address the plan's deficiencies within one year.

The City of Albuquerque and Bernalillo County, New Mexico has provided the information required under 40 CFR 51.309(d)(10)(i) in the five-year progress report. Based upon this information, the County stated in its progress report SIP that it believes that the current Section 309 and Section 309(g) regional haze SIPs are adequate to meet the State's 2018 RPGs and require no further revision at this time. Thus, the EPA has received a negative declaration from the City of Albuquerque and Bernalillo County, NM.

IV. The EPA's Proposed Action

The EPA is proposing to approve the City of Albuquerque and Bernalillo County, New Mexico's regional haze five-year progress report SIP revision (submitted June 24, 2016) as meeting the applicable regional haze requirements set forth in 40 CFR 51.309(d)(10). The EPA is proposing to approve the City of Albuquerque and Bernalillo County, New Mexico's determination that the current regional haze SIP is adequate to meet the State's 2018 RPGs.

V. Statutory and Executive Order Reviews

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

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993), 13563 (76 FR 3821, January 21, 2011), and 13771 (82 FR 9339, February 2, 2017);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994). In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Best Available Retrofit Technology, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Regional haze, Sulfur dioxide, Visibility, Volatile organic compounds.

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

Dated: September 26, 2017.

Samuel Coleman,

Acting Regional Administrator, Region 6.

[FR Doc. 2017–21006 Filed 9–29–17; 8:45 am]

BILLING CODE 6560–50–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1102

[Docket No. EP 739]

Ex Parte Communications in Informal Rulemaking Proceedings

AGENCY: Surface Transportation Board.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: In this decision, the Surface Transportation Board (the Board) proposes to modify its regulations to permit, subject to disclosure requirements, ex parte communications in informal rulemaking proceedings. The Board also proposes other changes to its ex parte rules that would clarify and update when and how interested persons may communicate informally with the Board regarding pending proceedings other than rulemakings. The intent of the proposed regulations is to enhance the Board's ability to make informed decisions through increased stakeholder communications while ensuring that the Board's record-building process in rulemaking proceedings remains transparent and fair.

DATES: Comments are due by November 1, 2017. Replies are due by November 16, 2017.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in paper format. Any person using e-filing should attach a document and otherwise comply with the instructions found on the Board's Web site at ''*www.stb.gov*'' at the ''E–FILING'' link. Any person submitting a filing in paper format should send an original and 10 paper copies of the filing to: Surface Transportation Board, Attn: Docket No. EP 739, 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet at (202) 245–0368. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The Board's current regulations at 49 CFR 1102.2 generally prohibit most informal communications between the Board and interested persons concerning the merits of pending Board proceedings. These regulations require that communications with the Board or Board staff regarding the merits of an ''on-the-record'' Board proceeding not be made on an ex parte basis (*i.e.,* without the knowledge or consent of the parties to the proceeding). *See* 49 CFR 1102.2(c); 49 CFR 1102.2(a)(3). The current regulations detail the procedures required in the event an impermissible communication occurs and the potential sanctions for violations. *See* 49 CFR 1102.2(e), (f).

The Board's predecessor agency, the Interstate Commerce Commission (ICC), determined that the general prohibition on ex parte communications in

proceedings should include the informal rulemaking proceedings the Board uses to promulgate regulations.[1] *See Revised Rules of Practice,* 358 I.C.C. 323, 345 (1977) (''[E]x parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission's decisions should be influenced only by statements that are a matter of public record.''). Accordingly, it has long been the agency's practice to prohibit meetings with individual stakeholders on issues that are the topic of pending informal rulemaking proceedings.

The Board has determined that it is appropriate to revisit the agency's strict prohibition on ex parte communications in informal rulemaking proceedings for several reasons. First, the case law governing the propriety of ex parte communications in informal rulemakings has evolved, and agencies now have more flexibility to engage in such communications and establish procedures to govern them. Second, a recent consensus recommendation of the Administrative Conference of the United States (ACUS), the body charged by Congress with recommending agency best practices, encourages greater use of ex parte communications in informal rulemaking proceedings so long as agencies devise appropriate safeguards. Third, the Board's own experiences in two recent rulemaking proceedings in which the Board waived its ex parte prohibitions to permit stakeholder meetings have demonstrated that informal meetings between the Board and stakeholders can aid the Board's decision-making process while still being conducted in a transparent and fair manner.

The Board has also determined that certain other aspects of its ex parte regulations that apply to proceedings other than rulemakings could be clarified and updated to reflect current practices and better guide stakeholders and agency personnel.

Case Law Developments Regarding Ex Parte Communications in Informal Rulemaking Proceedings

In the late 1970s, several court decisions expressed the view that ex parte communications in informal rulemaking proceedings were inherently suspect.[2] Courts expressed concerns that the written administrative record did not reflect the possible ''undue influence'' exerted by those stakeholders who had engaged in ex parte communications, *HBO* v. *FCC*, 567 F.2d at 54, and that ex parte communications ''violate[d] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decision making,'' foreclosing effective judicial review, *National Small Shipments Traffic Conference* v. *ICC,* 590 F.2d 345, 351 (D.C. Cir. 1978). At the same time, however, other court decisions were more tolerant of ex parte communications in informal rulemaking proceedings, so long as the proceeding was not quasi-adjudicative in nature and the process remained fair.[3] The ICC determined that its ex parte prohibition should apply equally to rulemaking proceedings. *Revised Rules of Practice,* 358 I.C.C. at 345.

Despite these initial misgivings by the courts, the D.C. Circuit's 1981 decision in *Sierra Club* v. *Costle,* 657 F.2d 298 (D.C. Cir. 1981), significantly clarified and liberalized treatment of this issue. That case involved an informal rulemaking conducted by the Environmental Protection Agency pursuant to the Clean Air Act, in which the agency had received numerous written and oral ex parte communications after the close of the comment period. The court considered the ''timing, source, mode, content, and the extent of . . . disclosure'' of ex parte communications received after the close of the comment period to determine whether those communications violated the Clean Air Act or due process. *Id.* at 391. The court noted that the Clean Air Act itself did not prohibit ex parte communications, although it did require documents of ''central relevance'' be placed on the public docket.[4] *Id.* at 397. Because the agency had docketed most of the ex parte communications and none of the comments were docketed ''so late as to preclude any effective public comment,'' the court held that the agency satisfied its statutory requirements. *Id.* at 398.

