

January 11, 2021

Scott Wilson  
Office of Wastewater Management, Water Permits Division  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

[Submitted Electronically]

Dear Mr. Wilson:

The Edison Electric Institute (EEI) appreciates the opportunity to submit comments to the Environmental Protection Agency (EPA) on the draft guidance titled *Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program* (Draft Guidance).<sup>1</sup> In *Maui*, the Supreme Court attempted to strike a balance between the Ninth Circuit’s “fairly traceable” test and the federal government’s position that National Pollutant Discharge Elimination System (NPDES) program authority ends once a discharge enters groundwater. The Court explained that the phrase “functional equivalent of a direct discharge” best captures, in broad terms, the circumstances in which Congress intended to require NPDES permits for discharges of pollutants into groundwater that eventually reached a water of the United States (WOTUS). *See, County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462; No. 18-260, slip op. at 15 (2020).

EEI is the association that represents all U.S. investor-owned electric companies. EEI members provide electricity for more than 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI member companies invest more than \$100 billion annually to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure in order to provide affordable and reliable electricity to customers.

EEI members own facilities and are engaged in activities that are subject to NPDES permitting and may encounter situations that could implicate the *Maui* “functional equivalent” test. The Draft Guidance, if finalized, provides EEI members with greater certainty regarding the applicability and implementation of the “functional equivalent” test. In these comments, EEI

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<sup>1</sup> EPA, *Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program* (Dec. 10, 2020), [https://www.epa.gov/sites/production/files/2020-12/documents/draft\\_ow\\_maui\\_guidance\\_document\\_-\\_12.2020\\_-\\_epa-hq-ow-2020-0673.pdf](https://www.epa.gov/sites/production/files/2020-12/documents/draft_ow_maui_guidance_document_-_12.2020_-_epa-hq-ow-2020-0673.pdf).

explains the potential for confusion in the Court's *Maui* opinion and how EPA's Draft Guidance will help resolve that confusion if finalized with minor modifications. These comments also encourage EPA to provide additional clarity and certainty regarding implementation of the "functional equivalent" test. If EPA decides not to finalize the Draft Guidance as proposed, but rather reconsiders its approach, EEI offers these comments to help shape effective future guidance.

Questions on these comments may be directed to Patrick McGuire ([pmcguire@eei.org](mailto:pmcguire@eei.org), 202-508-5167), Rich Bozek ([rbozek@eei.org](mailto:rbozek@eei.org), 202-508-5641), Riaz Mohammed ([rmohammed@eei.org](mailto:rmohammed@eei.org), 202-508-5036), or Alex Bond ([abond@eei.org](mailto:abond@eei.org), 202-508-5523).

Sincerely,

A handwritten signature in black ink, appearing to read "Quinlan J. Shea, III". The signature is fluid and cursive, with a prominent "Q" and "S".

Quinlan J. Shea, III

**COMMENTS OF THE EDISON ELECTRIC INSTITUTE ON  
UNITED STATES FOREST SERVICE HANDBOOK 2709.11, CHAPTER 80;  
SPECIAL USES; OPERATION PLANS AND AGREEMENTS  
FOR POWERLINE FACILITIES PROPOSED DIRECTIVE**

**January 11, 2021**

The Edison Electric Institute (EEI) appreciates the opportunity to submit comments to the United States Forest Service (USFS or Service) on the proposed directive, *Operating Plans and Agreements for Powerline Facilities* (Proposed Directive), implementing section 512 of the Federal Land Policy and Management Act, as added by the Consolidated Appropriations Act of 2018.<sup>1</sup> The Proposed Directive adds a chapter to USFS's Special Uses Handbook that provides guidance on vegetation management, routine maintenance, and inspections of electric transmission and distribution lines (powerline facilities) within and adjacent to their authorized rights-of-way (ROW) on National Forest System (NFS) lands. The new directive would guide Service personnel on how to collaborate with electric utilities to develop comprehensive operating plans and agreements that cover all system reliability activities, fire mitigation, and ensure minimum impacts to natural resources.

