

(F) A description of the means for containing any explosions and for fire suppression, including but not limited to the availability of water or chemical fire suppressants; and

(G) A statement that the requestor has read and understands the open burning requirements in this section; and

(iii) Written permission from the Regional Administrator for the fireworks disposal fire must be available on site the day of the fire.

(6) Open burning may also be subject to permitting requirements under § 49.132, § 49.142§ 49.143, § 49.133, or § 49.134, or an applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part.

§ 49.132 Rule for large open burning permits.

(a) *What is the purpose of this section?* This section establishes a permitting program for large open burning within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to the owner and lessee, if any, of the property on which a large open burn is conducted and to any person who conducts a large open burn.

(c) *What is exempted from this section?* The following open burning is exempted from this section:

(1) Outdoor fires set for cultural or traditional purposes;

(2) Fires set for cultural or traditional purposes within structures such as smoke houses, sweat houses, or sweat lodges;

(3) Outdoor cooking fires;

(4) Fires set for recreational purposes;

(5) Fires set as part of a firefighting strategy (*e.g.,* back burn, fire break, or safety perimeter burn), if approved by the appropriate fire safety jurisdiction and only under an emergency or incident command situation;

(6) Fires set for the disposal of diseased animals or other material by order of a public health authority;

(7) Agricultural burning; and

(8) Forestry and silvicultural burning.

(d) *What are the requirements for large open burning?* (1) A person subject to this section must have a permit to conduct a large open burn, have approval to burn on the day(s) of the burn, ensure that the person conducting the burn is familiar with the requirements of the permit, ensure that the permit is available on the property during the open burn, and conduct the open burn in accordance with the terms and conditions of the permit.

(2) The date after which a permit is required under this section is identified in the implementation plan in subpart M of this part for the specific Indian reservation where this section applies.

(3) A person subject to this section must comply with § 49.131 or the EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, as applicable.

(4) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments or other governmental entities.

(e) *Are there additional requirements that must be met?* (1) The owner or lessee of the property on which the large open burn will be conducted must submit an application to the Regional Administrator for each proposed large open burn. The application must be submitted in writing, on forms provided by the Regional Administrator, and be received by the Regional Administrator at least 1 business day before the proposed date the burn would be conducted or by such earlier date specified by the Regional Administrator in the application form. The forms will require, at a minimum, the following information:

(i) Street address of the property on which the proposed open burning will be conducted or, if there is no street address of the property, the legal description of the property.

(ii) Name, mailing address, email address and telephone number of the applicant, who must be the owner or lessee of the property on which the proposed open burning will be conducted.

(iii) Name, mailing address, email address and telephone number of the person who will be conducting the proposed open burning.

(iv) Name, mailing address, email address and telephone number of the owner or lessee, if any, of the property on which the proposed open burning will be conducted, if different from the applicant identified in paragraph (e)(1)(ii) of this section.

(v) A plot plan showing the location of the proposed open burn in relation to the property lines and indicating the distances and directions of the nearest residential, public, and commercial properties, as well as roads and other sensitive areas that could be affected by the smoke from the burning.

(vi) The type and quantity of materials proposed to be burned and the area over which the open burning will be conducted.

(vii) A description of the burning method(s) to be used (pile burn, ditch burn, broadcast burn, windrow burn, etc.), the amount of material to be burned with each method, and the means of ignition.

(viii) A description of the measures that will be taken to prevent escaped burns, including but not limited to the availability of water.

(ix) The requested date(s) when the proposed large open burn would be conducted.

(x) Any other information specifically requested by the Regional Administrator.

(2) At least 1 business day prior to the requested date of a proposed large open burn, the person conducting the burn must contact the Regional Administrator as specified in the large open burning permit to request approval to burn. If the proposed open burning is consistent with this section and § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, the Regional Administrator may approve the large open burn for the requested day(s) after taking into consideration relevant factors including, but not limited to:

(i) The size, duration, and location of the proposed open burn, the current and projected air quality conditions, the forecasted meteorological conditions, and other scheduled burning activities in the surrounding area;

(ii) Other factors indicating whether or not the proposed open burn can be conducted without causing or contributing to an exceedance of a national ambient air quality standard; and

(iii) When relevant, other factors indicating whether or not the proposed open burn can be conducted without causing any other adverse impact on air quality.

(3) The permit will authorize burning only for the date(s) and time(s) approved for the burning to be conducted and will include any conditions that the Regional Administrator determines are necessary to ensure compliance with this section, § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, and to protect the public health and welfare, including any monitoring, recordkeeping and post-burn reporting requirements.

(4) If any of the relevant factors in paragraph (e)(2) of this section change after approval to conduct the large open burn, the Regional Administrator may contact the person conducting the burn to revoke the approval and require the permittee to immediately extinguish the fire if safe to do so, discontinue lighting the fire and withhold additional material such that the fire burns down, as applicable.

(5) The Regional Administrator, to the extent practical, will consult with and coordinate approvals to burn with the open burning programs of surrounding jurisdictions.

§ 49.133 Rule for agricultural burning permits.

(a) *What is the purpose of this section?* This section establishes a permitting program for agricultural burning within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to the owner and lessee, if any, of the property on which agricultural burning is conducted and to any person who conducts agricultural burning.

(c) *What are the requirements for agricultural burning?* (1) A person subject to this section must have a permit to conduct an agricultural burn, have approval to burn on the day(s) of the burn, ensure that the person conducting the burn is familiar with the requirements of the permit, ensure that the permit is available on the property during the burn, and conduct the burn in accordance with the terms and conditions of the permit.

(2) The date after which a permit is required under this section is identified in the implementation plan in subpart M of this part for the specific Indian reservation where this section applies.

(3) A person subject to this section must comply with § 49.131 or the EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, as applicable.

(4) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments, or other governmental entities.

(d) *Are there additional requirements that must be met?* (1) The owner or lessee of the property on which an agricultural burn will be conducted must submit an application to the Regional Administrator for each proposed agricultural burn. The application must be submitted in writing, on forms provided by the Regional Administrator, and be received by the Regional Administrator at least 1 business day before the proposed date the burn would be conducted or by such earlier date specified by the Regional Administrator in the application form. The forms will require, at a minimum, the following information:

(i) Street address of the property on which the proposed agricultural burning will be conducted or, if there is no street address of the property, the legal description of the property.

(ii) Name, mailing address, email address and telephone number of the applicant, who must be the owner or lessee of the property on which the proposed agricultural burning will be conducted.

(iii) Name, mailing address, email address and telephone number of the person who will be conducting the proposed agricultural burning.

(iv) Name, mailing address, email address and telephone number of the owner or lessee, if any, of the property on which the proposed agricultural burning will be conducted, if different from the applicant identified in paragraph (d)(1)(ii) of this section.

(v) A plot plan showing the location of each proposed agricultural burning area in relation to the property lines and indicating the distances and directions of the nearest residential, public, and commercial properties, as well as roads and other sensitive areas that could be affected by the smoke from the burning.

(vi) The type and quantity of agricultural wastes proposed to be burned and the area over which burning will be conducted.

(vii) A description of the burning method(s) to be used (pile or stack burn, open field or broadcast burn, windrow burn, mobile field sanitizer, etc.), the amount of material to be burned with each method, and the means of ignition.

(viii) A description of the measures that will be taken to prevent escaped burns, including but not limited to the availability of water and plowed firebreaks.

(ix) The requested date(s) when the proposed agricultural burning would be conducted.

(x) Any other information specifically requested by the Regional Administrator.

(2) At least 1 business day prior to the requested date of the proposed agricultural burning, the person conducting the burn must contact the Regional Administrator as specified in the agricultural burning permit to request approval to burn. If the proposed agricultural burning is consistent with this section and § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, the Regional Administrator may approve the agricultural burning for the requested day(s) after taking into consideration relevant factors including, but not limited to:

(i) The size, duration, and location of the proposed burn, the current and projected air quality conditions, the forecasted meteorological conditions, and other scheduled burning activities in the surrounding area;

(ii) Other factors indicating whether or not the proposed agricultural burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard; and

(iii) When relevant, other factors indicating whether or not the proposed open burn can be conducted without causing any other adverse impact on air quality.

(3) The permit will authorize burning only for the date(s) and time(s) approved for the burning to be conducted and will include any conditions that the Regional Administrator determines are necessary to ensure compliance with this section, § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, and to protect the public health and welfare, including any monitoring, recordkeeping and post-burn reporting requirements.

(4) If any of the relevant factors in paragraph (d)(2) of this section change after approval to conduct the agricultural burning, the Regional Administrator may contact the person conducting the burn to revoke the approval and require the permittee to immediately extinguish the fire if safe to do so, discontinue lighting the fire and withhold additional material such that the fire burns down, as applicable.

(5) The Regional Administrator, to the extent practical, will consult with and coordinate approvals to burn with the open burning programs of surrounding jurisdictions.

§ 49.134 Rule for forestry and silvicultural burning permits.

(a) *What is the purpose of this section?* This section establishes a permitting program for forestry and silvicultural burning within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to the owner and lessee, if any, of the property on which forestry or silvicultural burning is conducted and to any person who conducts forestry or silvicultural burning.

(c) *What are the requirements for forestry and silvicultural burning?* (1) A person subject to this section must have a permit to conduct a forestry or silvicultural burn, have approval to burn on the day(s) of the burn, ensure that the person conducting the burn is familiar with the requirements of the permit, ensure that the permit is available on the property during the burn, and conduct the burn in accordance with the terms and conditions of the permit.

(2) The date after which a permit is required under this section is identified in the implementation plan in subpart M of this part for the specific Indian reservation where this section applies.

(3) A person subject to this section, must comply with § 49.131 or the EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, as applicable.

(4) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments, or other governmental entities.

(d) *Are there additional requirements that must be met?* (1) The owner or lessee of the property on which a forestry or silvicultural burn will be conducted must submit an application to the Regional Administrator for each proposed forestry or silvicultural burn. The application must be submitted in writing, on forms provided by the Regional Administrator, and be received by the Regional Administrator at least 1 business day before the proposed date the burn would be conducted or by such earlier date specified by the Regional Administrator in the application form. The forms will require, at a minimum, the following information:

(i) The legal description of the property on which the proposed forestry or silvicultural burning will be conducted.

(ii) Name, mailing address, email address and telephone number of the applicant, who must be the owner or lessee of the property on which the proposed forestry or silvicultural burning will be conducted.

(iii) Name, mailing address, email address and telephone number of the person who will be conducting the proposed forestry or silvicultural burning.

(iv) Name, mailing address, email address and telephone number of the owner or lessee, if any, of the property on which the proposed forestry and silvicultural burning will be conducted, if different from the applicant.

(v) A plot plan showing the location of the proposed forestry or silvicultural burning in relation to the property lines and indicating the distances and directions of the nearest residential, public, and commercial properties, as well as roads and other sensitive areas that could be affected by the smoke from the burning.

(vi) The type and quantity of forestry or silvicultural debris or material proposed to be burned and the area over which burning will be conducted.

(vii) A description of the burning method(s) to be used (pile burn, broadcast burn, windrow burn, understory burn, etc.), the amount of material to be burned with each method, and the means of ignition.

(viii) A description of the measures that will be taken to prevent escaped burns, including but not limited to the availability of water and firebreaks.

(ix) The requested date(s) when the proposed forestry or silvicultural burning would be conducted.

(x) Any other information specifically requested by the Regional Administrator.

(2) At least 1 business day prior to the requested date of a proposed forestry or silvicultural burn, the person conducting the burn must contact the Regional Administrator as specified in the forestry or silvicultural open burning permit to request approval to burn. If the proposed forestry or silvicultural burning is consistent with this section and § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, the Regional Administrator may approve the forestry or silvicultural burning for the requested day(s) after taking into consideration relevant factors including, but not limited to:

(i) The size, duration, and location of the proposed burn, the current and projected air quality conditions, the forecasted meteorological conditions, and other scheduled burning activities in the surrounding area;

(ii) Other factors indicating whether or not the proposed forestry or silvicultural burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard; and

(iii) When relevant, other factors indicating whether or not the proposed open burn can be conducted without causing any other adverse impact on air quality.

(3) The permit will authorize burning only for the date(s) and time(s) approved for the burning to be conducted and will include any conditions that the Regional Administrator determines are necessary to ensure compliance with this section, § 49.131 or the applicable EPA-

approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, and to protect the public health and welfare, including any monitoring, recordkeeping and post-burn reporting requirements.

(4) If any of the relevant factors in paragraph (d)(2) of this section change after approval to conduct the forestry or silvicultural burn, the Regional Administrator may contact the person conducting the burn to revoke the approval and require the permittee to immediately extinguish the fire if safe to do so, discontinue lighting the fire and withhold additional material such that the fire burns down, as applicable.

(5) The Regional Administrator, to the extent practical, will consult with and coordinate approvals to burn with the open burning programs of surrounding jurisdictions.

§ 49.135 Rule for emissions detrimental to public health or welfare.

(a) *What is the purpose of this section?* This section is intended to prevent the emission of air pollutants from any air pollution source operating within an Indian reservation from being detrimental to public health or welfare.

(b) *Who is affected by this section?* This section applies to any person who owns or operates an air pollution source.

(c) *What are the requirements for air pollution sources?* (1) A person must not cause or allow the emission of any air pollutants from an air pollution source, in sufficient quantities and of such characteristic and duration, that the Regional Administrator determines:

(i) Causes or contributes to a violation of any national ambient air quality standard; or

(ii) Is presenting an imminent and substantial endangerment to public health or welfare, or the environment.

(2) If the Regional Administrator makes either of the determinations in paragraph (c)(1) of this section, then the Regional Administrator may require the owner or operator of the source to install air pollution controls and/or take reasonable precautions to reduce or prevent the emissions. If the Regional Administrator determines that the installation of air pollution controls and/or reasonable precautions are necessary, then the Regional Administrator will require the owner or operator to obtain a non-Title V operating permit for the source. The specific requirements will be established in the required non-Title V operating permit.

(3) Nothing in this section affects the ability of the Regional Administrator to issue an order pursuant to section 303 of the Clean Air Act to require an owner or operator to immediately reduce or cease the emission of air pollutants.

(4) Nothing in this section shall be construed to impair any cause of action or legal remedy of any person, or the public, for injury or damages arising from the emission of any air pollutant in such place, manner, or amount as to constitute a nuisance under any other applicable law.

(d) *What does someone subject to this section need to do?* A person subject to this section, must comply with the terms and conditions of any non-Title V operating permit or order issued by the Regional Administrator.

§ 49.136 [Reserved]

§ 49.137 Rule for air pollution episodes.

(a) *What is the purpose of this section?* This section establishes procedures for addressing the excessive buildup of certain criteria air pollutants. This section is intended to prevent the occurrence of an air pollution emergency within an Indian reservation due to the effects of these air pollutants on human health.

(b) *Who is affected by this section?* This section applies to any person who owns or operates an air pollution source within an Indian reservation.

(c) *What are the requirements of this section?* (1) *Air pollution action level triggers.* Conditions justifying the issuance of an air stagnation advisory or the declaration of an air pollution alert, air pollution warning, or air pollution emergency exist whenever the Regional Administrator determines that the accumulation of air pollutants in any place is approaching, or has reached, levels that could lead to a threat to human health. The following criteria will be used for making these determinations:

(i) *Air stagnation advisory.* An air stagnation advisory may be issued by the Regional Administrator whenever meteorological conditions over a large area are conducive to the buildup of air pollutants.

(ii) *Air pollution alert.* An air pollution alert may be declared by the Regional Administrator when the air quality levels are in the Air Quality Index (AQI) Unhealthy category, or are projected to be in the Unhealthy category within the next 72 hours, at any monitoring site and the meteorological conditions are such that the levels are expected to continue or reoccur over the subsequent 24 hours.

(iii) *Air pollution warning.* An air pollution warning may be declared by the Regional Administrator when the air quality levels are in the AQI Very Unhealthy category, or are projected to be in the Very Unhealthy category within the next 72 hours, at any monitoring site and the meteorological conditions are such that the levels are expected to continue or reoccur over the subsequent 24 hours.