As for constitutional due process, the court in *Sierra Club* found there was ''questionable utility'' in insulating the decisionmaker in informal rulemakings (in contrast to quasi-judicial and quasi-adjudicatory rulemakings) from ex parte communications because the decisionmaker in such cases is not resolving ''conflicting private claims to a valuable privilege.'' *Id.* at 400. The court declined to prohibit ex parte communications in such rulemaking on due process grounds, and even held that not all ex parte communications must necessarily be docketed (implicitly concluding that whether such communications require docketing depends on case-specific circumstances). *Id.* at 402–04.

Today, *Sierra Club* is considered the most recent influential decision on ex parte communications in informal rulemakings and is often cited by courts for the proposition that ex parte communications in informal agency rulemaking are generally permissible.[5]

2014 ACUS Recommendation

In 2014, ACUS provided best-practices guidance to agencies that a general prohibition on ex parte communications in informal rulemaking proceedings is neither required nor advisable. *Ex Parte Commc'ns in Informal Rulemaking Proceedings,* 79 FR 35,988, 35,994 (June 25, 2014). ACUS examined both the potential benefits and risks of ex parte communications in informal rulemaking proceedings. Regarding potential

[1] The Administrative Procedure Act (APA), 5 U.S.C. 551–559, governs two categories of agency rulemaking: Formal and informal. Formal rulemaking is subject to specific procedural requirements, including hearings, presiding officers, and a strict ex parte prohibition. *See* 5 U.S.C. 556–57. But most federal agency rulemakings, including the Board's, are informal rulemaking proceedings subject instead to the less restrictive ''notice-and-comment'' requirements of 5 U.S.C. 553.

[2] *See, e.g., Home Box Office* v. *Fed. Commc'ns Comm'n* (*HBO* v. *FCC*), 567 F.2d 9, 51–59 (D.C. Cir. 1977) (finding that ex parte communications that occurred after the notice of proposed rulemaking (NPRM) violated the due process rights of the parties who were not privy to the communications); *see also Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221, 224 (D.C. Cir. 1959) (finding that undisclosed ex parte communications between agency commissioners and a stakeholder were unlawful because the informal rulemaking involved ''resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open'').

[3] *See, e.g., Action for Children's Television* v. *Fed. Commc'ns Comm'n,* 564 F.2d 458 (D.C. Cir. 1977) (upholding the agency's decision not to issue proposed rules and finding no APA violation for ex parte discussions where the agency provided a meaningful opportunity for public participation and the proceeding did not involve competing claims for a valuable privilege).

[4] The court also made clear that the APA does not impose any prohibition of, or requirements related to, ex parte communications in informal rulemaking. *Sierra Club,* 657 F.2d at 402 (noting that Congress declined to extend the ex parte prohibition applicable to formal rulemakings to informal rulemakings despite being urged to do so).

[5] *See, e.g., Tex. Office of Pub. Util. Counsel* v. *FCC,* 265 F.3d. 313, 327 (5th Cir. 2001) (''Generally, *ex parte* contact is not shunned in the administrative agency arena as it is in the judicial context. In fact, agency action often demands it.''); *Ammex, Inc.* v. *United States,* 23 Ct. Int'l Trade 549, 569 n.16 (1999) (noting that the decision at issue ''constitutes an exercise of 'informal' rulemaking under the [APA] and, as such, is not subject to the prohibition on ex parte communications set forth in 5 U.S.C. 557(d)(1) (1994)''); *Portland Audubon Soc.* v. *Endangered Species Comm.,* 984 F.2d 1534, 1545–46 (9th Cir. 1993) (''The decision in [*Sierra Club*] that the contacts were not impermissible was based explicitly on the fact that the proceeding involved was *informal* rulemaking to which the APA restrictions on ex parte communications are not applicable.'').

benefits, ACUS concluded that such communications

> convey a variety of benefits to both agencies and the public. . . . These meetings can facilitate a more candid and potentially interactive dialogue of key issues and may satisfy the natural desire of interested persons to feel heard. In addition, if an agency engages in rulemaking in an area that implicates sensitive information, ex parte communications may be an indispensable avenue for agencies to obtain the information necessary to develop sound, workable policies.

Id. But ACUS also acknowledged that fairness issues can arise if certain groups have, or are perceived to have, ''greater access to agency personnel than others'' and that ''[t]he mere possibility of non-public information affecting rulemaking creates problems of perception and undermines confidence in the rulemaking process.'' *Id.*

In balancing these competing considerations, ACUS urged agencies to consider placing few, if any, restrictions on ex parte communications that occur *before* an NPRM because communications at this stage are less likely to cause harm and more likely to ''help an agency gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.'' *Id.* However, ACUS recommended that agencies establish clear procedures ensuring that all ex parte communications occurring *after* an NPRM, whether planned or unplanned, be disclosed. Written communications should be placed in the docket, and oral communications should be summarized and placed in the docket. Written summaries of oral communications should include the date, location, and participants of any meeting, as well as ''adequate disclosure'' of the communication (prepared by agency staff or private parties, with the ultimate responsibility for adequacy falling on the agency). *Id.* at 35,995. ACUS also suggested that agencies exercise special care regarding communications that contain ''any significant new information that its decisionmakers choose to consider or rely upon.'' *Id.*

