Hawaii, Caribbean Insular Areas, and Pacific Insular areas will be assigned only to a primary or club station whose licensee's mailing address is in the corresponding state, commonwealth, or island. This limitation does not apply to an applicant for the call sign as the spouse, child, grandchild, stepchild, parent, grandparent, stepparent, brother, sister, stepbrother, stepsister, aunt, uncle, niece, nephew, or in-law, of the former holder now deceased.

4. In § 97.21, paragraphs (a)(3) and (ii) is revised to read as follows:

§ 97.21 Application for a modified or renewed license.

(a) * * *

(3) * * *

(ii) When the license shows a call sign selected by the vanity call sign system, the application must be filed as specified in Section 97.19(b). When the application has been received at the proper address specified in the Wireless Telecommunications Bureau Fee Filing Guide prior to the license expiration date, the licensee operating authority is continued until final disposition of the application.

* * * * *

[FR Doc. 95–25201 Filed 10–11–95; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 209 and 240

[FRA Docket No. RSOR–9, Notice 9, FRA Docket No. RSEP–6, Notice 8]

RIN 2130–AA74

Qualifications for Locomotive Engineers; and, Railroad Safety Enforcement Procedures—Disqualification Procedures: Procedural Changes to Accommodate FRA Hearing Officers

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Interim final rule.

SUMMARY: This interim final rule amends two different regulations to clarify the procedures that will be employed in hearings involving the determination of an individual's fitness for performing safety-sensitive functions and those regarding certification of locomotive engineers.

DATES: (1) This interim final rule is effective November 13, 1995. This rule shall apply as of that date to all future hearings and to review of all hearings pending on that date.

(2) Written comments concerning this rule must be filed no later than November 13, 1995. Comments received after that date will be considered to the extent practicable.

ADDRESSES: Written comments (three copies) concerning this rule should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street SW, Washington, DC 20590. Persons desiring to be notified that their written comments have been received by FRA should submit a stamped, self addressed, postcard with their comments. The docket clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination during normal business hours both before and after the closing date for comments in the public docket examination facility of the Nassif Building at the above address.

FOR FURTHER INFORMATION CONTACT: Alan H. Nagler, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW, Washington, DC 20590 (telephone: 202–366–0621).

SUPPLEMENTARY INFORMATION: This interim final rule amends two different regulations to clarify the procedures that will be employed in hearings regarding the determination of an individual's fitness for performing safety-sensitive functions and those involving denial or revocation of certification of locomotive engineers.

Disqualification Proceedings

Section 3(a) of the Rail Safety Improvement Act of 1988 ''RSIA'' (recodified at 49 U.S.C.A. 20111 (c) (1995)) authorizes FRA to disqualify individuals who are shown to be unfit to perform safety-sensitive functions based on the individual's violation of an FRA safety rule, regulation, order or standard. FRA's railroad safety enforcement regulations (49 CFR part 209, subpart D), prescribing procedures for disqualifying individuals from performing safety-sensitive functions in the rail industry, were published in the Federal Register on October 18, 1989 (54 FR 42894). FRA is amending that regulation to permit agency employees to serve as hearing officers and preside over disqualification proceedings rather than limiting selection of persons permitted to perform that function to administrative law judges (ALJs). The change is intended to assure the prompt and efficient conduct of disqualification proceedings in a manner more cost effective for the agency than using only ALJs while still affording administrative due process to those against whom such proceedings are initiated.

In the preamble to the disqualification final rule, FRA raised the preliminary question of whether the RSIA requires formal, trial-type ''on the record'' hearings under 5 U.S.C. 554, 556, and 557. In short, the preamble explained that neither the RSIA nor the legislative history granted an individual a right to an ''on the record'' hearing. Despite this conclusion, FRA chose to afford individuals procedural due process by adopting procedures similar to those set forth for formal hearings under 5 U.S.C. 554, 556, and 557.