(iv) *Air pollution emergency.* An air pollution emergency may be declared by the Regional Administrator when the air quality levels are in the AQI Hazardous category, or are projected to be in the AQI Hazardous category within the next 72 hours, at any monitoring site and the meteorological conditions are such that the levels are expected to continue or reoccur over the subsequent 24 hours.

(v) *AQI levels.* The air quality levels for the AQI categories of Unhealthy, Very Unhealthy and Hazardous are found in Table 2 of appendix G to 40 CFR part 58.

(vi) *Termination.* Once an air stagnation advisory is issued, or an air pollution alert, air pollution warning, or air pollution emergency is declared, it will remain in effect until the Regional Administrator either terminates the advisory, alert, warning or emergency or makes a different declaration.

(2) *Announcements by the Regional Administrator.* The Regional Administrator will post an announcement of an air stagnation advisory, air pollution alert, air pollution warning or air pollution emergency on the EPA Region 10 website and will consider other means to announce the event, such as posting the announcement on Region 10's social media and requesting Tribes within the affected area to post the announcement on their websites. Delegated Tribes may use these and other similar means to make announcements. These announcements will indicate that air pollution levels exist or may occur that could potentially be harmful to human health and indicate actions that people can take to reduce exposure. The announcements will also request voluntary actions to reduce emissions from sources of air pollutants as well as indicate that a ban on open burning is in effect, as provided in paragraphs (c)(3) and (4) of this section. Announcements of the termination of an air stagnation advisory, air pollution alert, air pollution warning, air pollution emergency or burn ban will be made in the same manner.

(3) *Voluntary curtailment of emissions by sources.* Whenever the Regional Administrator issues an air stagnation advisory or declares an air pollution alert, air pollution warning, or air pollution emergency, sources of air pollutants will be requested to take

voluntary actions to reduce emissions. People should refrain from using their wood stoves and fireplaces unless they are their sole source of heat. People should reduce their use of motor vehicles to the extent possible. Industrial sources should curtail operations or switch to a cleaner fuel if possible.

(4) *Mandatory curtailment of emissions by order of the Regional Administrator.* (i) Except for fires exempted under § 49.131(c)(1), (2), (3) or (4), all open burning is prohibited whenever:

(A) The Regional Administrator issues an air stagnation advisory or declares an air pollution alert, air pollution warning, or air pollution emergency; or

(B) A burn ban is declared pursuant to § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part.

(ii) Except for fires exempted under § 49.131(c)(1) through (4), any person conducting open burning when such an advisory is issued or declaration is made must immediately extinguish the fire if safe to do so, discontinue lighting the fire and withhold additional material such that the fire burns down, as applicable.

(iii) During an air pollution warning or air pollution emergency, the Regional Administrator may issue an order to any air pollution source requiring such source to curtail or eliminate the emissions.

§ 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(a) *What is the purpose of this section?* This section allows the Regional Administrator to develop and maintain a current and accurate record of air pollution sources operating within an Indian reservation and the emissions from such sources.

(b) *Who is affected by this section?* This section applies to: (1) Any person who owns or operates a part 71 source;

(2) Any person who owns or operates an air pollution source required to have a permit under the Federal Minor New Source Review Program in Indian Country (§§ 49.151 through 49.164);

(3) Any person who owns or operates any air pollution source required to have a permit under the Rule for non-Title V operating permits (§ 49.139); and

(4) Any person who owns or operates any other air pollution source that has the potential to emit more than 2 tons per year of any air pollutant listed in paragraph (e)(3)(xiii) of this section, except those air pollution sources exempted in paragraph (c) of this section.

(c) *What is exempted from this section?* This section does not apply to the following air pollution sources that would otherwise be required to register under paragraph (b)(iv) of this section:

(1) Mobile sources;

(2) Single-family residences and residential buildings with four or fewer dwelling units;

(3) Air conditioning units used for human comfort that do not exhaust air pollutants into the atmosphere from any manufacturing or industrial process;

(4) Ventilating units used for human comfort that do not exhaust air pollutants into the atmosphere from any manufacturing or industrial process;

(5) Furnaces and boilers used exclusively for space heating with a rated heat input capacity of less than 400,000 Btu per hour;

(6) Emergency generators, designed solely for the purpose of providing electrical power during outages, provided the total maximum manufacturer's site-rated horsepower of all units is below 1,000;

(7) Stationary internal combustion engines with a manufacturer's site rated horsepower of less than 50;

(8) Cooking of food, except for wholesale businesses that both cook and sell cooked food;

(9) Consumer use of office equipment and products;

(10) Janitorial services and consumer use of janitorial products;

(11) Maintenance and repair activities, except for air pollution sources engaged in the business of maintaining and repairing equipment;

(12) Agricultural activities and forestry and silvicultural activities, including agricultural burning and forestry and silvicultural burning; and

(13) Open burning.

(d) *What are the requirements of this section?* Any person who owns or operates an air pollution source subject to this section must register the source with the Regional Administrator and submit reports. The content and timing of submission of reports for a person who owns or operates a part 71 source is specified in paragraph (f) of this section. The content and timing of submission of reports for all other sources is specified in paragraph (e) of this section. All registration information and reports must be submitted via the FARR Online Reporting System (FORS), unless prior written approval to submit such information and reports in hard copy, paper or other format has been received from EPA Region 10.

(e) *Are there additional requirements that must be met?* Any person who owns or operates an air pollution source subject to this section, except for part 71 sources, must register an air pollution source and submit reports as follows:

(1) *Initial registration.* (i) The owner or operator of an air pollution source located on an Indian reservation within Idaho, Oregon, or Washington on or before June 7, 2005 (except for the Cowlitz Indian Reservation, Snoqualmie Indian Reservations, lands held in trust for the Samish Indian Nation and any land held in trust for a Tribe that existed on June 7, 2005 and has not been formally designated as a reservation) must register the air pollution source with the Regional Administrator by no later than February 15, 2007.

(ii) The owner or operator of a new air pollution source that begins actual construction after June 7, 2005 on an Indian reservation within Idaho, Oregon, or Washington (except for the Cowlitz Indian Nation, Snoqualmie Indian Reservations, lands held in trust for the Samish Indian Nation and any land held in trust for a Tribe that existed on June 7, 2005 and has not been formally designated as a reservation) must register the air pollution source with the Regional Administrator within 90 days after beginning operation.

(iii) The owner or operator of an air pollution source located on the Cowlitz Indian Reservation, the Snoqualmie Indian Reservation, lands held in trust for the Samish Indian Nation or any land held in trust for a Tribe that has not been formally designated as a reservation and that exists on [EFFECTIVE DATE OF FINAL RULE] must register the air pollution source with the Regional Administrator by no later than [6 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE].

(iv) The owner or operator of a new air pollution source which begins actual construction after [EFFECTIVE DATE OF FINAL RULE] on the Cowlitz Indian Reservation, the Snoqualmie Indian Reservation, the lands held in trust for the Samish Indian Nation or any land held in trust for a Tribe that has not been formally designated as a reservation must register the air pollution source with the Regional Administrator within 90 days after beginning operation.

(v) The owner or operator of an air pollution source located on land that is taken into trust and becomes part of the Indian reservation for an Indian Tribe after [EFFECTIVE DATE OF FINAL RULE] must register the air pollution source with the Regional Administrator by no later than 6 months after the date that the land is taken into trust.

(vi) The owner or operator of a new air pollution source which begins actual

construction on land that is taken into trust and becomes part of the Indian reservation for an Indian Tribe after [EFFECTIVE DATE OF FINAL RULE] must register the air pollution source with the Regional Administrator within 90 days after beginning operation.

(vii) Submitting an initial registration does not relieve the owner or operator from the requirement to obtain a permit to construct if the new air pollution source would be a new source or modification subject to any Federal or Tribal permit to construct rule.

(2) *Annual registration.* After initial registration, the owner or operator of an air pollution source must re-register with the Regional Administrator by February 15 of each year. The annual registration must include all of the information required in the initial registration and must be updated to reflect any changes since the previous registration. For information that has not changed since the previous registration, the owner or operator may reaffirm via the FORS that the information previously furnished to the Regional Administrator is still correct.

(3) *Information to include in initial registration and annual registration.* Each initial registration and annual registration must include the following information if it applies:

(i) Name of the air pollution source and the nature of the business.

(ii) Street address, email address and telephone number of the air pollution source.

(iii) Name, mailing address, email address and telephone number of the owner.

(iv) Name, mailing address, email address and telephone number of the operator, if different from the owner.

(v) Name, mailing address, email address and telephone number of the local individual responsible for compliance with this section.

(vi) Name, mailing address, email address and telephone number of the individual authorized to receive requests for data and information.

(vii) A description of the production processes, air pollution control equipment, and a related flow chart.

(viii) Identification of emission units and air pollutant-generating activities.

(ix) A plot plan showing the location of all emission units and air pollutant-generating activities. The plot plan must also show the property lines of the air pollution source, the height above grade of each emission release point, and the distance and direction to the nearest residential or commercial property.

(x) Type and quantity of fuels, including the sulfur content of fuels, used on a daily, annual, and maximum hourly basis.

(xi) Type and quantity of raw materials used or final product produced on a daily, annual, and maximum hourly basis.

(xii) Typical operating schedule, including number of hours per day, number of days per week, and number of weeks per year.

(xiii) Estimates (including all calculations for the estimates) of total actual emissions from the air pollution source for the following air pollutants: Particulate matter (PM), PM_{10}, $PM_{2.5}$, sulfur oxides (SO_X), nitrogen oxides (NO_X), carbon monoxide (CO), volatile organic compounds (VOC), lead (Pb) and lead compounds, ammonia (NH_3), fluorides (gaseous and particulate), sulfuric acid mist (H_2SO_4), hydrogen sulfide (H_2S), total reduced sulfur (TRS), and reduced sulfur compounds.

(xiv) Estimated efficiency of air pollution control equipment under present or anticipated operating conditions.

(xv) Global Positioning System (GPS) coordinates taken at the front entrance of the registered facility.

(xvi) The North American Industry Classification System (NAICS) code for the registered facility.

(xvii) A copy of the most recent fugitive particulate matter survey and current fugitive particulate matter plan as required under § 49.126.

(xviii) Any other information specifically requested by the Regional Administrator.

(4) *Procedure for estimating emissions.* The initial registration and annual registration must include an estimate of actual emissions taking into account equipment, operating conditions, and air pollution control measures. For an existing air pollution source that operated during the calendar year preceding the initial registration or annual registration submittal, the actual emissions are the actual rate of emissions for the preceding calendar year and must be calculated using the actual operating hours, production rates, in-place control equipment, and types of materials processed, stored, or combusted during the preceding calendar year. For a new air pollution source that is submitting its initial registration, the actual emissions are the estimated actual rate of emissions for the current calendar year. The emission estimates must be based upon actual test data or, in the absence of such data, upon procedures acceptable to the Regional Administrator. Any emission estimates submitted to the Regional Administrator must be verifiable using currently accepted engineering criteria. The following procedures are generally acceptable for estimating emissions from air pollution sources:

(i) Source-specific emission tests;

(ii) Mass balance calculations;

(iii) Published, verifiable emission factors that are applicable to the source;

(iv) Other engineering calculations; or

(v) Other procedures to estimate emissions specifically approved by the Regional Administrator.

(5) *Report of relocation.* After initial registration, the owner or operator of an air pollution source must report any relocation of the source via the FORS at least 30 days prior to the relocation of the source within an Indian reservation, or when relocating off of or on to an Indian reservation. The report must update the information required in paragraphs (e)(3)(i) through (v) of this section and, except when relocating to a site off of an Indian reservation, paragraph (e)(3)(viii) of this section and any other information required by paragraph (e)(3) of this section if it will change as a result of the relocation. Submitting a report of relocation does not relieve the owner or operator from the requirement to obtain a permit to construct if the relocation of the air pollution source would be a new source or modification subject to any Federal or Tribal permit to construct rule.

(6) *Report of change of ownership.* After initial registration, the owner or operator of an air pollution source must report any change of ownership via the FORS within 90 days after the change in ownership is effective. The report must update the information required in paragraphs (e)(3)(i) through (v) of this section, and any other information required by paragraph (e)(3) of this section if it would change as a result of the change of ownership.

(7) *Report of closure.* Except for regular seasonal closures, after initial registration, the owner or operator of an air pollution source must submit a report of closure via the FORS within 90 days after the cessation of all operations at the air pollution source. The report must include the information required in paragraph (e)(3)(xiii) of this section through the date of closure.

(8) *Certification of truth, accuracy, and completeness.* All registrations and reports must include a certification signed by the owner or operator as to the truth, accuracy, and completeness of the information. This certification must state that, based on information and belief formed after reasonable inquiry, the statements and information are true, accurate, and complete.

(f) *Requirements for part 71 sources.* (1) The owner or operator of a part 71 source must submit an annual

registration report that includes the information required by paragraphs (e)(3)(xiii), (xvii) and (e)(4) of this section. This annual registration report must be submitted by February 15 of each year. The first annual registration report for a part 71 source shall be submitted for calendar year 2006, or for the calendar year that the source became subject to part 71, whichever is later.

(2) The owner or operator of a part 71 source must also submit reports of a change in ownership and closure as provided in paragraphs (e)(6) and (7) of this section.

§ 49.139 Rule for non-Title V operating permits.

(a) *What is the purpose of this section?* This section establishes a permitting program to provide for the establishment of Federally-enforceable requirements for air pollution sources within an Indian reservation.

(b) *Who is affected by this section?* (1) This section applies to:

(i) The owner or operator of any air pollution source who wishes to obtain a Federally-enforceable limitation on the source's actual emissions or potential to emit that cannot be obtained under the Indian Country Minor NSR Rule (§§ 49.151 through 49.173) or the Federal rule for Prevention of Significant Deterioration (40 CFR 52.21);

(ii) Any air pollution source for which the Regional Administrator determines that additional Federally-enforceable requirements are necessary to ensure compliance with the implementation plan;

(iii) Any air pollution source for which the Regional Administrator determines that additional Federally-enforceable requirements are necessary to ensure the attainment and maintenance of any national ambient air quality standard or prevention of significant deterioration increment; or

(iv) Any air pollution source for which the Regional Administrator determines that additional Federally-enforceable requirements are necessary to implement or ensure compliance with any other provisions of the Clean Air Act.

(2) This section does not apply to the owner or operator of an air pollution source who wishes to obtain a Federally-enforceable limitation on the source's potential to emit in order to establish a synthetic minor source for purposes of the applicable prevention of significant deterioration, nonattainment major new source review or Clean Air Act title V permit programs and/or a synthetic minor source of hazardous air pollutants for purposes of 40 CFR part 63, section 112 of the Clean Air Act or the applicable Clean Air Act title V program. Applications for a synthetic minor source permit must be submitted pursuant to § 49.158.

(c) *What is the process for obtaining an owner-requested operating permit?*(1) The owner or operator of an air pollution source who wishes to obtain a Federally-enforceable limitation on the source's actual emissions or potential to emit under this section must submit an application in writing to the Regional Administrator requesting such limitation and include the following information:

(i) Name of the air pollution source and the nature of the business.

(ii) Street address, email address and telephone number of the air pollution source.

(iii) Name, mailing address, email address and telephone number of the owner or operator.

(iv) Name, mailing address, email address and telephone number of the local individual responsible for compliance with this section.

(v) Name, mailing address, email address and telephone number of the individual authorized to receive requests for data and information.

(vi) For each air pollutant and for all emission units and air pollutant-generating activities to be covered by a limitation:

(A) The proposed limitation and a description of its effect on actual emissions or the potential to emit. Proposed limitations may include, but are not limited to, emission limitations, production limits, operational restrictions, fuel or raw material specifications, and/or requirements for installation, and operation of emission controls. Proposed limitations must have a reasonably short averaging period, taking into consideration the operation of the air pollution source and the methods to be used for demonstrating compliance.

