

significant regulatory action under Executive Order 12866.

*J. National Technology Transfer and Advancement Act (NTTAA) and 1 CFR Part 51*

This action involves technical standards. Therefore, the EPA conducted searches for National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining Residual Risk and Technology Review through the Enhanced NSSN Database managed by the American National Standards Institute (ANSI). We also contacted voluntary consensus standards (VCS) organizations and accessed and searched their databases. Searches were conducted for EPA Methods 1, 2, 2F, 2G, 3, 3A, 3B, 4, 5, 5D, 23, 26, 26A, of 40 CFR part 60, appendix A, and EPA Methods 201 and 201A of 40 CFR part 51, appendix M. No applicable VCS were identified for EPA Methods 1, 2, 2F, 2G, 5D, 23, 201 and 201A.

During the search, if the title or abstract (if provided) of the VCS described technical sampling and analytical procedures that are similar to the EPA's reference method, the EPA considered it as a potential equivalent method. All potential standards were reviewed to determine the practicality of the VCS for this rule. This review requires significant method validation data which meets the requirements of EPA Method 301 for accepting alternative methods or scientific, engineering, and policy equivalence to procedures in EPA reference methods. The EPA may reconsider determinations of impracticality when additional information is available for particular VCS.

Two VCS were identified as an acceptable alternative to EPA test methods for the purposes of this rule. The VCS, ANSI/ASME PTC 19-10-1981 Part 10 (2010), "Flue and Exhaust Gas Analyses," is an acceptable alternative to EPA Method 3B manual portion only and not the instrumental portion. The VCS, ASTM D6735-01(2009), "Standard Test Method for Measurement of Gaseous Chlorides and Fluorides from Mineral Calcining Exhaust Sources Impinger Method," is an acceptable alternative to EPA Method 26 and 26A. The search identified 18 VCS that were potentially applicable for these rules in lieu of EPA reference methods. After reviewing the available standards, the EPA determined that 18 candidate VCS (ASTM D3154-00 (2014), ASTM D3464-96 (2014), ASTM 3796-09 (2016), ISO 10780:1994 (2016), ASME B133.9-1994 (2001), ISO 10396:(2007), ISO 12039:2001(2012), ASTM D5835-95

(2013), ASTM D6522-11, CAN/CSA Z223.2-M86 (R1999), ISO 9096:1992 (2003), ANSI/ASME PTC-38-1980 (1985), ASTM D3685/D3685M-98-13, CAN/CSA Z223.1-M1977, ISO 10397:1993, ASTM D6331 (2014), EN 1948-3 (1996), EN 1911:2010) identified for measuring emissions of pollutants or their surrogates subject to emission standards in the rule would not be practical due to lack of equivalency, documentation, validation data, and other important technical and policy considerations. Additional information for the VCS search and determinations can be found in the memorandum, *Voluntary Consensus Standard Results for National Emission Standards for Hazardous Air Pollutants: Primary Magnesium Refining Residual Risk and Technology Review*, which is available in the docket for this action. Under 40 CFR 63.7(f) and 40 CFR 63.8(f) of subpart A of the General Provisions, a source may apply to the EPA to use alternative test methods or alternative monitoring requirements in place of any required testing methods, performance specifications, or procedures in the final rule or any amendments.

The EPA welcomes comments on this aspect of the proposed rulemaking and, specifically, invites the public to identify potentially applicable VCS and to explain why such standards should be used in this regulation.

*K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations*

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994). This action's health and risk assessments are contained in section IV of this preamble. The documentation for this decision is contained in section IV.A.1 of this preamble and in the *Primary Magnesium Refining Risk Report*, which is available in Docket ID No. EPA-HQ-OAR-2020-0535.

**List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Incorporation by reference, Reporting and recordkeeping requirements.

**Andrew Wheeler,**  
*Administrator.*

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**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 219**

[Docket No. FRA-2019-0071, Notice No. 1]

**RIN 2130-AC80**

**Control of Alcohol and Drug Use: Coverage of Mechanical Employees and Miscellaneous Amendments**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** In response to a Congressional mandate in the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act), FRA is proposing to expand the scope of its alcohol and drug regulation to cover mechanical (MECH) employees who test or inspect railroad rolling equipment. FRA is also proposing miscellaneous, clarifying amendments to its alcohol and drug regulation.

**DATES:** Written comments on this proposed rule must be received on or before March 9, 2021. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

**ADDRESSES:** *Comments:* Comments related to Docket No. FRA-2019-0071 may be submitted by going to <http://www.regulations.gov> and following 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.regulations.gov> including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents, petitions for reconsideration, or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Gerald Powers, Drug and Alcohol Program Manager, Office of Railroad Safety—Office of Technical Oversight, telephone: 202-493-6313; email:

*gerald.powers@dot.gov*; Sam Noe, Drug and Alcohol Specialist, Office of Technical Oversight, telephone 615–719–2951, email: *sam.noe@dot.gov*; or Patricia V. Sun, Attorney Adviser, Office of the Chief Counsel, telephone: 202–493–6060, email: *patricia.sun@dot.gov*.

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#### I. Executive Summary

In 2018, Congress enacted the SUPPORT Act.<sup>1</sup> Section 8102 of the SUPPORT Act mandates that the Secretary of Transportation publish a rule amending the existing alcohol and drug regulations applicable to railroad employees (49 CFR part 219) to cover “all employees of railroad carriers who perform mechanical activities.” Further, that section requires the Secretary of Transportation to “define the term ‘mechanical activities’ by regulation.”

This proposed rule, which responds to that mandate, proposes to add MECH employees to the scope of part 219, and makes miscellaneous clarifying amendments. With certain exceptions, FRA proposes to define a MECH employee as an employee of a railroad, or a railroad contractor or subcontractor, who tests or inspects railroad rolling equipment. As proposed, individuals who perform those duties typically performed by railroad carmen would be included within the definition of MECH employee.

Under existing part 219, with the exception of maintenance-of-way (MOW) employees, employees in non-covered service crafts (*i.e.*, employees not subject to the hours of service laws in 49 U.S.C. chapter 211, which would include those employees defined in the notice of proposed rulemaking (NPRM) as MECH employees)<sup>2</sup> are subject to FRA-mandated alcohol and drug testing only if they are fatally injured as a result of a “fatal train incident” under § 219.203(a)(4). In such situations, the remains of a fatally injured employee (whether the employee was a covered-service or non-covered service employee) are subject to post-mortem post-accident toxicological (PAT) testing.

Since 2015, two employees who would be considered MECH employees under this NPRM have died in such incidents, and post-mortem PAT testing results of both employees were positive. One employee was fatally injured in a yard incident and tested positive for delta 9-tetrahydrocannabinol (THC, the primary psychoactive constituent of marijuana) in whole blood and liver in FRA post-mortem post-accident testing. Based on the identified concentrations of THC found, and those of the carboxy metabolite (THCA) identified in urine, whole blood, and liver, the employee’s last use of the drug likely occurred shortly before his death. The second employee was fatally injured by a remote control locomotive, and PAT testing found that he had a blood alcohol concentration (BAC) of 0.218, over five times the 0.04 BAC limit for an FRA alcohol positive.

Prior to Congress’ mandate in section 8102 of the SUPPORT Act, the National Transportation Safety Board (NTSB) recommended that FRA expand the scope of part 219 to cover all employees and agents performing safety-sensitive functions as defined in §§ 209.301 and 209.303.<sup>3</sup> In response to NTSB’s recommendation, in 2016, FRA expanded the scope of part 219 to cover MOW employees (non-covered service employees), but FRA found that expanding part 219 to all employees performing safety-sensitive functions was not justified.<sup>4</sup> FRA’s 2016 addition of MOW employees to the scope of part 219 was the first time non-covered service employees were covered by part 219 for other than post-mortem PAT testing. With this NPRM, FRA is proposing to apply part 219 to MECH

employees, another category of non-covered service employees who perform safety-sensitive functions. FRA estimates that this proposed rule would affect approximately 25,500 MECH employees.

In a 2018 petition for rulemaking, the Association of American Railroads (AAR) also requested that FRA make MECH employees, like covered service employees and MOW employees, fully subject to part 219. In support of its request, the AAR cited the success of DOT random testing programs in deterring drug abuse and alcohol misuse, and concerns about increased opioid use and State legalization of marijuana use. The AAR estimated that only 30 percent of MECH employees are currently covered by some form of DOT testing (*e.g.*, in addition to performing functions as mechanical employees, they perform covered service for a railroad or hold Commercial Driver’s Licenses and are subject to testing under the Federal Motor Carrier Safety Administration’s drug and alcohol regulation). The AAR stated that the implementation costs of adding approximately 29,550 MECH employees to part 219 would “be borne entirely by the railroads who are the entities requesting this expansion of regulation.”

In response to the SUPPORT Act’s mandate, FRA is proposing to make MECH employees subject to part 219 in the same manner as MOW employees. Like this proposed rule, the MOW rule also responded to a Congressional mandate<sup>5</sup> and an NTSB recommendation (R–08–07). FRA received and addressed 16 comments to the 2014 NPRM implementing the MOW employee mandate<sup>6</sup> before publishing a final rule expanding the scope of part 219 to cover MOW employees.<sup>7</sup> In lieu of repeating the MOW rule’s discussion, FRA is providing a summary of its proposed MECH employee requirements and referring interested parties to the MOW final rule, which contains discussion of the same provisions as applied to MOW employees.