As stated in the earlier rule, FRA continues to believe that ''it is essential to promulgate procedures that assure the prompt and efficient conduct of disqualification proceedings under the statute, afford administrative due process to those against whom such proceedings are initiated, and lead to the creation of a record in each individual proceeding that will form the basis for judicial review in the United States District Court without a trial *de novo* of the relevant facts. ''54 FR 42894'' (Oct. 18, 1989). Since this statement was written, review of FRA's final safety actions has been shifted to the federal courts of appeal, which is a further reason for ensuring that an adequate record is developed.

FRA expects that an agency hearing officer will be able to provide the essential due process at the same professional level as an ALJ without the substantial costs to the agency incurred when using ALJs. This change will bring FRA's disqualification regulation into conformity with analogous provisions contained in FRA's locomotive engineer certification regulation (described below) and its rules on hazardous materials and compliance order hearings. Under all of these rules, FRA already has given itself flexibility to use hearing officers other than ALJs. Moreover, this new flexibility in selecting agency personnel to perform this function, in addition to possible continued use of ALJs, has the potential for improving the promptness and efficiency with which these proceedings are conducted.

Engineer Qualifications

The initial final rule establishing qualification standards for locomotive engineers was published in the Federal Register on June 19, 1991 (56 FR 28228). That final rule established the right to an administrative hearing in the event of an adverse Locomotive Engineer Review Board (LERB) decision. See 49 CFR 240.407. This regulation already provides that the presiding officer at

this administrative hearing may be either an ALJ or any person authorized by the FRA Administrator. See 49 CFR 240.409. Therefore, the regulation originally anticipated the use of an FRA hearing officer.

Although no regulatory change is necessary to allow an FRA hearing officer to preside over these administrative proceedings, FRA has identified several procedural issues that are necessary to clarify the process that is to be employed by the presiding officer regardless of whether that person is an agency hearing officer or an ALJ. FRA believes that there is a selected group of changes, which involve improvements to the existing rule's hearing procedures and review processes for revocation decisions regarding locomotive engineer certificates, that should occur immediately. Thus, FRA has decided to issue this interim final rule to make those changes immediately. Prompt adoption of these changes will reduce the confusion caused by wording of the current provisions.

Since the publication of the final rule in June of 1991, a number of engineer qualification cases have been reviewed and several have proceeded to the administrative hearing stage. Based on these proceedings, FRA has identified improved procedures, identified below, to enhance the engineers' qualification program.

This interim final rule contains minor modifications that clarify existing procedural rules applicable to the administrative hearing process; a series of changes made to provide for omitted procedures; and changes to correct typographical errors and minor ambiguities that have been detected since the rule's issuance. In order to make the rule more easily read, the full texts of sections that FRA is changing have been provided where substantial edits or additions have been made.

Analysis of Changes to Part 240

Modification of § 240.7. A definition of ''Administrator'' has been added to make it clear that whoever holds that title or the title of ''Deputy Administrator'' may designate someone to act in his or her stead whenever the regulation requires or empowers the ''Administrator'' to act.

A definition of ''Filing'' has been added to make it clear that any document that requires timely filing under this Part shall be deemed filed only upon receipt by the Docket Clerk.

Modification of § 240.119. Subsection (d)(4)(ii) is being corrected since a typographical error had listed § 219.303(c), a non-existent subsection, as a cross-reference instead of § 219.303.

Modification of § 240.203. Subsection (a) is being corrected since a typographical error had mistakenly listed § 240.115 as § 240.15.

Modification of § 240.205. The title of this section is being corrected because of a typographical error. The word ''base'' has been corrected to ''based.''

Modification of § 240.217. Subsection (c)(1) is being corrected because of a typographical error. The word ''that'' has been corrected to ''than.''

Modification of § 240.307. Subsection (a) is being corrected since a typographical error had listed § 240.119(f), a non-existent subsection, as a cross-reference instead of § 240.119(e). In addition, some minor non-substantive changes have been made to improve the clarity of the paragraph.

