phone (202) 564–1629 or by sending an e-mail to *smith.lameka@epa.gov.* For additional information about the Lead and Copper Rule, please visit: *http://water.epa.gov/lawsregs/rulesregs/sdwa/lcr/index.cfm.* For additional information about the drinking water contaminant candidate list and the regulatory determinations process, please visit: *http://water.epa.gov/scitech/drinkingwater/dws/ccl/index.cfm.* For additional information about perchlorate, please visit: *http://water.epa.gov/drink/contaminants/unregulated/perchlorate.cfm.*

For additional information about carcinogenic VOCs, please visit the Drinking Water Strategy homepage: *http://water.epa.gov/lawsregs/rulesregs/sdwa/dwstrategy/index.cfm.*

SUPPLEMENTARY INFORMATION:

Registration: Individuals planning to attend in person or by teleconference must register for the meeting by contacting Junie Percy, of IntelliTech at (937) 427–4148 ext. 210 or by sending an e-mail to *junie.percy@itsysteminc.com* no later than Friday, February 28, 2011. Additional information pertaining to the meeting will be provided upon confirmation of registration. There is no charge for attending this public meeting, but seats and phone lines are limited, so register as soon as possible.

Special Accommodations: For information on access or request for special accommodations for individuals with disabilities, please contact Lameka Smith, Office of Ground Water and Drinking Water, U.S. Environmental Protection Agency; by telephone (202) 564–1629 or by sending an e-mail to *smith.lameka@epa.gov.* Please allow at least five business days prior to the meeting to allow time to process your request.

Dated: February 10, 2011.

Cynthia C. Dougherty,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 2011–3383 Filed 2–14–11; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Office of the Secretary

49 CFR Part 33

[Docket No. OST 2010–0298]

RIN 2105–AD83

Prioritization and Allocation Authority Exercised by the Secretary of Transportation Under the Defense Production Act

AGENCY: Office of the Secretary of Transportation (OST), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The Department of Transportation's Office of the Secretary (OST) is initiating this proposed rulemaking to clarify the priorities and allocation authorities exercised by the Secretary of Transportation (Secretary) under title 1 of the Defense Production Act of 1950 (Defense Production Act), and to set forth the administrative procedures by which the Secretary will exercise this authority. This proposed rule complies with the requirement in the Defense Production Act Reauthorization of 2009 (Pub. L. 111–67) to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and nonemergency conditions, and is part of a multi-agency effort that forms the Federal Priorities and Allocations System.

DATES: *Comment Closing Date:* Comments must be received by March 17, 2011.

ADDRESSES: You may submit comments (identified by the agency name and DOT Docket ID Number OST–2010–0298) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001.
- *Hand Delivery or Courier:* West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: You must include the agency name (Office of the Secretary, DOT) and Docket number (OST–2010–0298) for this notice at the beginning of your comments. You should submit two copies of your comments if you submit them by mail or courier. Note that all comments received will be posted without change to *http://www.regulations.gov* including any personal information provided and will be available to internet users. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit *http://DocketsInfo.dot.gov.*

Docket: For Internet access to the docket to read background documents and comments received, go to *http://www.regulations.gov.* Background documents and comments received may also be viewed at the U.S. Department of Transportation, 1200 New Jersey Ave., SE., Docket Operations, M–30, West Building Ground Floor, Room W12–140, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Donna L. O'Berry, Office of the General Counsel, Department of Transportation, 1200 New Jersey Avenue, SE., Room W96–317, Washington, DC 20590; telephone: (202) 366–6136; e-mail: *donna.o'berry@dot.gov*; or Lloyd E. Milburn, Office of Intelligence, Security and Emergency Response, Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone: (202) 366–4397; e-mail: *lloyd.milburn@dot.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

The Defense Production Act of 1950 (Defense Production Act) (50 U.S.C. App. 2061 *et seq.*) was enacted during the Korean War to ensure the availability of resources to meet national security needs. The Defense Production Act provides a number of important authorities to expedite and expand the supply of critical resources from the U.S. industrial base to support the national defense. While Defense Production Act provisions initially focused on Department of Defense (DoD) acquisition needs, several significant changes to the Defense Production Act definition of national defense have been added over time to expand the definition from military, energy, and space activities, to include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) (42 U.S.C. 5121 *et seq.*) and the protection and restoration of critical infrastructure.

Section 101(a) of title I of the Defense Production Act (50 U.S.C. App. 2071) authorizes the President:

(1) To require that performance under contracts or orders (other than contracts of employment) which he deems necessary or appropriate to promote the national defense shall take priority over performance under any other contract or order, and, for the purpose of assuring such priority, to require acceptance and performance of such contracts or orders in preference to other contracts or orders by any person he finds to be capable of their performance, and (2) to allocate materials, services, and facilities in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate to promote the national defense.

Executive Order 12919, National Defense Industrial Resources Preparedness (June 3, 1994), as amended, delegates the President's authority under section 101 of the Defense Production Act to the heads of several departments and agencies. The President has delegated this authority to the Secretary of Transportation with respect to all forms of civil transportation.[1] While the Department of Transportation (DOT) is seeking comments on all aspects of the rulemaking, we are particularly interested in comments on the scope and applicability of the definition of civil transportation.

Section 202 of Executive Order 12919 provides that this delegated authority may only be used to support programs that have been determined in writing as necessary or appropriate to promote the national defense by the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space and directly related activities; the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; or the Secretary of Homeland Security with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

Executive Order 12656, Assignment of Emergency Preparedness Responsibilities, as amended, assigns Federal departments and agencies responsibilities for national security emergency preparedness. The Secretary of Transportation is assigned lead responsibility for, among other things,

(1) Developing plans to promulgate and manage overall national policies, programs, procedures, and systems to meet essential civil and military transportation needs in national security emergencies; (2) preparing to provide direction to all modes of civil transportation in national security emergencies, including air, surface, water, pipelines, and public storage and warehousing, to the extent such responsibility is vested in the Secretary for: (a) Implementation of priorities for all transportation resource requirements for service, equipment, facilities, and systems; and (b) allocation of transportation resource capacity; and (3) emergency management and control of civil transportation resources and systems, including privately owned automobiles, urban mass transit, intermodal transportation systems, the National Railroad Passenger Corporation and the St. Lawrence Seaway Development Corporation.

This proposed rule would set forth the policies and procedures by which the Secretary would carry out certain authorities and responsibilities assigned under Executive Order 12656.

The Defense Production Act Reauthorization of 2009 (Pub. L. 111–67, September 30, 2009) requires each Federal agency with delegated authority under section 101 of the Defense Production Act to issue final rules establishing standards and procedures by which the priorities and allocations authority is used to promote the national defense, under both emergency and non-emergency conditions. Congress further directed that, to the extent practicable, the Federal agencies should work together to develop a consistent and unified Federal priorities and allocations system.

In order to meet this mandate, DOT has worked in conjunction with the Departments of Agriculture, Commerce, Defense, Energy, Health and Human Services, and Homeland Security to develop common provisions that can be used by each Department in its own regulation. Common provisions among the Departments would provide consistency and uniformity for how the Federal priorities and allocations are applied. However, each Department would supplement in its own regulation, as necessary, the common provisions in order to provide additional standards and procedures unique to its resource area. The six regulations to be promulgated by each Department with delegated Defense Production Act title I authority would be commonly referred to as the Federal Priorities and Allocations System (FPAS) of rules.

DOT's proposed regulation to form part of the FPAS would be known as the Transportation Priorities and Allocations System (TPAS).[2] Although DOT has developed procedures for implementing this authority through Departmental orders and other internal documents and protocols, DOT now proposes to establish a regulatory framework through TPAS to implement these authorities through this rulemaking. While TPAS adopts the common standards established under the FPAS, it would also include requirements that are specific to civil transportation. Transportation services covered under TPAS would include the movement of persons and property by all modes of civil transportation in commerce and related public storage and warehousing, ports, services, equipment and facilities.

DOT's Maritime Administration (MARAD) currently has regulations in 46 CFR that are based on Defense Production Act section 101 authority and is currently reviewing these regulations to determine if any modifications are necessary to bring them into conformance with TPAS.

Generally speaking, the transportation sector is very robust and even in emergencies DOT expects that the normal interactions between civilian transportation providers and those using their services will be maintained or that it will be possible to address any disruptions that may occur without the need for DOT to employ its priorities and allocations authority. Although DOT is developing a system to be used in emergency and non-emergency situations, DOT anticipates that only an extreme crisis would trigger the need to use DOT's authorities under this proposed rule. DOT has conducted response activities to multiple crises over the last decade and at no time

[1] Section 201 of Executive Order 12919 also delegates Defense Production Act section 101 authority to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Defense with respect to water resources; and

(5) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

[2] The other parts that make up FPAS are:

(1) Agricultural Priorities and Allocations System promulgated by the Department of Agriculture;

(2) Defense Priorities and Allocations System promulgated by the Department of Commerce;

(3) Energy Priorities and Allocations System promulgated by the Department of Energy;

(4) Health Resources Priorities and Allocations System promulgated by the Department of Health and Human Service; and

(5) Water Resources Priorities and Allocations System promulgated by the Department of Defense.

during the most severe situation was DOT required to use its delegated Defense Production Act priority or allocation authority to marshal adequate transportation resources to complete its mission. Instead, there was sufficient transportation capacity available through normal interactions or alternative arrangements between transportation service providers and end users to meet the demand or the disruption was addressed through other means.

II. Section-by-Section Analysis

Subpart A—General

Section 33.1 Purpose of this part. This section explains that the purpose of this rule would be to provide guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to civil transportation, in accordance with the delegation of authority provided in section 201 of Executive Order 12919. This section also lists other agency regulations that, along with this regulation, would form the Federal Priorities and Allocations System.

Section 33.2 Priorities and allocations authority. This section would summarize the delegations of priorities and allocations authority in section 201 of Executive Order 12919. This section would also explain that these delegated authorities may only be used to support programs that have been determined in writing as necessary or appropriate to promote the national defense by the Secretaries of Defense, Energy, or Homeland Security in their respective areas of jurisdiction, as specified in section 202 of Executive Order 12919.

Section 33.3 Program eligibility. This proposed section lists the categories of programs eligible for priorities and allocations support, in accordance with the definition of "national defense" in section 702 of the Defense Production Act (50 U.S.C. App. § 2152).

Subpart B—Definitions

Section 33.20 Definitions. This section would contain definitions used in this part. Some definitions are drawn from other sources, as follows:

- Section 702 of the Defense Production Act (50 U.S.C. App. § 2152)—"critical infrastructure," "facilities," "homeland security," "materials," "national defense," "person," and "services."
- Section 901 of Executive Order 12919—"civil transportation," "energy," "farm equipment," "fertilizer," "food resources," "food resource facilities," "health resources," and "water resources."
- The current Defense Priorities and Allocations System (DPAS) regulation—"allotment" (with technical modifications), "approved program" (with technical modifications), "construction," "delegate agency," "directive," "item," "maintenance and repair and operating supplies" or "MRO," "official action" (with technical modifications), "rated order," and "set-aside" (with technical modifications).
- Section 602 of the Stafford Act (42 U.S.C. 5195a)—"emergency preparedness" and "hazard."
- Section 18.3 of 49 Code of Federal Regulations—"local government" and "state."

The definitions of "allocation," "allocation authority," and "allocation order" are based on language in section 101 of the Defense Production Act that describes the allocation authority of the President.

"Defense Production Act" means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*).

"Planning order" defines an administrative tool used by DOT's Maritime Administration.

"Resource agency" refers to one of the six Federal departments that has been delegated Defense Production Act priorities and allocations authority under section 201 of Executive Order 12919.

"Secretary" refers to the Secretary of Transportation.

"Stafford Act" refers to title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195–5197g).

Subpart C—Placement of Rated Orders

Section 33.30 Delegation of authority. This section proposes to describe the delegation of priorities and allocations authority from the President to the Secretary of Transportation for all forms of civil transportation.

DOT anticipates receiving a delegation of authority from the Department of Commerce to enable DOT to place priority ratings for items and materials necessary for civil transportation resources that fall under the Department of Commerce's jurisdiction. For example, such "flow down" items might include brakes, tires, and engine parts necessary for motor coaches to operate under a priority order for the provision of civil transportation. In instances where DOT is placing such a "flow down" priority rating under authority delegated from the Department of Commerce, the time period for acceptance and rejection of the rated order set forth in TPAS applies, consistent with relevant sections of the Department of Commerce's regulations. Transportation service providers should work with their parts and component providers to ensure they are aware that they may be asked to provide necessary parts or components on an expedited basis.

Section 33.31 Priority ratings. This section would explain the following: "DO" and "DX" rating symbols; program identification symbols; order of precedence for directives and ratings; and priority ratings that consist of a rating symbol and a program identification symbol.

