

prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

**Regulatory Classification.** This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Executive Order 13132, Federalism.** This rule involves no policies that have federalism implications under Executive Order 13132.

**Executive Order 12988, Civil Justice Reform.** This rule meets the applicable standards of Executive Order 12988.

**Paperwork Reduction Act.** This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

**PART 64—[AMENDED]**

■ 1. The authority citation for part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

**§ 64.6 [Amended]**

■ 2. The tables published under the authority of § 64.6 are amended as follows:

State and location	Community No.	Effective date authorization/cancellation of sale of flood insurance in community	Current effective map date	Date certain Federal assistance no longer available in SFHAs
<b>Region III</b>				
Virginia:				
Farmville, Town of, Prince Edward and Cumberland Counties.	510118	November 9, 1973, Emerg; September 1, 1978, Reg; October 2, 2009, Susp.	Oct. 2, 2009 .....	Oct. 2, 2009.
Prince Edward County, Unincorporated Areas.	510239	April 11, 1974, Emerg; September 1, 1978, Reg; October 2, 2009, Susp.	.....do* .....	do.
<b>Region IV</b>				
North Carolina:				
Brevard, City of, Transylvania County ..	370231	January 17, 1974, Emerg; September 29, 1978, Reg; October 2, 2009, Susp.	.....do .....	do.
Rosman, Town of, Transylvania County	375358	December 30, 1971, Emerg; June 2, 1972, Reg; October 2, 2009, Susp.	.....do .....	do.
Transylvania County, Unincorporated Areas.	370230	January 21, 1974, Emerg; January 2, 1980, Reg; October 2, 2009, Susp.	.....do .....	do.
<b>Region V</b>				
Wisconsin:				
Delavan, City of, Walworth County .....	550463	October 18, 1974, Emerg; September 1, 1983, Reg; October 2, 2009, Susp.	.....do .....	do.
East Troy, Village of, Walworth County	550464	December 12, 1975, Emerg; December 1, 1982, Reg; October 2, 2009, Susp.	.....do .....	do.
Fontana-on-Geneva Lake, Village of, Walworth County.	550592	NA, Emerg; March 23, 2006, Reg; October 2, 2009, Susp.	.....do .....	do.
Mukwonago, Village of, Walworth and Waukesha Counties.	550485	February 18, 1975, Emerg; July 5, 1982, Reg; October 2, 2009, Susp.	.....do .....	do.
Walworth County, Unincorporated Areas .....	550462	June 10, 1975, Emerg; August 15, 1983, Reg; October 2, 2009, Susp.	.....do .....	do.

\*do = Ditto.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Susp.—Suspension.

Dated: September 22, 2009.

**Edward L. Connor,**

*Acting Assistant Administrator, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

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**BILLING CODE 9110-12-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Transit Administration**

**49 CFR Part 665**

[Docket No. FTA-2007-0011]

**RIN 2132-AA95**

**Bus Testing; Phase-In of Brake Performance and Emissions Testing, and Program Updates**

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Final rule.

**SUMMARY:** This final rule amends the Federal Transit Administration's (FTA's) bus testing regulation to incorporate brake performance and emissions tests into FTA's bus testing program to comply with statutory changes. To improve the program, this final rule also republishes the existing regulation to incorporate several updates that will enhance the program's value and respond to changes in the bus manufacturing industry and to bring it into conformity with statutory language.

**DATES:** This rule is effective January 1, 2010.

**FOR FURTHER INFORMATION CONTACT:** For technical information, Marcel Belanger, Bus Testing Program Manager, Office of Research, Demonstration, and Innovation (TRI), (202) 366-0725, [marcel.belanger@dot.gov](mailto:marcel.belanger@dot.gov). For legal information, Richard Wong, Office of the Chief Counsel (TCC), (202) 366-0675, [richard.wong@dot.gov](mailto:richard.wong@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**Background**

On September 30, 2008, the Federal Transit Administration (FTA) published a notice of proposed rulemaking (NPRM) in the **Federal Register** (73 FR 56781) that discussed proposals to incorporate brake performance and emissions tests into FTA's bus testing program as required by 49 U.S.C. Section 5318, as amended by the Safe, Accountable, Flexible, Equitable Transportation Efficiency Act: a Legacy for Users (SAFETEA-LU) (Pub. L. 109-59). These changes required by statute included a brake performance test procedure and an emissions test procedure.

The NPRM also sought comments on a number of other proposed ways to update the regulation to improve the functioning of the program, enhance its value, and clarify possible ambiguities in the existing regulation. These proposed changes, which were not required by statute, but were intended to improve the program, addressed issues related to: (1) The determination of service life category; (2) testing of buses that exceed weight limits when fully loaded; (3) clarification of FTA's "Family of Vehicles" policy; (4) separate reporting of third-party chassis test results; and, (5) the inclusion of an FTA evaluation or recommendation of bus models in bus testing reports.

**Comments Received**

FTA received a total of five comments—one from a major industry trade association consisting of more than 1,500 public and private members, one from a large public transit agency, a third from a manufacturer trade association representing almost 700 companies making motor vehicle components, the fourth from a manufacturer of large heavy-duty transit buses, and the fifth from an engineering consulting firm that provides consulting and test equipment for heavy-duty vehicles and brake systems.

**Section-by-Section Analysis of Specific Comments**

*1. Brake Performance Test Procedure*

FTA proposed that a test bus would be subjected to a series of brake stops

from 20, 30, 40, and 45 mph on a high-friction surface; from 20 mph on a low-friction surface; and up to 45 mph on a split-coefficient surface. The parking brake would be evaluated facing uphill and downhill on a ramp with a 20 percent grade. FTA also sought comments on whether, and, if so, how, the maintainability and noise tests should be modified to capture useful data related to the brake system and whether any such changes should be done within the regulation itself or through non-regulatory testing protocols and procedures.

FTA proposed to incorporate the brake performance test within the existing performance test category, as specified by SAFETEA-LU. The proposed test procedure specified that all brake performance tests would be performed with the bus loaded to gross vehicle weight, for which a definition would be provided in the revised 49 CFR Section 665.5.

**A. Comments Received**

FTA received comments on the proposed braking performance test from all respondents. Most of the comments received pertained to details of the sub-regulatory test procedures that would be used to conduct the braking performance test; for example, recommending that FTA measure brake system temperatures by the installation of thermocouples in the brake linings rather than the proposed use of a non-contacting digital thermometer.

