

## **DEPARTMENT OF DEFENSE**

### **STATEMENT OF REGULATORY PRIORITIES**

#### **Background**

The Department of Defense (DoD) is the largest Federal department, employing over 1.6 million military personnel and 750,000 civilians with operations all over the world. DoD's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our nation. To guide this mission, the Secretary of Defense has outlined three top priorities, which are to defend the nation, take care of our people, and succeed through teamwork. In addition, the National Defense Strategy sets out how DoD will contribute to advancing and safeguarding vital U.S. national interests – protecting the American people, expanding America's prosperity, promoting global security, seizing new strategic opportunities, and realizing and defending our democratic values. Because of this expansive and diversified mission and reach, DoD regulations can address a broad range of matters and have an impact on varied members of the public, as well as other federal agencies.

Pursuant to Executive Order 12866, "Regulatory Planning and Review" (September 30, 1993) and Executive Order 13563, "Improving Regulation and Regulatory Review" (January 18, 2011), the DoD issues this Regulatory Plan and Agenda to provide notice about the DoD's regulatory and deregulatory actions.

#### **Retrospective Review of Existing Regulations**

Pursuant to section 6 of Executive Order 13563 "Improving Regulation and Regulatory Review" (January 18, 2011), the Department continues to review existing regulations with a goal to eliminate outdated, unnecessary, or ineffective regulations; account for the currency and legitimacy of each of the Department's regulations; and ultimately reduce regulatory burden and costs.

#### **DOD Priority Regulatory Actions**

The regulatory and deregulatory actions identified in this Regulatory Plan embody the core of DoD's regulatory priorities for Fiscal Year (FY) 2023 and help support President Biden's regulatory priorities, the Secretary of Defense's top priorities, and those priorities set out in the National Defense Strategy. The DoD regulatory prioritization is focused on initiatives that:

- Promote the country's economic resilience, including addressing COVID-related and other healthcare issues.
- Support underserved communities and improve small business opportunities.
- Promote competition in the American economy.
- Promote diversity, equity, inclusion, and accessibility in the Federal workforce.
- Support national security efforts, especially safeguarding Federal Government information and information technology systems.
- Tackle the climate crisis and protect the environment; and
- Address military family matters.

### **Rules that Promote the Country's Economic Resilience**

#### **Pandemic COVID-19 Rules**

Pursuant to Executive Order 13987, "Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide United States Leadership on Global Health and Security," January 20, 2021; Executive Order 13995, "Ensuring an Equitable Pandemic Response and Recovery," January 21, 2021; Executive Order 13997, "Improving and Expanding Access to Care and Treatments for COVID-19," January 21, 2021; and Executive Order 13999, "Protecting Worker Health and Safety," January 21, 2021, the Department temporarily modified its TRICARE regulation so

TRICARE beneficiaries have access to the most up-to-date care required for the diagnosis and treatment of COVID-19. TRICARE continues to reimburse like Medicare, to the extent practicable, as required by statute. The Department is researching the impacts of making some of those modifications permanent and may pursue such future action.

These modifications include:

TRICARE Coverage of National Institute of Allergy and Infectious Disease – Coronavirus Disease 2019 Clinical Trials. RIN 0720-AB83

This final rule is required to finalize certain temporary flexibilities enacted in interim final rules published in 2020 in response to the COVID-19 pandemic. This rule finalizes provisions published in two interim final rules (IFRs) with request for comment, which temporarily added coverage for the treatment use of investigation drugs under U.S. Food and Drug Administration (FDA) approved expanded access programs when for the treatment of coronavirus disease 2019 (COVID-19) and permitted coverage of National Institute of Allergy and Infectious Disease (NIAID)-sponsored clinical trials for the treatment or prevention of COVID-19.