(B) Proposed testing, monitoring, recordkeeping, and reporting requirements to be used to demonstrate and assure compliance with the proposed limitation.

(C) A description of the production processes and a related flow chart.

(D) Identification of emission units and air pollutant-generating activities.

(E) Type and quantity of fuels and/or raw materials used.

(F) Description and estimated efficiency of air pollution control equipment under present or anticipated operating conditions.

(G) Estimates of the current actual emissions and current potential to emit, including all calculations for the estimates.

(H) Estimates of the allowable emissions and/or potential to emit that would result from compliance with the proposed limitation, including all calculations for the estimates.

(vii) Any other information specifically requested by the Regional Administrator.

(2) Estimates of actual emissions must be based upon actual test data, or in the absence of such data, upon procedures acceptable to the Regional Administrator. Any emission estimates submitted to the Regional Administrator must be verifiable using currently accepted engineering criteria. The following procedures are generally acceptable for estimating emissions from air pollution sources:

(i) Source-specific emission tests;

(ii) Mass balance calculations;

(iii) Published, verifiable emission factors that are applicable to the source;

(iv) Other engineering calculations; or

(v) Other procedures to estimate emissions specifically approved by the Regional Administrator.

(3) All applications for a non-Title V operating permit must include a certification by the owner or operator as to the truth, accuracy, and completeness of the information. This certification must state that, based on information and belief formed after reasonable inquiry, the statements and information are true, accurate, and complete.

(4) Within 60 days after receipt of an application, the Regional Administrator will determine if it contains the information specified in paragraph (c)(1) of this section and if so, will deem it complete for the purpose of preparing a draft non-Title V operating permit. If the Regional Administrator determines that the application is incomplete, it will be returned to the owner or operator along with a description of the necessary information that must be submitted for the application to be deemed complete.

(5) The Regional Administrator will prepare a draft non-Title V operating permit and a draft technical support document that describes the proposed limitation and its effect on the actual emissions and/or potential to emit of the air pollution source or draft decision to deny the permit.

(6) The Regional Administrator will provide a copy of the draft non-Title V operating permit and draft technical support document or the draft decision to deny the permit to the owner or operator of the air pollution source when the draft permit or the draft decision to deny the permit is sent out for public comment.

(d) *What is the process that the Regional Administrator will follow to require a non-Title V operating permit?*

(1) Whenever the Regional Administrator determines that additional Federally-enforceable requirements are necessary to ensure compliance with the implementation plan, to ensure the attainment and maintenance of any national ambient air quality standard or prevention of significant deterioration increment, or to implement or ensure compliance with any other provisions of the Clean Air Act, the owner or operator of the air pollution source will be so notified in writing.

(2) The Regional Administrator may require that the owner or operator provide any information that the Regional Administrator determines is necessary to establish such requirements in a non-Title V operating permit under this section.

(3) The Regional Administrator will prepare a draft non-Title V operating permit and a draft technical support document that describes the reasons and need for the proposed requirements.

(4) The Regional Administrator will provide a copy of the draft non-Title V operating permit and draft technical support document to the owner or operator of the air pollution source when the draft permit is sent out for public comment.

(e) *What permit information will be publicly available?* With the exception of any confidential information as defined in subpart B of 40 CFR part 2, the Regional Administrator must make available for public inspection the documents listed in paragraphs (c)(1) through (6) or (d)(1) through (4) of this section. The Regional Administrator must make such information available for public inspection at the EPA Region 10 Office and in at least one location in the area affected by the source, such as the Tribal environmental office or a local library.

(f) *How will the public be notified and participate?* (1) Before issuing a permit under this section, the Regional Administrator must prepare a draft permit and provide adequate public notice to ensure that the affected community and the general public have reasonable access to the application and draft permit information, as set out in paragraphs (f)(1)(i) and (ii) of this section. The public notice must provide an opportunity for public comment and notice of a public hearing, if any, on the draft permit.

(i) The Regional Administrator must mail a copy of the notice to the owner or operator of the source, the appropriate Indian governing body and the Tribal, State and local air pollution authorities having jurisdiction adjacent to the area of the Indian reservation potentially affected by the air pollution source.

(ii) Depending on such factors as the nature and size of the source, local air quality considerations and the characteristics of the population in the affected area (*e.g.,* subsistence hunting and fishing or other seasonal cultural practices), the Regional Administrator must use appropriate means of notification, such as those listed in paragraphs (f)(1)(ii)(A) through (E) of this section.

(A) The Regional Administrator may mail or email a copy of the notice to persons on a mailing list developed by the Regional Administrator consisting of those persons who have requested to be placed on such a mailing list.

(B) The Regional Administrator may post the notice on the Region 10 website.

(C) The Regional Administrator may publish the notice in a newspaper of general circulation in the area affected by the source. Where possible, the notice may also be published in a Tribal newspaper or newsletter.

(D) The Regional Administrator may provide copies of the notice for posting at one or more locations in the area affected by the source, such as post offices, trading posts, libraries, Tribal environmental offices, community centers or other gathering places in the community.

(E) The Regional Administrator may employ other means of notification as appropriate.

(2) The notice required pursuant to paragraph (f)(1) of this section must include the following information at a minimum:

(i) Identifying information, including owner or operator's name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact.

(ii) The name and address of EPA Region 10 and any delegated agency processing the permit action.

(iii) The purpose for which the permit is being issued, the regulated pollutants covered by the permit, and a description of any proposed limitations on the source.

(iv) Instructions for requesting a public hearing.

(v) The name, address, email address and telephone number of a contact person in EPA Region 10 from whom additional information may be obtained.

(vi) Locations and times of availability of the information (listed in paragraph (e) of this section) for public inspection.

(vii) A statement that any person may submit written comments, a written request for a public hearing or both, on the draft permit action. The Regional Administrator must provide a period of at least 30 days from the date of the public notice for comments and for requests for a public hearing.

(g) *How will the public comment and will there be a public hearing?* (1) Any person may submit written comments on the draft permit and may request a public hearing. These comments must raise any reasonably ascertainable issue with supporting arguments by the close of the public comment period (including any public hearing). The Regional Administrator must consider all comments in making the final decision. The Regional Administrator must keep a record of the commenters and of the issues raised during the public participation process and such records must be available to the public.

(2) The Regional Administrator must extend the public comment period under paragraph (f) of this section to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(3) A request for a public hearing must be in writing and must state the nature of the issues proposed to be raised at the hearing.

(4) The Regional Administrator must hold a hearing whenever there is, on the basis of requests, a significant degree of public interest in a draft permit. The Regional Administrator may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. The Regional Administrator must provide notice of any public hearing at least 30 days prior to the date of the hearing. Public notice of the hearing may be concurrent with that of the draft permit and the two notices may be combined. Reasonable limits may be set upon the time allowed for oral statements at the hearing.

(5) The Regional Administrator must make a recording or written transcript of any hearing available to the public.

(h) *Can a permit be reopened?* The Regional Administrator may reopen an existing, currently-in-effect permit for cause on its own initiative, such as if it contains a material mistake or fails to assure compliance with applicable requirements. However, except for those permit reopenings that do not increase the emissions limitations in the permit, such as permit reopenings that correct typographical, calculation and other errors, all other permit reopenings shall be carried out after the opportunity of public notice and comment and in accordance with one or more of the public participation requirements under paragraph (f) of this section.

(i) *What is an administrative permit revision?* The following provisions govern administrative permit revisions.

(1) An administrative permit revision is a permit revision that makes any of the following changes:

(i) Corrects typographical errors.

(ii) Identifies a change in the name, address or phone number of any person identified in the permit or provides a similar minor administrative change at the source.

(iii) Requires more frequent monitoring or reporting by the permittee.

(iv) Allows for a change in ownership or operational control of a source where the Regional Administrator determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the Regional Administrator.

(v) Incorporates any other type of change that the Regional Administrator has determined to be similar to those in paragraphs (i)(1)(i) through (iv) of this section.

(2) An administrative permit revision is not subject to the permit application, issuance, public participation or administrative and judicial review requirements of this section.

(j) *Can my existing owner-requested permit limits be revised?* Permits with owner-requested limits on the source's potential to emit previously issued under the authority of this section may be revised through an administrative permit revision as provided in paragraph (i) provided the revision qualifies as an administrative permit revision under that paragraph. If you propose a modification, as defined in § 49.152, to your existing source, you must obtain a permit pursuant to § 49.158 prior to beginning actual construction. For all permit revisions that do not arise from a proposed modification and do not qualify as administrative permit revisions, the permit may be revised consistent with, and subject to, the public participation procedures of this section. Such procedures shall only affect those parts of the permit for which revisions are proposed. An application for a permit revision need only include information on the affected permit terms and emission units to which those terms apply.

(k) *How will final action occur and when will the permit become effective?* (1) After decision on a permit, the Regional Administrator must notify the permit applicant of the decision, in writing, and if the permit is denied, of the reasons for such denial and the procedures for appeal. The final non-Title V operating permit and final technical support document (including responses to comments) will be sent to the owner or operator of the air pollution source. In addition, the Regional Administrator must provide adequate public notice of the final permit decision to ensure that the affected community, general public and any individuals who commented on the draft permit have reasonable access to the decision and supporting materials according to paragraph (e) of this section and according to one or more of the provisions in paragraphs (f)(1)(ii)(A) through (E) of this section.

(2) A final permit becomes effective 30 days after service of notice of the final permit decision unless a different effective date is specified in the permit.

(l) *For how long will the Regional Administrator retain permit-related records?* The records, including any required applications for each draft and final permit or application for permit revision, must be kept by the Regional Administrator for not less than 5 years.

(m) *What is the administrative record for each final permit?* (1) The Regional Administrator must base final permit decisions on an administrative record consisting of:

(i) The application and any supporting data furnished by the permit applicant;

(ii) The draft permit and technical support document or notice of intent to deny the application;

(iii) Other documents in the supporting files for the draft permit that were relied upon in the decision making;

(iv) All comments received during the public comment period, including any extension or reopening;

(v) The recording or transcript of any hearing(s) held;

(vi) Any written material submitted at such a hearing;

(vii) Any new materials placed in the record as a result of the Regional Administrator's evaluation of public comments;

(viii) The final permit and final technical support document (including responses to comments); and

(ix) Other documents in the supporting files for the final permit that were relied upon in the decision-making.

(2) The additional documents required under paragraph (m)(l) of this section should be added to the record as soon as possible after their receipt or preparation by the Regional Administrator. The record must be complete on the date the final permit is issued.

(3) Material readily available or published materials that are generally available and that are included in the administrative record under the standards of paragraph (m)(1) of this section need not be physically included in the same file as the rest of the record as long as it is specifically referred to in that file.

(n) *Final agency action.* The final non-Title V operating permit or denial of such permit is a final agency action for purposes of administrative appeal and judicial review.

3. Remove the undesignated center heading immediately following § 49.139 ''Federal Implementation Plan for Oil and Natural Gas Production Facilities, Fort Berthold Indian Reservation (Mandan, Hidatsa and Arikara Nations) in EPA Region 8''.

■ 4. Add §§ 49.140 through 49.143 to read as follows:

Sec.

* * * * *

49.140 Rule for residential wood burning devices.
49.141 Rule for curtailment of residential wood burning devices for specific areas.
49.142 Rule for small open burning annual permits.
49.143 Permit by rule for small open burns.

* * * * *

§ 49.140 Rule for residential wood burning devices.

(a) *What is the purpose of this section?* This section regulates the installation of residential wood burning devices and specifies what fuels may be burned in residential wood burning devices within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to any person who owns or operates a residential wood burning device.

(c) *What are the requirements of this section?* (1) After the effective date of the final rule, no new or used residential wood heater, residential central heater, residential forced-air furnace, or residential hydronic heater may be installed to provide heat to a structure unless it has been certified by EPA to meet the applicable PM emission standards in 40 CFR 60.532 or 40 CFR 60.5474 as in effect on or after May 15, 2015, and has affixed to it a permanent label pursuant to 40 CFR 60.536 or 40 CFR 60.5478.

(2) Only the following materials may be burned in a residential wood burning device:

(i) Seasoned firewood, which is firewood that has a moisture content of 20% or less;

(ii) Kiln dried or air dried lumber that has not been treated, chemically impregnated, painted or coated;

(iii) Products manufactured for the purpose of being used as a fuel for a residential wood burning device, such as wood pellets and biomass fire logs intended for burning in a wood stove or fireplace; and

(iv) Manufactured fire starters and paper sufficient to start a fire.

§ 49.141 Rule for curtailment of residential wood burning devices for specific areas.

(a) *What is the purpose of this section?* This section provides for Stage 1 and Stage 2 bans on the use of residential wood burning devices during periods of elevated $PM_{2.5}$ and PM_{10} concentrations within specific geographical areas to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to any person who owns or operates a residential wood burning device in specific geographical areas.

(c) *When and where does this section apply?* This section applies beginning October 1, of the second calendar year following the promulgation of this section into the implementation plan for an Indian reservation in subpart M of this part.

(d) *What are the requirements of this section?* (1) Except for residences that qualify for an exemption under paragraph (d)(3) of this section, the use of residential wood burning devices that have not been certified by EPA under subpart AAA or QQQQ to 40 CFR part 60 are prohibited whenever the Regional Administrator declares a Stage 1 ban. A Stage 1 ban may be declared for a specified geographic area whenever the Regional Administrator determines that air quality levels have exceeded, or are projected to exceed within the next 72 hours, 75% of any 24-hour national ambient air quality standard for particulate matter, that these levels are projected to continue or reoccur over at least the subsequent 24 hours, and that reductions in emissions from uncertified residential wood burning devices would reduce particulate matter concentrations.

(2) Except for residences that qualify for an exemption under paragraph (d)(3) of this section, the use of all residential wood burning devices (whether certified or uncertified) are prohibited whenever the Regional Administrator declares a Stage 2 ban. A Stage 2 ban may be declared for a specified geographic area whenever the Regional Administrator determines that air quality levels have exceeded, or are projected to exceed within the next 72 hours, any 24-hour national ambient air quality standard for particulate matter, that these levels are projected to continue or reoccur over at least the subsequent 24 hours, and that reductions in emissions from residential wood burning devices would reduce particulate matter concentrations.

(3) The requirements of paragraphs (d)(1) and (2) of this section do not apply to:

(i) Residences where residential wood burning devices are the sole source of heat. Sole source of heat means that the residential wood burning device is the only available source of heat for the residence, excluding portable space heaters; or

(ii) Residences where the household income is less than or equal to 1.5 times the Federal poverty guidelines as defined by the U.S. Department of Health and Human Services.

(4) Any person whose residence qualifies for, and is relying on, an exemption under paragraph (d)(3) of this section must complete an exemption form provided by the Regional Administrator and certify as to its truth and accuracy. Such form must be completed, signed and available at the qualifying residence before using the wood burning device during a Stage 1 or Stage 2 burn ban and must be made available for review upon request by the Regional Administrator or authorized representative.

(5) A signed form under paragraph (d)(4) of this section is valid for five years from the date of signature or until the residence no longer qualifies for an exemption under paragraph (d)(3) of this section, whichever occurs first.

§ 49.142 Rule for small open burning annual permits.

(a) *What is the purpose of this section?* This section establishes a permitting program for small open burns within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to the owner and lessee, if any, of the property on which a small open burn is conducted and to any person who conducts a small open burn.

(c) *What is exempted from this section?* The following open burns are exempted from this section:

(1) Outdoor fires set for cultural or traditional purposes;

(2) Fires set for cultural or traditional purposes within structures such as smoke houses, sweat houses, or sweat lodges;

(3) Outdoor cooking fires;

(4) Fires set for recreational purposes;

(5) Fires set as part of a firefighting strategy (*e.g.,* back burn, fire break, or safety perimeter burn), if approved by the appropriate fire safety jurisdiction and only under an emergency or incident command situation;

(6) Fires set for the disposal of diseased animals or other material by order of a public health authority;

(7) Open outdoor fires used by qualified personnel to train firefighters in the methods of fire suppression and firefighting techniques conducted pursuant to § 49.131(e)(4);

(8) Open outdoor fires conducted by Tribal governments to dispose of fireworks and associated packaging materials pursuant to § 49.131(e)(5);

(9) Agricultural burning; and

(10) Forestry and silvicultural burning.