A few comments referred to differences between the draft FTA test procedures and the procedures specified in Federal Motor Vehicle Safety Standard (FMVSS) 121. For example, FTA's proposed test procedure assumes that the brakes would be adequately burnished following completion of the gross-vehicle-weight portion of the structural durability test, while FMVSS 121 specifies a detailed brake burnishing procedure. Another comment noted that some buses may not be able to climb the 20 percent slope parking brake testing hill or may not be able to clear the hill's transition ramps, and questioned what the testing options would be in such situations. This commenter also asked who would be responsible if a bus is damaged on the brake testing slope.

**B. FTA Response**

Since the regulation is only intended to outline the tests that would be performed in general terms, specific details of the sub-regulatory test procedures are not appropriate to address in the regulation itself. Instead, FTA will consider each of the comments

received as we work with the facility operator to finalize the brake testing procedures.

With regard to consistency between FMVSS 121 certification and the bus testing program, FTA reiterates that its bus testing program is not a certification test. Rather, its purpose is to provide data that can facilitate grantees' comparisons of various transit bus models and provide indications of whether the contemplated bus model is suitable for a grantee's intended application. Therefore, it is not necessary for the bus testing program to replicate the test procedures in FMVSS 121. FTA believes that the operation on the test track and occasional operation on roadways between the Altoona Bus Testing Center and the Test Track Facility in State College should be adequate to produce a realistic real-world level of brake burnishing prior to conducting the brake performance tests. However, because this aspect of the test procedure will not be established by regulation, FTA will work with the bus testing facility operator to verify that its proposed burnishing procedure is adequate, or add additional steps to the procedure if that is determined to be necessary.

With regard to the concerns that buses may have difficulty navigating the test slope, the slope was designed to replicate conditions that could be encountered in a transit bus environment, so most if not all buses should be able to negotiate it without difficulty. In rare cases where clearance is inadequate, the operator can likely devise a workaround, perhaps such as filling in the concave transition at the bottom of the slope with temporary ramps or gravel. In the unlikely event that a bus has inadequate torque at the driving wheels to climb the 20 percent slope, then potential customers will likely want to know that limitation. If a bus is unable to navigate the ascent in order to complete the brake test, a bus could be assisted into position using a tow truck.

The operator has existing procedures in place to address damages that may occur to buses at the testing facility. These procedures will apply to any damages that may occur on the brake testing slope.

*2. Emissions Test Procedure*

FTA proposed a draft emissions test procedure based on 40 CFR part 86—"Emissions Regulations for New Otto-Cycle and Diesel Heavy-Duty Engines; Gaseous and Particulate Exhaust Test Procedures" and 40 CFR part 1065—"Engine Testing Procedures," as well as the Society of Automotive Engineers

(SAE) Recommended Practice, SAE J2711.

FTA proposed using an emissions testing laboratory equipped with a chassis dynamometer capable of both absorbing and applying power. FTA proposed measuring the emissions of exhaust constituents regulated by the United States Environmental Protection Agency (EPA) for transit buses, plus carbon dioxide (CO<sub>2</sub>) and methane (CH<sub>4</sub>), as the bus is operated over industry-standard driving cycles specified in the test procedure. FTA proposed that mileage accumulated by a bus while operating on the dynamometer during emissions testing would be counted toward the "other" miles that must be accumulated during durability testing. Under the proposed test procedure, the dynamometer would be set to simulate curb weight plus one-half of the fully seated load for the particular bus being tested. This approach would be consistent with the above-cited industry standard emissions measurement protocols and will facilitate direct comparisons with emissions measurements collected outside the bus testing program. FTA also sought comments on the merits of performing the emissions tests with the chassis dynamometer set to simulate gross vehicle weight, which would generally be expected to represent the "worst case" for emissions, seated load weight, which may result in emissions measurements closer to a typical case (and which would be consistent with the Performance and Fuel Economy tests, which are currently performed at seated load weight), or a different weight. FTA also sought comments on whether, and if so, how, the maintainability test should be modified to capture useful data related to the emissions control system and whether any such changes should be made within the regulation itself or in non-regulatory testing policies and procedures administered by the testing facility. FTA proposed to add the emissions test as a separate, eighth, test category.

#### A. Comments Received

The transit operator and the transit industry association both suggested that FTA test emissions at gross vehicle weight in order to shed light on the "worst case" emissions that might be produced by a bus model. These commenters also recommended that FTA measure emissions at a bus's tailpipe rather than at its engine. The bus manufacturer suggested that FTA's emissions testing procedure should be consistent with other accepted methodologies in order to facilitate

comparisons with other sources of emissions data.

#### B. FTA Response

FTA considered testing emissions at gross vehicle weight, but decided to test buses at curb weight plus one-half of the seated load weight in order to achieve greater consistency with industry-standard methods for emissions testing. FTA initially proposed to, and still intends to, measure bus emissions at the tailpipe exit rather than at the engine exhaust ports. Any confusion regarding the measurement site probably arose from the NPRM's proposed new definition of "Engine-Out Emissions," which will not be used in the final rule, and, therefore, has been removed.

#### 3. Applicability and Phase-In

FTA proposed that the date on which a bus testing contract was signed would determine the applicability of the brake performance and emissions tests. Models whose testing contracts were signed before the effective date of this regulation and that continue to be produced without major changes in any structure or systems would not be required to return to the Bus Testing Center to undergo brake performance and emissions testing. Buses for which full or partial testing contracts are signed on or after the effective date of this regulation would be subject to brake performance and emissions testing (in addition to the other testing requirements).

FTA also sought comments on whether the emissions test should apply to all vehicles subject to FTA's bus testing regulation or whether any classes of buses should be exempted. In addition, we asked for comments on whether the emissions testing program should begin on the effective date of this rule for all bus types subject to testing or whether the emissions test requirement should be gradually phased-in for various classes of bus (e.g., small or large buses), similar to the phase-in process used in the initial start-up of FTA's bus testing program.

#### A. Comments Received

The large transit operator agreed with FTA's proposal that emissions testing should begin on the effective date of the final rule, and any new buses should be required to meet the regulations in effect at the time of manufacture. The bus manufacturer stated that a single-stage bus manufacturer certifying to FMVSS 121 should not be required to undergo additional testing, and adding additional performance tests not consistent with FMVSS 121 could raise suspicions of non-compliance without

adding to safety or reliability. The bus manufacturer also expressed concerns that partial testing evaluations could subject a bus model to an undue number of additional tests, particularly when it may impact bus delivery schedules.