Expanding TRICARE Access to Care in Response to the COVID-19 Pandemic. RIN 0720-AB85

This interim final rule with comment will temporarily amend the TRICARE regulation at 32 CFR part 199 by: (1) adding freestanding End Stage Renal Disease facilities as a category of TRICARE-authorized institutional provider and modifying the reimbursement for such facilities; and (2) adopting Medicare New COVID-19 Treatments Add-on Payments (NTCAPs). The TRICARE regulation is temporarily being modified (except for the modifications to paragraphs 199.6(b)(4)(xxi) and 199.14(a)(1)(iii)(E)( 7 ), which will not expire), but, in each case, only to the extent necessary to ensure that TRICARE beneficiaries have access to the most up-to-date care required for the prevention, diagnosis, and treatment of COVID-19, and that TRICARE continues to reimburse like Medicare, to the extent practicable, as required by statute. The modifications to paragraphs 199.6(b)(4)(xxi) and 199.14(a)(1)(iii)(E)( 7 ) establish freestanding End Stage Renal Disease (ESRD) facilities as a category of TRICARE-authorized institutional provider and modify TRICARE reimbursement of freestanding ESRD facilities. These provisions will improve TRICARE beneficiary access to medically necessary dialysis and other ESRD services and supplies. These provisions also support the requirement that TRICARE reimburse like Medicare, and will help to alleviate

regional health care shortages due to the COVID-19 pandemic by ensuring access to dialysis care in freestanding ESRD facilities rather than hospital outpatient departments. The modification to paragraph 199.14(a)(iii)(E) adopts Medicare's New COVID-19 Treatments Add-on Payment (NCTAP) for COVID-19 cases that meet Medicare's criteria. This provision increases access to emerging COVID-19 treatments and supports the requirement that TRICARE reimburse like Medicare.

Restriction on Acquisition of Personal Protective Equipment and Certain Items From Non-Allied Foreign Nations (DFARS Case 2022-D009). RIN 0750-AL60

This rule implements section 802 of the National Defense Authorization Act for Fiscal Year 2022, which prohibits acquisition of personal protective equipment related to healthcare and certain other healthcare-related items from non-allied foreign nations. Decreasing dependence on personal protective equipment and certain other items originating in non-allied foreign nations is a matter of public health and national security, especially during a declared public health emergency. The domestic supply chain for personal protective equipment and certain other items is critical. An adequate continued supply is vital to ensure domestic control with minimal disruption in production and to reduce U.S. dependence on non-allied foreign nations. Potential benefits of this rule will be the elimination of counterfeit covered items within the domestic supply chain and reduced dependence on foreign sources that are not allies of the United States. In addition, this restriction will further promote growth in domestic capabilities and may provide additional opportunities to domestic small businesses for future procurement and manufacturing efforts, increasing domestic sourcing of personal protective equipment and other covered items.

**Medical Debt Relief**

Collection from Third Party Payers of Reasonable Charges for Healthcare Services. RIN 0720-AB87

This rule discusses new debt waiver process for medical debt owed for services rendered at Military Treatment Facilities to civilians who are not covered beneficiaries and implements section 702 of the FY 2021 NDAA. Under section 702, the Secretary of Defense may waive a fee charged to a civilian who is not a covered beneficiary if after any insurance payments the civilian is not able to pay for the trauma or other

medical care provided to the civilian; and the provision of such care enhanced the medical readiness of the health care provider or health care providers furnishing such care.

**Executive Order 13985, “Advancing Racial Equity and Support for Underserved Communities**

**Through the Federal Government’ January 20, 2021**

**Rules that Promote Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce**

Nondiscrimination on the Basis of Disability in Program or Activities Assisted or Conducted by the DoD

and in Equal Access to Information and Communication Technology Used by DoD, and Procedures for

