EPA-APPROVED LOUISIANA REGULATIONS IN THE LOUISIANA SIP—Continued

State citation	Title/subject	State approval date	EPA approval date	Comments
Section 502	Definitions	5/20/2011	8/4/2016 [Insert **Federal Register** citation].	
Section 503	Minor Source Permit Requirements.	4/20/2011	8/4/2016 [Insert **Federal Register** citation].	
Section 504	Nonattainment New Source Review (NNSR) Procedures.	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	The SIP does not include LAC 33:III.504.M.
*	* *	*	*	* *
Section 511	Emission Reductions	11/20/1993	8/4/2016 [Insert **Federal Register** citation].	
Section 513	General Permits, Temporary Sources, and Relocation of Portable Facilities.	10/20/2006	8/4/2016 [Insert **Federal Register** citation].	The SIP does not include LAC 33:III.513.A.1.
Section 515	Oil and Gas Wells and Pipelines Permitting Provisions.	11/20/1993	8/4/2016 [Insert **Federal Register** citation].	
Section 517	Permit Applications and Submittal of Information.	12/20/1997	8/4/2016 [Insert **Federal Register** citation].	
Section 519	Permit Issuance Procedures for New Facilities, Initial Permits, Renewals and Significant Modifications.	11/20/1993	8/4/2016 [Insert **Federal Register** citation].	The SIP does not include LAC 33:III.519.C.
Section 521	Administrative Amendments	5/20/2005	8/4/2016 [Insert **Federal Register** citation].	
Section 523	Procedures for Incorporating Test Results.	4/20/2011	8/4/2016 [Insert **Federal Register** citation].	
Chapter 6—Regulations on Control of Emissions Reduction Credits Banking				
Section 601	Purpose	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
Section 603	Applicability	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
Section 605	Definitions	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
Section 607	Determination of Creditable Emission Reductions.	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
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Section 615	Schedule for Submitting Applications.	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
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Section 619	Emission Reduction Credit Bank.	11/20/2012	8/4/2016 [Insert **Federal Register** citation].	
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SURFACE TRANSPORTATION BOARD

49 CFR Part 1040

[Docket No. EP 726]

On-Time Performance Under Section 213 of the Passenger Rail Investment and Improvement Act of 2008

AGENCY: Surface Transportation Board.

ACTION: Final rule.

SUMMARY: The Surface Transportation Board (STB or Board) is adopting a final rule to define ''on time'' and specify the formula for calculating ''on-time performance'' for purposes of Section 213 of the Passenger Rail Investment and Improvement Act of 2008. The Board will use these regulations only for the purpose of determining whether the ''less than 80 percent'' threshold that Congress set for bringing an on-time performance complaint has been met. In light of comments received on the Board's notice of proposed rulemaking issued on December 28, 2015, the proposed rule has been modified to deem a train's arrival at, or departure from, a given station ''on time'' if it occurs no later than 15 minutes after its scheduled time and to adopt an ''all-stations'' calculation of ''on-time performance.''

DATES: This rule is effective on August 27, 2016.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245–0386. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: The National Railroad Passenger Corporation (Amtrak) was established by Congress in 1970 to preserve passenger services and routes on the Nation's railroads. *See Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 383–384 (1995); *Nat'l R.R. Passenger Corp.* v. *Atchison, Topeka, & Santa Fe R.R.*, 470 U.S. 451, 454 (1985); *see also Rail Passenger Serv. Act of 1970,* Public Law 91–518, 84 Stat. 1328

(1970). As a condition of relieving the railroad companies of their common carrier obligation to provide passenger service, Congress required them to permit Amtrak to operate over their tracks and use their facilities. *See* 45 U.S.C. 561, 562 (1970 ed.). Since 1973, Congress has required railroads to give Amtrak trains preference over freight service when using their lines and facilities: ''Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing . . . .'' 49 U.S.C. 24308(c); *see* Amtrak Improvement Act of 1973, Public Law 93–146, section 10(2), 87 Stat. 552 (initial version).