#### B. FTA Response

Because none of the commenters directly responded to FTA's inquiries whether a categorical exemption for certain classes of vehicles and whether a gradual phase-in period was necessary, FTA will proceed with the plan outlined in the NPRM: Every bus model for which a full or partial bus testing contract is signed after the effective date of this final rule will be subject to brake performance and emissions testing, without a phase-in period or exemptions for specific categories of vehicles.

With regard to the suggestion that certification with FMVSS 121 exempt a vehicle from additional brake testing, FTA believes that a simple certification of compliance with FMVSS 121 does not exempt a vehicle from the braking test. Although aware that every vehicle operating on public roads must certify compliance with FMVSS, Congress nevertheless mandated that FTA establish the bus testing program, specifically adding a braking performance test, while giving FTA no statutory authority to exempt vehicles that certified compliance with FMVSS 121 or any other FMVSS requirement. Moreover, FTA's bus testing program consists of actual tests, while FMVSS compliance is met by the signing of a certificate of compliance.

FTA does not believe that the addition of braking performance and emissions testing will unduly delay delivery schedules. Under the existing regulation a bus subject to testing as a new model bus or as a modified model bus must be physically delivered to Altoona and must spend a predictable number of days at the testing facility. The addition of braking and emissions testing would add a maximum of 24 working hours to the time presently required at the test facility. When contrasted to the 60 or more days a heavy-duty model bus would spend at the test facility for a full test, an additional three business days would not significantly delay delivery schedules and perhaps could even be accounted for in a manufacturer's proposed delivery schedule.

#### 4. Partial Testing

Under the current rule, partial testing is permitted when a previously-tested bus model undergoes changes in configuration or components that are

expected to produce significantly different data from that previously obtained at the Bus Testing Facility. These partial testing determinations are made on a case-by-case basis, using criteria set forth in the June 28, 1992, final rule that established partial testing (57 FR 33394). FTA sought comment on changes that could trigger partial testing for the brake performance and emissions tests.

#### A. Comments Received

The only commenter, a large bus manufacturer, did not address FTA's request for substantive comments. This commenter only stated that FTA needed to implement a policy that would provide faster responses to partial testing determinations.

#### B. FTA Response

Without substantive input from commenters, FTA will continue to make requests for partial testing determinations on a case-by-case basis. To provide additional guidance to purchasers, manufacturers, and vendors, FTA has posted its partial testing guidelines on its bus testing Web site. Manufacturers seeking formal letters of determination must wait for FTA to conduct its case-by-case analysis.

#### 5. Reporting Procedures

FTA sought comment on how to better present data collected from the brake performance and emissions tests in the bus testing reports as well as in the bus testing database. FTA also welcomed comments on how to present more effectively the data from any of the eight test categories.

#### A. Comments Received

None of the commenters provided comment on this request.

#### B. FTA Response

FTA will continue using the standard test report procedure, adding braking performance and emissions as additional categories to the test reports. FTA may make changes to the test report format and/or emphasis in the future in order to present bus testing data more clearly and effectively.

### Other Changes

#### 6. Service Life Category

FTA sought comments on whether it should maintain its current requirement of allowing manufacturers to determine the useful life category in which their buses would be tested. In addition, FTA asked for comment on whether it should continue to expect grantees to evaluate the bus testing reports carefully to assess whether the bus will in fact

adequately meet its service life requirements.

FTA also sought comments on alternative policies for determining the service life category in which a particular bus model would be tested, such as (1) redefining the characteristics of buses in each service life category, and if that approach is taken, what those characteristics should be; (2) requiring manufacturers to request an official determination from FTA of a vehicle's service life category; or (3) providing guidance on the standard useful life based on type of construction but allowing manufacturers to test and sell in higher service life categories if they post a "durability assurance" bond or similar instrument.

#### A. Comments Received

All three commenters on this subject supported the retention of the current FTA requirement. The manufacturer of large buses stated that it is the purchaser's responsibility to review the test report and determine whether the vehicle is adequate to meet their needs. The trade association and transit operator also supported this approach and added that manufacturers should provide proof to the operator that the bus will meet the standards of the higher service life category. The transit operator proposed additional language that would provide the customer a "durability assurance bond" or similar instrument that would cover the vehicle's advertised useful standard life.

#### B. FTA Response

Based on the response from commenters, FTA does not believe that altering the current procedures is warranted. Although manufacturers may continue to select the appropriate service life category for testing, FTA believes that well-informed purchasers are the best safeguard—to that point, bus purchasers are advised to seek adequate assurances from the vendor in the form of extended warranties or contractual assurances that the vehicle will meet its advertised service life.

#### 7. Buses That Exceed Weight Limits When Fully Loaded

In the NPRM, FTA made note of the fact that a number of buses tested at the Bus Testing Center have not been tested in their fully loaded condition (*i.e.*, with all seats and standee positions occupied), since doing so would have caused their actual weight to exceed either their gross vehicle weight ratings (GVWR) or a front or rear gross axle weight rating (GAWR).

FTA noted that the test data might not reflect the actual performance of these

buses in real-life service, where operators frequently allow all seats and aisles to be filled without regard to the GVWR or GAWR to avoid leaving passengers behind at a stop. FTA sought comments on the following three approaches for addressing these situations:

1. Require that any tests specified in the test procedures be performed at gross vehicle weight (GVW) on the test track (which is not a public roadway) with all seats and standee positions ballasted, and require any tests specified in the test procedures be performed at seated load weight (SLW) on the test track with all seats ballasted. Although the bus would be overloaded, the test data may be more representative of the conditions the bus will face in actual service. This approach would help to "flag" buses that are not adequately able to withstand the rigors of transit service.

2. Continue the current practice of deleting ballast until the bus is within its GVWR/GAWR, but place a more prominent notice in the bus testing report stating that the bus will exceed its maximum GVWR/GAWR with all passenger positions occupied, and alert readers that the test data may not be representative of the vehicle's actual in-service durability.

3. Decline to test a bus that exceeds its GAWR or GVWR when loaded to full capacity.

#### A. Comments Received

Three commenters—the large industry trade association, the large transit agency, and the large bus manufacturer—supported continuing with the current practice outlined under Option 2, noting its practicability. The transit operator suggested testing a vehicle at its GVW on the test track, regardless of the vehicle's GVWR. The manufacturers' association supported Option 3, proposing that FTA decline to test any vehicle that exceeded its GVWR.