(d) *What are the requirements for small open burns under this section?* (1) The owner or lessee of a property must apply for and obtain an annual permit to conduct small open burns on that property.

(2) The date after which a permit is required under this section in order to conduct small open burns is identified in the implementation plan in subpart M of this part for the specific Indian reservation where this section applies.

(3) A person subject to this section must ensure that the person conducting the small open burns is familiar with the requirements of the permit, ensure that the permit is available on the property during the small open burns, conduct the small open burns in accordance with the terms and conditions of the permit, and comply with this section and § 49.131 or the EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, as applicable.

(4) The person conducting the small open burn must check, as specified in the permit, whether burning is allowed for the area on that day and conduct and complete the burn during the hours that burning is allowed on that day.

(5) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments, or other governmental entities.

(e) *How will a person know if burning is allowed on a day?* (1) The Regional Administrator shall identify each day as a ''burn day'' or a ''no burn day'' and

for a burn day, specify the hours and geographic area for which burning is allowed. When deciding whether to call a burn day, the Regional Administrator will take into consideration relevant factors including, but not limited to, the current and projected air quality conditions, the forecasted meteorological conditions, and other scheduled burning activities in the surrounding area. Where the Regional Administrator determines that open burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard or, when relevant, without causing any other adverse impact on air quality, a burn day may be called.

(2) The Regional Administrator will publicize whether a day is a ''burn day'' or a ''no burn day'' in a pre-recorded phone message, on a website, or through other appropriate means as identified in the small open burning permit.

(f) *Are there additional requirements that must be met?* (1) The owner or lessee of a property who wishes to conduct small open burns on that property must submit an application to the Regional Administrator for small open burning that the applicant expects to conduct during the calendar year. An application must be submitted in writing, on forms provided by the Regional Administrator, and be received by the Regional Administrator at least 1 business day prior to conducting the first small open burn on the property during a calendar year. The forms will require, at a minimum, the following information:

(i) Street address of the property on which the proposed open burning will be conducted, or if there is no street address of the property, the legal description of the property.

(ii) Name, mailing address, email address, and telephone number of the owner and lessee, if any, of the property on which the proposed open burning will be conducted.

(iii) A description of the measures that will be taken to prevent escaped burns, including but not limited to the availability of water.

(iv) Any other information specifically requested by the Regional Administrator.

(2) If the proposed open burning is consistent with this section and § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, the Regional Administrator may issue a small open burning permit. The permit will authorize burning consistent with this section and will include any conditions that the Regional Administrator determines are necessary to ensure compliance with this section, § 49.131, or the applicable EPA-approved Tribal open burning rule, and to protect the public health and welfare, including any monitoring, recordkeeping and reporting requirements.

(3) A permit issued under this section expires at the end of the calendar year in which it was issued unless it is revoked prior to that time by the Regional Administrator. The Regional Administrator may revoke a permit issued under this section, after written notice to the holder of the permit, upon finding that the permit must be revoked or revised to ensure compliance with this section, § 49.131 or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, or to protect the public health and welfare.

(4) If the owner or lessee of a property changes, a new permit is required in order to conduct small open burns on that property.

§ 49.143 Permit by rule for small open burns.

(a) *What is the purpose of this section?* This section establishes a permit by rule for small open burns within an Indian reservation to control emissions of air pollutants to the atmosphere and ground-level concentrations of $PM_{2.5}$ and PM_{10}.

(b) *Who is affected by this section?* This section applies to the owner and lessee, if any, of the property on which a small open burn is conducted and to any person who conducts a small open burn.

(c) *What is exempted from this section?* The following open burns are exempted from this section:

(1) Outdoor fires set for cultural or traditional purposes;

(2) Fires set for cultural or traditional purposes within structures such as smoke houses, sweat houses, or sweat lodges;

(3) Outdoor cooking fires;

(4) Fires set for recreational purposes;

(5) Fires set as part of a firefighting strategy (*e.g.,* back burn, fire break, or safety perimeter burn), if approved by the appropriate fire safety jurisdiction and only under an emergency or incident command situation;

(6) Fires set for the disposal of diseased animals or other material by order of a public health authority;

(7) Open outdoor fires used by qualified personnel to train firefighters in the methods of fire suppression and firefighting techniques conducted pursuant to § 49.131(e)(4);

(8) Open outdoor fires conducted by Tribal governments to dispose of fireworks and associated packaging materials pursuant to § 49.131(e)(5);

(9) Agricultural burning; and

(10) Forestry and silvicultural burning.

(d) *What are the requirements for small open burns under this section?* (1) The owner or lessee of a property must apply for and obtain approval of coverage under this section to conduct small open burns on that property.

(2) The date after which approval of coverage is required under this section in order to conduct small open burns is identified in the implementation plan in subpart M of this part for the specific Indian reservation where this section applies.

(3) A person subject to this section must ensure that the person conducting the small open burns is familiar with the requirements of the approval of coverage, ensure that the approval of coverage is available on the property during the small open burns and conduct the small open burns in accordance with this section and § 49.131 or the EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, as applicable.

(4) The person conducting the small open burn must check, as specified in the approval of coverage, whether burning is allowed for the area on that day and conduct and complete the burn during the hours that burning is allowed on that day.

(5) Nothing in this section exempts or excuses any person from complying with any applicable laws and ordinances of Tribal governments, local fire departments, or other governmental entities.

(e) *How will a person know if burning is allowed on a day?* (1) The Regional Administrator shall identify each day as a ''burn day'' or a ''no burn day'' and for a burn day, specify the hours and geographic area for which burning is allowed. When deciding whether to call a burn day, the Regional Administrator will take into consideration relevant factors including, but not limited to, the current and projected air quality conditions, the forecasted meteorological conditions, and other scheduled burning activities in the surrounding area. Where the Regional Administrator determines that open burning can be conducted without causing or contributing to an exceedance of a national ambient air quality standard or, when relevant, without causing any other adverse

impact on air quality, a burn day may be called.

(2) The Regional Administrator will publicize whether a day is a ''burn day'' or a ''no burn day'' in a pre-recorded phone message, on a website, or through other appropriate means as identified in the approval of coverage.

(f) *Are there additional requirements that must be met?* (1) The owner or lessee of a property who wishes to conduct small open burns on that property must submit an application to the Regional Administrator for approval of coverage under this section. An application must be submitted in writing, on forms provided by the Regional Administrator, and be received by the Regional Administrator at least 1 business day prior to conducting the first small open burn on the property. The forms will require, at a minimum, the following information:

(i) Street address of the property on which the proposed open burning will be conducted, or if there is no street address of the property, the legal description of the property.

(ii) Name, mailing address, email address, and telephone number of the owner and lessee, if any, of the property on which the proposed open burning will be conducted.

(iii) A description of the measures that will be taken to prevent escaped burns, including but not limited to the availability of water.

(iv) Any other information specifically requested by the Regional Administrator.

(2) Approval of coverage under this section is effective the day after receipt by the Regional Administrator of an application for coverage unless the Regional Administrator disapproves the application for coverage. The Regional Administrator may disapprove the application for coverage, in writing, if the proposed open burning is found to be inconsistent with this section, § 49.131, or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part.

(3) Approval of coverage under this section remains valid for the property for as long as it remains under the control of the owner and lessee who are identified on the application for the approval of coverage, unless the approval is revoked by the Regional Administrator. The Regional Administrator may revoke the approval of coverage under this section, after written notice to the applicant, upon finding that the approval must be revoked to ensure compliance with this section, § 49.131, or the applicable EPA-approved Tribal open burning rule as specified in the applicable implementation plan for the reservation in subpart M of this part, or to protect the public health and welfare.

(4) If the owner or lessee of a property changes, a new application for approval of coverage is required in order to conduct small open burns on that property.

Subpart M—Implementation Plans for Tribes—Region X

■ 5. Revise §§ 49.9861 through 49.10710 to read as follows:

Sec.

Implementation Plan for the Burns Paiute Tribe, Oregon

49.9861 Identification of plan.
49.9862 Approval status.
49.9863 [Reserved]
49.9864 [Reserved]
49.9865 Classification of regions for episode plans.
49.9866 Contents of implementation plan.
49.9867 [Reserved]
49.9868 Permits to construct.
49.9869 Permits to operate.
49.9870 Federally-promulgated regulations and Federal implementation plans.
49.9871–49.9890 [Reserved]

Implementation Plan for the Confederated Tribes of the Chehalis Reservation, Washington

49.9891 Identification of plan.
49.9892 Approval status.
49.9893 [Reserved]
49.9894 [Reserved]
49.9895 Classification of regions for episode plans.
49.9896 Contents of implementation plan.
49.9897 [Reserved]
49.9898 Permits to construct.
49.9899 Permits to operate.
49.9900 Federally-promulgated regulations and Federal implementation plans.
49.9901–49.9920 [Reserved]

Implementation Plan for the Coeur D'alene Tribe, Idaho

49.9921 Identification of plan.
49.9922 Approval status.
49.9923 [Reserved]
49.9924 [Reserved]
49.9925 Classification of regions for episode plans.
49.9926 Contents of implementation plan.
49.9927 [Reserved]
49.9928 Permits to construct.
49.9929 Permits to operate.
49.9930 Federally-promulgated regulations and Federal implementation plans.
49.9931–49.9950 [Reserved]

Implementation Plan for the Confederated Tribes of the Colville Reservation, Washington

49.9951 Identification of plan.
49.9952 Approval status.
49.9953 [Reserved]
49.9954 [Reserved]
49.9955 Classification of regions for episode plans.
49.9956 Contents of implementation plan.
49.9957 [Reserved]
49.9958 Permits to construct.
49.9959 Permits to operate.
49.9960 Federally-promulgated regulations and Federal implementation plans.
49.9961–49.9980 [Reserved]

Implementation Plan for the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, Oregon

49.9981 Identification of plan.
49.9982 Approval status.
49.9983 [Reserved]
49.9984 [Reserved]
49.9985 Classification of regions for episode plans.
49.9986 Contents of implementation plan.
49.9987 [Reserved]
49.9988 Permits to construct.
49.9989 Permits to operate.
49.9990 Federally-promulgated regulations and Federal implementation plans.
49.9991–49.10010 [Reserved]

Implementation Plan for the Coquille Indian Tribe, Oregon

49.10011 Identification of plan.
49.10012 Approval status.
49.10013 [Reserved]
49.10014 [Reserved]
49.10015 Classification of regions for episode plans.
49.10016 Contents of implementation plan.
49.10017 [Reserved]
49.10018 Permits to construct.
49.10019 Permits to operate.
49.10020 Federally-promulgated regulations and Federal implementation plans.
49.10021–49.10040 [Reserved]

Implementation Plan for the Cow Creek Band of Umpqua Tribe of Indians, Oregon

49.10041 Identification of plan.
49.10042 Approval status.
49.10043 [Reserved]
49.10044 [Reserved]
49.10045 Classification of regions for episode plans.
49.10046 Contents of implementation plan.
49.10047 [Reserved]
49.10048 Permits to construct.
49.10049 Permits to operate.
49.10050 Federally-promulgated regulations and Federal implementation plans.
49.10051–49.10070 [Reserved]

Implementation Plan for the Cowlitz Indian Tribe, Washington

49.10071 Identification of plan.
49.10072 Approval status.
49.10073 [Reserved]
49.10074 [Reserved]
49.10075 Classification of regions for episode plans.
49.10076 Contents of implementation plan.
49.10077 [Reserved]
49.10078 Permits to construct.
49.10079 Permits to operate.
49.10080 Federally-promulgated regulations and Federal implementation plans.
49.10081–49.10100 [Reserved]

Implementation Plan for the Confederated Tribes of the Grand Ronde Community of Oregon

49.10101 Identification of plan.
49.10102 Approval status.
49.10103 [Reserved]
49.10104 [Reserved]
49.10105 Classification of regions for episode plans.
49.10106 Contents of implementation plan.
49.10107 [Reserved]
49.10108 Permits to construct.
49.10109 Permits to operate.
49.10110 Federally-promulgated regulations and Federal implementation plans.
49.10111–49.10130 [Reserved]

Implementation Plan for the Hoh Indian Tribe, Washington

49.10131 Identification of plan.
49.10132 Approval status.
49.10133 [Reserved]
49.10134 [Reserved]
49.10135 Classification of regions for episode plans.
49.10136 Contents of implementation plan.
49.10137 [Reserved]
49.10138 Permits to construct.
49.10139 Permits to operate.
49.10140 Federally-promulgated regulations and Federal implementation plans.
49.10141–49.10160 [Reserved]

Implementation Plan for the Jamestown S'klallam Tribe, Washington

49.10161 Identification of plan.
49.10162 Approval status.
49.10163 [Reserved]
49.10164 [Reserved]
49.10165 Classification of regions for episode plans.
49.10166 Contents of implementation plan.
49.10167 [Reserved]
49.10168 Permits to construct.
49.10169 Permits to operate.
49.10170 Federally-promulgated regulations and Federal implementation plans.
49.10171–49.10190 [Reserved]

Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington

49.10191 Identification of plan.
49.10192 Approval status.
49.10193 [Reserved]
49.10194 [Reserved]
49.10195 Classification of regions for episode plans.
49.10196 Contents of implementation plan.
49.10197 [Reserved]
49.10198 Permits to construct.
49.10199 Permits to operate.
49.10200 Federally-promulgated regulations and Federal implementation plans.
49.10201–49.10220 [Reserved]

Implementation Plan for the Klamath Tribes, Oregon

49.10221 Identification of plan.
49.10222 Approval status.
49.10223 [Reserved]
49.10224 [Reserved]
49.10225 Classification of regions for episode plans.
49.10226 Contents of implementation plan.
49.10227 [Reserved]
49.10228 Permits to construct.
49.10229 Permits to operate.
49.10230 Federally-promulgated regulations and Federal implementation plans.
§ 49.10231–49.10250 [Reserved]

Implementation Plan for the Kootenai Tribe of Idaho

49.10251 Identification of plan.
49.10252 Approval status.
49.10253 [Reserved]
49.10254 [Reserved]
49.10255 Classification of regions for episode plans.
49.10256 Contents of implementation plan.
49.10257 [Reserved]
49.10258 Permits to construct.
49.10259 Permits to operate.
49.10260 Federally-promulgated regulations and Federal implementation plans.
49.103261–49.10280 [Reserved]

Implementation Plan for the Lower Elwha Tribal Community, Washington

49.10281 Identification of plan.
49.10282 Approval status.
49.10283 [Reserved]
49.10284 [Reserved]
49.10285 Classification of regions for episode plans.
49.10286 Contents of implementation plan.
49.10287 [Reserved]
49.10288 Permits to construct.
49.10289 Permits to operate.
49.10290 Federally-promulgated regulations and Federal implementation plans.
49.10291–49.10310 [Reserved]

Implementation Plan for the Lummi Tribe of the Lummi Reservation, Washington

49.10311 Identification of plan.
49.10312 Approval status.
49.10313 [Reserved]
49.10314 [Reserved]
49.10315 Classification of regions for episode plans.
49.10316 Contents of implementation plan.
49.10317 [Reserved]
49.10318 Permits to construct.
49.10319 Permits to operate.
49.10320 Federally-promulgated regulations and Federal implementation plans.
49.10321–49.10340 [Reserved]

Implementation Plan for the Makah Indian Tribe of the Makah Indian Reservation, Washington

49.10341 Identification of plan.
49.10342 Approval status.
49.10343 [Reserved]
49.10344 [Reserved]
49.10345 Classification of regions for episode plans.
49.10346 Contents of implementation plan.
49.10347 [Reserved]
49.10348 Permits to construct.
49.10349 Permits to operate.
49.10350 Federally-promulgated regulations and Federal implementation plans.
49.10351–49.10370 [Reserved]