In addition to changes to part 219 directly related to the addition of MECH employees, FRA also proposes other amendments to part 219. To lessen the burden on small railroads, FRA proposes to amend part 219 to exempt small railroads from subpart K (Referral Programs) because small railroads may lack the expertise and resources necessary to maintain referral programs.

<sup>2</sup> Throughout this NPRM, the term “covered service employees” means employees subject to the hours of service laws of 49 U.S.C. ch. 211.

<sup>3</sup> R–08–07, [https://www.ntsb.gov/safety/safety-recs/recletters/R08\\_05\\_07.pdf](https://www.ntsb.gov/safety/safety-recs/recletters/R08_05_07.pdf).

<sup>4</sup> 81 FR 37894 (June 10, 1996).

<sup>5</sup> Sec. 412 of the Rail Safety Improvement Act (RSIA) (Pub. L. 110–432, October 16, 2008).

<sup>6</sup> 79 FR 48380 (July 28, 2014).

<sup>7</sup> 81 FR 37894 (June 10, 2016).

<sup>1</sup> Public Law 115–271.

FRA is also proposing to clarify part 219's reasonable cause testing requirements to make clear that for reasonable cause testing based on a rule violation, a railroad that elects to test under FRA authority may only use rule violations listed in § 219.403(b) as a basis for testing.

Further, in May 2019, FRA removed the penalty schedules for its rules from the Code of Federal Regulations and republished them on FRA's website. In part 219, the penalty schedule was formerly in appendix A. FRA now also proposes to remove appendix B, which designates the name and contact information of FRA's PAT testing laboratory, and appendix C, which contains instructions for post-mortem collection of PAT testing specimens. Copies of the information contained in both appendices are included in FRA's PAT testing shipping kits, and can also be found at the FRA website and post-accident testing app. FRA is therefore proposing a global deletion of references to both appendices B and C throughout part 219, along with the removal of both appendices.

## II. Mechanical Employees, Contractors, and Subcontractors

### A. Background

As the SUPPORT Act mandates, this NPRM proposes to make MECH employees subject to all part 219 prohibitions and testing requirements (pre-employment, random, PAT, reasonable suspicion, return-to-duty, and follow-up). Under the proposal, railroads, contractors, and subcontractors would be subject to the same reporting, recordkeeping, and referral requirements for MECH employees as they are for covered service and MOW employees.

As noted above, before the addition of MOW employees, part 219 addressed only covered service employees. To incorporate MOW employees, FRA adopted the term "regulated employee," and defined the term to include both covered service employees and MOW employees subject to part 219. FRA is proposing to amend the term "regulated employee" to include MECH employees and to make additional amendments throughout the rule text, in order to incorporate MECH employees into part 219.

### B. The Small Railroad Exception and Employees, Contractor Employees, and Subcontractor Employees Who Perform MECH Activities

Currently, part 219 excepts small railroads (defined as railroads with 15 or fewer covered service employees and

having minimal joint operations with other railroads) from both reasonable cause and random testing.<sup>8</sup> As with MOW employees, FRA would not include MECH employees in a railroad's count of employees for purposes of the small railroad exception. FRA would continue to count only covered service employees to determine whether a railroad qualifies as a small railroad.

Consistent with part 219's treatment of MOW employees, as proposed, a contractor would have its required level of part 219 compliance determined by the size of the railroad(s) for which it performs MECH activities, not its size as a contractor. A contractor who performs MECH activities exclusively for small railroads that are excepted from full compliance with part 219 would also be excepted from full compliance, while a contractor who performs MECH activities for at least one railroad required to be in full compliance with part 219, would also be required to be in full compliance with part 219.

### C. Railroad, Contractor, and Subcontractor Responsibility for Compliance

As proposed, FRA would require each railroad to submit for FRA approval a revised random testing plan under subpart G of part 219 that would include MECH employees, as FRA required for MOW employees. A railroad would also be responsible for ensuring that its MECH contractor and subcontractor employees are subject to random testing. A railroad could do so either by including these contractor and subcontractor employees in its own random testing plan, or by requiring contractors and subcontractors to submit their own random testing plans to FRA for acceptance using the Model Railroad Contractor Compliance Plan available on the FRA Drug and Alcohol Program web page.<sup>9</sup> In either case, contractors and subcontractors are also responsible for ensuring that their employees who perform MECH activities comply with the rule's random testing requirements.

### D. Pre-Employment Drug Testing of Mechanical Employees

As FRA did for MOW employees, FRA is proposing to exempt all current MECH employees from the pre-employment drug testing requirements of subpart F of part 219. Under FRA's proposal, only those MECH employees hired by a railroad, or railroad contractor or subcontractor, after the

effective date of the final rule would be required to have a negative DOT pre-employment drug test before performing regulated service for the first time. This exemption would apply only so long as the MECH employee continues to perform work for the same DOT-regulated employer. An initially exempted MECH employee would be required to have a negative DOT pre-employment drug test result before performing regulated service for a different or additional DOT-regulated employer.

Interested parties should note that FRA's proposal to exempt current MECH employees from FRA pre-employment drug testing would not exempt these employees from DOT's background check requirement. DOT's background check requirement is a separate requirement under 49 CFR 40.25 and requires an employer to check an employee's previous two years of DOT drug and alcohol testing results within 30 days of when the employee performs safety-sensitive duties for that employer for the first time. For part 219 purposes, FRA has designated regulated service as a DOT safety-sensitive function which requires a § 40.25 background check.<sup>10</sup> Accordingly, a DOT-regulated employer would still be required to conduct a background check under § 40.25 on all of its MECH employees, including those who are initially exempted from pre-employment drug testing. Further, a MECH employee who has had a DOT violation may not perform safety-sensitive service until the employee has successfully completed the return-to-duty process.

Consistent with part 219's treatment of MOW employees, as proposed, FRA would not require a contractor or subcontractor employee who performs MECH activities for multiple railroads to have a negative Federal pre-employment drug test result for each railroad, provided that the contractor or subcontractor employee has a negative Federal pre-employment drug test result on file with the contractor who is his or her direct employer.

### E. Initial Mechanical Employee Random Testing Rates

FRA would set the initial minimum annual random testing rates for MECH employees at 50 percent for drugs and 25 percent for alcohol, the same levels it initially set for MOW employees when they first became subject to FRA testing.<sup>11</sup> As it did for MOW employees, FRA would create an independent

<sup>8</sup> § 219.3(c).

<sup>9</sup> <https://railroads.dot.gov/divisions/partnerships-programs/drug-and-alcohol>.

<sup>10</sup> § 219.5.

<sup>11</sup> § 219.625(c).

Management Information System (MIS) database of industry-wide MECH employee positive and violation rates, to set the future minimum annual random testing rates for these employees. An employer required to submit an annual MIS report may place its MECH employees in a commingled pool so long as the employer reports its results under the correct safety-sensitive category.

### III. Section-by-Section Analysis

#### Authority

FRA would amend the authority citation for part 219 to add a reference to section 8102 of the SUPPORT Act, which mandates the expansion of part 219 to cover “all employees of railroad carriers who perform mechanical activities.”

#### Subpart A—General

##### Section 219.3 Application

#### Paragraph (b)

FRA proposes to remove and reserve paragraph (b) in its entirety. Currently, paragraph (b)(1) applies to railroads and paragraphs (b)(2) and (3) apply to contractors. Existing paragraph (b)(1) is redundant with § 219.800(a)'s annual report requirements for railroads. In addition, to consolidate its railroad and contractor annual report requirements, FRA proposes to move the reporting requirements for contractors in existing paragraphs (b)(2) and (3) to new paragraph (g) of § 219.800 in subpart I. See the Section-by-Section Analysis discussion of § 219.800 below.

#### Paragraph (c)

As noted in II.B above, FRA would continue to except small railroads, defined as railroads with 15 or fewer covered service employees with minimal joint operations, from reasonable cause and random testing requirements (subparts E and G). FRA would continue to count only covered service employees (not MECH or MOW employees) to determine whether a railroad is a small railroad for purposes of this exception.

To lessen the burden on small railroads, FRA also proposes to amend this paragraph to exempt small railroads from subpart K (Referral Programs) because small railroads may lack the expertise and resources necessary to maintain referral programs.

##### Section 219.5 Definitions

FRA is proposing to amend the definitions section of part 219 to add several new definitions and to revise and clarify certain existing definitions.

#### Category of Regulated Employee

FRA would amend this definition to include the categories of covered service, maintenance-of-way, and mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs covered service, maintenance-of-way activities, and/or mechanical activities, he or she would belong in the category of regulated employee that corresponds with the majority of the employee's regulated service.

#### Employee

The term “employee” is currently defined to include “any individual (including a volunteer or a probationary employee) performing activities for a railroad or a contractor to a railroad.” FRA proposes to amend this definition to include any individual performing activities for a subcontractor to a railroad.

#### Mechanical or MECH Employee

FRA proposes to define a mechanical (MECH) employee generally as any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components. FRA's proposed MECH employee definition focuses on the testing and inspection of railroad rolling equipment required by FRA regulation, because these MECH activities directly affect railroad safety. Accordingly, FRA proposes to except employees who perform activities that have a negligible effect on rail safety from this definition. Specifically, a MECH employee would not include an employee who performs only one or more of the following duties:

- Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;
- Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;
- Checking lading for pilferage or vandalism; or
- Loading, unloading, or shifting car loads.