Modification of § 240.407. Four separate changes have been made to this section. First, the original wording of § 240.407(a) gave rise to questions regarding the nature of the proceeding contemplated by the existing regulations. Section 240.407(a) initially gave parties adversely affected by a LERB decision ''a right to an administrative hearing concerning that (LERB) decision.'' That language has been replaced by the words ''a right to an administrative hearing as prescribed by § 240.409.'' Although FRA has previously expressed its view as to the proper interpretation to be accorded this provision, confusion continues to exist. The modifications in wording will help clarify that the hearing's primary purpose is to determine anew the underlying facts and the correct application of part 240 to those facts, not to conduct an appellate review of the LERB's decision or the railroad's actions.

FRA's intent in providing the opportunity for an FRA hearing was to permit the parties to have a *de novo* proceeding in which administrative procedural and evidentiary standards will apply.

Second, § 240.407(c) has been modified to clarify that a party that fails to request an administrative hearing in a timely fashion will lose the right to further administrative review due since the LERB's decision will constitute final agency action.

Third, § 240.407(d)(2) has been modified to clarify the petitioner's duty to specify what allegedly needs to be examined in connection with the certification decision in question. The amendment also removes a reference suggesting that the presiding officer is to review the LERB decision.

Fourth, § 240.407(e) has been modified to clarify that FRA does not schedule hearings or set an agenda for the proceeding. FRA merely arranges for the appointment of a presiding officer and it is the presiding officer's duty to schedule the hearing for the earliest practicable date. This modification recognizes that the presiding officer has the discretion to set the pace of the pre-hearing schedule and ultimately schedule the hearing.

Modification of § 240.409. A number of subsections have been changed to more clearly define the nature of the proceeding and a number have been added to provide better procedural guidelines for the conduct of hearings. The specific changes being made are described below.

The proceeding provided by § 240.409 affords an aggrieved party a *de novo* hearing at which the relevant facts can be adduced and the correct application of part 240 can be applied. Thus, a change has been made to § 240.409 to eliminate any reference suggesting that an appellate review of the LERB's decision or a railroad's hearing was intended. This change reflects the intended nature of review of the original rule.

FRA has also recognized that there may be instances when the issues are purely legal, or when only limited factual matters are necessary to determine issues. Therefore, § 240.409(c) has been revised to address this possibility and provides that the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer may therefore grant full or partial summary judgment.

Sections 240.409 (d) through (t) contain a number of new provisions that more explicitly reflect the authority of the presiding officer and that were essentially implicit in the wording of former § 240.409 (b) through (j). For example, the subsections now explicitly authorize discovery and control details of service of filings by the parties in the proceeding. In addition, the subsections also have been amended to explicitly require that documents being submitted by any party must be appropriate matters for filing in the proceeding as well as be signed by the filing party.

As the regulations previously stood, the presiding officer had certain explicit and implicit authority to regulate the conduct of a hearing including discovery. This authority has been used on a case-by-case basis to direct discovery and the course of the separate proceedings. The rules of discovery and practice, which have been used by past presiding officers, have been relatively

uniform and very much the same as the rules herein published in the revised § 240.409. These rules are being published to guarantee greater uniformity and to make litigants aware of the applicable rules from the outset. The following is a discussion of a number of these provisions.

The amended version of § 240.409(d) is an addition which explicitly states that the presiding officer may authorize discovery. It also explicitly authorizes the presiding officer to sanction willful noncompliance with permissible discovery requests. Section 240.409(e) requires that documents in the nature of pleadings be signed. This signature constitutes a certification of factual and legal good faith. Section 240.409(f) states the requirement for service and for certificates of service. A presiding officer's authority to address noncompliance with a law or directive is made express in § 240.409(g). This provision is intended to ensure that the presiding officer has the authority to control the proceeding so that an efficient and fair hearing will result.