Prior to 2008, the Board was not involved in the adjudication of Amtrak's preference rights. The only way that Amtrak could enforce its preference rights was by asking the Attorney General to bring a civil action for equitable relief. 49 U.S.C. 24103. Further, the Secretary of Transportation had the authority under section 24308(c) to grant a host rail carrier relief from the preference obligation and to establish the usage rights between Amtrak and the host carrier if the Secretary found that Amtrak's preference materially lessened the quality of freight transportation provided to shippers. In 2008, Congress enacted Section 213 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA), 49 U.S.C. 24308(f), to address, among other things, the concern that one cause of Amtrak's inability to achieve reliable on-time performance was the failure of host railroads to honor Amtrak's right to preference. *See Passenger Rail Inv. & Improvement Act*, Public Law 110–432, Div. B, 122 Stat. 4907 (2008); S. Rep. No. 67, 110th Cong., 1st Sess. 25–26 (2007). Section 207 of PRIIA, 49 U.S.C. 24101 note, charged Amtrak and the Federal Railroad Administration (FRA) with ''jointly'' developing new, or improving existing, metrics and standards for measuring the performance of intercity passenger rail operations, including on-time performance and train delays incurred on host railroads.

PRIIA also transferred from the Secretary of Transportation to the Board the administration and enforcement of Amtrak's preference rights. Thus, PRIIA amended 49 U.S.C. 24308(c) to provide that: ''Except in an emergency, intercity and commuter rail passenger transportation provided by or for Amtrak has preference over freight transportation in using a rail line, junction, or crossing unless *the Board* orders otherwise under this subsection'' (emphasis added). Congress likewise transferred to the Board the authority under section 24308(c) to determine if ''preference for intercity and commuter rail passenger transportation materially will lessen the quality of freight transportation provided to shippers'' on a freight carrier's line, and, if so, to ''establish the rights of the carrier and Amtrak on reasonable terms.''

Under Section 213(a) of PRIIA, 49 U.S.C. 24308(f)(1), if the ''on-time performance'' (OTP) of any intercity passenger train averages less than 80% for any two consecutive calendar quarters, the Board may initiate an investigation, or upon complaint by Amtrak or another eligible complainant, the Board ''shall'' do so. The purpose of such an investigation is to determine whether and to what extent delays are due to causes that could reasonably be addressed by the passenger rail operator or the host railroad. Following the investigation, should the Board determine that Amtrak's substandard performance is ''attributable to'' the rail carrier's ''failure to provide preference to Amtrak over freight transportation as required'' by 49 U.S.C. 24308(c), the Board may ''award damages'' or other appropriate relief from a host railroad to Amtrak. 49 U.S.C. 24308(f)(2). If the Board finds it appropriate to award damages to Amtrak, Amtrak must use the award ''for capital or operating expenditures on the routes over which delays'' were the result of the host railroad's failure to grant the statutorily required preference to passenger transportation. 49 U.S.C. 24308(f)(4).

Thus, 49 U.S.C. 24308(f) sets up a two-stage process involving, first, a ''less than 80 percent'' threshold to indicate whether a train's OTP allows for an investigation; and second, if this prerequisite is satisfied, the Board may investigate (or on complaint, shall investigate) the causes of the deficient OTP, which could lead to findings, recommendations, and other possible relief as detailed in the statute.

On May 15, 2015, the Board instituted this rulemaking proceeding in response to a petition filed by the Association of American Railroads (AAR). *See On-Time Performance Under Sec. 213 of the Passenger Rail Inv. & Improvement Act of 2008*, EP 726 (STB served May 15, 2015). In that decision, the Board stated that a rulemaking would provide clarity regarding the ''less than 80 percent'' OTP threshold in all applicable cases and allow the Board to obtain the full range of stakeholder perspectives in one docket and avoid the potential relitigation of the issue in each case, thereby conserving party and agency resources.[1]

On December 28, 2015, the Board issued a Notice of Proposed Rulemaking (NPRM) that proposed a definition for OTP derived from a previous definition used by our predecessor, the Interstate Commerce Commission (ICC).[2] The Board's proposed rule read: ''A train is 'on time' if it arrives at its final terminus no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less.'' NPRM, slip op. at 4–9. The Board sought comments on this definition but also encouraged the public to propose other alternatives, including the alternative adopted here: factoring into the calculation a train's punctuality at intermediate stops rather than the final terminus only. *See* NPRM, slip op. at 6. The Board also established a procedural schedule providing for comments and replies.

