

the regulations would be the creation of a ready mechanism for a shipper to verify a carrier's compliance, without expenditure of any government resources.

*ANPRM.* On May 20, 1987, RSPA published an ANPRM, HM-199 [52 FR 19116], soliciting comments on a number of questions relating to the merits of the petition from NTTC, and whether DOT should proceed with rulemaking.

*Comments to the ANPRM.* Currently, there is no provision in the HMR requiring shippers to obtain proof from motor carriers that the financial responsibility requirements in 49 CFR part 397 are being met. A number of commenters to the ANPRM asserted that public safety would be enhanced by the shipper obtaining proof of carrier financial responsibility. Several commenters pointed out that some carriers are underinsured and that DOT can not effectively audit all carriers. Commenters opposed to the petition argued that it would require shippers to perform an unwarranted enforcement function. Some stated that verification of the appropriate level of carrier insurance would be difficult for small shippers. They maintained that the proposal would increase personnel training and operating costs and impose a recordkeeping burden, while doing nothing to ensure compliance or strengthen enforcement. One commenter concluded that the proposal fails to address carrier underinsurance and that it would involve increased enforcement against shippers and widen shipper liability.

RSPA believes that the concerns in the petition are sufficiently addressed by the following: (1) the existing certification and enforcement practices of the ICC and FHWA; (2) expansion of state motor carrier inspection programs; (3) improvements in the hazardous materials insurance market; and (4) development of new motor carrier registration and permitting requirements. Common and contract carriers entering hazardous materials service must show evidence of the appropriate financial responsibility levels, specified in part 387, to obtain operating authority from the ICC. In turn, proof of adequate financial responsibility is an essential function of FHWA's compliance review process, specified in part 385, involving on-site investigation of carrier operations. There is strong evidence that, for the most part, carriers are complying with part 387 requirements, and that non-compliance is not so widespread as to constitute a serious safety problem. For these reasons, RSPA believes that no

action is required on this rulemaking action and NTTC's petition is denied.

In consideration of the foregoing, Docket HM-199 is hereby terminated.

Issued in Washington, DC on January 25, 1995, under authority delegated in 49 CFR part 106, Appendix A.

**Alan I. Roberts,**

*Associate Administrator for Hazardous Materials Safety.*

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## INTERSTATE COMMERCE COMMISSION

### 49 CFR Parts 1105 and 1180

[Ex Parte No. 282 (Sub-No. 19)]

### New Procedures in Rail Acquisitions, Mergers and Consolidations

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commission is proposing to amend its regulations in order to establish more timely procedures for major and significant rail acquisitions, mergers and consolidations. The proposed rules will also shorten the timeframes for minor transactions where appropriate.

**DATES:** Written comments must be filed with the Commission by March 2, 1995.

**ADDRESSES:** Send an original and 15 copies of comments to: Office of the Secretary, Case Control Branch, Attn: Ex Parte No. 282 (Sub-No. 19), Interstate Commerce Commission, 1201 Constitution Avenue, N.W., Washington, DC 20423.

**FOR FURTHER INFORMATION CONTACT:** Joseph H. Dettmar, (202) 927-5660. [TDD for the hearing impaired: (202) 927-5721.]

**SUPPLEMENTARY INFORMATION:** In response to criticisms that this agency's consideration of applications by railroads to acquire other carriers or to merge or consolidate with each other is too slow, we have reviewed our existing procedures for major and significant transactions,<sup>1</sup> our practices in implementing them, and the applicable statutory provisions.<sup>2</sup> We have done so

<sup>1</sup> A major transaction involves control or merger of two or more class I railroads. 49 CFR 1180.2(a). A significant transaction is defined at 49 CFR 1180.2(b).

<sup>2</sup> Minor transactions are defined at 49 CFR 1180.2(c). Although we believe that our current rules provide for timely handling of this type of transaction, we do propose including minor transactions under many of our proposed changes to enhance the consistency of our rules and to

determine whether these applications can be processed more quickly while preserving the opportunity for: (1) affected persons and the public at large to participate effectively in the process; (2) reasoned consideration of the arguments for and against an application; and (3) consideration of competing applications, proposed conditions, and amendments offered by the applicants to meet objections to proposed transactions.

Typically, we receive a proposed schedule from an applicant in a major or significant transaction, publish the schedule in the **Federal Register**, modify it based upon consideration of comments we receive, and adopt it. Most recently, for example, the applicants in *Burlington Northern Inc. and Burlington Northern Railroad Company—Control and Merger—Santa Fe Pacific Corporation and The Atchison, Topeka and Santa Fe Railway Company*, Finance Docket No. 32549, proposed a procedural schedule calling for the Commission to issue a decision in 430 days. We sought comments on the proposed schedule and adopted one calling for the issuance of a decision in 535 days.