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<sup>1</sup> USFS, Proposed FSH 2709.11–Ch. 80, Operating Plans and Agreements for Powerline Facilities (Dec. 10, 2020); *see also* 85 *Fed. Reg.* 79,462 (Dec. 10, 2020).

billion annually to make the energy grid smarter, cleaner, more dynamic, more flexible, and more secure in order to provide affordable and reliable electricity to customers.

EEI members operate facilities on NFS lands and conduct routine operations and maintenance (O&M) and vegetation management activities, as well as non-routine or emergency O&M and vegetation management activities to enhance the grid<sup>2</sup> and maintain reliability. The increase in catastrophic wildfires has increased the need for EEI member companies to gain timely access to their physical assets and infrastructure in order to proactively address operational and vegetation management hazards within and adjacent to their ROWs.

## **I. Introduction and Executive Summary.**

EEI's member companies are in the middle of a profound, long-term transformation in how electricity is generated, transmitted, and used. As a result, the mix of resources used to generate electricity in the United States has changed dramatically over the last decade and is increasingly clean. EEI's member companies invested more than \$139 billion last year to make the energy grid stronger, smarter, cleaner, more dynamic, and more secure; to diversify the nation's energy mix; and to integrate new technologies that benefit customers. They are united in their commitment to get as clean as they can, as fast as they can, while keeping reliability and affordability front and center, as always, for the customers and communities they serve.

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<sup>2</sup> The United States electric grid is made up of more than 9,200 electric generating units having more than 1 million megawatts of generating capacity connected to more than 600,000 miles of transmission lines. The electric grid is more than just generation and transmission infrastructure. The grid is an ecosystem of asset owners, manufacturers, service providers, and government officials at Federal, state, and local levels. See U.S. Dept. of Energy, Grid Modernization and the Smart Grid (last visited Jan. 10, 2021), <https://www.energy.gov/oc/activities/technology-development/grid-modernization-and-smart-grid>.

The Service should move quickly to finalize the Proposed Directive. The Proposed Directive, if finalized, would provide EEI members with clear and consistent processes for the development and approval of operating plans and agreements for electric facilities on NSF lands. Further, the finalization of the Proposed Directive would benefit the Service, EEI members, and wildfire mitigation efforts. EEI's comments outline additional clarifications that, if adopted, would further the Service's stated goal of providing for the long-term, cost-effective, efficient, and timely inspection, operation, maintenance, and vegetation management for facilities on NFS lands. EEI's comments support the training and collaboration objectives in the Proposed Directive as well as the requirements for Integrated Vegetation Management (IVM) and Best Management Practices (BMPs). The comments also request clarifications of the submission, review, and approval of operating plans or agreements, modification and/or removal of the prior acknowledgement requirements for Class I and II activities, and clarification on the requirements for Class IV activities. Lastly, EEI's comments stress the need for sufficient funding and staffing to fulfill the requirements outlined in the Proposed Directive.

## **II. Electric Companies Continue to Lead the Clean Energy Transition.**

Electric companies are leading a clean energy transition. A wide range of factors are driving this, including declining costs for natural gas and renewable energy resources, technological improvements, changing customer expectations, federal and state regulations and policies, and the increasing use of distributed energy resources. As a result, the mix of resources used to generate electricity in the United States has changed dramatically over the last decade and is increasingly clean. Natural gas continues to be the main source of electricity generation in the

United States, accounting for over 38 percent of the country's electricity in 2019,<sup>3</sup> while generation from renewable sources continues to grow.<sup>4</sup> These trends are projected to continue.<sup>5</sup>

As natural gas use has increased, so has reliance on renewable generation. In 2019, renewable energy production and consumption both reached record highs,<sup>6</sup> and today more than one-third of America's electricity comes from carbon-free resources, including nuclear energy, hydropower, solar, and wind.<sup>7</sup> The trend of increasing renewable energy deployments will continue. The U.S. Energy Information Administration (EIA) projects that the United States will add 117 gigawatts of new wind and solar capacity between 2020 and 2023 alone, and that domestically the long-term demand for new electric generating capacity will be met by renewables and efficient natural gas as older coal-based and less-efficient natural gas-based generating units retire.<sup>8</sup> While EIA notes in the Annual Energy Outlook (AEO) that the amount of renewable and natural gas-based generation deployed are dependent on the price of natural

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<sup>3</sup> See EIA, Frequently Asked Questions: What is U.S. Electricity Generation by Energy Source (Feb. 27, 2020), <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3>.

