Paragraph 6005 Class E Airspace Areas Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO GA E5 Columbus, GA [Amended]

Columbus Metropolitan Airport, GA
(Lat. 32°30′59″ N., long. 84°56′20″ W.)
Lawson AAF, GA
(Lat. 32°20′14″ N., long. 84°59′29″ W.)
Lawson VOR/DME
(Lat. 32°19′57″ N., long. 84°59′36″ W.)
Lawson LOC
(Lat. 32°20′43″ N., long. 84°59′55″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Columbus Metropolitan Airport; and within 1 mile each side of the 234° bearing from the airport extending from the 6.8-mile radius to 7.3-miles south of the airport; and within a 7.6-mile radius of Lawson AAF; and within 2.5 miles each side of Lawson VOR/DME 340° radial extending from the 7.6-mile radius to 15 miles north of the VOR/DME; and within 4 miles each side of the Lawson LOC 145° course extending from the 7.6-mile radius to 10.6 miles southeast of Lawson AAF.

Issued in Washington, DC, on May 7, 2010.

Edith V. Parish,

Manager, Airspace and Rules Group.

[FR Doc. 2010–11851 Filed 5–17–10; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1140

[Docket No. FDA–2010–N–0136]

RIN 0910–AG33

Request for Comment on Implementation of the Family Smoking Prevention and Tobacco Control Act; Extension of Comment Period

AGENCY: Food and Drug Administration, HHS.

ACTION: Advance notice of proposed rulemaking; extension of comment period.

SUMMARY: The Food and Drug Administration (FDA) is extending for 60 days the comment period for the advance notice of proposed rulemaking (ANPRM) that appeared in the **Federal Register** of March 19, 2010. In the ANPRM, FDA requested comments, data, research, or other information on the regulation of outdoor advertising of cigarettes and smokeless tobacco. The agency is taking this action in response to a request for an extension to allow interested persons additional time to submit comments.

DATES: The comment period for the advance notice of proposed rulemaking, published March 19, 2010, at 75 FR 13241, is extended. Submit electronic or written comments by July 19, 2010.

ADDRESSES: You may submit comments, identified by Docket No FDA–2010–N–0136 and/or RIN number 0910–AG33, by any of the following methods:

Electronic Submissions

Submit electronic comments in the following way:

- Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments.

Written Submissions

Submit written submissions in the following ways:

- FAX: 301–827–6870.
- Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions): Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

Instructions: All submissions received must include the agency name and docket number and Regulatory Information Number (RIN) for this rulemaking. All comments received may be posted without change to *http://www.regulations.gov*, including any personal information provided. For additional information on submitting comments, see the "Comments" heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the "Search" box and follow the prompts and/or go to the Division of Dockets Management, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Annette Marthaler, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850–3229, 1–877–287–1373, *annette.marthaler@fda.hhs.gov*.

SUPPLEMENTARY INFORMATION:

I. Background

In the **Federal Register** of March 19, 2010 (75 FR 13241), FDA published an ANPRM with a 60-day comment period to request data, research, information, and comments on whether restrictions on outdoor advertising of tobacco products are necessary to protect children and adolescents from the harms caused by tobacco use and, if they are, whether the restrictions under consideration (as identified in the ANPRM), or close variations would be justified, lawful, and appropriate. FDA also solicited data, research, information, and comments on other restrictions on outdoor advertising that, either in addition to or instead of the specific restrictions under consideration, would advance the public health goal of protecting children and adolescents from the harms caused by tobacco use.

The agency has received a request for a 90-day extension of the comment period for the ANPRM. The request conveyed concern that the current 60-day comment period does not allow sufficient time to develop a meaningful response to the ANPRM.

FDA has considered the request and is extending the comment period for the ANPRM for 60 days, until July 19, 2010. The agency believes that a 60-day extension allows adequate time for interested persons to submit comments without significantly delaying a rulemaking on this important issue.

II. Comments

Interested persons may submit to the Division of Dockets Management (see **ADDRESSES**) either electronic or written comments regarding this document. it is only necessary to send one set of comments. It is no longer necessary to send two copies of mailed comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday.

Dated: May 13, 2010.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2010–11799 Filed 5–17–10; 8:45 am]

BILLING CODE 4160–01–S

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 220

[Docket No. FRA–2009–0118]

RIN 2130–AC21

Restrictions on Railroad Operating Employees' Use of Cellular Telephones and Other Electronic Devices

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to amend its railroad communications regulations by restricting use of mobile telephones and

other distracting electronic devices by railroad operating employees. This proposed rulemaking would codify most of the requirements of FRA Emergency Order No. 26, which would be supplanted by the final rule. FRA proposes that some of the substantive requirements of that order as well as its scope be changed by this rulemaking to accommodate changes previously recommended by a petition for review of that order and a number of additional amendments that FRA believes are appropriate. In addition, FRA is requesting comment regarding whether violations of this proposed subpart should be a basis for revoking a locomotive engineer's certification.

DATES: Written comments must be received by June 17, 2010. Comments received after that date will be considered to the extent possible without incurring additional delay or expense. FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However if FRA receives a specific request for a public, oral hearing prior to June 17, 2010, one will be scheduled, and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* Comments related to this Docket No. FRA–2009–0118 may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to *http://www.Regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590–0001.
- *Hand Delivery:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–225.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Please note that all comments received will be posted without change to *http://www.Regulations.gov,* including any personal information provided. Please *see* the discussion under the Privacy Act heading in the Supplementary Information section of this document.

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

FOR FURTHER INFORMATION CONTACT: Douglas H. Taylor, Staff Director-Operating Practices, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: (202) 493–6255); Ann M. Landis, Trial Attorney, Office of the Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (telephone: (202) 493–6064); or Joseph St. Peter, Trial Attorney, Office of the Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (telephone: (202) 493–6047).

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I. Distracted Driving and Its Transportation Safety Consequences

A. Background Information

The increasing number of distractions for drivers has led to increasing safety risks. The distractions caused by cell phones (mobile phones/cellular phones) have been a concern for years. In addition, each day, drivers are distracted by eating, conversations with passengers, using portable electronic devices, or some other type of multitasking. This type of behavior results in vehicle accidents and significant costs to our nation's economy.

In response to this growing problem, DOT hosted a Distracted Driving Summit in Washington, DC (*http://www.distraction.gov/dot/*). At the Summit, DOT brought together safety and law enforcement experts as well as young adults whose distracted driving had tragic consequences. Attendees heard the testimony of families who lost loved ones because someone else had chosen to send a text message, dial a phone, or become occupied with another activity while driving. In addition to hosting the Summit, DOT has reviewed recent research and has decided to take a more systematic look at the issue and its many dimensions.

B. Justification for the Rulemaking

FRA has discovered numerous examples proving the danger of distracting electronic devices. These examples indicate the necessity of restrictions on the use of such electronic devices. Five of these accidents are described below, though all of these and more can be found in the full text of the Order.

1. On June 8, 2008, a Union Pacific Railroad Company (UP) brakeman was struck and killed by the train to which he was assigned. FRA's investigation indicated that the brakeman instructed the locomotive engineer via radio to back the train up and that the brakeman subsequently walked across the track, into the path of the moving train. The brakeman was talking on his cell phone at the time of the accident.

2. On July 1, 2006, a northward BNSF Railway Company (BNSF) freight train collided with the rear of a standing BNSF freight train at Marshall, Texas. Although there were no injuries, there were estimated damages of $413,194.

Both trains had two-person crews. The striking train had passed a "Stop and Proceed at Restricted Speed" signal indication and was moving at 20 mph. FRA determined that the collision was caused by the failure of the locomotive engineer on the striking train to comply with restricted speed and that he was engaged in cell phone conversations immediately prior to the accident.