FTA also received unsolicited suggestions from two commenters, recommending that FTA increase the simulated ballast weight from the currently-used 150 pounds per passenger cited in the new definitions of "gross vehicle weight" and "seated load weight" proposed in the NPRM, to 170 pounds per passenger to reflect the increasing average weight of Americans over the last several decades.

#### B. FTA Response

FTA finds that declining to test a vehicle whose GVW exceeds its GVWR is impractical, noting that the entire purposes of the bus testing program is to carry out the legislative mission of

verifying that the bus can withstand the rigors of regular transit service. Similarly, testing a bus up to its GVWR but no higher, despite the inability to embark the equivalent of a full complement of passengers, is unrealistic and contrary to the intent of Congress in establishing the program. Buses frequently fill every available seat during rush-hour, and commonly allow "crush loads" of standees in the aisle.

Therefore, the final rule will require buses to be ballasted with a fully loaded passenger complement of seated and standee passengers during the gross vehicle weight portion and with all seats filled during the seated load weight portion of the testing. If the vehicle exceeds its GVWR, the bus will be tested in that condition only on the operator's non-public testing facilities unless and until the operator receives an exemption to operate the vehicle on public roads. Data on how a bus performs under full load conditions is essential to the purchaser, to support acquisition decisions, development of preventive maintenance schedules, and budgeting for unscheduled maintenance.

The suggestion to increase the average passenger weight is well taken, and currently, the U.S. Department of Transportation is considering this subject in the context of all modes of transportation: air, surface, and water. It is quite possible the Department will seek to establish higher value for average passenger weight. If so, FTA would initiate a new rulemaking to amend Part 665 accordingly. FTA will consult with the Department on this subject in the very near future.

#### 8. Family of Vehicles

FTA sought comments on whether it would be appropriate to expand its existing "Family of Vehicles" policy to the 7-year or higher service life categories. The existing Family of Vehicles policy is limited to buses in the 4-year and 5-year service life categories only, and allows manufacturers that have tested a complete bus built on one third-party chassis to offer closely-related variants (such as different lengths) of that bus body on the same or different (but similar) mass-produced chassis that has been tested at the Bus Testing Center on any similar bus by any bus manufacturer. FTA sought comments on the desirability and ramifications of extending the Family of Vehicles policy to all buses built on third-party chassis

##### A. Comments Received

The large industry trade association opposed the proposal, stating that the 4-

and 5-year buses are used differently than the larger vehicles, and that such a proposal would increase prices without increasing the quality of the vehicles. The large transit agency also recommended that FTA keep its current requirement, noting that the 4- and 5-year buses are not used in standard transit service.

##### B. FTA Response

Given the lack of support among commenters for the proposed expansion of the concept, FTA is retaining its Family of Vehicles policy for 4- and 5-year buses and will not expand it to include buses used in higher service life categories.

#### 9. Separate Reporting of Third-Party Chassis Test Results

Although Section 5318 directs that buses are to be tested as an integrated system, FTA's Family of Vehicles policy described in the previous paragraphs would be easier to implement and understand if the Bus Testing Center were able to produce separate testing reports for third-party chassis. These reports could be prepared by identifying, separating out, and summarizing only the chassis-related data during tests of buses built on third-party chassis. The Bus Testing Center operator expressed concern that in past experience, a significant number of buses are tested on modified third-party chassis, and these modifications, even if performed in strict compliance with the manufacturer's guidelines, would frustrate comparisons of data on third-party chassis. Therefore, FTA sought comments on the feasibility of preparing separate test reports for third-party chassis that are tested in the course of testing complete buses built on those chassis. FTA also sought comments on any practical considerations that may need to be addressed or difficulties that may be presented, as well as the best ways to separate and report data on third-party chassis. Finally, FTA sought comments on how the costs of this additional reporting would be borne.

##### A. Comments Received

FTA received two comments on this proposal—one from the large trade association, another from the large transit agency. The transit agency recommended preparation of separate third-party test reports, with costs to be negotiated between the chassis maker and purchasers. The trade association similarly commented that the costs should be negotiated, but did not address whether separate chassis reports are desirable.

##### B. FTA Response

Because the design, engineering, and manufacturing, and quality control of third-party chassis are the same regardless of the final customer, there may be little differentiation in test data when a particular third-party chassis is used on similar buses built by multiple bus manufacturers. FTA believes that some of the test data obtained from testing a vehicle using a third-party chassis already can be extrapolated to similar buses built on the same chassis through the partial testing process.

The regulation's existing partial testing provisions permit partial testing of previously tested bus models that are subsequently produced with changes in configuration or components, requiring additional testing only where significant changes in data are expected, including changes in chassis components, such as engines, axles, suspensions, and powertrains. Under these partial testing procedures, if a manufacturer of a fully-tested vehicle wants to offer that same vehicle using a different but already-tested third-party chassis, FTA will require only those tests where significant changes in data are expected—expecting that data intrinsic to the chassis can be extrapolated from the previous bus testing report using that chassis. The current process reduces the costs and testing requirements; however, to increase convenience and clarity for bus purchasers, FTA will continue to explore the feasibility of issuing separate test reports for third-party chassis.

#### 10. FTA Evaluation/Recommendation of Bus Models

In response to a number of informal suggestions received in the past that FTA issue "pass/fail" determinations for buses in the bus testing reports, FTA sought comments in the NPRM on whether the bus testing reports should include a "pass/fail" criterion or a "recommended/not-recommended" determination, and if so, how thresholds for such determinations should be established. Alternatively, FTA sought comments on improved ways to enhance the presentation of data in the reports (e.g., by presenting data graphically) so that information for decision-making is more readily apparent and better informs local decision-making.

##### A. Comments Received

FTA received two comments on this subject—one from a bus manufacturer, and one from an equipment manufacturers association. The bus

manufacturer stated that FTA should not make pass/fail determinations, noting that it should be the customer's prerogative and responsibility. The equipment manufacturer association stated that FTA should establish pass/fail criteria, at least for braking criteria.

#### B. FTA Response

FTA found the dearth of comments regarding the establishment of pass/fail criteria disappointing, based on pre-rulemaking comments from the presumed beneficiaries of pass/fail criteria, namely, the transit agencies that purchase the vehicles. FTA sought substantive comments on possible criteria and thresholds. In the absence of comments supporting such an approach, FTA will not proceed with establishing pass/fail criteria at this time. FMVSS 121 already includes pass/fail criteria for braking performance, so a separate criterion in the bus testing reports is not necessary and could be confusing.