We have not always crafted a time line based on schedules proposed by the parties to transactions but that has generally been the practice in recent years. We applied that practice in establishing a schedule and then deciding the application of *Rio Grande Industries* to acquire the Southern Pacific Transportation Company (SPTC) in 185 days. In that case, *Rio Grande Industries, et al.—Control—SPTC et al.*, 4 I.C.C.2d 834 (1988) (*Rio Grande-SP*), the Commission processed an application that involved a competing application filed by Kansas City Southern Industries (KCSI), several requested conditions and a number of embraced abandonments, leases, trackage rights requests, requests for authority to control and other related transactions. We afforded an opportunity for all interested persons to comment on the application and the inconsistent application of KCSI and to propose conditions. We gave the applicants an opportunity to reply to all comments on the application, to respond to the inconsistent application, and to propose any modifications to the merger in response to the comments filed.

We believe that the *Rio Grande-SP* case offers a useful model of a timely but fair process for rail mergers and consolidation proceedings. We propose

improve further our ability to handle minor transactions in a timely and efficient manner.

that process for consideration here. With that case in mind, the schedule we propose to adopt in all applications for merger and consolidation under 49 U.S.C. 11343-11345 is set out in Appendix A to this Notice. The proposed modifications to Parts 1105 and 1180 are set out below. The proposed schedule calls for the issuance of a decision by the agency in both major and significant transactions 180 days after an application is filed. In addition we propose to shorten the prefiling notification period from a minimum of 3 months for major transactions to 2 months, which we propose to apply to both major and significant transactions.

In considering the *Rio Grande-SP* proceeding as a model, it is important to note that the case was unique in one respect. There we asserted jurisdiction not only pursuant to our authority to consider mergers but also because the sale represented an effort by Santa Fe Southern Pacific Corporation (SFSP), as the beneficial owner of the SPTC, to comply with our orders directing it to divest itself of SPTC following our denial of SFSP's application to acquire control of the carrier.

We do not believe that factor precludes us from processing other applications for major and significant mergers and consolidations in a similar fashion. The issues that arose in that case are similar to those that would arise in any major merger. The only relevance of our divestiture jurisdiction in *Rio Grande-SP* is that we cited it as one of the bases for departing from the statutory procedures of 49 U.S.C. 11345 in order to establish a more expedited schedule than that set out in the statute and in our regulations at 49 CFR 1180. But that is not the only basis for our authority to depart from our procedures.

In proposing to modify the statutory schedule, we find authority in the exemption provisions of 49 U.S.C. 10505. We propose not only to modify our regulations at 49 CFR 1180.4 but also to grant an exemption for all major and significant acquisition, merger and consolidation proceedings from the procedural requirements of 49 U.S.C. 11344 and 11345, and in their stead adopt the schedule set out in Appendix A and the procedures set out below.<sup>3</sup>

<sup>3</sup>The schedule set out in Appendix A will not apply to minor transactions. We are able to process those transactions more expeditiously using a more simplified schedule geared to the specific transaction. We will continue to establish procedural schedules for those transactions on a case-by-case basis. Our exemption, however, will extend to minor transactions for procedures set out below where applicable, except as noted below.

We rely upon the criteria to exempt transactions set out at 49 U.S.C. 10505:

[T]he Commission shall exempt . . . a transaction . . . when the Commission finds that the application of a provision of this subtitle—

(1) is not necessary to carry out the transportation policy of section 10101a of this title; and

(2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

The rail transportation policy (RTP) would be fostered by establishing a more timely procedure for these proceedings. Specifically, 49 U.S.C. 10101a(2) states that it is the policy of the United States Government “. . . to require fair and expeditious regulatory decisions when regulation is required. . . .”

We believe that the procedures we are modifying are of limited scope within the meaning of 49 U.S.C. 10505. Most of the statutory standards are deadlines that require actions to be taken within a certain period of time. Adopting more expedited procedures does not contravene those provisions. The chief effects of the proposed schedule on the procedures established in 49 U.S.C. 11345 are that written comments on the application would be due in 30 rather than 45 days, that the U.S. Department of Transportation and the U.S. Department of Justice would be subject to the same schedule as other Federal agencies and other parties, and that inconsistent applications would have to be filed in 75 days rather than 90 days. These are not major departures from the statutory procedures.