3. On December 21, 2005, a contractor working on property of The Kansas City Southern Railway Company at Copeville, Texas was struck and killed when he stepped into the path of an approaching freight train. FRA's investigation disclosed that the contractor was talking on a cell phone at the time of the accident.

4. One locomotive engineer died and a train conductor suffered serious burns when two BNSF freight trains collided head-on near Gunter, Texas on May 19, 2004. The collision resulted in the derailment of 5 locomotives and 28 cars, with damages estimated at $2,615,016. Approximately 3,000 gallons of diesel fuel were released from the locomotives, which resulted in a fire. NTSB investigators obtained records that showed the number and duration of cell phone calls made by crewmembers on both trains between 1:50 p.m. and the time of the accident, approximately 5:46 p.m. During this time, a total of 22 personal cell phone calls were made and/or received by the five crewmembers on both trains while the trains were in motion.

5. At 8:57 a.m. on May 28, 2002, an eastbound BNSF coal train collided head on with a westbound BNSF intermodal train near Clarendon, Texas. The conductor and engineer of the coal train received critical injuries. The engineer of the intermodal train was killed. The cost of the damages exceeded $8,000,000. The NTSB found that all four crewmembers involved in this accident had personal cell phones. It also found that the use of a cell phone by the engineer of one of the trains may have distracted him to the extent that he was unaware of the dispatcher's instructions that he stop his train at a designated point.

On October 1, 2008, FRA issued Emergency Order No. 26 (Order or EO 26) restricting the on-duty use of cellular telephones and other electronic devices. 73 FR 58702, Oct. 7, 2008). This FRA action was in part a response to the accidents discussed above and in part a response to the September 12, 2008 head-on collision between a Southern California Regional Rail Authority (Metrolink) commuter train and a UP freight train in Chatsworth, California. This accident resulted in 25 deaths, numerous injuries, and more than $7 million in damages. Information discovered during the NTSB investigation indicates that the locomotive engineer of the Metrolink commuter train passed a stop signal. NTSB stated that a cell phone owned by the commuter train engineer was being used to send a text message within 30 seconds of the time of the accident.

In the period from the effective date of the Order, October 27, 2008, through December 7, 2009, FRA inspectors discovered approximately 200 instances in which the Order may have been violated. FRA's Office of Railroad Safety recommended enforcement action against the employee or railroad in 36 of these instances. All 36 of these actions were based on a railroad employee's using an electronic device, failing to have its earpiece removed from the employee's ear, or failing to have the device turned off in a potentially unsafe situation. Of these 36 instances, approximately half of them involved an employee using or failing to have a cell phone turned off while in the cab of a locomotive during a potentially hazardous time. In addition, 33 of the incidents recommended for enforcement action involved personal, as opposed to railroad-supplied, devices. The hazard of distracting electronic devices has been made abundantly and, at times, tragically clear. FRA inspectors have noticed a decrease in the unsafe use of electronic devices within locomotive cabs since the Order became effective, but the problem still exists.

FRA has considered the costs and benefits of this proposed rule. Relative to the current requirements of EO 26, the only additional burden produced by the requirements of this proposed rule is that related to revising programs and initial training focused on the exceptions that this proposal would introduce. This added burden would total approximately $286,000. The exceptions to the existing restrictions on the use of electronic devices would allow for greater flexibility with respect to the use of certain electronic devices while maintaining the safety benefits intended. Thus, when compared to the existing requirements, the added flexibility would justify the relatively minor cost burden. In an effort to also evaluate the requirements that would be transferred from EO 26 to Part 220, FRA examined costs and benefits relative to conditions prior to issuance of EO 26 in the format of break-even analyses, which can be relied upon to indicate likely net benefit outcomes. Applying highly conservative assumptions, 20-year direct and indirect costs could total as much as $22.4 million (discounted at 7%) or $30.2 million (discounted at 3%). The break-even analyses show that, in all scenarios considered, it would not require an unreasonable decrease in the probability of an accident in order to at least break even. As discussed more completely in the Regulatory Impact Analysis accompanying this proposed rule, the frequency and severity of accidents together with the observed rising incidence of improper use of cell phones and other electronic devices strongly suggest that the elimination of improper electronic device usage by railroad operating employees, as proposed in this rule, will prevent more than one fatality every two years, and therefore, that the benefits of the requirements proposed exceed the costs.

C. Distracted Driving Impacts All Transportation Modes

The use of cell phones and other electronic devices has become ubiquitous in American society. There is strong evidence that people permit electronic devices to distract them from driving all kinds of vehicles and that such distractions can have serious safety consequences.

1. Aviation

On October 21, 2009, Northwest Airlines Flight 188 was enroute from San Diego to Minneapolis-St. Paul International/Wold-Chamberlain Airport with 144 passengers. Flight 188 overflew its destination airport by approximately 150 miles before air traffic controllers were able to contact the crew via radio. After the incident, the pilot and first officer told the NTSB that they had lost track of the plane's location because they had been distracted in the cockpit while using personal laptop computers and discussing airline crew scheduling procedures. Using personal laptop computers in the cockpit was a violation of airline policy, and the Federal Aviation Administration suspended the certificates of both the pilot and first officer on October 27, 2009.

2. Rail

See the discussion above.

3. Motorcoach

On November 14, 2004, a bus struck a bridge on the George Washington Parkway in Alexandria, Virginia, a serious accident that destroyed the roof of the motorcoach and injured 11 students, including one seriously. As determined by an NTSB investigation, the bus driver said he had been talking on a hands-free cell phone at the time

of the accident. Records from the bus driver's personal cell phone service provider showed that the bus driver initiated a 12-minute call on the morning of the accident. The driver said that he saw neither the warning signs nor the bridge itself before the impact. Evidence indicates that he did not apply any brakes before impacting the bridge. The NTSB concluded that the bus driver's cell phone conversation at the time of the accident diverted his attention from driving.

This crash resulted in the NTSB recommendation H–06–27 that commercial driver's license (CDL) holders with a passenger-carrying or school bus endorsement be prohibited from using cell phones or other personal electronic devices while driving those vehicles.

Statistics show that distraction from the primary task of driving presents a serious and potentially deadly danger. In 2008, 5,870 people lost their lives and an estimated 515,000 people were injured in police-reported crashes in which at least one form of driver distraction was reported on the crash report. While these numbers are significant, they may not state the true size of the problem, since it is difficult to identify distraction and its role in a crash. *See http://www.dot.gov/affairs/DOT%20HS%20811%20216.pdf.*

First, the data are based largely on police accident reports that are conducted after the crash has occurred. These reports vary across police jurisdictions, thus creating potential inconsistencies in reporting. Some police accident reports identify distraction as a distinct reporting field, while others identify distraction from the narrative portion of the report. Further, the data includes only those crashes in which at least one form of driver distraction was actually reported by law enforcement, thus creating the potential for an undercount.

In addition to, and contributing to, inconsistent reporting of distraction on police accident reports, there are challenges in determining whether the driver was distracted at the time of the crash. Self-reporting of negative behavior, such as distracted driving, is likely lower than actual occurrence of that behavior. Law enforcement must also rely on crash investigation information to determine if distraction was involved in those crashes with a driver death. The information available to law enforcement may not indicate distraction even where it was a cause of or a factor in the accident. For these additional reasons, reported crashes involving distraction may be undercounted.