Board Rationale for Revising its Ex Parte Regulations

Starting in 2015, the Board began to look at the possibility of conducting ex parte meetings in order to gain even more stakeholder input in the informal rulemaking process. As a result, the Board waived the ex parte prohibition to permit Board Members or designated Board staff to participate in ex parte communications in two proceedings.[6] *See Reciprocal Switching,* EP 711 (Sub-No. 1), slip op. at 28–29 (STB served July 27, 2016);[7] *U.S. Rail Serv. Issues—Performance Data Reporting* (*U.S. Rail Serv. Issues Nov. 2015 Decision*), EP 724 (Sub-No. 4), slip op. at 2–3 (STB served Nov. 9, 2015). In both proceedings, the Board established when ex parte meetings could be scheduled and specific instructions for the scheduling and disclosure of the meetings. The Board has required written meeting summaries be prepared and docketed, although it has taken slightly different approaches in each proceeding. In EP 724 (Sub-No. 4), where stakeholder meetings were held with Board staff (rather than Board Members), the meeting summaries were prepared by Board staff and placed in the rulemaking docket. (*See, e.g.,* Summary of Ex Parte Meeting between CSX Transp., Inc. & STB Staff, Dec. 16, 2015, *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4).) In comparison, in EP 711 (Sub-No. 1), where stakeholder meetings are being held with individual Board Members, the Board has directed the parties requesting the ex parte meetings to prepare the written summaries, which are provided, along with any handouts, to the office of the Board Member with whom the party met within two business days of the meeting and then placed in the rulemaking docket within 14 days of the meeting. (*See, e.g.,* Summary of Ex Parte Meeting Between INEOS USA LLC & STB Member, Feb. 7, 2017, *Reciprocal Switching,* EP 711 (Sub-No. 1).) In both proceedings, the Board has ensured that the meeting summaries contain the date of the meeting and a list of attendees; a summary of the arguments, information, and data presented; and a copy of any handout given or presented to the Board. *See Reciprocal Switching,* EP 711 (Sub-No. 1), slip op. at 29; *see also U.S. Rail Serv. Issues Nov. 2015 Decision,* EP 724 (Sub-No. 4), slip op. at 3. The Board has also ensured that meeting summaries are submitted and docketed promptly. *See Reciprocal Switching,* EP 711 (Sub-No. 1), slip op. at 28–29 (requiring meetings summaries to be submitted by parties within two business days of the meeting and noting that the Board expects to docket the meeting summaries within 14 days of the meeting); *see also U.S. Rail Serv. Issues—Performance Data Reporting,* Docket No. EP 724 (Sub-No. 4) (meeting summaries prepared by Board staff were generally docketed within 14 days of a meeting).

Many stakeholders in these proceedings have expressed appreciation for the opportunity to meet with Board Members or Board staff regarding the merits of the proposed rules. *See, e.g.,* Summary of Ex Parte Meeting Between Packaging Corp. of Am. & Acting Chairman Begeman at 3, Aug. 3, 2017, *Reciprocal Switching,* EP 711 (Sub-No. 1) (''The meeting concluded with . . . an acknowledgement that the ex parte meeting process on EP 711 has allowed for valuable input from shippers and their perspective on the need for a competitive rail-pricing environment that ultimately serves the public interest.''); Summary of Ex Parte Meeting Between CSX Transp. & STB Staff at 1, Dec. 16, 2015, *U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4) (''CSXT hopes that there will be additional opportunities for informal discussions on Board initiatives in the future and noted that it has many informal discussions with the Federal Railroad Administration, which also does rulemakings.''). In these meetings, parties have been able to respond directly to questions from Board staff on the feasibility and utility of certain aspects of the Board's proposal. As a result of the written comments and ex parte meetings in Docket No. EP 724 (Sub-No. 4), the Board issued a supplemental NPRM significantly revising its proposed rules. *See U.S. Rail Serv. Issues—Performance Data Reporting,* EP 724 (Sub-No. 4), slip op. at 3 (STB served Apr. 29, 2016). Because the ex parte meetings in that proceeding better informed the agency about the often highly technical service reporting issues that were most important to commenters, the Board believes that the ultimate final rule was a better reflection of the needs and concerns of all stakeholders. The Board has every reason to expect that the ongoing meetings in EP 711 (Sub-No. 1) will prove similarly helpful and informative. The Board believes its experiences in these two cases indicate a strong desire among stakeholders to interact with the Board more informally.

Both the developments in case law related to ex parte communications and

[6] Greater use of ex parte meetings in Board rulemaking proceedings was also a topic of the U.S. Senate Committee on Commerce, Science, and Transportation's August 11, 2016 hearing. *See* Freight Rail Reform: Implementation of the STB Reauthorization Act of 2015: Field Hearing Before the S. Comm. on Commerce, Sci., & Transp., 114th Cong. 32, 35, 46, 50–52, 57, 69, 72 (2016), *https://www.gpo.gov/fdsys/pkg/CHRG-114shrg23228/pdf/CHRG-114shrg23228.pdf.*

[7] In the Board's July 27, 2016 decision, which embraced *Petition for Rulemaking to Adopt Revised Competitive Switching Rules,* Docket No. EP 711, the Board terminated the proceeding in Docket No. EP 711, and all meetings with Board Members are taking place under *Reciprocal Switching,* Docket No. EP 711 (Sub-No. 1).

the Board's own experiences waiving its ex parte prohibitions in the two recent proceedings discussed above provide the Board with ample support to re-examine and update its ex parte regulations to permit and govern ex parte communications in informal rulemaking proceedings. The Board's removal of its prohibition on ex parte communications would also be consistent with the more liberal approach to ex parte communications in informal rulemakings allowed under *Sierra Club.* First, the Board's informal rulemaking proceedings are the type of proceedings in which the court in *Sierra Club* found ex parte communications are not prohibited on strict due process grounds. Specifically, the Board's informal rulemakings are legislative in nature, in that they focus on policy or law to be implemented in the future and are based on various factors designed to determine what prospective rule would be most beneficial. *See U.S. Rail Serv. Issues Nov. 2015 Decision,* EP 724 (Sub-No. 4), slip op. at 2 n.4. The Board's informal rulemaking proceedings thus generally do not involve competing claims to a specific ''valuable privilege,'' which the court in *Sierra Club* warned would trigger due process concerns.[8] Accordingly, the strict due process considerations that motivate blanket ex parte restrictions in other cases would not apply to the Board's informal rulemaking proceedings.