The Board received 121 comments and replies on its proposed rule from the railroad industry (both passenger and freight), states, the U.S. Department of Transportation, elected officials at all levels of government, individual members of the traveling public, and various stakeholder groups.

Shortly after the comment period in this docket closed, in *Association of American Railroads* v. *Department of Transportation*, 821 F.3d 19 (D.C. Cir. 2016), the United States Court of Appeals for the District of Columbia Circuit held that the structure of Section 207 of PRIIA violates the Due Process Clause of the U.S. Constitution because, in the court's view, it authorized Amtrak, ''an economically self-interested actor,'' to ''regulate its competitors''—that is, the railroads that host Amtrak passenger trains outside the Northeast Corridor. Accordingly, the FRA and Amtrak metrics are currently invalid.

Discussion of Issues Raised in Response to the NPRM.

The Board's Authority. Several freight rail interests argue that—even though section 24308(f)(1) allows, and in some

[1] By that point Amtrak had filed two complaints (both pending, but in abeyance based on this rulemaking) requesting that the Board initiate an investigation pursuant to section 24308(f), and claiming that host Class I carriers have not given Amtrak preference as required under section 24308(c). *See Nat'l R.R. Passenger Corp.—Sec. 213 Investigation of Substandard Performance on Rail Lines of Canadian Nat'l Ry.*, NOR 42134; *Nat'l R.R. Passenger Corp.—Investigation of Substandard Performance of the Capitol Ltd.*, NOR 42141.

[2] The NPRM contains additional background on the court and agency litigation and controversies that led the Board to initiate the rulemaking.

circumstances requires, the Board to investigate the causes of poor ''on time performance,'' including whether a host rail carrier has failed to provide preference to Amtrak over its rail line as required by section 24308(c)—the Board lacks authority to give meaning to the term ''on-time performance.'' They argue this even though PRIIA provides that if the on-time performance of an Amtrak passenger train falls below 80% for two consecutive quarters, such performance may warrant an investigation by the Board.

Although regulatory agencies like the Board typically have the authority to define the terms in provisions of the statutes that they administer, AAR and freight railroad commenters (Canadian National Railway Company (CN), CSX Transportation, Inc. (CSXT), and Norfolk Southern Railway Company (NS)) argue that the Board does not have the authority to define on-time performance because Congress gave that responsibility jointly to Amtrak and FRA in Section 207 of PRIIA. We disagree.

In *National Railroad Passenger Corp.—Section 213 Investigation of Substandard Performance on Rail Lines of Canadian National Railway* (*Illini/Saluki*), NOR 42134, slip op. at 2 (STB served Dec. 19, 2014), the Board concluded that the unconstitutionality of Section 207 of PRIIA does not prevent the Board from initiating investigations of on-time performance problems under section 24308(c). Indeed, the only way for the Board now to fulfill its responsibilities under 49 U.S.C. 24308(f) is to define OTP as a threshold for such investigations.

CN and AAR in their initial comments (*see* CN Feb. 8 Comment 4; AAR Feb. 8 Comment 6) raise concerns that host freight railroads may be faced with two inconsistent sets of regulations (*i.e.*, issued by (1) FRA/Amtrak and (2) the Board) if section 24308(f) investigations are instituted using the OTP definition established in this final rule and the courts ultimately uphold the validity of the PRIIA Section 207 metrics and standards. However, at present there are not two different operative standards, and there may never be. We will, therefore, address the issue of conflicting OTP definitions if and when the issue should arise.