Resolving Complaints. RIN: 0790-AJ04

Revisions to this regulation: (1) update and clarify the obligations that Section 504 of the Rehabilitation Act of 1973 (section 504) imposes on recipients of Federal financial assistance and the Military Departments and Components (DoD Components); (2) reflect the most current Federal statutes and regulations, as well as developments in Supreme Court jurisprudence, regarding unlawful discrimination on the basis of disability and promotes consistency with comparable provisions implementing title II of the Americans with Disabilities Act (ADA); (3) implement section 508 of the Rehabilitation Act of 1973 (section 508), requiring DoD make its electronic and information technology accessible to individuals with disabilities; (4) establish and clarify obligations under the Architectural Barriers Act of 1968 (ABA), which requires that DoD make facilities accessible to individuals with disabilities; and (5) Provide complaint resolution and enforcement procedures pursuant to section 504 and the complaint resolution and enforcement procedures pursuant to section 508. These revisions incorporate the directive of Executive Order 14035, “Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce” by defining, clarifying, advancing accessibility throughout DoD programs and activities.

USACE Implementing Procedures for Principles, Requirements, and Guidelines Applicable to Actions Involving Investment in Water Resources. RIN 0710-AB41

Section 2031 of the Water Resources Development Act of 2007 (Pub. L. 110-114) called for revisions to the 1983 Principles and Guidelines for Water and Land Related Resources Implementation Studies, resulting in the issuance of the Principles and Requirements (P&R) guidance document in March 2013 and the Interagency Guidelines in December 2014, which together comprise the Principles, Requirements, and Guidelines (PR&G). The PR&G are intended to provide a common framework and comprehensive policy and guidance for analyzing a diverse range of water resources projects, programs, activities, and related actions involving Federal investment in water resources. The U.S. Army Corps of Engineers (Corps) proposes a regulation to show how it would apply the PR&G to the Corps' mission and authorities. In this proposed regulation, the Corps intends to increase consistency and compatibility in Federal water resources investment decision making to include considerations such as analyzing a broader range of long-term costs and benefits, enhancing collaboration, including a more thorough and transparent risk and uncertainty analyses, and improving resilience for dealing with emerging challenges, including climate change.

Flood Control Cost-Sharing Requirements Under the Ability to Pay Provision. RIN: 0710-AB34

Section 103(m) of the Water Resources Development Act (WRDA) of 1986, as amended (33 U.S.C. 2213(m)), authorizes the USACE to reduce the non-Federal share of the cost of a study or project for certain communities that are not able financially to afford the standard cost-share. Part 241 of title 33 in the Code of Federal Regulations provides the criteria that the USACE uses in making these determinations where the primary purpose of the study or project is flood damage reduction. The proposed rule would update this regulation, by broadening its applicability to include projects with other purposes (instead of just flood damage reduction) and the feasibility study of a project (instead of just design and construction). The WRDA 2000 modified section 103(m) to also include the following mission areas: environmental protection and restoration, flood control, navigation, storm damage protection, shoreline erosion, hurricane protection, and recreation or an agricultural water supply project which have not yet been added to the regulation. It also included the opportunity to cost share all phases of a USACE project to also include feasibility in

addition to the already covered design and construction. This rule would provide a framework for deciding which projects are eligible for consideration for a reduction in the non-Federal cost share based on ability to pay.

### **Rules that Support Underserved Communities and Improve Small Business Opportunities**

#### **Rules of particular Interest to Small Business**

##### **Small Business Innovation Research Program Data Rights (DFARS Case 2019-D043). RIN 0750-AK84**

This rule implements changes made by the Small Business Administration (SBA) related to data rights in the Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directive, published in the Federal Register on April 2, 2019 (84 FR 12794). The SBIR and STTR programs fund a diverse portfolio of startups and small businesses across technology areas and markets to stimulate technological innovation, meet Federal research and development (R&D) needs, and increase commercialization to transition R&D into impact. The final SBA Policy Directive includes several revisions to clarify data rights, which require corresponding revisions to the Defense Federal Acquisition Regulation Supplement (DFARS). These changes include harmonizing definitions, lengthening the SBIR/STTR protection period from 5 years to 20 years, and providing for the granting of Government-purpose rights license in place of an unlimited rights license upon expiration of the SBIR/STTR protection period.