The new procedure would also represent a departure from our existing regulations, which we may modify without invoking 49 U.S.C. 10505. The existing regulations call for the completion of the evidentiary record within 24 months of accepting the application in major transactions and for the completion of the record within 180 days in significant transactions. To the extent that the statute sets maximum time limits of 24 months and 180 days, we may of course shorten those deadlines by rule. The proposed schedule calls for the completion of the record in 125 days of acceptance of an application. The proposed schedule gives the Commission 40 days to issue a decision after the close of the written record and 30 days after oral argument, if the Commission schedules an oral argument. That compares with the existing standards that provide that a final decision will be issued within 180 days after the conclusion of the

evidentiary proceeding in a major transaction and within 90 days after completion of the evidentiary phase in a significant transaction.

A vital element in carrying out the proposed procedures is strict compliance with the Commission's environmental rules at 49 CFR Part 1105. These rules ensure compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act, the National Historic Preservation Act, the Coastal Zone Management Act, and other environmental statutes.

Section 1105.6(b)(4) provides that environmental assessments will normally be prepared in those mergers, consolidations, or acquisitions of control under 49 U.S.C. 11343 that involve significant changes in operation or rail line abandonments and constructions. Mergers that do not involve abandonments and constructions or major operational changes are generally exempt from environmental review. However, if a merger is likely to significantly affect the environment, NEPA requires that the Commission prepare an environmental impact statement. As a result, we will not be able to apply the proposed schedule to these mergers, and will establish an alternate schedule that will permit compliance with NEPA without creating undue delay.

To expedite the NEPA environmental review process, we are requiring that applicants consult with the Commission's Section of Environmental Analysis (SEA) with, or prior to, the filings of their prefiling notices for all mergers involving the preparation of environmental documentation. In the case of mergers requiring an environmental assessment, we are requiring that the applicant submit, with its application, a preliminary draft environmental assessment (PDEA). We encourage the use of independent third party contractors in preparing the PDEA. This document shall be based on consultations with SEA and the various agencies set forth in 49 CFR 1105.7(b) of our environmental rules. SEA will use the PDEA in preparing a draft environmental assessment for public comment.

An equally vital element in enabling the parties and the Commission to adhere to a more timely schedule is the avoidance of protracted disputes involving discovery. Under our proposed procedures any applicant must establish a depository or other facility for making documents supporting the application available promptly to all interested parties subject to the appropriate protective orders. Immediately upon each evidentiary

filing, the filing party shall place all relevant documents in the depository.

The new schedule is designed to provide a timely decision on whether a proposed acquisition, merger, or consolidation comports with sections 11343 and 11344. The Commission will also decide directly related applications, e.g., grants of trackage rights, leases, and similar transactions. We admonish applicants to structure their transactions so as to permit efficient processing of the application. If protests or other factors require that such applications or petitions be given more extensive consideration, they will be addressed in separate decisions that may be issued after the decision on the acquisition, merger, or consolidation.

The only pending major consolidation proceeding where the record has not yet been developed is the *BN-Santa Fe* case. Because it is currently pending, we will serve a copy of this notice on all the parties on the service list in Finance Docket No. 32549. By this notice, we seek comments as to whether that case should be governed by the schedule originally adopted or the schedule proposed herein.<sup>4</sup>

This action will not significantly affect either the quality of the human environment or conservation of energy resources.

This action will have no significant effect on a substantial number of small entities. The revised rules should result in fewer required filings by parties in each of these proceedings and to that extent our action should benefit small entities.

#### List of Subjects

##### 49 CFR Part 1105

Environmental impact statements, Reporting and recordkeeping requirements.

##### 49 CFR Part 1180

Administrative practice and procedure, Bankruptcy, Railroads, Reporting and recordkeeping requirements.

Decided: January 25, 1995.

By the Commission, Chairman McDonald, Vice Chairman Morgan, and Commissioners Simmons and Owen.

**Vernon A. Williams,**  
Secretary.

For the reasons set forth in the preamble, title 49, chapter X, parts 1105 and 1180 are proposed to be amended as set forth below:

<sup>4</sup>The procedural schedule adopted in Finance Docket No. 32549 was suspended pending the outcome of the Santa Fe Pacific Corporation's shareholders' vote, which is scheduled to occur on February 7, 1995.