#### 11. Scope

Paragraph 665.3 is being amended to bring it into statutory conformity. Section 317 of the Surface Transportation and Uniform Relocation Assistance Act of 1987 initially limited applicability of the bus testing program to recipients of FTA funding under the former sections 3, 9, 16(b)(2), and 18 programs. Paragraph 3023(c) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users amended 49 USC 5318, paragraph (e), to extend the bus testing requirement to all new bus models acquired with funds under 49 USC Chapter 53. The statutory change is not significant, as practically all buses subject to the testing requirements are acquired with funds authorized under one of those four programs.

#### Regulatory Analyses and Notices

All comments received are available for examination in the docket at <http://www.regulations.gov>. All comments have been fully considered in this final rule.

#### A. Statutory/Legal Authority for This Rulemaking

This rulemaking is issued under the authority of 49 U.S.C. 5318, as amended by section 3020 of SAFETEA-LU (Pub. L. 109-59).

#### B. Executive Order 13132: Federalism

Executive Order 13132 requires agencies to assure meaningful and timely input by State and local officials in the development of regulatory policies that may have a substantial, direct 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. This final action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and FTA has determined that this final action will not have sufficient federalism implications to warrant additional consultation. FTA has also determined that this final action will not preempt any State law or State regulation or affect the States' ability to discharge traditional governmental functions.

#### C. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that "significantly or uniquely affect" Indian communities and that impose "substantial and direct compliance costs" on such communities. FTA has analyzed this final rule under Executive Order 13175 and believes that this final action will not have substantial, direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal laws. Therefore, a tribal impact statement is not required. FTA received no comments on the NPRM from Indian tribal governments.

#### D. Regulatory Flexibility Act and Executive Order 13272: Proper Consideration of Small Entities in Agency Rulemaking

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272, FTA must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations under 50,000. FTA certifies that this final rule will not have a significant economic impact on substantial number of small entities.

#### E. Executive Order 12866 and DOT Regulatory Policies and Procedures

FTA has determined that this action is not considered a significant regulatory action under Executive Order 12866 and the Regulatory Policies and Procedures of the Department of Transportation (44 FR 11032). Executive Order 12866 requires agencies to

regulate in the "most cost-effective manner," to make a "reasoned determination that the benefits of the intended regulation justify its costs," and to develop regulations that "impose the least burden on society." Although some of the changes made by this rule are statutorily mandated, FTA anticipates that the direct economic impact of this rulemaking will be minimal and has actively sought to minimize the bus testing burden, including the continued availability of partial testing procedures.

This final rule also clarifies existing regulatory requirements that will not adversely affect, in any material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

#### F. Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This final rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$128.1 million or more in any one year (2 U.S.C. 1532).

#### G. Executive Order 13211: Energy Effects

FTA has analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use dated May 18, 2001, and determined that this is not a significant energy action under that order, because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects is not required.

#### H. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, no person is required to respond to a collection of information unless it displays a valid OMB control number. This final rule does not propose any new information collection burdens.

#### I. Regulation Identifier Number (RIN)

The U.S. DOT assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this

document may be used to cross-reference this action with the Unified Agenda.

#### J. Privacy Act

Anyone is able to search the electronic form for all comments received into any of our dockets by the name of the individual submitting the comments (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may view the U.S. DOT Privacy Act Statement by visiting <http://docketsinfo.dot.gov/> or at 65 FR 19477 (April 11, 2000).

#### List of Subjects in 49 CFR Part 665

Buses, Grant programs—transportation, Motor vehicle safety, Public transportation, Reporting and recordkeeping requirements.

■ For the reasons stated in the preamble, the Federal Transit Administration revises 49 CFR part 665 to read as follows:

### PART 665—BUS TESTING

#### Subpart A—General

- 665.1 Purpose.
- 665.3 Scope.
- 665.5 Definitions.
- 665.7 Grantee certification of compliance.

#### Subpart B—Bus Testing Procedures

- 665.11 Testing requirements.
- 665.13 Test report and manufacturer certification.

#### Subpart C—Operations

- 665.21 Scheduling.
  - 665.23 Fees.
  - 665.25 Transportation of vehicle.
  - 665.27 Procedures during testing.
- Appendix A to Part 665—Tests To Be Performed at the Bus Testing Facility

Authority: 49 U.S.C. 5318 and 49 CFR 1.51.

#### Subpart A—General

##### § 665.1 Purpose.

An applicant for Federal financial assistance under the Federal Transit Act for the purchase or lease of buses with funds obligated by the FTA shall certify to the FTA that any new bus model acquired with such assistance has been tested in accordance with this part. This part contains the information necessary for a recipient to ensure compliance with this provision.

##### § 665.3 Scope.

This part shall apply to an entity receiving Federal financial assistance under 49 U.S.C. Chapter 53.

##### § 665.5 Definitions.

As used in this part—

*Administrator* means the Administrator of the Federal Transit

Administration or the Administrator's designee.

*Automotive* means that the bus is not continuously dependent on external power or guidance for normal operation. Intermittent use of external power or guidance shall not automatically relieve a bus of its automotive character or requirement for bus testing.

*Bus* means a rubber-tired automotive vehicle used for the provision of public transportation service by or for a recipient.

*Bus model* means a bus design or variation of a bus design usually designated by the manufacturer by a specific name and/or model number.

*Bus testing facility* means the bus testing facility established by the Secretary of Transportation, and includes test track facilities operated in connection with the facility.

*Bus testing report*, also *full bus testing report*, means a complete test report for a bus model, documenting the results of performing the complete set of bus tests on that bus model.

*Curb weight* means the weight of the empty, ready-to-operate bus plus driver and fuel.

*Emissions* means the components of the engine tailpipe exhaust that are regulated by the United States Environmental Protection Agency (EPA), plus carbon dioxide (CO<sub>2</sub>) and methane (CH<sub>4</sub>).

*Emissions control system* means the components on a bus whose primary purpose is to minimize regulated emissions before they reach the tailpipe exit. This definition does not include components that contribute to low emissions as a side effect of the manner in which they perform their primary function (e.g., fuel injectors or combustion chambers).

*Final acceptance* means that a recipient has released the FTA-provided funds to a bus manufacturer or dealer in connection with bus procurement.

*Gross weight*, also *gross vehicle weight*, means the curb weight of the bus plus passengers simulated by adding 150 pounds of ballast to each seating position and 150 pounds for each standing position (assumed to be each 1.5 square feet of free floor space).