To avoid duplication with the application of requirements to covered service employees, FRA also proposes to exclude from the definition an employee who is a member of a train and engine crew assigned to perform tests or inspections on railroad rolling equipment that is part of a train or yard

movement the employee has been called to operate.

Notably, by focusing the definition of MECH employee on the testing and inspection of railroad rolling equipment required by FRA regulation, employees who only repair railroad rolling equipment are specifically excluded from the definition.

FRA also makes clear that a MECH employee would not include any individual involved only in the original manufacturing, or in testing or inspection of railroad rolling equipment or its components on the manufacturer's behalf, and who does not perform any FRA-mandated final tests or inspections on behalf of a railroad. However, regardless of an individual's employer (original equipment manufacturer, railroad, or contractor or subcontractor to a railroad), an individual who performs an FRA-mandated inspection or test (*i.e.*, an inspection or test required by parts 215, 221, 229, 230, 232 or 238) of railroad rolling equipment or any of its components on a railroad's behalf would be considered a MECH employee. For example, if a company manufactures railroad rolling equipment and sells it to a railroad, but does not inspect or test that equipment once it is delivered to the railroad, the employees of that company involved in the equipment's manufacturing, product testing, and inspection prior to delivery would not be MECH employees for purposes of this rule. If, however, a company manufactures railroad rolling equipment (*e.g.*, a locomotive), sells that equipment to a railroad, and the railroad then contracts with the manufacturing company to perform any FRA-required tests or inspections (*e.g.*, the required 92-day periodic inspection and tests under § 229.23 of this chapter) the employees of the manufacturer performing those required tests and/or inspections would be considered MECH employees under this rule.

#### Regulated Employee

Currently, this definition includes a covered service employee or MOW employee who performs regulated service for an entity subject to the requirements of this part. FRA would expand this definition to include a MECH employee (as defined in this section) who performs regulated service (as defined in this section).

#### Regulated Service

Currently, “regulated service” means activities a covered service employee or MOW employee performs that makes such an employee subject to this part. FRA would expand this definition to

include activities performed by a MECH employee (as defined in this section).

#### Rolling Equipment

FRA proposes to add a definition of railroad rolling equipment as locomotives, railroad cars, and one or more locomotives coupled to one or more cars, based on the definition of rolling equipment provided in FRA's Railroad Operating Practices regulation (49 CFR 218.5).

#### Side Collision

The term "side collision" is currently defined to mean "a collision at a turnout where one consist strikes the side of another consist." FRA is proposing to clarify that the term also includes collisions at switches or highway-rail grade crossings. FRA intends this proposed revision as a clarification only and does not believe the proposed revision is a substantive change from the existing definition.

#### Section 219.10 Penalties

FRA proposes to substitute the term "regulated employee" for "employee" to clarify that this section would apply to MOW, MECH, and covered service employees.

#### Section 219.11 General Conditions for Chemical Tests

##### Paragraph (g)

As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves.

#### Section 219.23 Railroad Policies

This section sets forth requirements for a railroad's Federal alcohol and drug testing policy, including requirements for railroads to provide employees educational materials explaining the requirements of this part, as well as the railroad's policies and procedures with respect to meeting those requirements.

##### Paragraph (a)

FRA would substitute the term "regulated employee" for "employee," to clarify that the requirements of this section apply to MOW, MECH, and covered service employees.

##### Paragraph (c)

FRA proposes to revise paragraph (c)(2) to require railroads to make hard copies of the required educational materials in this section available to each MECH employee for a minimum of three years after the effective date of the final rule. When FRA added MOW employees to the scope of part 219, it required railroads to make the same hard copy distribution to those

employees for the same three-year period to introduce them to part 219. Because that three-year period for MOW employees will end after June 12, 2020, existing paragraph (c)(2) will become unnecessary. FRA is therefore proposing to revise paragraph (c)(2) to address the addition of MECH employees and remove the reference to MOW employees.

##### Paragraph (d)(2)

FRA would amend this paragraph to identify specifically MECH employees as subject to the provisions in this part.

#### Subpart C—Post-Accident Toxicological Testing

#### Section 219.203 Responsibilities of Railroads and Employees

##### Paragraph (a)

As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves. FRA would remove "and appendix C to this part" at the end of this paragraph.

##### Paragraph (d)

Currently, if a railroad does not complete specimen collection within four hours of a PAT testing event, the railroad must notify the FRA Drug and Alcohol Program Manager and submit a concise written explanation for the delay within 30 days after the expiration of the month during which the accident or incident occurred. FRA is proposing to remove the requirement to provide a written explanation for the delay. FRA has found that the immediate, telephonic notification and related discussion between the railroad and FRA about the testing provide sufficient information to explain the testing delay. Further, § 219.209(b) would continue to require each railroad to provide both immediate, telephonic notification and a follow-up, written report to FRA when, for whatever reason, a specimen cannot be collected and provided to FRA as required by this subpart.

#### Section 219.205 Specimen Collection and Handling

This section contains several references to both appendices B and C. As mentioned above, FRA is proposing to remove references to appendices B and C throughout the rule, along with the appendices themselves. FRA is proposing to remove references to these appendices in paragraphs (a), (c)(1), (c)(2), (d), and (e).

#### Section 219.206 FRA Access to Breath Test Results

This section contains a reference to appendix C. As mentioned above, FRA is proposing to remove references to appendix C throughout the rule, along with the appendix itself.

#### Section 219.207 Fatality

This section contains the requirements for PAT testing in the event of an employee fatality in an accident or incident described in § 219.101.

##### Paragraph (c)

Paragraph (c) lists the individuals who are authorized to collect post-mortem body fluid and tissue samples from a deceased employee for FRA PAT testing. FRA proposes to remove "Aviation Medical Examiners" (AMEs) from the list of authorized professionals. AMEs appointed by the FAA primarily conduct airman medical examinations to support FAA medical certification requirements. In selecting an AME, the Federal Air Surgeon or an authorized representative, considers a number of factors regarding the applicant's medical qualifications but does not specifically consider whether the applicant has post-mortem expertise or expertise in collecting samples from fatally injured persons, unlike the other professionals listed in this paragraph, namely, coroners, medical examiners, and pathologists.<sup>12</sup>

##### Paragraph (d)

This section contains a reference to appendix C. As mentioned above, FRA is proposing to remove references to appendix C throughout the rule, along with the appendix itself.

#### Section 219.211 Analysis and Follow-Up

In addition to allowing reports and requests to be submitted to FRA by email as well as hard copy, FRA would simplify and clarify the language in this section. No substantive changes are intended other than the proposed amendments discussed below.

##### Paragraph (a)

This section contains a reference to appendix B. As mentioned above, FRA is proposing to remove references to appendix B throughout the rule, along with the appendix itself. FRA proposes to remove the reference to appendix B in this paragraph and make conforming changes.

<sup>12</sup> See 14 CFR 183.11(a); FAA Order 8000.95, Vol. 2, Ch. 2, para. 3.

## Paragraph (c)

With regard to surviving employees, existing paragraph (c) requires a PAT test reported as positive for alcohol or a controlled substance to be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. Currently, this paragraph requires the MRO to report the results of each review "in writing" to FRA's Associate Administrator for Railroad Safety and specifies that the envelope in which each report is provided must be marked as confidential. As proposed, FRA would allow an MRO to submit the report either by hard copy to FRA's Drug and Alcohol Program Manager, or by email to an email box specifically set up for receipt of MRO reports (*FRA-MROletters.email@dot.gov*). Access to this firewall-protected email box would be limited to FRA headquarters drug and alcohol staff.

## Paragraph (e)

Currently, an employee may submit a response by hard copy to the FRA Drug and Alcohol Program Manager within 45 days of receipt of his or her PAT test results prior to the preparation of any final report of investigation concerning the accident or incident. Within the 45-day limit, FRA would also allow an employee to email the response to *FRA-DrugAlcoholProgram.email@dot.gov*.

## Paragraph (i)

Currently, an employee may request a retest of his or her PAT test specimen within 60 days of receipt of the applicable toxicology report. FRA would allow an employee to submit a request for a retest either by hard copy to the FRA Drug and Alcohol Program Manager or by email to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's request would still have to be submitted within the 60-day time limit and specify the railroad, accident date, and location.

FRA is also proposing to conform this paragraph to reflect FRA's standard procedures for handling employee requests for retests of PAT testing specimens. FRA's PAT testing program pre-dates DOT's Workplace Testing Procedures (49 CFR part 40), is excepted from its requirements, and tests for more substances and specimen types than other DOT tests conducted under part 40.<sup>13</sup> FRA post-accident testing tests blood, as well as urine and breath specimens, from surviving employees, and vitreous fluid, tissue, and spinal

fluid specimens, from fatally-injured employees.

Currently, paragraph (i) authorizes a PAT testing retest to be performed by FRA's PAT laboratory or by a different laboratory certified by the Department of Health and Human Services (HHS). FRA proposes to remove the language authorizing an HHS-certified laboratory to conduct a PAT retest, because HHS certification only qualifies a laboratory to conduct part 40 urine tests. A referee laboratory must, however, have the capacity to test the same type of post-accident specimen type(s) for the same analyte(s) identified in the employee's test result.