##### **Executive Order 14036, “Promoting Competition in the American Economy” July 9, 2021**

#### **Rule that Promotes Competition in the American Economy**

##### **Past Performance of Subcontractors and Joint Venture Partners (DFARS Case 2018-D055). RIN 0750AK16**

This rule implements section 823 of the National Defense Authorization Act for Fiscal Year 2019, which establishes a requirement for use of the best available information regarding past performance of subcontractors and joint venture partners when awarding DoD construction and architect-engineer

contracts. Section 823 requires annual performance evaluations for first-tier subcontractors and individual parties to joint ventures performing construction and architect-engineer contracts valued at either \$750,000 or more, or 20 percent of the value of the prime contract (whichever is higher), in accordance with specified conditions. In addition, processes for exceptions from the annual evaluation requirement will be established for construction and architect-engineer contracts where submission of annual evaluations would not provide the best representation of the performance of a contractor, including subcontractors and joint venture partners under specified conditions. This rule will make it easier for subcontractors and individual parties to joint ventures to establish a record of their past performance. These entities will be able to take credit for the work they performed on contracts and subcontracts, which will help them be more competitive when bidding on future DoD contracts. This will help increase competition for DoD contracts.

Defense Commercial Solutions Opening (DFARS Case 2022-D006). RIN 0750-AL57

This rule implements section 803 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81), which establishes a permanent authority for the Secretary of Defense and those of the military departments to acquire innovative commercial products and commercial services through a competitive selection of proposals resulting from a general solicitation and the peer review of such proposals. Products and services purchased under this authority are treated as commercial. This rule will enable DoD to access innovative products and services of entities that may not have done business with DoD in the past. Such entities may compete for additional DoD contracts, thereby increasing competition for DoD contracts.

Modification of Prize Authority for Advanced Technology Achievements (DFARS Case 2022-D014). RIN 0750-AL65

This rule implements section 822 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81). Section 822 revises 10 U.S.C. 2374a regarding the award of prizes for advanced technology achievement to: (1) authorize the award of procurement contracts and other agreements "as another type of prize" (as in other than cash prizes); (2) permit the award of prizes, including procurement contracts and other agreements, in excess of \$10,000,000 with the approval of the Under Secretary of Defense for Research and Engineering; and (3) require DoD provide Congress with notice of an award of a



procurement contract or other agreement under this program that exceeds \$10 million. This rule will help to expand the Defense Industrial Base, thereby increasing competition for future DoD contracts.

DFARS Buy American Act Requirements (DFARS Case 2022-D019). RIN 0750-AL74

This rule implements the requirements of Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers. Changes to the Federal Acquisition Regulation (FAR) are being made via RIN 9000-AO22 (FAR Case 2021-008, Amendments to the FAR Buy American Act Requirements). This rule proposes conforming changes to the DFARS.

**Rules that Support National Security Efforts**

Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041). RIN 0750-AK81

The purpose of this rule is to ensure that Defense Industrial Base (DIB) contractors will adequately protect sensitive unclassified information at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain.

Cybersecurity Maturity Model Certification (CMMC) Program. RIN 0790-AL49

This rule establishes a requirement for Defense Industrial Base (DIB) contractors to be assessed against the Cybersecurity Maturity Model Certification (CMMC) 2.0 in order to qualify for award of designated future DoD contracts. This model is designed to provide increased assurance to the Department that contractors are compliant with existing information security standards for Federal Contract Information (FCI) and Controlled Unclassified Information (CUI) and are fully capable of protecting such information at a level commensurate with risk from cybersecurity threats.