<sup>4</sup> See EIA, EIA expects U.S. electricity generation from renewables to soon surpass nuclear and coal (Jan. 30, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=42655>.

<sup>5</sup> See EIA, AEO 2020: With Projections to 2050 (Jan. 29, 2020) at 5, 31, <https://www.eia.gov/outlooks/aeo/pdf/AEO2020%20Full%20Report.pdf>.

<sup>6</sup> See EIA, U.S. Energy Facts Explained: Consumption and Production (May 7, 2020), <https://www.eia.gov/energyexplained/us-energy-facts/>.

<sup>7</sup> See EIA, Electricity Explained: Electricity in the United States (Mar. 20, 2020), [https://www.eia.gov/energyexplained/index.php?page=electricity\\_in\\_the\\_united\\_states](https://www.eia.gov/energyexplained/index.php?page=electricity_in_the_united_states).

<sup>8</sup> See AEO 2020, n.5, *supra*, at 36.

gas, this does not impact the expected closure of coal-based and other less efficient generation levels while keeping electricity affordable and reliable.<sup>9</sup>

As of the end of 2019, the electric power sector had reduced its carbon dioxide (CO<sub>2</sub>) emissions by 33 percent compared to peak levels in 2005—the lowest level in more than 30 years. Investor-owned utilities—those that make up EEI’s membership—have reduced CO<sub>2</sub> levels even further, by approximately 45 percent when compared with 2005. These reductions will continue: EEI’s member companies are on a path to reduce CO<sub>2</sub> emissions 80 percent or more by 2050 compared to 2005 levels. These changes have helped the sector reduce its environmental footprint while keeping electricity affordable and reliable. As these changes continue, increasing pressure will be put on the nation’s transmission system and new infrastructure will be needed to move clean energy to meet electricity demand. The Proposed Directive will provide EEI members with clear and consistent processes for the development and approval of operating plans and agreements and provide for the long-term operation, maintenance, and vegetation management of facilities on Federal lands. This certainty will help EEI members continue this clean energy transition.

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<sup>9</sup> Many EEI member companies have announced significant voluntary commitments to further reduce CO<sub>2</sub> emissions by 2030 and 2050, many of which aim to reduce emissions 80 percent or more below 2005 levels by 2050. EIA’s AEO 2020 reference case projects that electric power sector emissions will level off from 2025 to 2050, despite a projected 30-percent increase in generation over this period, as a result of decreases in the use of coal as a generating fuel. *See* AEO 2020, n.5, *supra*, at 7. EIA’s reference case only considers existing policies and laws and does not address the potential for future reductions as a result of new laws or industry commitments.

### **III. In Reviewing Existing Operating Plans or Agreements, USFS Should Exercise Flexibility in Determining Whether a Plan is Consistent With this Directive.**

Many EEI members have existing operating plans or agreements in place with USFS, as a result of collaboration and coordination with the USFS over multiple years. The Proposed Directive instructs authorized officers to ensure that existing operating plans are consistent with this directive. *See* Proposed Directive at 11. When reviewing an existing operating plan, the Service should exercise discretion, and take a flexible interpretation of the term “consistent”, so as to not require the modification of any existing plan that meets the objective of this directive, which is to provide for long-term, cost-effective, efficient, and timely inspection, O&M, and vegetation management within and adjacent to utility ROWs.

Additionally, the Proposed Directive provides that should an authorized officer determine that an existing operating plan is inconsistent with the directive, the owner/operator may continue to operate its authorized powerline facility pending approval of the modified operating plan. *See id.* The Service should clarify that this also allows continued O&M and vegetation management within and adjacent to the authorized powerline facility during this period.