Section 240.409(h) states the right of each party to appear and be represented. Section 240.409(i) protects witnesses by ensuring their right of representation and their right to have their representative question them. Section 240.409(j) allows any party to request consolidation or separation of hearings of two or more petitions when to do so would be appropriate under established jurisprudential standards. This option is intended to allow more efficient determination of petitions in cases where a joint hearing would be advantageous. Under § 240.409(k), the presiding officer can, with certain exceptions, extend periods for action required in the proceedings, provided substantial prejudice will not result to a party. The authority to deny a request for extension submitted after the expiration of the period involved shows the preference for use of this authority as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Section 240.409(l) establishes that a motion is the appropriate method for requests for action made to the presiding officer. This subsection also provides for the form of motions and the response period for written motions. Section 240.409(m) provides rules for the mode of hearing and record maintenance, including requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Section 240.409(e) in the original regulation has been redesignated as § 240.409(n). The original provisions of §§ 240.409 (f), (g), (h), and (i) are now found in §§ 240.409 (o), (p), (s), and (t), respectively. Except for § 240.409(p), the wording of these subsections has not been altered.

In addition to moving the provisions of former §§ 240.409(g) to 240.409(p), the wording of this subsection has been revised to make party status mandatory. While railroads have chosen to participate in most of the part 240 hearings, we have experienced a few situations where a railroad opted not to be a party where its presence would have been helpful to illuminate certain issues. Hence, we are requiring that both the railroad and the petitioner to the LERB are mandatory parties so that a more logical hearing will take place.

Furthermore, the new § 240.409(p) reflects FRA's view that the railroad involved in each certification case clearly has an interest in the outcome of these proceedings. In most cases, the evidence being introduced at the hearing was initially gathered by the railroad, the railroad's own rules are at the heart of the case, and the railroad will be affected in a variety of ways by any decision rendered. Thus, the regulation provides that the railroad will be a party to the hearing. Given its interest in the outcome of the case, FRA expects that the railroad will be active parties in each case.

The wording of the original § 240.409(k) has been changed and now appears as § 240.409(q) and (r). Experience has shown that the wording of the former provision and FRA's description of its role under that wording is a source of considerable confusion about the roles of various parties in the proceeding. The amended wording of this provision now reflects a refined view of the intended nature of the proceeding and the role of the parties.

Section 240.409(q) reflects FRA's conclusion, based on over three years of experience, that it is more logical and efficient to have the party requesting the hearing carry the burden of proof than to have FRA bear the burden of proving that the LERB decision was correct. The actions at issue in the hearing are those of the engineer and the railroad—not the LERB. Thus, it is appropriate that the engineer and the railroad fill the roles of petitioner and respondent for the hearing. In addition, the burden each party would have if they were the hearing petitioner is articulated in the rule.

Section 240.409(r) clarifies that FRA will continue to be a mandatory party in the proceeding. In all proceedings, FRA will initially be considered a respondent. If, based on evidence acquired after the filing of a petition for hearing, FRA were to conclude that the public interest in safety was more closely aligned with the position of the petitioner than the respondent, FRA could request that the hearing officer exercise his or her inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would occur rarely, if ever. Since FRA can realign itself, we want to caution future parties that FRA represents the interests of the government; hence, parties and their representatives should be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself.

Modification of § 240.411. Subsection (a) has been modified to provide explicitly that if no appeal is timely filed, the presiding officer's decision constitutes final agency action. This statement is implicit in the rule's construction but has been explicitly clarified so that the parties fully understand the implications of not filing a timely request for an appeal.

Modification of Appendix A. Some minor revisions have been made to the penalty schedule references of §§ 240.221 and 240.305 so that they accurately reflect the language of the regulation. A reference to § 240.201(j) has been eliminated since the regulation does not contain such a subsection. Also, some typographical errors were corrected (*i.e.*, the transposition of §§ 240.307 and 240.309 in the original schedule).