Generally speaking, most contracts or orders for transportation services would be unrated. However, DOT may authorize priority rating authority if necessary to support a program that has been determined as necessary or appropriate to promote the national defense. A "DO" rating authorization may be authorized if the service or item is in critical or urgent need. For example, in 1990, DOT's Federal Aviation Administration was granted "DO" rating authority by DoD for specified procurements to support Civil Reserve Air Fleet use in Operation Desert Shield. In 2002, the Transportation Security Administration, which was then part of DOT, was granted "DO" rating authorization for contracts to support the acquisition of Explosive Detection Systems machines. Finally, in 2005, DOT sponsored a priority rating request by a railroad operator to support the emergency delivery of generators and transfer switches to replace those destroyed by Hurricane Katrina. The Department of Commerce granted the company "DO" rating authority. A "DO" rated contract or order takes precedence over unrated contracts or orders.

A "DX" rating would be reserved for those services or items that are determined to support programs that are of the highest national defense urgency based on the requesting entity's mission objectives. A "DX" rating would take precedence over a "DO" rating. The Secretary of Transportation must approve all requests for a "DX" rating pertaining to civil transportation resources.

Program Identification Symbols (PIS) would be used to identify approved programs, meaning a program that has been determined by the Secretaries of DoD, DHS, or DOE, as appropriate, as necessary to promote the national defense. DOT currently has no approved programs, but anticipates working with Commerce, DHS, DoD or DOE, as appropriate, in the near future to

develop approved programs. The proposed PIS for DOT-approved programs would contain the letter "T" followed by a letter and a number; for example, T–L1. All approved programs would have equal status. The PIS would be combined with the appropriate priority rating authority, either DX or DO, to form the priority rating, for example DO–T–L1 or DX–T–L1. DOT is particularly interested in comments on its proposed PIS letter and number combination.

Section 33.32 Elements of a rated order. This section proposes to describe the four elements that must be included in a contract or order to make it a "rated order," in accordance with the standards and procedures provided in this part. The four elements are: (1) A priority rating; (2) specific delivery date(s) for materials or services covered in the rated order; (3) the signature of an individual authorized to place the rated order; and (4) a statement describing what is required of the rated order recipient, in accordance with procedures provided in this part.

This section also would include a provision for an additional statement to be included in a rated order involving emergency preparedness, which would require quicker action by the recipient to accept or reject the order. The justification for the expedited timeframes is explained below in the § 33.33 discussion.

Section 33.33 Acceptance and rejection of rated orders. This section would describe mandatory and optional conditions for acceptance or rejection of rated orders, as well as customer notification timeframes pertaining to acceptance or rejection. In general, a person would be required to accept a rated order if the person normally supplies the materials or services covered by the rated order and must do so regardless of any other orders on hand. Persons would be prohibited from charging higher prices, imposing different terms, or any other discriminatory practices for the rated order that are different from a comparable unrated order.

A person would be required to reject a rated order if unable to fill the order by the specified delivery date(s) or if the order would interfere with delivery under another rated order with a comparable or higher priority rating. In addition, a person would be required to reject a rated order if the person is prohibited by law from meeting the terms of the order; for example, the provider of the services contemplated in the order does not have current operating authority to perform the service. A person would have the option of rejecting a rated order if any one of a number of other conditions set forth in the regulation exists.

Under non-emergency conditions, the recipient of a rated order would be required to accept or reject the rated order within fifteen calendar days for a "DO"-rated order or ten working days for a "DX"-rated order. (*See* § 33.33(d)) DOT is proposing calendar days instead of working days in order to provide greater specificity for deadlines. However, DOT is interested in comments on whether the use of calendar days could lead to any unintended consequences for recipients of a rated order.

While the deadlines discussed above would be appropriate for non-emergency circumstances, they are too long for emergency conditions when quick procurement actions may be needed to help save lives, protect property, or restore services. Transportation services are unique in that they are often the first services needed to move people out of harm's way and to move rescue and response personnel and supplies into a disaster area; thus, transportation services often must be marshaled on very short notice. DOT proposes in this rule that orders placed for the purpose of emergency preparedness must be accepted or rejected within 6 hours from receipt of the order if the order is issued in response to a hazard that has occurred and within 12 hours from receipt of the order if the order is issued to prepare for an imminent hazard.

Prior to 2008, DOT was the lead Federal agency responsible for providing and managing emergency transportation services, including those necessary for mass evacuations.[3] Our experiences while carrying out this mission, which included managing the massive transportation needs for the evacuation of persons and the movement of supplies, equipment and teams in response to Hurricanes Katrina and Rita, confirm that transportation providers can respond within these expedited timeframes. Specifically, the contract that DOT had in place for transportation services required the contractor to acknowledge an order for service within one hour of receiving the order and to make transportation equipment available at the shipment place of origin to begin moving cargo and passengers within four hours from receipt of the order for service.[4]

In this proposed provision, DOT would only require acceptance or rejection of a rated order within an expedited timeframe and not actual fulfillment of the order within that timeframe. The expedited response periods proposed in this regulation are necessary in order for DOT to rapidly identify and obtain sufficient transportation resources to meet emergency response needs.

DOT is mindful, however, that some circumstances may necessitate closer coordination between DOT and the potential recipient of a rated order. For example, if a rated order is placed in preparation for an imminent hazard, such as a hurricane that is projected to make landfall in 13 hours, DOT obviously would not wish to learn at the end of the 12-hour window that the proposed supplier is unable to accept the rated order. In these situations, DOT would work closely with industry to identify and resolve any potential issues in order to meet the transportation requirements.

Not all regulations promulgated under FPAS contain such expedited notification requirements because those resources normally are not required immediately for emergency response as are transportation resources. However, for any orders issued under TPAS that "flow down" from the prime contractor to a subcontracted supplier of a necessary service, component, or part, the requirements of TPAS would apply to all subcontractors in the procurement or distribution chain. Therefore, transportation service providers should work with their suppliers to ensure they are aware that they may be asked to provide necessary services, parts, or components on an expedited basis.

Section 33.34 Preferential scheduling. This section would describe: (1) When a recipient of a rated order must modify production or delivery schedules to satisfy the delivery requirements of a rated order; (2) the order of precedence for rated, unrated, and conflicting orders; and (3)

[3] In 2007 DOT and DHS entered into a Memorandum of Understanding transferring the responsibility for evacuations and commodity and equipment movements to the Federal Emergency Management Agency (FEMA). New authority given to FEMA in the Post-Katrina Emergency Management Reform Act of 2006 necessitated redefining DOT's role for providing emergency transportation services and for designating the Federal lead for planning, coordinating and conducting evacuations of the general population.

[4] DOT's contract with Landstar Express America, Inc. contained the following requirements for Rapid Response Capability:

Within one (1) hour of receiving the initial Order for Service (OFS) from the Contracting Officer, the Contractor (Landstar) shall acknowledge receipt of the OFS by electronic commerce or fax.

Within four (4) hours of receipt of an OFS, the Contractor shall make transportation equipment available at the shipment place of origin to commence movement of cargo and passengers, using air and surface modes of transportation. The Contractor shall meet all pickup and transit deadlines.

the use of inventoried production items when needed to fill a rated order.

Section 33.35 Extension of priority ratings. This section would require that the recipient of a rated order must, in turn, use rated orders with suppliers to obtain items or services needed to fill a rated order. The requirement would apply to all contractors and subcontractors throughout the procurement chain necessary to fill the rated order.

Section 33.36 Changes or cancellations of priority ratings and rated orders. This section would describe the procedures for changing or cancelling a priority rating or the provisions of a rated order. In addition, this section would list types of modifications that do not constitute a new rated order.

Section 33.37 Use of rated orders. This section would describe the process and procedures for when the recipient of a rated order: (1) Must use rated orders to obtain items and services needed to fulfill the rated order; (2) may use a rated order to replace inventoried items that were used to fulfill the order; (3) may combine orders with different priority ratings or with unrated orders; and (4) may forgo use of rated orders for orders below certain thresholds.

Section 33.38 Limitations on placing rated orders. This section would describe specific circumstances when the use of rated orders would be prohibited. This section also would prohibit the use of TPAS to obtain rated orders for a resource under the resource jurisdiction of other agencies with delegated Defense Production Act priorities and allocations authority, unless specifically authorized by the resource agency.

Subpart D—Special Priorities Assistance

Section 33.40 General provisions. This section would explain the circumstances and procedures under which DOT would provide assistance in resolving problems related to priority rated contracts and orders. This section also would list the DOT points of contact and the form to be used to request assistance.

Section 33.41 Requests for priority rating authority. This section would establish the procedures to request rating authority under special circumstances. DOT may grant priority ratings for items and services not normally rated under the regulation in order to prevent a delay of a rated order. This section also would specify that rating authority for production or construction equipment must come from the Department of Commerce. Finally, this section would explain when DOT may authorize the use of a priority rating on an order to a supplier in advance of the issuance of a rated prime contract, and the factors DOT would consider in deciding whether to grant such a request.

Section 33.42 Examples of assistance. This section would list examples of when special priority assistance may be provided.

Section 33.43 Criteria for assistance. This section would require that a request for special priorities assistance be timely, that there be an urgent procurement need for the item, and that the applicant has made a reasonable effort to resolve the problem for which assistance is needed.

§ 33.44 Instances where assistance may not be provided. This section would list examples of when special priority assistance may not be provided.

Section 33.45 Assistance programs with other nations. Reserved.

Subpart E—Allocation Actions

Section 33.50 Policy. This section would explain the policy of the Federal Government regarding use of the allocations authority, which is based on the statutory language in section 101 of the Defense Production Act and the legislative history of section 101.[5] Specifically, allocation authority would only be used when priority authority is unable to provide a sufficient supply of a material, service, or facility to meet the national defense, or when the use of priority authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities.

Allocation authority would not be used to ration materials or services at the retail level. In other words, allocation authority would not be used to control how much of a product or service a person may have for personal use. For example, DOT could use allocation authority to require the nation's bus companies to dedicate 40% of their bus fleet to a designated emergency, but DOT could not use allocation authority to tell a bus company how to distribute its buses to serve its commercial customers or to tell a bus company how many tickets it could sell to persons in a given month.

Allocation orders would be distributed equitably among similarly situated suppliers of the resources being allocated and would not require any person to relinquish a disproportionate share of the civilian market. Allocation authority would not apply to resources owned by the Federal Government, as those resources may be used by the controlling Federal entity in accordance with other governing laws. Nor, generally speaking, would allocation authority apply to resources owned by States, local governments or Native American tribes, as that could potentially undermine other Federal laws. For example, the Stafford Act is designed "to provide an orderly and continuing means of assistance by the Federal Government to States and local governments in carrying out their responsibilities to alleviate the suffering and damage which results from * * * disasters. * * *" Thus, it would be counterproductive for the Federal Government to consider allocating for its own use the very resources the State, local or tribal government could be counting on as part of its response efforts.

The Civil Reserve Air Fleet (CRAF) and the Voluntary Intermodal Sealift Agreement (VISA) are two examples of DOT's use of its allocation authority.[6] Concerning CRAF, under the terms of a Memorandum of Understanding, DOT develops plans and allocates aircraft to the CRAF program based on DoD requirements. DOT advises DoD if it intends to allocate fewer aircraft than requested by DoD, notifies DoD if a particular level of CRAF activation will have a serious adverse impact on the civil air carrier's ability to provide essential service, and works with DoD to identify alternatives or determine ways to minimize the impact. DOT publishes a periodic allocation of aircraft, by registration or "N" number, of each airline participating in the CRAF program.

The VISA program is a preparedness program designed to make intermodal shipping services and systems available to DoD as required to support the emergency deployment and sustainment of U.S. military forces. This is done through cooperation among the

[5] Legislative history indicates that Congress was concerned that national defense requirements, during times of emergency, could consume much of the output of key industrial sectors and selected producers within some sectors. Allocations authority was viewed as a means to ensure an equitable distribution of national defense demand among potential suppliers to avoid disproportionate impacts on each supplier's share of the civilian market.

[6] CRAF was formed through a joint agreement between DoD and the Department of Commerce. Executive Order 10999 placed responsibility for administration of the CRAF program in the Department of Commerce as a function of the Office of Emergency Transportation. In 1967, the Office of Emergency Transportation transferred in its entirety with its mission, functions and staff into the new Department of Transportation. Responsibility for carrying out the Secretary's role with respect to the CRAF program now resides with the Office of Intelligence, Security and Emergency Response.

maritime industry, DOT and DoD pursuant to a voluntary agreement entered into in accordance with Section 708 of the Defense Product Act (50 U.S.C. App. § 2158). During a Stage III activation, the Secretary of DoD will request the Secretary of DOT to allocate sealift capacity based on DoD requirements.

Section 33.51 General procedures. The proposed procedures set out in this section and in proposed section 33.52 are intended to provide a reasonable assurance that allocation authority would only be used in situations where such authority is justified. Section 33.51 would set out the specific requirements and findings that DOT must meet before it could use its allocation authority.