CN and AAR argue that the issue is not whether section 24308(f) survives if Section 207 of PRIIA is unconstitutional, but whether Congress delegated to the Board in section 24308(f)(1) the authority to define on-time performance. They contend that because Congress explicitly delegated the authority to define on-time performance to FRA and Amtrak in Section 207 of PRIIA, the Board lacks that authority even if FRA and Amtrak are found not to have the legal authority to meet the statutory command.[3]

An agency has implied authority to implement ''a particular statutory provision . . . when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.'' *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001).[4] ''Sometimes, the legislative delegation to an agency on a particular question is implicit rather than explicit.'' *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Several federal courts of appeals have held that an administrative agency with rulemaking authority has implicit authority to fill a gap exposed by the Supreme Court's invalidation of a portion of a statute. *See Pittston Co.* v. *United States*, 368 F.3d 385, 403–04 (4th Cir. 2004); *Sidney Coal Co.* v. *Social Security Admin.*, 427 F.3d 336, 346 (6th Cir. 2005).[5]

Here, as in *Pittston* and *Sidney Coal*, the invalidation of Section 207 of PRIIA leaves a gap that the Board has the delegated authority to fill by virtue of its authority to adjudicate complaints brought by Amtrak against host freight railroads for violations of Amtrak's statutory preference and to award damages where a preference violation is found. Any other result would gut the remedial scheme, a result that Congress clearly did not intend.

All-Stations OTP. As summarized below, the Board's NPRM proposed to calculate OTP solely on the basis of train arrivals at endpoint termini (Endpoint OTP). The Board proposed Endpoint OTP as an appropriate threshold for bringing OTP cases under 49 U.S.C. 24308(f)(1) because it would be ''clear and relatively easy to apply,'' *i.e.*, comprehensible to the traveling public and simple to describe and implement. In addition, Amtrak's public OTP data[6] suggest that under either an Endpoint OTP or All-Stations OTP standard, the threshold for initiating a case could be triggered in a comparable number of cases, if long-established trends continue. Nevertheless, many commenters perceived that in proposing an Endpoint OTP threshold, the Board was devoting insufficient attention to intermediate stations, their passengers, and even the states in which the intermediate stations are located. That was not the Board's intent; rather, the intent was solely to set a threshold for accepting cases.

Except for the freight railroad industry, virtually all commenters urge the Board to define ''on time'' based on train punctuality at all stations, rather than just at the endpoints (as originally proposed), because the majority of the traveling public are destined for intermediate rather than endpoint stations. (*See, e.g.*, Amtrak Feb. 8 Comment 7.) Moreover, the examples provided by individual passengers—*e.g.*, of waiting for hours at unattended stations in remote or unsecured locations at night for late trains that would be deemed ''on time'' at their endpoints—convince us that an ''all-stations'' definition will more appropriately reflect the principle that rail passengers destined for every station along a line, regardless of its

[3] In support, they cite *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974) (''When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'') and *Bayou Lawn & Landscape Services* v. *Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013). But neither case has any bearing on the Board's authority to fill the definitional gap exposed by the invalidation of a statutory provision. *National Railroad Passenger Corp.* did not involve agency delegation; that case addressed the question whether the predecessor to 49 U.S.C. 24103, which allows the Attorney General to bring suit against Amtrak or host freight railroads to enforce obligations related to Amtrak, created a private right of action to allow third parties to sue to prevent what they regarded as the unlawful discontinuance of certain passenger trains. In *Bayou Lawn*, the court held that the Department of Labor's general rulemaking authority did not give it delegated authority to issue legislative rules for visa applications for non-agricultural workers where Congress had expressly delegated that authority to the Department of Homeland Security. There was no suggestion there that the express delegation to Homeland Security had been invalidated, or that Homeland Security was otherwise incapable of carrying out the Congressional delegation.

[4] *See ICC* v. *Am. Trucking Assns.*, 467 U.S. 354, 364–67 (1984) (agency may ''modify express remedies in order to achieve specific statutory purposes'' if the ''discretionary power . . . further[s] a specific statutory mandate [and] the exercise of that power [is] directly and closely tied to that mandate''); *W. Coal Traffic League* v. *STB*, 216 F.3d 1168 (D.C. Cir. 2000).

[5] CN argues that the Fifth Circuit held in *Texas* v. *United States*, 497 F.3d 491, 504 (5th Cir. 2007) that a later court decision cannot affect or create ambiguity for purposes of *Chevron* delegation. But Chief Judge Jones' opinion cited by CN is not the majority opinion on the issue of implicit delegation. Both Judge King, who concurred in the result, and Judge Denis, who dissented, agreed that a court decision invalidating a portion of a statute creates implicit authority to the agency administering the statute to engage in gap-filling. 497 F.3d at 511–12, 513–14. Judge King and Judge Denis disagreed over whether the agency's authority to fill gaps included overriding portions of the statute that remained in effect. There is no such problem here because the Board is simply defining the term ''on-time performance,'' which remains in effect.