D. Legal Basis for the Rulemaking

Congress required the Secretary of Transportation (Secretary) to complete a study on the safety impact of the use of personal electronic devices by safety-related railroad employees by October 16, 2009, and to report to Congress on the results of the study within six months after its completion. *See* Sec. 405(a) and (c) of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Div. A, 122 Stat. 4848, Oct. 16, 2008 (122 Stat. 4885, 49 U.S.C. 20103 note). Sec. 405(d) of the RSIA authorizes the Secretary to prohibit the use of personal electronic devices that may distract employees from safely performing their duties based on the conclusions of the required study. The Secretary, in turn, has delegated the responsibility to carry out these duties and to exercise this authority to the Administrator of FRA. 49 CFR 1.49(oo). In addition, the Secretary has delegated general rulemaking authority to the Administrator, which FRA also is relying on for this proposed regulation. 49 CFR 1.49(m).

E. Studies

Due to differences in methodology and definitions of distraction, any study or survey conducted may arrive at different results and conclusions with respect to the involvement of driver distraction in causing a crash. A 2008 research paper sponsored by the National Highway Traffic Safety Administration (NHTSA) entitled, *Driver Distraction: A Review of the Current State-of-Knowledge,* discusses multiple means of measuring the effects of driver distraction including observational studies of driver behavior, crash-based studies, and experimental studies of driving performance. Each type of study has its own set of advantages and disadvantages.[1]

1. National Motor Vehicle Crash Causation Survey (NMVCCS)

NHTSA recently conducted a nationwide survey of crashes involving light passenger vehicles with a focus on factors related to pre-crash events.[2] The NMVCCS investigated a total of 6,950 crashes during the three-year period from January 2005 to December 2007. The report used a nationally representative sample of 5,471 crashes that were investigated during a two-and-a-half-year period from July 3, 2005, to December 31, 2007. Based on the sampling method of the survey, findings were representative of the nation as a whole.

Survey researchers were able to assess the critical event that preceded the crash, the reason for this event, and any other associated factors that might have played a role. Examples of the critical event preceding the crash include running off the edge of the road, failure to stay in the proper lane, or loss of control of the vehicle. Researchers assessed the reason underlying this critical event and attributed that reason to either the driver, the condition of the vehicle, failure of the vehicle systems, adverse environmental conditions, or roadway design. Each of these areas was further broken down to determine more specific critical reasons. For the driver, critical reasons included facets of driver distraction and, therefore, NMVCCS was able to quantify driver distraction involvement in crashes. The percentages included in this discussion are based on 5,471 crashes.

In addition to reporting distraction as the critical reason for the pre-crash event, NMVCCS also reported crash-associated factors. These are factors such as interior distractions that likely added to the probability of a crash occurrence. In cases where the researchers attributed the critical reason of the pre-crash event to a driver, researchers also attempted to determine the role and type of distraction. Of the crashes studied, about 18 percent of the drivers were engaged in at least one interior (*i.e.,* in-vehicle) non-driving activity (*e.g.,* looking at other occupants, dialing or hanging up a phone, or conversing with a passenger). For the most part, that activity was conversing either with other passengers or on a cell phone, as a total of about 12 percent of drivers in these crashes were engaged in conversation. Drivers between ages of 16 and 25 demonstrated the highest rate of being engaged in at least one interior non-driving activity.

2. 100-Car Naturalistic Driving Study

The 100-Car Naturalistic Driving Study was an observational study—via

[1] Ranney, Thomas A. (2008). "Driver Distraction: A Review of the Current State-of-Knowledge." DOT HS 810 787. Available online at:*http://www.scribd.com/doc/12073978/Driver-Distraction-A–Review-of-the-Current-StateofKnowledge.* A more comprehensive listing of research on distracted driving, which includes links to many of the reports discussed in this analysis, can be found online at: *http://www.nhtsa.dot.gov/portal/site/nhtsa/template.MAXIMIZE/menuitem.8f0a414414e99092b477cb30343c44cc/?javax.portlet.tpst=4670b93a0b088a006bc1d6b760008a0c_ws_MX&javax.portlet.prp_4670b93a0b088a006bc1d6b760008a0c_viewID=detail_view&itemID=97b964d168516110VgnVCM1000002fd17898RCRD&overrideViewName=Article.*

[2] National Highway Traffic Safety Administration (2009). "National Motor Vehicle Crash Causation Survey: Report to Congress." DOT HS 811 059. Available online at: *http://www-nrd.nhtsa.dot.gov/Pubs/811059.PDF.*

instrumented vehicles—to provide details on driver performance, behavior, environment, and other factors associated with critical incidents, near-crashes, and crashes for 100 cars over a one-year period.[3] This exploratory study was conducted to determine the feasibility of a larger-scale study that would be more representative of the nation's driving behavior. Despite the small scale of the 100-Car study, extensive information was obtained on 241 primary and secondary drivers over a 12- to 13-month period occurring between January, 2003, and July, 2004. The data covered approximately 2 million vehicle miles driven and 43,000 hours of driving. As stated in *An Overview of the 100-Car Naturalistic Study and Findings,* "the goal of this study was to maximize the potential to record crash or near crash events through the selection of subjects with higher than average crash or near crash risk exposure."[4] In order to achieve this goal, the 100-car study selected a larger sample of drivers who were 18–25 years of age and who drove more than average.

Additionally, the subjects were selected from the Northern Virginia/Washington, DC metropolitan area which offers primarily urban and suburban driving conditions, often in moderate to heavy traffic. This type of purposive sample served well the intentions of the study; however, it also created limitations on the application of the findings. The findings of the 100-car study cannot be generalized to represent the behavior of the nation's population or the potential causal factors for the crashes that occur across the nation's roadways.

During the 100-car study, complete information was collected on 69 crashes, 761 near-crashes, and 8,295 incidents. The encompassing term *inattention* was classified during this study as (1) Secondary task involvement, (2) fatigue, (3) driving-related inattention to the forward roadway, and (4) non-specific eye glance away from the forward roadway. Secondary task involvement is defined for the study as driver behavior that diverts the driver's attention away from the driving task; this may include talking on a cell phone, eating, talking to a passenger, and other distracting tasks. Results of the 100-car study indicate that secondary task distraction contributed to over 22 percent of all the crashes and near-crashes recorded during the study period.[5] This study found that when a secondary task took the driver's eyes off of the road for more than 2.0 seconds (out of a 6.0-second time interval), the odds of a crash or near-crash event occurring significantly increased.

3. National Occupant Protection Use Survey (NOPUS)

NHTSA's annual survey of occupant protection also collects data on electronic device use. NOPUS provides the only probability-based observed data on driver electronic device use in the United States.[6] Based on the sampling method of the survey, findings are representative of the nation as a whole. In 2008, it was estimated that about 6 percent of all drivers were using hand-held cell phones while driving during daylight hours. This finding means that about 812,000 vehicles on the road at any given daylight moment were being driven by someone using a hand-held cell phone in 2008. Survey data from the previous year yielded an even higher figure: according to NOPUS, in 2007 about 1,005,000 vehicles were being driven by someone using a hand-held cell phone at any given daylight moment.[7] Another finding was that in both 2007 and 2008 an estimated 11 percent of vehicles in a typical daylight moment were driven by someone who was using some type of electronic device, either hand-held or hands-free.[8]

4. Motor Vehicle Occupant Safety Survey (MVOSS)

The MVOSS is a periodic national telephone survey on occupant protection issues. The most recent administration of the survey was in 2007. *Volume 4, Crash Injury and Emergency Medical Services Report,* includes discussion of questions pertaining to wireless phone use in the vehicle.[9] According to the report summarizing the 2007 data, 81 percent of drivers age 16 and older usually have a wireless phone in the vehicle with them when they drive. Drivers over the age of 54 were less likely than younger drivers to have them—87 percent of 16- to 54-year olds, 74 percent of 55- to 64-year-olds, and 63 percent of drivers age 65 and older. Of those drivers who usually have a wireless phone in the vehicle, 85 percent said they keep the phone on during all or most of their trips. Among drivers who keep the phone turned on when they drive, 64 percent always or usually answer incoming phone calls.