Second, as in *Sierra Club,* the Board's authorizing statute creates no procedural impediments regarding ex parte communications in informal rulemaking proceedings. The statutory authority for most of the Board's rules, the Interstate Commerce Act, does not itself prohibit ex parte communications. Indeed, 49 U.S.C. 11324(f) explicitly *permits* ex parte communications in major rail merger proceedings, subject to prompt placement in the public docket of the written communication or a summary of the oral communication. And 49 U.S.C. 11123 exempts the Board from the requirements of the APA altogether in emergency situations requiring immediate Board action to provide relief for service inadequacies.

In determining whether and to what extent to permit ex parte communications in informal rulemaking proceedings, the Board must appropriately balance the benefits of allowing ex parte communications with institutional concerns regarding transparency and fairness. The benefits are evident: Ex parte communications would provide the Board with the opportunity to informally engage stakeholders, gather information, and receive the benefit of industry data and stakeholder expertise. Such informal discussions would help ensure the Board thoroughly understands stakeholder perspectives and would ultimately aid the Board in developing the most appropriate regulations. Ex parte communications would also allow stakeholders to further explain or clarify data and arguments submitted in written comments and would enable the Board to explore the nuances of those arguments by asking follow-up questions, as needed. As noted in *Sierra Club,* government administrators must be open, accessible, and amenable to the needs and ideas of the public. *Sierra Club,* 657 F.2d at 400–01. Indeed, the Board's policy decisions in informal rulemaking proceedings are guided by stakeholder input, and, as the Board has experienced in Docket Nos. EP 711 (Sub-No. 1) and EP 724 (Sub-No. 4), ex parte meetings provide a meaningful and direct way for stakeholders to share their views and for the Board Members and/or Board staff to ask specific questions, thus promoting an increased dialogue about particular issues.

The Board recognizes that ex parte communications can also raise concerns, including that decisionmakers may be influenced by communications made in private; that interested persons may be unable to reply effectively to information presented in ex parte communications; and that certain parties may be perceived to have greater access to the agency. *See infra* at 7 (discussing ACUS report). However, the Board believes that these concerns can be remedied by implementing safeguards to ensure that the public record adequately reflects the evidence and argument provided during the ex parte meetings and that parties have an opportunity to respond. Such safeguards would include requiring the disclosure of any written or oral ex parte communication in a meeting summary that would be posted to the public docket and providing parties an opportunity to submit written comments in response to the summaries at the conclusion of the ex parte meeting period. Moreover, the Board could address concerns regarding the accessibility of the process by permitting ex parte meetings via telephone or video-conferencing.[9]

With safeguards in place, the Board believes that the ability to communicate directly with stakeholders in informal rulemaking proceedings would enhance the Board's deliberations and better enable it to issue the most appropriate regulations in accordance with a transparent and fair record-building process. Accordingly, the Board proposes to revise its ex parte regulations to permit ex parte communications in informal rulemaking proceedings, but also to implement procedural safeguards that ensure the rulemaking process remains fair and transparent. Moreover, the Board seeks to clarify certain other aspects of its ex parte regulations that apply to proceedings other than informal rulemakings, to ensure that they provide clear guidance on how stakeholders can communicate with Board Members and staff during such proceedings.

The Proposed Rule

The Board proposes to make the following modifications, organized here by topic, to the Board's regulations at 49 CFR 1102.2 regarding ex parte communication. The Board proposes changes to the definitions set out in paragraph (a) of the regulations; changes to communications that are and are not prohibited; and changes to the procedures required upon receipt of prohibited communications. The Board also proposes new rules governing ex parte communications in informal rulemaking proceedings. The Board invites comment on the proposed revisions.

Changes to Definitions

The Board proposes to modify paragraph (a) to reflect that the revised regulations would govern, rather than prohibit all, ex parte communications. Under the existing regulations, ex parte communications are prohibited in ''on-the-record proceedings.'' The term ''on-the-record proceeding'' is defined in existing § 1102.2(a)(1) to include formal rulemaking and adjudicatory proceedings under §§ 556–57 of the APA (5 U.S.C. 556–57), as well as any matter required by the Constitution, statute, Board rule, or by decision to be decided solely on the record made in a Board proceeding. As discussed above, informal rulemaking proceedings are not expressly covered by this definition.

[8] Claims involving specific valuable privilege are more typically resolved in Board adjudications, such as rate reasonableness or unreasonable practice cases, where ex parte communications would remain prohibited.

[9] Any parties in need of assistance understanding or complying with the Board's ex parte regulations—for example, locating example summaries from prior cases on the Board's Web site—would be able to contact the Board's Rail Customer and Public Assistance Program (RCPA). Among other things, RCPA assists Board stakeholders seeking guidance in complying with Board decisions and regulations. Matters brought to RCPA are handled informally by Board staff who are not reasonably expected to participate in Board decisions, and guidance offered through RCPA is not binding on the agency.

Rather, the ICC, in effect, extended the ex parte prohibition to informal rulemaking proceedings in *Revised Rules of Practice,* 358 I.C.C. at 345. The proposed regulations, however, would essentially reverse this extension by no longer completely prohibiting ex parte communications in informal rulemaking proceedings, while also ensuring any ex parte communications post-NPRM would be disclosed in a transparent manner.

To accomplish this, the Board proposes to add two new definitions to § 1102.2(a): ''informal rulemaking proceeding'' and ''covered proceedings.'' ''Informal rulemaking proceeding'' would include any proceeding to issue, amend, or repeal rules pursuant to 49 CFR part 1110 and 5 U.S.C. 553. ''Covered proceedings'' would encompass both on-the-record proceedings and informal rulemaking proceedings following the issuance of an NPRM.[10] As discussed in more detail below, ex parte communications would be permitted in informal rulemaking proceedings (subject to disclosure requirements for those communications occurring post-NPRM), but would remain prohibited in on-the-record proceedings.