Department of Defense (DoD)-Defense Industrial Base (DIB) Cybersecurity (CS) Activities. RIN: 0790-

AK86

This rule will allow a broader community of defense contractors to access to relevant cyber threat information the Department believes is critical in defending unclassified networks and information systems and protecting DoD warfighting capabilities. These revisions seek to address the increasing cyber threat targeting all defense contractors by expanding eligibility to defense contractors that process, store, develop, or transmit DoD Controlled Unclassified Information (CUI). This rule is part of DoD's approach to collaborate with industry to counter cyber threats through information sharing.

### **Rules that Tackle the Climate Crisis and Protect the Environment**

#### Policy and Procedures for Processing Requests to Alter US Army Corps of Engineers Civil Works

##### Projects Pursuant to 33 U.S.C. 408. RIN: 0710-AB22

Where a party other than the USACE seeks to use or alter a Civil Works project that USACE constructed, the proposed use or alteration is subject to the prior approval of the USACE. Some examples of such alterations include an improvement to the project; relocation of part of the project; or installing utilities or other non-project features. These alterations may be proposed by local or state governments, other federal agencies, private corporations, or private citizens, for example. This requirement was established in section 14 of the Rivers and Harbors Act of 1899 and is codified at 33 USC 408 (section 408). Section 408 provides that the USACE may grant permission for another party to alter a Civil Works project, upon a determination that the alteration proposed will not be injurious to the public interest and will not impair the usefulness of the Civil Works project. The USACE is proposing to convert its policy that governs the section 408 program to a binding regulation. This policy, Engineer Circular 1165-2-220, Policy, and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408, was issued in September 2018.

#### Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of

#### Engineers. RIN 0710-AA78

The U.S. Army Corps of Engineers (Corps) is proposing to update the Federal regulation that covers the procedures that the Corps uses under section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n), commonly referred to as Public Law 84-99. The Corps relies on this program to prepare for, respond to, and help communities recover from a flood, hurricane, or other natural disaster, including the repair of damage to eligible flood risk reduction infrastructure. The Corps initiated this rulemaking process through an advanced notice of proposed rulemaking (ANPRM) on February 13, 2015. As a next step, the Corps is planning to propose revisions to the program to address statutory changes under various Water Resources Development Act provisions and to formalize certain agency guidance relating to natural disaster procedures. Hurricane Katrina (2005), Hurricane Sandy (2012), flooding on the Mississippi and Missouri Rivers (2008, 2011, and 2013), and Hurricanes Harvey, Irma, and Maria (2017) have provided a more detailed understanding of the nature and severity of risk associated with flood control projects. In addition, the maturation of risk-informed decision-making approaches and technological advancements influenced the outlook on the implementation of Public Law 84-99 activities, with a shift toward better alignment with Corps Levee Safety and National Flood Risk Management Programs, as well as the National Preparedness and Response Frameworks. Through these programs, the Corps works with non-Federal sponsors and stakeholders to assess, communicate, and manage the risks to people, property, and the environment associated with levee systems and flood risks.

#### Credit Assistance for Water Resources Infrastructure Projects. RIN: 0710-AB31

The USACE proposes to implement a new credit program for dam safety work at non-Federal dams. The program is authorized under the Water Infrastructure Finance and Innovation Act of 2014 (WIFIA) and Division D, Title 1 of the Consolidated Appropriations Act of 2021. WIFIA authorizes the USACE to provide secured (direct) loans and loan guarantees (Federal Credit instruments) to eligible water resources infrastructure projects and to charge fees to recover all or a portion of the USACE's cost of providing credit assistance and the costs of conducting engineering reviews and retaining expert firms, including financial and legal services, to assist in the underwriting and servicing of Federal credit instruments. Projects would

be evaluated and selected by the Secretary of the Army (the Secretary), based on the requirements and the criteria described in this rule.