*Hybrid* means a propulsion system that combines two power sources, at least one of which is capable of capturing, storing, and re-using energy.

*Major change in chassis design* means, for vehicles manufactured on a third-party chassis, a change in frame structure, material or configuration, or a change in chassis suspension type.

*Major change in components* means: (1) For those vehicles that are not manufactured on a third-party chassis, a

change in a vehicle's engine, axle, transmission, suspension, or steering components;

(2) For those that are manufactured on a third-party chassis, a change in the vehicle's chassis from one major design to another.

*Major change in configuration* means a change that is expected to have a significant impact on vehicle handling and stability or structural integrity.

*Modified third-party chassis or van* means a vehicle that is manufactured from an incomplete, partially assembled third-party chassis or van as provided by an OEM to a small bus manufacturer. This includes vehicles whose chassis structure has been modified to include: a tandem or tag axle; a drop or lowered floor; changes to the GVWR from the OEM rating; or other modifications that are not made in strict conformance with the OEM's modifications guidelines.

*New bus model* means a bus model that—

(1) Has not been used in public transportation service in the United States before October 1, 1988; or

(2) Has been used in such service but which after September 30, 1988, is being produced with a major change in configuration or a major change in components.

*Operator* means the operator of the bus testing facility.

*Original equipment manufacturer (OEM)* means the original manufacturer of a chassis or van supplied as a complete or incomplete vehicle to a bus manufacturer.

*Parking brake* means a system that prevents the bus from moving when parked by preventing the wheels from rotating.

*Partial testing* means the performance of only that subset of the complete set of bus tests in which significantly different data would reasonably be expected compared to the data obtained in previous full testing of the baseline bus model at the bus testing facility.

*Partial testing report*, also *partial test report*, means a report documenting, for a previously-tested bus model that is produced with major changes, the results of performing only that subset of the complete set of bus tests in which significantly different data would reasonably be expected as a result of the changes made to the bus from the configuration documented in the original full bus testing report. A partial testing report is not valid unless accompanied by the full bus testing report for the corresponding baseline bus configuration.

*Public transportation service* means the operation of a vehicle that provides

general or special service to the public on a regular and continuing basis.

*Recipient* means an entity that receives funds under 49 U.S.C. Chapter 53, either directly from FTA or through a State administering agency.

*Regenerative braking system* means a system that decelerates a bus by recovering its kinetic energy for on-board storage and subsequent use.

*Retarder* means a system other than the service brakes that slows a bus by dissipating kinetic energy.

*Seated load weight* means the weight of the bus plus driver, fuel, and seated passengers simulated by adding 150 pounds of ballast to each seating position.

*Service brake(s)* means the primary system used by the driver during normal operation to reduce the speed of a moving bus and to allow the driver to bring the bus to a controlled stop and hold it there. Service brakes may be supplemented by retarders or by regenerative braking systems.

*Small bus manufacturer* means a secondary market assembler that acquires a chassis or van from an original equipment manufacturer for subsequent modification or assembly and sale as 5-year/150,000-mile or 4-year/100,000-mile minimum service life vehicle.

*Tailpipe emissions* means the exhaust constituents actually emitted to the atmosphere at the exit of the vehicle tailpipe or corresponding system.

*Third party chassis* means a commercially available chassis whose design, manufacturing, and quality control are performed by an entity independent of the bus manufacturer.

*Unmodified mass-produced van* means a van that is mass-produced, complete and fully assembled as provided by an OEM. This shall include vans with raised roofs, and/or wheelchair lifts, or ramps that are installed by the OEM, or by a party other than the OEM provided that the installation of these components is completed in strict conformance with the OEM modification guidelines.

*Unmodified third-party chassis* means a third-party chassis that either has not been modified, or has been modified in strict conformance with the OEM's modification guidelines.

#### **§ 665.7 Grantee certification of compliance.**

(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the bus testing

facility. The recipient shall receive the appropriate full bus testing report and any applicable partial testing report(s) before final acceptance of the first vehicle by the recipient.

(b) In dealing with a bus manufacturer or dealer, the recipient shall be responsible for determining whether a vehicle to be acquired requires full testing or partial testing or has already satisfied the requirements of this part.

### **Subpart B—Bus Testing Procedures**

#### **§ 665.11 Testing requirements.**

(a) A new bus model to be tested at the bus testing facility shall—

(1) Be a single model;

(2) Meet all applicable Federal Motor Vehicle Safety Standards, as defined by the National Highway Traffic Safety Administration in Part 571 of this title; and

(3) Be substantially fabricated and assembled using the techniques, tooling, and materials that will be used in production of subsequent buses of that model.

(b) If the new bus model has not previously been tested at the bus testing facility, then the new bus model shall undergo the full tests requirements for Maintainability, Reliability, Safety, Performance including braking performance, Structural Integrity, Fuel Economy, Noise, and Emissions;

(c) If the new bus model has not previously been tested at the bus testing facility and is being produced on a third-party chassis that has been previously tested on another bus model at the bus testing facility, then the new bus model may undergo partial testing requirements;

(d) If the new bus model has previously been tested at the bus testing facility, but is subsequently manufactured with a major change in chassis or components, then the new bus model may undergo partial testing.

(e) The following vehicle types shall be tested:

(1) Large-size, heavy-duty transit buses (approximately 35'–40' in length, as well as articulated buses) with a minimum service life of 12 years or 500,000 miles;

(2) Medium-size, heavy-duty transit buses (approximately 30' in length) with a minimum service life of ten years or 350,000 miles;

(3) Medium-size, medium duty transit buses (approximately 30' in length) with a minimum service life of seven years or 200,000 miles;

(4) Medium-size, light duty transit buses (approximately 25'–35' in length) with a minimum service life of five years or 150,000 miles; and

(5) Other light duty vehicles such as small buses and regular and specialized vans with a minimum service life of four years or 100,000 miles.

(f) Tests performed in a higher service life category (*i.e.*, longer service life) need not be repeated when the same bus model is used in lesser service life applications.

(g) The operator of the bus testing facility shall develop a test plan for the testing of vehicles at the facility. The test plan shall follow the guidelines set forth in the appendix to this part.

#### **§ 665.13 Test report and manufacturer certification.**

(a) Upon completion of testing, the operator of the facility shall provide the resulting test report to the entity that submitted the bus for testing.

