

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, 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 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.

#### G. Protest Activities

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

#### 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, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0961 to read as follows:

#### § 165.T08–0961 Safety Zone; Laguna Madre, South Padre Island, TX.

(a) *Location.* The following area is a safety zone: all navigable waters of the Laguna Madre encompassed by a 700-

yard radius from the following point; 26°6′02.1″ N, 97°10′17.7″ W.

(b) *Enforcement period.* This section is in effect, and subject to enforcement, from 9 p.m. on December 31, 2023, through 1 a.m. on January 1st, 2024.

(c) *Regulations.* (1) According to the general regulations in § 165.23 of this part, remaining in, or entry into this temporary safety zone are prohibited unless authorized by the Captain of the Port, Sector Corpus Christi (COTP) or a designated representative. They may be contacted on Channel 16 VHF–FM (156.8 MHz) or by telephone at 361–939–0450.

(2) If permission is granted, all persons and vessels shall comply with the instructions of the COTP or designated representative.

(d) *Information broadcasts.* The COTP or a designated representative will inform the public of the enforcement times and date for this safety zone through Broadcast Notices to Mariners, Local Notices to Mariners, and/or Safety Marine Information Broadcasts as appropriate.

Dated: December 22, 2023.

#### Jason Gunning,

*Captain, U.S. Coast Guard, Captain of the Port, Sector Corpus Christi.*

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## DEPARTMENT OF THE INTERIOR

### National Park Service

#### 36 CFR Part 51

[NPS–WASO– 36913; PPWOBADC0; PPMVSCS1Y.Y00000]

RIN 1024–AE57

#### Commercial Visitor Services; Concession Contracts

**AGENCY:** National Park Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** The National Park Service revises regulations that govern the solicitation, award, and administration of concession contracts to provide commercial visitor services at National Park System units under the authority granted through the Concessions Management Improvement Act of 1998 and the National Park Service Centennial Act. The changes reduce administrative burdens and expand sustainable, high quality, and contemporary concessioner-provided visitor services in national parks.

**DATES:** This rule is effective January 29, 2024.

**ADDRESSES:** The comments received on the proposed rule and an economic analysis are available on <https://www.regulations.gov> in Docket ID: NPS–2020–0003.

**FOR FURTHER INFORMATION CONTACT:** Kurt Rausch, Chief of Commercial Services Program, National Park Service; (202) 513–7202; [kurt\\_rausch@nps.gov](mailto:kurt_rausch@nps.gov).

#### SUPPLEMENTARY INFORMATION:

#### Background

##### Authority and Purpose

The National Park Service (NPS) enters into contracts with concessioners to provide commercial visitor services in over 100 units of the National Park System. Examples of such services include lodging, food, retail, marinas, transportation, and guided recreation. Each year, concession contracts generate approximately \$1.5 billion in gross revenues and return approximately \$135 million in franchise fees to the NPS. The National Park Service Concession Policies Act of 1965 (1965 Act) (Pub. L. 89–249) provided the first statutory authority for the NPS to issue concession contracts. Since the repeal of the 1965 Act, concession contracts have been awarded under the Concessions Management Improvement Act of 1998 (1998 Act), 54 U.S.C. 101901–101926. A revision to the 1998 Act was also included in section 502 of the 2016 National Park Service Centennial Act (Centennial Act) (Pub. L. 114–289). NPS regulations in 36 CFR part 51 govern the solicitation and award of concession contracts issued under the 1998 Act and the administration of concession contracts issued under the 1965 and 1998 Acts. The NPS promulgated these regulations in April 2000 (65 FR 20630) and since that time has made only minor changes to them (see, e.g., 79 FR 58261).

In August of 2018, as part of the Department of the Interior’s implementation of Executive Order 13777, *Enforcing the Regulatory Reform Agenda*, and in response to a request for public input on how the Department of the Interior can improve implementation of regulatory reform initiatives by identifying regulations for modification (82 FR 28429), the NPS’s external concessions partners provided the Secretary of the Interior (Secretary) with suggestions for improving existing concession regulations. The Department of the Interior considered the suggestions provided by the concessions partners, and those suggestions are reflected in this rule. In addition, Secretary’s Order 3366, *Increasing Recreational Opportunities on Lands and Waters Managed by the U.S.*

*Department of the Interior*, signed by the Secretary in April of 2018, directed the NPS to look for ways to streamline and improve the contracting process for recreational concessioners as part of the Department's efforts to expand access to and improve the infrastructure on public lands and waters, including through the use of public-private partnerships. The directives set forth in that Secretary's Order are intended to provide the public with more recreational opportunities and memorable experiences on the Department's public lands and waters. This rule is responsive to these directives, suggestions received, and areas for improvement identified by the NPS. Finally, the NPS received a variety of comments on the proposed revisions to the rule during the public comment period including suggestions for additional improvements to the rule. The NPS considered these comments and has incorporated some of the suggestions in this final rule.

Each of the changes to 36 CFR part 51 is explained below and corresponds to the subparts of the existing regulations that are amended under this rule. In total, this final rule makes 12 changes to the existing regulations, which are numbered to assist with ease of reading. Some of the changes are implemented for new contracts, while others are effective for both current and new contracts as identified in the explanation for each change. The overall purpose of these changes is to update and improve the regulations governing concession contracts so that the public is better served when visiting our nation's most cherished public lands and waters.

#### *Subpart C—Solicitation, Selection, and Award Procedures (36 CFR 51.4–51.22)*

The regulations in Subpart C set forth the processes and rules governing the solicitation, selection, and award of concession contracts. The NPS makes four changes to this subpart, as explained below.

#### *Change 1: New Concession Opportunities*

The NPS recognizes that the needs for commercial visitor services in parks may change over time, including the need to provide new services that are not currently provided. Recent examples include wireless connectivity services at Lake Mead National Recreation Area, parking management at Muir Woods National Monument, and bike rentals at Grand Canyon National Park. The NPS considers evolving visitor needs through its commercial services planning processes. Each unit

of the national park system is required to have a park foundation document, that provides basic guidance for all planning and management decisions and from which the NPS develops a park's planning portfolio. The planning portfolio is the assemblage of individual plans, studies, and inventories that guide park decision-making. For commercial services, these may range from broader planning efforts such as visitor use studies and commercial services strategies to more focused studies such as climbing or horse management plans. Commercial visitor services planning also occurs through the concession contract prospectus development process. During this process, the NPS reviews the services currently provided, conducts market studies, and may solicit public comments to assess new commercial visitor service opportunities.

The final rule recognizes this planning framework by requiring the solicitation and consideration of suggestions for new concession opportunities. Section 51.4(c) states that the Director will issue a prospectus for a new concession opportunity when the Director determines that a new concession opportunity is necessary and appropriate for public use and enjoyment of the park area and is consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area. This standard for evaluating new opportunities is consistent with the 1998 Act. 54 U.S.C. 101912(b)(1)–(2). Section 51.4(d) requires the Director to establish procedures to annually solicit and consider suggestions from the public for new commercial services in NPS units. While the regulation does not specify the procedures for the solicitation, the regulation does require the Director to make all proposals and the Director's evaluation of them public.<sup>1</sup> Section 51.4(e) establishes relevant factors that the Director will consider when deciding whether to issue a prospectus for a new concession opportunity in addition to the determination that a commercial visitor service is necessary and appropriate for public use and enjoyment of the park area and is consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area. These factors shall include whether the suggested

concession opportunities are already adequately provided within the unit; the potential for augmented resources for park area operations; the effects of the suggested concession operations on the park area; the sustainability of the suggested concession opportunities; the innovative quality of the suggestions; and the potential impacts on park area visitation and on communities located near the park area. Paragraph (f) clarifies that the NPS may not, during the competitive evaluation process, give preference to any party that suggests an opportunity that is subsequently offered by the NPS simply because the party originally suggested the idea. The 1998 Act recognizes only two categories of concession contracts that provide preferential rights to incumbent concessioners. 54 U.S.C. 101913(7), (8). The final rule recognizes, however, that in some circumstances the Director may award a contract without competition under 36 CFR 51.25. Section 51.4(g) provides the Director discretion to amend an existing contract to allow a concessioner to provide new or additional services under 36 CFR 51.76. This preserves the authority of the Director to adjust the services being provided in response to changing visitor needs over the term of the contract, consistent with the fundamental business opportunity that was offered in the concession prospectus. Paragraph (h) states that nothing in the new processes to be established by the Director would limit the Director from soliciting, considering, or collecting information related to new concession opportunities.

#### *Change 2: Timing of Issuing Prospectuses*

Section 51.4(b) of the existing regulations states that the Director will not issue a prospectus for a concession contract earlier than 18 months prior to the expiration of a related existing concession contract. The original purpose of this restriction was to ensure that an existing concessioner would not have to compete for a new contract in circumstances where assessment of the feasibility of the terms and conditions of the new contract would be unduly speculative (65 FR 20637). The proposed rule would have eliminated the 18-month restriction for new concession contract prospectuses to allow the NPS the flexibility to issue a prospectus earlier in circumstances where there are unusually significant commitments required of potential offerors to acquire personal property, such as vessels, or to obtain financing or to manage reservations. The NPS proposed this change on the view that

<sup>1</sup> The NPS will specify solicitation procedures in policy and in instructions that will be posted on public-facing websites, such as the website for the NPS Commercial Services Program (<https://www.nps.gov/orgs/csp/index.htm>).

this additional time would provide for more offerors, which benefits the NPS and the public because increased competition generally results in higher quality offers.

Based on comments, however, the NPS retains the 18-month rule but provides an exception for when the Director determines releasing a prospectus earlier is necessary to provide additional time to potential offerors, such as when additional time is needed to avoid issuing a prospectus during a busy operating season or where potential offerors must make significant financial commitments to meet the requirements of the contract. Such additional time must be as short as prudent.

#### *Change 3: Publishing Notice of a Prospectus*

Section 51.8 of the existing regulations states that the Director will publish notice of the availability of a prospectus at least once in the Commerce Business Daily or in a similar publication if the Commerce Business Daily ceases to be published. The rule updates this provision to require publication in the System for Award Management (SAM). The rule expands the description of the types of electronic media that will be used to advertise opportunities to include websites and social media.

#### *Change 4: Weighting Selection Factors*

The fourth change is to § 51.16 of the existing regulations. Section 51.16 is closely related to § 51.17 of the existing regulations, which identifies selection factors that must be applied by the Director when assessing the merits of a proposal. Section 51.17(a) lists five primary selection factors:

*Principal selection factor 1:* The responsiveness of the proposal to the objectives, as described in the prospectus, of protecting, conserving, and preserving resources of the park area.

*Principal selection factor 2:* The responsiveness of the proposal to the objectives, as described in the prospectus, of providing necessary and appropriate visitor services at reasonable rates.

*Principal selection factor 3:* The experience and related background of the offeror, including the past performance and expertise of the offeror in providing the same or similar visitor services as those to be provided under the concession contract.

*Principal selection factor 4:* The financial capability of the offeror to carry out its proposal.

*Principal selection factor 5:* The amount of the proposed minimum franchise fee, if any, and/or other forms of financial consideration to the Director.

The Director must consider these five factors under the 1998 Act. 54 U.S.C. 101913(5)(A).

Section 51.17(b) identifies one secondary selection factor (secondary selection factor 1) and allows the Director to use additional secondary selection factors where appropriate and otherwise permitted by law. Secondary selection factor 1 is the quality of the offeror's proposal to conduct its operations in a manner that furthers the protection, conservation and preservation of park area and other resources through environmental management programs and activities, including, without limitation, energy conservation, waste reduction, and recycling. The NPS may exclude this factor for small contracts and those expected to have limited impacts on park resources. Secondary selection factors are permitted, but not required, to be considered under the 1998 Act. 54 U.S.C. 101913(5)(B). Although the 1998 Act is silent on how the Director should weigh each factor, § 51.16 requires the Director to assign a score for each selection factor that reflects the merits of the proposal compared to other proposals received, if any.

The final rule retains the relative scoring relationships of the 2000 rule but provides additional flexibility for the NPS by increasing the possible number of total points from 30 to 40. The final rule also requires that each selection factor used must provide for a maximum score of at least one point. Further, the final rule provides that secondary selection factor 1 must have a maximum score less than the maximum score for the principal selection factor for franchise fees and the aggregate score of all other secondary selection factors must have a maximum score less than the maximum score for the principal selection factor for franchise fees. The final rule also assigns a score of one point for agreeing to the prospectus franchise fee (as defined in § 51.78) or, when the Director determines use of the prospectus franchise fee inappropriate, the minimum acceptable franchise fee set forth in the prospectus. The proposed rule did not specify minimum or maximum points for selection factors and provided that the principal selection factor for franchise fees could have the same possible score as the other principal selection factors. The revisions to § 51.16 will apply to all prospectuses issued after the effective

date of the final rule and will provide the NPS with greater flexibility to weigh the factors according to how important they are to the NPS and for the specific contract.

#### *Change 5: Adding Secondary Selection Factor for Consideration of New Services*

The final rule features the benefit of providing new commercial visitor services. For several years, the NPS occasionally has included a secondary selection factor asking offerors to identify ways they could add additional services and programs within the scope of the subject contract. The NPS has revised § 51.17(b)(2) specifically to provide that the Director will include such a secondary selection factor when appropriate. This revision will apply to all prospectuses issued after the effective date of the final rule.

#### *Subpart G—Leasehold Surrender Interest (36 CFR 51.51–51.67)*

The regulations in Subpart G explain how a concessioner can obtain leasehold surrender interest (LSI) in capital improvements to visitor service facilities that are made under the terms of a concession contract. The NPS makes one change to this subpart, as explained below under Change 6. This change applies to future concession contracts.

The NPS manages concession contracts to ensure concessioners maintain and repair the facilities assigned as required under the terms of their contract. The NPS also seeks to encourage concessioners to make capital improvements in order to ensure facilities are structurally sound, updated, and adequate to meet the needs of the visiting public. When the NPS approves the concessioner to fund and construct capital improvements to expand, update, and rehabilitate facilities, the concessioner receives LSI for the associated costs in each capital improvement. The NPS considers the costs associated with these improvements, as well as the opportunity for receiving LSI, when it determines the concessioner's reasonable opportunity for net profit and sets the prospectus or minimum franchise fee for the contract. The 1998 Act outlines, in general terms, what constitutes a capital improvement eligible for LSI and how to value LSI. 54 U.S.C. 101915. Details about which types of construction activities are eligible for LSI and how it is valued are found in subpart G.

LSI is unique to NPS concession contracts and is not used in the private sector. In the private sector, an owner

bears the risk of changes when an asset increases or decreases in value. The owner may realize a return on its investment for capital improvements when it sells an improved property, if the value has appreciated, or lose money if the value has declined. In contrast, under concession contracts with the NPS, the concessioner invests in facilities they do not own. As a result, since the concessioner cannot receive a return on the investment through a sale of the property, LSI provides them that opportunity in the form of a guaranteed return to the concessioner of its investment.

