

# Proposed Rules

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

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 97

[Docket ID: DOD–2018–OS–0103]

RIN 0790–AK11

#### Release of Official Information in Litigation and Presentation of Witness Testimony by DoD Personnel (Touhy Regulation)

**AGENCY:** Office of the General Counsel of the Department of Defense (DoD), DoD.

**ACTION:** Proposed rule.

**SUMMARY:** Commonly known as the *Touhy* regulation, this rule prescribes the requirements for submitting subpoenas and litigation requests to the Department as well as the procedures that its personnel will follow to respond. The Department proposes to amend and consolidate component-level requirements and procedures into a single Department-level *Touhy* rule.

**DATES:** Comments must be received by July 13, 2021.

**ADDRESSES:** You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) number and title, by any of the following methods:

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

- *Mail:* The DoD cannot receive written comments at this time due to the COVID–19 pandemic. Comments should be sent electronically to the docket listed above.

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

**FOR FURTHER INFORMATION CONTACT:** Ms. Denise Shellman, 703–571–0793, [denise.v.shellman.civ@mail.mil](mailto:denise.v.shellman.civ@mail.mil).

#### SUPPLEMENTARY INFORMATION:

##### A. Summary of New and Amended Regulatory Provisions and Their Impact

DoD’s longstanding policy—that official information should be made reasonably available for use in litigation, as long as the information is not classified, privileged, or otherwise protected—is unchanged. This proposed rule modifies existing regulations at 32 CFR part 97 primarily to clarify and streamline the requirements for the proper submission of subpoenas and litigation requests, the factors that chief legal advisors will consider when responding, and the fees that may be collected to cover associated expenses.

The modifications include:

- Adding in § 97.1 references to 5 U.S.C. 301 and the Supreme Court’s decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), to note the legal basis for this rule’s purpose.
- Reorganizing the subsections in § 97.2 to provide a more practical order of categories covered by and excluded from the rule.
- Revising in § 97.3 the definition of “personnel” to make clear that the rule covers not only Service members and civilian employees of every DoD component, but also employees of other federal agencies who are assigned to, detailed to, or otherwise affiliated with a DoD component.
- Adding in § 97.3 the defined term “chief legal advisors” to replace the phrases “appropriate DoD official designated in paragraph (a) of this section” and “appropriate DoD official designated in § 97.6(a),” which are used awkwardly throughout the current rule to refer to a component’s chief attorney. Also adding in § 97.3 the defined term “court” to replace the awkward phrase “court of competent jurisdiction or other appropriate authority” throughout the rule. These changes allow for cleaner sentences and result in a more straightforward rule that is easier to follow.
- Moving the definition of “disclosure” from § 97.6 to § 97.3, the Definitions section, so that the reader may find it easily. For the same reason, separating the defined terms “litigation” and “litigation request,” which appear

together in the current rule under the definition of “litigation.”

- Dividing the Responsibilities section into two separate sections (GC DoD and DoD Component heads); dividing the Procedures section into five separate sections (authorities, factors to consider, requirements and determinations, fees, and expert or opinion testimony); and subdividing the five new Procedures sections to list separately each item that requesting parties, personnel, and chief legal advisors must take into account. These formatting changes result in a more streamlined rule that is easier to use.

The proposed revisions will also consolidate four existing and one proposed component-level rules, which are redundant, into the existing Department-level rule. When this proposed rule is finalized, DoD will rescind:

- The National Security Agency’s *Touhy* regulation at 32 CFR part 93, “Acceptance of Service of Process; Release of Official Information in Litigation; and Testimony by NSA Personnel as Witnesses”;
- the Department of the Army’s *Touhy* regulation at 32 CFR part 516, “Litigation”;
- the Department of the Navy’s *Touhy* regulation at 32 CFR part 725, “Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel”;
- the Department of the Navy’s additional rules on delivery of personnel and production of official records at 32 CFR part 720, “Delivery of Personnel; Service of Process and Subpoenas; Production of Official Records”.