FRA would also make several clarifying changes to conform this paragraph to its PAT testing procedures. FRA would change the term "split specimen" to "specimen," because FRA does not collect split specimens for PAT testing. When an employee requests a PAT retest, FRA sends an aliquot of the employee's PAT testing specimen to the referee laboratory for retesting. FRA also proposes to replace the term "compound" with the more specific term "analyte," and to replace the term "fluid" with "specimen," as FRA PAT testing may test specimens that are not fluids.<sup>14</sup> To address the potential for some analytes to deteriorate during storage, FRA currently states that it will report and consider corroborative of the original PAT test result, a retest result that detects levels of the compound that are "technically appropriate." For greater precision, FRA would amend this paragraph to state that a retest would corroborate a PAT test result if the retest's result is above the laboratory's Limit of Detection (LOD).<sup>15</sup> Finally, FRA would remove the sentence stating that the employee bears the costs of the retest, because historically FRA has paid these costs.

*Subpart E—Reasonable Cause Testing**Section 219.403 Requirements for Reasonable Cause Testing*

This section authorizes railroads to conduct FRA reasonable cause testing as a result of a regulated employee's involvement in certain accidents or incidents, or a regulated employee's direct involvement in certain rule violations or "other errors." FRA proposes revisions to the introductory paragraph of this section to make clear that for reasonable cause testing based on a rule violation, a railroad that elects to test under FRA authority may only use rule violations listed in paragraph (b) as bases for testing.

## Paragraph (b)

Existing paragraph (b) sets forth the rule violations that may constitute reasonable cause for the administration of alcohol and/or drug tests under this part. FRA proposes to remove "or other errors" from this paragraph to clarify that a railroad that has chosen to conduct reasonable cause testing for rule violations under FRA authority may do so only for a rule violation specified in paragraph (b).

FRA would also expand the list of rule violations in paragraph (b) by adding rule violations involving common mechanical activities such as setting derails, performing brake tests, and initiating appropriate blue flag protection. In addition, FRA would add a rule violation for positive train control (PTC) enforcement to address PTC requirements that became applicable after the publication of the MOW rule.

Specifically, the additional rule violations would be:

- Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable, signal indication, special instruction, or other directive with respect to movement of railroad on-track equipment that involves a failure to take appropriate action, resulting in the enforcement of a PTC system;
- Failure to comply with blue signal protection of workers in accordance with § 218.23 through § 218.30 of this chapter;
- Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;
- Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or
- Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

*Subpart F—Pre-Employment Drug Tests**Section 219.501 Pre-Employment Drug Testing*

## Paragraph (e)

FRA is proposing to clarify that: (1) Covered employees performing regulated service for small railroads are exempted from pre-employment drug testing only if they were performing regulated service for the railroad before June 12, 2017; and (2) MOW employees

<sup>14</sup> See § 219.11(f).

<sup>15</sup> See § 40.3.

<sup>13</sup> 49 CFR 40.1(c).

are exempted from pre-employment drug testing only if they were performing “regulated service” for a railroad before June 12, 2017, and not just “duties” that may not have qualified as “regulated service.” Both clarifying amendments are consistent with discussion in the MOW final rule preamble, which explained that FRA was exempting employees who, before June 12, 2017, were performing MOW activities for a railroad or covered service for a small railroad.<sup>16</sup>

FRA is also proposing to exempt from pre-employment drug testing MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before (EFFECTIVE DATE OF FINAL RULE).

An exempted employee would be required to have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and after (EFFECTIVE DATE OF FINAL RULE) for MECH employees.

Paragraph (f)

To clarify how the proposed revisions in this section fit with the existing requirements of part 40, as also discussed in I.L.D. above, FRA proposes to add paragraph (f) to clarify that § 40.25 of DOT’s Workplace Testing Procedures (49 CFR part 40) applies to a MOW or MECH employee who was or would be exempted from FRA pre-employment drug testing. To comply with § 40.25, a railroad must still conduct a drug and alcohol records check of an exempted MOW or MECH employee’s previous two years of employment within 30 days of when the employee performs regulated service for the first time. FRA does not intend this as a substantive change to the current requirement and is proposing this revision merely as a clarification of existing requirements.

*Subpart G—Random Drug and Alcohol Testing Programs*

*Section 219.605 Submission and Approval of Random Testing Plans*

Paragraph (a)

Existing paragraph (a) requires railroads to submit random testing plans to FRA in writing for FRA approval. FRA would allow a railroad to submit its random testing plan by email or letter. A railroad that chooses to submit

its random testing plan by email should send it to the FRA Drug and Alcohol Program Manager at *FRA-DrugAlcoholProgram.email@dot.gov*. Regardless of the manner of submission, the plan must include the name of the railroad or contractor in the subject line.

Paragraph (e)

FRA proposes to amend this paragraph to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service or MOW activities. Accordingly, each railroad or contractor or subcontractor to a railroad must submit for FRA approval or acceptance a random testing plan ensuring that each MECH employee reasonably anticipates that he or she is subject to random testing without advance warning each time the employee is on-duty and subject to performing MECH activities. FRA has developed model random testing plans for MOW employees and contractors that could also serve as templates for MECH employees and contractors.

*Section 219.607 Requirements for Random Testing Plans*

Paragraph (c)

FRA proposes to revise paragraph (c) of this section to reflect the application of railroad random testing plans to MECH employees. Specifically, new paragraph (c)(3) would require railroad random testing plans to identify the total number of mechanical employees, including mechanical contractor employees and volunteers. Existing paragraph (c)(3) would be redesignated as paragraph (c)(4), and the remainder of paragraph (c) would be redesignated in conformance. FRA is also proposing minor clarifications to newly redesignated paragraphs (c)(7), (9) and (14) (existing paragraphs (c)(6), (8), and (13)).

*Section 219.615 Random Testing Collections*

Paragraph (e)

FRA proposes to revise paragraph (e)(3) to state that a railroad must inform “each regulated employee” that he or she has been selected for random testing at the time the employee is notified—rather than inform “an regulated employee,” as paragraph (e)(3) currently reads. FRA does not intend this as a substantive change to the current requirement and is proposing this revision merely as a clarification and grammatical correction of an existing requirement.

*Section 219.617 Participation in Random Alcohol and Drug Testing*

Paragraph (a)

FRA proposes to substitute the term “regulated employee” for “employee” in paragraph (a)(3), to clarify that the requirements of this section would apply to MOW, MECH, and covered service employees.

*Section 219.625 FRA Administrator’s Determination of Random Alcohol and Drug Testing Rates*

Paragraph (c)(1)

As stated above, FRA is proposing to subject an employee who performs MECH activities to the same random testing requirements as one who performs covered service. Currently, this paragraph authorizes the Administrator to amend the minimum annual random testing rates, which are initially set at 50 percent for drugs and 25 percent for alcohol, for a new category of regulated employee after the compilation of 18 months of Management Information System (MIS) data. FRA found, however, that MOW contractors were still submitting random testing plans for its approval 18 months after the effective date of the MOW rule. To allow sufficient time for the implementation of random testing by MECH contractors, FRA is proposing to revise this paragraph to require two consecutive calendar years of MIS data before the initial minimum annual random testing rates for regulated employees could be raised or lowered. This would be consistent with the MIS data requirements that FRA had set for adjustment of the minimum annual random testing rates for covered employees.

*Subpart I—Annual Report*

*Section 219.800 Annual Reports*

Paragraph (a)

A railroad required to file an MIS report must summarize both its alcohol misuse and drug abuse results for the previous calendar year. As a clarifying change, FRA would re-insert “and drug abuse,” which had been inadvertently omitted from this paragraph, to state that the summary includes both alcohol misuse and drug abuse information.

Paragraph (f)

FRA would revise this paragraph to require a railroad to submit its annual MIS report with separate sections for its covered service employees, MOW employees, and MECH employees.

<sup>16</sup> 81 FR 37911 (June 10, 2016).

Paragraph (g)

As noted in the discussion of § 219.3 above, for ease of reference, FRA would move § 219.3(b)'s annual MIS reporting requirements for contractors to this subpart to consolidate and clarify its railroad and contractor MIS reporting requirements.

Appendices B and C to Part 219

As discussed above in the Executive Summary, FRA is proposing to remove appendices B and C to this part, because these appendices duplicate information that can be found in FRA's PAT testing shipping kits or on the FRA website and post-accident testing app. For ease of reference, each FRA PAT testing shipping kit includes the address of FRA's PAT testing laboratory, and each FRA fatality PAT testing shipping kit contains instructions for the post-

mortem collection of body fluid and tissue specimens.

**IV. Regulatory Impact and Notices**

*A. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This proposed rule is a non-significant regulatory action within the meaning of Executive Order 12866 (E.O. 12866) and DOT's Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. FRA made this determination by finding that this proposed regulatory action would not exceed the \$100 million annual threshold defined by E.O. 12866. Details on the estimated cost savings of this proposed rule can be found in the proposed rule's Regulatory Evaluation, which FRA has prepared and placed in the docket (FRA-2019-0071). The Regulatory Evaluation details the estimated costs and benefits of those

entities who are expected to be impacted by the rule, are likely to see over a 10-year period.

FRA is proposing to expand the definition of regulated employee to include mechanical employees in part 219, as mandated by section 8102 of the Support Act.<sup>17</sup> The proposed rule also includes non-quantified miscellaneous amendments that would reduce reporting burdens, enhance a railroad's authority to conduct reasonable cause testing, and add clarity to part 219.

The proposed rule generates costs related to provisions on random testing, reasonable cause/reasonable suspicion testing, pre-employment drug testing, peer support, and co-worker referral policies and reporting. As shown in Table ES.1, over the 10-year period of analysis the proposed rule would result in a total discounted cost of \$13.9 million (PV 7%).