[6] *See* Amtrak's Monthly Performance Reports on Amtrak.com, as well as the quarterly OTP statistics published by the Federal Railroad Administration (*http://www.fra.dot.gov/Page/P0532*).

size, should have the same expectation of punctuality. This principle underlies the Congressional aspiration that ''Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, *to all station stops* within 15 minutes of the time established in public timetables.'' 49 U.S.C. 24101(c)(4) (emphasis added).[7] We therefore will incorporate an all-stations calculation in the threshold for bringing cases to the Board under 49 U.S.C. 24308(f).

As the freight railroads point out, and as FRA and Amtrak themselves acknowledged in their final metrics and standards under PRIIA Section 207 (in which they deferred application of an all-stations test for OTP for two years to allow for schedule adjustments), some schedules, particularly for long-distance trains, may need to be modified to more realistically distribute recovery time in light of an all-stations threshold. (*See* CN Mar. 30 Reply 3–4; AAR Mar. 30 Reply 6–7.) For example, as CSXT notes, considerable care must be exercised in distributing recovery time along a route, to avoid site-specific operational concerns. (*See* CSXT Mar. 30 Reply 10.) Moreover, a number of current passenger rail schedules insert a very large share of recovery time between the last stations on a route. To support all stations OTP on such a route could require a reevaluation and potential reallocation of recovery time across the entire route. We are confident, however, that following adoption of an all-stations approach to OTP in this rulemaking, rail operations planners from all affected parties will be able to devise appropriate, realistic, and up-to-date modifications to published schedules that are consistent both with all-stations OTP and with Congress' explicit intent in PRIIA to improve intercity passenger rail service. Furthermore, considerations regarding the published schedules may enter into the investigation stage of the two-stage process contemplated in the statute.

The 15-Minute Allowance. In the NPRM, the Board proposed that an Amtrak train would be considered on-time if it arrives at its final terminus no more than five minutes after its scheduled arrival time per 100 miles of operation, or 30 minutes after its scheduled arrival time, whichever is less. Based on the comments received,[8] the Board has decided to deem a train's arrival or departure ''on time'' if it occurs no later than 15 minutes after its scheduled time. In our view, this 15-minute allowance has several advantages. First, it is consistent with the Congressional goal set forth in 49 U.S.C. 24101(c)(4).[9] Second, in comparison with the tiered proposal, it is simple and easy to apply. Third, it treats all stations and all passengers equally. Finally, Amtrak has long been calculating All-Stations OTP with a constant 15-minute allowance at each station,[10] so the data needed to apply this final rule are readily available to the public and stakeholders.

Contract On-Time Performance Versus Published Schedules. The freight railroads generally argue that OTP should be measured in accordance with the criteria contained in their private contracts with Amtrak (contract OTP) rather than the published Amtrak timetables. (*See* Union Pac. R.R. (UP) Feb. 8 Comment 3; AAR Feb. 8 Comment 10; CN Feb. 8 Comment 5.) However, the Congressional goal at 49 U.S.C. 24101(c)(4) refers to the ''time established in public timetables.'' In addition to being consistent with the Congressional goal, a comparison of publicly scheduled train timings with actual train timings is also the simplest and most transparent way to compare a train's OTP, as experienced by the traveling public, with the ''less than 80 percent'' threshold mandated in 49 U.S.C. 24308(f)(1). Although the private contracts between Amtrak and its host carriers will not enter into the threshold stage of an OTP case, such contracts could be relevant in the investigation stage.

Several freight railroads and AAR claim that if the Board does not account for the problems with the schedules and simply relies on the published schedules as they are, it could result in an avalanche of complaints and ''false positives''—trains that technically fall below the OTP threshold but are not necessarily poor performers because the schedules are allegedly ''unrealistic.'' (*See* AAR Mar. 30 Reply; CN Mar. 30 Reply; UP Mar. 30 Reply; NS Mar. 30 Reply; CSXT Mar. 30 Reply.) Because the complainant has the primary burden of proving its case and litigation is resource intensive, the adopted approach is not expected to result in an overwhelming number of claims.