Implementation Plan for the Muckleshoot Indian Tribe, Washington

49.10371 Identification of plan.
49.10372 Approval status.
49.10373 [Reserved]
49.10374 [Reserved]
49.10375 Classification of regions for episode plans.
49.10376 Contents of implementation plan.
49.10377 [Reserved]
49.10378 Permits to construct.
49.10379 Permits to operate.
49.10380 Federally-promulgated regulations and Federal implementation plans.
49.10381–49.10400 [Reserved]

Implementation Plan for the Nez Perce Tribe, Idaho

49.10401 Identification of plan.
49.10402 Approval status.
49.10403 [Reserved]
49.10404 [Reserved]
49.10405 Classification of regions for episode plans.
49.10406 Contents of implementation plan.
49.10407 [Reserved]
49.10408 Permits to construct.
49.10409 Permits to operate.
49.10410 Federally-promulgated regulations and Federal implementation plans.
49.10411 Permits for large open burning, agricultural burning, forestry and silvicultural burning, and permit by rule for small open burning.
49.10412–49.10430 [Reserved]

Implementation Plan for the Nisqually Indian Tribe, Washington

49.10431 Identification of plan.
49.10432 Approval status.
49.10433 [Reserved]
49.10434 [Reserved]
49.10435 Classification of regions for episode plans.
49.10436 Contents of implementation plan.
49.10437 [Reserved]
49.10438 Permits to construct.
49.10439 Permits to operate.
49.10440 Federally-promulgated regulations and Federal implementation plans.
49.10441–49.10460 [Reserved]

Implementation Plan for the Nooksack Indian Tribe, Washington

49.10461 Identification of plan.
49.10463 [Reserved]
49.10464 [Reserved]
49.10465 Classification of regions for episode plans.
49.10466 Contents of implementation plan.
49.10467 [Reserved]
49.10468 Permits to construct.
49.10469 Permits to operate.
49.10470 Federally-promulgated regulations and Federal implementation plans.
49.10471–49.10490 [Reserved]

Implementation Plan for the Port Gamble S'klallam Tribe, Washington

49.10491 Identification of plan.
49.10492 Approval status.
49.10493 [Reserved]
49.10494 [Reserved]
49.10495 Classification of regions for episode plans.
49.10496 Contents of implementation plan.
49.10497 [Reserved]
49.10498 Permits to construct.
49.10499 Permits to operate.
49.10500 Federally-promulgated regulations and Federal implementation plans.
49.10501–49.10520 [Reserved]

Implementation Plan for the Puyallup Tribe of the Puyallup Reservation, Washington

49.10521 Identification of plan.
49.10522 Approval status.
49.10523 [Reserved]
49.10524 [Reserved]
49.10525 Classification of regions for episode plans.
49.10526 Contents of implementation plan.
49.10527 [Reserved]
49.10528 Permits to construct.
49.10529 Permits to operate.
49.10530 Federally-promulgated regulations and Federal implementation plans.
49.10531–49.10550 [Reserved]

Implementation Plan for the Quileute Tribe of the Quileute Reservation, Washington

49.10551 Identification of plan.
49.10552 Approval status.
49.10553 [Reserved]
49.10554 [Reserved]
49.10555 Classification of regions for episode plans.
49.10556 Contents of implementation plan.
49.10557 [Reserved]
49.10558 Permits to construct.
49.10559 Permits to operate.
49.10560 Federally-promulgated regulations and Federal implementation plans.
49.10561–49.10580 [Reserved]

Implementation Plan for the Quinault Indian Nation, Washington

49.10581 Identification of plan.
49.10582 Approval status.
49.10583 [Reserved]
49.10584 [Reserved]
49.10585 Classification of regions for episode plans.
49.10586 Contents of implementation plan.
49.10587 [Reserved]
49.10588 Permits to construct.
49.10589 Permits to operate.
49.10590 Federally-promulgated regulations and Federal implementation plans.
49.10591–49.10610 [Reserved]

Implementation Plan for the Samish Indian Nation, Washington

49.10611 Identification of plan.
49.10612 Approval status.
49.10613 [Reserved]
49.10614 [Reserved]
49.10615 Classification of regions for episode plans.
49.10616 Contents of implementation plan.
49.10617 [Reserved]
49.10618 Permits to construct.
49.10619 Permits to operate.
49.10620 Federally-promulgated regulations and Federal implementation plans.
49.10621–49.10640 [Reserved]

Implementation Plan for the Sauk-Suiattle Indian Tribe, Washington

49.10641 Identification of plan.
49.10642 Approval status.
49.10643 [Reserved]
49.10644 [Reserved]
49.10645 Classification of regions for episode plans.
49.10646 Contents of implementation plan.
49.10647 [Reserved]
49.10648 Permits to construct.
49.10649 Permits to operate.
49.10650 Federally-promulgated regulations and Federal implementation plans.
49.10651–49.10670 [Reserved]

Implementation Plan for the Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation, Washington

49.10671 Identification of plan.
49.10672 Approval status.
49.10673 [Reserved]
49.10674 [Reserved]
49.10675 Classification of regions for episode plans.
49.10676 Contents of implementation plan.
49.10677 [Reserved]
49.10678 Permits to construct.
49.10679 Permits to operate.
49.10680 Federally-promulgated regulations and Federal implementation plans.
49.10681–49.10700 [Reserved]

Implementation Plan for the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho

49.10701 Identification of plan.
49.10702 Approval status.
49.10703 [Reserved]
49.10704 [Reserved]
49.10705 Classification of regions for episode plans.
49.10706 Contents of implementation plan.
49.10707 [Reserved]
49.10708 Permits to construct.
49.10709 Permits to operate.
49.10710 Federally-promulgated regulations and Federal implementation plans.

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Implementation Plan for the Burns Paiute Tribe, Oregon

§ 49.9861 Identification of plan.

This section and §§ 49.9862 through 49.9890 contain the implementation plan for the Burns Paiute Tribe. This plan consists of Federal regulations and measures which apply within the Burns Paiute Reservation.

§ 49.9862 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Burns Paiute Reservation.

§ 49.9863 [Reserved]

§ 49.9864 [Reserved]

§ 49.9865 Classification of regions for episode plans.

The air quality control region which encompasses the Burns Paiute Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.9866 Contents of implementation plan.

The implementation plan for the Burns Paiute Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.9867 [Reserved]

§ 49.9868 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.9869 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.9870 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Burns Paiute Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.9871–49.9890 [Reserved]

Implementation Plan for the Confederated Tribes of the Chehalis Reservation, Washington

§ 49.9891 Identification of plan.

This section and §§ 49.9892 through 49.9920 contain the implementation plan for the Confederated Tribes of the Chehalis Reservation. This plan consists of Federal regulations and measures which apply within the Chehalis Reservation.

§ 49.9892 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Chehalis Reservation.

§ 49.9893 [Reserved]

§ 49.9894 [Reserved]

§ 49.9895 Classification of regions for episode plans.

The air quality control region which encompasses the Chehalis Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.9896 Contents of implementation plan.

The implementation plan for the Chehalis Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.9897 [Reserved]

§ 49.9898 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.9899 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.9900 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Chehalis Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.9901–49.9920 [Reserved]

Implementation Plan for the Coeur D'alene Tribe, Idaho

§ 49.9921 Identification of plan.

This section and §§ 49.9922 through 49.9950 contain the implementation plan for the Coeur D'Alene Tribe. This plan consists of Federal regulations and measures which apply within the Coeur D'Alene Reservation.

§ 49.9922 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Coeur D'Alene Reservation.

§ 49.9923 [Reserved]

§ 49.9924 [Reserved]

§ 49.9925 Classification of regions for episode plans.

The air quality control region which encompasses the Coeur D'Alene Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	II

§ 49.9926 Contents of implementation plan.

The implementation plan for the Coeur D'Alene Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(f) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(g) Section 49.130 Rule for limiting sulfur in fuels.

(h) Section 49.131 General rule for open burning.

(i) Section 49.135 Rule for emissions detrimental to public health or welfare.

(j) Section 49.137 Rule for air pollution episodes.

(k) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(l) Section 49.139 Rule for non-Title V operating permits.

(m) Section 49.140 Rule for residential wood burning devices.

§ 49.9927 EPA-approved Tribal rules and plans. [Reserved]

§ 49.9928 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.9929 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.9930 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Coeur D'Alene Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(f) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(g) Section 49.130 Rule for limiting sulfur in fuels.

(h) Section 49.131 General rule for open burning.

(i) Section 49.135 Rule for emissions detrimental to public health or welfare.

(j) Section 49.137 Rule for air pollution episodes.

(k) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(l) Section 49.139 Rule for non-Title V operating permits.

(m) Section 49.140 Rule for residential wood burning devices.

Note 1 to § 49.9930: EPA entered into a Partial Delegation of Administrative Authority Agreement with the Coeur D'Alene Tribe on August 26, 2008 for the rules listed in paragraphs (b), (h), and (j) of this section.

§§ 49.9931–49.9950 [Reserved]

Implementation Plan for the Confederated Tribes of the Colville Reservation, Washington

§ 49.9951 Identification of plan.

This section and §§ 49.9952 through 49.9980 contain the implementation plan for the Confederated Tribes of the Colville Reservation. This plan consists of Federal regulations and measures which apply within the Colville Reservation.

§ 49.9952 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Colville Reservation.

§ 49.9953 [Reserved]

§ 49.9954 [Reserved]

§ 49.9955 Classification of regions for episode plans.

The air quality control region which encompasses the Colville Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.9956 Contents of implementation plan.

The implementation plan for the Colville Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.127 Rule for woodwaste burners.

(f) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(g) Section 49.129 Rule for limiting emissions of sulfur dioxides.

(h) Section 49.130 Rule for limiting sulfur in fuels.

(i) Section 49.131 General rule for open burning.

(j) Section 49.135 Rule for emissions detrimental to public health or welfare.

(k) Section 49.137 Rule for air pollution episodes.

(l) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(m) Section 49.139 Rule for non-Title V operating permits.

(n) Section 49.140 Rule for residential wood burning devices.

(o) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

§ 49.9957 [Reserved]

§ 49.9958 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.9959 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.9960 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Colville Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.127 Rule for woodwaste burners.

(f) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(g) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(h) Section 49.130 Rule for limiting sulfur in fuels.

(i) Section 49.131 General rule for open burning.

(j) Section 49.135 Rule for emissions detrimental to public health or welfare.

(k) Section 49.137 Rule for air pollution episodes.

(l) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(m) Section 49.139 Rule for non-Title V operating permits.

(n) Section 49.140 Rule for residential wood burning devices.

(o) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

Note 1 to § 49.9960: The EPA entered into a Partial Delegation of Administrative Authority Agreement with the Confederated Tribes of the Colville Reservation on October 26, 2015, for the rules listed in paragraphs (b), (i), and (k) of this section.

§§ 49.9961–49.9980 [Reserved]

Implementation Plan for the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians, Oregon

§ 49.9981 Identification of plan.

This section and §§ 49.9982 through 49.10010 contain the implementation plan for the Confederated Tribes of the Coos, Lower Umpqua and Siuslaw Indians. This plan consists of Federal regulations and measures which apply within the Coos, Lower Umpqua and Siuslaw Reservation.

§ 49.9982 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Coos, Lower Umpqua and Siuslaw Reservation.

§ 49.9983 [Reserved]

§ 49.9984 [Reserved]

§ 49.9985 Classification of regions for episode plans.

The air quality control region which encompasses the Coos, Lower Umpqua and Siuslaw Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.9986 Contents of implementation plan.

The implementation plan for the Coos, Lower Umpqua and Siuslaw Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.9987 [Reserved]

§ 49.9988 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.9989 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.9990 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Coos, Lower Umpqua and Siuslaw Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.9991–49.10010 [Reserved]

Implementation Plan for the Coquille Indian Tribe, Oregon

§ 49.10011 Identification of plan.

This section and §§ 49.10012 through 49.10040 contain the implementation plan for the Coquille Indian Tribe. This plan consists of Federal regulations and measures which apply within the Coquille Reservation.

§ 49.10012 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Coquille Reservation.

§ 49.10013 [Reserved]

§ 49.10014 [Reserved]

§ 49.10015 Classification of regions for episode plans.

The air quality control region which encompasses the Coquille Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.10016 Contents of implementation plan.

The implementation plan for the Coquille Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10017 [Reserved]

§ 49.10018 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to 40 CFR 52.21 and §§ 49.151 through 49.173, as applicable.

§ 49.10019 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10020 Federally-promulgated regulations and Federal implementation plans.

The following regulations are incorporated and made part of the implementation plan for the Coquille Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10021–49.10040 [Reserved]

Implementation Plan for the Cow Creek Band of Umpqua Tribe of Indians, Oregon

§ 49.10041 Identification of plan.

This section and §§ 49.10042 through 49.10070 contain the implementation plan for the Cow Creek Band of Umpqua Tribe of Indians. This plan consists of Federal regulations and measures which apply within the Cow Creek Umpqua Reservation.

§ 49.10042 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Cow Creek Umpqua Reservation.

§ 49.10043 [Reserved]

§ 49.10044 [Reserved]

§ 49.10045 Classification of regions for episode plans.

The air quality control region which encompasses the Cow Creek Umpqua Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.10046 Contents of implementation plan.

The implementation plan for the Cow Creek Umpqua Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10047 [Reserved]

§ 49.10048 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10049 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10050 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Cow Creek Umpqua Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10051–49.10070 [Reserved]

Implementation Plan for the Cowlitz Indian Tribe, Washington

§ 49.10071 Identification of plan.

This section and §§ 49.10072 through 49.10100 contain the implementation plan for the Cowlitz Indian Tribe. This plan consists of Federal regulations and measures which apply within the Cowlitz Indian Reservation.

§ 49.10072 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Cowlitz Indian Reservation.

§ 49.10073 [Reserved]

§ 49.10074 [Reserved]

§ 49.10075 Classification of regions for episode plans.

The air quality control region which encompasses the Cowlitz Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10076 Contents of implementation plan.

The implementation plan for the Cowlitz Indian Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10077 EPA-approved Tribal rules and plans. [Reserved]

§ 49.10078 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10079 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10080 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Cowlitz Indian Reservation:

(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10081–49.10100 [Reserved]

Implementation Plan for the Confederated Tribes of the Grand Ronde Community of Oregon

§ 49.10101 Identification of plan.

This section and §§ 49.10102 through 49.10130 contain the implementation plan for the Confederated Tribes of the Grand Ronde Community. This plan consists of Federal regulations and measures which apply within the Grand Ronde Reservation.

§ 49.10102 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Grand Ronde Reservation.

§ 49.10103 [Reserved]

§ 49.10104 [Reserved]

§ 49.10105 Classification of regions for episode plans.

The air quality control region which encompasses the Grand Ronde Reservation:

Pollutant	Classification
Carbon monoxide	I
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10106 Contents of implementation plan.

The implementation plan for the Grand Ronde Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10107 [Reserved]

§ 49.10108 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10109 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10110 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Grand Ronde Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10111–49.10130 [Reserved]

Implementation Plan for the Hoh Indian Tribe, Washington

§ 49.10131 Identification of plan.

This section and §§ 49.10132 through 49.10160 contain the implementation plan for the Hoh Indian Tribe. This plan consists of Federal regulations and measures which apply within the Hoh Indian Reservation.

§ 49.10132 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Hoh Indian Reservation.

§ 49.10133 [Reserved]

§ 49.10134 [Reserved]

§ 49.10135 Classification of regions for episode plans.

The air quality control region which encompasses the Hoh Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10136 Contents of implementation plan.

The implementation plan for the Hoh Indian Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10137 [Reserved]

§ 49.10138 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10139 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10140 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Hoh Indian Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10141–49.10160 [Reserved]

Implementation Plan for the Jamestown S'klallam Tribe, Washington

§ 49.10161 Identification of plan.