Of the drivers who usually have a wireless phone in the vehicle with them when they drive, 16 percent said they talk while driving during most or all of their trips, and 17 percent said they talk on their wireless phone during about half of their trips. On the other hand, 22 percent of individuals reported never talking on their phone while driving. When driving and wanting to dial the phone, 32 percent of those who at least occasionally talk on the phone while driving tend to dial the phone while driving the vehicle. An additional 37 percent tend to wait until they are temporarily stopped, and 19 percent tend to pull over to a stop to place the call. Ten percent stated they never dial while driving.

F. Other Efforts

1. State Action

Rhode Island recently enacted a ban on text messaging, becoming the 19th State (in addition to the District of Columbia and Guam) to prohibit all drivers from using a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of a roadway. The law, effective November 10, 2009, makes the activity a primary enforcement crime with the potential of a civil penalty to be imposed and a fine if convicted.

2. Federal Action

On October 1, 2009, during DOT's Distracted Driving Summit, the President issued Executive Order 13513 on "Federal Leadership on Reducing Text Messaging While Driving." Among

[3] Dingus, T.A. *et al.* (2006). "The 100-Car Naturalistic Driving Study, Phase II—Results of the 100-Car Field Experiment." DOT HS 810–593. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100CarMain.pdf.* Neale *et al.* (2005). "An Overview of the 100-Car Naturalistic Study and Findings." NHTSA Paper Number 05–0400. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100Car_ESV05summary.pdf.*

[4] Neale *et al., supra* note 3.

[5] Klauer *et al.* (2006). "The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data." DOT HS 810 594. Available online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/810594.pdf.*

[6] National Highway Traffic Safety Administration (2009). "Driver Electronic Device Use in 2008." DOT HS 811 184. Available online: *http://www-nrd.nhtsa.dot.gov/Pubs/811184.PDF.*

[7] National Highway Traffic Safety Administration (2008). "Driver Electronic Device Use in 2007." DOT HS 810 963. Available online at: *http://www-nrd.nhtsa.dot.gov/Pubs/810963.PDF.*

[8] NHTSA (2008) *supra* note 7 and NHTSA (2009) *supra* note 6.

[9] Boyle, J. M and C. Lampkin (2008). "2007 Motor Vehicle Occupant Safety Survey Volume 4: Crash Injury and Emergency Medical Services Report." DOT HS 810 977. *See* report summary dated March 2009 online at: *http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/Communication%20&%20Consumer%20Information/Traffic%20Tech%20Publications/Associated%20Files/tt371.pdf.*

other things, the Order prohibits all Federal employees from engaging in text messaging while—

- Driving Government-owned, -leased, or -rented vehicles;
- Driving privately-owned vehicles while on official Government business; and
- Using electronic equipment supplied by the Government (including, but not limited to, cell phones, BlackBerries, or other electronic devices) while driving any vehicle.

II. Summary of Proposed Rule

The proposed rule largely codifies E.O. 26. Some substantive changes have been made in response to comments from interested parties and practical issues that FRA discovered since the Order was issued. FRA is proposing to keep many of the same restrictions on personal and railroad-supplied devices as in the Order, but has altered them somewhat to account more appropriately for such issues as calculators, cameras, and the usage of electronic devices by deadheading employees.

III. Comments from Interested Parties on Railroad Operating Employee Use of Electronic Devices

A. General

FRA has already received significant input from a Railroad Safety Advisory Committee (RSAC) working group on the issue of railroad operating employees using electronic devices. At the time that FRA decided to issue an emergency order, FRA had already been working within the RSAC's Operating Rules Working Group to create an FRA Safety Advisory and was near a final draft. That proposed Safety Advisory and the suggestions and concerns voiced by members of the RSAC were instrumental in FRA's development of the Order.

Despite these previous consultations and discussions with stakeholders, there was still concern about some of the requirements of the Order. On November 14, 2008, the United Transportation Union (UTU) and the Brotherhood of Locomotive Engineers and Trainmen (BLET) (collectively, "Unions") jointly filed a Petition for Review (Petition) of the Order. The Petition cited four concerns:

(1) The Order did not exempt deadheading employees who were in the body of a passenger train or railroad business car, or inside of the cab of locomotive that was not the lead locomotive of the train;

(2) The Order prohibited employees from taking a picture or video of a safety hazard with an electronic camera;

(3) The Order prohibited the use of calculators;

(4) The Order prohibited the use of Global Positioning System (GPS) tracking devices, even to verify the accuracy of the speed indicator in a controlling locomotive.

This proposed rule addresses the Unions' concerns and adopts the substance of many of their suggestions.

The Association of American Railroads (AAR) responded to the Unions' Petition in a letter dated December 3, 2008. AAR asserted that the changes suggested in the Petition are unnecessary, could create distractions, or would make E.O. 26 "difficult, if not impossible" to enforce. AAR recommended that the changes suggested in the Petition should be "scrutinized" as part of the study of the use of "personal electronic devices, including cell phones, video games, and other distracting devices" that is required by Sec. 405 of RSIA or discussed within the RSAC before being adopted. FRA shared some of these concerns and considered the necessity and potential distractions of each of the proposed exceptions of the Unions' Petition. Additionally, in this proposed rule, FRA is endeavoring to protect the enforceability of limits on the use of electronic devices.

B. Deadheading Employees

The Petition recommended adding an exception for deadheading employees to use cell phones. The specific language proposed was as follows:

> A railroad operating employee who is deadheading may use a cell phone while within the body of a passenger train or railroad business car, or while inside the cab of a locomotive that is not the lead locomotive of the train on which the employee is deadheading.

FRA recognizes that the scope of the Order is far-reaching and in some cases, covers employees in situations in which the safety hazards that the Order was designed to prevent do not arise. The Order currently states, "Use of a personal electronic or electrical device to perform any function other than voice communication while on duty is prohibited." A railroad operating employee is on duty even when he or she is simply deadheading to a duty station, even if the deadheading takes places in a motor vehicle. He or she is not, however, on duty nor off duty, but in limbo, if deadheading from a duty station to the point of final release and so is not currently covered by the Order even if he or she is distracting a locomotive engineer operating a train by talking on a cell phone right next to him or her. FRA has decided to address the issues in deadheading directly to guard against the hazards of distractions by electronic devices in a more focused and consistent manner.

The proposed rule allows deadheading railroad operating employees who are not in the cab of a controlling locomotive to use electronic devices if that use does not interfere with an employee's personal safety or performance of safety-related duties. The proposed rule would require deadheading employees within the cab of a controlling locomotive to have electronic devices turned off when the train is moving or in other situations in which the crewmembers responsible for operating the train need to be able to focus. FRA believes that these proposed changes would restrict the use of electronic devices in a more appropriate manner to address safety concerns.

C. Cameras

The Petition also recommended that cameras be permitted to document safety hazards. Specifically, it recommended the following language to be added as an exception:

> An electronic still or video camera may be used to document a safety hazard or a violation of a rail safety law, regulation, order or standard; provided, that (1) the use of a camera in the cab of a moving train may only be by a crew member other than the locomotive engineer, and (2) the use of a camera by a train employee on the ground is permissible only when (a) the employee is not fouling a track, (b) no switching operation is underway, (c) no other safety duties are presently required, and (d) all members of the crew have been briefed that operations are suspended. The use of the photographic function of a cell phone is permitted under these same conditions.