Finally, some commenters (*e.g.,* Virginia DOT, Michigan DOT, States for Passenger Rail Coalition) argue that the Board should set standards for the development of route schedules or conduct further study of the schedules prior to adopting rules. However, while section 24308(f) permits the Board, in conducting a particular investigation, to review the extent to which scheduling may contribute to the delays being investigated and to identify reasonable measures to improve OTP, the statute does not include generalized authority, outside a particular investigation, for the Board to set standards for the development of schedules. Thus, what these commenters are asking the Board to do is beyond the scope of our authority and this rulemaking.

Third-Party (State) Agreements. A number of states and others expressed concern that the Board's OTP rule could undermine or preempt separate agreements entered into between states, operators, hosts, and others for the improvement of passenger rail service in specific corridors—for example, service outcomes agreements under FRA's High-Speed Intercity Passenger Rail (HSIPR) Program. (*See* States for Passenger Rail Coalition, Inc. Feb. 8 Comment 3; Cal. State Transp. Agency Feb. 8 Comment 3.) We reiterate, however, that the Board is defining ''on time'' and describing the calculation of OTP only for the purpose of determining whether the ''less than 80 percent'' threshold for bringing an OTP complaint has been met. The Board neither intends nor expects that its OTP definition here will have any applicability beyond that limited purpose.

Multicarrier Routes. Several commenters, including freight railroad interests, argue that for routes where there are multiple host carriers, OTP should not be measured for the entire route, but for each host carrier's segment. The commenters argue that this would allow the Board to determine if the delays are occurring on one carrier's segment and, if so, to properly narrow the investigation solely to that carrier's conduct. The commenters argue that if the Board does not do so, a carrier that is meeting its statutory duty could be unfairly drawn into an investigation.

Although the Board understands that concern, the attribution of delays to hosts and specific causes more properly pertains to—indeed, would likely be among the initial topics addressed in—the investigatory phase of a case. Moreover, the statutory mandate (49 U.S.C. 24308(f)) specifically refers to the ''on-time performance of any intercity passenger train,'' irrespective of the number of host carriers involved in the

[7] *See also Adequacy of Intercity Rail Passenger Serv.,* 351 I.C.C. 883 (1976).

[8] *See, e.g.,* Capital Corridor Joint Powers Authority March 30 Reply 4 n.3; Amtrak February 8 Comment 8; Virginia Rail Policy Institute February 8 Comment 1.

[9] ''Amtrak shall . . . operate Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables.''

[10] The only exception is Amtrak's Acela service in the Northeast Corridor, to which Amtrak applies a 10-minute lateness allowance.

train's operation. Therefore, the adopted approach is consistent with the statute.

Calculation of OTP. Two individuals take issue with the Board's proposal to exclude from the OTP analysis any train that does not operate ''from its scheduled origin to its scheduled destination.'' The commenters argue that these trains should be accounted for, because they might represent instances of the most severe service failures.

The changes adopted in this final rule will lessen the potential impact of this issue. Endpoint OTP, as proposed in the NPRM, would not have included any train that does not serve both its scheduled endpoints. By contrast, under the all-stations calculation method, every departure from origin and every arrival at subsequent stations that actually occurs—regardless of whether the train originates at its scheduled origin or completes its run to its scheduled destination—will enter into the denominator. The Board will exclude, from its prescribed calculation method, only trains that do not operate at all, or stations on a curtailed train's route that do not actually receive service. This is consistent with the statute, which provides that Congressionally-mandated investigations in 49 U.S.C. 24308(f)(1) should analyze ''delays'' (not cancellations). In addition, in a train operation that does not take place, there typically would be no practical way to determine whether preference (the focus of 49 U.S.C. 24308(f)(2)) was granted or withheld. Finally, because Amtrak generally cancels or curtails its services only in the event of emergencies or extreme weather events (such as the severe flooding in South Carolina in the Fall of 2015), it is doubtful that inclusion of such incidents in the denominator of the calculation would shed light on what is taking place under typical operating conditions for a particular train. To clarify this point, language is being added to the final rule making clear that the OTP calculation includes only ''actual'' arrivals and departures.