This section and §§ 49.10162 through 49.10190 contain the implementation plan for the Jamestown S'Klallam Tribe. This plan consists of Federal regulations and measures which apply within the Jamestown S'Klallam Reservation.

§ 49.10162 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Jamestown S'Klallam Reservation.

§ 49.10163 [Reserved]

§ 49.10164 [Reserved]

§ 49.10165 Classification of regions for episode plans.

The air quality control region which encompasses the Jamestown S'Klallam Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10166 Contents of implementation plan.

The implementation plan for the Jamestown S'Klallam Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10167 [Reserved]

§ 49.10168 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10169 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10170 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Jamestown S'Klallam Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10171–49.10190 [Reserved]

Implementation Plan for the Kalispel Indian Community of the Kalispel Reservation, Washington

§ 49.10191 Identification of plan.

This section and §§ 49.1019192 through 49.10220 contain the implementation plan for the Kalispel Indian Community. This plan consists of Federal regulations and measures which apply within the Kalispel Reservation.

§ 49.10192 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Kalispel Reservation.

§ 49.10193 [Reserved]

§ 49.10194 [Reserved]

§ 49.10195 Classification of regions for episode plans.

The air quality control region which encompasses the Kalispel Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.10196 Contents of implementation plan.

The implementation plan for the Kalispel Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10197 [Reserved]

§ 49.10198 Permits to construct.

(a) Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.
(b) In accordance with section 164 of the Clean Air Act and the provisions of 40 CFR 52.21(g), the original Kalispel Reservation, as established by Executive Order No. 1904, signed by President Woodrow Wilson on March 23, 1914, is designated as a Class I area for the purposes of prevention of significant deterioration of air quality.

§ 49.10199 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10200 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Kalispel Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10201–49.10220 [Reserved]

Implementation Plan for the Klamath Tribes, Oregon

§ 49.10221 Identification of plan.

This section and §§ 49.10222 through 49.10250 contain the implementation plan for the Klamath Tribes. This plan consists of Federal regulations and measures which apply within the Klamath Reservation.

§ 49.10222 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Klamath Reservation.

§ 49.10223 [Reserved]

§ 49.10224 [Reserved]

§ 49.10225 Classification of regions for episode plans.

The air quality control region which encompasses the Klamath Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.10226 Contents of implementation plan.

The implementation plan for the Klamath Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10227 [Reserved]

§ 49.10228 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10229 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10230 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Klamath Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10231–49.10250 [Reserved]

Implementation Plan for the Kootenai Tribe of Idaho

§ 49.10251 Identification of plan.

This section and §§ 49.10252 through 49.10280 contain the implementation plan for the Kootenai Tribe of Idaho. This plan consists of Federal regulations and measures which apply within the Kootenai Reservation.

§ 49.10252 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Kootenai Reservation.

§ 49.10253 [Reserved]

§ 49.10254 [Reserved]

§ 49.10255 Classification of regions for episode plans.

The air quality control region which encompasses the Kootenai Reservation

is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	III

§ 49.10256 Contents of implementation plan.

The implementation plan for the Kootenai Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10257 [Reserved]

§ 49.10258 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10259 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10260 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Kootenai Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.103261–49.10280 [Reserved]

Implementation Plan for the Lower Elwha Tribal Community, Washington

§ 49.10281 Identification of plan.

This section and §§ 49.10282 through 49.10310 contain the implementation plan for the Lower Elwha Tribal Community. This plan consists of Federal regulations and measures which apply within the Lower Elwha Reservation.

§ 49.10282 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Lower Elwha Reservation.

§ 49.10283 [Reserved]

§ 49.10284 [Reserved]

§ 49.10285 Classification of regions for episode plans.

The air quality control region which encompasses the Lower Elwha Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10286 Contents of implementation plan.

The implementation plan for the Lower Elwha Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10287 [Reserved]

§ 49.10288 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10289 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10290 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Lower Elwha Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10291–49.10310 [Reserved]

Implementation Plan for the Lummi Tribe of the Lummi Reservation, Washington

§ 49.10311 Identification of plan.

This section and §§ 49.10312 through 49.10340 contain the implementation plan for the Lummi Tribe of the Lummi Reservation. This plan consists of Federal regulations and measures which apply within the Lummi Reservation.

§ 49.10312 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Lummi Reservation.

§ 49.10313 [Reserved]

§ 49.10314 [Reserved]

§ 49.10315 Classification of regions for episode plans.

The air quality control region which encompasses the Lummi Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10316 Contents of implementation plan.

The implementation plan for the Lummi Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10317 [Reserved]

§ 49.10318 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10319 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10320 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Lummi Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10321–49.10340 [Reserved]

Implementation Plan for the Makah Indian Tribe of the Makah Indian Reservation, Washington

§ 49.10341 Identification of plan.

This section and §§ 49.10342 through 49.10370 contain the implementation plan for the Makah Indian Tribe. This plan consists of Federal regulations and measures which apply within the Makah Indian Reservation.

§ 49.10342 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Makah Indian Reservation.

§ 49.10343 [Reserved]

§ 49.10344 [Reserved]

§ 49.10345 Classification of regions for episode plans.

The air quality control region which encompasses the Makah Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10346 Contents of implementation plan.

The implementation plan for the Makah Indian Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10347 [Reserved]

§ 49.10348 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10349 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10350 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Makah Indian Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10351–49.10370 [Reserved]

Implementation Plan for the Muckleshoot Indian Tribe, Washington

§ 49.10371 Identification of plan.

This section and §§ 49.10372 through 49.10400 contain the implementation plan for the Muckleshoot Indian Tribe. This plan consists of Federal regulations and measures which apply within the Muckleshoot Reservation.

§ 49.10372 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Muckleshoot Reservation.

§ 49.10373 [Reserved]

§ 49.10374 [Reserved]

§ 49.10375 Classification of regions for episode plans.

The air quality control region which encompasses the Muckleshoot Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10376 Contents of implementation plan.

The implementation plan for the Muckleshoot Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10377 [Reserved]

§ 49.10378 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10379 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10380 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Muckleshoot Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10381–49.10400 [Reserved]

Implementation Plan for the Nez Perce Tribe, Idaho

§ 49.10401 Identification of plan.

This section and §§ 49.10402 through 49.10430 contain the implementation plan for the Nez Perce Tribe. This plan consists of Federal regulations and measures which apply within the Nez Perce Reservation, as described in the 1863 Nez Perce Treaty.

§ 49.10402 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Nez Perce Reservation.

§ 49.10403 [Reserved]

§ 49.10404 [Reserved]

§ 49.10405 Classification of regions for episode plans.

The air quality control region which encompasses the Nez Perce Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	III

§ 49.10406 Contents of implementation plan.

The implementation plan for the Nez Perce Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.127 Rule for woodwaste burners.

(f) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(g) Section 49.129 Rule for limiting emissions of sulfur dioxides.

(h) Section 49.130 Rule for limiting sulfur in fuels.

(i) Section 49.131 General rule for open burning.

(j) Section 49.132 Rule for large open burning permits.

(k) Section 49.133 Rule for agricultural burning permits.

(l) Section 49.134 Rule for forestry and silvicultural burning permits.

(m) Section 49.135 Rule for emissions detrimental to public health or welfare.

(n) Section 49.137 Rule for air pollution episodes.

(o) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(p) Section 49.139 Rule for non-Title V operating permits.

(q) Section 49.140 Rule for residential wood burning devices.

(r) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

(s) Section 49.143 Permit by rule for small open burning.

§ 49.10407 [Reserved]

§ 49.10408 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10409 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10410 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Nez Perce Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.127 Rule for woodwaste burners.

(f) Section 49.128 Rule for limiting particulate matter emissions from wood products industry sources.

(g) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(h) Section 49.130 Rule for limiting sulfur in fuels.

(i) Section 49.131 General rule for open burning.

(j) Section 49.132 Rule for large open burning permits.

(k) Section 49.133 Rule for agricultural burning permits.

(l) Section 49.134 Rule for forestry and silvicultural burning permits.

(m) Section 49.135 Rule for emissions detrimental to public health or welfare.

(n) Section 49.137 Rule for air pollution episodes.

(o) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(p) Section 49.139 Rule for non-Title V operating permits.

(q) Section 49.140 Rule for residential wood burning devices.

(r) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

(s) Section 49.143 Permit by rule for small open burning.

Note 1 to § 49.10410: EPA entered into a Partial Delegation of Administrative Authority Agreement with the Nez Perce Tribe on June 27, 2005 for the rules listed in paragraphs (b), (i), (j), (k), (l), and (n) of this section.

§ 49.10411 Permits for large open burning, agricultural burning, forestry and silvicultural burning, and permit by rule for small open burning.

(a) From June 7, 2005 through December 31, 2023, small open burns and large open burns are subject to the permitting requirements of § 49.132.

(b) Beginning January 1, 2024, large open burns are subject to the permitting requirements of § 49.132.

(c) Beginning June 7, 2005, agricultural burns are subject to the permitting requirements of § 49.133.

(d) Beginning June 7, 2005, forestry and silvicultural burns are subject to the permitting requirements of § 49.134.

(e) Beginning January 1, 2024, small open burns are subject to the permitting requirements of § 49.143.

§§ 49.10412–49.10430 [Reserved]

Implementation Plan for the Nisqually Indian Tribe, Washington

§ 49.10431 Identification of plan.

This section and §§ 49.10432 through 49.10460 contain the implementation plan for the Nisqually Indian Tribe. This plan consists of Federal regulations and measures which apply within the Nisqually Reservation.

§ 49.10432 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Nisqually Reservation.

§ 49.10433 [Reserved]

§ 49.10434 [Reserved]

§ 49.10435 Classification of regions for episode plans.

The air quality control region which encompasses the Nisqually Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10436 Contents of implementation plan.

The implementation plan for the Nisqually Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10437 [Reserved]

§ 49.10438 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and40 CFR 52.21, as applicable.

§ 49.10439 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10440 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Nisqually Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10441–49.10460 [Reserved]

Implementation Plan for the Nooksack Indian Tribe, Washington

§ 49.10461 Identification of plan.

This section and §§ 49.10462 through 49.10490 contain the implementation plan for the Nooksack Indian Tribe. This plan consists of Federal regulations and measures which apply within the Reservation of the Nooksack Indian Tribe.

§ 49.10462 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Reservation of the Nooksack Indian Tribe.

§ 49.10463 [Reserved]

§ 49.10464 [Reserved]

§ 49.10465 Classification of regions for episode plans.

The air quality control region which encompasses the Reservation of the

Nooksack Indian Tribe is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10466 Contents of implementation plan.

The implementation plan for the Reservation of the Nooksack Indian Tribe consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10467 [Reserved]

§ 49.10468 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, 40 CFR 52.21, as applicable.

§ 49.10469 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10470 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Reservation of the Nooksack Indian Tribe:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10471–49.10490 [Reserved]

Implementation Plan for the Port Gamble S'klallam Tribe, Washington

§ 49.10491 Identification of plan.

This section and §§ 49.10492 through 49.10520 contain the implementation plan for the Port Gamble S'Klallam Tribe. This plan consists of Federal regulations and measures which apply within the Port Gamble S'Klallam Reservation.

§ 49.10492 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Port Gamble S'Klallam Reservation.

§ 49.10493 [Reserved]

§ 49.10494 [Reserved]

§ 49.10495 Classification of regions for episode plans.

The air quality control region which encompasses the Port Gamble S'Klallam Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10496 Contents of implementation plan.

The implementation plan for the Port Gamble S'Klallam Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10497 EPA-approved Tribal rules and plans. [Reserved]

§ 49.10498 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10499 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10500 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Port Gamble S'Klallam Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10501–49.10520 [Reserved]

Implementation Plan for the Puyallup Tribe of the Puyallup Reservation, Washington

§ 49.10521 Identification of plan.

This section and §§ 49.10522 through 49.10550 contain the implementation

plan for the Puyallup Tribe of the Puyallup Reservation. This plan consists of Federal regulations and measures which apply to trust and restricted lands within the 1873 Survey Area of the Puyallup Reservation (the Puyallup Reservation), consistent with the Puyallup Tribe of Indians Land Claims Settlement Act, ratified by Congress in 1989 (25 U.S.C. 1773).

§ 49.10522 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the lands in trust that are within the Puyallup Reservation.

§ 49.10523 [Reserved]

§ 49.10524 [Reserved]

§ 49.10525 Classification of regions for episode plans.

The air quality control region which encompasses the lands in trust that are within the Puyallup Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10526 Contents of implementation plan.

The implementation plan for the lands in trust that are within the Puyallup Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10527 [Reserved]

§ 49.10528 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10529 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10530 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the lands in trust that are within the Puyallup Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10531–49.10550 [Reserved]

Implementation Plan For The Quileute Tribe Of The Quileute Reservation, Washington

§ 49.10551 Identification of plan.

This section and §§ 49.10552 through 49.10580 contain the implementation plan for the Quileute Tribe. This plan consists of Federal regulations and measures which apply within the Quileute Reservation.

§ 49.10552 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Quileute Reservation.

§ 49.10553 [Reserved]

§ 49.10554 [Reserved]

§ 49.10555 Classification of regions for episode plans.

The air quality control region which encompasses the Quileute Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10556 Contents of implementation plan.

The implementation plan for the Quileute Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10557 [Reserved]

§ 49.10558 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10559 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10560 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Quileute Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10561–49.10580 [Reserved]

Implementation Plan For The Quinault Indian Nation, Washington

§ 49.10581 Identification of plan.

This section and §§ 49.10582 through 49.10610 contain the implementation plan for the Quinault Indian Nation. This plan consists of Federal regulations and measures which apply within the Quinault Indian Reservation.

§ 49.10582 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Quinault Indian Reservation.

§ 49.10583 [Reserved]

§ 49.10584 [Reserved]

§ 49.10585 Classification of regions for episode plans.

The air quality control region which encompasses the Quinault Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10586 Contents of implementation plan.

The implementation plan for the Quinault Indian Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10587 [Reserved]

§ 49.10588 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10589 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10590 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Quinault Indian Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

Note 1 to § 49.10590: EPA entered into a Partial Delegation of Administrative Authority Agreement with the Quinault Indian Nation on October 4, 2007 for the rules listed in paragraphs (b), (g), and (i) of this section.

§§ 49.10591–49.10610 [Reserved]

Implementation Plan for the Samish Indian Nation, Washington

§ 49.10611 Identification of plan.

This section and §§ 49.10612 through 49.10640 contain the implementation plan for the Samish Indian Nation. This plan consists of Federal regulations and measures which apply within the Samish Indian Nation Reservation.

Note 1 to § 49.10611: As of [DATE OF PUBLICATION OF THE FINAL RULE], the Samish Indian Nation Reservation is comprised only of lands held in trust for the Samish Indian Nation.

§ 49.10612 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the lands held in trust for the Samish Indian Nation Reservation.

§ 49.10613 [Reserved]

§ 49.10614 [Reserved]

§ 49.10615 Classification of regions for episode plans.

The air quality control region which encompasses the lands held in trust for the Samish Indian Nation Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10616 Contents of implementation plan.

The implementation plan for the lands held in trust for the Samish Indian Nation Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10617 [Reserved]

§ 49.10618 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10619 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10620 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the lands held in trust for the Samish Indian Nation Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10621–49.10640 [Reserved]

Implementation Plan for the Sauk-Suiattle Indian Tribe, Washington

§ 49.10641 Identification of plan.

This section and §§ 49.10642 through 49.10670 contain the implementation plan for the Sauk-Suiattle Indian Tribe. This plan consists of Federal regulations and measures which apply within the Reservation of the Sauk-Suiattle Indian Tribe.

§ 49.10642 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Reservation of the Sauk-Suiattle Indian Tribe.

§ 49.10643 [Reserved]

§ 49.10644 [Reserved]

§ 49.10645 Classification of regions for episode plans.

The air quality control region which encompasses the Reservation of the Sauk-Suiattle Indian Tribe is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10646 Contents of implementation plan.

The implementation plan for the Reservation of the Sauk-Suiattle Indian Tribe consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10647 [Reserved]

§ 49.10648 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10649 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10650 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Reservation of the Sauk-Suiattle Indian Tribe:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10651–49.10670 [Reserved]

Implementation Plan for the Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation, Washington

§ 49.10671 Identification of plan.