Although the NPS seeks to encourage concessioners to make capital investments, it must balance the benefits of such investments with the need to address the LSI generated from such investments. If the incumbent concessioner wins the new contract, the concessioner retains the LSI value, which continues through the term of the next contract. If there is a new concessioner, the LSI is often transferred to a new concessioner by the new concessioner compensating the outgoing concessioner for the value of the LSI. This can create a significant investment hurdle that limits competition on the contract. A higher initial investment can lead to reduced competition because fewer entities have access to the large buy-in amounts for certain contracts or because the return on their investment is not as attractive as other opportunities. When there is the likelihood of less competition, the incumbent also may not be incentivized to offer as many new enhancements when providing the services required, which can lessen the visitor experience. If, instead, the NPS pays the value of the LSI to the outgoing concessioner, the funds expended are unavailable to support other NPS needs, such as prospectus development or managing the new concessioner during the term of the contract and improving visitor operations and facilities.

#### *Change 6: Definition of Major Rehabilitation*

Section 51.51 defines terms used in subpart G to explain how LSI is applied.

The NPS revises the definition of “major rehabilitation” in order to simplify and more appropriately characterize what qualifies as a major rehabilitation with the intent of encouraging investment in commercial visitor service capital improvements by concessioners. These changes apply for future concession contracts.

First, the NPS simplifies the definition of a major rehabilitation by removing the term “comprehensive”

because it is vague and suggests a limitation on investments that is not intended to be included in the concept of a planned “major” rehabilitation as defined in the regulation.

Second, the NPS removes the term “that the director approves in advance” as § 51.54 already requires such approval for any capital improvement, including major rehabilitations.

Third, the NPS removes the requirement that, unless special circumstances exist, the Director must determine the rehabilitation project is completed within 18 months from the start of the rehabilitation work. Projects must be approved by the Director and any approval would include a project schedule. Eighteen months is a timeframe typical for such projects. In practice, however, the Director approves the timeline for major rehabilitation projects based on the complexity and scope of the project. The result is that the 18-month requirement in the existing regulation has been rendered superfluous and does not provide any benefit to the public. Removing this requirement simplifies and clarifies the definition to match existing practice.

Fourth, the NPS decreases the construction cost threshold for what constitutes major rehabilitation from 50% of the pre-rehabilitation value to 30% of the pre-rehabilitation value. This allows for a broader range of major commercial visitor service capital improvement construction projects to qualify for increased LSI under § 51.64 or new LSI under § 51.66.

The NPS selected the 30% threshold through industry research. The International Facility Management Association identifies 30% as the threshold for when a rehabilitation is “critical” to the structure. The NPS believes the 30% threshold better aligns with this industry standard than does the 50% threshold in the existing definition. Further, the NPS believes that broadening the situations in which the Director may approve the availability of LSI will facilitate important and needed capital improvement projects that will improve the conditions of facilities and help ensure a safe and enjoyable experience for park visitors.

While the 1998 Act intended to promote private investment in concession structures by providing LSI to concessioners, the 50% threshold contained in the existing regulations has limited the Director’s ability to allow concessioners’ opportunities to make investments of the type envisioned by Congress. Concerns have been raised that the current regulations actually discourage investment in concessions

structures. The NPS seeks to improve the regulations to encourage concessioners to invest in capital improvements.

Broadening the scope of projects that can be supported by the availability of LSI will have other consequences to the concession contract and its management. For example, the utilization of LSI for rehabilitation projects allows for the recovery of investment by the concessioner where insufficient remaining contract term could make the investment financially imprudent without LSI lowering the risk of that investment. This lower risk associated with the ability of a concessioner to incur LSI will be considered in the NPS analysis of the opportunity and may result in a higher franchise fee set in the prospectus consistent with the statutory requirements to set a fee appropriate to the probable value of the contract and thus possibly result in a higher franchise fee paid to the government. Franchise fee revenue may also increase if increased concessioner investment in higher quality facilities results in increased visitor demand for NPS concessions. The NPS could use the new fee revenue for other NPS needs or when appropriate to buy down LSI incurred on the contract as a result of the concessioner investment. This assumes that revenue projections for the contract are realized and adequate franchise fees are available, since franchise fees are calculated as a function of revenue. The use of franchise fees for this purpose will be balanced against the use of these funds for other NPS needs in light of all funding sources. An analysis of the expected relationship between LSI and franchise fees as a result of this change can be found in the report entitled “36 CFR [part] 51 Concessions Contract Revisions Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA)” that can be accessed at <https://www.regulations.gov> in Docket ID: NPS–2020–0003.

Fifth, the NPS added to the definition of a major rehabilitation, that it must improve visitor health, safety, and enjoyment or the health and safety of concessioner employees and will either enhance the property’s overall value, prolong its useful life, or adapt it to new uses. This adopts a common industry definition for the scope of capital investment to aid concessioners in understanding the scope of LSI-eligible projects.

The changes to the definition of “major rehabilitation” do not negate the requirement that the Director must approve in advance any major

rehabilitation project in accordance with § 51.54. Although the changes to the definition will likely increase the opportunities for concessioners to seek approval for major rehabilitation projects, the NPS considers many factors when deciding whether to approve a capital investment. For example, the NPS may decide that the value of LSI that would result from the capital improvement would decrease competition for future contracts, outweighing the benefit of the improvement. As a result, the availability of LSI may not generate the desired outcome of increased investment in all cases. However, in these cases the NPS may pay for the capital improvements itself to avoid generating imprudent levels of LSI. The NPS would need to evaluate the benefits of the investment against the opportunity costs of diverting funds from other projects, and how that would impact the quality of other concession facilities and visitor services.

#### *Subpart I—Concession Contract Provisions (36 CFR 51.73–51.83)*

The regulations in subpart I govern key provisions in concession contracts. The NPS makes six changes to this subpart, as explained below.

#### *Change 7: Term of Concession Contracts*

Section 51.73 of the existing regulations governs the length of concession contracts and contained a phrase not required by the statute that concessioner contracts should be as short as is prudent considering certain factors. The final rule deletes the reference to “as short as is prudent” to better align § 51.73(a) with the provisions of the 1998 Act (54 U.S.C. 101914). The final rule states that contracts may not exceed 20 years in length and generally will be awarded for ten years or less, unless the Director determines that the contract terms and conditions, including the required construction of capital improvements, warrant a longer term. The regulations also say that it is the policy of the Director that the terms should account for the financial requirements of the concession contract, resource protection, and visitor needs, and other factors the Director may deem appropriate.

The NPS also revises § 51.73 to allow the Director to include contract provisions allowing for an optional term or terms of one year or more (but not to exceed three years in total), provided that the total term of the contract, including all optional terms, does not exceed 20 years. As proposed, the concessioner would need to meet the

performance criteria described in the contract. In the final rule, the NPS states the subject contract will set out the evaluation rating requirements and other performance criteria rather than regulating the rating standard. The final rule also provides that the concessioner may exercise the option(s) only if the Director has determined the concessioner has met the performance criteria. This change applies to future contracts only.

The final rule has a separate provision allowing the Director and concessioner to agree to amend a contract to lengthen the original term of a contract when the Director determines there has been a substantial interruption of or change to operations due to natural events or other reasons outside the control of the concessioner. These substantial interruptions could include, for example, cessation of operations due to extended fire season, severe hurricane damage, or lengthy administrative closures ordered by the government. This change allows the NPS and the concessioners a better opportunity to receive the benefits that both anticipated during the solicitation process and upon execution of the contract. This change applies to current concession contracts still within the original term of the contract as well as future contracts; it does not apply when the concessioner is operating under either a temporary concession contract or an extension of an existing concession contract awarded pursuant to subpart D of this part, as the NPS may only award a temporary contract or a contract extension “for a term not to exceed 3 years,” and only “[t]o avoid interruption of services to the public[.]” 54 U.S.C. 101913(11)(A). The NPS expects that this change will increase competition for contracts and avoid situations where concessioners reduce services, facility management, or other aspects of their contracted requirements to cover lost revenue.

#### *Change 8: New or Additional Services*

The Centennial Act revised 54 U.S.C. 101913(9) to allow the NPS to amend an existing contract to provide new and additional services that do not represent a material change to the required and authorized services under the contract. This language may provide new opportunities to enhance commercial services under existing contracts allowing concessioners to meet changing visitor needs where appropriate. Before the Director authorizes such new or additional services under a contract, the rule will continue to require the Director to determine that the services are

necessary and appropriate for public use and enjoyment of the NPS unit where they will be provided and are consistent to the highest practicable degree with the preservation and conservation of the resources and values of that unit in accordance with the Centennial Act and the 1998 Act. 54 U.S.C. 101912(b) and 10913(9).

The final rule also regulates the administrative practice of allowing minor changes to the scope of existing services (such as extending operating hours) as part of the revisions to this section.

The proposed rule would have retained a provision that prohibited the Director from including a provision in a concession contract that would grant a concessioner a preferential right to provide new or additional visitor services under the terms of a concession contract (defined as a right of a concessioner to a preference in the nature of a right of first refusal). The Centennial Act replaced the statutory basis for this regulatory prohibition, so the NPS excludes it from the final rule.

This change applies to current and future concession contracts.

#### *Change 9: Setting Franchise Fees*

Section 51.78 reflects the requirement of the 1998 Act that concession contracts provide for payment to the government of a franchise fee in consideration of the probable value to the concessioner of the privileges granted by the contract. The regulations describe how probable value will be determined and how the fee may be adjusted during the term of the contract. The final rule modifies § 51.78 in several ways to clarify how the NPS will set the franchise fee to encourage competition and provide enhanced or higher quality service offerings while considering the reasonable opportunity for net profit in relation to capital invested and the obligations of the contract.

First, the NPS modifies language in § 51.78(a) to clarify that the consideration in the capital invested to determine reasonable opportunity for net profit includes those funds required to be placed in special accounts identified in § 51.81, and the obligations of the contract as described in the prospectus.

Second, the NPS provides a new subsection (b) providing alternative methods for the Director to determine the type of franchise fee to include in a prospectus. Congress has charged the NPS with ensuring that the franchise fee reflects “the probable value to the concessioner of the privileges granted by the particular contract involved,” 54

U.S.C. 101917(a). Historically, the NPS implemented this statutory directive by setting a minimum acceptable franchise fee in the prospectus and allowing competition to determine whether a higher franchise fee better reflects the contract's probable value to the offeror in consideration of the capital invested and obligations of the contract including any enhancements in visitor services that might be offered. In the final rule, the NPS has included an additional means of meeting the statutory directive by using a "prospectus franchise fee," which will be set at a level to encourage competition for the concession opportunity through offers of either higher franchise fees, or lower franchise fees combined with enhanced or higher quality service offerings that exceed the requirements included in the prospectus. The NPS will use the prospectus franchise fee unless such use is inappropriate, in which case the NPS will use the minimum acceptable franchise fee.

Third, the final rule adds in a new paragraph (c) that requires that the Director use relevant industry data when determining the applicable franchise fee and to provide the basis for this determination in the prospectus. These additions to the regulation are consistent with historical NPS practice in prospectus development that already provides the basis for the calculation of a franchise fee based on the probable value of the contract to the offeror. This addition to the regulation will further transparency in prospectuses.

These changes apply to all prospectuses issued after the effective date of the final rule. As noted, however, many of these requirements reflect historical NPS practice.

#### *Change 10: Special Accounts*

Section 51.81(b) of the existing regulations allows concession contracts to require the concessioner to set aside a percentage of its gross receipts in a repair and maintenance reserve to be used, at the direction of the Director, solely for maintenance and repair of real property improvements located in park areas and utilized by the concessioner in its operations. Repair and maintenance reserve funds may not be expended to construct improvements that would be eligible for LSI. The proposed rule merely changed the name of the "repair and maintenance reserve" to "component renewal reserve" to reduce confusion about how the funds in this reserve may be used." The final rule retains that change (which applies to current, if amended, and future contracts) and well as the following

changes that will improve the understanding of the reserve.

First, the rule specifies that the NPS should identify the anticipated timing and estimated costs of component renewal projects in the prospectus. This change applies to all prospectuses issued after the effective date of the final rule.

Second, to further avoid confusion, the rule describes that the component renewal reserve provides a mechanism for a concessioner to reserve monies to fund component renewal projects, and that concessioner obligations to maintain assigned concession facilities, including component renewal, are not limited to the monies in the component renewal reserve. This change does not change how the NPS and concessioners treat the component renewal reserve or the concessioners' maintenance obligations.

#### *Change 11: Concessioner Rates*

Section 51.82(a) of the existing regulations states that concession contracts must allow concessioners to set reasonable rates and charges to the public for visitor services, subject to approval by the Director. Paragraph (b) explains how the Director will determine whether rates and charges are reasonable, by comparison with rates and charges for facilities and services of comparable character under similar conditions with due consideration to the following factors: length of season, peakloads, average percentage of occupancy, accessibility, availability and costs of labor and materials, and types of patronage. Rates and charges may not exceed market rates and charges for comparable facilities, goods, and services, after considering certain factors. These requirements are taken directly from the 1998 Act. 54 U.S.C. 101916.

The 1998 Act also states that the rate approval process shall be as prompt and as unburdensome to the concessioner as possible and rely on market forces to establish the reasonableness of rates and charges to the maximum extent practicable. 54 U.S.C. 101916(b)(1). The NPS finalizes several changes to § 51.82 to meet these requirements. These changes apply to current and future concession contracts.

First, the NPS codifies the requirements in the 1998 Act and provides that the NPS will rely on market forces to establish the reasonableness of such rates and charges to the maximum extent practicable.