One requirement would be for DOT to obtain a written determination from either DoD, DHS or DOE, as appropriate, that the program DOT intends to support through its allocation authority is necessary or appropriate to support the national defense. As previously mentioned, section 202 of Executive Order 12919 requires such a finding before DOT can take an allocation action. Additionally, DOT would be required to provide a detailed description of the situation creating the need for allocation and the specific objectives to be obtained through the allocation action; a list of the materials, services, or facilities to be allocated, and of the sources that will be subject to the allocation action; a detailed description of the requirements to be contained in the allocation action, to include the percentage or quantity of capacity to be allocated and the duration of the allocation action; and an evaluation of the potential impact on the civilian market and proposed actions to mitigate any disruption of the civilian market.

Section 33.52 Controlling the general distribution of a material in the civilian market. This section would provide procedures for making the findings required by section 101(b) of the Defense Production Act and section 201(d) of Executive Order 12919. Defense Production Act section 101(b) states that the priorities and allocations authority shall not be used to control the general distribution of any material in the civilian market unless the President finds (1) that such material is a scarce and critical material essential to the national defense, and (2) that the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship. Section 201(d) of Executive Order 12919 directs each agency with delegated authority under section 101 of the Defense Production Act to make the finding required by section 101(b) and submit the finding for the President's approval through the Assistant to the President for National Security Affairs. By definition under the Defense Production Act, services, including transportation services, are not considered a "material" as contemplated in section 101(b) of the Defense Production Act or section 201(d) of Executive Order 12919.

Section 33.53 Types of allocation orders. This section proposes to describe the three types of allocations orders DOT might issue: a set-aside; an allocation directive; or an allotment. A *set-aside* is an official action that would require a person to reserve a resource capacity in anticipation of receipt of rated orders. An *allocation directive* is an official action that would require a person to take or refrain from taking certain actions in accordance with its provisions. For example, an allocation directive could require a person to stop or reduce production of an item or service; prohibit the use of selected materials, services or facilities; divert supply of one type of material, service or facility to another; or to supply a specific quantity, size, shape, and type of an item or service within a specific time period. An *allotment* is an official action that would specify the maximum quantity of a material, service, or facility authorized for use in a specific program or application.

Section 33.54 Elements of an allocation order. This section would describe the minimum elements of an allocation order. These elements would be: (1) A detailed description of the required allocation action(s); (2) specific start and end calendar dates for each required allocation action; (3) the written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary of DOT, which would certify that the order is authorized under this regulation and that the requirements of this part are being followed; (4) a statement that the order is certified for national defense use and that recipients are required to comply with the order; and (5) a copy of the Transportation Priorities and Allocations System regulation.

Section 33.55 Mandatory acceptance of an allocation order. This section would require a person to accept and comply with allocation orders if the person is capable of complying. If a person is unable to comply fully with the required actions specified in an allocation order, the person would be required to notify DOT immediately, explain the extent to which compliance is possible, and give reasons why full compliance is not possible. Furthermore, notifying DOT of possible non-compliance does not release the person from complying with the allocation order to the extent possible.

This section also would state that a person may not discriminate against an allocation order in any manner, such as by charging higher prices or imposing terms and conditions on allocation orders that are different from what the person imposed on contracts or orders for the same resource prior to receiving the allocation order.

Section 33.56 Changes or cancellations of an allocation order. This section would state that DOT may modify or cancel an allocation order.

Subpart F—Official Actions

Section 33.60 General provisions. This section would set out the specific official actions that DOT may take to implement the provisions of this regulation. These official actions include Rating Authorizations, Directives, Planning Orders, and Memoranda of Understanding.

Section 33.61 Rating authorizations. This section would define a rating authorization as an official action granting priority rating authority.

Section 33.62 Directives. This section would define a directive as an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. A priority directive would take precedence over rated orders, and allocation directives take precedence over a priority directive.

Section 33.63 Memoranda of Understanding. This section would explain that a Memorandum of Understanding is an official action that may be issued to reflect an agreement resolving a request for special priorities assistance. A Memorandum of Understanding may not be used to alter scheduling between rated orders, authorize the use of priority ratings, impose restrictions under this regulation, or take other official actions.

Subpart G—Compliance

Section 33.70 General provisions. This section would clarify that DOT has the authority to enforce or administer the Defense Production Act, this regulation, or an official action. Additionally, this section would state that willful violations of title I or section 705 of the Defense Production Act, this regulation, or an official DOT action, are criminal acts, punishable as provided in the Defense Production Act, and as set forth in § 33.74 below.

Section 33.71 Audits and investigations. This section would provide the procedures for conducting audits and investigations to ensure that the provisions of the Defense Production Act and other applicable statutes, this regulation, and official actions have been properly followed. This provision is limited to activities conducted under DPA authorities and would not limit the authority of DOT elements to initiate and conduct audits, investigations, or other inquiries under their specific statutes or authorities, nor would it affect the process for such audits, investigations or inquiries.

Section 33.72 Compulsory process. This section would explain the procedures DOT may use to seek a compulsory process if a person refuses to permit a duly authorized DOT representative to have access to any premises or any necessary information. For purposes of this regulation, compulsory process would mean the institution of appropriate legal action, including ex parte application for an inspection warrant or its equivalent in any forum of appropriate jurisdiction. Furthermore, compulsory process under this regulation may be sought in advance of an audit or investigation if DOT believes a person will refuse to comply with the audit or investigation.

Section 33.73 Notification of failure to comply. This section would provide procedures for notification of failure to comply with the Defense Production Act, other applicable statutes, this regulation, or an official DOT action.

Section 33.74 Violations, penalties, and remedies. This section would set out the penalties and related actions the Government may take for violations of the provisions of title I or sections 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act, when applicable, this regulation, or an official DOT action.

Section 33.75 Compliance conflicts. This section would require persons to immediately notify DOT if compliance with any provision of the Defense Production Act, other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act, other applicable statutes, this regulation, or an official action.

Subpart H—Adjustments, Exceptions, and Appeals

Section 33.80 Adjustments or exceptions. This section would describe the procedures necessary to request an adjustment or exception to a provision of this regulation or an official action on the grounds that it would create an undue or exceptional hardship or compliance is contrary to the intent of the Defense Production Act or this regulation. Such requests must be submitted in writing and the submission of a request for adjustment or exception does not relieve the requester from compliance while the request is being considered by DOT.

Section 33.81 Appeals. This section would provide procedures and timeframes for appealing a decision denying relief from a request for an adjustment or exception under this regulation. This section would provide for an expedited procedure for appeals involving a rated order placed for the purpose of emergency preparedness.

Subpart I—Miscellaneous Provisions

Section 33.90 Protection against claims. This section would provide that a person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this regulation or an official action. This "hold harmless" provision applies even if any provision of this regulation or action is subsequently declared to be invalid by judicial or other competent authority.

Section 33.91 Records and reports. This section would require persons to create and preserve for at least three years accurate and complete records of any transaction covered by this regulation or an official action. This section also would detail the various requirements pertaining to the required records and reports. In addition, this section would describe the confidentiality provision of the Defense Production Act pertaining to information submitted under the Defense Production Act or this regulation.

Section 33.92 Applicability of this part and official actions. This section would establish the jurisdictional applicability of this regulation.

Section 33.93 Communications. This section would provide DOT contact information for communications concerning this regulation.

III. Regulatory Analyses and Notices

A. Executive Order 12866—Regulatory Planning and Review

This proposed rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. While the requirements under title I of the Defense Production Act have been in existence for years, these proposed regulations are new to the transportation industry and could be considered to raise novel legal or policy issues under section 3(f)(4) of Executive Order 12866. The proposed rule is not economically significant, however, as it would not have an annual economic impact of over $100 million.

B. Executive Order 13132—Federalism

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, Federalism. This proposed rule would not have a substantial direct effect on, or sufficient federalism implications for, the States, nor would it limit the policymaking discretion of the States. Therefore, the consultation requirements of Executive Order 13132 do not apply.

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

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13175 Consultation and Coordination with Indian Tribal Governments. Because this proposed rule would not significantly or uniquely affect the communities of the Indian tribal governments and would not impose substantial direct compliance costs, the funding and consultation requirements of Executive Order 13175 would not apply.

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires an agency to review regulations to assess their impact on small entities unless the agency determines that a rule is not expected to have significant impact on a substantial number of small entities.

Potentially Affected Small Entities

Small entities include small businesses, small organizations and small governmental jurisdictions. For purposes of assessing the impacts of this proposed rule on small entities, a small business, as described in the Small Business Administration's Table of Small Business Size Standards Matched to North American Industry Classification System Codes (August 2008 Edition), has a maximum annual revenue of $33.5 million and a maximum of 1,500 employees (for some business categories, these numbers are lower). A small governmental jurisdiction is a government of a city, town, school district or special district with a population of less than 50,000. A small organization is any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.

This proposed regulation would set criteria under which DOT would authorize prioritization of certain orders or contracts, as well as criteria under which DOT would issue orders allocating materials, services, or facilities. Because the proposed rule would mainly be used for larger commercial transportation operations, DOT believes that small organizations and small governmental jurisdictions are unlikely to be affected by this proposed rule. To date, DOT has not exercised its existing priorities authority and has only exercised its existing allocations authority for one aviation program and one sealift program, both of which rely on voluntary engagement by industry. Therefore, DOT has no basis on which to estimate the number of small businesses that might be affected by promulgation of this proposed rule.

Potential Impacts

Although DOT cannot determine precisely the number of small entities that would be affected by this proposed rule, DOT believes that the overall impact on such entities would not be significant. In most instances, rated contracts would be fulfilled in addition to other (unrated) contracts and could actually increase the total amount of business for a firm that receives a rated contract. DOT expects that allocations would be ordered only in extraordinary circumstances, other than in the two well-established, voluntary programs discussed above. Furthermore, DOT believes that the provisions of section 701(e) of the Defense Production Act, which requires that small businesses be considered in allocations, indicate that any impact on small business would not be significant.

Conclusion

Therefore, for the reasons set forth above, I certify that this proposed rule, if implemented, would not have a significant economic impact on a substantial number of small entities.

E. Paperwork Reduction Act

This proposed rule contains an information collection requirement. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), DOT has submitted the information requirement to the Office of Management and Budget (OMB) for review. DOT estimates that the public reporting burden for submission of Form OST F 1254 is an average of 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

DOT is seeking public comment on any aspect of the information collection, including: (1) Whether the proposed collection is necessary for DOT's performance; (2) the accuracy of the estimate burdens; (3) ways for DOT to enhance the quality, usefulness, and clarity of the collected information; and (4) ways that the burden could be minimized without reducing the quality of the collected information. Organizations and individuals desiring to submit comments on the collection of information should direct them to the Office of Management and Budget, Attention: Desk Officer for the Office of the Secretary of Transportation, Office of Information and Regulatory Affairs, Washington, DC 20505. Comments should also be sent to the Department of Transportation, Attn: Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue, SE., Washington DC 20590.

We will respond to any OMB or public comments on the information collection requirement contained in this proposed rule. DOT may not impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. DOT intends to obtain a current OMB control number for the information collection requirements that would result from this proposed rulemaking action. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

List of Subjects in 49 CFR Part 33

Administrative practice and procedure, Business and industry, Government contracts, National Defense, Reporting and recordkeeping requirements, Strategic and critical materials, Transportation.

Raymond LaHood,
Secretary of Transportation.

In consideration of the foregoing, the Department proposes to add Part 33 of Title 49, Code of Federal Regulations, to read as follows:

PART 33—TRANSPORTATION PRIORITIES AND ALLOCATION SYSTEM

Subpart A—General

Sec.
33.1 Purpose of this part.
33.2 Priorities and allocations authority.
33.3 Program eligibility.

Subpart B—Definitions

33.20 Definitions.

Subpart C—Placement of Rated Orders

33.30 Delegation of authority.
33.31 Priority ratings.
33.32 Elements of a rated order.
33.33 Acceptance and rejection of rated orders.
33.34 Preferential scheduling.
33.35 Extension of priority ratings.
33.36 Changes or cancellations of priority ratings and rated orders.
33.37 Use of rated orders.
33.38 Limitations on placing rated orders.

Subpart D—Special Priorities Assistance

33.40 General provisions.
33.41 Requests for priority rating authority.
33.42 Examples of assistance.
33.43 Criteria for assistance.
33.44 Instances where assistance may not be provided.
33.45 [Reserved]

Subpart E—Allocation Actions

33.50 Policy.
33.51 General procedures.
33.52 Controlling the general distribution of a material in the civilian market.
33.53 Types of allocation orders.
33.54 Elements of an allocation order.
33.55 Mandatory acceptance of an allocation order.
33.56 Changes or cancellations of an allocation order.

Subpart F—Official Actions

33.60 General provisions.
33.61 Rating Authorizations.
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33.63 Memoranda of Understanding.