TABLE ES.1—TOTAL COSTS

Costs	Costs (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Pre-employment testing .....	2,653,000	2,331,000	1,994,000	273,000	284,000
Random testing .....	13,111,000	11,813,000	10,438,000	1,385,000	1,486,000
Reasonable cause/suspicion testing .....	465,000	409,000	350,000	48,000	50,000
Government administrative .....	1,525,000	1,340,000	1,146,000	157,000	134,000
<b>Total costs .....</b>	<b>17,754,000</b>	<b>15,893,000</b>	<b>13,928,000</b>	<b>1,863,000</b>	<b>1,954,000</b>

The benefits of the proposed rule would come from reducing the number of mechanical employees who have a substance use disorder (SUD). FRA determined that testing programs would provide a deterrent effect, which would provide a reduction in the number of existing mechanical employees with an SUD. The deterrent effect would induce mechanical employees with an SUD to self-correct their behavior and no longer

misuse alcohol or abuse drugs. Pre-employment drug testing would prevent individuals with SUDs from being hired as mechanical employees. Random testing and reasonable cause/suspicion testing would allow railroads to identify mechanical employees with SUDs so that they can enter rehabilitation.

Over a 10-year period of analysis, this analysis estimates the proposed rule's benefit by multiplying the reduction in

the number of employee work years that mechanical employees with an SUD are employed (21,977 employee work years) by the annual cost of having a mechanical employee with a SUD (\$3,200) on the payroll. As shown in Table ES.2, the proposed rule would result in total benefits of \$52.8 million (PV 7%).

TABLE ES.2—TOTAL BENEFITS

Benefits	Benefits (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Deterrent effect .....	63,904,000	56,147,000	48,025,000	6,582,000	6,838,000
Pre-employment .....	2,365,000	2,050,000	1,721,000	240,000	245,000
Random testing .....	3,651,000	3,237,000	2,797,000	379,000	398,000
Reasonable cause/suspicion .....	406,000	353,000	296,000	41,000	42,000
<b>Total benefits .....</b>	<b>70,326,000</b>	<b>61,787,000</b>	<b>52,839,000</b>	<b>7,242,000</b>	<b>7,523,000</b>

*B. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980<sup>18</sup> and E.O. 13272<sup>19</sup> require agency

review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA)

unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

<sup>17</sup> Public Law 115-271.

<sup>18</sup> 5 U.S.C. 601 *et seq.*

<sup>19</sup> 67 FR 53461 (Aug. 16, 2020).

FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA seeks comment on the potential small business impacts of the requirements in this NPRM. FRA prepared an IRFA, which is included as an appendix to the accompanying

Regulatory Evaluation and available in the docket for the rulemaking (FRA–2019–0071), to aid the public in commenting on the potential small business impacts of the requirements in this NPRM.

*C. Paperwork Reduction Act*

FRA is submitting the information collection requirements in this proposed

rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.<sup>20</sup> The sections that contain the new information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

CFR section/subject <sup>21</sup>	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent <sup>22</sup>
219.4—Petition for recognition of a foreign railroad’s workplace testing program.	1 railroad .....	1 petition .....	40 hours .....	40	\$3,040
—Comments on petitions .....	1 railroad .....	2 comments + 2 copies.	15 minutes + 15 minutes.	1	76
219.7—Waivers .....	734 railroads <sup>23</sup> .....	3 waiver letters .....	90 minutes .....	5	380
219.23(a)—Notification to employees for testing.	171,410 employees <sup>24</sup> .....	75,154 notices .....	3 seconds + 30 seconds.	204	15,504
219.12(d)—RR Documentation on need to place employee on duty for follow-up tests.	734 railroads .....	6 documents .....	30 minutes .....	3	228
219.23(c) and (e)—Educational materials ...	734 railroads .....	744 modified/revised educational documents.	1 hour .....	744	56,544
—Copies of educational materials to employees.	171,410 employees	22,901 copies of educational material documents.	2 minutes .....	763	57,988
219.25(a)—Previous employer drug and alcohol checks—Employee testing records from previous employers and employee release of information (49 CFR Part 40.25(a) and (f)).	25,410 MECH employees.	10,164 reports .....	8 minutes .....	1,355	102,980
219.104(b)—Removal of employee from regulated service—Verbal notice + follow-up written letter.	734 railroads .....	550 verbal notices + 550 letters.	30 seconds + 2 minutes.	23	1,748
219.105—RR’s duty to prevent violations—Documents provided to FRA after agency request regarding RR’s alcohol and/or drug use education/prevention program.	734 railroads .....	3 document copies	5 minutes .....	.3	23
—RR Supervisor Rule G observations and records of regulated employees.	734 railroads .....	342,820 observation records.	2 seconds .....	190	14,440
219.201(c)—Report by RR concerning decision by person other than RR representative about whether an accident/incident qualifies for testing.	734 railroads .....	2 reports .....	30 minutes .....	1	76
219.203/207—Verbal notification and subsequent written report of failure to collect urine/blood specimens within four hours.	734 railroads .....	80 notifications .....	2 minutes .....	2.7	205
—Recall of employees for testing and Narrative Report Completion.	734 railroads .....	4 reports .....	30 minutes .....	2	152
—RR reference to part 219 requirements and FRA’s post-accident toxicological kit instructions in seeking to obtain facility cooperation.	734 railroads .....	98 references .....	5 minutes .....	8	608
—RR notification to National Response Center of injured employee unconscious or otherwise unable to give testing consent.	734 railroads .....	2 phone calls .....	10 minutes .....	.3	23
—RR notification to local authority .....	734 railroads .....	5 phone calls .....	10 minutes .....	0.8	61
219.205—Post Accident Toxicological Testing Forms—Completion of FRA F 6180.73.	734 railroads .....	105 forms .....	10 minutes .....	18	1,368
—Specimen handling/collection—Completion of Form FRA F 6180.74 by train crew members after accident.	171,410 employees	223 forms .....	15 minutes .....	56	4,256
—Completion of Form FRA 6180.75 ...	734 railroads .....	7 forms .....	20 minutes .....	2	152
—Documentation of chain of custody of sealed toxicology kit from medical facility to lab delivery.	734 railroads .....	105 chain of custody documents.	2 minutes .....	4	304

<sup>20</sup> 44 U.S.C. 3501 *et seq.*

CFR section/subject <sup>21</sup>	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent <sup>22</sup>
—RR/medical facility record of kit error	734 railroads .....	10 written records ..	2 minutes .....	.3	23
219.209(a)—Notification to NRC and FRA of accident/incident where samples were obtained.	734 railroads .....	105 phone reports	2 minutes .....	4	304
219.211(b)—Results of post-accident toxicological testing to RR MRO and RR employee.	734 railroads .....	7 reports .....	15 minutes .....	2	152
—MRO report to FR of positive test for alcohol/drugs of surviving employee.	734 railroads .....	6 reports .....	15 minutes .....	2	152
219.303—RR written documentation of observed signs/symptoms for reasonable suspicion determination.	734 railroads .....	34 written documents.	5 minutes .....	3	228
219.305—RR written record stating reasons test was not promptly administered.	734 railroads .....	11 records .....	2 minutes .....	.4	30
219.405—RR documentation describing basis of reasonable cause testing.	734 railroads .....	2,365 written documents.	5 minutes .....	197	14,972
219.407(b)—Prompt specimen collection time limitation exceeded—Record.	734 railroads .....	17 records .....	15 minutes .....	4	304
219.501(e)—RR documentation of negative pre-employment drug tests.	734 railroads .....	6,500 lists .....	30 seconds .....	54	4,104
219.605(a)—Submission of random testing plan: New RRs.	734 railroads .....	12 plans .....	1 hour .....	12	912
—Amendments to currently-approved FRA random testing plan.	734 railroads .....	450 amendments ...	1 hour .....	450	34,200
—Resubmitted random testing plans after notice of FRA disapproval of plan or amendment.	734 railroads .....	57 resubmitted plans.	30 minutes .....	29	2,204
—Non-substantive amendment to an approved plan.	734 railroads .....	300 amendments ...	15 minutes .....	75	5,700
219.615—Incomplete random testing collections—Documentation.	734 railroads .....	2,333 documents ...	30 seconds .....	19	1,444
219.617—Employee Exclusion from random alcohol/drug testing after providing verifiable evidence from credible outside professional.	734 railroads .....	6 documents .....	1 hour .....	6	456
219.623—Random testing records .....	734 railroads .....	52,153 records .....	1 minutes .....	869	66,044
219.800(b)—Annual reports—Management Information System (MIS) form for MECH employees (49 CFR Part 40.26—MIS form submission).	38 railroads .....	55 MIS reports .....	90 minutes .....	83	6,308
	+ 17 contractors ...				
219.1001—Co-worker referral of employee who is unsafe to work with/in violation of Part 219 or railroad’s drug/alcohol rules.	734 railroads .....	24 referrals .....	5 minutes .....	2	152
<b>Total .....</b>	<b>734 railroads + 171,410 employees.</b>	<b>517,976 responses</b>	<b>N/A .....</b>	<b>5,235</b>	<b>397,845</b>

All estimates include the time for reviewing instructions, searching existing data sources, gathering or

maintaining the needed data, and reviewing the information.

For information, a copy of the paperwork package submitted to OMB, or to submit comments on the collection of information requirements, contact Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Regulatory Analysis Division at [Hodan.Wells@dot.gov](mailto:Hodan.Wells@dot.gov).