#### PART 1105—PROCEDURES FOR IMPLEMENTATION OF ENVIRONMENTAL LAWS

1. The authority citation for part 1105 continues to read as follows:

**Authority:** 49 U.S.C. 10321, 10505, 10901, 10903–10906, and 11343; 16 U.S.C. 470f, 1451, and 1531; 42 U.S.C. 4332 and 6362(b); and 5 U.S.C. 553 and 559.

2. Section 1105.7 is proposed to be amended by adding a sentence to the end of paragraph (a) to read as follows:

##### §1105.7 Environmental reports.

(a) \* \* \* An applicant for a rail acquisition, merger, or consolidation submitted under 49 CFR 1180.4 must consult with the Section of Environmental Analysis at the time of, or prior to, filing its notice, and must submit with, or prior to, its application a Preliminary Draft Environmental Assessment as described in § 1105.13.

\* \* \* \* \*

##### §1105.10 [Amended]

3. Section 1105.10, paragraph (b), is proposed to be amended by adding to the end of the first sentence after "1105.8" the words "and a Preliminary Draft Environmental Assessment submitted by an applicant pursuant to § 1105.13".

4. A new § 1105.13 is added to read as follows:

##### §1105.13 Preliminary Draft Environmental Assessment.

An applicant for a rail acquisition, merger, or consolidation submitted under 49 CFR 1180.4 must submit at the time of, or prior to, its application, a Preliminary Draft Environmental Assessment (PDEA) for transactions requiring an Environmental Assessment under § 1105.6(b)(4). The PDEA must contain the information required in § 1105.7 and § 1105.8 and must be served on the parties designated in § 1105.7(b). The PDEA must be based on consultations with the Section of Environmental Analysis (SEA) and the agencies specified in § 1105.7(b). We encourage the use of third-party consultants in preparing the PDEA. SEA will use the PDEA in preparing a draft Environmental Assessment.

#### PART 1180—RAILROAD ACQUISITION, CONTROL, MERGER, CONSOLIDATION PROJECT, TRACKAGE RIGHTS, AND LEASE PROCEDURES

5. The authority citation for part 1180 continues to read as follows:

**Authority:** 49 U.S.C. 10321, 10505, 11341, 11343–11346; 5 U.S.C. 553 and 559; and 11 U.S.C. 1172.

6. Section 1180.4 is amended as follows:

a. Paragraph (a)(4) is revised.  
b. Paragraph (b)(1) introductory text, the first sentence is revised and a new sentence is added after the first sentence.

c. Paragraph (b)(2) introductory text, the words "30 days" are revised to read "15 days".

d. Paragraphs (c)(2)(v) through (c)(2)(vii) are redesignated as paragraphs (c)(2)(vi) through (c)(2)(viii) and a new paragraph (c)(2)(v) is added.

e. Paragraphs (c)(7)(i) and (c)(7)(ii), the words "30 days" are revised to read "15 days".

f. Paragraph (d)(1)(i) is revised.

g. In paragraphs (d)(1)(iii)(H) and (d)(1)(iii)(I)(3), the first two words "An initial" are removed and the word "A" is added in their place.

h. Paragraph (d)(2) is removed.

i. Paragraph (d)(3) is removed.

j. Paragraph (d)(4) is redesignated as paragraph (d)(2) and redesignated paragraphs (d)(2)(i) and (d)(2)(iv) are revised.

k. Paragraph (e)(2) is revised.

l. Paragraph (e)(3) is revised.

7. The additions and revisions read as follows:

##### §1180.4 Procedures.

(a) \* \* \*

(4) The Commission shall issue a list of all parties to the proceeding within 40 days of the application's acceptance.

(b) \* \* \*

(1) Between 2 to 4 months prior to the proposed filing of an application in a major or significant transaction, applicants shall file a notice with the Commission. The applicant shall initiate consultations with the Section of Environmental Analysis upon, or prior to, the filing of this notice. \* \* \*

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(v) For transactions requiring an environmental assessment (EA) under 49 CFR 1105.6(b)(4), the applicant shall submit to the Commission a Preliminary Draft Environmental Assessment (PDEA) as described in 49 CFR 1105.13.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

(i) Time to file. Written comments and proposed conditions must be filed no later than 30 days after an application's acceptance.

\* \* \* \* \*

(2) \* \* \*

(i) All responsive applications shall be filed 60 days after acceptance of the primary application. No responsive

applications shall be permitted to minor transactions.

\* \* \* \* \*

(iv) Any petitions for waiver, clarification, extension of time, or for leave to file an incomplete application, or to rebut the presumption of a significant transaction, must be filed at least 30 days in advance of the filing of the responsive application.