Public Proceedings

The Administrative Procedure Act, specifically 5 U.S.C. 553(b)(3), provides that no notice and comment period is required when an agency modifies rules of internal procedure and practice. Accordingly, this regulation is issued without provision of such a period of comment prior to its adoption.

Although not required to provide notice and opportunity for comment in such a proceeding, FRA frequently does provide notice and opportunity for comment even on its procedural rules. FRA has not chosen that course of action here because it concludes that such notice and comment would be impracticable, unnecessary, and contrary to the public interest. A number of these changes are critical to the effective implementation of these rules and the delay that notice and comment would cause would be contrary to the public interest in railroad safety. The beginning of a new fiscal year on October 1, 1995, provides some urgency because budgetary constraints will require the use of

internal hearing officers on all but emergency matters at the conclusion of Fiscal Year 1995. Moreover, the orderly implementation of part 240 requires prompt revision of its hearing procedures.

Despite the need for prompt action, FRA is soliciting comments on this rule and will consider those comments in determining whether there is a need to take further action to improve these regulations. For this reason, FRA has issued this as an interim final rule so that it can take effect while any comments are being considered. If comments persuade FRA that amendments are necessary, it will address them in a subsequent notice. Written comments must be submitted no later than November 13, 1995.

Regulatory Impact

E.O. 12866 and DOT Regulatory Policies and Procedures

This interim final rule has been evaluated in accordance with existing regulatory policies and is considered to be nonsignificant under Executive Order 12866 and is not significant under the DOT policies and procedures (44 FR 11034; February 26, 1979).

Regulatory Flexibility Act

FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities. These rules will apply to railroads. Although a substantial number of small railroads are subject to this regulation, the economic impact of this amendment to the rule will not be significant since it only clarifies existing provisions and makes technical changes to procedural rules which should, to the extent of change, result in more efficient and more economical proceedings.

These amendments to the basic rule will have no direct impact on small units of government, businesses, or other organizations. State rail agencies are not required to participate in this program. This amendment's changes do not involve any part of the program in which state rail agencies would participate, if they chose to participate in the program as a whole.

Paperwork Reduction Act

There are no new collection of information requirements contained in this rule and, in accordance with the Paperwork Reduction Act of 1980, the record keeping and reporting requirements already contained in this rule have been approved by the Office of Management and Budget. The OMB approval number was published in a previous amendment to part 240. The information collection requirements of this rule became effective when they were approved by OMB.

Environmental Impact

FRA has evaluated this regulation in accordance with its procedure for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related directives. This regulation meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This rule will not have a substantial effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Thus in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

List of Subjects

49 CFR Part 209

Railroad safety, Disqualification procedures.

49 CFR Part 240

Railroad safety, Railroad operating procedures.

The Part 209 Rule

Therefore, in consideration of the foregoing, FRA amends part 209, Title 49, Code of Federal Regulations to read as follows:

PART 209—[AMENDED]

1. The authority citation for Part 209, Disqualification Procedures, is revised to read as follows:

Authority: 49 U.S.C. Chs. 51, 57, and 201–213; 49 CFR 1.49.

2. Section 209.321 is amended by revising paragraph (a) to read as follows:

§ 209.321 Hearing.

(a) Upon receipt of a hearing request complying with § 209.311, an administrative hearing for review of a notice of proposed disqualification shall be conducted by a presiding officer, who can be any person authorized by the FRA Administrator, including an administrative law judge. The hearing shall begin within 180 days from receipt of respondent's hearing request. Notice of the time and place of the hearing shall be given to the parties at least 20 days before the hearing. Testimony by witnesses shall be given under oath and the hearing shall be recorded verbatim. The hearing shall be open to the public, unless the presiding official determines that it would be in the best interests of the respondent, a witness, or other affected persons, to close all or any part of it. If the presiding official makes such a determination, an appropriate order, which sets forth the reasons therefor, shall be entered.