<sup>21</sup> The proposed burdens under §§ 219.25(a) and 219.800(b), once approved, will fall under DOT’s Part 40 information collection (OMB No. 2105–0529).

<sup>22</sup> Throughout the tables in this document, the dollar equivalent cost is derived from the Surface Transportation Board’s Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges. Also, totals may not add due to rounding.

<sup>23</sup> For purposes of this table, the respondent universe of 734 railroads represents the estimated 30 contractor companies that would be newly subject to part 219 because they perform MECH activities on behalf of the 734 railroads.

<sup>24</sup> The respondent universe of 171,410 employees includes an estimated 25,410 MECH employees who would be newly subject to part 219.

Under 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA’s estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

OMB must make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule, and will announce the OMB control number, when assigned, by separate notice in the **Federal Register**.

#### D. Environmental Impact

Consistent with the National Environmental Policy Act<sup>25</sup> (NEPA), the Council of Environmental Quality's NEPA implementing regulations,<sup>26</sup> and FRA's NEPA implementing regulations,<sup>27</sup> FRA has evaluated this proposed rule and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.<sup>28</sup> Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), "[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise."

The purpose of this rulemaking is to propose expanding the scope of FRA's alcohol and drug regulation to cover MECH employees who test or inspect railroad rolling equipment. This proposed rule would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. Instead, the proposed rule would likely result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.<sup>29</sup> FRA has concluded that no such unusual circumstances exist with

respect to this proposed regulation and the proposal meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.<sup>30</sup> FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).<sup>31</sup>

#### E. Executive Order 12898 (Environmental Justice)

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a)<sup>32</sup> require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

#### F. Federalism Implications

Executive Order 13132, "Federalism,"<sup>33</sup> requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, an Agency may not issue a regulation with federalism implications that imposes substantial

direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed the proposed rule under the principles and criteria contained in Executive Order 13132. This proposed rule complies with a statutory mandate and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that the proposed rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 would not apply. However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

In sum, FRA has analyzed this proposed rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement for this proposed rule is not required.

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

Pursuant to section 201 of the Unfunded Mandates Reform Act of

<sup>25</sup> 42 U.S.C. 4321 *et seq.*

<sup>26</sup> 40 CFR parts 1500–1508.

<sup>27</sup> 23 CFR part 771.

<sup>28</sup> See 40 CFR 1508.4.

<sup>29</sup> 23 CFR 771.116(b).

<sup>30</sup> See 16 U.S.C. 470.

<sup>31</sup> See Department of Transportation Act of 1966, as amended (Pub. L. 89–670, 80 Stat. 931); 49 U.S.C. 303.

<sup>32</sup> 91 FR 27534 (May 10, 2012).

<sup>33</sup> 64 FR 43255 (Aug. 10, 1999).

1995,<sup>34</sup> each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act<sup>35</sup> further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the Agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

#### H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”<sup>36</sup> FRA has evaluated this proposed rule in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.<sup>37</sup> FRA determined this proposed rule would not burden the development or use of domestically produced energy resources.

#### I. Tribal Consultation

FRA has evaluated this proposed rule under the principles and criteria in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. This proposed rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would

not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

#### J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice, DOT/ALL-14 FDMS, accessible through [www.dot.gov/privacy](http://www.dot.gov/privacy). To facilitate comment tracking and response, FRA encourages commenters to provide their names, or the name of their organization; although submission of names is optional. Whether or not commenters identify themselves, FRA will fully consider all timely comments. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

#### List of Subjects in 49 CFR Part 219

Alcohol abuse, Drug abuse, Drug testing, Penalties, Railroad safety, Reporting and recordkeeping requirements, Safety, Transportation. For the reasons stated above, FRA proposes to amend part 219 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

#### PART 219—CONTROL OF ALCOHOL AND DRUG USE—[AMENDED]

- 1. Revise the authority citation for part 219 to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20140, 21301, 21304, 21311; 28 U.S.C. 2461, note; Sec. 412, Pub. L. 110-432, 122 Stat. 4889; Sec. 8108, Div. A, Pub. L. 115-271, 132 Stat. 3894; and 49 CFR 1.89.

#### Subpart A—General

- 2. In § 219.3, remove and reserve paragraph (b), and revise and republish paragraph (c) to read as follows:

#### § 219.3 Application.

\* \* \* \* \*

(b) [Reserved]

(c) *Small railroad exception.* (1) Subparts E, G, and K of this part do not apply to small railroads, and a small railroad may not perform the Federal requirements authorized by those subparts. For purposes of this part, a small railroad means a railroad that:

- (i) Has a total of 15 or fewer employees who are covered by the hours of service laws at 49 U.S.C. 21103, 21104, or 21105, or who would be subject to the hours of service laws at 49 U.S.C. 21103, 21104, or 21105 if their

services were performed in the United States; and

(ii) Does not have joint operations, as defined in § 219.5, with another railroad that operates in the United States, except as necessary for purposes of interchange.

(2) An employee performing only MOW or MECH activities, as defined in § 219.5, does not count towards a railroad’s total number of covered service employees for the purpose of determining whether it qualifies for the small railroad exception.

(3) A contractor performing MOW or MECH activities exclusively for small railroads also qualifies for the small railroad exception (*i.e.*, is excepted from the requirements of subparts E, G, and K of this part). A contractor is not excepted if it performs MOW or MECH activities for at least one railroad that is required to be in full compliance with this part.

(4) If a contractor is subject to all of part 219 of this chapter because it performs regulated service for multiple railroads, not all of which qualify for the small railroad exception, the responsibility for ensuring that the contractor complies with subparts E and G of this part is shared between the contractor and any railroad using the contractor that does not qualify for the small railroad exception.

■ 3. In § 219.5, add definitions of “Mechanical employee or MECH employee” and “Rolling equipment,” and revise the definitions of “Category of regulated employee,” “Employee,” “Regulated employee,” “Regulated service,” and “Side collision” to read in alphabetical order as follows:

#### § 219.5 Definitions.

\* \* \* \* \*

*Category of regulated employee* means a broad class of covered service, maintenance-of-way, or mechanical employees (as defined in this section). For the purposes of determining random testing rates under § 219.625, if an individual performs both covered service and maintenance-of-way activities, or covered service and mechanical activities, he or she belongs in the category of regulated employee that corresponds with the type of regulated service comprising the majority of his or her regulated service.

\* \* \* \* \*

*Employee* means any individual, (including a volunteer or a probationary employee) performing activities for a railroad, a contractor to a railroad, or a subcontractor to a railroad.

\* \* \* \* \*

*Mechanical employee or MECH employee* means—

<sup>34</sup> Public Law 104-4, 2 U.S.C. 1531.

<sup>35</sup> 2 U.S.C. 1532.

<sup>36</sup> 66 FR 28355 (May 22, 2001).

<sup>37</sup> 82 FR 16093 (Mar. 31, 2017).

(1) Any employee who, on behalf of a railroad, performs mechanical tests or inspections required by parts 215, 221, 229, 230, 232, or 238 of this chapter on railroad rolling equipment, or its components, except for:

(i) An employee who is a member of a train crew assigned to test or inspect railroad rolling equipment that is part of a train or yard movement the employee has been called to operate; or

(ii) An employee who only performs one or more of the following duties:

(A) Cleaning and/or supplying cabooses, locomotives, or passenger cars with ice, food concession items, drinking water, tools, sanitary supplies, or flagging equipment;

(B) Servicing activities on locomotives such as fueling, replenishing engine oils and engine water, sanding, and toilet discharge and recharge;

(C) Checking lading for pilferage or vandalism; or

(D) Loading, unloading, or shifting car loads.

(2) An employee who only performs work related to the original manufacturing, testing, or inspection of railroad rolling equipment, or its components, on the manufacturer's behalf, is not a mechanical employee or MECH employee.

\* \* \* \* \*

*Regulated employee* means a covered service employee, maintenance-of-way employee, or mechanical employee (as defined in this section) who performs regulated service for a railroad subject to the requirements of this part.

*Regulated service* means activities a covered service employee, maintenance-of-way employee, or mechanical employee (as defined in this section) performs that makes such an employee subject to this part.

\* \* \* \* \*

*Rolling equipment* means locomotives, railroad cars, and one or more locomotives coupled to one or more railroad cars.

\* \* \* \* \*

*Side collision* means a collision when one consist strikes the side of another consist at a turnout, including a collision at a switch or a highway-rail crossing at grade.

\* \* \* \* \*

■ 4. Revise and republish § 219.10 to read as follows:

**§ 219.10 Penalties.**

Any person, as defined by § 219.5, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$892 and not more than \$29,192 per violation, except that:

Penalties may be assessed against individuals only for willful violations; where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury, or has caused death or injury, a penalty not to exceed \$116,766 per violation may be assessed; and the standard of liability for a railroad will vary depending upon the requirement involved. See, e.g., § 219.105, which is construed to qualify the responsibility of a railroad for the unauthorized conduct of a regulated employee that violates § 219.101 or § 219.102 (while imposing a duty of due diligence to prevent such conduct). Each day a violation continues constitutes a separate offense. See FRA's website at [www.fra.dot.gov](http://www.fra.dot.gov) for a statement of agency civil penalty policy.