The proposed language would also redefine an ex parte communication as ''an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.'' This new definition would alter the existing definition in two significant ways. First, the existing concept that communications are only ex parte if made ''by or on behalf of a party'' would be removed. The Board proposes eliminating this phrase because communications that concern the merits or substantive outcome of a proceeding, even if they are not made by a formal party to the proceeding or on behalf of such a party, could nonetheless have the potential to impact a proceeding. Second, the proposed new definition would remove the suggestion that an ex parte communication that is made with the ''consent of any other party'' could be permissible. The Board believes it is more appropriate for the Board, rather than other parties, to determine whether to permit ex parte communications.[11]

These revisions would not change the generally understood concept that certain communications, by their very nature, do not concern the merits or substantive outcome of pending proceedings or are not made to Board Members or staff who are reasonably expected to participate in Board decisions. For example, communications that do not raise issues include communications about purely procedural issues; public statements or speeches by Board Members or staff that merely provide general and publicly available information about a proceeding; communications that solely concern the status of a proceeding; and communications with the Board's RCPA.

Communications That Are Not Prohibited

Paragraph (b), as currently written, permits certain types of communications that do not appear to threaten transparency or fairness but that may also have an impact on a proceeding. Such communications include information from the news media and facts or contentions that are general in nature. *See* 49 CFR 1102.2(b)(2), (3). The Board proposes to amend this paragraph to include additional categories of ex parte communications that are permissible and would not be subject to the proposed disclosure requirements of proposed paragraphs (e) and (g), discussed below. Proposed additions to this category include communications related to an informal rulemaking proceeding *prior* to the issuance of an NPRM; communications related to the Board's implementation of the National Environmental Policy Act and related environmental laws; and communications concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff involved in that litigation.

Regarding ex parte communications prior to the issuance of an NPRM, the proposed rules would allow for *unconstrained* ex parte communications in informal rulemaking proceedings until an NPRM is issued. The Board believes that free-flowing communications with stakeholders should be encouraged during the exploratory, pre-NPRM phase of a rulemaking proceeding. Some rulemaking proceedings have been initiated by the Board with a general request for comments or an informational hearing designed to allow the Board to obtain preliminary stakeholder input regarding certain broad topics. *See R.R. Revenue Adequacy,* EP 722 (STB served April 2, 2014); *Review of Rail Access & Competition Issues—Renewed Pet. of the W. Coal Traffic League,* EP 575 (STB served June 2, 2006); *see also Review of the STB's Gen. Costing Sys.,* EP 431 (Sub-No. 3) (STB served Apr. 6, 2009). When such preliminary or general decisions have been issued, the applicability of the Board's ex parte prohibitions has been unclear, and this ambiguity has caused confusion. The Board proposes to clarify that, during the pre-NPRM phase of an informal rulemaking proceeding, it is not necessary to limit (or subject to strict disclosure requirements) informal communications with individual stakeholders regarding such general topics because, as noted by ACUS, pre-NPRM ex parte communications do not implicate administrative or due process concerns. Information gathered in a pre-NPRM ex parte meeting that the Board incorporates or relies upon in its proposal should be evident in the NPRM itself, and the public would have the opportunity to examine and respond to that information.[12] For these reasons, the Board believes that such communications, which could assist the Board in the preliminary stages of a rulemaking proceeding, should be encouraged.

Additionally, communications related to environmental laws and communications regarding judicial

[10] Accordingly, the Board proposes to replace references to ''on-the-record proceedings'' with ''covered proceedings,'' as appropriate, throughout § 1102.2.

[11] The Board also proposes some modifications for syntax purposes. In particular, to reflect the revised definition of ''ex parte communication,'' which incorporates the fact that ex parte communications ''concern[ ] the merits or the substantive outcome of a pending proceeding,'' the Board proposes to remove the phrase ''concerning the merits of a proceeding'' (and the like) from the remainder of § 1102.2. For example, where existing paragraph (c)(2) states ''knowingly entertain any ex parte communication concerning the merits of a proceeding,'' the proposed rules would only state ''knowingly entertain any ex parte communication.''

[12] For example, in Docket No. EP 733, *Expediting Rate Cases,* Board staff held informal meetings with stakeholders in April 2016 to explore ideas on how the Board could expedite rate reasonableness cases. The goal of the informal discussions was to enhance Board staff's perspective on strategies and pathways to expedite and streamline rate cases. The Board utilized feedback received during the informal meetings to generate ideas, which were incorporated into an advance notice of proposed rulemaking. *Expediting Rate Cases,* EP 733, slip op. at 2 (STB served June 15, 2017); *see also id.* at 3 (proposing standardized discovery requests in light of statements by several stakeholders in the informal meetings that standardizing discovery would help expedite rate cases and reduce the number of disputes). Parties were permitted to comment on the details of the proposal, including those stemming from feedback gathered in the informal meetings. *Id.* at 1.

review of matters already decided by the Board are being added to codify existing and well-accepted practices. The Board's environmental review process ''is necessarily informal and all-inclusive and depends on cooperative consultations with the [license] applicant as well as other agencies and other interested parties with expertise, so that all possible environmental information, issues, and points of view will come before the agency.'' *San Jacinto Rail Ltd. Constr. Exemption & BNSF Operation Exemption—Build-Out to the Bayport Loop Near Houston, Harris Cty., Tex.,* FD 34079, slip op. at 3 (STB served Dec. 3, 2002) (finding that a letter sent as part of the environmental review process did not constitute an ex parte communication). Accordingly, the Board proposes to clarify that communications related solely to the preparation of environmental review documents, such as Environmental Impact Statements and Environmental Assessments, are not ex parte communications. In addition, once a Board decision has been appealed in court, it is both necessary and proper for there to be communication between the agency and other litigants concerning litigation issues.

Lastly, paragraph (b)(1) of the current regulation permits any communication ''to which all the parties to the proceeding agree.'' The Board proposes to modify the existing regulations to remove this language because, as noted above, the Board believes it is more appropriate for the Board, rather than other parties, to determine whether to permit ex parte communications.

Communications That Are Prohibited

The Board proposes to make changes in paragraph (c) that either clarify the existing regulations or modify them to reflect that some ex parte communications, such as those in informal rulemakings, would be permitted under the proposed amendments.

In paragraph (c)(1), the Board proposes to add an introductory clause, ''[e]xcept to the extent permitted by these rules'' to reflect the fact that the revised rules would govern, but not entirely prohibit, ex parte communications.