FRA believes that allowing employees to document safety hazards could be useful in certain situations, but realizes that cameras can be exceptionally distracting. To that end, FRA is proposing the following: the camera may only be used to document a safety hazard or safety violation; the camera must be a stand-alone device and turned off immediately after the picture is taken; and the locomotive engineer must not take pictures in the cab of the controlling locomotive of a moving train.

These conditions are reasonable. EO 26 currently has no exception for cameras. They can, however, serve a useful purpose if used properly but also create unsafe situations. To that end, FRA is proposing that a camera may be used only by someone other than the locomotive engineer and only to document safety hazards. In addition, the camera must be a stand-alone device. Enforcement of restrictions on

electronic devices is already difficult because the prohibited use often has to be witnessed first-hand for a violation to be discovered. If the exception existed as recommended by the Petition, railroad operating employees caught using their cell phones for sending a text message might allege that they were using the camera function instead. Requiring that the camera be a stand-alone device prevents this enforcement problem.

D. Calculators

The use of calculators was another desired exception contained within the Petition. In particular, the Petition requested the following exemption:

> When mathematical calculations are required for safe train movement (*e.g.,* managing correct horsepower per ton, calculating tons per operative brake, dynamic brake and tractive effort compliance, and correcting train length), it is permissible to perform such calculations by using an electronic calculator, or by using the calculator function of a cell phone or electronic timepiece.

FRA agrees that train crews can have a legitimate need for a calculator in some instances. To that end, FRA has decided to exclude stand-alone calculators from all restrictions within this subpart as long as the calculator is used for an authorized business purpose and does not interfere with the performance of any employee's safety-related duties. The proposed rule, however, does not permit the use of a calculator function of a cell phone or electronic timepiece, for the same reason that cameras must be stand-alone devices; enforcing limits on the use of electronic devices could be hampered by allowing some uses but not others of a device at any given time.

E. GPS Devices

Noting that FRA regulations require speed indicators of most locomotives to be checked as soon as possible after departure, the Petition requested that the use of Global Positioning System (GPS) devices to be excluded from the Order for that purpose. The Petition requested an exception that stated, "A Global Positioning Satellite (GPS) tracking device may be used in order to verify the accuracy of the speed indicator in a controlling locomotive."

FRA is concerned that these devices could distract operating employees and potentially create an unsafe situation. We do not believe that any potential advantage of allowing these devices outweighs the safety hazard involved and accordingly such use is proposed to be prohibited.

IV. Other Considerations

A. Medical Devices

Beyond the suggestions and concerns formally addressed in the Petition, FRA has realized that the Order, in some instances, covered more situations and devices than was intended or desired. For example, some diabetics use electronic devices to monitor glucose. These devices arguably do not fall under the Order's exception for devices that enhance an individual's ability to perform safety-related tasks. FRA is proposing an exception for medical devices to encompass both devices that enhance an ability to perform safety-related tasks, such as hearing aid, and other devices that protect an employee's health and well-being.

B. Exception for Working Wireless Communication Devices for Train Movements

The Order has an exception for railroad operating employees to use a railroad-supplied or railroad-authorized electronic device to conduct train or switching operations "under conditions authorized under 49 CFR Part 220." This exception was included to reflect the reality that many small railroads use cell phones or similar devices instead of a working radio and to allow those railroads to continue to do so. The proposed rule clarifies that this exception was only intended for small railroads.

C. Locomotive Engineer Certification Revocation

FRA is considering amending 49 CFR part 240 (part 240) to add violations of this subpart as a basis for revoking a locomotive engineer's certification. *See* 49 CFR 240.117(e). FRA specifically invites comments on this issue and based on the comments received may include a revision of part 240 in the final rule issued in this rulemaking.

V. Enforcement Issues

One of the concerns FRA had before issuing the Order was that it is difficult to enforce violations of restrictions on electronic devices by railroad employees. Unlike equipment or track problems, which can be readily seen, or even training violations, which must be documented, it is difficult to detect unauthorized use of cell phones and other personal electronic devices. FRA inspectors only ride with train crews a fraction of the time as part of the inspection process. It is unlikely that a locomotive engineer operating a moving train would begin to text message or call friends while an FRA inspector was present. Of course, personal cell phone records, combined with the operating record of the locomotive, would be able to indicate that the locomotive engineer was improperly calling someone while the engineer was supposed to be fully focused on operating a train.

Because of the evidentiary difficulties associated with establishing violations of restrictions on use of electronic devices, and the help that personal phone records would provide, FRA considered adding a provision regarding those records. FRA debated requiring railroads to require their operating employees to allow the railroads access to the employees' personal cell phone records if the employees were involved in any accident for which the employer has a reasonable belief that the employees' acts or omissions contributed to the occurrence or severity of the accident. FRA declines to add such a provision at this time. A significant factor in this determination is the broad statutory authority that FRA has to investigate accidents, including the issuance of subpoenas, under 49 U.S.C. 20107 or 20902. When there is a reasonable belief that an accident was caused or affected by a railroad operating employee's actions or omissions, FRA will subpoena that employee's cell phone records or other personal records if they are related to FRA's investigation. FRA does so now. However, FRA is requesting comment on the utility of such a provision and whether it would be useful in gathering data on safety incidents that do not result in accidents. FRA also seeks comment on the privacy concerns implicated by such a measure and on any suggested procedures or limitations that should be followed in the event FRA ever proposed such a provision.

FRA understands that this rulemaking covers a wide range of devices and that many of these electronic devices have become ingrained in our contemporary culture. FRA also understands that, in a genuine personal emergency, employees of some railroads have an advantage in their ability to be contacted through channels that the railroad has created. FRA did not, however, expressly include an exception for personal emergencies. FRA requests comments on whether an express exception should be created to address personal emergency situations and, if so, how it should be expressed.

VI. Section-by-Section Analysis

All section references below refer to sections in Title 49, Part 220 of the Code of Federal Regulations (CFR). FRA seeks comments on all proposals made in this NPRM. Proposed Amendments to 49 CFR part 220 (part 220).

Section 220.1 Scope

FRA proposes to amend the scope of § 220.1 to include the new subpart C proposed by this NPRM. The proposed amendment states that part 220 now sets forth prohibitions, restrictions, and requirements for the use of electronic devices. It also establishes that these are only minimum restrictions that must be complied with and that railroads are free to impose stricter prohibitions at their discretion.

Section 220.5 Definitions

FRA proposes to amend the existing "definitions" section for Part 220 by both adding new definitions and amending an existing definition. FRA proposes to add new definitions for the following terms: earpiece; fouling a track; in deadhead status; medical device; electronic device; personal electronic device; railroad operating employee; railroad-supplied electronic device; and switching operation. FRA also proposes to amend Part 220's existing definition of "train."

Of the new terms that FRA proposes to add to this section, all but two had been previously defined in the Order. Some of those definitions have been amended slightly to be more efficiently focused toward accomplishing the goals of this proposed rule. For example, in describing "electronic device," FRA broadens that description from that found in the Order to ensure that the definition in the proposed rule includes electronic book-reading devices or devices used to replicate navigation of the physical world. We have also excepted locomotive electronic control systems and digital timepieces from the definition. The first exception makes clear that this subpart does not affect the use of any control systems or displays in the cab of a locomotive that facilitate the operation of a train. This rule instead obviously intends to address electronic devices that are not part of those systems. The second exception allows railroad operating employees the use of digital clocks or wristwatches whose primary functions are as timepieces. Timepieces are commonly used in the railroad industry to verify the accuracy of a locomotive's speed indicator. This function is safety-related in that it accurately allows a train crew to comply with relevant track speed limits during the course of a train's movement. FRA notes that this specific provision is limited to allowing the use of a stopwatch, wristwatch, or other similar device whose primary function is the keeping of time. This provision does not allow for the use of other devices, such as a cell phone or a personal digital assistant, that might have a stopwatch function but whose primary purpose is not that of a timepiece. FRA has so limited this exception specifically to timepieces as enforcement otherwise would be difficult, but also primarily to avoid the potential for distraction when an employee might turn on a cell phone with a stop watch function in order to verify the train's speed, but then might proceed to use that device in an otherwise impermissible manner.