* * * * *

The Part 240 Rule

Therefore, in consideration of the foregoing, FRA amends part 240, title 49, Code of Federal Regulations to read as follows:

PART 240—[AMENDED]

1. The authority citation for Part 240 is revised to read as follows:

Authority: 49 U.S.C. Chs. 201–213; 49 CFR 1.49.

2. Section 240.7 is amended to add the following definitions:

§ 240.7 Definitions.

Administrator means the Administrator of FRA, the Deputy Administrator of FRA, or the delegate of either.

* * * * *

Filing means that a document to be filed under this Part shall be deemed filed only upon receipt by the Docket Clerk.

* * * * *

3. Section 240.119 is amended by revising the first sentence of paragraph (d)(4)(ii) to read as follows:

§ 240.119 Criteria for consideration of data on substance abuse disorders and alcohol drug rules compliance.

* * * * *

(d) * * *

(4) * * *

(ii) Analysis of a blood specimen for alcohol in the same manner as prescribed in § 219.303 of this chapter.***

* * * * *

4. Section 240.203 is amended by revising paragraph (a)(1) to read as follows:

§ 240.203 Determinations required as a prerequisite to certification.

(a) * * *

(1) The individual meets the eligibility requirements of §§ 240.115, 240.117 and 240.119; and

* * * * *

5. Section 240.205 is amended by revising the section heading:

§ 240.205 Procedures for determining eligibility based on prior safety conduct.

* * * * *

6. Section 240.217 is amended by revising paragraph (c)(1) to read as follows:

§ 240.217 Time limitations for making determinations.

* * * * *

(c) * * *

(1) Certify a person as a qualified locomotive engineer for an interval of more than 36 months; or

* * * * *

7. Section 240.307 is amended by revising paragraph (a) to read as follows:

§ 240.307 Revocation of certification.

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires information which convinces the railroad that the person no longer meets the qualification requirements of this Part, shall revoke the person's certificate as a qualified locomotive engineer.

* * * * *

8. Section 240.407 is revised to read as follows:

§ 240.407 Request for a hearing.

(a) If adversely affected by the Locomotive Engineer Review Board decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 240.409.

(b) To exercise that right, the adversely affected party shall file with the Docket Clerk a written request within 20 days of service of the Board's decision on that party.

(c) The result of a failure to request a hearing within the period provided in paragraph (b) of this section is that the Locomotive Engineer Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, and telephone number of the respondent and the requesting party's designated representative, if any;

(2) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(3) The signature of the requesting party or the requesting party's representative, if any.

(e) Upon receipt of a hearing request complying with paragraph (d) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

9. Section 240.409 is revised to read as follows:

§ 240.409 Hearings.

(a) An administrative hearing for a locomotive engineer qualification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator, including an administrative law judge.

(b) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(c) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that he or she has read the document; that to the best of his or her knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer, when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 240.407(c) of this part and paragraph (u)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought, and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within fourteen (14) days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;

(2) Issue subpoenas as provided for in § 209.7 of part 209 in this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

(p) The petitioner before the Locomotive Engineer Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the ''hearing petitioner.'' The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Locomotive Engineer Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. Between the petitioner before the Locomotive Engineer Review Board and the railroad involved in taking the certification action, the party who is not the hearing petitioner will be a respondent.

(r) FRA will be a mandatory party to the administrative hearing. At the start of each proceeding, FRA will be a respondent.

(s) The record in the proceeding shall be closed at the conclusion of the evidentiary hearing unless the presiding officer allows additional time for the submission of additional evidence. In such instances the record shall be left open for such time as the presiding officer grants for that purpose.

(t) At the close of the record, the presiding officer shall prepare a written decision in the proceeding.