Subpart G—Compliance

33.70 General provisions.
33.71 Audits and investigations.
33.72 Compulsory process.
33.73 Notification of failure to comply.
33.74 Violations, penalties, and remedies.
33.75 Compliance conflicts.

Subpart H—Adjustments, Exceptions, and Appeals

33.80 Adjustments or exceptions.
33.81 Appeals.

Subpart I—Miscellaneous Provisions

33.90 Protection against claims.
33.91 Records and reports.
33.92 Applicability of this part and official actions.
33.93 Communications.
Appendix I to Part 33—Sample Form OST F 1254
Appendix II to Part 33—Schedule 1 Approved Programs

Authority: Defense Production Act of 1950, as amended, 50 U.S.C. App. 2061–2171; Executive Order 12919, as amended, (59 FR 29525, June 7, 1994).

Subpart A—General

§ 33.1 Purpose of this part.

This part provides guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to all forms of civil transportation. The

guidance and procedures in this part are generally consistent with the guidance and procedures provided in other regulations that, as a whole, form the Federal Priorities and Allocations System. Guidance and procedures for use of the Defense Production Act priorities and allocations authority with respect to other types of resources are provided for: food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer in the Agricultural Priorities and Allocation Systems at 7 CFR part 700; all forms of energy in the Energy Priorities and Allocations System regulation at 10 CFR part 217; health resources in the Health Resources Priorities and Allocations System at *[CFR citation to be inserted in the final rule];* water resources in the Water Resources Priorities and Allocations System at *[CFR citation to be inserted in the final rule];* and all other materials, services, and facilities, including construction materials in the Defense Priorities and Allocations System (DPAS) regulation at 15 CFR part 700.

§ 33.2 Priorities and allocations authority.

(a) Section 201 of Executive Order 12919 (59 FR 29525) delegates the President's authority under section 101 of the Defense Production Act to require acceptance and priority performance of contracts and orders (other than contracts of employment) to promote the national defense over performance of any other contracts or orders, and to allocate materials, services, and facilities as deemed necessary or appropriate to promote the national defense to:

(1) The Secretary of Agriculture with respect to food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer;

(2) The Secretary of Energy with respect to all forms of energy;

(3) The Secretary of Health and Human Services with respect to health resources;

(4) The Secretary of Transportation with respect to all forms of civil transportation;

(5) The Secretary of Defense with respect to water resources; and

(6) The Secretary of Commerce for all other materials, services, and facilities, including construction materials.

(b) Section 202 of Executive Order 12919 states that the priorities and allocations authority delegated in section 201 of the order may be used only to support programs that have been determined in writing as necessary or appropriate to promote the national defense:

(1) By the Secretary of Defense with respect to military production and construction, military assistance to foreign nations, stockpiling, outer space, and directly related activities;

(2) By the Secretary of Energy with respect to energy production and construction, distribution and use, and directly related activities; and

(3) By the Secretary of Homeland Security with respect to essential civilian needs supporting national defense, including civil defense and continuity of government and directly related activities.

§ 33.3 Program eligibility.

Certain programs to promote the national defense are eligible for priorities and allocations support. These include programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Other eligible programs include emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5195 *et seq.*) and critical infrastructure protection and restoration.

Subpart B—Definitions

§ 33.20 Definitions.

The following definitions pertain to all sections of this part:

"Allocation" means the control of the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

"Allocation authority" means the authority of the Department of Transportation, pursuant to section 101 of the Defense Production Act, to allocate materials, services, and facilities for use in approved programs.

"Allocation order" means an official action to control the distribution of materials, services, or facilities for a purpose deemed necessary or appropriate to promote the national defense.

"Allotment " means an official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use to promote the national defense.

"Approved program" means a program determined by the Secretary of Defense, the Secretary of Energy, or the Secretary of Homeland Security to be necessary or appropriate to promote the national defense, in accordance with section 202 of Executive Order 12919.

"Civil transportation" includes movement of persons and property by all modes of transportation in interstate, intrastate, or foreign commerce within the United States, its territories and possessions, and the District of Columbia, and, without limitation, related public storage and warehousing, ports, services, equipment and facilities, such as transportation carrier shop and repair facilities. However, "civil transportation" shall not include transportation owned or controlled by the Department of Defense, use of petroleum and gas pipelines, and coal slurry pipelines used only to supply energy production facilities directly. As applied herein, "civil transportation" shall include direction, control, and coordination of civil transportation capacity regardless of ownership.

"Construction" means the erection, addition, extension, or alteration of any building, structure, or project, using materials or products which are to be an integral and permanent part of the building, structure, or project. Construction does not include maintenance and repair.

"Critical infrastructure" means any systems and assets, whether physical or cyber-based, so vital to the United States that the degradation or destruction of such systems and assets would have a debilitating impact on national security, including, but not limited to, national economic security and national public health or safety.

"Defense Production Act" means the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*).

"Delegate Agency" means a government agency authorized by delegation from the Department of Transportation to place priority ratings on contracts or orders needed to support approved programs.

"Directive" means an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

"Emergency preparedness" means all those activities and measures designed or undertaken to prepare for or minimize the effects of a hazard upon the civilian population, to deal with the immediate emergency conditions which would be created by the hazard, and to effectuate emergency repairs to, or the emergency restoration of, vital utilities and facilities destroyed or damaged by the hazard. Such term includes the following:

(1) Measures to be undertaken in preparation for anticipated hazards (including the establishment of appropriate organizations, operational plans, and supporting agreements, the recruitment and training of personnel, the conduct of research, the procurement and stockpiling of

necessary materials and supplies, the provision of suitable warning systems, the construction or preparation of shelters, shelter areas, and control centers, and, when appropriate, the nonmilitary evacuation of the civilian population).

(2) Measures to be undertaken during a hazard (including the enforcement of passive defense regulations prescribed by duly established military or civil authorities, the evacuation of personnel to shelter areas, the control of traffic and panic, and the control and use of lighting and civil communications).

(3) Measures to be undertaken following a hazard (including activities for fire fighting, rescue, emergency medical, health and sanitation services, monitoring for specific dangers of special weapons, unexploded bomb reconnaissance, essential debris clearance, emergency welfare measures, and immediately essential emergency repair or restoration of damaged vital facilities).

"Energy" means all forms of energy including petroleum, gas (both natural and manufactured), electricity, solid fuels (including all forms of coal, coke, coal chemicals, coal liquification, and coal gasification), and atomic energy, and the production, conservation, use, control, and distribution (including pipelines) of all of these forms of energy.

"Facilities" includes all types of buildings, structures, or other improvements to real property (but excluding farms, churches or other places of worship, and private dwelling houses), and services relating to the use of any such building, structure, or other improvement.

"Farm equipment" means equipment, machinery, and repair parts manufactured for use on farms in connection with the production or preparation for market use of food resources.

"Fertilizer" means any product or combination of products that contain one or more of the elements—nitrogen, phosphorus, and potassium—for use as a plant nutrient.

"Food resources" means all commodities and products, simple, mixed, or compound, or complements to such commodities or products, that are capable of being ingested by either human beings or animals, irrespective of other uses to which such commodities or products may be put, at all stages of processing from the raw commodity to the products thereof in vendible form for human or animal consumption. "Food resources" also means all starches, sugars, vegetable and animal or marine fats and oils, cotton, tobacco, wool, mohair, hemp, flax fiber, and naval stores, but does not mean any such material after it loses its identity as an agricultural commodity or agricultural product.

"Food resource facilities" means plants, machinery, vehicles (including on-farm), and other facilities required for the production, processing, distribution, and storage (including cold storage) of food resources, livestock and poultry feed and seed, and for the domestic distribution of farm equipment and fertilizer (excluding transportation thereof).

"Hazard" means an emergency or disaster resulting from—

(1) A natural disaster; or

(2) An accidental or man-caused event.

"Health resources" means materials, facilities, health supplies, and equipment (including pharmaceutical, blood collecting and dispensing supplies, biological, surgical textiles, and emergency surgical instruments and supplies) required to prevent the impairment of, improve, or restore the physical and mental health conditions of the population.

"Homeland security" includes efforts—

(1) To prevent terrorist attacks within the United States;

(2) To reduce the vulnerability of the United States to terrorism;

(3) To minimize damage from a terrorist attack in the United States; and

(4) To recover from a terrorist attack in the United States.

"Item" means any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

"Local government" means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

"Maintenance and repair and operating supplies" or "MRO"—

(1) "Maintenance" is the upkeep necessary to continue any plant, facility, or equipment in working condition.

(2) "Repair" is the restoration of any plant, facility, or equipment to working condition when it has been rendered unsafe or unfit for service by wear and tear, damage, or failure of parts.

(3) "Operating supplies" are any resources carried as operating supplies according to a person's established accounting practice. Operating supplies may include hand tools and expendable tools, jigs, dies, fixtures used on production equipment, lubricants, cleaners, chemicals and other expendable items.

(4) MRO does not include items produced or obtained for sale to other persons or for installation upon or attachment to the property of another person, or items required for the production of such items; items needed for the replacement of any plant, facility, or equipment; or items for the improvement of any plant, facility, or equipment by replacing items which are still in working condition with items of a new or different kind, quality, or design.

"Materials" includes—

(1) Any raw materials (including minerals, metals, and advanced processed materials), commodities, articles, components (including critical components), products, and items of supply; and

(2) Any technical information or services ancillary to the use of any such materials, commodities, articles, components, products, or items.

"National defense" means programs for military and energy production or construction, military or critical infrastructure assistance to any foreign nation, homeland security, stockpiling, space, and any directly related activity. Such term includes emergency preparedness activities conducted pursuant to title VI of the Robert T. Stafford Disaster Relief and Emergency Assistance Act and critical infrastructure protection and restoration.

"Official action" means an action taken by the Department of Transportation or another resource agency under the authority of the Defense Production Act, Executive Order 12919, and this part or another regulation under the Federal Priorities and Allocations System. Such actions include, but are not limited to, the issuance of Rating Authorizations, Directives, Set Asides, Allotments, Planning Orders, Memoranda of Understanding, Demands for Information, Inspection Authorizations, and Administrative Subpoenas.

"Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representative thereof, or any State or local government or agency thereof.

"Planning order" means notification of tentative arrangements to meet national

defense requirements issued in priority order or allocation order format, for planning purposes only.

"Rated order" means a prime contract, a subcontract, or a purchase order in support of an approved program issued in accordance with the provisions of this part.

"Resource agency" means any agency delegated priorities and allocations authority as specified in § 33.2.

"Secretary" means the Secretary of Transportation.

"Services" includes any effort that is needed for or incidental to—

(1) The development, production, processing, distribution, delivery, or use of an industrial resource or a critical technology item;

(2) The construction of facilities;

(3) The movement of individuals and property by all modes of civil transportation; or

(4) Other national defense programs and activities.

"Set-aside" means an official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders.

"Stafford Act" means title VI (Emergency Preparedness) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (42 U.S.C. 5195–5197g).

"State" means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

"Water resources" means all usable water, from all sources, within the jurisdiction of the United States, which can be managed, controlled, and allocated to meet emergency requirements.

Subpart C—Placement of Rated Orders

§ 33.30 Delegation of authority.

The priorities and allocations authorities of the President under title I of the Defense Production Act with respect to all forms of civil transportation have been delegated to the Secretary of Transportation under section 201(a)(4) of Executive Order 12919 of June 3, 1994 (59 FR 29525).

§ 33.31 Priority ratings.

(a) Levels of priority.

(1) There are two levels of priority established by set of regulations that comprise the Federal Priorities and Allocations System regulations, identified by the rating symbols "DO" and "DX".

(2) All DO-rated orders have equal priority with each other and take precedence over unrated orders. All DX-rated orders have equal priority with each other and take precedence over DO-rated orders and unrated orders. (For resolution of conflicts among rated orders of equal priority, see § 33.34(c).)

(3) In addition, a Directive regarding priority treatment for a given item issued by the resource agency with priorities jurisdiction for that item takes precedence over any DX-rated order, DO-rated order, or unrated order, as stipulated in the Directive. (For a full discussion of Directives, see § 33.62.)

(b) Program identification symbols. Program identification symbols indicate which approved program is being supported by a rated order. DOT will use the letter "T" followed by a letter and a number for all transportation-related approved programs. Programs may be approved under the procedures of Executive Order 12919 at any time. Program identification symbols, in themselves, do not connote any priority.

(c) Priority ratings. A priority rating consists of the rating symbol—DO and DX—and the program identification symbol, such as DO–T–L1 or DX–T–L1 for a priority rating under TPAS.

§ 33.32 Elements of a rated order.