FRA has also chosen to refer to an "electronic or electrical device" as only an "electronic device" in the proposed rule. We have done so both for the purposes of complying with plain language directives and for brevity. We have also done so because, based on our research, "electronic device" is a more accurate descriptor of the devices meant to be subject to this proposed rule. The definition of "railroad operating employee" has also been changed from that found in the Order. We have attempted to clarify which employees are covered by this proposed rule in order to avoid inadvertent over-inclusion. The definition of "railroad-supplied electronic devices" has also been modified from the Order to mean that the term refers only to devices that are provided for a business purpose authorized by the employing railroad. FRA has slightly changed that definition in order to focus more narrowly on which devices will be considered railroad-supplied.

The only truly new definitions that were not established in some form in the Order are for the terms "earpiece," "in deadhead status," and "medical device." FRA proposes to add a definition for the term "in deadhead status" because below in proposed § 220.311 we explain that railroad operating employees in deadhead status are subject to somewhat different prohibitions on the use of electronic devices than are employees who are actively engaged in their assigned duties. The definition that we have proposed is similar to and consistent with the existing definition of "deadheading" found in existing 49 CFR 228.5. FRA also proposes adding the term "medical device" to the "definitions" section, as below we explain that the use of any electronic medical devices consistent with a railroad's medical fitness for duty standards is exempt from the restrictions of this subpart. After having had additional time since the publication of the Order to contemplate its effect, FRA wishes to make clear that medical devices such as hearing aids or blood sugar monitors are exempt from the prohibitions that this rule puts forth. FRA finds that these devices do not detract from rail safety, but they may actually enhance safety in some circumstances for obvious reasons.

Next, FRA proposes to amend the existing definition of a "train" in § 220.5. The existing definition specifically references a train for purposes of existing subparts A and B to include "one or more locomotives coupled with or without cars requiring an air brake test in accordance with 49 CFR Part 232 or 238 * * *". The existing definition resulted from FRA's work with an RSAC Working Group and intentionally meant to exempt certain trains and switching operations from the existing part 220. That existing definition will still apply to subparts A and B. However, we have proposed that the definition of a "train" for purposes of subpart C would go beyond locomotive or locomotives coupled to one or more cars that are subject to the requirements of an air brake test. We propose a more inclusive definition of "train" in order to apply the prohibitions on use of electronic devices to all switching movements.

Finally, FRA has eliminated one definition from this proposed rule that appeared in the Order. The term "wireless communication device" has been eliminated, as the term "working wireless communications" is already included in existing § 220.5, and encompasses the substance of what FRA attempted to convey with that definition in the Order, and also because the devices described in that definition are already addressed by other provisions of this proposed rule.

Subpart C—Electronic Devices

Section 220.301 Purpose and Application

FRA proposes to amend part 220 by adding a new subpart C. FRA's purpose for promulgating this new subpart is to limit distractions caused by electronic devices to railroad crews. FRA means to limit these distractions in its effort to improve railroad safety and prevent incidents such as those mentioned in the preamble above, where loss of human life, injuries, and property damage may have been attributable to distraction by these devices. FRA notes that this proposed subpart sets forth minimum standards that must be complied with, yet we fully anticipate that railroads will implement even stricter guidelines via operating rules. This is consistent with both existing and proposed § 220.1, which provides that part 220 only sets minimum standards that must be complied with, but that

railroads may adopt additional, more stringent, requirements.

Section 301 of this new proposed subpart describes both its purpose and application. Paragraph (a) of this section merely restates the new subpart's purpose as described above. Paragraph (b) makes clear that the new proposed subpart does not affect the use of working wireless communications that railroads use under the authority of existing subparts A and B. Paragraph (c)(1) explains that this proposed regulation also does not in any way propose to affect the use of railroad radios. Railroad radios are an essential part of daily operating practices, and FRA wishes to make explicit that this new subpart does not apply to their use. Proposed paragraph (c)(2) of this section explains that in the event of a working railroad radio failure, that locomotive engineers or conductors may use electronic devices provided that use is in accordance with the applicable railroad's operating rules. FRA recognizes that in certain instances the use of an electronic device such as a cell phone in place of a malfunctioning radio may actually enhance safety rather than harm it. For example, should a crew need to contact a train dispatcher regarding their train's movement, a cell phone might in certain instances be the best means of reaching such a person in the event of a radio failure, and may provide a higher level of safety than not being able to make contact at all. So long as the device is used with the parameters of railroad operating rules, FRA has made this exception to the prohibitions on use of electronic devices discussed below.

Section 220.303 General Use of Electronic Devices

FRA is proposing to add § 220.303 to this new subpart to set forth general guidance regarding the use of electronic devices. This proposed section would prohibit railroad operating employees from using electronic devices in any way that would detract from railroad safety, irrespective of the other specific provisions and exceptions to this rule. This provision reinforces FRA's overarching mission of ensuring safety while railroad employees are performing their duties. As discussed above, distractions resulting from the use of electronic devices can result in railroad accidents that have catastrophic consequences. This paragraph is also meant to encompass other potential uses of electronic devices that may arise outside those detailed or contemplated by this proposed rule or by railroad operating rules. Section 220.303 is intended to be restrictive, as FRA views any use of electronic devices not contemplated in this proposed subpart as capable of distracting employees while on duty.

Section 220.305 Use of Personal Electronic Devices

This section is being proposed to prohibit the use of personal electronic devices while any safety-related duty is being performed. This provision governing personal electronic devices is self-explanatory, and is meant to be more restrictive than provisions governing railroad-suppled electronic devices. *See* proposed § 220.307 discussed below. Provisions (a) through (c) of this proposed section dictate certain safety-critical times during which each personal electronic device must be turned off with any earpiece removed, and are meant to encompass the situations in which FRA finds it is absolutely impermissible to use a personal electronic device. FRA notes that compliance with this proposed section might have prevented many of the accidents described above and in the Order that occurred as a result of distraction caused by electronic devices.

Section 220.307 Use of Railroad-Supplied Electronic Devices

This section is proposed to address the use of electronic devices that are supplied by the railroad to employees, other than a working railroad radio. Paragraph (a) sets forth the general restriction that any use of these devices must be in accordance with railroad instructions for authorized business purposes as determined by the railroad. FRA also wishes to make clear that the use of railroad-supplied devices contemplated by this provision is limited to those authorized by the railroad in writing.