(u) The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each concerning all material issues of fact or law presented on the record;

(2) Shall be served on the hearing petitioner and all other parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

10. Section 240.411 is amended by revising paragraph (a) to read as follows:

§ 240.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 400 Seventh Street SW., Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

* * * * *

11. Appendix A to Part 240 is amended by revising the penalty entries for §§ 240.201, 240.221, 240.305, 240.307, and 240.309 to read as follows:

APPENDIX A TO PART 240.—SCHEDULE OF CIVIL PENALTIES

Section	Violation	Willful violation
* * * * * * *		
240.201—Schedule for implementation:		
(a) Failure to select supervisors by specified date	1,000	2,000
(b) Failure to identify grandfathered engineers	2,000	4,000
(c) Failure to issue certificate to engineer	1,000	2,000
(d) Allowing uncertified person to operate	5,000	10,000
(e–g) Certifying without complying with subpart C	2,500	5,000
(h–i) Failure to issue certificate to engineer	1,000	2,000
* * * * * * *		
240.221–Identification of persons:		
(a–c) Failure to have a record	2,000	4,000
(d) Failure to update a record	2,000	4,000
(e–f) Failure to make a record available	1,000	2,000

APPENDIX A TO PART 240.—SCHEDULE OF CIVIL PENALTIES—Continued

Section	Violation	Willful violation
* * * * * * *		
240.305—Prohibited conduct:		
(a) Unlawful:		
(1) control of speed	2,500	5,000
(2) passing of stop signal	2,500	5,000
(3) occupancy of main track without authority	2,500	5,000
(b) Failure of engineer to:		
(1) carry certificate	1,000	2,000
(2) display certificate when requested	1,000	2,000
(c) Failure of engineer to notify railroad of limitations or railroad requiring engineer to exceed limitations	4,000	8,000
(d) Failure of engineer to notify railroad of denial or revocation	4,000	8,000
* * * * * * *		
240.307—Revocation of certification:		
(a) Failure to withdraw person from service	2,500	5,000
(b) Failure to notify, provide hearing opportunity; or untimely procedures	2,000	4,000
240.309—Oversight responsibility report		
(a) Failure to report or to report on time	500	1,000
(b–f) Incomplete or inaccurate report	2,000	4,000
* * * * * * *		

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Issued in Washington, DC, on September 29, 1995.

Jolene M. Molitoris,

Administrator.

[FR Doc. 95–25183 Filed 10–11–95; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 228

[Docket No. 950823213–5213–01; I.D. 102792B]

RIN 0648–AD25

Incidental Take of Marine Mammals; Bottlenose Dolphins and Spotted Dolphins

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations authorizing and governing the taking of bottlenose and spotted dolphins incidental to the removal of oil and gas drilling and production structures in state waters and on the Outer Continental Shelf (OCS) in the Gulf of Mexico. The incidental taking of small numbers of marine mammals is authorized by the Marine Mammal Protection Act (MMPA), if certain findings are made and regulations are issued that include requirements for monitoring and reporting. These regulations do not authorize the removal of the rigs as such authorization is provided by the Minerals Management Service (MMS) and is not within the jurisdiction of NMFS. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat.

EFFECTIVE DATE: November 13, 1995, through November 13, 2000.

ADDRESSES: Copies of the Environmental Assessment (EA), proposed rule, and application may be obtained by writing to the Chief, Marine Mammal Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910–3282 or by telephoning the contact listed below.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, D.C. 20503.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, Office of Protected Resources, (301) 713–2055.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, if certain findings are made, and regulations are issued. Under the MMPA, the term ''taking'' means to harass, hunt, capture or kill or to attempt to harass, hunt, capture or kill.

Permission may be granted for periods up to 5 years if NMFS finds, after notice and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds and areas of similar significance. The regulations must include requirements pertaining to the monitoring and reporting of such taking.

In 1986, the MMPA and the Endangered Species Act (16 U.S.C. 1531–1543; the ESA) were amended to allow incidental takings of depleted, endangered, or threatened marine mammals. Before the 1986 amendments, section 101(a)(5) applied only to nondepleted marine mammals.

Summary of Request

On October 30, 1989, NMFS received a request from the American Petroleum