Second, the NPS adds a new paragraph (c) that requires the Director to identify the rate approval method for each category of facilities, goods, and

services in the prospectus. Unless the Director determines that market forces are not sufficient to establish the reasonableness of rates and charges, the rule requires the Director to make a competitive market declaration (rather than using other NPS annual rate approval methods), and further provides that rates and charges will be approved based upon what the concessioner determines the market will bear. The Director will determine this by reviewing the services being provided by the current concessioner relative to the comparable set of offerings in the market. Other rate approval methods will be used only when the Director determines that market forces are inadequate to establish the reasonableness of rates and charges for the facilities, goods, or services. For example, this may occur for lodging or food and beverage outlets where there are no alternatives, guiding services for one-of-a-kind recreational experiences, and transportation to NPS units where there is only one way to access the site (e.g. ferry service to the Statue of Liberty). This rule requires the Director to monitor rates and charges and competition and allows the Director to change the rate approval method during the term of the contract to reflect changes in market conditions. This last provision allows the NPS to respond to market pressures on rates for concessioner services that did not historically exist. This has occurred where lodging and other visitor services have expanded in gateway communities, aided by online searches and booking methods that provide more options for visitors. In addition, competitors in some locations use dynamic pricing to set rates, which means that prices are adjusted to reflect demand. The task of approving reasonable and appropriate rates and charges in these scenarios is burdensome. Unlike private sector companies, concessioners must undergo an annual rate approval process each year where maximum rates are set through a complex comparability process that occurs months in advance of the season. The concessioners are then not as able to quickly and efficiently adjust rates, particularly in times when visitor demand is higher than was forecasted. This rule acknowledges this fact and allows the NPS to more fully consider competitive, demand-driven pricing methods where it makes sense to lessen this burden. The NPS monitors the rates of the concessioner. In the event that the concessioner's rates set based upon a competitive market declaration no

longer reflect changes in market conditions taking into account the varied characteristics and quality of services offered, the Director may determine that this rate approval method is not providing reasonable and appropriate rates and may change the rate approval method to one that will meet these conditions. The Director will monitor rates and charges and competition and may change the rate approval method during the term of the contract to reflect changes in market conditions.

The enhanced use of competitive market methods may result in increased rates and revenue with no change in expenses to the concessioner. These changes in the financial opportunity of the contract will be accounted for through contract requirements that would benefit the public using the concession services. An analysis of the expected relationship between rates and such contract changes can be found by reading the report entitled “36 CFR [part] 51 Concessions Contract Revisions Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA)” that can be accessed at <https://www.regulations.gov> in Docket ID: NPS-2020-0003. The NPS notes that the competitive market declaration and other rate methods establish reasonable and appropriate rates for the services that are being offered. This is separate than the determination of what services are necessary and appropriate, including the range of offerings and associated price points. That determination is conducted through the NPS planning process.

Third, the NPS adds a new paragraph (d) that establishes rules for how the Director responds to requests from existing concessioners to change rates and charges to the public so that they are as prompt and as unburdensome as possible to the concessioner. The new language requires each contract to include a schedule for rate requests and describe the information necessary to include in a complete rate request. This clarifies a current NPS practice to include this information in the concession contract operating plan. The rule further requires, upon receipt of a request for a change in rates or charges, the NPS, as soon as practicable but not

more than 20 days of receipt of the request, to provide the concessioner with a written determination that the request is complete, or, if not, a description of the information required for the request to be determined complete. Where changes in rates and charges have been requested and the NPS deems the request complete, concessioners may notify visitors making reservations 90 or more days in advance of the anticipated rates subject to review and adjustment, if necessary, at or before the time of the visit pursuant to the NPS’s timely decision to approve or reject the rate change. The NPS will issue a final decision approving or rejecting a request by a concessioner to change rates and charges to the public within 10 days of receipt of a complete request in accordance with the conditions described in the contract, except for those change requests requiring a full comparability study, for which the NPS will issue a decision as soon as possible and in no event longer than 30 days after receipt of the complete request. If the NPS does not approve of the rates and charges proposed by the concessioner, the NPS must provide in writing the substantive basis for any disapproval. These timeframes will be exceeded only in extraordinary circumstances and the concessioner must be notified in writing of such circumstances. If the NPS fails to meet the timeframes described above, and has not notified the concessioner in writing of the existence of extraordinary circumstances justifying delay, a concessioner may implement the requested change to rates and charges until the Director issues a final written decision. If the Director denies the requested change to rates and charges after implementation by the concessioner, the Director will not require the concessioner to retroactively adjust any rates or charges for services booked prior to the Director’s denial.

Under current policy, the NPS responds to rate requests within 45 days, but does not have any specific timeframes as outlined in the revisions to the rule. The specific response requirements included in the final rule will improve responsiveness and

provide more certainty to concessioners by ensuring prompt and transparent decisions regarding requests for rates and charges. Additionally, the advance rate practices described in the rule provide the concessioner flexibility so they are not encumbered in their ability to advertise, take reservations and charge reasonable and appropriate rates during the rate request and approval process. The NPS clarifies that charging advanced rates outside the rate request schedule in the contract and rate request and approval procedures in paragraph (c) of § 51.82 may be allowed if specified in the contract. Such allowances may occur when additional advanced rate practices are determined by the NPS as appropriate and consistent with comparable services and when they are conducted in accordance with NPS rate administration policy.

*Change 12: Subpart J—Assignment or Encumbrance of Concession Contracts (36 CFR 51.84–51.97).*

The regulations in Subpart J set forth rules for executing assignments and encumbrances of concession contracts. The proposed rule included a prohibition on submitting requests to approve an assignment of a concession contract within twenty-four months following the effective date of the contract unless the proposed assignment was compelled by circumstances beyond the control of the assigning concessioner. After receiving many comments criticizing this prohibition as too restrictive, the NPS has decided to withdraw the rule change. Instead of imposing an additional restriction on the assignment of concession contracts, the NPS will pursue its policy objectives through the current regulatory framework.

*Final Rule*

Summary of Changes

After internal deliberations and in response to comments, the NPS made the following changes to the proposed rule. For a more detailed discussion of these changes, refer to the next section entitled “Summary of Public Comments” and bureau responses, organized by topic.

Title 36	Description of change
§ 51.4 .....	How will the Director invite the general public to apply for the award of a concession contract and how will the Director determine when to issue a prospectus for a new concession opportunity where no prior concession services had been provided? <ul style="list-style-type: none"> <li>• NPS retained the 18-month rule with exceptions for issuing prospectuses earlier.</li> <li>• NPS added a requirement for an annual process to invite ideas for new services and requires public disclosure of proposals and evaluations.</li> <li>• NPS changed the factors considered when issuing a prospectus for new concession opportunities.</li> <li>• NPS added a reference to the authority for noncompetitive award of concession contracts.</li> </ul>
§ 51.8 .....	§ 51.8 Where will the Director publish the notice of availability of the prospectus?

Title 36	Description of change
§ 51.16 .....	<p>How will the Director evaluate proposals and select the best one?</p> <ul style="list-style-type: none"> <li>• NPS kept the language as proposed with editing improvement.</li> <li>• NPS added a maximum aggregate score of 40 points.</li> <li>• NPS added a requirement that each selection factor used must have a maximum score of at least one point.</li> <li>• NPS provided that the maximum score for the principal selection factor for franchise fees remains subordinate to the other principal selection factors listed in § 51.17(a).</li> <li>• NPS provided that an offerors will receive one point for agreeing to the prospectus franchise fee or the minimum acceptable franchise fee, whichever is applicable.</li> <li>• NPS included the prospectus franchise fee option when describing the scoring for the principal selection factor for franchise fees.</li> <li>• NPS provided that the scores for secondary selection factors reflect the relationship between principal and secondary selection factors.</li> </ul>
§ 51.17 .....	<p>What are the selection factors?</p> <ul style="list-style-type: none"> <li>• NPS added a requirement to include a secondary selection factor for new services when appropriate.</li> </ul>
§ 51.51 .....	<p>What special terms must I know to understand leasehold surrender interest?</p> <ul style="list-style-type: none"> <li>• The NPS is removing the term “comprehensive” from the definition of a major rehabilitation.</li> <li>• The NPS is removing the term “that the director approves in advance” from the definition of major rehabilitation in paragraph (a).</li> <li>• The NPS is removing the word “solely” from the definition of leasehold surrender interest because it is unnecessary. This is a non-substantive edit that will not change the meaning of the definition.</li> </ul>
§ 51.73 .....	<p>What is the term of a concession contract?</p> <ul style="list-style-type: none"> <li>• NPS clarified the conditions for including option terms based on performance factors in new concession contracts including a three-year limit for such options.</li> <li>• NPS clarified when the Director and concessioner may amend a concession contract to lengthen the term of a contract due to a substantial interruption of or change to operations including a three-year limit.</li> </ul>
§ 51.76 .....	<p>May the Director amend a concession contract to provide new or additional visitor services or grant a concessioner a preferential right to provide new or additional visitor services?</p> <ul style="list-style-type: none"> <li>• NPS included the administrative practice of amending operating plans for minor changes to visitor services.</li> <li>• NPS included a list of possible changes that could lead to an operating plan or contract amendment.</li> <li>• NPS deleted the provision regarding granting concessioners a preferential right to new or additional services.</li> <li>• NPS added a provision that the Director should consider whether other operators adequately provide a service when considering whether to amend an existing contract to add a new service.</li> </ul>
§ 51.78 .....	<p>Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment?</p> <ul style="list-style-type: none"> <li>• The NPS is modifying the language in paragraph (a) clarifying that the consideration in the capital invested to determine reasonable opportunity for net profit includes those funds required to be placed in special accounts identified in § 51.81.</li> <li>• The NPS is moving requirements regarding the consideration of revenue to the Government compared to other factors to paragraph (c).</li> <li>• The NPS is adding a new paragraph (b) providing a new means for the Director to determine the franchise fee for the contract as an alternative to the minimum franchise fee. This alternative method would include in the prospectus, a “prospectus franchise fee” set at a level to encourage competition for the concession opportunity through offers of higher franchise fees or lower franchise fees combined with enhanced or higher quality service offerings that exceed prospectus requirements.</li> <li>• The NPS provides that the NPS will use the prospectus franchise fee unless such use is inappropriate, in which case the NPS will use the minimum acceptable franchise fee.</li> </ul>
§ 51.81 .....	<p>May the Director include “special account” provisions in concession contracts?</p> <ul style="list-style-type: none"> <li>• The NPS is revising paragraph (b) to add a requirement that the anticipated timing and estimated costs of component renewal projects should be identified in the prospectus.</li> <li>• The NPS is expanding paragraph (b) to clarify that the component renewal reserve provides a mechanism for a concessioner to reserve monies to fund component renewal projects and that concessioner obligations to maintain assigned concession facilities including component renewal are not limited to the monies in the component renewal reserve.</li> </ul>
§ 51.82 .....	<p>Are a concessioner's rates required to be reasonable and subject to approval by the Director?</p> <ul style="list-style-type: none"> <li>• The NPS is removing the requirement provided in the proposed rule that the Director respond to rate requests within 30 days.</li> <li>• The NPS is adding a new paragraph (d) that establishes more defined rules for how the Director responds to requests from concessioners to change rates and charges to the public. The provision requires that each contract include a schedule for rate requests and describe the information necessary to include in a complete rate request. Specific timelines for various rate approval actions by the Director and advanced rate charging allowances during the rate approval process have been included.</li> </ul>
§ 51.87 .....	<p>Does the concessioner have an unconditional right to receive the Director's approval of an assignment or encumbrance?</p> <ul style="list-style-type: none"> <li>• The NPS removed the requirement in paragraph (i) that the request for approval of the assignment must be received 24 months or more after the effective date of the contract unless the requested assignment is compelled by circumstances beyond the control of the concessioner.</li> </ul>

### Summary of Public Comments

The NPS published a proposed rule in the **Federal Register** on July 20, 2020, (85 FR 43775) and accepted comments on the proposed rule through the mail, by hand delivery, and through the

Federal eRulemaking Portal at <https://www.regulations.gov>. The comment period closed on September 18, 2020. The NPS received 68 comments on the proposed rule from individuals and organizations. A summary of the

pertinent issues raised in the comments and NPS responses are provided below. In general, the concessioner community generally supported the proposed rule. Some individual members of the public objected to expanding commercial

operations in national parks. Non-governmental organizations generally supported the proposed rule as a whole while objecting to some changes, citing perceived detrimental effects on the National Park System, small business, and the visitor experience. After considering public comments and after additional review, the NPS made several substantive changes in the final rule that are explained in the responses to comments below. Additionally, the NPS made non-substantive stylistic, formatting, and structural changes in the final rule.

#### *General Comments*

*1. Comment:* Several commenters do not support allowing for commercial visitor service opportunities in the National Park System and expressed concerns that this will have a detrimental effect to both resources and the public, could change the nature of the visitor experience, and is contrary to the Organic Act.

*NPS Response:* The NPS disagrees with these commenters. In accordance with statutory requirements contained in 1998 Act, the NPS provides commercial visitor services only when they are necessary and appropriate for public use and enjoyment of the unit of the National Park System in which they are located and are consistent to the highest practicable degree with the preservation and conservation of the resources and values of the unit. These statutory conditions are restated in the rule in regard to the introduction of any new or additional services. NPS adheres to these tenets in planning, solicitation and award and management of concession contracts.

*2. Comment:* Several commenters assert that the rule could damage or disadvantage existing small businesses.

*NPS Response:* The NPS disagrees that the rule will damage or disadvantage small businesses. The regulatory impact analysis conducted for this rule resulted in a determination that the rule will have a positive impact on small businesses. First, the rule changes are designed to improve the way that NPS solicits, evaluates, and administers concessions contracts. The vast majority of concessioners operating in parks (estimated 96%) are small businesses as defined by the Small Business Administration (SBA) and, as such, will benefit from the changes to the rule. Solicitations for concession contracts are full and open and any qualified businesses, including small businesses, may compete in such solicitations. In regard to whether new or additional services may impact small businesses outside the park unit, the

NPS must consider the potential impacts on communities located near the park area when evaluating the potential to offer new and/or additional services. This includes potential impacts on small businesses. Additionally, when considering whether to amend the applicable terms of an existing concession contract to provide new or additional services, the rule requires the Director to consider the potential benefit to the visitor experience where other commercial operators (most of which are small businesses) in the same park area already adequately provide those services.

*3. Comment:* One commenter requested that the NPS include in the rule a statement “that concessions agreements are a legitimate strategy for meeting the financial needs for both park protection and infrastructure creation, operation and maintenance directly associated with visitor needs.”

*NPS Response:* NPS declines to make this addition as the purpose of concession contracts are clearly stated in the 1998 Act and are reaffirmed in the regulation as currently written.

*4. Comment:* One commenter expressed concern that the NPS failed to include regulations pertaining to the Visitor Experience Improvements Authority (VEIA) in the rule.

*NPS Response:* The NPS declines to address the VEIA in this rule as these revisions to 36 CFR part 51 focus on concession contracts and not on other contract types for commercial visitor service that may be authorized under the VIEA.

#### *New Concession Opportunities*

*5. Comment:* The NPS received some comments generally opposed to increasing commercial operations in parks and listed types of activities the NPS should prohibit in the regulation such as Amazon deliveries, food trucks, cell towers, Wi-Fi services, and other “urban amenities.” The NPS also received comments that the NPS should consider only the expansion of existing services rather than allowing entirely new services.