In addition, DoD will not finalize the National Reconnaissance Office’s proposed *Touhy* regulation published in the **Federal Register** on November 25, 2016 (81 FR 85196–85201), “Production of Official Records or Disclosure of Official Information in Proceedings Before Federal, State or Local Governmental Entities of Competent Jurisdiction,” which would appear at 32 CFR part 267. This consolidation will further streamline the litigation-request process and promote uniformity across the Department in the release of information to third-party litigants.

**B. Background and Legal Basis for This Rule**

The Housekeeping Statute, 5 U.S.C. 301, authorizes agency heads to promulgate regulations governing “the custody, use, and preservation of its records, papers, and property.”

The Supreme Court held in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), that under such authority, agency heads may establish procedures for determining whether to release official information and allow personnel testimony sought through a subpoena or other litigation request. This regulation sets forth DoD’s procedures, which as the Supreme Court explained, are useful and necessary as a matter of internal administration to prevent possible harm from unrestricted disclosures in court. In DoD Directive 5145.01, “General Counsel of the Department of Defense (GC DoD),” December 2, 2013, as amended (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/514501p.pdf>), and pursuant to 10 U.S.C. 113, the Secretary of Defense has delegated the authority to establish those procedures to the General Counsel.

This rule’s corresponding internal issuance is DoD Directive 5405.2, “Release of Official Information in Litigation and Testimony by DoD Personnel as Witnesses,” July 23, 1985 (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/540502p.pdf>). When this rule is finalized, DoD Directive 5405.2 will be reissued as DoD Instruction 5405.02, “Release of Official Information in Litigation and Presentation of Witness Testimony by DoD Personnel,” which will be made available at <https://www.esd.whs.mil/Directives/issuances/dodi/>.

**C. Expected Impact of the Proposed Rule**

This rule action will not impose any new costs. Consolidating *Touhy* requirements into a single rule, along with updating the rule to make it clearer and more streamlined, will produce efficiencies and uniformity to the public’s benefit. Less attorney time will be spent searching for only one rule and complying with its requirements. After consulting with subject matter experts in the DoD Office of the General Counsel and offices of the chief legal

counsels of various components, the Department concluded that attorneys for third-party litigants will save an estimated 30 minutes of research, review, and compliance time per subpoena or litigation request when referring to the CFR for guidance.

For purposes of estimating the cost savings, the Department’s subject matter experts deemed it reasonable to use the mean hourly wage for lawyers as informed by the Bureau of Labor and Statistics, \$69.86.<sup>1</sup> Subject matter experts further advised that at least 80% of subpoenas and litigation requests submitted to DoD involve consultation of the various rules in the CFR.<sup>2</sup> An average of 1,405 requests are received annually across the entire Department, according to Fiscal Year 2016 data. When finalized, this rule should result in an annual cost savings of approximately \$39,261.32, which is the impacted percentage (80%) of total annual requests (1,405) multiplied by the attorney hours saved per request (0.5) and the mean hourly wage (\$69.86)—in other words,  $0.8 * 1,405 * 0.5 * 69.86 = \$39,261.32$ . These savings are reflected in the chart below.

Rules	Components	Litigation requests in 2016	Impacted requests (%)	Hours saved per request	Lawyers’ hourly wage	Projected cost savings to public
93	NSA	35	80	0.5	69.86	\$978.04
97	DoD	20	80	0.5	69.86	558.88
267	NRO	10	80	0.5	69.86	279.44
516	Army	400	80	0.5	69.86	11,177.60
720, 725	Navy	940	80	0.5	69.86	26,267.36
<b>Total</b>						<b>39,261.32</b>

In addition to these cost savings, there will be an unquantified benefit of transparency through access to official information, while safeguarding classified, privileged, and personally identifiable information.

**D. Executive Order 12866, “Regulatory Planning and Review,” Executive Order 13563, “Improving Regulation and Regulatory Review,” and Congressional Review Act (5 U.S.C. 801–08)**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distribute impacts, and equity).

Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Following the requirements of these Executive Orders, the Office of Management and Budget has determined that this proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866 nor a “major rule” as defined by 5 U.S.C. 804(2).

DoD estimates that the rule would generate \$9,309.05 in annualized cost savings at the 7% discount rate, discounted to a 2016 equivalent, over a perpetual time as discussed in the Expected Impact of the Proposed Rule section. The present value savings are estimated at \$51,463.58.