■ 5. In § 219.11, revise paragraph (g) to read as follows:

**§ 219.11 General conditions for chemical tests.**

\* \* \* \* \*

(g) Each supervisor responsible for regulated employees (except a working supervisor who is a co-worker as defined in § 219.5) must be trained in the signs and symptoms of alcohol and drug influence, intoxication, and misuse consistent with a program of instruction to be made available for inspection upon demand by FRA. Such a program shall, at a minimum, provide information concerning the acute behavioral and apparent physiological effects of alcohol, the major drug groups on the controlled substances list, and other impairing drugs. The program must also provide training on the qualifying criteria for post-accident toxicological testing contained in subpart C of this part, and the role of the supervisor in post-accident collections described in subpart C.

\* \* \* \* \*

■ 6. In § 219.23, revise the first sentence of paragraph (a) introductory text, and revise paragraphs (c)(2) and (d)(2) to read as follows:

**§ 219.23 Railroad policies.**

(a) Whenever a breath or body fluid test is required of a regulated employee under this part, the railroad (either through a railroad employee or a designated agent, such as a contracted collector) must provide clear and unequivocal written notice to the employee that the test is being required under FRA regulations and is being conducted under Federal authority.

\* \* \*

\* \* \* \* \*

(c) \* \* \*

(2) For a minimum of three years after (EFFECTIVE DATE OF FINAL RULE), also ensuring that a hard copy of these materials is provided to each mechanical employee.

(d) \* \* \*

(2) The specific classes or crafts of employee who are subject to the provisions of this part, such as engineers, conductors, MOW employees, MECH employees, signal maintainers, or train dispatchers;

\* \* \* \* \*

**Subpart C—Post-Accident Toxicological Testing**

■ 7. In § 219.203, revise paragraph (a) introductory text and paragraph (d)(1) to read as follows:

**§ 219.203 Responsibilities of railroads and employees.**

(a) *Employees tested.* A regulated employee subject to post-accident toxicological testing under this subpart must cooperate in the provision of specimens as described in this part.

\* \* \* \* \*

(d) \* \* \*

(1) A railroad must make every reasonable effort to assure that specimens are provided as soon as possible after the accident or incident, preferably within four hours. Specimens that are not collected within four hours after a qualifying accident or incident must be collected as soon thereafter as practicable. If a specimen is not collected within four hours of a qualifying event, the railroad must immediately notify the FRA Drug and Alcohol Program Manager at 202-493-6313 and provide detailed information regarding the failure (either verbally or via a voicemail).

\* \* \* \* \*

■ 8. In § 219.205, revise paragraphs (a) and (c)(1), the first sentence of paragraph (c)(2), paragraph (d), and the first sentence of paragraph (e) to read as follows:

**§ 219.205 Specimen collection and handling.**

(a) *General.* Urine and blood specimens must be obtained, marked, preserved, handled, and made available to FRA consistent with the requirements of this subpart and the instructions provided inside the FRA post-accident toxicological shipping kit.

\* \* \* \* \*

(c) \* \* \*

(1) FRA makes available for purchase a limited number of standard shipping kits for the purpose of routine handling of post-accident toxicological specimens under this subpart. Specimens must be

placed in the shipping kit and prepared for shipment according to the instructions provided in the kit.

(2) Standard shipping kits may be ordered by requesting an order form from FRA's Drug and Alcohol Program Manager at 202-493-6313. \* \* \*

(d) *Shipment.* Specimens must be shipped as soon as possible by pre-paid air express (or other means adequate to ensure delivery within 24 hours from time of shipment) to FRA's post-accident toxicological testing laboratory. However, if delivery cannot be ensured within 24 hours due to a suspension in air express delivery services, the specimens must be held in a secure refrigerator until delivery can be accomplished. In no circumstances may specimens be held for more than 72 hours. Where express courier pickup is available, the railroad must ask the medical facility to transfer the sealed toxicology kit directly to the express courier for transportation. If courier pickup is not available at the medical facility where the specimens are collected or if for any other reason a prompt transfer by the medical facility cannot be assured, the railroad must promptly transport the sealed shipping kit holding the specimens to the most expeditious point of shipment via air express. The railroad must maintain and document a secure chain of custody of the kit(s) from its release by the medical facility to its delivery for transportation.

(e) *Specimen security.* After a specimen kit or transportation box has been sealed, no entity other than FRA's post-accident toxicology testing laboratory may open it. \* \* \*

■ 9. Revise § 219.206 to read as follows:

**§ 219.206 FRA access to breath test results.**

Documentation of breath test results must be made available to FRA consistent with the requirements of this subpart.

■ 10. In § 219.207, revise paragraphs (c) and (d) to read as follows:

**§ 219.207 Fatality.**

\* \* \* \* \*

(c) A coroner, medical examiner, pathologist, or other qualified professional is authorized to remove the required body fluid and tissue specimens from the remains on request of the railroad or FRA pursuant to this part; and in so acting, such person is the delegate of the FRA Administrator under sections 20107 and 20108 of title 49, United States Code (but not the agent of the Secretary for purposes of the Federal Tort Claims Act (chapter 71 of Title 28, United States Code). A qualified professional may rely upon the

representations of the railroad or FRA representative with respect to the occurrence of the event requiring that toxicological tests be conducted and the coverage of the deceased employee under this part.

(d) The instructions included inside the shipping kits specify body fluid and tissue specimens required for toxicological analysis in the case of a fatality.

■ 11. In § 219.211, revise paragraphs (a), (c), (e), and (i) to read as follows:

**§ 219.211 Analysis and follow-up.**

(a) Specimens are analyzed for alcohol, controlled substances, and non-controlled substances specified by FRA under protocols specified by FRA. These substances may be tested for in any form, whether naturally or synthetically derived. Specimens may be analyzed for other impairing substances specified by FRA as necessary to the particular accident investigation.

\* \* \* \* \*

(c) With respect to a surviving employee, a test reported as positive for alcohol or a controlled substance must be reviewed by the railroad's Medical Review Officer (MRO) with respect to any claim of use or administration of medications (consistent with § 219.103) that could account for the laboratory findings. The MRO must promptly report the results of each review by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed reports must be sent to *FRA-MROletters.email@dot.gov*. The report must reference the employing railroad, accident/incident date, and location; and state whether the MRO reported the test result to the employing railroad as positive or negative and the basis of any determination that analytes detected by the laboratory derived from authorized use (including a statement of the compound prescribed, dosage/frequency, and any restrictions imposed by the authorized medical practitioner). Unless specifically requested by FRA in writing, the MRO may not disclose to FRA the underlying physical condition for which any medication was authorized or administered. The FRA is not bound by the MRO's determination, but that determination will be considered by FRA in relation to the accident/incident investigation and with respect to any enforcement action under consideration.

\* \* \* \* \*

(e) An employee may respond within 45 days of receipt of his or her test results prior to the preparation of any final investigative report concerning the

accident or incident by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed responses should be sent to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's response must state the accident date, railroad, and location; the position the employee held on the date of the accident/incident; and any information the employee requests be withheld from public disclosure. FRA will decide whether to honor the employee's request to withhold information.

\* \* \* \* \*

(i) An employee may, within 60 days of receipt of the toxicology report, request a retest of his or her PAT testing specimen by hard copy or email to the FRA Drug and Alcohol Program Manager. Emailed requests must be sent to *FRA-DrugAlcoholProgram.email@dot.gov*. The employee's request must specify the railroad, accident date, and location. Upon receipt of the employee's request, FRA will identify and select a qualified referee laboratory that has available an appropriate, validated assay for the specimen type and analyte(s) declared positive. Because some analytes may deteriorate during storage, if the referee laboratory detects levels above its Limit of Detection (as defined in 49 CFR 40.3), FRA will report the retest result as corroborative of the original PAT test result.

**Subpart E—Reasonable Cause Testing**

■ 12. In § 219.403, revise the introductory text, revise and republish paragraph (b)(1), revise paragraphs (b)(17) and (18), and add paragraphs (b)(19) through (22) to read as follows:

**§ 219.403 Requirements for reasonable cause testing.**

Each railroad's decision process regarding whether reasonable cause testing is authorized must be completed before the reasonable cause testing is performed and documented according to the requirements of § 219.405. The following circumstances constitute reasonable cause for the administration of alcohol and/or drug tests under the authority of this subpart. For reasonable cause testing based on a rule violation as authorized in paragraph (b) of this section, a railroad that elects to test under FRA authority may only use the rule violations listed in paragraph (b) of this section as bases for reasonable cause testing.

\* \* \* \* \*

(b) \* \* \*

(1) Noncompliance with a train order, track warrant, track bulletin, track permit, stop and flag order, timetable,

signal indication, special instruction or other directive with respect to movement of railroad on-track equipment that involves—

(i) Occupancy of a block or other segment of track to which entry was not authorized;

(ii) Failure to clear a track to permit opposing or following movements to pass;

(iii) Moving across a railroad crossing at grade without authorization;

(iv) Passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); or

(v) Failure to take appropriate action, resulting in the enforcement of a positive train control system.

\* \* \* \* \*

(17) Improper use of individual train detection in a manual interlocking or control point;

(18) Failure to apply three point protection (fully apply the locomotive and train brakes, center the reverser, and place the generator field switch in the off position) that results in a reportable injury to a regulated employee;

(19) Failure to display blue signals in accordance with § 218.25 through § 218.30 of this chapter;

(20) Failure to perform or have knowledge that a required brake test was performed pursuant to the Class I, Class IA, Class II, or Class III, or transfer train brake test provisions of part 232, or the running brake test provisions of part 238, of this chapter;

(21) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or permitting a train to be operated with an unauthorized disabled safety device in the controlling locomotive; or

(22) Failure to have a derailing device in proper position and locked if required in accordance with § 218.109 of this chapter.