Appendix C Procedures for the Protection of Historic Properties. RIN 0710-AB46

The U.S. Army Corps of Engineers (Corps) considers the effects of its actions on historic properties pursuant to section 106 of the National Historic Preservation Act (NHPA). The Corps' Regulatory Program's regulations for complying with the NHPA are outlined at 33 CFR 325 Appendix C. Since these regulations were promulgated in 1990, there have been amendments to the NHPA and revisions to the Advisory Council on Historic Preservation's (ACHP) regulations at 36 CFR part 800. In response, the Corps issued interim guidance until rulemaking could be completed in order to ensure full compliance with the NHPA and ACHP's regulations. Appendix C is intended to provide the implementing procedures for the Regulatory Program's compliance with Section 106 of the National Historic Preservation Act. Rulemaking is required to ensure the Regulatory Program is compliant with the NHPA and ACHP's implementing regulations at 36 CFR 800 for federal agency compliance with Section 106.

Revised Definition of "Waters of the United States" –Rule 1 RIN: 0710-AB40. Related RIN: 2040-AG19.

In April 2020, the EPA, and the Department of the Army ("the agencies") published the Navigable Waters Protection Rule (NWPR) that revised the previously codified definition of "waters of the United States" (85 FR 22250, April 21, 2020). The agencies are now initiating this new rulemaking process that restores the regulations (51 FR 41206) in place prior to the 2015 "Clean Water Rule: Definition of 'Waters of the United States'" (80 FR 37054, June 29, 2015), updated to be consistent with relevant Supreme Court decisions. The agencies conducted a substantive re-evaluation of the definition of "waters of the United States" in accordance with the Executive Order 13990 and determined that they need to revise the definition to ensure the definition is consistent with the best available science, protects the environment, ensures access to clean water, considers how climate change resiliency may be affected by the definition of waters of the United States, and ensures environmental justice is prioritized in the rulemaking process. The agencies intend to consider further revisions in a second rule in light of additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort

will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.

#### Revised Definition of “Waters of the United States” –Rule 2 RIN: 0710-AB47

The Department of the Army and the Environmental Protection Agency intend to pursue a second rule defining “Waters of the United States” to consider further revisions to the agencies' first rule (RIN 0710-AB40) which proposes to restore the regulations in place prior to the 2015 “Clean Water Rule: Definition of ‘Waters of the United States’” (80 FR 37054, June 29, 2015), updated to be consistent with relevant Supreme Court Decisions, and reflect a reasonable interpretation based on the record before the agencies, including the best available science. This second rule proposes to include revisions reflecting on additional stakeholder engagement and implementation considerations, scientific developments, and environmental justice values. This effort will also be informed by the experience of implementing the pre-2015 rule, the 2015 Clean Water Rule, and the 2020 Navigable Waters Protection Rule.

#### **Rules that Address Military Family Matters**

##### Definitions of Gold Star Family and Gold Star Survivor. RIN 0790-AL56

This rule implements section 626 of the FY 2022 NDAA to define the terms “gold star family” and “gold star survivor” for consistent use across all military departments. The Defense Department treats all surviving family members equally and survivor benefits are the same across the board unless their Service member is killed or dies from causes under dishonorable conditions.

##### TRICARE: Reimbursement of Ambulatory Surgery Centers and Outpatient Services Provided in Cancer and Children’s Hospitals. RIN 0720-AB73

This final rule will revise: 1) 32 CFR 199.2 by adding, in alphabetical order, the definitions of “Ambulatory Surgery Center”, “Cancer hospital”, and “Children’s hospital”; 2) 32 CFR 199.6 to include new requirements that Ambulatory Surgery Centers (ASC) participating in Medicare must meet all program requirements; and 3) 32 CFR 199.14 to implement Medicare’s payment methodologies for reimbursing

ambulatory surgery centers and Cancer and Children's Hospitals. The combined impact of is rule is a cost-saving of approximately \$45 million, which would be offset by \$1.5 million in administrative costs to implement the changes. This estimated reduction in costs of \$45 million is a transfer from providers to DoD.