**E. Public Law 96–354, “Regulatory Flexibility Act” (5 U.S.C. 601)**

DoD certifies that this proposed rule is not subject to the Regulatory Flexibility Act, 5 U.S.C. 601, because it would not have a significant economic impact on a substantial number of small entities. Therefore, the Regulatory Flexibility Act, as amended, does not require us to prepare a regulatory flexibility analysis.

**F. Section 202 of Public Law 104–4, “Unfunded Mandates Reform Act” (2 U.S.C. 1532)**

Section 202 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, requires agencies to assess anticipated costs and benefits before issuing any rule whose mandates require the expenditure of \$100 million

<sup>1</sup> This information can be found in the website of the Bureau of Labor Statistics under National Wage Data for Lawyers, Occupation Code 23–1011

(available at <https://www.bls.gov/oes/current/oes231011.htm>), last updated in May 2019.

<sup>2</sup> The Department consulted with subject matter experts in the DoD Office of the General Counsel

and offices of chief legal counsels of various components, who provided the estimates of impacted percentage of total requests and of the attorney hours saved per request.

or more (in 1995 dollars, adjusted annually for inflation) in any one year. This proposed rule will not mandate any requirements for State, local, or tribal governments, nor will it affect private sector costs.

#### G. Public Law 96–511, “Paperwork Reduction Act” (44 U.S.C. Chapter 35)

It has been determined that 32 CFR part 97 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act.

#### H. Executive Order 13132, “Federalism”

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on State and local governments, preempts State law, or otherwise has Federalism implications. This proposed rule will not have a substantial effect on State and local governments.

#### List of Subjects in 32 CFR Part 97

Archives and records, Courts, Information.

■ Accordingly, 32 CFR part 97 is proposed to be revised to read as follows:

#### PART 97—RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND PRESENTATION OF WITNESS TESTIMONY BY DOD PERSONNEL (TOUHY REGULATION)

Sec.

- 97.1 Purpose.
- 97.2 Applicability.
- 97.3 Definitions.
- 97.4 Policy.
- 97.5 Responsibilities—GC DoD.
- 97.6 Responsibilities—DoD Component heads.
- 97.7 Procedures—authorities.
- 97.8 Procedures—factors to consider.
- 97.9 Procedures—requirements and determinations.
- 97.10 Procedures—fees.
- 97.11 Procedures—expert or opinion testimony.

Appendix A to part 97—Litigation Requests and Demands to the Department of the Navy.

**Authority:** 5 U.S.C. 301, 10 U.S.C. 113.

#### § 97.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for the release of official information in litigation and the presentation of witness testimony by Department of Defense (DoD) personnel pursuant to 5 U.S.C. 301 and the Supreme Court’s decision in *United*

*States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

#### § 97.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the “DoD Components”).

(b) Is intended only to provide guidance for the internal operations of the DoD, without displacing the responsibility of the Department of Justice to represent the United States in litigation.

(c) Does not preclude official comments on matters in litigation.

(d) Does not apply to the release of official information or the presentation of witness testimony in connection with:

- (1) Courts-martial convened by the authority of a Military Department.
- (2) Administrative proceedings or investigations conducted by or for a DoD Component.
- (3) Security-clearance adjudicative proceedings, including those conducted pursuant to DoD Directive 5220.6, “Defense Industrial Personnel Security Clearance Review Program,” January 2, 1992, as amended (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/522006p.pdf>).

(4) Administrative proceedings conducted by or for the Equal Employment Opportunity Commission or the Merit Systems Protection Board.

(5) Negotiated grievance proceedings conducted in accordance with a collective bargaining agreement.

(6) Requests by government counsel representing the United States or a federal agency in litigation.

(7) Disclosures to federal, State, local, or foreign authorities related to investigations or other law-enforcement activities conducted by a DoD law-enforcement officer, agent, or organization.

(e) Does not affect in any way existing laws or DoD programs governing:

(1) The release of official information or the presentation of witness testimony in grand jury proceedings.

(2) Freedom of Information Act requests submitted pursuant to 32 CFR part 286, even if the records sought are related to litigation.

(3) Privacy Act requests submitted pursuant to 32 CFR part 310, even if the records sought are related to litigation.