This section and §§ 49.10672 through 49.10700 contain the implementation plan for the Shoalwater Bay Indian Tribe of the Shoalwater Bay Indian Reservation. This plan consists of Federal regulations and measures which apply within the Shoalwater Bay Indian Reservation.

§ 49.10672 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Shoalwater Bay Indian Reservation.

§ 49.10673 [Reserved]

§ 49.10674 [Reserved]

§ 49.10675 Classification of regions for episode plans.

The air quality control region which encompasses the Shoalwater Bay Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10676 Contents of implementation plan.

The implementation plan for the Shoalwater Bay Indian Reservation

consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10677 [Reserved]

§ 49.10678 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.2, as applicable.

§ 49.10679 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10680 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Shoalwater Bay Indian Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10681–49.10700 [Reserved]

Implementation Plan for the Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho

§ 49.10701 Identification of plan.

This section and §§ 49.10702 through 49.10730 contain the implementation plan for the Shoshone-Bannock Tribes of the Fort Hall Reservation. This plan consists of Federal regulations and measures which apply within the Fort Hall Reservation.

§ 49.10702 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Fort Hall Reservation.

§ 49.10703 [Reserved]

§ 49.10704 [Reserved]

§ 49.10705 Classification of regions for episode plans.

The air quality control region which encompasses the Fort Hall Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	II

§ 49.10706 Contents of implementation plan.

The implementation plan for the Fort Hall Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

(m) Section 49.10711 Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.

§ 49.10707 [Reserved]

§ 49.10708 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10709 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10710 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Fort Hall Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

(m) Section 49.10711 Federal Implementation Plan for the Astaris-Idaho LLC Facility (formerly owned by FMC Corporation) in the Fort Hall PM–10 Nonattainment Area.

■ 6. Revise §§ 49.10731 through 49.10956 to read as follows:

* * * * *

Sec.

Implementation Plan for the Confederated Tribes of Siletz Indians of Oregon

49.10731 Identification of plan.
49.10732 Approval status.
49.10733 [Reserved]
49.10734 [Reserved]
49.10735 Classification of regions for episode plans.
49.10736 Contents of implementation plan.

49.10737 [Reserved]
49.10738 Permits to construct.
49.10739 Permits to operate.
49.10740 Federally-promulgated regulations and Federal implementation plans.
49.10741–49.10760 [Reserved]

Implementation Plan for the Skokomish Indian Tribe, Washington

49.10761 Identification of plan.
49.10762 Approval status.
49.10763 [Reserved]
49.10764 [Reserved]
49.10765 Classification of regions for episode plans.
49.10766 Contents of implementation plan.
49.10767 [Reserved]
49.10768 Permits to construct.
49.10769 Permits to operate.
49.10770 Federally-promulgated regulations and Federal implementation plans.
49.10771–49.10790 [Reserved]

Implementation Plan for the Snoqualmie Indian Tribe, Washington

49.10791 Identification of plan.
49.10792 Approval status.
49.10793 [Reserved]
49.10794 [Reserved]
49.10795 Classification of regions for episode plans.
49.10796 Contents of implementation plan.
49.10797 [Reserved]
49.10798 Permits to construct.
49.10799 Permits to operate.
49.10800 Federally-promulgated regulations and Federal implementation plans.
49.10801–49.10820 [Reserved]

Implementation Plan for the Spokane Tribe of the Spokane Reservation, Washington

49.10821 Identification of plan.
49.10822 Approval status.
49.10823 [Reserved]
49.10824 [Reserved]
49.10825 Classification of regions for episode plans.
49.10826 Contents of implementation plan.
49.10827 [Reserved]
49.10828 Permits to construct.
49.10829 Permits to operate.
49.10830 Federally-promulgated regulations and Federal implementation plans.
49.10831–49.10850 [Reserved]

Implementation Plan for the Squaxin Island Tribe of the Squaxin Island Reservation, Washington

49.10851 Identification of plan.
49.10852 Approval status.
49.10853 [Reserved]
49.10854 [Reserved]
49.10855 Classification of regions for episode plans.
49.10856 Contents of implementation plan.
49.10857 [Reserved]
49.10858 Permits to construct.
49.10859 Permits to operate.
49.10860 Federally-promulgated regulations and Federal implementation plans.
49.10861–49.10880 [Reserved]

Implementation Plan for the Stillaguamish Tribe of Indians of Washington

49.10881 Identification of plan.
49.10882 Approval status.
49.10883 [Reserved]
49.10884 [Reserved]
49.10885 Classification of regions for episode plans.
49.10886 Contents of implementation plan.
49.10887 [Reserved]
49.10888 Permits to construct.
49.10889 Permits to operate.
49.10890 Federally-promulgated regulations and Federal implementation plans.
49.10891–49.10920 [Reserved]

Implementation Plan for the Suquamish Indian Tribe of the Port Madison Reservation, Washington

49.10921 Identification of plan.
49.10922 Approval status.
49.10923 [Reserved]
49.10924 [Reserved]
49.10925 Classification of regions for episode plans.
49.10926 Contents of implementation plan.
49.10927 [Reserved]
49.10928 Permits to construct.
49.10929 Permits to operate.
49.10930 Federally-promulgated regulations and Federal implementation plans.
49.10931–49.10950 [Reserved]

Implementation Plan for the Swinomish Indian Tribal Community, Washington

49.10951 Identification of plan.
49.10952 Approval status.
49.10953 [Reserved]
49.10954 [Reserved]
49.10955 Classification of regions for episode plans.
49.10956 Contents of implementation plan.

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Implementation Plan for the Confederated Tribes of Siletz Indians of Oregon

§ 49.10731 Identification of plan.

This section and §§ 49.10732 through 49.10760 contain the implementation plan for the Confederated Tribes of Siletz Indians. This plan consists of Federal regulations and measures which apply within the Siletz Reservation.

§ 49.10732 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Siletz Reservation.

§ 49.10733 [Reserved]

§ 49.10734 [Reserved]

§ 49.10735 Classification of regions for episode plans.

The air quality control region which encompasses the Siletz Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	III
Sulfur oxides	III

§ 49.10736 Contents of implementation plan.

The implementation plan for the Siletz Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10737 [Reserved]

§ 49.10738 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10739 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10740 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Siletz Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permit.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10741–49.10760 [Reserved]

Implementation Plan for the Skokomish Indian Tribe, Washington

§ 49.10761 Identification of plan.

This section and §§ 49.10762 through 49.10790 contain the implementation plan for the Skokomish Indian Tribe. This plan consists of Federal regulations and measures which apply within the Skokomish Reservation.

§ 49.10762 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Skokomish Reservation.

§ 49.10763 [Reserved]

§ 49.10764 [Reserved]

§ 49.10765 Classification of regions for episode plans.

The air quality control region which encompasses the Skokomish Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10766 Contents of implementation plan.

The implementation plan for the Skokomish Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10767 [Reserved]

§ 49.10768 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21 and, as applicable.

§ 49.10769 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10770 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Skokomish Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10771–49.10790 [Reserved]

Implementation Plan for the Snoqualmie Indian Tribe, Washington

§ 49.10791 Identification of plan.

This section and §§ 49.10792 through 49.10820 contain the implementation plan for the Snoqualmie Indian Tribe. This plan consists of Federal regulations and measures which apply within the Snoqualmie Indian Reservation.

§ 49.10792 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Snoqualmie Indian Reservation.

§ 49.10793 [Reserved]

§ 49.10794 [Reserved]

§ 49.10795 Classification of regions for episode plans.

The air quality control region which encompasses the Snoqualmie Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10796 Contents of implementation plan.

The implementation plan for the Snoqualmie Indian Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10797 [Reserved]

§ 49.10798 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10799 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10800 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation

plan for the Snoqualmie Indian Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10801–49.10820 [Reserved]

Implementation Plan for the Spokane Tribe of the Spokane Reservation, Washington

§ 49.10821 Identification of plan.

This section and §§ 49.10822 through 49.10850 contain the implementation plan for the Spokane Tribe. This plan consists of Federal regulations and measures which apply within the Spokane Reservation.

§ 49.10822 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Spokane Reservation.

§ 49.10823 [Reserved]

§ 49.10824 [Reserved]

§ 49.10825 Classification of regions for episode plans.

The air quality control region which encompasses the Spokane Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.10826 Contents of implementation plan.

The implementation plan for the Spokane Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10827 [Reserved]

§ 49.10828 Permits to construct.

(a) Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

(b) In accordance with section 164 of the Clean Air Act and the provisions of 40 CFR 52.21(g), the Spokane Indian Reservation is designated as a Class I area for the purposes of preventing significant deterioration of air quality.

§ 49.10829 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10830 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Spokane Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10831–49.10850 [Reserved]

Implementation Plan for the Squaxin Island Tribe of the Squaxin Island Reservation, Washington

§ 49.10851 Identification of plan.

This section and §§ 49.10852 through 49.10880 contain the implementation plan for the Squaxin Island Tribe of the Squaxin Island Reservation. This plan consists of Federal regulations and measures which apply within the Squaxin Island Reservation.

§ 49.10852 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Squaxin Island Reservation.

§ 49.10853 [Reserved]

§ 49.10854 [Reserved]

§ 49.10855 Classification of regions for episode plans.

The air quality control region which encompasses the Squaxin Island Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10856 Contents of implementation plan.

The implementation plan for the Squaxin Island Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10857 [Reserved]

§ 49.10858 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, 40 CFR 52.21, as applicable.

§ 49.10859 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10860 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Squaxin Island Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10861–49.10880 [Reserved]

Implementation Plan for the Stillaguamish Tribe of Indians of Washington

§ 49.10881 Identification of plan.

This section and §§ 49.10882 through 49.10920 contain the implementation plan for the Stillaguamish Tribe of Indians. This plan consists of Federal regulations and measures which apply within the Reservation of the Stillaguamish Tribe of Indians.

§ 49.10882 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Reservation of the Stillaguamish Tribe of Indians.

§ 49.10883 [Reserved]

§ 49.10884 [Reserved]

§ 49.10885 Classification of regions for episode plans.

The air quality control region which encompasses the Reservation of the Stillaguamish Tribe of Indians is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10886 Contents of implementation plan.

The implementation plan for the Reservation of the Stillaguamish Tribe of Indians consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10887 [Reserved]

§ 49.10888 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10889 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10890 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Reservation of the Stillaguamish Tribe of Indians:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10891–49.10920 [Reserved]

Implementation Plan for the Suquamish Indian Tribe of the Port Madison Reservation, Washington

§ 49.10921 Identification of plan.

This section and §§ 49.10922 through 49.10950 contain the implementation plan for the Suquamish Indian Tribe of the Port Madison Reservation. This plan consists of Federal regulations and measures which apply within the Port Madison Reservation.

§ 49.10922 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Port Madison Reservation.

§ 49.10923 [Reserved]

§ 49.10924 [Reserved]

§ 49.10925 Classification of regions for episode plans.

The air quality control region which encompasses the Port Madison Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10926 Contents of implementation plan.

The implementation plan for the Port Madison Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10927 [Reserved]

§ 49.10928 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10929 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10930 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Port Madison Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10931–49.10950 [Reserved]

Implementation Plan for the Swinomish Indian Tribal Community, Washington

§ 49.10951 Identification of plan.

This section and §§ 49.10952 through 49.10980 contain the implementation plan for the Swinomish Indian Tribal Community. This plan consists of a combination of Tribal rules and measures and Federal regulations and measures which apply within the Swinomish Reservation.

§ 49.10952 Approval status.

The implementation plan for the Swinomish Reservation includes the EPA-approved Tribal rules and measures incorporated by reference in § 49.10957.

§ 49.10953 [Reserved]

§ 49.10954 [Reserved]

§ 49.10955 Classification of regions for episode plans.

The air quality control region which encompasses the Swinomish Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.10956 Contents of implementation plan.

The implementation plan for the Swinomish Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) [Reserved]
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.
(m) The EPA-approved Tribal open burning rules and measures approved in § 49.10957 of this chapter.
(1) Title, authority, jurisdiction, definitions.
(2) Open burning.
(3) Public involvement.
(4) Appeals.
(5) Repealer, severability and effective date.
(6) Enforcement.
(7) Hearings, Appeals, computation of time and law applicable.

7. Amend § 49.10957 by revising the last sentence of paragraph (b)(3) to read as follows:

§ 49.10957 EPA-approved Tribal rules and plans.

* * * * *
(b) * * *
(3) * * * For information on the availability of this material at NARA, contact the Office of the Federal Register—email: *fr.inspection@nara.gov;* website: *www.archives.gov/federal-register/cfr/ibr-locations.html.*
* * * * *

■ 8. Revise §§ 49.10958 through 49.11111 to read as follows:

Sec.

* * * * *
49.10958 Permits to construct.
49.10959 Permits to operate.
49.10960 Federally-promulgated regulations and Federal implementation plans.
49.10961–49.10980 [Reserved]

Implementation Plan for the Tulalip Tribes of Washington

49.10981 Identification of plan.
49.10982 Approval status.
49.10983 [Reserved]
49.10984 [Reserved]
49.10985 Classification of regions for episode plans.
49.10986 Contents of implementation plan.
49.10987 [Reserved]
49.10988 Permits to construct.
49.10989 Permits to operate.
49.10990 Federally-promulgated regulations and Federal implementation plans.
49.10991–49.11010 [Reserved]

Implementation Plan for the Confederated Tribes of the Umatilla Indian Reservation, Oregon

49.11011 Identification of plan.
49.11012 Approval status.
49.11013 [Reserved]
49.11014 [Reserved]
49.11015 Classification of regions for episode plans.
49.11016 Contents of implementation plan.
49.11017 [Reserved]
49.11018 Permits to construct.
49.11019 Permits to operate.
49.11020 Federally-promulgated regulations and Federal implementation plans.
49.11021 Permits for large open burning, agricultural burning, forestry and

silvicultural burning, and small open burning annual permits.
49.11022–49.11040 [Reserved]

Implementation Plan for the Upper Skagit Indian Tribe, Washington

49.11041 Identification of plan.
49.11042 Approval status.
49.11043 [Reserved]
49.11044 [Reserved]
49.11045 Classification of regions for episode plans.
49.11046 Contents of implementation plan.
49.11047 [Reserved]
49.11048 Permits to construct.
49.11049 Permits to operate.
49.11050 Federally-promulgated regulations and Federal implementation plans.
49.11051–49.11070 [Reserved]

Implementation Plan for the Confederated Tribes of the Warm Springs Reservation of Oregon

49.11071 Identification of plan.
49.11072 Approval status.
49.11073 [Reserved]
49.11074 [Reserved]
49.11075 Classification of regions for episode plans.
49.11076 Contents of implementation plan.
49.11077 [Reserved]
49.11078 Permits to construct.
49.11079 Permits to operate.
49.11080 Federally-promulgated regulations and Federal implementation plans.
49.11081–49.11100 [Reserved]

Implementation Plan for the Confederated Tribes and Bands of the Yakama Nation, Washington

49.11101 Identification of plan.
49.11102 Approval status.
49.11103 [Reserved]
49.11104 [Reserved]
49.11105 Classification of regions for episode plans.
49.11106 Contents of implementation plan.
49.11107 [Reserved]
49.11108 Permits to construct.
49.11109 Permits to operate.
49.11110 Federally-promulgated regulations and Federal implementation plans.
49.11111 Permits for large open burning, agricultural burning and small open burning annual permits.

* * * * *

§ 49.10958 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10959 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10960 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Swinomish Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) [Reserved]

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10961–49.10980 [Reserved]

Implementation Plan for the Tulalip Tribes of Washington

§ 49.10981 Identification of plan.

This section and §§ 49.10982 through 49.11010 contain the implementation plan for the Tulalip Tribes. This plan consists of Federal regulations and measures which apply within the Tulalip Reservation.

§ 49.10982 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Tulalip Reservation.