Each rated order must include:

(a) The appropriate priority rating (*e.g.* DO–T or DX–T);

(b) A required delivery date or dates. The words "immediately" or "as soon as possible" do not constitute a delivery date. A "requirements contract," "basic ordering agreement," "prime vendor contract," or similar procurement document bearing a priority rating may contain no specific delivery date or dates and may provide for the furnishing of items or service from time-to-time or within a stated period against specific purchase orders, such as "calls," "requisitions," and "delivery orders". These purchase orders must specify a required delivery date or dates and are to be considered as rated as of the date of their receipt by the supplier and not as of the date of the original procurement document;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of an individual authorized to sign rated orders for the person placing the order. The signature or use of the name certifies that the rated order is authorized under this part and that the requirements of this part are being followed; and

(d)(1) A statement that reads in substance:

This is a rated order certified for national defense use, and you are required to follow all the provisions of the Transportation Priorities and Allocations System regulation at 49 CFR part 33.

(2) If the rated order is placed in support of emergency preparedness requirements and expedited action is necessary and appropriate to meet these requirements, the following sentences should be added following the statement set forth in paragraph (d)(1) of this section:

This rated order is placed for the purpose of emergency preparedness. It must be accepted or rejected within *[INSERT NUMBER OF HOURS REQUIRED IN § 33.33]* hours from receipt of the order, in accordance with § 33.33(e) of the Transportation Priorities and Allocations System regulation at 49 CFR Part 33.

§ 33.33 Acceptance and rejection of rated orders.

(a) Mandatory acceptance.

(1) Except as otherwise specified in this section, a person shall accept every rated order received and must fill such orders regardless of any other rated or unrated orders that have been accepted.

(2) A person shall not discriminate against rated orders in any manner such as by charging higher prices or by imposing different terms and conditions than for comparable unrated orders.

(b) Mandatory rejection. Unless otherwise directed by the Department of Transportation for a rated order involving all forms of civil transportation:

(1) A person shall not accept a rated order for delivery on a specific date if unable to fill the order by that date. However, the person must inform the customer of the earliest date on which delivery can be made and offer to accept the order on the basis of that date. Scheduling conflicts with previously accepted lower rated or unrated orders are not sufficient reason for rejection under this section.

(2) A person shall not accept a DO-rated order for delivery on a date which would interfere with delivery of any previously accepted DO- or DX-rated orders. However, the person must offer to accept the order based on the earliest delivery date otherwise possible.

(3) A person shall not accept a DX-rated order for delivery on a date which would interfere with delivery of any previously accepted DX-rated orders, but must offer to accept the order based on the earliest delivery date otherwise possible.

(4) If a person is unable to fill all of the rated orders of equal priority status received on the same day, the person must accept, based upon the earliest delivery dates, only those orders which can be filled, and reject the other orders. For example, a person must accept order A requiring delivery on December 15 before accepting order B requiring delivery on December 31. However, the person must offer to accept the rejected orders based on the earliest delivery dates otherwise possible.

(5) A person shall not accept a rated order if the person is prohibited by Federal law from meeting the terms of the order.

(c) Optional rejection. Unless otherwise directed by the Department of Transportation for a rated order involving all forms of civil transportation, rated orders may be rejected in any of the following cases as long as a supplier does not discriminate among customers:

(1) If the person placing the order is unwilling or unable to meet regularly established terms of sale or payment;

(2) If the order is for an item not supplied or for a service not capable of being performed;

(3) If the order is for an item or service produced, acquired, or provided only for the supplier's own use for which no orders have been filled for two years prior to the date of receipt of the rated order. If, however, a supplier has sold some of these items or provided similar services, the supplier is obligated to accept rated orders up to that quantity or portion of production or service, whichever is greater, sold or provided within the past two years;

(4) If the person placing the rated order, other than the U.S. Government, makes the item or performs the service being ordered;

(5) If acceptance of a rated order or performance against a rated order would violate any other regulation, official action, or order of the Department of Transportation, issued under the authority of the Defense Production Act or another relevant statute.

(d) Customer notification requirements.

(1) Except as provided in paragraph (e) of this section, a person must accept or reject a rated order in writing or electronically within fifteen (15) calendar days after receipt of a DO rated order and within ten (10) calendar days after receipt of a DX rated order. If the order is rejected, the person must give reasons in writing or electronically for the rejection.

(2) If a person has accepted a rated order and subsequently finds that shipment or performance will be delayed, the person must notify the customer immediately, give the reasons for the delay, and advise of a new shipment or performance date. If notification is given verbally, written or electronic confirmation must be provided within five (5) calendar days.

(e) Exception for emergency preparedness conditions. If a rated order is placed for the purpose of emergency preparedness and includes the additional statement set forth in § 33.32(d)(2), a person must accept or reject the rated order and transmit the acceptance or rejection in writing or in an electronic format:

(1) Within six (6) hours after receipt of the order if the order is issued in response to a hazard that has occurred; or

(2) Within the greater of twelve (12) hours from receipt of the order or the time specified in the order, if the order is issued to prepare for an imminent hazard.

§ 33.34 Preferential scheduling.

(a) A person must schedule operations, including the acquisition of all needed production items or services, in a timely manner to satisfy the delivery requirements of each rated order. Modifying production or delivery schedules is necessary only when required delivery dates for rated orders cannot otherwise be met.

(b) DO-rated orders must be given production or performance preference over unrated orders, if necessary to meet required delivery dates, even if this requires the diversion of items being processed or ready for delivery or services being performed against unrated orders. Similarly, DX-rated orders must be given preference over DO-rated orders and unrated orders. (Examples: If a person receives a DO-rated order with a delivery date of June 3 and if meeting that date would mean delaying production or delivery of an item for an unrated order, the unrated order must be delayed. If a DX-rated order is received calling for delivery on July 15 and a person has a DO-rated order requiring delivery on June 2 and operations can be scheduled to meet both deliveries, there is no need to alter production schedules to give any additional preference to the DX-rated order.)

(c) *Conflicting rated orders.* (1) If a person finds that delivery or performance against any accepted rated orders conflicts with the delivery or performance against other accepted rated orders of equal priority status, the person shall give precedence to the conflicting orders in the sequence in which they are to be delivered or performed (not to the receipt dates). If the conflicting orders are scheduled to be delivered or performed on the same day, the person shall give precedence to those orders that have the earliest receipt dates.

(2) If a person is unable to resolve rated order delivery or performance conflicts under this section, the person should promptly seek special priorities assistance as provided in §§ 33.40 through 33.44. If the person's customer objects to the rescheduling of delivery or performance of a rated order, the customer should promptly seek special priorities assistance as provided in §§ 33.40 through 33.44. For any rated order against which delivery or performance will be delayed, the person must notify the customer as provided in § 33.33.

(d) If a person is unable to purchase needed production items in time to fill a rated order by its required delivery date, the person must fill the rated order by using inventoried production items. A person who uses inventoried items to fill a rated order may replace those items with the use of a rated order as provided in § 33.37(b).

§ 33.35 Extension of priority ratings.

(a) A person must use rated orders with suppliers to obtain items or services needed to fill a rated order. The person must use the priority rating indicated on the customer's rated order, except as otherwise provided in this part or as directed by the Department of Transportation. For example, if a person is in receipt of a DO–T–L1 rated order for a bus and needs to purchase brakes for its use, that person must use a DO–T–L1 rated order to obtain the needed brakes.

(b) The priority rating must be included on each successive order placed to obtain items or services needed to fill a customer's rated order. This continues from contractor to subcontractor to supplier throughout the entire procurement chain.

§ 33.36 Changes or cancellations of priority ratings and rated orders.

(a) The priority rating on a rated order may be changed or canceled by:

(1) An official action of the Department of Transportation; or

(2) Written notification from the person who placed the rated order.

(b) If an unrated order is amended so as to make it a rated order, or a DO rating is changed to a DX rating, the supplier must give the appropriate preferential treatment to the order as of the date the change is received by the supplier.

(c) An amendment to a rated order that significantly alters a supplier's

original production or delivery schedule shall constitute a new rated order as of the date of its receipt. The supplier must accept or reject the amended order according to the provisions of § 33.33.

(d) The following amendments do not constitute a new rated order: a change in shipping destination; a reduction in the total amount of the order; an increase in the total amount of the order which has negligible impact upon deliveries; a minor variation in size or design; or a change which is agreed upon between the supplier and the customer.

(e) If a person no longer needs items or services to fill a rated order, any rated orders placed with suppliers for the items or services, or the priority rating on those orders, must be canceled.

(f) When a priority rating is added to an unrated order, or is changed or canceled, all suppliers must be promptly notified in writing.

§ 33.37 Use of rated orders.

(a) A person must use rated orders to obtain:

(1) Items which will be physically incorporated into other items to fill rated orders, including that portion of such items normally consumed or converted into scrap or by-products in the course of processing;

(2) Containers or other packaging materials required to make delivery of the finished items against rated orders;

(3) Services, other than contracts of employment, needed to fill rated orders; and

(4) MRO needed to produce the finished items to fill rated orders.

(b) A person may use a rated order to replace inventoried items (including finished items) if such items were used to fill rated orders, as follows:

(1) The order must be placed within 90 days of the date of use of the inventory.

(2) A DO rating and the program identification symbol indicated on the customer's rated order must be used on the order. A DX rating may not be used even if the inventory was used to fill a DX-rated order.

(3) If the priority ratings on rated orders from one customer or several customers contain different program identification symbols, the rated orders may be combined. In this case, the program identification symbol "E1" must be used (*i.e.,* DO–T–E1).

(c) A person may combine DX- and DO-rated orders from one customer or several customers if the items or services covered by each level of priority are identified separately and clearly. If different program identification symbols are indicated on those rated orders of equal priority, the person must use the program identification symbol "E1" (*i.e.,* DO–T–E1 or DX–T–E1).

(d) Combining rated and unrated orders.

(1) A person may combine rated and unrated order quantities on one purchase order provided that:

(i) The rated quantities are separately and clearly identified; and

(ii) The four elements of a rated order, as required by § 33.32, are included on the order with the statement required in § 33.32(d) modified to read in substance:

This purchase order contains rated order quantities certified for national defense use, and you are required to follow all the provisions of the Transportation Priorities and Allocations System regulations at 49 CFR part 33 only as it pertains to the rated quantities.

(2) A supplier must accept or reject the rated portion of the purchase order as provided in § 33.33 and give preferential treatment only to the rated quantities as required by this part. This part may not be used to require preferential treatment for the unrated portion of the order.

(3) Any supplier who believes that rated and unrated orders are being combined in a manner contrary to the intent of this part or in a fashion that causes undue or exceptional hardship may submit a request for adjustment or exception under section 33.80.

(e) A person may place a rated order for the minimum commercially procurable quantity even if the quantity needed to fill a rated order is less than that minimum. However, a person must combine rated orders as provided in paragraph (c), if possible, to obtain minimum procurable quantities.

(f) A person is not required to place a priority rating on an order for less than $50,000, or one-half of the Simplified Acquisition Threshold (as established in the Federal Acquisition Regulations (FAR) (see FAR section 2.101) or in other authorized acquisition regulatory or management systems), whichever amount is greater, provided that delivery can be obtained in a timely fashion without the use of the priority rating.

§ 33.38 Limitations on placing rated orders.

(a) *General limitations.* (1) A person may not place a DO- or DX-rated order unless entitled to do so under this part.

(2) Rated orders may not be used to obtain:

(i) Delivery or performance on a date earlier than needed;

(ii) A greater quantity of the item or services than needed, except to obtain a minimum procurable quantity. Separate rated orders may not be placed solely for the purpose of obtaining minimum procurable quantities on each order;

(iii) Items or services in advance of the receipt of a rated order, except as specifically authorized by the Department of Transportation (*see* § 33.41(c) for information on obtaining authorization for a priority rating in advance of a rated order);

(iv) Items that are not needed to fill a rated order, except as specifically authorized by the Department of Transportation, or as otherwise permitted by this part;

(v) Any of the following items unless specific priority rating authority has been obtained from the Department of Transportation, a Delegate Agency, or the Department of Commerce, as appropriate:

(A) Items for plant improvement, expansion, or construction, unless they will be physically incorporated into a construction project covered by a rated order; and

(B) Production or construction equipment or items to be used for the manufacture of production equipment (For information on requesting priority rating authority, see § 33.41); or

(vi) Any items related to the development of chemical or biological warfare capabilities or the production of chemical or biological weapons, unless such development or production has been authorized by the President or the Secretary of Defense.

(b) *Jurisdictional limitations.* Unless authorized by the resource agency with jurisdiction, the provisions of this part are not applicable to the following resources:

(1) Food resources, food resource facilities, and the domestic distribution of farm equipment and commercial fertilizer (Resource agency with jurisdiction—Department of Agriculture);

(2) All forms of energy, including radioisotopes, stable isotopes, source material, and special nuclear material produced in Government-owned plants or facilities operated by or for the Department of Energy (Resource agency with jurisdiction—Department of Energy);

(3) Health resources (Resource agency with jurisdiction—Department of Health and Human Services);

(4) Water resources (Resource agency with jurisdiction—Department of Defense/U.S. Army Corps of Engineers); and

(5) Communications services (Resource agency with jurisdiction—National Communications System under Executive Order 12472 of April 3, 1984).