(4) The release of official information outside of litigation.

(f) Does not create any right or benefit (substantive or procedural) enforceable at law against the DoD or the United States.

#### § 97.3 Definitions.

These terms and their definitions are for the purpose of this part.

*Chief legal advisors.* (1) The General Counsel of the Department of Defense (GC DoD).

(2) The General Counsel of a Military Department.

(3) The Legal Counsel to the Chairman of the Joint Chiefs of Staff.

(4) The Judge Advocate General of a Military Service.

(5) The Staff Judge Advocate to the Commandant of the Marine Corps.

(6) The Staff Judge Advocate to a Combatant Commander.

(7) The General Counsel to the Inspector General of the Department of Defense.

(8) The General Counsel of a Defense Agency.

(9) The General Counsel of a DoD Field Activity.

(10) The chief legal advisor of any other organizational entity within the DoD.

*Court.* A federal, State, or local court, tribunal, commission, board, or other adjudicative body of competent jurisdiction.

*Demand.* An order or subpoena by a court of competent jurisdiction for the production or release of official information or for the presentation of witness testimony by DoD personnel at deposition or trial.

*Disclosure.* The release of official information in litigation or the presentation of witness testimony by DoD personnel.

*Litigation.* All pretrial (e.g., discovery), trial, and post-trial stages of existing judicial or administrative actions, hearings, investigations, or similar proceedings before a civilian court, whether foreign or domestic.

*Litigation request.* Any written request by a party in litigation or the party’s attorney for the production or release of official information or for the presentation of witness testimony by DoD personnel at deposition, trial, or similar proceeding.

*Official information.* All information of any kind and however stored that is in the custody and control of the DoD, relates to information in the custody and control of the DoD, or was acquired by DoD personnel due to their official duties or status.

*Personnel.* (1) Present and former (e.g., retired, separated) Service

members, including Service academy cadets and midshipmen.

(2) Present and former (*e.g.*, retired, separated) civilian employees of a DoD Component, including non-appropriated fund activity employees.

(3) Present and former (*e.g.*, retired, separated) employees of another federal agency assigned to, detailed to, or otherwise affiliated with a DoD Component.

(4) Non-U.S. nationals who perform or have performed services overseas for any of the Military Services in accordance with a status of forces agreement.

(5) Any individuals who perform or have performed services for a DoD Component through a contractual arrangement.

#### § 97.4 Policy.

The DoD generally should make official information reasonably available for use in federal, State, and foreign courts and other adjudicative bodies if the information is not classified, privileged, or otherwise protected from public disclosure.

#### § 97.5 Responsibilities—GC DoD.

The GC DoD has overall responsibility for the policy in this part, oversees the implementation of its procedures throughout the DoD, and provides supplemental guidance as appropriate.

#### § 97.6 Responsibilities—DoD Component heads.

The DoD Component heads:

(a) Implement the policy and procedures in this part and, through their chief legal advisors, provide guidance for their respective components.

(b) Must issue or update, as appropriate, their respective components' implementing regulations within 180 days of this part's effective date.

#### § 97.7 Procedures—authorities.

(a) In response to a litigation request or demand, and after any required coordination with the Department of Justice, the chief legal advisors (see § 97.3) are authorized to:

(1) Determine whether their respective DoD Components may release official information originated by or in the custody of such components.

(2) Determine whether personnel assigned to, detailed to, or affiliated with their respective DoD Components may be contacted, interviewed, or used as witnesses concerning official information or, in exceptional circumstances, as expert witnesses.

(3) Impose conditions or limitations on disclosures approved pursuant to

this paragraph (*e.g.*, approve the release of official information only to a federal judge for in camera review).

(4) Assert claims of privilege or protection before any court or adjudicative body.

(b) The GC DoD may assume primary responsibility for responding to any litigation request or demand, particularly if it involves terrorism, espionage, nuclear weapons, or intelligence means or sources.

#### § 97.8 Procedures—factors to consider.

In making a determination pursuant to § 97.7(a), the chief legal advisors will consider whether:

(a) The litigation request or demand is overbroad, unduly burdensome, or otherwise inappropriate under applicable law or court rules.