§ 49.10983 [Reserved]

§ 49.10984 [Reserved]

§ 49.10985 Classification of regions for episode plans.

The air quality control region which encompasses the Tulalip Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	I
Particulate matter (PM_{10})	I
Sulfur oxides	IA

§ 49.10986 Contents of implementation plan.

The implementation plan for the Tulalip Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§ 49.10987 [Reserved]

§ 49.10988 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.10989 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.10990 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Tulalip Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.135 Rule for emissions detrimental to public health or welfare.

(i) Section 49.137 Rule for air pollution episodes.

(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(k) Section 49.139 Rule for non-Title V operating permits.

(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.10991–49.11010 [Reserved]

Implementation Plan for the Confederated Tribes of the Umatilla Indian Reservation, Oregon

§ 49.11011 Identification of plan.

This section and §§ 49.11012 through 49.11040 contain the implementation plan for the Confederated Tribes of the Umatilla Indian Reservation. This plan consists of Federal regulations and measures which apply within the Umatilla Indian Reservation.

§ 49.11012 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Umatilla Indian Reservation.

§ 49.11013 [Reserved]

§ 49.11014 [Reserved]

§ 49.11015 Classification of regions for episode plans.

The air quality control region which encompasses the Umatilla Indian Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.11016 Contents of implementation plan.

The implementation plan for the Umatilla Indian Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.132 Rule for large open burning permits.

(i) Section 49.133 Rule for agriculture burning permits.

(j) Section 49.134 Rule for forestry and silvicultural burning permits.

(k) Section 49.135 Rule for emissions detrimental to public health or welfare.

(l) Section 49.137 Rule for air pollution episodes.

(m) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(n) Section 49.139 Rule for non-Title V operating permits.

(o) Section 49.140 Rule for residential wood burning devices.

(p) Section 49.142 Rule for small open burning annual permits.

§ 49.11017 [Reserved]

§ 49.11018 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.11019 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.11020 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Umatilla Indian Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.132 Rule for large open burning permits.

(i) Section 49.133 Rule for agriculture burning permits.

(j) Section 49.134 Rule for forestry and silvicultural burning permits.

(k) Section 49.135 Rule for emissions detrimental to public health or welfare.

(l) Section 49.137 Rule for air pollution episodes.

(m) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(n) Section 49.139 Rule for non-Title V operating permits.

(o) Section 49.140 Rule for residential wood burning devices.

(p) Section 49.142 Rule for small open burning annual permits.

Note 1 to § 49.11020: EPA entered into a Partial Delegation of Administrative Authority Agreement with the Confederated Tribes of the Umatilla Indian Reservation on August 21, 2006 for the rules listed in paragraphs (a), (g), (h), (i), (j) and (l) of this section.

§ 49.11021 Permits for large open burning, agricultural burning, forestry and silvicultural burning, and small open burning annual permits.

(a) From June 7, 2005 through December 31, 2023, small open burns and large open burns are subject to the permitting requirements of § 49.132.

(b) Beginning January 1, 2024, large open burns are subject to the permitting requirements of § 49.132.

(c) Beginning January 1, 2007, agricultural burns are subject to the permitting requirements of § 49.133.

(d) Beginning January 1, 2007, forestry or silvicultural burns are subject to the permitting requirements of § 49.134.

(e) Beginning January 1, 2024, small open burns are subject to the permitting requirements of § 49.142.

§§ 49.11022–49.11040 [Reserved]

Implementation Plan for the Upper Skagit Indian Tribe, Washington

§ 49.11041 Identification of plan.

This section and §§ 49.11042 through 49.11070 contain the implementation plan for the Upper Skagit Indian Tribe. This plan consists of Federal regulations and measures which apply within the Upper Skagit Reservation.

§ 49.11042 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Upper Skagit Reservation.

§ 49.11043 [Reserved]

§ 49.11044 [Reserved]

§ 49.11045 Classification of regions for episode plans.

The air quality control region which encompasses the Upper Skagit Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	II

§ 49.11046 Contents of implementation plan.

The implementation plan for the Upper Skagit Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.11047 [Reserved]

§ 49.11048 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.11049 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.11050 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Upper Skagit Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.11051–49.11070 [Reserved]

Implementation Plan for the Confederated Tribes of the Warm Springs Reservation of Oregon

§ 49.11071 Identification of plan.

This section and §§ 49.11072 through 49.11100 contain the implementation plan for the Confederated Tribes of the Warm Springs Reservation. This plan consists of Federal regulations and measures which apply within the Warm Springs Reservation.

§ 49.11072 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Warm Springs Reservation.

§ 49.11073 [Reserved]

§ 49.11074 [Reserved]

§ 49.11075 Classification of regions for episode plans.

The air quality control region which encompasses the Warm Springs Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III
Ozone	III
Particulate matter (PM_{10})	II
Sulfur oxides	III

§ 49.11076 Contents of implementation plan.

The implementation plan for the Warm Springs Reservation consists of the following rules, regulations, and measures:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§ 49.11077 [Reserved]

§ 49.11078 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.11079 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.11080 Federally-promulgated regulations and Federal implementation plans.

The following regulations are adopted and made part of the implementation plan for the Warm Springs Reservation:
(a) Section 49.123 General provisions.
(b) Section 49.124 Rule for limiting visible emissions.
(c) Section 49.125 Rule for limiting the emissions of particulate matter.
(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.
(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.
(f) Section 49.130 Rule for limiting sulfur in fuels.
(g) Section 49.131 General rule for open burning.
(h) Section 49.135 Rule for emissions detrimental to public health or welfare.
(i) Section 49.137 Rule for air pollution episodes.
(j) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.
(k) Section 49.139 Rule for non-Title V operating permits.
(l) Section 49.140 Rule for residential wood burning devices.

§§ 49.11081–49.11100 [Reserved]

Implementation Plan for the Confederated Tribes and Bands of the Yakama Nation, Washington

§ 49.11101 Identification of plan.

This section and §§ 49.11102 through 49.11130 contain the implementation plan for the Confederated Tribes and Bands of the Yakama Nation. This plan consists of Federal regulations and measures which apply within the Yakama Reservation.

§ 49.11102 Approval status.

There are currently no EPA-approved Tribal rules or measures in the implementation plan for the Yakama Reservation.

§ 49.11103 [Reserved]

§ 49.11104 [Reserved]

§ 49.11105 Classification of regions for episode plans.

The air quality control region which encompasses the Yakama Reservation is classified as follows for purposes of episode plans:

Pollutant	Classification
Carbon monoxide	III
Nitrogen dioxide	III

Pollutant	Classification
Ozone	III
Particulate matter (PM_{10})	I
Sulfur oxides	III

§ 49.11106 Contents of implementation plan.

The implementation plan for the Yakama Reservation consists of the following rules, regulations, and measures:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.132 Rule for large open burning permits.

(i) Section 49.133 Rule for agricultural burning permits.

(j) Section 49.135 Rule for emissions detrimental to public health or welfare.

(k) Section 49.137 Rule for air pollution episodes.

(l) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(m) Section 49.139 Rule for non-Title V operating permits.

(n) Section 49.140 Rule for residential wood burning devices.

(o) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

(p) Section 49.142 Rule for small open burning annual permits.

§ 49.11107 [Reserved]

§ 49.11108 Permits to construct.

Permits to construct are required for new stationary sources and modifications to existing stationary sources pursuant to §§ 49.151 through 49.173, and 40 CFR 52.21, as applicable.

§ 49.11109 Permits to operate.

Permits to operate are required for sources in accordance with the requirements of § 49.139.

§ 49.11110 Federally-promulgated regulations and Federal implementation plans.

The following regulations are incorporated and made part of the implementation plan for the Yakama Reservation:

(a) Section 49.123 General provisions.

(b) Section 49.124 Rule for limiting visible emissions.

(c) Section 49.125 Rule for limiting the emissions of particulate matter.

(d) Section 49.126 Rule for limiting fugitive particulate matter emissions.

(e) Section 49.129 Rule for limiting emissions of sulfur dioxide.

(f) Section 49.130 Rule for limiting sulfur in fuels.

(g) Section 49.131 General rule for open burning.

(h) Section 49.132 Rule for large open burning permits.

(i) Section 49.133 Rule for agricultural burning permits.

(j) Section 49.135 Rule for emissions detrimental to public health or welfare.

(k) Section 49.137 Rule for air pollution episodes.

(l) Section 49.138 Rule for the registration of air pollution sources and the reporting of emissions.

(m) Section 49.139 Rule for non-Title V operating permits.

(n) Section 49.140 Rule for residential wood burning devices.

(o) Section 49.141 Rule for curtailment of residential wood burning devices for specific areas.

(p) Section 49.142 Rule for small open burning annual permits.

§ 49.11111 Permits for large open burning, agricultural burning and small open burning annual permits.

(a) Beginning [date to be determined] large open burns are subject to the permitting requirements of § 49.132.

(b) Beginning [date to be determined], agricultural burns are subject to the permitting requirements of § 49.133.

(c) Beginning [date to be determined], small open burns are subject to the permitting requirements of § 49.142.

■ 9. Designate the appendix to subpart M of part 49 as appendix A to subpart M of part 49 and revise newly-designated appendix A to read as follows:

Appendix A to Subpart M—Alphabetical Listing of Tribes and Corresponding Sections

Indian tribe	Refer to the following sections in subpart M
Burns Paiute Tribe, Oregon	§§ 49.9861 to 49.9890.
Chehalis Reservation, Washington—Confederated Tribes of the	§§ 49.9891 to 49.9920.
Coeur D'Alene Tribe, Idaho	§§ 49.9921 to 49.9950.
Colville Reservation, Washington—Confederated Tribes of the	§§ 49.9951 to 49.9980.
Coos, Lower Umpqua and Siuslaw Indians, Oregon—Confederated Tribes of the	§§ 49.9981 to 49.10010.
Coquille Indian Tribe, Oregon	§§ 49.10011 to 49.10040.
Cow Creek Band of Umpqua Tribe of Indians Oregon	§§ 49.10041 to 49.10070.
Cowlitz Indian Tribe, Washington	§§ 49.10071 to 49.10100.
Grand Ronde Community of Oregon—Confederated Tribes of the	§§ 49.10101 to 49.10130.
Hoh Indian Tribe, Washington	§§ 49.10131 to 49.10160.
Jamestown S'Klallam Tribe, Washington	§§ 49.10161 to 49.10190.
Kalispel Indian Community of the Kalispel Reservation, Washington	§§ 49.10191 to 49.10220.
Klamath Tribes, Oregon	§§ 49.10221 to 49.10250.
Kootenai Tribe of Idaho	§§ 49.10251 to 49.10280.
Lower Elwha Tribal Community, Washington	§§ 49.10281 to 49.10310.
Lummi Tribe of the Lummi Reservation, Washington	§§ 49.10311 to 49.10340.
Makah Indian Tribe of the Makah Indian Reservation, Washington	§§ 49.10341 to 49.10370.
Muckleshoot Indian Tribe, Washington	§§ 49.10371 to 49.10400.
Nez Perce Tribe, Idaho	§§ 49.10401 to 49.10430.
Nisqually Indian Tribe, Washington	§§ 49.10431 to 49.10460.
Nooksack Indian Tribe, Washington	§§ 49.10461 to 49.10490.
Port Gamble S'Klallam Tribe, Washington	§§ 49.10491 to 49.10520.
Puyallup Tribe of the Puyallup Reservation, Washington	§§ 49.10521 to 49.10550.
Quileute Tribe of the Quileute Reservation, Washington	§§ 49.10551 to 49.10580.
Quinault Indian Nation, Washington	§§ 49.10581 to 49.10610.
Samish Indian Nation, Washington	§§ 49.10611 to 49.10640.
Sauk-Suiattle Indian Tribe, Washington	§§ 49.10641 to 49.10670.
Shoalwater Bay Tribe of the Shoalwater Bay Indian Reservation, Washington	§§ 49.10671 to 49.10700.

Indian tribe	Refer to the following sections in subpart M
Shoshone-Bannock Tribes of the Fort Hall Reservation, Idaho	§§ 49.10701 to 49.10730.
Siletz Indians of Oregon—Confederated Tribes of	§§ 49.10731 to 49.10760.
Skokomish Indian Tribe, Washington	§§ 49.10761 to 49.10790.
Snoqualmie Indian Tribe, Washington	§§ 49.10791 to 49.10820.
Spokane Tribe of the Spokane Reservation, Washington	§§ 49.10821 to 49.10850.
Squaxin Island Tribe of the Squaxin Island Reservation, Washington	§§ 49.10851 to 49.10880.
Stillaguamish Tribe of Indians of Washington	§§ 49.10881 to 49.10920.
Suquamish Indian Tribe of the Port Madison Reservation, Washington	§§ 49.10921 to 49.10950.
Swinomish Indian Tribal Community, Washington	§§ 49.10951 to 49.10980.
Tulalip Tribes of Washington	§§ 49.10981 to 49.11010.
Umatilla Indian Reservation, Oregon—Confederated Tribes of the	§§ 49.11011 to 49.11040.
Upper Skagit Indian Tribe, Washington	§§ 49.11041 to 49.11070.
Warm Springs Reservation of Oregon—Confederated Tribes of the	§§ 49.11071 to 49.11100.
Yakama Nation, Washington—Confederated Tribes and Bands of the	§§ 49.11101 to 49.11130.

[FR Doc. 2022–20486 Filed 10–11–22; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL REGISTER

Vol. 87 Wednesday,
No. 196 October 12, 2022

Part V

The President

Presidential Determination No. 2023–01 of October 3, 2022—Presidential Determination and Certification With Respect to the Child Soldiers Prevention Act of 2008

Federal Register
Vol. 87, No. 196
Wednesday, October 12, 2022

Presidential Documents

Title 3—

The President

Presidential Determination No. 2023–01 of October 3, 2022

Presidential Determination and Certification With Respect to the Child Soldiers Prevention Act of 2008

Memorandum for the Secretary of State

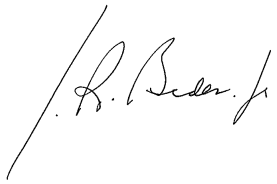
Pursuant to section 404 of the Child Soldiers Prevention Act of 2008 (22 U.S.C. 2370c–1) (CSPA), I hereby:

Determine that it is in the national interest of the United States to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to the Central African Republic and the Democratic Republic of the Congo to allow for the provision of International Military Education and Training (IMET) and Peacekeeping Operations (PKO) assistance, to the extent that the CSPA would restrict such assistance; to waive in part the application of the prohibition in section 404(a) of the CSPA with respect to Somalia and Yemen to allow for the provision of IMET and PKO assistance and support provided pursuant to 10 U.S.C. 333, to the extent that the CSPA would restrict such assistance or support; to waive the application of the prohibition in section 404(a) of the CSPA with respect to allowing for the issuance of licenses for direct commercial sales related to other United States Government assistance for the above countries and, with respect to Russia, solely for direct commercial sales in connection with the International Space Station; and

Certify that the governments of the above countries are taking effective and continuing steps to address the problem of child soldiers.

Accordingly, I hereby waive such applications of section 404(a) of the CSPA.

You are authorized and directed to submit this determination and certification to the Congress, along with the Memorandum of Justification, and to publish this determination in the *Federal Register*.



THE WHITE HOUSE,
Washington, October 3, 2022

[FR Doc. 2022–22338
Filed 10–11–22; 11:15 am]
Billing code 4710–10–P

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The President

Memorandum of October 4, 2022—Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

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Title 3—

The President

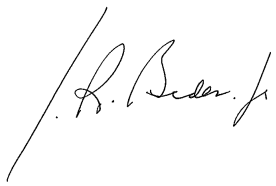
Memorandum of October 4, 2022

Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State the authority under section 506(a)(1) of the FAA to direct the drawdown of up to $625 million in defense articles and services of the Department of Defense, and military education and training, to provide assistance to Ukraine and to make the determinations required under such section to direct such a drawdown.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, October 4, 2022

[FR Doc. 2022–22346
Filed 10–11–22; 11:15 am]
Billing code 4710–10–P

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