Subpart D—Special Priorities Assistance

§ 33.40 General provisions.

(a) TPAS is designed to be largely self-executing. However, from time-to-time production or delivery problems will arise. In this event, a person should immediately contact DOT's Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue, SE., Washington, DC 20590, for guidance or assistance. If the problem(s) cannot otherwise be resolved, special priorities assistance should be sought from the Department of Transportation through the Director, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue, SE., Washington, DC 20590. If the Department of Transportation is unable to resolve the problem or to authorize the use of a priority rating and believes additional assistance is warranted, the Department of Transportation may forward the request to another resource agency, as appropriate, for action. Special priorities assistance is a service provided to alleviate problems that do arise.

(b) Special priorities assistance is available for any reason consistent with this part. Generally, special priorities assistance is provided to expedite deliveries, resolve delivery conflicts, place rated orders, locate suppliers, or to verify information supplied by customers and vendors. Special priorities assistance may also be used to request rating authority for items that are not normally eligible for priority treatment.

(c) A request for special priorities assistance or priority rating authority must be submitted on Form OST F 1254 (OMB control number to be inserted in the final rule) to the Defense Production Act Activities Coordinator, Office of Intelligence, Security, and Emergency Response, 1200 New Jersey Avenue, SE., Washington, DC 20590. Form OST F 1254 may be obtained from the Department of Transportation or a Delegate Agency. A sample Form OST F 1254 is attached at Appendix I.

§ 33.41 Requests for priority rating authority.

(a) If a rated order is likely to be delayed because a person is unable to obtain items or services not normally rated under this part, the person may request the authority to use a priority rating in ordering the needed items or services.

(b) Rating authority for production or construction equipment.

(1) A request for priority rating authority for production or construction equipment must be submitted to the U.S. Department of Commerce on FORM BIS–999.

(2) When the use of a priority rating is authorized for the procurement of production or construction equipment, a rated order may be used either to purchase or to lease such equipment. However, in the latter case, the equipment may be leased only from a person engaged in the business of leasing such equipment or from a person willing to lease rather than sell.

(c) Rating authority in advance of a rated prime contract.

(1) In certain cases and upon specific request, the Department of Transportation, in order to promote the national defense, may authorize a person to place a priority rating on an order to a supplier in advance of the issuance of a rated prime contract. In these instances, the person requesting advance rating authority must obtain sponsorship of the request from the Department of Transportation or the appropriate Delegate Agency. The person shall also assume any business risk associated with the placing of rated orders if these orders have to be cancelled in the event the rated prime contract is not issued.

(2) The person must state the following in the request:

It is understood that the authorization of a priority rating in advance of our receiving a rated prime contract from the Department of Transportation and our use of that priority rating with our suppliers in no way commits the Department of Transportation or any other government agency to enter into a contract or order or to expend funds. Further, we understand that the Federal Government shall not be liable for any cancellation charges, termination costs, or other damages that may accrue if a rated prime contract is not eventually placed and, as a result, we must subsequently cancel orders placed with the use of the priority rating authorized as a result of this request.

(3) In reviewing requests for rating authority in advance of a rated prime contract, the Department of Transportation will consider, among other things, the following criteria:

(i) The probability that the prime contract will be awarded;

(ii) The impact of the resulting rated orders on suppliers and on other authorized programs;

(iii) Whether the contractor is the sole source;

(iv) Whether the item being produced has a long lead time; and

(v) The time period for which the rating is being requested.

(4) The Department of Transportation may require periodic reports on the use of the rating authority granted under paragraph (c) of this section.

(5) If a rated prime contract is not issued, the person shall promptly notify all suppliers who have received rated orders pursuant to the advanced rating authority that the priority rating on those orders is cancelled.

§ 33.42 Examples of assistance.

(a) While special priorities assistance may be provided for any reason in support of this part, it is usually provided in situations where:

(1) A person is experiencing difficulty in obtaining delivery against a rated order by the required delivery date; or

(2) A person cannot locate a supplier for an item or service needed to fill a rated order.

(b) Other examples of special priorities assistance include:

(1) Ensuring that rated orders receive preferential treatment by suppliers;

(2) Resolving production or delivery conflicts between various rated orders;

(3) Assisting in placing rated orders with suppliers;

(4) Verifying the urgency of rated orders; and

(5) Determining the validity of rated orders.

§ 33.43 Criteria for assistance.

Requests for special priorities assistance should be timely, e.g., the request has been submitted promptly and enough time exists for the Department of Transportation or the Delegate Agency to effect a meaningful resolution to the problem, and must establish that:

(a) There is an urgent need for the item; and

(b) The applicant has made a reasonable effort to resolve the problem.

§ 33.44 Instances where assistance may not be provided.

Special priorities assistance is provided at the discretion of the Department of Transportation or the Delegate Agencies, when it is determined that such assistance is warranted to meet the objectives of this part. Examples where assistance may not be provided include situations when a person is attempting to:

(a) Secure a price advantage;

(b) Obtain delivery prior to the time required to fill a rated order;

(c) Gain competitive advantage;

(d) Disrupt an industry apportionment program in a manner designed to provide a person with an unwarranted share of scarce items; or

(e) Overcome a supplier's regularly established terms of sale or conditions of doing business.

§ 33.45 [Reserved]

Subpart E—Allocation Actions

§ 33.50 Policy.

(a) It is the policy of the Federal Government that the allocations authority under title I of the Defense Production Act may:

(1) Only be used when there is insufficient supply of a material, service, or facility to satisfy national defense supply requirements through the use of the priorities authority or when the use of the priorities authority would cause a severe and prolonged disruption in the supply of materials, services, or facilities available to support normal U.S. economic activities; and

(2) Not be used to ration materials or services at the retail level.

(b) Allocation orders, when used, will be distributed equitably among the suppliers of the materials, services, or facilities being allocated and not require any person to relinquish a disproportionate share of the civilian market.

§ 33.51 General procedures.

When the Department of Transportation plans to execute its allocations authority to address a supply problem within its resource jurisdiction, the Department shall develop a plan that includes the following information:

(a) A copy of the written determination made in accordance with section 202 of Executive Order 12919, that the program or programs that would be supported by the allocation action are necessary or appropriate to promote the national defense;

(b) A detailed description of the situation to include any unusual events or circumstances that have created the requirement for an allocation action;

(c) A statement of the specific objective(s) of the allocation action;

(d) A list of the materials, services, or facilities to be allocated;

(e) A list of the sources of the materials, services, or facilities that will be subject to the allocation action;

(f) A detailed description of the provisions that will be included in the allocation orders, including the type(s) of allocation orders, the percentages or quantity of capacity or output to be allocated for each purpose, and the duration of the allocation action (*e.g.,* anticipated start and end dates);

(g) An evaluation of the impact of the proposed allocation action on the civilian market; and

(h) Proposed actions, if any, to mitigate disruptions to civilian market operations.

§ 33.52 Controlling the general distribution of a material in the civilian market.

No allocation action by the Department of Transportation may be used to control the general distribution of a material in the civilian market, unless the Secretary of the Department of Transportation has:

(a) Made a written finding that:

(1) Such material is a scarce and critical material essential to the national defense, and

(2) The requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship;

(b) Submitted the finding for the President's approval through the Assistant to the President for National Security Affairs; and

(c) The President has approved the finding.

§ 33.53 Types of allocation orders.

There are three types of allocation orders available for communicating allocation actions. These are:

(a) Set-aside: An official action that requires a person to reserve materials, services, or facilities capacity in anticipation of the receipt of rated orders;

(b) Directive: An official action that requires a person to take or refrain from taking certain actions in accordance with its provisions. For example, a directive can require a person to: Stop or reduce production of an item; prohibit the use of selected materials, services, or facilities; or divert the use of materials, services, or facilities from one purpose to another; and

(c) Allotment: An official action that specifies the maximum quantity of a material, service, or facility authorized for a specific use.

§ 33.54 Elements of an allocation order.

Each allocation order must include:

(a) A detailed description of the required allocation action(s);

(b) Specific start and end calendar dates for each required allocation action;

(c) The written signature on a manually placed order, or the digital signature or name on an electronically placed order, of the Secretary. The signature or use of the name certifies that the order is authorized under this part and that the requirements of this part are being followed;

(d) A statement that reads in substance: "This is an allocation order certified for national defense use. [Insert the legal name of the person receiving the order] is required to comply with this order, in accordance with the provisions of the Transportation Priorities and Allocations System regulation (49 CFR part 33)"; and

(e) A current copy of the Transportation Priorities and Allocations System regulation (49 CFR part 33) as of the date of the allocation order.

§ 33.55 Mandatory acceptance of an allocation order.

(a) Except as otherwise specified in this section, a person shall accept and comply with every allocation order received.

(b) A person shall not discriminate against an allocation order in any manner such as by charging higher prices for materials, services, or facilities covered by the order or by imposing terms and conditions for contracts and orders involving allocated materials, services, or facilities that differ from the person's terms and conditions for contracts and orders for the materials, services, or facilities prior to receiving the allocation order.

(c) If a person is unable to comply fully with the required action(s) specified in an allocation order, the person must notify the Department of Transportation immediately, explain the extent to which compliance is possible, and give the reasons why full compliance is not possible. If notification is given verbally, written or electronic confirmation must be provided within five (5) calendar days. Such notification does not release the person from complying with the order to the fullest extent possible, until the person is notified by the Department of Transportation that the order has been changed or cancelled.

§ 33.56 Changes or cancellations of an allocation order.

An allocation order may be changed or canceled by an official action of the Department of Transportation.

Subpart F—Official Actions

§ 33.60 General provisions.

(a) The Department of Transportation may take specific official actions to implement the provisions of this part.

(b) These official actions include, but are not limited to, Rating Authorizations, Directives, Planning Orders, and Memoranda of Understanding.

§ 33.61 Rating authorizations.

(a) A Rating Authorization is an official action granting specific priority rating authority that:

(1) Permits a person to place a priority rating on an order for an item or service not normally ratable under this part; or

(2) Authorizes a person to modify a priority rating on a specific order or series of contracts or orders.

(b) To request priority rating authority, see § 33.41.

§ 33.62 Directives.

(a) A Directive is an official action that requires a person to take or refrain from taking certain actions in accordance with its provisions.

(b) A person must comply with each Directive issued. However, a person may not use or extend a Directive to obtain any items from a supplier, unless expressly authorized to do so in the Directive.

(c) A Priorities Directive takes precedence over all DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

(d) An Allocations Directive takes precedence over all Priorities Directives, DX-rated orders, DO-rated orders, and unrated orders previously or subsequently received, unless a contrary instruction appears in the Directive.

§ 33.63 Memoranda of Understanding.

(a) A Memorandum of Understanding is an official action that may be issued in resolving special priorities assistance cases to reflect an agreement reached by all parties (the Department of Transportation, the Department of Commerce (if applicable), a Delegate Agency (if applicable), the supplier, and the customer).

(b) A Memorandum of Understanding is not used to alter scheduling between rated orders, authorize the use of priority ratings, impose restrictions under this part, or take other official actions. Rather, Memoranda of Understanding are used to confirm production or shipping schedules that do not require modifications to other rated orders.

Subpart G—Compliance

§ 33.70 General provisions.

(a) The Department of Transportation may take specific official actions for any reason necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes or this part. Such actions include Administrative Subpoenas, Demands for Information, and Inspection Authorizations.

(b) Any person who places or receives a rated order or an allocation order must comply with the provisions of this part.

(c) Willful violation of the provisions of title I or Section 705 of the Defense Production Act and other applicable statutes, this part, or an official action of the Department of Transportation, is a criminal act, punishable as provided in the Defense Production Act and other applicable statutes, and as set forth in § 33.74 of this part.

§ 33.71 Audits and investigations.

(a) Audits and investigations are official actions involving the examination of books, records, documents, other writings and information to ensure that the provisions of the Defense Production Act and other applicable statutes, this part, and official actions have been properly followed. An audit or investigation may also include interviews and a systems evaluation to detect problems or failures in the implementation of this part.

(b) When undertaking an audit, investigation, or other inquiry, the Department of Transportation shall:

(1) Define the scope and purpose in the official action given to the person under investigation; and

(2) Have ascertained that the information sought or other adequate and authoritative data are not available from any Federal or other responsible agency.

(c) In administering this part, the Department of Transportation may issue the following documents that constitute official actions:

(1) Administrative Subpoenas. An Administrative Subpoena requires a person to appear as a witness before an official designated by the Department of Transportation to testify under oath on matters of which that person has knowledge relating to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions. An Administrative Subpoena may also require the production of books, papers, records, documents and physical objects or property.

(2) Demands for Information. A Demand for Information requires a person to furnish to a duly authorized representative of the Department of Transportation any information necessary or appropriate to the enforcement or the administration of the Defense Production Act and other applicable statutes, this part, or official actions.