### **IV. USFS Appropriately Acknowledges the Need to Provide Training on the Development, Review, and Approval of Operating Plans and Agreements to Authorized Officers and their Staff.**

The Proposed Directive appropriately promotes USFS collaboration with the electric utility industry for approving operating plans and agreements. This collaboration allows for long-term, cost-effective, efficient, and timely inspection, O&M, and vegetation management within and adjacent to utility ROWs. Collaboration also helps enhance electric grid reliability, promote public safety, and avoid fire hazards. *See id.* at 3. It is appropriate and sensible for the Proposed Directive to recognize the varied experience of authorized officers and the staff at the local level,



and the individuality that each operating plan could present. Further, the Proposed Directive correctly instructs the Washington Office of Lands and Realty to provide training and training materials—with input from the electric utility industry—for operating, maintaining, and inspecting powerline facilities. See *id.* at 5. The Proposed Directive also appropriately instructs the authorized officers “to the maximum extent practicable that their employees who work with the owners and operators on the development of proposed operating plans and agreement, and who review and approve operating plans and agreements are trained on this directive.” *Id.*

Providing training to authorized officers and their staff on the intent, scope, development, review, and approval process for operating plans and agreements is critical to the Service achieving the intent of the Proposed Directive. EEI and its members have a long history of working collaboratively with USFS on vegetation management and O&M activities within and adjacent to ROWs on NFS lands. We look forward to collaborating further on these trainings and training materials to provide for the consistent, cost-effective, timely, and long-term operating plans.

**V. USFS Should Finalize the Inclusion of Integrated Vegetation Management and Best Management Practices as Minimum Requirements in Operating Plans and Agreements.**

The Proposed Directive explains that in developing, reviewing, and approving proposed operating plans and agreements, the authorized officer shall, in part, “[e]nsure that the proposed operating plan or agreement provides for [IVM] that specifically addresses efforts to increase or sustain pollinator habitats.” See *id.* at 15-16. Further, the Proposed Directive requires that at a minimum, the authorized officer shall ensure that operating plans and agreements for powerline facilities on NFS lands, in part, “[i]dentify [BMP]s for vegetation management; schedules for

conducting routine vegetation management; the applicable minimum vegetation clearance distance; procedures for designating, marking, and removing or pruning hazard trees and other vegetation; and road and trail standards and [BMPs].” *See id.* at 13-14.

EEI members have a long history utilizing both IVM<sup>10</sup> and the BMPs identified in the Proposed Directive within and adjacent to ROWs on NFS lands to maintain and protect powerline facilities. Many EEI members are already working with the Service to include IVM and the BMPs identified in the Proposed Directive in their operating plans. Including these requirements as a minimum obligation in an operating plan or agreement will provide for a streamlined approach, consistent with the objectives of this rulemaking, to ensure utilities can continue to engage in IVM implement BMPs as part of their approved O&M plan. Therefore, the Service should finalize these requirements.

**VI. Collaboration Between USFS and the Electric Utility Industry During the Planning, Development, Review, and Implementation of Operating Plans and Agreements is Critical to Achieving the Goal of the Directives.**

Throughout the Proposed Directive, the Service appropriately encourages communication and collaboration between the owner/operator and USFS staff, during all phases of the planning, developing, reviewing, and implementing the operating plan. The Proposed Directive and associated sample operating plan/agreement identify specific, illustrative examples of where owner/operators are to schedule in-person meetings with Service staff, exchange contact information, and otherwise communicate during the permitting process.

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<sup>10</sup> IVM is a type of forest management that controls the growth and composition of forest vegetation for an array of objectives, including wildlife habitat, timber, water resources, and recreation. IVM seeks to promote desirable and stable plant communities using appropriate, environmentally sound, and cost-effective control methods. These methods can include a combination of chemical, biological, cultural, mechanical, and manual treatments. *See id.* at 16.

Communication and collaboration are critical to ensuring that the permitting process is as streamlined and efficient as possible, especially as it relates to the type of activities the owner/operator will be conducting under their operating plan, the level of environmental reviews needed, and implementation of the operating plan once approved. These examples are helpful guideposts for communication and collaboration during the permitting process. However, USFS must ensure that the scheduling of in-person meetings and engagement with Service staff does not result in delaying the review and approval timeline. The Service should work to expeditiously schedule these in-person meetings and respond to utility communication in a timely manner.