*NPS Response:* NPS declines to include such a list because some of those activities may be necessary and appropriate in some parks and during some time periods. For example, food trucks for special events at the National Mall in Washington, DC, would provide additional visitor services during well attended events. Rather than listing specific activities to allow or disallow, the NPS relies on existing planning processes and the necessary and appropriate determination process to

make park-by-park determinations of visitor services to include in a concession contract. In some instances, services available to the NPS and its employees are not subject to concession contracts (Amazon deliveries and Wi-Fi services). The NPS manages cell towers in the National Park System through other authorities and not concession contracts. The decision of what commercial visitor services to allow in individual parks considers park specific conditions. The NPS regional directors, upon advice from park superintendents, decide what commercial visitor services are necessary and appropriate. NPS avoided regulating any specific commercial visitor service to allow this discretion by those most familiar with park-specific conditions.

*6. Comment:* Many commenters generally supported the idea of expanding visitor services citing topics such as economic development, modernization, and technology. Others suggested developing comprehensive criteria to evaluate new visitor service suggestions. The NPS also received a comment that the NPS should reevaluate currently provided commercial services that may be inadequate and should consider the public benefits of having multiple providers of a service, or multiple variations of a service, to suit differing visitor needs.

*NPS Response:* The NPS appreciates these comments. The 1998 Act provides that the NPS may issue concession contracts only for commercial visitor services determined to be necessary and appropriate and consistent to the highest practicable degree with the preservation and conservation of the National Park System unit. The NPS complies with this direction through public planning processes guided by NPS Management Policies and related guidance. The NPS chooses to allow park managers and regional directors discretion to consider circumstances and conditions unique to a System unit rather than define one regulatory standard for the entire National Park System. Experience has shown that the existing policies and guidance provide sufficient standards to ensure continued preservation and conservation of System units as required by law.

*7. Comment:* One commenter encouraged the NPS to establish an annual process for the Director to solicit ideas for new services (in addition to the recognition in the proposed rule that the NPS would do this during park-level planning processes). That commenter also stated the NPS should commit to consider a minimum number of proposals each year (suggesting 10).

*NPS Response:* Considering these comments, NPS has included in the rule a provision to require the Director to annually solicit visitor service ideas through a process separate from the park planning processes. Proposals received for new visitor service and concession opportunities will be encouraged, reviewed, and responded to; however, NPS chose not to set a minimum number of proposals to consider as the NPS cannot predict or control how many such proposals it will receive.

*8. Comment:* As proposed, the regulation stated no party will have a preference to a new contract that authorizes a suggestion submitted by that party. One commenter suggested deleting that language and creating a method to provide that party “appropriate credit” in the rating process. That commenter also suggested the NPS allow the suggesting party, if awarded the contract, to credit against franchise fees a “portion of the costs incurred . . . in generating a proposal for new or additional visitor services . . .” The commenter suggested regulatory language to incorporate these concepts.

*NPS Response:* The NPS declines to make such revisions. The 1998 Act included preferences for only two categories of concessioners—those whose operations generate under \$500,000/year and those who met specific qualifications as outfitters and guides. The NPS thinks providing credit as suggested by this commenter would create a preference system not authorized by law. In addition, allowing a deduction for the costs of developing a suggestion to the Director could also provide a preference for the offeror that submitted the idea, as knowing it would recoup some of the cost of development might allow it to propose a higher franchise fee than other offerors, and, therefore, receive more points for the principal selection factor for franchise fees during the competitive evaluation process. Furthermore, allowing for the recoupment of development costs is uncommon in the private sector and other government contracting actions. The NPS sees no benefit in allowing such for concession contracts.

In consideration of these concerns, however, the NPS added a new provision to § 51.17(b) providing that the NPS will include a secondary selection factor requesting suggestions for new services when appropriate. This reflects a practice the NPS has used off and on for several years to encourage new ideas for commercial visitor services within the scope of the contract included in a prospectus and should allow entities that seek to provide new

services in a park area to develop such ideas and receive appropriate credit as part of the competitive process.

*9. Comment:* NPS received several comments expressing concerns that allowing new services may adversely affect businesses in nearby towns or the operations of other park concessioners or commercial operators.

*NPS Response:* The final rule addresses this concern. In determining whether to issue a prospectus for a concession contract to provide such new concession opportunities, the Director shall consider relevant factors including whether the suggested opportunities are adequately provided within the park area by other authorized commercial providers; the potential for augmented resources for park area operations; the effects of the suggested concession operations on the park area; the sustainability of the suggested concession opportunities; the innovative quality of the suggestions; and the potential impacts on park area visitation and on communities located near the park area.

*10. Comment:* The NPS received several comments about using the innovative quality of the suggested new services as one of the evaluation factors because some visitor service ideas, such as bicycle rentals, may not be innovative but could still provide a valued additional visitor service. Another commenter suggested NPS consider the impacts of new services to park operations and the sustainability of the new concession operation.

*NPS Response:* The NPS chooses to keep the innovative nature of the visitor service as a factor to consider, however, it is by no means a controlling factor or intended to work to exclude new visitor services that are not considered innovative. The NPS also included consideration of the impacts of new services to park operations and the sustainability of the new concession operations.

*11. Comment:* One commenter stated the NPS should set clear criteria in determining what visitor services to provide within a park, suggesting that this would include making the necessary and appropriate determinations. For many years, the NPS has relied on policy to guide this exercise of discretion.

*NPS Response:* Both NPS Management Policies 2006 and the Commercial Services Guide have information on this process. The NPS declines to regulate more specific criteria for this decision process.

*12. Comment:* One commenter stated the NPS should set a deadline for developing the process of seeking

proposals for new visitor services. Another commenter recommended the NPS include broad agency input and include some outside parties in its evaluations. Finally, a commenter suggested creating a unique plan for Alaska.

*NPS Response:* While the rule does not contain a specific timeframe for soliciting and reviewing proposals for new visitor services, it does require an annual process. The NPS, therefore, intends to implement the first solicitation of ideas as soon as practicable and before the end of the calendar year following the effective date of the final regulations. The NPS will consider suggestions for broad input in evaluating proposals for developing new visitor service opportunities, including those in currently underdeveloped Alaska park areas as the NPS constructs the new visitor service opportunity solicitation process and related guidance.

#### *Timing of Issuing Prospectuses*

*13. Comment:* Several comments generally opposed or generally supported the elimination of the requirement to issue prospectuses not sooner than 18 months before the contract expires. Some commenters raised specific objections, often contradicted by other commenters (for example: “it will increase competition” and “it will have no effect on competition;” “it will decrease the quality of bids” and “it will increase the quality of bids”).

*NPS Response:* The NPS has decided to keep the language in the existing regulation retaining what we call the 18-month rule but allowing the Director to issue a prospectus earlier when necessary to provide additional time to potential offerors, such as when additional time is needed to avoid issuing a prospectus during a busy operating season or where potential offerors must make significant financial commitments to meet the requirements of the contract. This additional time will be as short as prudent.

*14. Comment:* One commenter supported keeping the 18-month rule and suggested adding a requirement that the NPS not issue a prospectus during a busy operating season.

*NPS Response:* The NPS has chosen to keep the 18-month rule. Some limited circumstances, however, could result in the need to depart from the 18-month rule. Generally, the NPS issues contracts with a January 1 start date, rather than having contract start dates scattered over the year, keeping the inventory of contracts on a calendar year basis. Consequently, the 18-month rule would

prohibit the NPS from issuing a prospectus sooner than July 1 the year before the current contract expires. Since most recreation providers are busiest during the summer season, the 18-month rule results in the NPS either issuing a prospectus during the operator's busy season or delaying release until later that year. Preparing an offer during the busiest time of year can present many challenges for concessioners, especially for small businesses with limited staff. Delaying the release until later in the year, however, can result in the NPS needing to extend an existing contract for another year because of the time it takes the NPS to complete its evaluation process, announce the selection of the best proposal, and award the contract. In some circumstances the potential for contract extension out of necessity should be avoided by the issuing of a prospectus in advance of 18 months prior to contract expiration, but as close to contract expiration as is prudent.

*15. Comment:* Several commenters said the NPS should use the ability to extend contracts to provide more time during the solicitation and evaluation period rather than eliminating the 18-month rule.

*NPS Response:* Contract extensions may be appropriate when necessary to ensure the continuity of visitor services and as such serve as a remedy where the circumstances surrounding the solicitation and evaluation of proposals within the allotted 18-month period may give rise to interruptions of services to the public. However, such extensions should be the exception and not the rule. The final rule, therefore, provides the NPS with flexibility in certain circumstances to use additional time for prospectus solicitation, evaluation and award, provided that additional time is as short as is prudent. This added flexibility to the 18-month rule is necessary, as the 18-month rule can leave insufficient time to solicit, evaluate, select and award contracts for several reasons. First, as described above, to avoid issuing prospectuses during the concessioners' (and likely competitors') busy seasons, the NPS has delayed issuing a prospectus until later in the year, which frequently leads to extending contracts. Second, for more complex contracts, the NPS frequently allows offerors four to five months to compile and submit proposals. Many of these contracts require notice to Congress at least 60 days prior to award (see 54 U.S.C. 101913(6)). All of this extra time often leads to the need for a contract extension. Third, even for less complex contracts, the rigorous evaluation and selection processes,

providing the selected offeror time to review the terms of the contract, and allowing reasonable transition time also may give rise to the need for extensions of contracts.

*16. Comment:* Several commenters pointed to the justification for including the 18-month rule in the 2000 regulations, that issuing prospectuses sooner than 18 months before contract expiration would result in too much uncertainty and speculation.

*NPS Response:* The concerns raised have led to keeping the 18-month rule in the final regulations as a matter of general application, but with limited exceptions. Over the past 20 years, the NPS has developed a professional and reliable process to analyze information and develop prospectuses. The NPS relies on the incumbent concessioner's operating history and on industry metrics and the experience of long-time financial consultants and A&E firms. Where it is necessary due to operating circumstances to issue a prospectus more than 18 months in advance, the reliability of this information will not diminish by issuing a prospectus a few months earlier. That said, the NPS remains concerned with information becoming stale when issuing a prospectus too far in advance of a contract effective date. The NPS also anticipates for most contracts where circumstances require early release of a prospectus, the timing of such releases will move less than six months. In other rare circumstances, for example, the NPS may release a prospectus two years before expiration to accommodate a new concessioner's need to acquire expensive personal property such as passenger ferries. The NPS may award those well before operations commence to provide the new concessioner an awarded concession contract to rely upon to enter into acquisition agreements and necessary financing.

*17. Comment:* Several commenters suggested keeping the 18-month rule and adding language requiring the NPS to demonstrate a need for an earlier prospectus release.

*NPS Response:* The NPS has added criteria for the NPS to use to issue a prospectus earlier than 18 months before a contract expires. Applying these criteria will be the exception to the 18-month rule and will be supported by an administrative record. Modifying the 18-month rule to allow for earlier releases when necessary provides the NPS with the ability to time the issuance of prospectuses to meet many goals, including that of relieving concessioners of the burden of preparing proposals during a busy operating season, and of alleviating the

uncertainty associated with a concessioner's future operations. As stated in the preamble to the proposed rule, it also allows the NPS to better design competition and award for contracts with substantial personal property investment. The NPS recognizes the concern represented by commenters opposing this change and will develop guidance on factors the NPS should consider in determining when to release a prospectus as well as additional steps the NPS could take to improve competition and the quality of proposals.

*18. Comment:* A commenter suggested several processes the NPS should use to encourage more and better proposals including earlier disclosure of contract requirements, two rounds of questions and answers, and a more thorough debriefing process.

*NPS Response:* The NPS will consider these as suggestions to consider in developing additional policy guidance but does not find it necessary to include such guidance in the final rule.

#### *Publishing Notice of a Prospectus*

*19. Comment:* The NPS received three comments related to the publication of the notice of a prospectus release. None of the comments addressed the change in the regulation. One commenter suggested changes to the NPS practices of posting expected prospectus releases on the WASO Commercial Services Program website. Two supported publishing notice in trade publications (included in the existing rule). One suggested taking steps to notify the incumbent concessioner directly.

*NPS Response:* The NPS sees no need to make changes to the rule as proposed based on these comments, which addressed the title of the publication and not the method, but will consider this input in developing any additional policy guidance regarding publication methods.

#### *Weighting Selection Factors*

*20. Comment:* The NPS received one comment opposing the additional flexibility the proposed changes would provide the NPS due in part to the ambiguities in the proposed rule. On the other hand, the NPS also received many comments supporting additional flexibility in scoring proposals but asking for further clarification. Additional comments noted that each selection factor used should be worth at least one point.

*NPS Response:* The proposed rule language, which provided considerable flexibility to the NPS to design proposal packages that reflected park area goals, unfortunately was vague and led to

differing interpretations of how the scoring would work. The final rule clarifies the scoring and recognizes the subordination of franchise fees and other consideration to the government to other principal selection factors. For consistency and clarity, the new language for § 51.16(a) includes a maximum aggregate total point score of 40, which is 10 points higher than provided for in the existing regulations. The NPS believes the new maximum will provide additional flexibility for the NPS and reliability for those who submit proposals for new concession contracts. The final rule also includes a requirement that each selection factor used must have a maximum score of at least one point. In § 51.16(a)(2) and (3), the final rule clarifies the scoring for secondary selection factors to reflect the relative scoring structure of the existing regulations, to wit: the maximum score for the secondary selection factor in § 51.17(b)(1) must be lower than the maximum score for the principal selection factor for franchise fees and the maximum aggregate score for all other secondary selection factors must be lower than the maximum score for the principal selection factor for franchise fees. This retains the current scoring structure and continues to differentiate between principal and secondary selection factors.

*21. Comment:* Many commenters pointed out the proposed rule did not provide that franchise fees and other consideration to the government would be subordinate to other principal selection factors as required by the 1998 Act and as incorporated into the existing regulations. In a related vein, several commenters requested that experience receive higher consideration than consideration of franchise fees and other consideration to the government, especially for high risk recreation activities.

*NPS Response:* In § 51.16(a)(1), the NPS added language to reflect the 1998 Act requirement that consideration of franchise fees and other consideration to the government will be subordinate to the objectives of protecting, conserving, and preserving resources of the park area and of providing necessary and appropriate visitor services to the public at reasonable rates, which are two of four statutorily mandated “principal selection factors.” Even though the foregoing statutory requirement subordinates consideration of franchise fees and other consideration to the government only to these two principal selection factors, the NPS decided to maintain the relative scoring structure of the existing regulations and also subordinate consideration of franchise

fees and other consideration to the government to the experience and related background of offerors and the financial capability of offerors, which are the other two principal selection factors. The NPS also agree that experience in high risk operations should matter more than consideration of franchise fees and other consideration to the government, but thinks it should matter in all circumstances. And while the NPS did not receive comments asking to maintain the higher consideration for the principal selection factor regarding the financial capability of offerors over the principal selection factor for franchise fees and other consideration to the government, we recognize from twenty years of evaluating proposals that those supported by strong financial capability and understanding of the business opportunity translate into financially sustainable concession operations. As a result, the final rule provides that the maximum score for the principal selection factor regarding franchise fees and other consideration to the government must be less than the maximum score for the other principal selection factors set out in § 51.7(a).