(b)(1) A manufacturer or dealer of a new bus model or a bus produced with a major change in component or configuration shall provide a copy of the corresponding full bus testing report and any applicable partial testing report(s) to a recipient during the point in the procurement process specified by the recipient, but in all cases before final acceptance of the first bus by the recipient.

(2) A manufacturer who releases a report under paragraph (b)(1) of this section also shall provide notice to the operator of the facility that the report is available to the public.

(c) If a bus model subject to a bus testing report has a change that is not a major change under this Part, the manufacturer or dealer shall advise the recipient during the procurement process and shall include a description of the change and the manufacturer's basis for concluding that it is not a major change.

(d) A bus testing report shall be available publicly once the bus manufacturer makes it available during a recipient's procurement process. The operator of the facility shall have copies of all the publicly available reports available for distribution.

(e) The bus testing report is the only information or documentation that shall be made publicly available in connection with any bus model tested at the bus testing facility.

### **Subpart C—Operations**

#### **§ 665.21 Scheduling.**

(a) To schedule a bus for testing, a manufacturer shall contact the operator of FTA's bus testing program. Contact information and procedures are available on the operator's bus testing Web site, <http://www.altoonabustest.com>.



(b) Upon contacting the operator, the operator shall provide the manufacturer with the following:

- (1) A draft contract for the testing;
- (2) A fee schedule; and
- (3) The draft test procedures that will be conducted on the vehicle.

(c) The operator shall provide final test procedures to be conducted on the vehicle at the time of contract execution.

(d) The operator shall process vehicles for testing in the order in which the contracts are signed.

#### **§ 665.23 Fees.**

(a) The operator shall charge fees in accordance with a schedule approved by FTA, which shall include prorated fees for partial testing.

(b) Fees shall be prorated for a vehicle withdrawn from the bus testing facility before the completion of testing.

#### **§ 665.25 Transportation of vehicle.**

A manufacturer shall be responsible for transporting its vehicle to and from the bus testing facility at the beginning and completion of the testing at the manufacturer's own risk and expense.

#### **§ 665.27 Procedures during testing.**

(a) The operator shall perform all maintenance and repairs on the test vehicle, consistent with the manufacturer's specifications, unless the operator determines that the nature of the maintenance or repair is best performed by the manufacturer under the operator's supervision.

(b) The manufacturer shall be permitted to observe all tests. The manufacturer shall not provide maintenance or service unless requested to do so by the operator.

### **Appendix A to Part 665—Tests To Be Performed at the Bus Testing Facility**

The eight tests to be performed on each vehicle are required by SAFETEA-LU and are based in part on tests described in the FTA report "First Article Transit Bus Test Plan," which is mentioned in the legislative history of section 317 of STURAA. When appropriate, Society of Automotive Engineers (SAE) test procedures and other procedures accepted by the transit industry will be used. The eight tests are described in general terms in the following paragraphs.

#### **1. Maintainability**

The maintainability test should include bus servicing, preventive maintenance, inspection, and repair. It also should include the removal and reinstallation of the engine and drive train components that would be expected to require replacement during the bus's normal life cycle. Much of the maintainability data should be obtained during the bus durability test at the test track. Up to twenty-five percent of the bus life should be simulated and servicing,

preventive maintenance, and repair actions should be recorded and reported. These actions should be performed by test facility staff, although manufacturers should be allowed to maintain a representative on site during the testing. Test facility staff may require a manufacturer to provide vehicle servicing or repair, under the supervision of the facility staff. Because the operator will not become familiar with the detailed design of all new bus models that are tested, tests to determine the time and skill required to remove and reinstall an engine, a transmission, or other major propulsion system components may require advice from the bus manufacturer. All routine and corrective maintenance should be carried out by the test operator in accordance with the manufacturer's specifications.

The maintainability test report should include the frequency, personnel hours, and replacement parts or supplies required for each action during the test. The accessibility of selected components and other observations that could be important to a bus user should be included in the report.

#### **2. Reliability**

Reliability should not be a separate test, but should be addressed by recording all bus failures and breakdowns during testing. It is recognized that with one test bus it is not feasible to conduct statistical reliability tests. The detected bus failures, repair time, and the actions required to return the bus to operation should be recorded in the report.

#### **3. Safety**

The safety test should consist of a handling and stability test. The handling and stability test should be an obstacle avoidance or double-lane change test performed at the test track. Bus speed should be held constant throughout a given test run. Individual test runs should be made at increasing speeds up to a specified maximum or until the bus can no longer be operated safely over the course, whichever speed is lower. Both left- and right-hand lane changes should be tested.

#### **4. Performance**

The performance test should be performed on the test track and should measure acceleration, maximum speed attained, gradeability, and braking. The bus should be accelerated at full throttle from a full stop to maximum safe speed on the track. The gradeability capabilities should be measured when starting from a full stop on a steep grade, and supplemented by calculating gradeability based on the acceleration data. The functionality and performance of the service, regenerative (if applicable), and parking brake systems should be evaluated at the test track. The test bus should be subjected to a series of brake stops from specified speeds on high, low, and split-friction surfaces. The parking brake should be evaluated with the bus parked facing both up and down a steep grade.

#### **5. Structural Integrity**

Two complementary structural integrity tests should be performed. Structural strength and distortion tests should be performed at the Bus Testing Center, and the

structural durability test should be performed at the test track.

#### *a. Structural Strength and Distortion Tests*

(1) A shakedown of the bus structure should be conducted by loading and unloading the bus with a distributed load equal to 2.5 times the load applied for the gross weight portions of testing. The bus should then be unloaded and inspected for any permanent deformation on the floor or coach structure. This test should be repeated a second time, and should be repeated up to one more time if the permanent deflections vary significantly between the first and second tests.

(2) The bus should be loaded to gross vehicle weight, with one wheel on top of a curb and then in a pothole. This test should be repeated for all four wheels. The test verifies: normal operation of the steering mechanism; and operability of all passenger doors, passenger escape mechanisms, windows, and service doors. A water leak test should be conducted in each suspension travel condition.

(3) Using a load-equalizing towing sling, a static tension load equal to 1.2 times the curb weight should be applied to the bus towing fixtures (front and rear). The load should be removed and the two eyes and adjoining structure inspected for damages or permanent deformations.

(4) The bus should be towed at curb weight with a heavy wrecker truck for several miles and then inspected for structural damage or permanent deformation.

(5) With the bus at curb weight probable damages and clearance issues due to tire deflating and jacking should be assessed.