(3) Inspection Authorizations. An Inspection Authorization requires a person to permit a duly authorized representative of the Department of Transportation to interview the person's employees or agents, to inspect books, records, documents, other writings, and information, including electronically-stored information, in the person's possession or control at the place where that person usually keeps them or otherwise, and to inspect a person's property when such interviews and inspections are necessary or appropriate to the enforcement or the administration of the Defense Production Act and related statutes, this part, or official actions.

(d) The production of books, records, documents, other writings, and information will not be required at any place other than where they are usually kept if, prior to the return date specified in the Administrative Subpoena or Demand for Information, a duly authorized official of the Department of Transportation is furnished with copies of such material that are certified under oath to be true copies. As an alternative, a person may enter into a stipulation with a duly authorized official of the Department of Transportation as to the content of the material.

(e) An Administrative Subpoena, Demand for Information, or Inspection Authorization, shall include the name, title, or official position of the person issuing the document and of the person to be served, the evidence sought to be adduced, and its general relevance to the scope and purpose of the audit, investigation, or other inquiry. If employees or agents are to be interviewed; if books, records, documents, other writings, or information are to be produced; or if property is to be inspected; the Administrative Subpoena, Demand for Information, or Inspection Authorization will describe them with particularity.

(f) Service of documents shall be made in the following manner:

(1) Service of a Demand for Information or Inspection Authorization shall be made personally, or by Certified Mail-Return Receipt Requested at the person's last known address. Service of an Administrative Subpoena shall be made personally. Personal service may also be made by leaving a copy of the document with someone at least 18 years old at the person's last known dwelling or place of business.

(2) Service upon other than an individual may be made by serving a partner, corporate officer, or a managing or general agent authorized by appointment or by law to accept service of process. If an agent is served, a copy of the document shall be mailed to the person named in the document.

(3) Any individual 18 years of age or over may serve an Administrative Subpoena, Demand for Information, or Inspection Authorization. When personal service is made, the individual making the service shall prepare an affidavit as to the manner in which service was made and the identity of the person served, and return the affidavit, and in the case of subpoenas, the original document, to the issuing officer. In case of failure to make service, the reasons for the failure shall be stated on the original document.

(g) This section is neither intended to limit the authority of the Inspector General of the Department of Transportation to initiate and conduct audits and investigations nor confer additional authority beyond that provided by the Inspector General Act.

§ 33.72 Compulsory process.

(a) If a person refuses to permit a duly authorized representative of the Department of Transportation to have access to any premises or source of information necessary to the administration or the enforcement of the Defense Production Act and other applicable statutes, or this part, the Department of Transportation representative may seek compulsory process. Compulsory process means the institution of appropriate legal action, including *ex parte* application for an inspection warrant or its equivalent, in any forum of appropriate jurisdiction.

(b) Compulsory process may be sought in advance of an audit, investigation, or other inquiry, if, in the judgment of DOT there is reason to believe that a person will refuse to permit an audit, investigation, or other inquiry, or that other circumstances exist which make such process desirable or necessary.

§ 33.73 Notification of failure to comply.

(a) At the conclusion of an audit, investigation, or other inquiry, or at any other time, the Department of Transportation may inform the person in writing where compliance with the requirements of the Defense Production Act and other applicable statutes, this part, or an official action were not met.

(b) In cases where the Department of Transportation determines that failure to comply with the provisions of the Defense Production Act and other applicable statutes, this part, or an official action was inadvertent, the person may be informed in writing of the particulars involved and the corrective action to be taken. Failure to take corrective action may then be construed as a willful violation of the Defense Production Act and other applicable statutes, this part, or an official action.

§ 33.74 Violations, penalties, and remedies.

(a) Willful violation of the provisions of title 1 or section 705 or 707 of the Defense Production Act, the priorities provisions of the Selective Service Act, this part, or an official action, is a crime and upon conviction, a person may be punished by fine or imprisonment, or both. The maximum penalty currently provided by the Defense Production Act is a $10,000 fine, or one year in prison, or both. The maximum penalty currently provided by the Selective Service Act is a $50,000 fine, or three years in prison, or both.

(b) The Government may also seek an injunction from a court of appropriate jurisdiction to prohibit the continuance of any violation of, or to enforce compliance with, the Defense Production Act, this part, or an official action.

(c) In order to secure the effective enforcement of the Defense Production Act and other applicable statutes, this part, and official actions, the following are prohibited:

(1) No person may solicit, influence or permit another person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(2) No person may conspire or act in concert with any other person to perform any act prohibited by, or to omit any act required by, the Defense Production Act and other applicable statutes, this part, or an official action.

(3) No person shall deliver any item or perform any service if the person knows or has reason to believe that the item will be accepted, redelivered, held, or used in violation of the Defense Production Act and other applicable statutes, this part, or an official action. In such instances, the person must immediately notify the Department of Transportation that, in accordance with this provision, delivery of the item or performance of the service has not been made.

§ 33.75 Compliance conflicts.

If compliance with any provision of the Defense Production Act and other applicable statutes, this part, or an official action would prevent a person from filling a rated order or from complying with another provision of the Defense Production Act and other applicable statutes, this part, or an official action, the person must immediately notify the Department of Transportation for resolution of the conflict.

Subpart H—Adjustments, Exceptions, and Appeals

§ 33.80 Adjustments or exceptions.

(a) A person may submit a request to the Defense Production Act Activities Coordinator, Office of Intelligence Security, and Emergency Response, 1200 New Jersey Avenue, SE., Washington, DC 20590, for an adjustment or exception on the ground that:

(1) A provision of this part or an official action results in an undue or exceptional hardship on that person not suffered generally by others in similar situations and circumstances; or

(2) The consequences of following a provision of this part or an official action are contrary to the intent of the Defense Production Act and other applicable statutes, or this part.

(b) Each request for adjustment or exception must be in writing and contain a complete statement of all the facts and circumstances related to the provision of this part or official action from which adjustment or exception is sought and a full and precise statement of the reasons why relief should be provided.

(c) The submission of a request for adjustment or exception shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the request is being considered unless such interim relief is granted in writing by the Office of Intelligence, Security, and Emergency Response.

(d) A decision of the Defense Production Act Activities Coordinator under this section may be appealed to the Assistant Secretary for Administration. (For information on the appeal procedure, see § 33.81.)

§ 33.81 Appeals.

(a) Any person who has had a request for adjustment or exception denied by the Defense Production Act Activities Coordinator under § 33.80, may appeal to the Department of Transportation's Assistant Secretary for Administration, who shall review and reconsider the denial.

(b)(1) Except as provided in paragraph (b)(2) if this section, an appeal must be received by the Assistant Secretary for Administration no later than 45 days after receipt of a written notice of denial from the Defense Production Act Activities Coordinator. After this 45-day period, an appeal may be accepted at the discretion of the Assistant Secretary for Administration for good cause shown.

(2) For requests for adjustment or exception involving rated orders placed for the purpose of emergency preparedness, an appeal must be received by the Assistant Secretary for Administration, no later than five (5) days after receipt of a written notice of denial from the Defense Production Act Activities Coordinator. Contract performance under the order shall not be stayed pending resolution of the appeal.

(c) Each appeal must be in writing and contain a complete statement of all the facts and circumstances related to the action appealed from, all necessary documents, and a full and precise statement of the reasons the decision should be modified or reversed.

(d) In addition to the written materials submitted in support of an appeal, an appellant may request, in writing, an opportunity for an informal hearing. This request may be granted or denied at the discretion of the Assistant Secretary for Administration.

(e) When a hearing is granted, the Assistant Secretary for Administration may designate an employee of the Office of the Senior Procurement Executive to conduct the hearing and to prepare a report. The hearing officer shall determine all procedural questions and impose such time or other limitations deemed reasonable. In the event that the hearing officer decides that a printed transcript is necessary, all expenses shall be borne by the appellant.

(f) When determining an appeal, the Assistant Secretary for Administration may consider all information submitted during the appeal as well as any recommendations, reports, or other relevant information and documents available to the Department of Transportation, or consult with any other persons or groups.

(g) The submission of an appeal under this section shall not relieve any person from the obligation of complying with the provision of this part or official action in question while the appeal is being considered unless such relief is granted in writing by the Assistant Secretary for Administration.

(h) The decision of the Assistant Secretary for Administration shall be made within five (5) working days after receipt of the appeal, or within one (1) working day for appeals pertaining to emergency preparedness and shall be the final administrative action. It shall be issued to the appellant in writing with a statement of the reasons for the decision.

Subpart I—Miscellaneous Provisions

§ 33.90 Protection against claims.

A person shall not be held liable for damages or penalties for any act or failure to act resulting directly or indirectly from compliance with any provision of this part, or an official action, notwithstanding that such provision or action shall subsequently be declared invalid by judicial or other competent authority.

§ 33.91 Records and reports.

(a) Persons are required to make and preserve for at least three years, accurate and complete records of any transaction covered by this part or an official action.

(b) Records must be maintained in sufficient detail to permit the determination, upon examination, of whether each transaction complies with the provisions of this part or any official action. However, this part does not specify any particular method or system to be used.

(c) Records required to be maintained by this part must be made available for examination on demand by duly authorized representatives of the Department of Transportation as provided in § 33.71.

(d) In addition, persons must develop, maintain, and submit any other records and reports to the Department of Transportation that may be required for the administration of the Defense Production Act and other applicable statutes, and this part.

(e) Section 705(d) of the Defense Production Act, as implemented by Executive Order 12919, provides that information obtained under this section which the Secretary deems confidential, or with reference to which a request for confidential treatment is made by the person furnishing such information, shall not be published or disclosed unless the Secretary determines that the withholding of this information is contrary to the interest of the national defense. Information required to be submitted to the Department of Transportation in connection with the enforcement or administration of the Defense Production Act, this part, or an official action, is deemed to be confidential under section 705(d) of the Defense Production Act and shall be handled in accordance with applicable Federal law.

§ 33.92 Applicability of this part and official actions.

(a) This part and all official actions, unless specifically stated otherwise, apply to transactions in any State, territory, or possession of the United States and the District of Columbia.

(b) This part and all official actions apply not only to deliveries to other persons but also include deliveries to affiliates and subsidiaries of a person and deliveries from one branch, division, or section of a single entity to another branch, division, or section under common ownership or control.

(c) This part and its schedules shall not be construed to affect any administrative actions taken by the Department of Transportation, or any outstanding contracts or orders placed pursuant to any of the parts, orders, schedules or delegations of authority previously issued by the Department of Transportation pursuant to authority granted by the President to the Department under in the Defense Production Act. Such actions, contracts, or orders shall continue in full force and effect under this part unless modified or terminated by proper authority.

§ 33.93 Communications.

All communications concerning this part, including requests for copies of the part and explanatory information, requests for guidance or clarification, and requests for adjustment or exception shall be addressed to the Defense Production Act Activities Coordinator, Office of Intelligence, Security and Emergency Response, 1200 New Jersey Avenue, SE., Washington, DC 20590.

BILLING CODE 4910–9X–P

Appendix I to Part 33 – Sample Form OST F 1254

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
READ INSTRUCTIONS FOLLOWING FORM

FOR DOT USE
OMB Control Number: 2105-XXXX
Expiration Date: mm/dd/yyyy

You must submit a completed application in order to request Special Priorities Assistance (SPA). See sections 33.40-33.44 of the Transportation Priorities and Allocations System (TPAS) regulation (49 CFR 33). It is a criminal offense under 18 U.S.C. 1001 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction. All company information furnished related to this application will be deemed BUSINESS CONFIDENTIAL under Sec. 705(d) of the Defense Production Act of 1950 [50 U.S.C. App. 2155(d)] which prohibits publication or disclosure of this information unless the President determines that withholding it is contrary to the interest of the national defense. The Department of Transportation will assert the appropriate Freedom of Information Act (FOIA) exemptions if such information is the subject of FOIA requests. The unauthorized publication or disclosure of such information by Government personnel is prohibited by law. Violators are subject to fine and/or imprisonment.

The U.S. Department of Transportation reserves the right to request more detailed information from Applicant(s) on any responses given in the completed application for the purpose of making determinations for Special Priorities Assistance to Applicant(s).

PUBLIC BURDEN STATEMENT

A federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2105-XXXX. Public reporting for this collection of information is estimated to be approximately 30 minutes per response, including the time for reviewing instructions, gathering the data needed, and completing and reviewing the collection of information. All responses to this collection of information are mandatory. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Defense Production Act Activities Coordinator, U.S. Department of Transportation, Office of Intelligence, Security and Emergency Response, W56-306, 1200 New Jersey Avenue, SE, Washington, DC 20590.

1. APPLICANT INFORMATION

a. Name and complete address of Applicant. Applicant can be any person needing assistance – a government agency, a private company, a contractor, or service supplier. See definition of "Applicant" in the Instructions for this form.