*22. Comment:* The NPS received comments that supported continuing to award one point for agreeing to the minimum franchise fee.

*NPS Response:* The NPS revised the proposed language to provide that the score for agreeing to the prospectus franchise fee or the minimum franchise fee (as applicable) set out in the prospectus would be one point.

*23. Comment:* Several commenters pointed out that the scoring scheme in the proposed rule could result in a scoring anomaly where the franchise fee is undervalued inappropriately.

*NPS Response:* The NPS thinks that the maximum aggregate score of 40 points resolves this concern.

*24. Comment:* One commenter suggested the NPS limit the score for franchise fees to 15% of the total score for all selection factors asserting that would retain the current approximate weight of that selection factor as against the other selection factor scores.

*NPS Response:* The NPS declined to do this for two reasons. First, this could lead to a situation where the minimum and maximum scores for the principal selection factor for franchise fees would be other than a whole number, which would unduly complicate the panel evaluation process. For example, rather than having a range of scores from zero to four, the range could be zero to 3.705 or 5.47. Second, by adding the maximum score of 40 points, our calculations for various scenarios

resulted in scores for principal selection factor 5 at or near levels under the existing regulations or around 15%. To reflect the change under § 51.78 defining a new method of developing a “prospectus franchise fee,” the NPS included a reference to that type of franchise fee in discussing the scoring for the principal selection factor on franchise fees.

*25. Comment:* The NPS received comments stating we should require disclosure of subfactor scores for every subfactor.

*NPS Response:* The NPS declines to make this part of the regulatory change because each prospectus includes proposal instructions that vary little from one prospectus to the next. Those instructions contain a provision (which has been included in the prospectus instructions for many years) that all subfactors will receive the same weight unless the NPS specifies otherwise. The NPS believes this instruction sufficient for offerors to understand when we do and do not assign different scoring weights among subfactors. To enhance transparency, however, the NPS will develop guidance to disclose when subfactors are considered of equal weight beyond the language in the prospectus instructions.

*26. Comment:* The NPS received a variety of comments suggesting we require specific topics for secondary selection factors such as using local businesses to support concession operations, efforts to attract lower income visitors, demonstrated knowledge or the NPS or the park area involved, and recommending additional visitor services.

*NPS Response:* The NPS agrees these are good topics for secondary selection factors and have used variations of these in past prospectuses. Rather than requiring specific topics, however, the NPS thinks it important to develop topics for secondary selection factors as appropriate for the specific concession contract. The NPS will consider adding to existing policy guidance some of these topics to remind those who develop prospectuses of the value of these ideas.

*27. Comment:* The NPS received comments asking the NPS to provide that certain commitments would receive additional points such as favoring minority or women-owned businesses or specific nonprofit organizations.

*NPS Response:* The current regulatory language in § 51.17(b)(2) provides direction in this regard.

*28. Comment:* Several commenters stated the NPS should include requirements in the regulations to explain the allocation of points in each

prospectus and how we determined the minimum franchise fee.

*NPS Response:* The NPS thinks the existing structure of proposal packages, which identify the NPS's objectives for protecting, conserving and preserving park resources and of providing necessary and appropriate visitor services at reasonable rates, currently discloses this reasoning. The NPS, however, will review existing policy guidance and consider whether we need to develop additional guidance on these topics considering the changes to the scoring as reflected in the new regulatory language. In addition, in Proposed Change # 8, the NPS has provided additional information on how it determines the minimum franchise fee.

*29. Comment:* The NPS received a variety of comments suggesting additional process changes or guidance topics not directly related to the revision of scoring in the proposed rules. Those topics include making sure page limitations reflect the relative scoring weights among subfactors, having less restrictive operating plans to provide more opportunity for creative proposals, provide more detailed debriefing opportunities, exercise better contract management to enforce commitments made in proposals, and recognition of concessioners working with certain nonprofit organizations.

*NPS Response:* The NPS will consider these when reviewing existing guidance.

#### *Definition of Major Rehabilitation*

*30. Comment:* Several commenters did not support the change in the definition of major rehabilitation and proposed the existing definition should be retained. One of these commenters suggested the change in definition would lead to more LSI credit for maintenance that should have been routine, that the concessioner will delay and bundle projects in order to achieve more LSI at the lower threshold, and stated there is no evidence that franchise fees will be increased under the reduced threshold. A commenter suggested that the options presented all transfer costs to the NPS.

*NPS Response:* NPS disagrees with these comments. As outlined in the preamble, the NPS accounts for LSI-eligible projects through the prospectus development process and considers these investments in the franchise fee analysis for the contract. The NPS has and will maintain procedures to approve facility improvement projects, monitor maintenance and component renewal needs, and other activities to ensure LSI-eligible projects are

conducted in a timely manner and avoid unplanned LSI-eligible events.

*31. Comment:* One commenter suggested that it should be explicitly stated that concessioners are responsible for maintenance and that clear standards should be set for maintenance and LSI eligibility.

*NPS Response:* NPS declines to include a statement in the rule regarding maintenance responsibilities as those responsibilities are clearly defined in the standard concession contract. NPS already has standards for maintenance and LSI eligibility in the standard concession contract and policy but will review its policy and update as necessary.

*32. Comment:* One commenter recommended that NPS remove the term "comprehensive" from the definition of major rehabilitation in Section 51.51 because existing criteria in the regulation make clear that LSI applies only where the investment is substantial and adding the undefined term "comprehensive" appears unnecessary and risks confusing the standard.

*NPS Response:* NPS agrees that the term "comprehensive" is vague and an unnecessary modification of the term "major rehabilitation" and therefore has been removed from the rule. A major rehabilitation is a planned rehabilitation of an existing structure that will either enhance the property's overall value, prolong its useful life, or adapt it to new uses and therefore could involve a number of separate planned actions that collectively and in combination are a major rehabilitation that benefits the subject structure.

*33. Comment:* Several commenters recommended additional modifications to the definition of major rehabilitation projects eligible for LSI. Commenters proposed that a LSI-eligible major rehabilitation should include "any qualified capital investment approved by the Director in advance and vital to the visitor health, safety and enjoyment or the health and safety of NPS and concession employees with the life expectancy of at least 30 years." Commenters also proposed that a LSI-eligible major rehabilitation should be any "*Capital Improvements as defined by Generally Accepted Accounting Principles (GAAP) or . . . is a qualified capital investment approved by the Director. . .*". The commenter separately indicated that the criteria for what work on existing capital improvements can qualify for LSI must incorporate the Congressional intent of "capital improvements," whether as defined under GAAP or some other commonly used industry definition.

*NPS Response:* The NPS declines to incorporate these recommendations as presented, but has included a more detailed definition of major rehabilitations eligible for LSI to provide clarity and more closely track industry standards. NPS has described why the use of GAAP is not an appropriate standard for this purpose in the report titled 36 CFR [part] 51 Concessions Contract Revisions Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA)" that can be accessed at <https://www.regulations.gov> in Docket ID: NPS-2020-0003. Instead, the final rule defines an LSI-eligible major rehabilitation to be a planned rehabilitation of an existing structure where the construction cost exceeds thirty percent of the pre-rehabilitation value of the structure and the work performed improves visitor health, safety, and enjoyment or the health and safety of concessioner employees and will either enhance the property's overall value, prolong its useful life, or adapt it to new uses. The NPS selected the 30% threshold through industry research, specifically the International Facility Management Association, and the requirement that the work "either enhance the property's overall value, prolong its useful life, or adapt it to new uses" relies on common industry understanding of the term "capital improvement." The NPS declines to include projects for NPS employee safety in the definition of LSI-eligible major rehabilitations since projects for that purpose are not specifically relevant to concession contracts. NPS does not include a 30-year life expectancy condition for qualifying major rehabilitations but does include that the work must either enhance the property's overall value, prolong its useful life, or adapt it to new uses.

*34. Comment:* One commenter suggested the proposed changes to the LSI eligibility threshold should apply to existing contracts and not only new contracts.

*NPS Response:* NPS declines this recommendation. NPS will not apply changes to the LSI eligibility to existing contracts as changing the LSI structure would change the financial terms of the concession contract and would be a material change to the opportunity that was initially solicited.

*35. Comment:* One commenter suggested that the NPS allow LSI for employee housing for concessioners or for the housing of both NPS and concessioner employees.

*NPS Response:* No change is needed to the rule. Concessioners may already obtain LSI for capital improvements for

employee housing where it is determined to be necessary during the prospectus process. However, a concessioner cannot build dedicated NPS-employee housing under a concession contract as such capital improvements are not a commercial visitor service.

*36. Comment:* One commenter proposed that the criteria for defining fixtures be modified through policy.

*NPS Response:* NPS is not taking any action in the rule but may consider this recommendation if appropriate in policy as suggested.

*37. Comment:* One commenter encouraged the NPS to use the alternative method formula (aka straight-line depreciation) allowed for contracts where LSI is estimated to exceed \$10 Million.

*NPS Response:* The NPS already uses this formula where the NPS determines it is appropriate.

*38. Comment:* One commenter suggested that NPS allow concessioners to negotiate third party agreements that provide the concessioner with reimbursement rights that survive both during and after the length of the concession contract. For example, a ferry concessioner may negotiate with the third party for the right to recover a docking fee for use of the constructed facility over a certain number of years, extending beyond the end of the concession contract, as well as a provision for an incoming concessioner to buy out that right. While the NPS would not confer these rights to the concessioner, NPS would allow these agreements, and would have to disclose them to a new incoming concessioner. The commenter suggested that allowing concessioners a better third-party reimbursement approach could incentivize and encourage even more essential and complementary projects—dock and dock repairs, seawalls, roadways, parking, lighting, shelters—that greatly improve visitor services for the park.

*NPS Response:* NPS is not taking any action in the rule but may consider this recommendation if appropriate in policy as suggested. There is nothing currently in the regulation that requires NPS approval of these third-party arrangements; however, when the NPS determines that third-party capital investment could potentially be required, the NPS takes this investment into consideration when determining the franchise fee for the contract.

#### *Term of Concession Contracts*

Most commenters supported the proposed changes to § 51.73 that primarily set out circumstances when

the NPS may add additional operating time to a concession contract without invoking the extension authority of § 51.23 to avoid an interruption of visitor services. When reviewing the proposed changes to the rule, the NPS noticed an error in § 51.73(a) in the following sentence: “The Director will issue a contract with a term longer than 10 years when the Director determines that the contract terms and conditions, including but not limited to the required construction of capital improvements or other potential investments related to providing *both* required *and* authorized services, warrant a longer term (emphasis added).” To clarify, when developing the financial analysis for a new concession contract, the NPS analyzes the financial profile of providing the *required* visitor services but not the *authorized* visitor services as a concessioner may choose not to offer the authorized visitor services. Consequently, the final rule deletes the italicized words in the quoted language above to accurately reflect the financial requirements of the new contract.

*39. Comment:* Several commenters wanted the NPS to retain the phrase “should be as short as prudent” in § 51.73(a), stating the phrase reinforced Congressional intent to support competition for concession contracts.

*NPS Response:* The proposed rule deleted the phrase “should be as short as is prudent” from § 51.73(a). The phrase was not reflective of the statutory requirements, as the language of the 1998 Act expresses no preference for the shortest possible term.

*40. Comment:* One commenter wanted the NPS to delete the phrase “years (unless extended in accordance with this part)” from the end of the first sentence of § 51.73(a) asserting it was inconsistent with Congress limiting the length of concession contracts to 20 years.

*NPS Response:* The NPS declines to make that change. The subject phrase appears in the existing regulation, recognizing that the authority under § 51.23 to extend contracts to avoid an interruption of visitor services applies to concession contract no matter the length of the term.

*41. Comment:* The proposed language for § 51.73 (b) appeared to create confusion among commenters and may not have accurately reflected the NPS’s intent for the two situations for option terms.

*NPS Response:* The NPS has revised the language to clarify these provisions. The first situation provides that the NPS may include contract terms that allow a concessioner to have additional option years for meeting NPS-defined

performance criteria, which includes evaluation ratings criteria (the NPS refers to this as the performance option). The second situation provides that the Director (outside the express terms of a concession contract) may provide a concessioner additional operating terms for substantial interruption in operations (the NPS refers to this as the interruption option). For the performance option, the NPS would develop opportunities for new concession contracts providing additional operating years if the concessioner performs at a defined evaluation level and meets other performance metrics (for example, occupancy during shoulder season or visitor satisfaction scores). The NPS would describe those performance metrics in the draft contract included in a prospectus to reflect the NPS’s priorities for that operation. The NPS will develop additional guidance on this process.

*42. Comment:* Some commenters expressed concern with the timing of exercising performance options.

*NPS Response:* The NPS understands the issues with timing and the prospectus process. The NPS has used this in one current contract, which set out the time by which the Director must determine the concessioner has met the performance criteria and the time in which the concessioner must agree to exercise the option. That contract also had provisions for continued levels of performance after exercise of the option to support continued successful operations. The timing recognizes the need for the NPS to commence prospectus development for a new contract at a certain point should the concessioner not achieve the performance criteria or decide to not exercise the option for additional time.

For the interruption option, the Director would exercise his or her discretion to amend an existing unexpired contract to provide additional operating time when events outside the control of the concessioner cause a substantial interruption of or change to operations. This ability of the Director to take such action does not need to be an express part of a concession contract and is an exercise of the Director’s discretion and authority under the 1998 Act.

The NPS added language clarifying that both options are subject to the statutory requirement that concessions contracts, including options, are limited to terms of 20 years. One commenter wanted that limitation struck from the regulation, but the NPS does not find the statutory authority to do so. Other commenters urged the NPS to limit the

length of performance options and one suggested a limit of three years like contract extensions. The NPS agrees and has included language for such limitation, thereby adopting for option years Congress' expressed preference of a three-year maximum when it comes to increasing the length of time a concessioner may provide visitor services.

*43. Comment:* Several commenters asked for clarification surrounding the issue of "favorable annual ratings" for performance options as used in the proposed rules. Several commenters asked the NPS to define "favorable."

*NPS Response:* The NPS has a comprehensive concessioner evaluation system that has the following levels of ratings: superior, satisfactory, marginal, and unsatisfactory. Just a few years ago, the superior level did not exist, but was added as a matter of guidance. NPS believes it important to retain the flexibility to adjust how we evaluate concession operations and describe performance levels as a matter of guidance and not of regulation. At this time, a favorable rating would be at the satisfactory or superior level.

*44. Comment:* Several commenters objected to the requirement of a favorable annual rating for every year of the contract citing issues with the NPS's evaluation system and subjectivity of park managers. Some commenters wanted the NPS to eliminate any requirement regarding evaluation ratings.