Additional issues, including the following, were raised by certain commenters, but the issues are beyond the scope of this rulemaking.

Per-Train vs. Per-Route Calculation. Some railroad interests argue that the Board should not calculate OTP for all trains on the route, but rather, for each individual train that operates on that route. This argument goes to the question of what constitutes a ''train,'' an issue that this rulemaking does not address and was not intended to address.

International Service. Some commenters note that the proposed OTP standard rule does not provide any guidance for cross-border routes (*i.e.,* those that go into Canada). No such issue has arisen in a case brought to the Board, and this issue goes to the question of what constitutes a ''train,'' an issue that, again, this rulemaking does not address and was not intended to address.

Eligible Complainants. The Michigan Association of Railroad Passengers argues that the Board should expand the pool of the parties that can file complaints to include passengers. However, the parties eligible to bring complaints under section 24308(f) are specified by that statute, and we are not at liberty to expand it in this rulemaking.

Time Limits on Data. Some freight railroad commenters also state that without a time limit on the period during which the OTP deficiency at issue is alleged to have occurred (*e.g.,* the most recent four quarters), outdated and unnecessary claims could be filed regarding a train that is currently performing well. (*See* CN Feb. 8 Comment 6; AAR Feb. 8 Comment 14.) This issue, too, is beyond the scope of this rulemaking, which was intended solely to define ''on time'' and specify the formula for calculating OTP for purposes of 49 U.S.C. 24308(f).

Summary of the Final Rule

For the reasons discussed above, we are modifying the rule as initially proposed and adopting the all-stations approach. This approach will be codified at 49 CFR 1040. The final regulations are attached at the end of this decision.

Section 1040.1 makes explicit the strictly limited purpose of the rulemaking, as discussed above: To define ''on time'' and specify the formula for calculating OTP so as to trigger implementation of 49 U.S.C. 24308(f).

Section 1040.2 states that a train's arrival at or departure from a particular station is ''on time'' if it occurs no later than 15 minutes after its scheduled time. This section embodies the 15-minute allowance contained in the longstanding Congressional goal for Amtrak at 49 U.S.C. 24101(c)(4).

Section 1040.3 implements the ''all-stations'' option that was suggested as an alternative to endpoint OTP in the NPRM. Pursuant to 49 U.S.C. 24308(f)(1), which states that a train can be the subject of an OTP complaint if its OTP ''averages less than 80 percent for any two consecutive calendar quarters,'' Section 1040.3 describes the method for calculating a train's OTP in each quarter. Specifically, OTP is the percentage equivalent to the fraction (1) whose denominator is the total number of the train's actual (a) departures from its origin station, (b) arrivals at all intermediate stations, and (c) arrivals at its destination station, during that calendar quarter, and (2) whose numerator is the total number of such actual departures and arrivals that are ''on time'' under § 1040.2—*i.e.,* that occur no later than 15 minutes after their scheduled time.

Regulatory Flexibility Act Statement

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 5 U.S.C. 601–604. Under section 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a ''significant impact on a substantial number of small entities.''

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop. Ass'n* v. *Conner,* 553 F.3d 467, 478, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. *United Distrib. Cos.* v. *FERC,* 88 F.3d 1105, 1170 (D.C. Cir. 1996).

In the NPRM, the Board already certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Board explained that the proposed rule would not place any additional burden on small entities, but rather clarify an existing obligation. The Board further explained that, even assuming for the sake of argument that the proposed regulation were to create an impact on small entities, which it would not, the number of small entities so affected would not be substantial. A copy of the

NPRM was served on the U.S. Small Business Administration (SBA).