Applicant Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact's name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

b. If Applicant is not end-user, give name and complete address of the end-user.

Customer Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact's name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

Existing contract/purchase order #: _____

Dated: _____ Priority Rating: _____

2. APPLICANT SERVICE(S) OR ITEM(S). If Applicant is not end-user, describe service(s) or items(s) to be delivered by Applicant under its customer's contract or purchase order through the use of service(s) or items(s) listed in Section 3. If known, identify the Government program and service or end-item for which these service(s) or items(s) are required. If Applicant is end-user Government agency and Section 3 service(s) or item(s) are not end-items, identify the end-service or end-item for which the Section 3 service(s) or item(s) are required. See definition of "service" and "item" in the Footnotes section of the Instructions for this form.

OPI: Office of Intelligence, Security, and Emergency Response

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
READ INSTRUCTIONS FOLLOWING FORM

FOR DOT USE
OMB Control Number: 2105-XXXX
Expiration Date: mm/dd/yyyy

3. SERVICES OR ITEMS FOR WHICH APPLICANT REQUESTS ASSISTANCE

Name and Quantity	Description	Estimated Dollar Value

4. SUPPLIER OF ITEM OR SERVICE PROVIDER INFORMATION

a. Name and complete address of Applicant's Supplier/Provider.

Supplier/Provider Name: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact Name: _____

Title: _____

Telephone: _____ Fax: _____

E-mail address: _____

b. Applicant's contract or purchase order to Supplier/Provider.

Number: _____

Dated: _____

Priority rating:
(If none, so state)

5. BRIEF JUSTIFICATION STATEMENT OF NEED FOR SPECIAL ASSISTANCE. Please provide a brief justification for this request for Special Priorities Assistance. The justification should begin with the reason you are seeking Special Priorities Assistance in support of the TPAS; e.g.: when its regular provisions are not sufficient to obtain delivery of service(s) or items(s) in time to meet urgent customer or program requirements; or help in locating a supplier or placing a rated order; to ensure that rated orders are receiving necessary preferential treatment by suppliers; to resolve production or delivery conflicts between or among rated orders; to verify the urgency or determine the validity of rated orders; or to request authority to use a priority rating. If Applicant(s) are requesting authority to use a priority rating, please explain the necessity of the requested items and/or services. As applicable, also explain the potential effects of delay in receipt of Section 3 items or services. Describe attempts to procure items/services in normal market conditions and give specific reasons why special priority assistance is required. If DX priority rating authority is requested, please explain the necessity over a DO priority rating.

OPI: Office of Intelligence, Security, and Emergency Response

U.S. DEPARTMENT OF TRANSPORTATION
REQUEST FOR SPECIAL PRIORITIES ASSISTANCE
READ INSTRUCTIONS FOLLOWING FORM

FOR DOT USE
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Expiration Date: mm/dd/yyyy

6. CERTIFICATION: I certify that the information contained in Sections 1 – 5 of this form, and all other information attached, is correct and complete to the best of my knowledge and belief (omit signature if this form is electronically generated and transmitted - use of name is deemed certification).

Signature of Applicant's authorized official

Title

Print or type Name of Applicant's authorized official

Date

CONTINUATION SECTION
Identify each statement with appropriate Section number

OPI: Office of Intelligence, Security, and Emergency Response

Instructions for Using OMB Form 2105-XXXX

REQUEST FOR SPECIAL PRIORITIES ASSISTANCE

WHO DO I CONTACT FOR FURTHER INFORMATION?

Email: S60.Policy@dot.gov

Mail: Defense Production Act Activities Coordinator, U.S. Department of Transportation, Office of Intelligence, Security and Emergency Response, W56-306, 1200 New Jersey Avenue, SE, Washington, DC 20590

Phone: 202-366-1863

Fax: 202-366-4902

HOW DO I SUBMIT THIS FORM?

Email. Please fill out form electronically using Adobe Acrobat Reader and send by email, if possible. Otherwise, print and scan your signed evaluation to a pdf document and email to S60.Policy@dot.gov.

Fax. Fax your signed evaluation to (202) 366-4902.You will receive an email confirmation.

DOT may contact you for additional clarifying information, and will respond to you in a timely manner with a decision regarding your request.

WHEN SHOULD THIS FORM BE USED?

Requests for Special Priorities Assistance (SPA) may be filed with the U.S. Department of Transportation (DOT) for any reason in support of the Transportation Priorities and Allocations System (TPAS); e.g.: when its regular provisions are not sufficient to obtain delivery of service(s) or items(s) in time to meet urgent customer or program requirements; or help in locating a supplier or placing a rated order; to ensure that rated orders are receiving necessary preferential treatment by suppliers; to resolve production or delivery conflicts between or among rated orders; to verify the urgency or determine the validity of rated orders; or to request authority to use a priority rating.

Requests for SPA must be sponsored by the U.S. Government agency responsible for the program or project supported by the Applicant's contract or purchase order.

Generally, one form should be completed for each contract or purchase order number. However, if SPA is requested for multiple contracts or purchase orders placed with a supplier for the same or similar services or items, information from all contracts or purchase orders may be included in one application. However, each contract or purchase order number must be identified and shown separately.

WHO SHOULD COMPLETE THE FORM?

Private sector applicants should file with their respective customers as follows: **lower-tier suppliers** file with customer/subcontractor for forwarding to subcontractor/prime contractor; **subcontractors/suppliers** file with prime contractor for forwarding to DOT or the sponsoring U.S. Government Agency, as applicable; **prime contractors** file directly with DOT or the sponsoring U.S. Government Agency, as applicable. If for any reason the applicant is unable to file this form as specified above, see section below on "Who do I contact for further information?"

DEFINITIONS:

Applicant as used in this form refers to any person requiring Special Priorities Assistance, and eligible for such assistance under TPAS.

Item is defined in TPAS as any raw, in process, or manufactured material, article, commodity, supply, equipment, component, accessory, part, assembly, or product of any kind, technical information, process, or service.

Person is defined in TPAS to include any individual, corporation, partnership, association, any other organized group of persons, a U.S. Government agency, or any other government.

Service is defined in TPAS to include any effort that is needed for or incidental to (1) the development, production, processing, distribution, deliver, or use of an industrial resource or a critical technology item; (2) the construction of facilities; (3) the movement of individuals and property by all modes of civil transportation; or (4) other national defense programs and activities

SPECIFIC INSTRUCTIONS

Section 1:

a. Information about the applicant should go here. An "applicant" refers to any person requiring Special priorities Assistance and eligible for such assistance under the TPAS. A "person" in this context is any individual, corporation, partnership, association, or other organized group of persons, a US Government agency or any other government.
b. Information about the end-user or ultimate customer for the item or service goes here.

Section 2:

Recognizing that many requests for special priorities may involve interim services or items, please complete this section describing the "end product" that will be improved through providing the priority listed. An example would be providing freight rail transportation for a subcomponent of a major item that is direly needed for the national defense by the Government. Explain how the transportation of the subcomponent will fulfill the Government's need.

Section 3:

Here you provide information on the item or service you provide and seek special priority assistance with. What is it called, how many or how much, what is the description and also the estimated dollar value of the item/service itself. This helps DOT understand the scope of your request.

Section 4:

This section helps DOT understand who your supplier or service provider is. These are the people who need to move faster to accomplish your priority objective.

Section 5:

Please provide enough information so DOT understands the need for and urgency of your request.

Section 6:

This section certifies that the information is correct, to the best knowledge of the person whose name and/or signature is shown (depending on format of form used). It is a criminal offense under 18 U.S.C. 1011 to make a willfully false statement or representation to any U.S. Government agency as to any matter within its jurisdiction.

Continuation Section

Understanding that situations requiring requests for special priorities assistance may be complex and information required not easily confined to sections on a form, you are provided this opportunity to provide any additional information that will assist DOT in making a determination on your request.

SPECIAL INSTRUCTIONS:

- If the space in any block is insufficient to provide a clear and complete statement of the information requested, use a separate sheet to be attached to this form.
- If disclosure of certain information on this form is prohibited by security regulations or other security considerations, enter "classified" or "confidential" in the appropriate block in lieu of the restricted information.
- The U.S. Department of Transportation

reserves the right to request more detailed information from Applicant(s) on any responses given in the completed application for the purpose of making determinations for Special Priorities Assistance to Applicant(s).

PRIVACY ACT STATEMENT

This notice is provided pursuant to the Privacy Act, 5, U.S.C. 552a(e)(3): The Information on this application is solicited under the authority of Title 50 U.S.C. App. § 2061 et seq., the Defense Production Act of 1950. The principal purpose for which the information is to be used is to determine your eligibility for Special Priorities Assistance under the Transportation Priorities and Allocations System program. Contact information will be used to notify you if Special Priorities Assistance has been granted, and to provide any other notifications required by the program. Other possible uses of information are published in the Federal Register at 75 FR 82133 (December 29, 2010) under "Prefatory Statement of General Routine Uses". Furnishing the information on this form is voluntary, but failure to provide all or part of the information may delay or prevent the processing of your application.

Appendix II to Part 33—Schedule 1 Approved Programs

The programs listed in this schedule have been approved for priorities and allocations support under this part by the Administrator of FEMA. They have equal preferential status.

Approved Program

Program Identification Symbol

[FR Doc. 2011–3209 Filed 2–14–11; 8:45 am]

BILLING CODE 4910–9X–C

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 229 and 238

[Docket Nos. FRA–2009–0094 and FRA–2009–0095, Notice No. 2]

RIN 2130–AC16

Locomotive Safety Standards; Correction

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Proposed rule; correction.

SUMMARY: FRA is notifying the public that the correct docket number for the Locomotive Safety Standards notice of proposed rulemaking (NPRM) is FRA–2009–0094. The NPRM issued on January 12, 2011, incorrectly identified docket number FRA–2009–0095 as the public docket for this rulemaking proceeding. FRA is requesting that all comments related to this proceeding be submitted to FRA–2009–0094.

DATES: The comment date for the proposed rule published January 12, 2011, at 76 FR 2200, remains March 14, 2011.

FOR FURTHER INFORMATION CONTACT: Michael Masci, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC (telephone 202–493–6037).

ADDRESSES: Comments: Comments related to Docket No. FRA–2009–0094, may be submitted by any of the following methods: Web Site: Federal eRulemaking Portal, *http://www.regulations.gov.* Follow the online instructions for submitting comments.

- *Fax:* 202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., W12–140, Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to *http://www.regulation.gov* including any personal information. FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or you may visit *http://dms.dot.gov.*

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION: On January 12, 2011, FRA published an NPRM related to locomotive safety standards. *See* 76 FR 2200. The NPRM established a public docket to receive comments in response to FRA's proposal related to locomotive safety standards. That *NPRM* mistakenly lists FRA–2009–0095 ("incorrect docket") as the docket number for the NPRM. The correct docket number for this proceeding is FRA–2009–94 ("correct docket"). FRA requests that comments to the NPRM be submitted to the correct docket.

Comments submitted to the incorrect docket will be fully considered as part of the locomotive safety standards rulemaking. Because the incorrect docket is listed in the January 12, 2011, **Federal Register** document issuing the NPRM, comments submitted to the incorrect docket will remain valid. FRA will transfer all comments and information that are received in the incorrect docket to the correct docket. As such, interested parties that wish to read comments to the NPRM should access docket FRA–2009–0094 to locate the comments.

Issued in Washington, DC, on February 9, 2011.

Robert Lauby,

Deputy Associate Administrator for Regulatory and Legislative Operations.

[FR Doc. 2011–3260 Filed 2–14–11; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1201

[Docket No. EP 706]

Reporting Requirements for Positive Train Control Expenses and Investments

AGENCY: Surface Transportation Board, DOT.

ACTION: Notice of intent to institute a rulemaking proceeding.

SUMMARY: In a decision served on February 10, 2011, the Board granted a petition by the Union Pacific Railroad Company (UP) to institute a rulemaking proceeding to explore whether the Board should require Class I railroads to report separately how much each railroad is spending on the development, installation, and maintenance of Positive Train Control, a federally mandated safety system that will automatically stop or slow a train before an accident can occur. Several parties filed comments in reply to UP's petition. The Board will address the arguments and issues raised in those filings in a subsequent decision. The Board's decision makes no determination on the merits of UP's specific proposal.

DATES: The Board's decision became effective on February 10, 2011. The Board will establish further procedures for public comment in a subsequent decision.

FOR FURTHER INFORMATION CONTACT: Valerie Quinn, (202) 245–0382. Federal Information Relay Service (FIRS) for the hearing impaired, (800) 877–8339.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Board's February 10, 2011, decision, which is available on our Web site at *http://www.stb.dot.gov.* Copies of the decision may be purchased by contacting the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245–0236. Assistance for the hearing impaired is available through FIRS at (800) 877–8339.

This action will not significantly affect either the quality of the human