*NPS Response:* NPS agrees that a favorable rating, which documents that a concessioner is meeting the terms of the concession contract, should not be required for every year of the contract but otherwise disagrees with those comments. Generally, a favorable rating indicates that a concessioner is meeting the terms of the concession contract, which seems a minimum expectation, but an unusual instance of poor performance should not be used to frustrate the award of additional operating time where performance otherwise justifies such an award. Rather than define the requirement in the regulation, however, the NPS proposes to define all performance requirements in the individual contracts, including the operational goals the concessioner must meet and the evaluation ratings the concessioner must achieve.

*45. Comment:* NPS received one comment suggesting the rule authorize amending a contract to provide an additional operating term for new or unanticipated mid-contract investments.

*NPS Response:* NPS declines to include this in the final rule as it has not

evaluated the potential economic consequences of such a change.

*46. Comment:* NPS received a comment suggesting additional actions NPS could take to encourage high performance from concessioners such as reducing franchise fees in later years of a contract.

*NPS Response:* NPS did not analyze the consequences of reducing franchise fees in later years of contracts and does not understand the economic consequences of such action, especially as it would affect the NPS's ability to plan for use of franchise fees. Also, NPS did not include such item in the proposed rule and receive public comment on such action.

*47. Comment:* A commenter suggested the NPS solicit additional ideas from concessioners to incentivize their performance and earn performance options.

*NPS Response:* The NPS declines to add such process to the regulation but may consider it in guidance. The NPS intends to use performance options to meet its goals. The NPS is not sure if meeting the concessioners' goals would meet the NPS's objectives and needs to evaluate such an idea further. The NPS also received comments raising questions about how we would implement performance options when a park has multiple operators providing the same or similar service under a group of contracts. The NPS will address these situations on a case by case basis as it develops prospectuses using such options.

*48. Comment:* Several commenters stated the NPS should not shorten the "base term" in order to provide for options.

*NPS Response:* The NPS interprets "base term" as meaning ten years and thinks the comment means that contracts with performance options should have an initial term of ten years before options. The NPS appreciates this perspective, but will not add language to the regulation to include such a provision. The NPS will consider the concern in developing guidance for performance options. It is not the intent of the rule to have the availability of performance options affect the base term in any way. The base term must reflect the financial requirements of the contract. Several commenters stated the concessioner should be able to refuse to exercise an option. The final rule provides that it is the concessioner that would exercise the option once the Director has determined the concessioner has met the performance criteria. An allowance to exercise an option includes the ability to decline the exercise of the option.

*49. Comment:* For interruption options, one commenter stated the rule should specify that the NPS can require no other contract changes unless the concessioner agrees.

*NPS Response:* The NPS chooses not to include such a restriction in the regulation, believing that it could unduly constrain the Director's discretion.

*50. Comment:* The NPS received comments on other incentives it could offer to enhance concessioner performance as well as encouragement to increase the length of contracts.

*NPS Response:* The NPS appreciates these comments. As for contract length, the NPS again reminds commenters that Congress defined the maximum contract term as 20 years and that stated contracts generally should be ten years or less.

#### *New or Additional Services*

Many comments supported the concept of adding new or additional services to existing concession contracts. The NPS received suggested revisions from industry trade groups and some individual concessioners.

*51. Comment:* For § 51.76(a), one commenter suggested revising the regulatory language to specifically allow for adjustments to existing services that could be provided by changes to the operating plan (which is an exhibit to and part of a concession contract). That commenter proposed using a metric measured against existing gross receipts as a method for determining when new or additional services could simply be added to a contract's operating plan by a superintendent or must be added to the main body of the contract through a formal amendment executed by the Director.

*NPS Response:* The NPS declines to make this change as it overly complicates current practices not subject to a specific rule, such as expanding operating hours for a store or extending operating seasons for a lodging facility.

*52. Comment:* A commenter proposed to add criteria for consideration involving contribution to visitor enjoyment and understanding of the System unit and the National Park System.

*NPS Response:* The NPS-proposed language in § 51.76(a) is nearly identical to the statutory language in the Centennial Act, and the NPS declines to add to the statutory criteria. Additionally, the suggested supplemental criteria, enhancing visitor experiences and contributing to visitor understanding and appreciation of a

unit, already are part of the necessary and appropriate determination.

53. *Comment:* A commenter proposed rule language that would require keeping the franchise fee at the existing level after adding new or additional visitor services.

*NPS Response:* The NPS declines to make that change. Although rare, some changes could provide substantial revenue gains to the concessioner without significant added expense. For example, increasing the number of passengers a concessioner could transport on a vessel creates little additional expense but adds considerable additional revenue on a passenger by passenger basis. The NPS sees no reason to prohibit the NPS from sharing the financial benefits of such a change.

54. *Comment:* A commenter proposed a sample list of actions that could be considered new or additional services.

*NPS Response:* The NPS included a list of such actions in the rule.

55. *Comment:* Several commenters requested a provision prohibiting adding new and additional services to a concession contract if other concessioners already provide the service in the System unit.

*NPS Response:* 36 CFR 51.77 provides “Concession contracts will not provide in any manner an exclusive right to provide all or certain types of visitor services in a park area. The Director may limit the number of concession contracts to be awarded for the conduct of visitor services in a particular park area in furtherance of the purposes described in this [Part 51].” The NPS thinks that these commenters raised a valid concern, and § 51.77 allows recognizing such concern.

Consequently, the NPS has added language stating the Director should consider whether other commercial operators in the park area already provide the services adequately. Although the NPS received no comments on the proposed subsection (b), we deleted it because it implemented a provision in the 1998 Act replaced in the Centennial Act.

#### *Setting Franchise Fees*

56. *Comment:* Several commenters supported the proposed changes to the rule clarifying how the NPS sets the franchise fee.

*NPS Response:* No proposed action or response is required.

57. *Comment:* One commenter indicated that the NPS should expand the scope of the data it uses to determine the minimum franchise fee beyond “relevant hospitality industry

data” to include outdoor recreation industry data.

*NPS Response:* The NPS currently uses such data and has incorporated such revisions to the rule.

58. *Comment:* One commenter suggested that the NPS should use current practices to establish the minimum acceptable franchise fee and then reduce that minimum franchise fee by 25% when posting that minimum franchise fee in the prospectus. The commenter suggested that it would allow offerors to compete as Congress intended by letting offerors propose what they believe is the best balance of efforts to protect park resources and provide quality visitor services (which are the primary selection criteria) along with the most competitive fee.

*NPS Response:* After reviewing comments and internal deliberation, NPS will provide an alternative to its current practice of setting a minimum franchise fee. This alternative will be to set a “prospectus franchise fee” and allow offerors to either propose a higher franchise fee, or a lower franchise fee when combined with enhanced or higher quality visitor services offerings that exceed prospectus requirements, as allowed in the 1998 Act.

59. *Comment:* Several comments indicated NPS should expand on data provided in the prospectus to include additional hospitality statistics, profitability measures, return on investment assumptions or more thoroughly describe the steps associated with calculating the franchise fee.

*NPS Response:* The NPS declines this suggestion. NPS indicated in the proposed rule that it would provide the basis for its franchise fee analysis and retains this proposal in the final rule. However, NPS will not expand the information provided beyond this basis because NPS will continue to expect offerors to complete their own due diligence to present their understanding of the business opportunity.

60. *Comment:* One commenter recommends NPS adopt a policy of setting minimum franchise fees below “breakeven,” to maintain essential flexibility and to guard against bids that are pre-planned to reduce the performance levels. The same commenter suggested that the NPS set the minimum franchise fee to balance requirements, risks, costs and potential challenges throughout the contract.

*NPS Response:* The NPS declines this suggestion. Any franchise fee set by the NPS is determined in accordance with the 1998 Act, considering the probable value to the concessioner of the privileges granted by the particular contract involved based upon a

reasonable opportunity for net profit in relation to capital invested and the obligations of the contract. Artificially lowering the fee below this determination would be contrary to this statutory requirement. However, the NPS has included in the rule a new, alternative means to set the franchise fee in the contract. This alternative approach allows the NPS to use a “prospectus franchise fee,” which is still based upon the probable value determination mentioned above, but also allows offerors to offer a higher franchise fee, as they have traditionally done, or a lower franchise fee when combined with enhanced or higher quality visitor service offerings that exceed the requirements of the prospectus. The NPS also retains the current means to establish a minimum acceptable franchise fee when the NPS determines using a “prospectus franchise fee” is inappropriate for the particular concession opportunity.

61. *Comment:* One commenter provided a statement that references uniformity in franchise fees in situations where there are multiple contracts for outfitting, guiding, river running or similar services. This NPS assumes this is in reference to Sec. 411 of the 1998 Act (54 U.S.C. 101921). The commenter also provided a statement that suggests that this would discourage bidding up of franchise fees.

*NPS Response:* No proposed action or response to the commenter’s statements is required. NPS abides by the terms of the 1998 Act when setting the minimum franchise fee for these types of contracts.

#### *Special Accounts*

62. *Comment:* All commenters on these changes supported replacing the term “Repair and Maintenance Reserve” with “Component Renewal Reserve.”

*NPS Response:* None.

63. *Comment:* A few commenters suggested that the NPS should consistently set out a description of CRR-eligible projects in the prospectus to help offerors more accurately assess and take into account the scope and cost of these activities.

*NPS Response:* The NPS agrees with the commenters, and the final rule requires that the timing and estimated costs of anticipated component renewal projects be identified in the contract.

64. *Comment:* Several commenters suggested changes to how the NPS distributes any CRR that remains at the end of the contract, which is currently returned to the park as franchise fees. One commenter suggested NPS issue administrative guidelines that would allow concessioners to share in any excess funds being left in the CRR fund.

The commenter indicated this would incentivize concessioners to seek cost savings when undertaking CRR-eligible projects. The same concessioner suggested the NPS include in the rule, a process for funding unanticipated CRR costs that arise during the term of the contract through an addition to the special account resulting from either a reduction in franchise fee rate or generated from other revenues, such as surcharges on concessioner-offered goods and services. A second commenter stated that the funds left in the reserve should be returned to the park unit as something other than franchise fees because the commenter believes that returning the funds as franchise fees allows the NPS to spend the funds for park unit needs that are not concession related.

*NPS Response:* The NPS disagrees with these recommendations. In regard to the NPS adjusting the franchise fee or otherwise funding the concessioner for unanticipated CRR projects, the component renewal reserve provides a mechanism for a concessioner to reserve monies to fund component renewal projects. However, concessioner obligations to maintain assigned concession facilities are not limited to the monies in the component renewal reserve. Additionally, franchise fee changes, including for the purpose of adjusting the component renewal reserve, cannot occur during the term of the contract unless it is in accordance with the franchise fee reconsideration procedures in the 1998 Act. In regard to allowing concessioners to retain a portion of the unspent CRR that remains at the end of the contract, this could create an incentive for the concessioner to avoid spending the CRR, not just be more efficient in their expenditure. Historically, the balance of the reserve was returned to the concessioner as has been recommended, and the NPS found these funds in fact, were often not expended when appropriate and facilities were inadequately maintained. Further, the concessioner has already benefited from the CRR as the reserve percentage is accounted for in the probable value calculation used to set the franchise fee. Regarding CRR funds that might be returned to the NPS as a franchise fee, the NPS has policies that prioritize use of franchise fees paid to the NPS for concession-related purposes such as prospectus development, saving for LSI payment and concession program management before any other park unit needs. Furthermore, to avoid the need to convert such component renewal reserves, NPS has in place and continues to develop processes

including periodic reserve audits, to ensure that reserve funds are used during the term of the contract to address appropriate component renewal projects and avoid deferred maintenance for concession facilities.

*65. Comment:* One commenter suggested that concessioners should be able to “deposit” additional reserve funds during the contract term to address projects that need more funding than what is available in the reserve.

*NPS Response:* The NPS declines to address this in the rule. The NPS will consider the proposal for forward funding to address such needs as a change in policy and/or contract terms.

*66. Comment:* One commenter recommends that the NPS include, as part of the solicitation, a prospectus selection factor to gain “points” for proposals that include, as a commitment, an increase in the reserve percentage.

*NPS Response:* NPS declines this recommendation. Concessioners are responsible for all maintenance regardless of the amount of funds that are available in the CRR. Offerors should not be given extra points just to meet what is a contractual obligation because they reserved such funds. Concessioners may set aside additional reserves outside the CRR as an internal business practice.

#### *Concessioner Rates*

*67. Comment:* Several commenters expressed concern regarding the change to the rule that would emphasize competitive market pricing, indicating that prices to visitors will rise due to the change and visitors will be priced out of staying in parks. A different commenter suggested that it is the concessioner’s goal to set prices as high as possible, not considering the diversity of park visitors from a variety of income levels. That commenter stated visitors should pay reasonable rates and concessioners should help encourage all visitors to enjoy our national parks and the services and products concessioners provide, implying perhaps that the rule changes would prevent this from happening. Another commenter provided statements that it is not clear on how competitive market declaration pricing will impact rates (some could be higher, others, lower).

*NPS Response:* The NPS disagrees with these comments. The changes in the rule to provide in most cases for competitive market declaration (“CMD”) pricing implement rather than depart from statutory requirements. The final rule clarifies the NPS’s commitment to ensuring that rates and prices are set in accordance with market

forces to the maximum extent possible, as the 1998 Act requires; that is, rates are reasonable and appropriate, and the process for approving rates is as unburdensome to the concessioner as possible. CMD represents the best means to meet these objectives. As noted in the preamble, the NPS recognizes there may be situations where market forces are not adequate for a CMD to provide for reasonable and appropriate rates. The NPS will use other rate approval methods such as direct comparability in those circumstances. With regard to meeting the needs of a diversity of visitors, the NPS strives to offer a variety of service levels, thereby providing options to account for diverse preferences. For example, dependent upon the size of park, there may be upscale to rustic (*e.g.* camping) lodging options, and food and beverage options from fast casual to formal sit-down restaurants offering a range of price points as dictated by the market.

*68. Comment:* One commenter suggested the revisions to the rule would curtail the ability of the Director to approve rates, that they would not be effective because some parks are located in remote locations where competitive markets are scarce and that this market emphasis would place significant burden on the NPS to prove the inadequacy of market forces.

*NPS Response:* The NPS disagrees with this comment. The burden upon the NPS to complete rate approvals has not changed; the NPS remains responsible for determining whether to use CMD or the appropriate alternative rate method, to monitor the operations to ensure the rate method continues to be appropriate, to approve rates when CMD is not being used, and monitor rates. These features of the rate administration process remain unchanged. The rule reinforces that CMD is the preferred method and should be used unless rates using this method would not be reasonable and appropriate. The NPS has, however, defined specific timelines that will apply in order to ensure it takes action to review and approve rate requests in a reasonable timeframe.