\* \* \* \* \*

(e) \* \* \*

(2) The evidentiary proceeding will be completed in 125 days after the primary application is accepted for a major or a significant transaction and in 105 days for a minor transaction.

(3) A final decision on the primary application and all consolidated cases will be issued in 40 days after the conclusion of the evidentiary record.

\* \* \* \* \*

**Note:** This appendix will not be published in the CFR.

**Appendix A—Proposed Schedule for Major Rail Acquisition, Merger and Consolidation Applications Under the Interstate Commission Act**

Discovery begins immediately.

- D Date Application filed.
- D+15 Notice of the application published in the **Federal Register**.
- D+20 Discovery conference on application held.
- D+45 Comments and protests due on the application; requested conditions due; description of anticipated inconsistent and responsive applications due.
- D+50 Discovery conference on comments, protests and conditions held.
- D+75 Inconsistent and responsive applications due. Response to comments, protests, conditions and rebuttal in support of primary application due.
- D+80 Discovery conference on inconsistent applications held.
- D+90 Notice of acceptance (if required) of inconsistent and responsive applications published in the **Federal Register**.
- D+105 Response to inconsistent and responsive applications due. Rebuttal in support of comments, protests, and conditions to the primary application due.

- D+115 Rebuttal in support of inconsistent and responsive applications due.
- D+125 Briefs due, all parties.
- D+140 Oral Argument (at Commission's discretion).
- D+150 Voting Conference (at Commission's discretion).
- D+180 Date for service of decision.

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BILLING CODE 7035-01-P

**DEPARTMENT OF INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**Endangered and Threatened Wildlife and Plants; Public Hearing and Extension of Comment Period on Proposed Determination of Critical Habitat for Lost River Sucker and Shortnose Sucker**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Proposed rule; notice of public hearing and extension of comment period.

**SUMMARY:** The Fish and Wildlife Service (Service) provides notice that a public hearing will be held on the proposed determination of critical habitat for Lost River sucker (*Deltistes luxatus*) and shortnose sucker (*Chasmistes brevirostris*). In addition, the Service has extended the comment period. All parties are invited to submit comments on this proposal.

**DATES:** The public hearing will be held from 2 to 4 p.m. and 6 to 8 p.m. on March 7, 1995, in Klamath Falls, Oregon. The comment period, which originally was to close on January 30, 1995, now closes on March 17, 1995. Any comments received by the closing date will be considered in the final decision on this proposal.

**ADDRESSES:** The public hearing will be held at the Oregon Institute of Technology, College Union Auditorium, 3201 Campus Drive, Klamath Falls, Oregon. Comments and materials should be submitted to the U.S. Fish and Wildlife Service, Portland Field Office, 2600 S.E. 98th Avenue, Suite 100, Portland, Oregon 97266. Comments

and materials received will be available for public inspection during normal business hours, by appointment, at the above address.

**FOR FURTHER INFORMATION CONTACT:** Rollie White (See **ADDRESSES** section) at (503) 231-6179.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Lost River sucker (*Deltistes luxatus*) and shortnose sucker (*Chasmistes brevirostris*) are large, long-lived fishes endemic to the Upper Klamath River Basin of Oregon and California. Listed as endangered pursuant to the Endangered Species Act of 1973 (Act) on July 18, 1988 (52 FR 32145), the Service proposed to designate a total of approximately 182,400 hectares (456,000 acres) of stream, river, lake, and shoreline areas as critical habitat for the shortnose sucker, and approximately 170,000 hectares (424,000 acres) of stream, river, lake, and shoreline areas as critical habitat for the Lost River Sucker on December 1, 1994 (59 FR 61744).

Section 4(b)(5)(E) of the Act (16 U.S.C. 1531 et seq.) requires that a public hearing be held if it is requested within 45 days of the publication of the proposed rule. Public hearing requests were received from a number of requesters. As a result, the Service has scheduled a public hearing on March 7, 1995, at the Oregon Institute of Technology, College Union Auditorium in Klamath Falls, Oregon. Anyone wishing to make statements for the record should bring a written copy of their statements to the hearing. Oral statements may be limited in length if the number of parties present at the hearing necessitates such a limitation. Oral and written comments receive equal consideration. The Service places on limits on the length of written comments or materials presented at the hearing or mailed to the Service.

The comment period on the proposal was to close on January 30, 1995. To accommodate the hearing, the Service extends the public comment period. Written comments may now be submitted until March 17, 1995, to the Service in the **ADDRESSES** section.