(6) With the bus at curb weight possible damages or deformation associated with lifting the bus on a two post hoist system or supporting it on jack stands should be assessed.

#### *b. Structural Durability*

The structural durability test should be performed on the durability course at the test track, simulating twenty-five percent of the vehicle's normal service life. The bus structure should be inspected regularly during the test, and the mileage and identification of any structural anomalies and failures should be reported in the reliability test.

#### **6. Fuel Economy**

The fuel economy test should be conducted using duty cycles that simulate transit service. This test should measure the fuel economy of the bus in miles per gallon or other energy-equivalent units.

The fuel economy test should be designed only to enable FTA recipients to compare the relative fuel economy of buses operating at a consistent loading condition on the same set of typical transit driving cycles. The results of this test are not directly comparable to fuel economy estimates by other agencies, such as the U.S. Environmental Protection Agency (EPA) or for other purposes.

#### **7. Noise**

The noise test should measure interior noise and vibration while the bus is idling (or in a comparable operating mode) and driving,

and also should measure the transmission of exterior noise to the interior while the bus is not running. The exterior noise should be measured as the bus is operated past a stationary measurement instrument.

#### 8. Emissions

The emissions test should measure tailpipe emissions of those exhaust constituents regulated by the United States Environmental Protection Agency (EPA) for transit bus emissions, plus carbon dioxide (CO<sub>2</sub>) and methane (CH<sub>4</sub>), as the bus is operated over specified driving cycles. The emissions test should be conducted using an emissions testing laboratory equipped with a chassis dynamometer capable of both absorbing and applying power.

The emissions test is not a certification test, and is designed only to enable FTA recipients to compare the relative emissions of buses operating on the same set of typical transit driving cycles. The results of this test are not directly comparable to emissions measurements obtained by other agencies, such as the EPA, which are used for other purposes.

Peter M. Rogoff,  
Administrator.

[FR Doc. E9-23818 Filed 10-2-09; 8:45 am]

BILLING CODE 4910-57-P

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 0909101271-91272-01]

RIN 0648-AY23

#### Fisheries of the Northeastern United States; Black Sea Bass Recreational Fishery; Emergency Rule

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

**ACTION:** Emergency rule; emergency action; request for comments.

**SUMMARY:** NMFS is implementing, through this emergency rule, a closure of the recreational black sea bass fishery in the Federal waters of the Exclusive Economic Zone (EEZ) from 3 to 200 nautical miles offshore, north of Cape Hatteras, NC. This action is necessary because the best available information for black sea bass recreational landings indicates that the 2009 recreational harvest limit established for the black sea bass fishery is projected to have been exceeded. NMFS is effecting this closure to mitigate the magnitude of the recreational overage because the established mortality objective for 2009 has been exceeded.

**DATES:** Effective October 5, 2009.

**ADDRESSES:** You may submit comments, identified by RIN 0648-AY23, by any one of the following methods:

- **Electronic submissions:** Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

- **Mail and hand delivery:** Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on 2009 Black Sea Bass Recreational EEZ Closure."

- **Fax:** (978) 281-9135. Send the fax to the attention of the Sustainable Fisheries Division. Include "Comments on 2009 Black Sea Bass Recreational EEZ Closure" prominently on the fax.

**Instructions:** All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:**

Michael Ruccio, Fishery Policy Analyst, (978) 281-9104.

**SUPPLEMENTARY INFORMATION:** A final rule to establish the recreational harvest limits for 2009 for the summer flounder, scup, and black sea bass fisheries was published in the *Federal Register* on January 2, 2009 (74 FR 29). The black sea bass recreational harvest limit for 2009 is 1.14 million lb (517 mt). The 2009 recreational management measures for Federal waters are a 12.5-inch (31.75-cm) minimum size, a 25-fish possession limit, and an open season of January 1 through December 31. Marine Recreational Fisheries Statistics Survey (MRFSS) data through Wave 3 (January-June) indicate that 1,018,878 lb (462 mt) have been landed. Due to time constraints, this amount has not been stratified to exclude southern stock landings that occur south of Cape Hatteras, NC. The total North Carolina landings through Wave 3 are 71,059 lb (32 mt). Therefore, the landings through Wave 3 are at least 947,819 lb (430 mt). This means that between 83 and 89 percent of the 2009 recreational harvest limit had been taken by the end of June. Data for Wave 4 (July-August) are not yet available; however, an average of 27

percent of the annual landings has occurred during Wave 4 in the years 2005-2008. On average, an additional 24 percent of landings have occurred during Wave 5 (September-October) and 4 percent during Wave 6 (November-December) for the same time period. Using these proportions of landings by wave (*i.e.*, Waves 1-3 = 45 percent of annual landings) and applying the information to the actual landings data available through Wave 3 for 2009 would result in approximately 611,000 lb (277 mt) being landed through the end of August (end of Wave 4), with an additional 634,000 lb (288 mt) expected to be landed before the end of the year if the fishery remains open.

Using MRFSS data in a variety of projection scenarios, NMFS, along with independent MRFSS queries made by staff of the Atlantic States Marine Fisheries Commission (Commission) and Mid-Atlantic Fishery Management Council (Council) have concluded that the 2009 recreational harvest limit for black sea bass has been exceeded.

Multiple projections utilizing the actual 2009 MRFSS data through Wave 3 and projected landings for the remaining Waves 4-6 have indicated that the potential range of total 2009 landings is from 2.1 to 3.7 million lb (953 to 1,678 mt). This would exceed the 2009 recreational harvest limit by 84 to 225 percent, respectively, if landings are left unchecked until the regulatory closure date of December 31, 2009.

Regardless of the variability in the projection methods utilized, wherein average fish weight and multiple ranges of prior years are included to inform average landings in Waves 4-6 were modified in the different treatments, a substantial portion of the black sea bass recreational fishery clearly occurs during the months of July-October (MRFSS Waves 4 and 5). On average, Waves 4-6 have produced 55 percent of the total coastwide black sea bass landings in the years 2005-2008. Wave 4 MRFSS information for 2009 will not be available until mid-October. However, the best information currently available indicates that the 2009 recreational harvest level has been exceeded and that continued operation of the fishery will result in additional landings above the established harvest level. Even after a closure of the EEZ occurs, additional landings above the established recreational harvest level will occur in state waters, unless all states implement closures of their state-water recreational black sea bass fisheries.

The Commission's Black Sea Bass Management Board (Board) convened on September 8, 2009, to discuss