Paragraph (b) sets forth the specific instances where FRA proposes to prohibit any use of railroad-supplied electronic devices by a locomotive engineer who is at the controls of a train. Similar to the conditions set out in § 220.305, paragraph (b) of § 220.307 describes specific instances where FRA finds distraction by electronic devices impermissibly interferes with railroad safety. While the actions specified in paragraph (b) are taking place, it is imperative that a locomotive engineer be attentive to his or her duties and not be distracted by any electronic device, regardless of whether that device is railroad-supplied or not. FRA also notes that it considers paragraph (b)(3) of this section to encompass those times when passengers are boarding or alighting from a train. For example, if a locomotive engineer at the controls of a passenger train was using a railroad-supplied electronic device while the train was stopped and passengers were boarding, FRA views that conduct as a violation of this proposed regulation. Paragraph (c) sets forth the circumstances under which an operating employee other than a locomotive engineer in the situations described in paragraph (b) may use a personal electronic device while located in the cab of a controlling locomotive. This paragraph (c) states that it only proposes to permit use of a mobile telephone or remote computing device. These two devices may only be used if a safety briefing is held by all crewmembers in the locomotive, who must then also come to an agreement that it is safe to use the device. It is FRA's intent that the permissible use of these devices under this paragraph must be for a railroad-related purpose, *e.g.,* to contact a dispatcher, control operator, or yardmaster. It is not permissible to use the mechanisms provided by this section to use an electronic device for a personal use, such as making a personal phone call or watching a movie. FRA has also chosen to restrict the number of devices that may be used to only two. By limiting the type of devices that are permitted to be used under the authority of this paragraph, FRA is attempting to ensure minimum distractions and narrow the scope of this provision. This provision and the provision found in paragraph (d) of this section discussed below both state that they apply only to employees who are not in deadhead status. Different rules apply to employees in deadhead status, as is explained below in the analysis to § 220.311.

Paragraph (d) of proposed § 220.307 explains the conditions under which it is permissible for an operating employee who is outside the cab of a controlling locomotive to use a railroad-supplied device. It sets forth three conditions that must be met for that use to be permitted. The first condition is that no crewmember may be fouling a track. The second condition, at paragraph (d)(2) of this proposed section, states that all operations must be suspended. For example, this provision requires that no switching operations are being performed, no portion of an air brake test is in progress, or essentially that no duties are presently required of the crewmember, including railroad radio communications. The third condition is that all crewmembers must be briefed that operations have been suspended before use of a device under this provision is permissible. An instance described in the background section of

the Order discusses an incident that occurred on December 21, 2005, when a contractor working on The Kansas City Southern Railway Company was struck and killed by a train after fouling a track while allegedly talking on a cell phone. Although in that case the incident involved a contractor who was apparently not a train employee, FRA notes that compliance by operating employees with the provisions of paragraph (d) would eliminate any similar occurrences among operating employees resulting from the impermissible use of electronic devices.

Section 220.309 Permitted Uses

This section proposes to establish six uses of electronic devices that FRA finds to be permissible. This list is intended to be exhaustive. FRA has specifically weighed other exceptions and uses, such as the BLET and UTU's proposed GPS device exception discussed above. After contemplating those other uses, at this time FRA does not agree there is a need for further permitted use of electronic devices other than those described here. However, we welcome additional comment and input on this subject. Also, as stated in the text of this section, these permitted uses are subject to the requirement that the use not interfere with any employee's safety-related duties. This is consistent with the overall goals of this proposed rule, and also specifically with the general prohibition established by proposed § 220.303 discussed above.

Paragraph (a) of § 220.309 refers to electronic storage devices that specifically hold relevant operating documents that a crew might need to access during the normal course of their duties, as FRA is aware that some railroads issue devices to their operating employees that contain such information. FRA views this use as no different from a crewmember accessing relevant paperwork, such as a railroad timetable or train consist, in hardcopy form during the course of her duties. However, as stated in the text of paragraph (a), the use of this device must be authorized under an applicable railroad operating rule. For example, if a freight conductor wished to utilize a railroad-supplied electronic device while in the cab of the controlling locomotive of a moving train for the purpose of accessing a railroad operating rule, he would be allowed to do so if permitted by applicable railroad operating rules. If railroad operating rules more stringent than those provided by this subpart prohibited the use of that device while on a moving train, then that use would be disallowed. Importantly, FRA also notes that this exception must not be read to permit a locomotive engineer at the controls of a moving train, or in any of the situations described in proposed § 220.307(b), to use one of these devices.

Paragraph (b) of this section specifically allows for the use of personal electronic devices in response to an emergency situation. This paragraph is meant to allow flexibility to this proposed regulation, as common sense dictates that unpredictable emergency situations may arise where use of a personal electronic device, such as a cell phone, may be appropriate. FRA contemplated this when it proposed § 220.303(b), which allows for use of a personal electronic device in instances where a radio failure occurs, but also proposes this broader emergency exception to build in flexibility where common sense dictates.

Paragraph (c) sets forth the proposed guidelines under which an employee may take a photograph or video to document a safety hazard or violation of a rail safety regulation, order, or standard, subject to several requirements. This permitted use was suggested by the BLET and UTU, as discussed above. This proposed provision dictates that only cameras whose primary function is for taking still pictures or videos may be used. As stated in the rule text, a camera that is part of a cell phone or other electronic device is not included in this exception for the reasons explained above. Use of the camera to document such rail safety hazards or violations is only permitted where its use does not interfere with a crewmember's performance of a safety-related duty, is turned off immediately after documentation has been made, and is not used by a locomotive engineer who is at the controls of a moving train. While FRA realizes the importance of documenting potential hazardous conditions, we emphasize that such documentation should only be made when the taking of the documentation itself would not create a hazardous situation.

Paragraph (d) permits the use of a calculator, as also suggested by the BLET and UTU in response to the Order. The use of this device is common in the railroad industry for important safety-related purposes. Train tonnage, train length, and train stopping formulas are commonly computed using a calculator. An example of the safety-related reasons for allowing the use of a calculator includes the need to compute train length accurately so that a locomotive engineer (via the locomotive's distance counter) can accurately ascertain when his or her train has cleared a relevant speed restriction, interlocking, or working limits. However, consistent with paragraph (c) above, FRA has chosen to limit the permissible devices under this paragraph to those whose primary purpose is as a calculator. FRA will not allow the use of another device, such as a personal cell phone that might have a calculator function, to be used. The temptation afterward to then use that device for another non-permissible electronic activity might be too great, and again could cause enforceability problems for FRA. It should be noted, however, that this exception should not be read to permit a locomotive engineer to use a calculator on a moving train, or in any of the situations described in proposed § 220.307(b).

Paragraph (e) permits the use of a medical device, if that use is consistent with the railroad's standards for medical fitness for duty. In putting forth this exception, FRA envisioned blood sugar monitors used by operating employees with diabetes, hearing aids used by operating employees with hearing loss, *etc.* The definition of a "medical device" was added to the definitions section of this part, at § 220.5, as is discussed above. FRA finds that the use of these devices does not detract from rail safety and in many instances may enhance it. For example, an operating employee with hearing loss who utilizes an electronic hearing aid may consequently be able to communicate via working radio more effectively, resulting in safer train operations.

Paragraph (f) permits the use of wireless communication devices for crewmembers of trains that are exempt from the requirement of a working radio under § 220.9(b). That section exempts railroads that have less than 400,000 annual employee work hours from being required to have a working radio on the controlling locomotive of certain trains so long as such usage is limited to performing the employees' railroad duties. FRA proposes this exception to allow smaller railroads to continue to operate as they are presently permitted. The locomotives of these railroads do not operate at high speeds, do not handle regular passenger traffic, are only permitted to operate over joint territory in specific, low-speed circumstances, and must have working wireless communications aboard the controlling locomotive of trains containing placarded hazardous material loads. As such, FRA finds there is no safety risk in continuing to allow permitted railroads to use wireless communication devices in place of railroad radios so long as such usage by

railroad employees is limited to performing their railroad duties. It is not the intent of this proposed rule to affect in any way the use of working wireless communications pursuant to existing Part 220, as those presently permitted business uses have not been problematic in regard to safety in the past. This rule is instead obviously directed at the type of use that occurred in the railroad accidents described above.