(b) The disclosure would be improper (*e.g.*, the information is irrelevant, cumulative, or disproportional to the needs of the case) under the rules of procedure governing the litigation from which the request or demand arose.

(c) The official information or witness testimony is privileged or otherwise protected from disclosure under applicable law.

(d) The disclosure would violate a statute, Executive order, regulation, or policy.

(e) The disclosure would reveal:

(1) Information properly classified pursuant to Volume 1 of DoD Manual 5200.01, "DoD Information Security Program: Overview, Classification, and Declassification," February 24, 2012, as amended (available at [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520001m\\_vol1.pdf?ver=2018-05-04-091448-843](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520001m_vol1.pdf?ver=2018-05-04-091448-843)).

(2) Controlled Unclassified Information pursuant to Volume 4 of DoD Manual 5200.01, "DoD Information Security Program: Controlled Unclassified Information (CUI)," February 24, 2012, as amended (available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/520001-V4p.PDF?ver=2018-05-09-115318-927>).

(3) Technical data withheld pursuant to 32 CFR part 250.

(4) Information otherwise exempt from unrestricted disclosure.

(f) The disclosure would:

(1) Interfere with an ongoing enforcement proceeding.

(2) Compromise a constitutional right.

(3) Expose an intelligence source or confidential informant.

(4) Divulge a trade secret or similar confidential information.

(5) Be otherwise inappropriate.

#### § 97.9 Procedures—requirements and determinations.

(a) A litigation request or demand must describe, in writing and with specificity, the nature of the official information or witness testimony sought, its relevance to the litigation, and other pertinent details addressing the factors in § 97.8.

(b) Personnel who receive a litigation request or demand must notify their DoD Component's chief legal advisor immediately. Former personnel (*e.g.*, retired Service members, separated employees, past contractors) must notify the chief legal advisor of the component to which they were last assigned.

(c) If another DoD Component or federal agency originated the responsive information or otherwise has the primary equity with respect to that information, the chief legal advisor will:

(1) Transfer the litigation request or demand (or the appropriate portions) to such other component or agency for action.

(2) Inform the requesting party or issuing court.

(3) In case of conflict, elevate to the GC DoD for resolution.

(d) If the litigation request or demand requires a response before a determination can be made, the chief legal advisor will inform the requesting party or the issuing court that the request or demand is still under consideration. The chief legal advisor also may seek a stay from the court in question until a final determination is made.

(e) Upon making a final determination pursuant to § 97.7(a), the chief legal advisor will inform the requesting party or issuing court.

(f) If the chief legal advisor approves the release of official information or the presentation of witness testimony, personnel will limit the disclosure to those matters specified in the litigation request or demand, subject to any conditions imposed by the chief legal advisor. Personnel may not release, produce, comment on, or testify about any official information without the chief legal advisor's prior written approval.

(g) If a court orders a disclosure that the chief legal advisor previously disapproved or has yet to approve, personnel must respectfully decline to comply with the court's order unless the chief legal advisor directs otherwise.

#### § 97.10 Procedures—fees.

Parties seeking official information by litigation request or demand may be charged reasonable fees in accordance with Volume 11A, Chapter 4 of DoD 7000.14–R, "Department of Defense

Financial Management Regulation: Reimbursable Operations Policy: User Fees,” July 2016 (available at [http://comptroller.defense.gov/Portals/45/documents/fmr/current/11a/11a\\_04.pdf](http://comptroller.defense.gov/Portals/45/documents/fmr/current/11a/11a_04.pdf)), to reimburse expenses associated with the government’s response. These reimbursable expenses may include the cost of:

(a) Materials and equipment used to search for, copy, and produce responsive information.

(b) Personnel time spent processing and responding to the request or demand.

(c) Attorney time spent assisting with the government’s response, to include reviewing the request or demand and the potentially responsive information.

#### § 97.11 Procedures—expert or opinion testimony.

(a) Personnel may not present expert or opinion testimony involving official information, except when:

(1) The testimony is presented on behalf of the United States, a federal agency, or any party represented by the Department of Justice.

(2) The chief legal advisor of the DoD Component with primary equity has granted special written approval upon a showing of exceptional need or unique circumstances, but only if the anticipated testimony is not adverse to the interests of the DoD or the United States and is presented at no expense to the government.