#### **VII. USFS Should Clarify Submission, Review, and Approval Timeframes.**

Through the Proposed Directive, the Service adopts of a timeframe of 120 days for the submission, review, and approval timeframes for a submitted operating plan or agreement. *See id.* at 17, 20. During this timeframe, the authorized officer will review the submission for sufficiency, and under “Procedures for Review and Approval of Proposed Operating Plans and Agreements” the Service states that “the authorized officer has 30 days to submit comments on a proposed operating plan or agreement to the owner or operator.” *Id.* Ostensibly, the authorized officer would use this opportunity to “Report any missing information to the owner or operator.” *Id.* at 20. In the Proposed Directive it is unclear if the 30-day period runs concurrently with the 120-day timeframe, and to avoid expanding the 120-day period it should be explicitly stated that it does run concurrently. Additionally, the critical step of incorporating owner/operator responses to agency comments, as well as the timeframe for receiving those responses, is missing from the template.

The Service should confirm the 30-day period for the authorized officer's submission of agency comments on a proposed operating plan or agreement, and the project applicant's subsequent response and/or re-submission of an operating plan or agreement, is within the Service's 120-day timeframe for approval, consistent with the objectives of streamlining the approval process.

**VIII. USFS Should Clarify that Classes of Activities, Including Any Notice and Approval Requirements, Conducted Under an Approved Operating Plan are Determined Solely on the Environmental and Ground Disturbance Impacts.**

The Proposed Directive appropriately recognizes that different activities under an approved operating plan will have differing levels of environmental and ground disturbances, and thus require different notice and approval requirements. In the Proposed Directive, the Service categorizes these actions under four classes of activities. *See id.* at 22-24. Under each class of activities, the Service generally identifies a level of environmental and ground disturbance that would be applicable to that class of activity. However, the Service then further provides a non-exhaustive list of "categories" of activities that would fall under that class of activities. For example, Class II activities would include routine vegetation management. *See id.* at 22.

Rather than use examples of activities under each class of activity, it would be more appropriate to eliminate any reference to specific activities under each class and focus solely on the environmental and ground impact of the specific activity. This would better align with existing operating plans and more appropriately focus electric utility and Service resources on activities that have more than minimal environmental and ground impacts.

**IX. USFS Should Modify and/or Remove Prior Acknowledgement Requirements for Class I and II Activities and Provide Further Clarification for Class IV Activities.**

As part of the classification of activities to be conducted under an approved operating plan/agreement, the Proposed Directive provides specific prior notice and acknowledgment or

approval requirements. The benefit of collaborating during the planning, development, review and implementation of operating plans and agreements is that there is a common understanding of the activities and accompanying annual schedules for work to be conducted by EEI's members. Some of these activities include minimal impact in the ROW while others are more invasive. These actions are reviewed, including their environmental impacts, and are ultimately approved in an operating plan or agreement. Certain activities may require additional approval, which if approved require an amendment to the permit. *See id.* at 13, 21.

As an initial matter, for Class I and Class II activities, there is minimal additional impact to the NFS lands. The scale of activities that EEI members conduct under these classes of activities would make it infeasible to provide notice for every activity under these classes. Additionally, there is no commensurate benefit to the Service or the public to require any additional notification prior to undertaking these class of actions.

For Class I Activities, requiring prior acknowledgment by authorized officer before proceeding, whether written, by telephone or email, for this class of activity could result in delays to an owner/operator's ability to proceed with these already approved activities as specified in an approved operating plan or agreement, without commensurate benefit to the NFS land or the Service. The USFS should not finalize this prior acknowledgment requirement given the work has already been approved. If USFS chooses not to do so, the Service at a minimum should provide additional detail on what constitutes "acknowledgment," with particular attention to what response is required from the Service. The Service also should provide an exception to the

prior acknowledgment requirement—identical to what is allowed in Class II Activities—that allows the owner/operator to proceed if the authorized officer has failed to respond by telephone or email to the prior notice in accordance with the specified timeframe in the approved operating plan or agreement. Moreover, should USFS maintain a notice and acknowledgement/approval requirement, the Service should specify in the approved operating plan or agreement a subset of activities that require prior notice and acknowledgment/approval, with a justification for this requirement, and a presumption that any activity not identified requires no prior notice and acknowledgment/approval. This process is consistent with the goal of streamlining development, approval, and implementation of operating plans that allow utilities to address operational and vegetation management hazards within and adjacent to their ROWs.