The Board also proposes to amend paragraph (d) to clarify when the ex parte prohibitions take effect. The language of the existing regulations ties ex parte communications governance to the noticing for oral hearing or the taking of evidence by modified procedure. The Board believes that more general ''docketing'' triggers would better reflect the various ways Board proceedings are initiated. Thus, under the proposed rule, the prohibitions against ex parte communications in on-the-record proceedings would apply when the first filing or Board decision in a proceeding is posted to the public docket or when the person responsible for a communication knows that the first filing has been filed with the Board, whichever occurs first. In informal rulemaking proceedings, except as provided in the new paragraph (g), discussed in more detail below, the prohibitions on ex parte communications would apply when the Board issues an NPRM.

The Board also proposes to clarify that ex parte prohibitions in covered proceedings remain in effect until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. 1322(c) or judicial review.

Procedures Upon Receipt of Prohibited Ex Parte Communications

The Board proposes revisions to paragraphs (e) and (f), which entail the procedures required of Board Members and employees upon receipt of prohibited ex parte communications and sanctions, to reflect the fact that some ex parte communications would be permissible under the revised regulation. First, the proposed rules would clarify that the procedures in paragraphs (e)(1) and (2) apply to ''[a]ny Board Member, hearing officer or Board employee'' who receives an ex parte communication. Second, the procedures set forth in existing paragraphs (e) and (f) would now apply only to communications not otherwise permitted by the regulation. Lastly, the Board proposes to amend the provision in paragraph (e)(1), which requires the Chief of the Office of Proceedings' Section of Administration to place any written communication or a written summary of an oral communication not permitted by these regulations in the public correspondence file, to also require that such placements be made ''promptly'' and contain a label indicating that the prohibited ex parte communication is not part of the decisional record of the proceeding.

Ex Parte Communications in Informal Rulemaking Proceedings

The Board proposes to add a new paragraph (g) specifically governing ex parte communications in informal rulemaking proceedings that occur following the issuance of an NPRM, at which point disclosure requirements would attach. Under the proposed rule, ex parte communications with Board Members in informal rulemaking proceedings following the issuance of an NPRM would be permitted, subject to disclosure requirements, until 20 days before the deadline for reply comments to the NPRM, unless otherwise specified by the Board. The Board may delegate its participation in such ex parte communications to Board staff. *See e.g., U.S. Rail Serv. Issues Nov. 2015 Decision,* EP 724 (Sub-No. 4). Ex parte communications in informal rulemaking proceedings that occur outside of the permitted meeting period, that occur with Board staff where such participation has not been delegated, or that do not comply with the required disclosure requirements would be subject to the sanctions provided in paragraph (f). To schedule meetings, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0238 or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

As discussed in more detail above, prompt and effective disclosure of ex parte communications in informal rulemaking proceedings would balance the Board's desire to obtain more stakeholder input through informal interactions while ensuring transparency and fairness. Accordingly, the proposed rules would require that the substance of each ex parte meeting be disclosed by the Board by posting in the docket of the proceeding a written meeting summary of the arguments, information, and data presented at each meeting and a copy of any handouts given or presented. The meeting summary would also disclose basic information about the meeting including the date and location of the ex parte communication (or means of communication in the case of telephone calls or video-conferencing) and a list of attendees/participants.

The proposed rules would also provide that the meeting summaries be sufficiently detailed to describe the substance of the ex parte communication. The Board's intent is to create a requirement that ensures that summaries are not merely lists of the topics discussed but rather contain the arguments made and information presented. The proposed rules provide that presenters may be required to resubmit summaries that are insufficiently detailed or that contain inaccuracies as to the substance of the presentation, thus ensuring that the Board attendees at the meeting retain the responsibility of adequate disclosure, as recommended by ACUS. It is the Board's preliminary view that stakeholders do not need further formal instructions in order to provide appropriately detailed summaries, but

parties may comment on whether more specific instructions on the format or content of meeting summaries would be appropriate.[13]

The proposed rules provide that a single meeting summary may be submitted to the Board even if multiple parties, persons, or counsel are involved in the same ex parte meeting. In such instances, it would be the responsibility of the person submitting the summary to ensure that all other parties at the meeting agree to the form and content of the summary. This provision is intended to provide an efficient way for parties with aligned interests to make joint presentations to Board Members or Board staff in the same way they are able to make such presentations via written pleadings. Likewise, the proposed rules would permit parties to present confidential information during ex parte meetings. If the presentations contain material that a party asserts is confidential under an existing protective order governing the proceeding, parties would be required to present a public version and a confidential version of ex parte summaries and any handouts. Just as parties use the redacted, public versions of written filings to vet arguments presented in written comments, parties likewise could use redacted, public versions of the meeting summaries to vet the arguments and information shared with the Board during ex parte meetings. Parties would have the opportunity to respond to any information contained in the meeting summaries in their written NPRM reply comments. To ensure that parties have sufficient time to respond to the meeting summaries, as noted, the Board is proposing that the meetings occur at least 20 days before the deadline for reply comments to the NPRM, unless otherwise specified by the Board. If a protective order has not been issued in the proceeding at the time the presenter seeks to file a meeting summary or handout containing confidential information, the presenting party must file a request with the Board seeking such an order no later than the date it submits its meeting summary.

The Board also believes it is important that meeting summaries be submitted as soon after the meetings occur as practicable. The entire substance of communications is best recalled if they are recorded soon after the meeting or presentation. Moreover, if meeting summaries are submitted promptly, the Board will be able to post them promptly, which will ensure that all interested stakeholders will have sufficient time to review the summaries. Accordingly, the proposed rules would require parties to submit summaries within two business days of an ex parte presentation or meeting. The rules also provide that the Board would post the summaries within seven days of submission of a summary that is complete for posting.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. §§ 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, § 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities,'' § 605(b). Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

The proposed regulation would not create a significant impact on a substantial number of small entities.[14] The proposed regulations provide for participation in ex parte communications with the Board in informal rulemaking proceedings to provide stakeholders with an alternative means of communicating their interests to the Board in a transparent and fair manner. When a party chooses to engage in ex parte communications with the Board in an informal rulemaking proceeding, the requirements contained in these proposed regulations do not have a significant impact on participants, including small entities. While the proposed rules would require parties to provide written summaries of the ex parte communications, based on the Board's experiences in EP 711 (Sub-No. 1) and EP 724 (Sub-No. 4), the summary documentation is a minimal burden. The meeting summaries are generally only a few pages long (excluding copies of handouts from the meetings that were attached). For example, the meeting summaries the Board received in EP 724 (Sub-No. 4) ranged from two to six pages in length. Of those summaries, nearly half were just two pages long. Likewise, in EP 711 (Sub-No. 1), the meeting summaries range from one to four pages in length, with the majority of those summaries being three or fewer pages long. For these reasons, the proposed rule would not place any significant burden on small entities.