(b) If a court orders the presentation of testimony disallowed by § 97.11(a), personnel must respectfully decline to comply with the court’s order unless the chief legal advisor directs otherwise.

#### Appendix A to part 97—Litigation Requests and Demands to the Department of the Navy

A litigation request to the Department of the Navy must be submitted to the appropriate determining authority as defined in Secretary of the Navy Instruction 5820.8, “Release of Official Information for Litigation Purposes and Testimony by Department of the Navy Personnel,” August 27, 1991, as amended (available at <https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-800%20Laws%20and%20Legal%20Services/5820.8A%20CH-1.pdf>).

As with all service of process on the Department of the Navy, a demand (subpoena or court order) must be delivered to the Naval Litigation Office using registered or certified mail, a commercial courier service, or a process server. The address for all service of process is: General Counsel of the Department of the Navy, Naval Litigation Office, 720 Kennon St. SE, Room 233, Washington Navy Yard, DC 20374–5013.

Answers to frequently asked questions on *Touhy* requests are available at [https://www.jag.navy.mil/organization/documents/Touhy\\_Requests.pdf](https://www.jag.navy.mil/organization/documents/Touhy_Requests.pdf). Contact the Office of the General Counsel at 202–685–7039 or the Office of the Judge Advocate General at 202–685–5450 with any additional questions.

#### Appendix B to Part 97—Litigation Requests and Demands to the Department of the Air Force

A litigation request or demand to the Department of the Air Force must be submitted to the base-level or servicing Staff Judge Advocate for the installation or organization where the official information or witness is located.

Should the information or witness be located in a Headquarters-level office, the request or demand must be submitted to the Commercial Litigation Field Support Center (for matters involving contracts, acquisition, and procurement) or to the Air Force General Litigation Division (for all other matters). Their addresses are: Commercial Litigation Field Support Center, AFLOA/JAQC, 1500 W Perimeter Rd., Suite 4100, Joint Base Andrews, MD 20762; Air Force General Litigation Division, AFLOA/JACL, 1500 W Perimeter Rd., Suite 1370, 1st Floor, Joint Base Andrews, MD 20762.

Dated: May 7, 2021.

**Aaron T. Siegel,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

[FR Doc. 2021–10077 Filed 5–13–21; 8:45 am]

**BILLING CODE 5001–06–P**

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA–R03–OAR–2020–0706; FRL–10023–22–Region 3]

#### Air Plan Approval; Pennsylvania; Emissions Statement Rule Certification for the 2015 Ozone National Ambient Air Quality Standard

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

**ACTION:** Proposed rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is proposing to approve a state implementation plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This revision fulfills Pennsylvania’s emissions statement requirement for the 2015 ozone national ambient air quality standard (NAAQS). This action is being taken under the Clean Air Act (CAA).

**DATES:** Written comments must be received on or before June 14, 2021.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA–R03–OAR–2020–0706 at <https://www.regulations.gov>, or via email to

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

#### FOR FURTHER INFORMATION CONTACT:

Serena Nichols, Planning & Implementation Branch (3AD30), Air & Radiation Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. The telephone number is (215) 814–2053. Ms. Nichols can also be reached via electronic mail at [Nichols.Serena@epa.gov](mailto:Nichols.Serena@epa.gov).

**SUPPLEMENTARY INFORMATION:** On April 23, 2020, the Pennsylvania Department of Environmental Protection (PADEP) submitted a revision to the Pennsylvania SIP intended to satisfy the Commonwealth’s obligations under the CAA related to emissions statements for the 2015 ozone NAAQS.

#### I. Background

On October 26, 2015, EPA revised the ozone NAAQS from 0.075 parts per million (ppm) to 0.070 ppm. See 80 FR 65291. Subsequently, on June 4, 2018, EPA designated the Philadelphia-Wilmington-Atlantic City (PA-NJ-MD-DE) Area as a marginal nonattainment area for the 2015 ozone NAAQS. See 83 FR 25776. Pennsylvania’s portion of this area includes Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties. See 40 CFR 81.339.

Section 182 of the CAA identifies plan submissions and requirements for ozone nonattainment areas. Specifically, section 182(a)(3)(B) of the CAA requires