The final rule adopted here uses a different measure of ''on time'' and ''on-time performance'' for purposes of Section 213 of PRIIA than those proposed in the NPRM. However, the same basis for the Board's certification of the proposed rule applies to the final rule adopted here. The final rule would not create a significant impact on a substantial number of small entities. Host carriers have been required to allow Amtrak to operate over their rail lines since the 1970s. Moreover, an investigation concerning delays to intercity passenger traffic is a function of Section 213 of PRIIA rather than this rulemaking. The final rule only defines ''on-time performance'' for the purpose of implementing the rights and obligations already established in Section 213 of PRIIA. Thus, the rule does not place any additional burden on small entities, but rather clarifies an existing obligation. Moreover, even assuming, for the sake of argument, that the final rule were to create an impact on small entities, which it does not, the number of small entities so affected would not be substantial. The final rule applies in proceedings involving Amtrak, currently the only provider of intercity passenger rail transportation subject to PRIIA, and its host railroads. For almost all of its operations, Amtrak's host carriers are Class I rail carriers, which are not small businesses under the Board's new definition for RFA purposes.[11] Currently, out of the several hundred Class III railroads (''small businesses'' under the Board's new definition) nationwide, only approximately 10 host Amtrak traffic.[12] Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

The final rule is categorically excluded from environmental review under 49 CFR 1105.6(c).

List of Subjects in 49 CFR Part 1040

On-time performance of intercity passenger rail service.

It is ordered:

1. The final rule set forth below is adopted and will be effective on August 27, 2016. Notice of the rule adopted here will be published in the **Federal Register**.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. This decision is effective on the date of service.

Decided: July 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Kenyatta Clay,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, subchapter A, of the Code of Federal Regulations by adding part 1040 as follows:

PART 1040: ON-TIME PERFORMANCE OF INTERCITY PASSENGER RAIL SERVICE

Sec.

Authority: 49 U.S.C. 1321 and 24308(f).

§ 1040.1. Purpose.

This part defines ''on time'' and specifies the formula for calculating on-time performance for the purpose of implementing Section 213 of the Passenger Rail Investment and Improvement Act of 2008, 49 U.S.C. 24308(f).

§ 1040.2. Definition of ''on time.''

An intercity passenger train's arrival at, or departure from, a given station is on time if it occurs no later than 15 minutes after its scheduled time.

§ 1040.3. Calculation of quarterly on-time performance.

In any given calendar quarter, an intercity passenger train's on-time performance shall be the percentage equivalent to the fraction calculated using the following formula:

(a) The denominator shall be the total number of the train's actual: Departures from its origin station, arrivals at all intermediate stations, and arrivals at its destination station, during that calendar quarter; and

(b) The numerator shall be the total number of the train's actual: Departures from its origin station, arrivals at all intermediate stations, and arrivals at its destination station, during that calendar quarter, that are on time as defined in § 1040.2.

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[11] At the time the Board issued the NPRM, the Board used the SBA's size standard for rail transportation, which is based on number of employees. *See* 13 CFR 121.201 (industry subsector 482). Subsequently, however, pursuant to 5 U.S.C. 601(3) and after consultation with SBA, the Board (with Commissioner Begeman dissenting) established a new definition of ''small business'' for the purpose of RFA analysis. Under that new definition, the Board defines a small business as a rail carrier classified as a Class III rail carrier under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016).

[12] This number is derived from Amtrak's Monthly Performance Report for May 2015, historical on-time performance records, and system timetable, all of which are available on Amtrak's Web site.

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R1–ES–2015–0070; 4500030114]

RIN 1018–BA91

Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Marbled Murrelet

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final determination.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), determine the critical habitat for the marbled murrelet (*Brachyramphus marmoratus*), as designated in 1996 and revised in 2011, meets the statutory definition of critical habitat under the Endangered Species Act of 1973, as amended (Act). The current designation includes approximately 3,698,100 acres (1,497,000 hectares) of critical habitat in the States of Washington, Oregon, and California.

DATES: This final determination confirms the effective date of the final rule published at 61 FR 26256 and effective on June 24, 1996, as revised at 76 FR 61599, and effective on November 4, 2011.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* and *http://www.fws.gov/wafwo.* Comments and materials we received, as well as some of the supporting documentation we used in preparing this final rule, are available for public inspection at *http://www.regulations.gov.* All of the comments, materials, and documentation that we considered in this rulemaking are available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Washington Fish and Wildlife Office, 510 Desmond Drive SE., Suite 102,