List of Subjects in 49 CFR Part 1102

Administrative practice and procedure.

It is ordered:

1. The Board proposes to amend its rules as set forth in this decision. Notice of the proposed rules will be published in the **Federal Register**.

2. The procedural schedule is established as follows: Comments regarding the proposed rules are due by November 1, 2017; replies are due by November 16, 2017.

3. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

4. This decision is effective on the day of service.

Decided: September 26, 2017.

By the Board, Board Member Begeman, Elliott, and Miller.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend 49 CFR part 1102 as follows:

49 CFR PART 1102—COMMUNICATIONS

■ 1. The authority citation for part 1102 is revised to read as follows:

[13] In addition, stakeholders may find the Board-staff prepared summaries in *U.S. Rail Serv. Issues—Performance Data Reporting,* Docket No. EP 724 (Sub-No. 4), to be helpful examples regarding the appropriate level of detail.

[14] Effective June 30, 2016, for the purpose of RFA analysis for rail carriers subject to Board jurisdiction, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $35,809,698 or less when adjusted for inflation using 2016 data. Class II rail carriers have annual operating revenues of less than $250 million in 1991 dollars or less than $447,621,226 when adjusted for inflation using 2016 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its Web site. 49 CFR 1201.1–1.

Authority: 49 U.S.C. 1321.

■ 2. Amend § 1102.2 as follows:
■ a. Revise the section heading;
■ b. In paragraph (a), redesignate paragraphs (a)(2) and (3) as paragraphs (a)(4) and (5) and add new paragraphs (2) and (3);
■ c. Revise newly redesignated paragraph (a)(5);
■ d. Revise paragraph (b) introductory text;
■ e. Revise paragraph (b)(1);
■ f. Redesignate paragraphs (b)(2) and (3) as paragraphs (b)(3) and (4), and add new paragraphs (b)(2), (5), and (6);
■ g. Revise newly designated paragraphs (b)(3) and (4);
■ h. Revise paragraphs (c) introductory text, (c)(1), (c)(2), and (d);
■ i. Revise paragraph (e);
■ j. In paragraph (f)(1), remove ''concerning the merits of a proceeding'';
■ k. In paragraph (f)(2), add ''covered'' before the word ''proceeding'';
■ l. Revise paragraph (f)(3); and
■ m. Add a new paragraph (g).

The revisions and additions read as follows:

§ 1102.2 Procedures governing ex parte communications.

(a) * * *

(2) ''Informal rulemaking proceeding'' means a proceeding to issue, amend, or repeal rules pursuant to 5 U.S.C. 553 and part 1110 of this chapter.

(3) ''Covered proceedings'' means on-the-record proceedings and informal rulemaking proceedings following the issuance of a notice of proposed rulemaking.

* * * * *

(5) ''Ex parte communication'' means an oral or written communication that concerns the merits or substantive outcome of a pending proceeding; is made without notice to all parties and without an opportunity for all parties to be present; and could or is intended to influence anyone who participates or could reasonably be expected to participate in the decision.

(b) *Ex parte communications that are not prohibited and need not be disclosed.*

(1) Any communication that the Board formally rules may be made on an ex parte basis;

(2) Any communication occurring in informal rulemaking proceedings prior to the issuance of a notice of proposed rulemaking;

(3) Any communication of facts or contention which has general significance for a regulated industry if the communicator cannot reasonably be expected to have known that the facts or contentions are material to a substantive issue in a pending covered proceeding in which it is interested;

(4) Any communication by means of the news media that in the ordinary course of business of the publisher is intended to inform the general public, members of the organization involved, or subscribers to such publication with respect to pending covered proceedings;

(5) Any communications related solely to the preparation of documents necessary for the Board's implementation of the National Environmental Policy Act and related environmental laws, pursuant to part 1105 of this chapter;

(6) Any communication concerning judicial review of a matter that has already been decided by the Board made between parties to the litigation and the Board or Board staff who are involved in that litigation.

(c) *General Prohibitions.*

(1) Except to the extent permitted by these rules, no party, counsel, agent of a party, or person who intercedes in any covered proceeding shall engage in any ex parte communication with any Board Member, hearing officer, or Board employee who participates, or who may reasonably be expected to participate, in the decision in the proceeding.

(2) No Board Member, hearing officer, or Board employee who participates, or is reasonably expected to participate, in the decision in a covered proceeding shall invite or knowingly entertain any ex parte communication or engage in any such communication to any party, counsel, agent of a party, or person reasonably expected to transmit the communication to a party or party's agent.

(d) *When prohibitions take effect.* In on-the-record proceedings, the prohibitions against ex parte communications apply from the date on which the first filing or Board decision in a proceeding is posted to the public docket by the Board, or when the person responsible for the communication has knowledge that such a filing has been filed, or at any time the Board, by rule or decision, specifies, whichever occurs first. In informal rulemaking proceedings, except as provided in paragraph (g) of this section, the prohibitions against ex parte communications apply following the issuance of a notice of proposed rulemaking. The prohibitions in covered proceedings continue until the proceeding is no longer subject to administrative reconsideration under 49 U.S.C. 1322(c) or judicial review.