*69. Comment:* One commenter suggested the rule should include a statement to address improved accessibility as a requirement for new contracts or modified pricing.

*NPS Response:* The NPS disagrees with this comment. Concessioners, as expressly set forth in their contracts, are already required to provide accessible services as operational and facility requirements in accordance with statutes, regulations, and NPS policy.

Additionally, the requirement for accessibility is not directly relevant to prices and rates.

*70. Comment:* One commenter suggested the NPS should consult with the Interior Business Center (IBC) or an alternative external source (*i.e.*, hospitality consultants) as part of its rate review process.

*NPS Response:* The NPS declines to add this requirement to the rule. The IBC does not have the hospitality expertise to complete such reviews. The NPS currently uses trained concession specialists to complete analyses to review rate requests and already uses its hospitality consultants as needed to provide assistance, particularly during the prospectus development process and when there are especially complex issues. The NPS will continue these practices. The NPS also notes that involvement by third parties in all circumstances would inhibit the ability for a timely response to concessioners.

*71. Comment:* Numerous commenters supported the change in the rule that requires the NPS to codify and reduce the current policy-defined response time for rate requests from 45 to 30 days when possible. Many commenters suggested that additional steps should be taken (either independently or in some combination) such as:

(a) Notifying concessioners within a certain window of time if a request is not “complete and timely,” no later than 10 days after receipt of request;

(b) Removing the “when possible” qualifier that describes the 30-day approval window;

(c) De facto approval of rates in 45 days without NPS action;

(d) That NPS notify a concessioner within 15 days of receipt of a rate request if additional information to support the rate request is necessary; and

(e) Defining what constitutes a “response” from NPS.

*NPS Response:* The NPS agrees that any rate requests should be responded to in a substantive and timely manner. To that end, NPS has established in the final rule detailed timelines and procedures the NPS will follow in responding to rate requests. These timelines will be met unless there are extraordinary circumstances. In the event that the timeline is not met and there are no extraordinary circumstances, the concessioner will be able to charge the requested rates until the Director makes a rate approval determination without being subject to retroactive adjustment.

*72. Comment:* Numerous commenters had varying comments on rate structures and CMD. Most commenters

supported using CMD but had different suggestions surrounding its application, either to policy or the rule itself. For example, one commenter suggested the NPS should eliminate clarifying examples provided in the preamble to the rule on when CMD might not apply because there is not a competitive market. A commenter wanted the rule to state that a comparability study is not required to establish CMD reasonable rates. Another commenter suggested that rate setting for comparability should be based on “unbundled rates” (likely referring to situations such as a tour service where the tour price may have associated fees attached such as for an audio-tour provided through another party) and that such situations should be identified in the rule as a “due consideration” factor in 51.82 (b). The same commenter also suggested changes to the rule to create distinctions between what it calls “market rate” (the highest visitors show they are willing to pay), “direct price” (stated as lower than market price) and “final” prices paid by the consumer. One commenter expressed concern that CMD rates could result in increased franchise fees to be paid to the NPS without accounting for the trend in increasing expenses to the concessioner and that additional requirements could be imposed if NPS changes the rate approval method during the term of the contract.

*NPS Response:* The NPS may consider these comments if appropriate, when it establishes or adjusts policy for rate administration to implement this regulation, but the NPS declines to address these recommendations in the rule.

*73. Comment:* A commenter recommended that NPS should provide national permission to use an anticipated rate method where competitive market declaration is not utilized.

*NPS Response:* The NPS declines to include this recommendation in the rule. The NPS already allows advanced rates as a matter of policy where appropriate and will continue this practice. The NPS has, however, included in the rule specific advance rate procedures for the time after a concessioner has submitted a complete rate request but before the NPS has made a decision approving or disapproving the request to ensure that the concessioner can take appropriate steps to advertise and take reservations during this period.

#### *Timing of Assigning Contracts*

*74. Comment:* A number of commenters disagreed with the proposed restriction on assigning

concession contracts. Most of these commenters focused on the unique circumstances of concessioners holding qualified contracts and, thus, holding a right of preference to a new concession contract. Commenters asserted that the combination of needing to operate satisfactorily for two years under an existing contract and a 24-month delay in submitting a request to transfer the contract to a new operator unfairly restricts the transfer of such contracts.

*NPS Response:* Although the NPS thinks it is reasonable to require 24 months of operations under a concession contract before submitting a request to transfer the contract, we have decided to withdraw this proposed change in consideration of the many comments criticizing this prohibition as too restrictive. The NPS will develop policy and procedures, however, that require the authority approving requests for assignments of contracts to carefully scrutinize the ability of the purported new concessioner to provide the required services based on that entity’s specific experience and financial ability to carry out the terms of the concession contract.

#### **Compliance With Other Laws, Executive Orders, and Department Policy**

##### *Regulatory Planning and Review (Executive Orders 12866, 13563, and 14094)*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 14094 amends Executive Order 12866 and reaffirms the principles of Executive Order 12866 and Executive Order 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with Executive Order 12866, Executive Order 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to

consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that agencies must base regulations on the best available science and the rulemaking process must allow for public participation and an open exchange of ideas. The NPS has developed this rule in a manner consistent with these requirements. The potential costs and benefits of this rule were assessed by Industrial Economics, Incorporated (IEc), on behalf of the NPS, in a Regulatory Impact Analysis (prepared for the proposed rule) and associated Memorandum (assessing the costs and benefits of the changes from the proposed rule in the final rule) that can be accessed at <https://www.regulations.gov> in Docket ID: NPS-2020-0003.

#### **Regulatory Flexibility Act (RFA) and Small Business Regulatory Enforcement Fairness Act (SBREFA)**

The head of this agency certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C. 801 *et seq.*). An Initial Regulatory Flexibility Analysis (IRFA) was prepared pursuant to the Regulatory Flexibility Act (RFA) and the Small Business Regulatory Enforcement Fairness Act (SBREFA). The analysis is available in the report prepared by Industrial Economics, Incorporated (IEc), on behalf of the NPS, entitled “36 CFR [part] 51 Concessions Contract Revisions Regulatory Impact Analysis (RIA) and Initial Regulatory Flexibility Analysis (IRFA)” that can be accessed at <https://www.regulations.gov> in Docket ID: NPS-2020-0003—specifically, Chapter 5 of that report. The analysis in the IRFA concluded that the potential impact on small concessioners is likely to be positive. The IRFA estimated that the majority (96%) of the entities that have concession contracts are small businesses and that this makeup is likely to be similar in the future. Furthermore, the IRFA conducted a qualitative analysis to determine the likely impacts of the rule on concessioners that focused on key changes to the rule related to LSI, rates and franchise fees. While the NPS lacks the ability to quantify the impact, the IRFA found that the impacts are likely to be beneficial to concessioners in general, without any particular bias

toward small or large businesses. Since the majority of contracts are held by small businesses, the IRFA concluded that the impacts to small businesses would therefore be positive.

The IRFA stated that, due to uncertainties associated with quantifying the impact on small entities, the “potential exists for the proposed rule to result in a significant beneficial impact on a substantial number of small entities.” Based upon a further review of the impacts described in the IRFA, the NPS now believes the beneficial impact on small entities will not be significant and will not affect a substantial number of small entities. This certification is based upon the following statements and upon the analysis contained in a Memorandum prepared by IEc that concludes that the small entities holding concession contracts that would be affected by this rule represent less than 0.1 percent of the small entities providing similar services in the United States. This Memorandum is available on <https://www.regulations.gov> in Docket ID: NPS-2020-0003.

The IRFA estimated the annual transfer payments associated with changes in the eligibility threshold for LSI in the rule as \$4.2 million from concessioners to the NPS in increased franchise fees and up to \$4.2 million from NPS to concessioners in the form of LSI buy downs for a total net financial impact of zero to the concessioner community. There are no changes between the proposed and final rule that the NPS believes would change this analysis.

The IRFA identified that the implementation of market-based pricing in the rule could result in transfers of \$54 million in franchise fee revenue from concessioners to the NPS. As stated in the IRFA, an increase in rates resulting from the rule, without any change in service or amenities, would be reflected as an increase in revenue to the concessioner without any increase in expense. Because the base franchise fee as determined using the current rate approval methods (without enhanced market-based pricing) already provides a reasonable opportunity for the concessioner, the NPS assumed in the IRFA that all of the additional profit would pass-through flow to the government in the form of the \$54 million in franchise fees for a total net financial impact of zero to the concessioner community. There are no changes between the proposed and final rule that the NPS believes would change this analysis.

One change was made to the final rule in response to public comments that required further consideration relative

to potential impacts to the concessioner community. That change is in § 51.78, Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment? The final rule provides as an alternative, the ability for the NPS to provide in the prospectus, a proposed franchise fee based on the probable value determination in the prospectus (“prospectus franchise fee”). The Offerors may bid either (i) higher franchise fees or (ii) lower franchise fees in combination with enhanced or higher quality service offerings that exceed prospectus requirements. Any investment made by the concessioner to provide enhanced or higher quality offerings is intended to be offset by an adjustment in the franchise fee offered, such that the total net financial impact to the concession community is estimated at zero.

#### **Congressional Review Act (CRA)**

This rule is not a major rule under 5 U.S.C. 804(2), the CRA. This rule:

- (a) Does not have an annual effect on the economy of \$100 million or more.
- (b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.
- (c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

#### **Unfunded Mandates Reform Act (UMRA)**

This rule does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or Tribal governments or the private sector. This rule clarifies NPS procedures and does not impose requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

#### **Takings (Executive Order 12630)**

This rule does not effect a taking of private property or otherwise have takings implications under Executive Order 12630. A takings implication assessment is not required.

#### **Federalism (Executive Order 13132)**

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact

statement. A federalism summary impact statement is not required.

#### **Civil Justice Reform (Executive Order 12988)**

This rule complies with the requirements of Executive Order 12988. This rule:

(a) Meets the criteria of section 3(a) requiring agencies to review all regulations to eliminate errors and ambiguity and write them to minimize litigation; and

(b) Meets the criteria of section 3(b)(2) requiring agencies to write all regulations in clear language and contain clear legal standards.

#### **Consultation With Indian Tribes (Executive Order 13175 and Department Policy)**

The Department of the Interior strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. The NPS has evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175, and has determined that it has no substantial direct effects on federally recognized Indian Tribes and that consultation under the Department's Tribal consultation policy is not required.

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

This rule contains no new information collections. All information collections require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). The NPS may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number.

#### **National Environmental Policy Act (NEPA)**

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under NEPA is not required. The NPS has determined the rule is categorically excluded under 43 CFR 46.210(i) because it is administrative, financial, legal, and technical in nature. In addition, the environmental effects of this rule are too speculative to lend themselves to meaningful analysis. NPS decisions to enter into concession contracts will be subject to compliance with NEPA at the time the contracts are executed. The NPS has determined that the rule does

not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

#### **Effects on the Energy Supply (Executive Order 13211)**

This rule is not a significant energy action under the definition in Executive Order 13211; although the rule is significant under Executive Order 12866, the rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and the Administrator of OIRA has not otherwise designated the rule as a significant energy action. A Statement of Energy Effects is not required.

#### **List of Subjects in 36 CFR Part 51**

Commercial services, Government contracts, National parks, Visitor services.

#### **Signing Authority**

The Assistant Secretary for Fish and Wildlife and Parks has delegated authority to the Chief of Staff, Office of the Assistant Secretary for Fish and Wildlife and Parks, to electronically sign this document for purposes of publication in the **Federal Register**.

In consideration of the foregoing, the National Park Service is amending 36 CFR part 51 as follows:

#### **PART 51—CONCESSION CONTRACTS**

■ 1. The authority citation for part 51 is revised to read as follows:

**Authority:** 54 U.S.C. 101901–101926 and title IV of the National Parks Omnibus Management Act of 1998 (Pub. L. 105–391).

■ 2. Amend § 51.4 by revising the section heading and paragraph (b) and adding paragraphs (c) through (h) to read as follows:

**§ 51.4 How will the Director invite the general public to apply for the award of a concession contract and how will the Director determine when to issue a prospectus for a new concession opportunity where no prior concession services had been provided?**

\* \* \* \* \*

(b) Except as provided under § 51.47 (which calls for a final administrative decision on preferred offeror appeals prior to the selection of the best proposal) the terms, conditions and determinations of the prospectus and the terms and conditions of the proposed concession contract as described in the prospectus, including, without limitation, its minimum franchise fee, are not final until the concession contract is awarded. The Director will not issue a new prospectus for a concession contract earlier than

eighteen months prior to the expiration of a related existing contract except when the Director determines it is necessary to provide additional time to potential offerors, such as when additional time is needed to avoid issuing a prospectus during a busy operating season or where potential offerors must make significant financial commitments to meet the requirements of the contract. This additional time should be as short as prudent.

(c) The Director will issue a prospectus for a new concession opportunity in a park area when the Director determines, in the Director's discretion, that a new concession opportunity is necessary and appropriate for public use and enjoyment of the park area and is consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area.

(d) The Director will establish procedures to solicit and consider suggestions for new concession opportunities within park areas from the public (including from potential concessioners) through the National Park Service's planning processes for such opportunities as well as through annual invitations for proposals for improving visitor experiences through third-party providers. The Director shall fully review all proposals received, provide a written evaluation for each proposal, and make all proposals and completed evaluations available to the public.

(e) In determining whether to issue a prospectus for a concession contract to provide such new concession opportunities, the Director will consider relevant factors including whether the suggested concession opportunities are adequately provided within the park area by other authorized commercial providers; the potential for augmented resources for park area operations; the effects of the suggested concession operations on the park area; the long-term viability of the suggested concession opportunities; the innovative quality of the suggestions; and the potential impacts on park area visitation and on communities located near the park area.

(f) No preference to a concession contract shall be granted to a party based on that party's having submitted a proposal for a new concession opportunity described in this section. The Director, however, may award a contract noncompetitively to such a party when determined appropriate as described in § 51.25.

(g) The Director may consider suggestions for new services as

additional services to be provided through an existing concession contract as described in § 51.76.

(h) Nothing in this section shall constrain the discretion of the Director to solicit or consider suggestions for new concession opportunities or collect other information that can be used by the Director in connection with a new concession opportunity.

■ 3. Revise § 51.8 to read as follows:

**§ 51.8 Where will the Director publish the notice of availability of the prospectus?**

The Director will publish notice of the availability of the prospectus at least once in the System for Award Management (SAM) where Federal business opportunities are electronically posted, or in a similar publication if this site ceases to be used. The Director, if determined appropriate, may also publish notices electronically on websites including social media and in local or national newspapers or trade magazines.