**Subpart F—Pre-Employment Tests**

■ 13. In § 219.501, revise paragraph (e) and add paragraph (f) to read as follows:

**§ 219.501 Pre-employment drug testing.**

\* \* \* \* \*

(e)(1) The pre-employment drug testing requirements of this section do not apply to:

(i) Covered service employees of railroads qualifying for the small railroad exception (see § 219.3(c)) who were performing regulated service for the qualifying railroad, or a contractor or subcontractor of a qualifying railroad, before June 12, 2017;

(ii) Maintenance-of-way employees who were performing regulated service

for a railroad, or a contractor or subcontractor of a railroad, before June 12, 2017; or

(iii) MECH employees who were performing regulated service for a railroad, or contractor or subcontractor of a railroad, before (Effective Date of Final Rule).

(2) An exempted employee under paragraph (e)(1) of this section must have a negative pre-employment drug test before performing regulated service for a new or additional employing railroad, or contractor or subcontractor of a railroad, on or after June 12, 2017, for exempted covered employees and maintenance-of-way employees, and after (Effective Date of Final Rule) for MECH employees.

(f) A railroad, or contractor or subcontractor of a railroad, must comply with 49 CFR 40.25 by performing a records check on any of its MOW or MECH employees who have been exempted from pre-employment testing before the employee first performs regulated service. An employee may not perform regulated service after 30 days from the date on which the employee first performed regulated service, unless this information has been obtained or a good faith effort to obtain this information has been made and documented.

**Subpart G—Random Alcohol and Drug Testing Programs**

■ 14. In § 219.605, revise and republish paragraph (a) and paragraph (e) to read as follows:

**§ 219.605 Submission and approval of random testing plans.**

(a) *Plan submission.* (1) Each railroad must submit for review and approval a random testing plan meeting the requirements of §§ 219.607 and 219.609 to the FRA Drug and Alcohol Program Manager, at *FRA-DrugAlcoholProgram.email@dot.gov* or 1200 New Jersey Ave. SE, Washington, DC 20590. The submission must include the name of the railroad or contractor in the subject line. A railroad commencing start-up operations must submit its plan no later than 30 days before its date of commencing operations. A railroad that must comply with this subpart because it no longer qualifies for the small railroad exception under § 219.3 (due to a change in operations or its number of covered employees) must submit its plan no later than 30 days after it becomes subject to the requirements of this subpart. A railroad may not implement a Federal random testing plan or any substantive amendment to that plan before FRA approval.

(2) A railroad may submit separate random testing plans for each category of regulated employees (as defined in § 219.5), combine all categories into a single plan, or amend its current FRA-approved plan to add additional categories of regulated employees, as defined by this part.

\* \* \* \* \*

(e) *Previously approved plans.* A railroad is not required to resubmit a random testing plan that FRA had approved before (EFFECTIVE DATE OF FINAL RULE), unless the railroad must amend the plan to comply with the requirements of this subpart. A railroad must submit new plans, combined plans, or amended plans incorporating new categories of regulated employees (*i.e.*, mechanical employees) for FRA approval at least 30 days before (EFFECTIVE DATE OF FINAL RULE).

■ 15. Revise § 219.607 by redesignating paragraphs (c)(3) through (14) as (c)(4) through (15), adding new paragraph (c)(3), and revising newly redesignated paragraphs (c)(7), (9), and (14) to read as follows:

**§ 219.607 Requirements for random testing plans.**

\* \* \* \* \*

(c) \* \* \*

(3) Total number of mechanical employees, including mechanical contractor employees and volunteers;

\* \* \* \* \*

(7) Name, address, and contact information for any service providers, including the railroad’s Medical Review Officers (MROs), Substance Abuse and Mental Health Services Administration (SAMHSA) certified drug testing laboratory(ies), Drug and Alcohol Counselors (DACs), Substance Abuse Professionals (SAPs), and Consortium/Third Party Administrators (C/TPAs) or collection site management companies. Individual collection sites do not have to be identified;

\* \* \* \* \*

(9) Target random testing rates meeting or exceeding the minimum annual random testing rates;

\* \* \* \* \*

(14) Designated testing window. A designated testing window extends from the beginning to the end of the designated testing period established in the railroad’s FRA-approved random plan (see § 219.603), after which time any individual selections for that designated testing window that have not been collected are no longer active; and

\* \* \* \* \*

■ 16. In § 219.615, revise the first sentence of paragraph (e)(3) to read as follows:

**§ 219.615 Random testing collections.**

\* \* \* \* \*

(e) \* \* \*

(3) A railroad must inform each regulated employee that he or she has been selected for random testing at the time the employee is notified. \* \* \*

\* \* \* \* \*

■ 17. In § 219.617, revise the first sentence of paragraph (a)(3) to read as follows:

**§ 219.617 Participation in random alcohol and drug testing.**

(a) \* \* \*

(3) A railroad may excuse a regulated employee who has been notified of his or her selection for random testing only if the employee can substantiate that a medical emergency involving the employee or an immediate family member (e.g., birth, death, or medical emergency) supersedes the requirement to complete the test. \* \* \*

\* \* \* \* \*

■ 18. In § 219.625, revise paragraph (c)(1) to read as follows:

**§ 219.625 FRA Administrator's Determination of Random Alcohol and Drug Testing Rates**

\* \* \* \* \*

(c) \* \* \*

(1) These initial testing rates are subject to amendment by the Administrator in accordance with paragraphs (d) and (e) of this section after at least two consecutive calendar years of MIS data have been compiled for the category of regulated employee.

\* \* \* \* \*

**Subpart I—Annual Report**

■ 19. In § 219.800, revise the first sentence of paragraph (a) and paragraph (f), and add paragraph (g) to read as follows:

**§ 219.800 Annual reports.**

(a) Each railroad that has a total of 400,000 or more employee hours (including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States), must submit to\* FRA by March 15 of each year a report covering the previous calendar year (January 1–December 31), summarizing the results of its alcohol misuse and drug abuse prevention program. \* \* \*

\* \* \* \* \*

(f) A railroad required to submit an MIS report under this section must submit separate reports for covered service employees, MOW employees, and MECH employees.

(g)(1) This subpart does not apply to any contractor that performs regulated

service exclusively for railroads with fewer than 400,000 total employee annual work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States.

(2) When a contractor performs regulated service for at least one railroad with 400,000 or more total annual employee work hours, including hours worked by all employees of the railroad, regardless of occupation, not only while in the United States, but also while outside the United States, this subpart applies as follows:

(i) A railroad with 400,000 or more total employee annual work hours must comply with this subpart regarding any contractor employees it integrates into its own alcohol and drug program under this part; and

(ii) If a contractor establishes an independent alcohol and drug testing program that meets the requirements of this part and is acceptable to the railroad, the contractor must comply with this subpart if it has 200 or more regulated employees.

**Appendix B to Part 219—[Removed]**

■ 20. Remove appendix B to part 219.

**Appendix C to Part 219—[Removed]**

■ 21. Remove appendix C to part 219.

Issued in Washington, DC

**Quintin C. Kendall,**

*Deputy Administrator.*

[FR Doc. 2020–25868 Filed 1–7–21; 8:45 am]

**BILLING CODE 4910–06–P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Parts 223 and 226**

[Docket No.: 201228–0358]

RIN 0648–BJ65

**Endangered and Threatened Species; Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** We, the National Marine Fisheries Service (NMFS), propose to designate critical habitat for the Beringia distinct population segment (DPS) of the Pacific bearded seal subspecies

*Erignathus barbatus nauticus* under the Endangered Species Act (ESA). The proposed designation comprises an area of marine habitat in the Bering, Chukchi, and Beaufort seas. We seek comments on all aspects of the proposed critical habitat designation and will consider information received before issuing a final designation.

**DATES:** Comments must be received by March 9, 2020. Public hearings on the proposed rule will be held in Alaska. The dates and times of these hearings will be provided in a subsequent **Federal Register** notice.

**ADDRESSES:** You may submit data, information, or comments on this document, identified by NOAA–NMFS–2020–0029, and on the associated Draft Impact Analysis Report (i.e., report titled “Draft RIR/ESA Section 4(b)(2) Preparatory Assessment/IRFA of Critical Habitat Designation for the Beringia Distinct Population Segment of the Bearded Seal”) by either of the following methods:

- **Electronic Submission:** Submit all electronic comments via the Federal eRulemaking Portal. Go to [www.regulations.gov/#/docketDetail;D=NOAA-NMFS-2020-0029](http://www.regulations.gov/#/docketDetail;D=NOAA-NMFS-2020-0029), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.
- **Mail:** Submit written comments to Jon Kurland, Assistant Regional Administrator for Protected Resources, Alaska Region NMFS, Attn: James Bruschi, P.O. Box 21668, Juneau, AK 99082–1668.

**Instructions:** NMFS may not consider comments sent by any other method, to any other address or individual, or received after the end of the comment period. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous).

Electronic copies of the Draft Impact Analysis Report for this proposed rule and a complete list of references cited in this proposed rule are available on the Federal eRulemaking Portal at [www.regulations.gov/#/docketDetail;D=NOAA-NMFS-2020-0029](http://www.regulations.gov/#/docketDetail;D=NOAA-NMFS-2020-0029).

**FOR FURTHER INFORMATION CONTACT:** Tammy Olson, NMFS Alaska Region, (907) 271–5006; Jon Kurland, NMFS