(e) *Procedure required of Board Members and Board staff upon receipt of prohibited ex parte communications.*

(1) Any Board Member, hearing officer, or Board employee who receives an ex parte communication not permitted by these regulations must promptly transmit either the written communication, or a written summary of the oral communication with an outline of the surrounding circumstances to the Chief, Section of Administration, Office of Proceedings, Surface Transportation Board. The Section Chief shall promptly place the written material or summary in the correspondence section of the public docket of the proceeding with a designation indicating that it is a prohibited ex parte communication that is not part of the decisional record.

(2) Any Board Member, hearing officer, or Board employee who is the recipient of such ex parte communication may request a ruling from the Board's Designated Agency Ethics Official as to whether the communication is a prohibited ex parte communication. The Designated Agency Ethics Official shall promptly reply to such requests. The Chief, Section of Administration, Office of Proceedings, shall promptly notify the Chairman of the Board of such ex parte communications sent to the Section Chief. The Designated Agency Ethics Official shall promptly notify the Chairman of all requests for rulings sent to the Designated Agency Ethics Official. The Chairman may require that any communication be placed in the correspondence section of the docket when fairness requires that it be made public, even if it is not a prohibited communication. The Chairman may direct the taking of such other action as may be appropriate under the circumstances.

(f) * * *

(1) The Board may censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited ex parte communication.

(2) The relief or benefit sought by a party to a covered proceeding may be denied if the party or the party's agent knowingly and willfully violates these rules.

(3) The Board may censure, suspend, dismiss, or institute proceedings to suspend or dismiss any Board employee who knowingly and willfully violates these rules.

(g) *Ex parte communications in informal rulemaking proceedings; disclosure requirements.*

(1) Notwithstanding paragraph (c) of this section, ex parte communications with Board Members in informal rulemaking proceedings are permitted

after the issuance of a notice of proposed rulemaking and until 20 days before the deadline for reply comments set forth in the notice of proposed rulemaking, unless otherwise specified by the Board in procedural orders governing the proceeding. The Board may delegate its participation in such ex parte communications to Board staff. All such ex parte communications must be disclosed in accordance with paragraph (g)(4) of this section. Any person who engages in such ex parte communications must comply with any schedule and additional instructions provided by the Board in the proceeding. Communications that do not comply with this section or with the schedule and instructions established in the proceeding are not permitted and are subject to the procedures and sanctions in paragraphs (e) and (f) of this section.

(2) To schedule ex parte meetings permitted under paragraph (g)(1) of this section, parties should contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance or the Board Member office with whom the meeting is requested, unless otherwise specified by the Board.

(3) Parties seeking to present confidential information during an ex parte communication must inform the Board of the confidentiality of the information at the time of the presentation and must comply with the disclosure requirements in paragraph (g)(4)(iv) of this section.

(4) The following disclosure requirements apply to ex parte communications permitted under paragraph (g)(1) of this section:

(i) Any person who engages in ex parte communications in an informal rulemaking proceeding shall submit to the Board Member office or delegated Board staff with whom the meeting was held a memorandum that states the date and location of the communication; lists the names and titles of all persons who attended (including via phone or video) or otherwise participated in the meeting during which the ex parte communication occurred; and summarizes the data and arguments presented during the ex parte communication. Any written or electronic material shown or given to Board Members or Board staff during the meeting must be attached to the memorandum.

(ii) Memoranda must be sufficiently detailed to describe the substance of the presentation. Board Members or Board staff may ask presenters to resubmit memoranda that are not sufficiently detailed.

(iii) If a single meeting includes presentations from multiple parties, counsel, or persons, a single summary may be submitted so long as all presenters agree to the form and content of the summary.

(iv) If a memorandum, including any attachments, contains information that the presenter asserts is confidential, the presenter must submit a public version and a confidential version of the memorandum. If there is no existing protective order governing the proceeding, the presenter must, at the same time the presenter submits its public and redacted memoranda, file a request with the Board seeking such an order pursuant to § 1104.14 of this chapter.

(v) Memoranda must be submitted to the Board in the manner prescribed no later than two business days after the ex parte communication.

(vi) Ex parte memoranda submitted under this section will be posted on the Board's Web site in the docket for the informal rulemaking proceeding within seven days of submission. If a presenter has requested confidential treatment for all or part of a memorandum, only the public version will appear on the Board's Web site. Persons seeking access to the confidential version must do so pursuant to the protective order governing the proceeding.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R6–ES–2016–0013: FXES11130900000C6–178–FF09E30000]

RIN 1018–BB41

Endangered and Threatened Wildlife and Plants; Removing Astragalus desereticus (Deseret Milkvetch) From the Federal List of Endangered and Threatened Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule and 12-month petition finding; request for comments.

SUMMARY: The best available scientific and commercial data indicate that threats to *Astragalus desereticus* (Deseret milkvetch) identified at the time of listing in 1999 are not as significant as originally anticipated and are being adequately managed. Therefore, the species no longer meets the definition of an endangered or threatened species under the Endangered Species Act of 1973, as amended (Act). Consequently, we, the U.S. Fish and Wildlife Service (Service), propose to remove (delist) *Astragalus desereticus* from the Federal List of Endangered and Threatened Plants (List). This determination is based on a thorough review of all available information, which indicates that this species' population is much greater than was known at the time of listing in 1999 and that threats to this species have been sufficiently minimized. This document also serves as the 12-month finding on a petition to remove this species from the List. We are seeking information, data, and comments from the public on the proposed rule to remove the *Astragalus desereticus* from the List.

DATES: We will accept comments received or postmarked on or before December 1, 2017. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below), must be received by 11:59 p.m. Eastern Time on the closing date. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by November 16, 2017.

ADDRESSES: You may submit written comments on the proposed rule and the draft post-delisting monitoring plan by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter Docket No. FWS–R6–ES–2016–0013, which is the docket number for this rulemaking. Then, click on the Search button. On the resulting page, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on the blue ''Comment Now!'' box. If your comments will fit in the provided comment box, please use this feature of *http://www.regulations.gov,* as it is most compatible with our comment review procedures. If you attach your comments as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred formation is a spreadsheet in Microsoft Excel.
- *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–6–ES–2016–0013; U.S. Fish and Wildlife Service; MS: BPHC; 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you submit written comments only by the methods described above. We will post all