For Class II Activities, requiring prior acknowledgment by an authorized officer by email or letter places an additional burden on USFS staff and as in Class I Activities, has the potential to significantly delay an owner/ operator's ability to proceed with these approved activities as specified in an approved operating plan or agreement without commensurate benefit to the NFS land or the Service. Class II Activities are included in the annual schedule of work provided to the authorized officer and are in accordance with the approved operating plan. As such, the Service should not include the prior acknowledgment requirements for Class II Activities in any final guidance. If USFS chooses to retain such requirements, the Service should at least add acknowledgment by telephone as an option and as currently exists for Class I Activities or enlarge the current exemption for prior written approval to include prior acknowledgement to allow the owner/operator to proceed if the authorized officer has failed to respond by telephone

or email to the prior notice in accordance with the specified timeframe in the approved operating plan/agreement.

USFS should also confirm that Class IV Activities—emergency vegetation management—are exempt from any additional environmental analysis and consultation for threatened and endangered species and cultural resource impacts. *See id.* at 24. The sample operating plan appears to contradict this exemption, seemingly requiring compliance by the owner/operator with all environmental laws and regulations that apply during emergency vegetation management in the permitted area. *See id.* at 43-44.

The Service should also reduce the level of detail required by utilities within 24 hours of initiating a Class IV activity. The Proposed Directive requires that within 24 hours of initiating a Class IV activity, the owner/operator must provide the location of the activity, the quantity of emergency vegetation management, or type and scope of emergency powerline facility maintenance. *See id.* at 24. During emergency situations—for example, hurricanes or wildfires—the full scope of the emergency vegetation management or powerline facility maintenance may not be known within 24 hours. The Service should limit the initial notice to the location and type of activity undertaken. Alternatively, the Service should only require a written report within 30 days of an owner/operator completing a Class IV activity.

**X. USFS Should Ensure Sufficient Funding and Staffing to Fulfill the Requirements Outlined in the Directive.**

The Proposed Directive outlines detailed steps and processes that must be completed during the review and approval of proposed operating plans/agreements for special use authorizations for powerline facilities. These steps require staff time to initiate in-person meetings with project

applicants, prepare cost recovery agreements, and, as appropriate, conduct environmental review and consultation processes mandated under the National Environmental Policy Act, the Endangered Species Act, and Section 106 of the National Historical Preservation Act. Additionally, the Service is directed to “Establish a project team, including relevant specialists, relevant program managers, and the authorization administrators.” *See id.* The number of time-intensive activities—all projected to be completed within 14 months—and providing the extensive staffing required on the project team represent a significant commitment of Service resources. Accordingly, the Service should endeavor to supply the sufficient resources and requisite staffing required to successfully fulfill the process outlined in the directive.

## **XI. Conclusion**

As explained in these comments, the Service should move quickly to finalize the Proposed Directive. The Proposed Directive, if finalized, would provide EEI members with clear and consistent processes for the development and approval of operating plans and agreements for electric facilities on NSF lands. Further, the finalization of the Proposed Directive would benefit the Service, EEI members, and wildfire mitigation efforts. EEI supports the training and collaboration objectives in the Proposed Directive as well as the requirements for IVM and adherence to BMPs. EEI requests clarifications of the submission, review, and approval and modification and/or removal of the prior acknowledgement requirements for Class I and II activities as well as clarification of the requirements under Class IV activities. Lastly, EEI stresses that sufficient funding and staffing are necessary to fulfill the requirements outlined in the Proposed Directive. Questions on these comments may be directed to [Sarah Ball](#) (202-508-5208), [Riaz Mohammed](#) (202-508-5036), or [Patrick McGuire](#) (202-508-5167).