■ 4. Amend § 51.16 by revising paragraph (a) to read as follows:

**§ 51.16 How will the Director evaluate proposals and select the best one?**

(a) The Director will apply the selection factors set forth in § 51.17 by assessing each timely proposal under each of the selection factors on the basis of a narrative explanation, discussing any subfactors when applicable. For each selection factor, the Director will assign a score that reflects the determined merits of the proposal under the applicable selection factor and in comparison to the other proposals received, if any. The maximum aggregate score available for all selection factors will be 40 points, and every selection factor used must have a maximum score of one point or higher. Each selection factor will be scored as identified in the prospectus, subject to the following criteria:

(1) The maximum score assignable for the principal selection factor described in § 51.17(a)(5) will be less than the lowest maximum score of the other principal selection factors described in § 51.17(a) with a score of one point for agreeing to the prospectus franchise fee (as defined in § 51.78) or, when the Director determines appropriate, the minimum acceptable franchise fee set forth in the prospectus.

(2) The maximum score assignable for the secondary selection factor set forth in § 51.17(b)(1) will be less than the maximum score for the principal selection factor described in § 51.17(a)(5); and,

(3) The maximum scores assignable for any additional secondary selection

factors set forth in § 51.17(b) will be such that the maximum aggregate score assignable for all additional secondary selection factors will be less than the maximum score for the principal selection factor described in § 51.17(a)(5).

\* \* \* \* \*

■ 5. Amend § 51.17 by revising paragraph (b)(2) to read as follows:

**§ 51.17 What are the selection factors?**

\* \* \* \* \*

(b) \* \* \*

(2) Any other selection factors the Director may adopt in furtherance of the purposes of this part, including, where appropriate and otherwise permitted by law, the extent to which a proposal calls for the employment of Indians (including Native Alaskans) and/or involvement of businesses owned by Indians, Indian Tribes, Native Alaskans, or minority or women-owned businesses in operations under the proposed concession contract. When appropriate, the Director will include a secondary selection factor requesting suggestions for new services.

\* \* \* \* \*

■ 6. Amend § 51.51 by:

■ a. Removing the word “solely” from the term “Leasehold surrender interest solely”; and

■ b. Revising the definition of the term “Major rehabilitation”.

The revision reads as follows:

**§ 51.51 What special terms must I know to understand leasehold surrender interest?**

\* \* \* \* \*

*Major rehabilitation* means a planned rehabilitation of an existing structure that the Director determines:

(1) The construction cost of which exceeds thirty percent of the pre-rehabilitation value of the structure; and

(2) Improves visitor health, safety, and enjoyment or the health and safety of concessioner employees and will either enhance the property’s overall value, prolong its useful life, or adapt it to new uses.

\* \* \* \* \*

■ 7. Revise § 51.73 to read as follows:

**§ 51.73 What is the term of a concession contract?**

(a) A concession contract will generally be awarded for a term of 10 years or less and may not have a term of more than 20 years (unless extended in accordance with this part). The Director will issue a contract with a term longer than 10 years when the Director determines that the contract terms and conditions, including but not limited to the required construction of

capital improvements or other potential investments related to providing required services, warrant a longer term. It is the policy of the Director under these requirements that the term of concession contracts should take into account the financial requirements of the concession contract, resource protection, visitor needs, and other factors the Director may deem appropriate.

(b) The Director may include in a concession contract, as advertised in the applicable prospectus, an optional term or terms in increments of at least one year and not to exceed three years in total, where the total term of the contract, including all optional terms, does not exceed 20 years. The Director shall specify in the contract the performance criteria (including evaluation ratings) the concessioner must meet to be eligible to exercise such option term or terms. Such contract also shall provide that the concessioner may exercise an optional term or terms only if the Director determines that the concessioner has met the performance criteria defined in the contract.

(c) When the Director determines, in his or her sole discretion, that a substantial interruption of or change to operations due to natural events or other reasons outside the control of the concessioner, including but not limited to government-ordered interruptions, warrants lengthening the original term of a concession contract, the Director and the concessioner may amend the contract to add the amount of time to the term of the contract deemed appropriate by the Director, which in no case may be longer than three years and where the total term of the contract, including any added time, may not exceed 20 years.

■ 8. Revise § 51.76 to read as follows:

**§ 51.76 May the Director amend a concession contract to provide new or additional visitor services or grant a concessioner a preferential right to provide new or additional visitor services?**

(a) The Director may provide for new or additional services under the annual operating plan of the concessioner or through a contract amendment, as appropriate, where the Director determines the new or additional services are necessary and appropriate for public use and enjoyment of the park area in which they are located. New or additional services must be consistent to the highest practicable degree with the preservation and conservation of the resources and values of the park area. Such new or additional services shall not represent a material change to the required and authorized services as set

forth in the applicable prospectus or contract. Changes may include, but are not limited to, extensions of seasons, operating hours and increases in capacity limitations.

(b) When considering whether to amend the applicable terms of an existing concession contract to provide new or additional services, the Director should consider the benefit to the visitor experience where other concessioners or holders of commercial use authorizations in the same park area already provide those services.

(c) A concessioner that is allocated park area entrance, user days or similar resource use allocations for the purposes of a concession contract will not obtain any contractual or other rights to continuation of a particular allocation level pursuant to the terms of a concession contract or otherwise. Such allocations will be made, withdrawn and/or adjusted by the Director from time to time in furtherance of the purposes of this part.

■ 9. Revise § 51.78 to read as follows:

**§ 51.78 Will a concession contract require a franchise fee and will the franchise fee be subject to adjustment?**

(a) Concession contracts will provide for payment to the government of a franchise fee or other monetary consideration as determined by the Director upon consideration of the probable value to the concessioner of the privileges granted by the contract involved. This probable value will be based upon a reasonable opportunity for net profit in relation to capital invested, including any funds required to be placed in special accounts identified in § 51.81, and the obligations of the contract as described in the prospectus.

(b) Each prospectus shall include one of the following:

(1) A proposed franchise fee based on the probable value determination in the prospectus (“prospectus franchise fee”). The prospectus franchise fee should be set at a level to encourage competition for the concession opportunity through offers of either:

(i) Higher franchise fees; or  
(ii) Lower franchise fees in combination with enhanced or higher quality service offerings that exceed prospectus requirements.

(2) Alternatively, when the Director determines that using a prospectus franchise fee is inappropriate for the particular concession opportunity, a minimum acceptable franchise fee based on the probable value determination and set at a level to encourage competition.

(c) In determining the minimum acceptable franchise fee or prospectus

franchise fee to include in a prospectus, the Director shall use relevant industry data for similar operations (e.g., hospitality, recreation) and provide in the prospectus the basis for the determination of the minimum acceptable franchise fee or prospectus franchise fee. Consideration of revenue to the United States shall be subordinate to the objectives of protecting and preserving park areas and of providing necessary and appropriate services for public use and enjoyment of the park area in which they are located at reasonable rates.

(d) The franchise fee contained in a concession contract with a term of 5 years or less may not be adjusted during the term of the contract. Concession contracts with a term of more than 5 years will contain a provision that provides for adjustment of the contract’s established franchise fee at the request of the concessioner or the Director. An adjustment will occur if the concessioner and the Director mutually determine that extraordinary, unanticipated changes occurred after the effective date of the contract that have affected or will significantly affect the probable value of the privileges granted by the contract. The concession contract will provide for arbitration if the Director and a concessioner cannot agree upon an appropriate adjustment to the franchise fee that reflects the extraordinary, unanticipated changes determined by the concessioner and the Director.

■ 10. Amend § 51.81 by revising paragraph (b) to read as follows:

**§ 51.81 May the Director include “special account” provisions in concession contracts?**

\* \* \* \* \*

(b) Concession contracts may contain provisions that require the concessioner to set aside a percentage of its gross receipts or other funds in a component renewal reserve to be used at the direction of the Director solely for renewal of real property components located in park areas and utilized by the concessioner in its operations. The anticipated timing and estimated costs of component renewal projects should be identified in the prospectus. Component renewal reserve funds may not be expended to construct real property improvements, including, without limitation, capital improvements. Component renewal reserve provisions may not be included in concession contracts in lieu of a franchise fee, and funds from these reserves will be expended only for the renewal of real property components as identified in the contract and assigned

to the concessioner by the Director for use in its operations. The component renewal reserve provides a mechanism for a concessioner to reserve monies to fund component renewal projects. Concessioner obligations to maintain assigned concession facilities including component renewal are not limited to the monies in the component renewal reserve.

\* \* \* \* \*

■ 11. Amend § 51.82 by revising paragraph (b) and adding paragraphs (c) and (d) to read as follows:

**§ 51.82 Are a concessioner’s rates required to be reasonable and subject to approval by the Director?**

\* \* \* \* \*

(b) The Director shall approve rates and charges that are reasonable and appropriate in a manner that is as prompt and as unburdensome to the concessioner as possible and that relies on market forces to establish the reasonableness of such rates and charges to the maximum extent practicable. Unless otherwise provided in the concession contract, the reasonableness and appropriateness of rates and charges shall be determined primarily by comparison with those rates and charges for facilities, goods and services of comparable character under similar conditions with due consideration to the following factors and other factors deemed relevant by the Director: length of season; peakloads; average percentage of occupancy; accessibility; availability and cost of labor; and types of patronage.

(c) The Director shall identify the rate approval method to be used for each category of facilities, goods, and services to be provided when preparing the prospectus for a concession contract. The Director will use the least burdensome and most market-based comparability method. Unless the Director determines that market forces are not sufficient to determine reasonable and appropriate rates, the Director shall make a competitive market declaration as the means of comparability, and rates and charges will be approved based upon what the concessioner determines the market will bear. Other rate approval methods will be used only when the Director determines that market forces are inadequate to establish the reasonableness of rates and charges for the facilities, goods, or services. The Director will monitor rates and charges and competition and may change the rate approval method during the term of the contract to reflect changes in market conditions.

(d) Each contract shall include a schedule for rate requests and describe the information necessary to include in a complete rate request. Upon receipt of a request for a change in rates or charges the Director shall, as soon as practicable but not more than 20 days of receipt of the request, provide the concessioner with a written determination that the request is complete, or where the Director determines the request incomplete, a description of the information required for the request to be determined complete. Where changes in rates and charges have been requested and the request has been deemed complete, concessioners shall be allowed to notify visitors making reservations 90 or more days in advance of the anticipated rates. Those rates are subject to adjustment prior to the visit based upon the Director's review and final decision about the requested rate change. The Director shall issue a final decision approving or rejecting a request by a concessioner to change rates and charges to the public within 10 days of receipt of a complete request in accordance with the conditions described in the contract, except for those change requests requiring a full comparability study, for which the Director shall issue a decision as soon as possible and in no event longer than 30 days after receipt of the complete request. If the Director does not approve of the rates and charges proposed by the concessioner, the Director must provide in writing the substantive basis for any disapproval. These timeframes will be exceeded only in extraordinary circumstances and the concessioner must be notified in writing of such circumstances. If the Director fails to meet the timeframes described above, and has not notified the concessioner in writing of the existence of extraordinary circumstances justifying delay, a concessioner may implement the requested change to rates and charges until the Director issues a final written decision. If the Director denies the requested change to rates and charges after implementation by the concessioner, the Director will not require the concessioner to retroactively adjust any rates or charges for services booked prior to the Director's denial.

**Maureen Foster,**

*Chief of Staff, Office of the Assistant Secretary for Fish and Wildlife and Parks.*

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## DEPARTMENT OF VETERANS AFFAIRS

### 38 CFR Part 70

RIN 2900-AS03

#### Changes in Rates VA Pays for Special Modes of Transportation; Delay of Effective Date

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Final rule; delay of effective date.

**SUMMARY:** The Department of Veterans Affairs (VA) published in the **Federal Register** on February 16, 2023, a final rule to amend its beneficiary travel regulations to establish a new payment methodology for special modes of transportation available through the VA beneficiary travel program. The preamble of that final rule stated the effective date was February 16, 2024. This rulemaking delays that effective date to February 16, 2025.

**DATES:** The effective date for the final rule published February 16, 2023, at 88 FR 10032, is delayed from February 16, 2024, until February 16, 2025.

**FOR FURTHER INFORMATION CONTACT:** Ben Williams, Director, Veterans Transportation Program (15MEM), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, (404) 828-5691. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On November 5, 2020, VA proposed amending its beneficiary travel regulations to implement the discretionary authority in 38 U.S.C. 111(b)(3)(C), which permits VA to pay the lesser of the actual charge for ambulance transportation or the amount determined by the Centers for Medicare and Medicaid Services (CMS) Medicare Part B Ambulance Fee Schedule (hereafter referred to the CMS ambulance fee schedule) established under section 1834(l) of the Social Security Act (42 U.S.C. 1395m(l)), unless VA has entered into a contract for that transportation. We provided a 60-day comment period that ended on January 4, 2021, and we received six comments, five of which were substantive. Those five comments all raised similar concerns to 38 CFR 70.30(a)(4) introductory text and (a)(4)(i) and (ii) as proposed, related to using the CMS ambulance fee schedule or, in the case of travel by modes other than ambulance, the posted rates from each State. We responded to all comments in a final rule published in the **Federal Register** on February 16, 2023 (88 FR

10032), wherein we stated that we would not make changes from the proposed rule related to application of the CMS ambulance fee schedule but would delay the effective date of the final rule by one year (to be February 16, 2024) to ensure that ambulance providers have adequate time to adjust to VA's new methodology for calculating ambulance rates (88 FR 10035). We further stated in the final rule that such adjustment could include ambulance providers entering negotiations with VA to contract for payment rates different than those under the CMS ambulance fee schedule, as contemplated in the final rule.

Since publication of the final rule, however, VA has received feedback from both internal and external stakeholders, including VA employees, ambulance providers, and industry experts, that more time is necessary for successful implementation of the rule. Specifically, the delay of the effective date is necessary to accommodate unforeseen difficulties in air ambulance broker contracting. These difficulties relate to air ambulance brokers requiring a contract or subcontract in place with all potential air ambulance providers that covers emergency, non-VA initiated trips. Based on this feedback and evaluation of the continued effort that would be required by air ambulance brokers to negotiate and enter into contracts before February 16, 2024, VA is delaying the effective date of the regulation by one year. VA believes a 12-month delay is appropriate based on its experience with contracting, especially in circumstances like this where subcontracting actions are required.

#### Administrative Procedure Act

The Administrative Procedure Act (APA), codified in part at 5 U.S.C. 553, generally requires that agencies publish substantive rules in the **Federal Register** for notice of proposed rulemaking and to solicit public comment. However, pursuant to 5 U.S.C. 553(b)(B) of the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an "agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

VA finds that there is good cause under the APA to issue this rule without prior notice and opportunity for public comment. The final rule published at 88 FR 10032 will become effective February 16, 2024. Given the