Section 220.311 Railroad Operating Employees in Deadhead Status

This section proposes to establish guidelines for the use of an electronic device by operating employees in deadhead status. The definition of "in deadhead status" has been added to the "definitions" section of this part at § 220.5 as discussed above. Paragraph (a) of this section allows for employees in deadhead status to use electronic devices so long as that use does not interfere with that employee's personal safety or any other employee's performance of safety related duties. FRA proposes this loosened restriction on employees in deadhead status as we recognize that while deadheading, operating employees typically do not have any safety-related responsibilities. As stated above, these proposed changes amend the restrictions on electronic devices put forth in the Order in a more appropriate manner to address safety concerns.

However, paragraph (b) of this proposed section limits the use of any electronic device by employees in deadhead status who are located inside the cab of a controlling locomotive of a train. Employees in deadhead status who are located inside the cab of a controlling locomotive must follow the identical restrictions set forth both in this provision and in § 220.305, regardless of whether the device is a personal electronic device or a railroad-supplied electronic device. This is to reflect that any use of electronic devices in the cab of a controlling locomotive has the potential to distract employees engaged in safety-related duties, no matter the status of person using a device. This proposed provision more strictly prohibits the use of any railroad-supplied device than does § 220.307, as employees in deadhead status typically do not have any safety-related responsibilities that would necessitate use of such devices.

Section 220.313 Instruction

This proposed section would require railroads to provide instruction to its operating employees on the substance of this proposed regulation if adopted. This instruction is obviously a necessary requirement if employees would be operationally tested by railroad supervisors on the substance of this regulation, as FRA has proposed in § 220.315(a). Very simply, by requiring such training we also hope also to ensure that both railroads and their employees are fully aware of the requirements of the final regulation.

In paragraph (a), FRA proposes that each railroad maintain a written program that will qualify its operating employees for compliance with operating rules implementing the requirements of the final rule. The written program may be consolidated with the program of instruction required under 49 CFR 217.11. Paragraph (a)(1) would specifically require that the program include instruction on both the requirements of this subpart as well as consequences of non-compliance. Paragraph (a)(2) proposes that the written program be required to include instruction on specific provisions of this rule. FRA notes that proposed paragraph (a)(2)(iii) would specifically require that instruction be provided on the distinctions between the requirements of the final rule and any more stringent railroad operating rules. FRA proposes to mandate this instruction because of the different potential consequences involved with violation of this subpart versus violation of a railroad rule. If FRA were to find a probable violation of the final rule had occurred, FRA could attempt to take action against an individual employee by way of its authority to impose a monetary civil penalty or disqualification of that employee from safety-sensitive service. These actions are quite different, and in some instances much more severe than those that a railroad might take against an individual employee for a violation of its operating rules. The distinction is also important given FRA's request for public comment above on whether violations of the final rule should be considered for purposes of locomotive engineer certification revocation in the future.

Paragraph (b) sets the proposed implementation schedule for this section. Paragraph (b) states that within 120 days from the publication date of the final rule, employees performing duties subject to these requirements shall receive instruction on the requirements of this subpart. Under paragraph (b)(1), after 120 days from the publication date of the final rule FRA proposes no further grace period and requires that employees receive recurrent training at least every three years. FRA expects that new operating employees would receive the proper training before being allowed to perform duties subject to the requirements of this subpart. FRA proposes a three-year recurrent training window in this paragraph because it is a standard industry practice to re-qualify employees on operating rules at least every three years. Finally, in paragraph (b)(2), FRA proposes that records maintenance of the training required by this section shall serve as documentation that employees have been qualified on the requirements of this subpart.

In paragraph (c), FRA proposes that training records discussed in paragraph (b)(2) be retained at a railroad's division headquarters where the employee is assigned. This will enable FRA to quickly obtain such records upon request if necessary. Records must be kept for each employee trained on the requirements of this subpart, and must be kept for three years after the end of the calendar year to which they relate. This paragraph also would allow for railroads to keep the required records electronically.

Paragraph (d) provides a mechanism for FRA to review a railroad's written program required under paragraph (a). This proposed paragraph would require that the Associate Administrator for Railroad Safety/Chief Safety Officer only disapprove programs of instruction, training, and examination required by this section for cause stated. As the disapproval decision is made for cause, it is significant for the railroad to understand exactly why FRA is disapproving the program; thus, FRA proposes that its notification of such disapproval be made in writing and specify the basis for the disapproval decision. If the Associate Administrator for Railroad Safety/Chief Safety Officer disapproves the program, paragraph (d)(1) provides that a railroad would be required to respond within 35 days by either providing submissions in support of its program or by amending its program and submitting those proposed amendments. Paragraph (d)(1)(ii) proposes that the Associate Administrator for Railroad Safety/Chief Safety Officer shall render a final decision in writing informing the railroad of FRA's decision. Paragraph (d)(2) provides that a failure to submit a program with the necessary revisions to the Associate Administrator for Railroad Safety/Chief Safety Officer will be considered by FRA to be a failure to implement a program under this part.

The approach as proposed in paragraph (d) recognizes that FRA will want to review such written programs during audits or investigations, and that FRA should have the authority to request changes to the program if it does

not meet the minimum requirements of this rule. FRA does not intend to have each railroad submit its program for review and explicit approval. Rather, FRA intends to review the qualification programs of the major railroads over a multi-year cycle, in connection with review of the overall program of operating rules, to determine if they are effective.

Section 220.315 Operational Tests and Inspections; Further Restrictions on Use of Electronic Devices

This section proposes to mandate that railroads perform operating tests to ensure operating employees' compliance with proposed Subpart C. FRA also proposes this requirement to both help ensure that railroads provide employee instruction on the conditions of this subpart and to verify that the requirements of the subpart are being adhered to.

Paragraph (a) sets forth specific guidelines on the minimum number of operational tests that must be performed by referring to the guidelines established in 49 CFR part 217, Railroad Operating Rules. Per part 217, railroads are already required to perform regular operating tests on employees. This paragraph would merely add the proposed Subpart C to that existing requirement.

Paragraph (b) of this section proposes to prohibit railroad supervisors from calling or sending a text message to an electronic device of a locomotive engineer during an operating test while the train to which the engineer is assigned is moving. This is to prevent an operating test from posing potentially dangerous distractions that could impact rail safety. It is also meant to prevent the encouragement of potential rail safety violations.

Finally, paragraph (c) also proposes to prohibit the use of electronic devices by operating employees during an operating test. This necessarily requires that for this prohibition to apply, that employees be aware that an operating test is being conducted, as FRA recognizes that during certain operating tests employees might not be aware a test is in progress. FRA proposes this section so that during operating tests employees do not attempt what might otherwise be a permissible use of devices.

Operating tests present valuable learning opportunities that help to facilitate railroad safety. Therefore, it is FRA's goal that during operating tests both employees and railroad supervisors utilize the process in a way most beneficial to promoting rail safety. FRA proposes this section to help minimize employee distraction to ensure that those opportunities are fully utilized.

VII. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposed rule is a significant regulatory action within the meaning of Executive Order 12866 and the U.S. Department of Transportation's regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, Feb. 26, 1979). FRA has made this preliminary determination by finding that, although the economic effects of the proposed regulatory action would not exceed the $100 million annual threshold as defined in Executive Order 12866, the rule is significant because of substantial public interest in transportation safety and because it is the first part of a broader programmatic effort to address distracted transportation operations. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this final rule.

The RIA details estimates of the costs likely to be induced over the first twenty years after promulgation. This analysis also includes break-even analyses, or estimates of the monetized benefits that would be necessary to achieve to offset the total costs of the proposed rule. Informed by its analysis of the economic effects of both EO 26 and this proposed rule, FRA believes that this proposed rule will achieve the same safety outcome as EO 26 at a lower cost. The proposed rule achieves this outcome more cost-effectively relative to EO 26 by removing some restrictions on the usage of electronic devices by deadhead status employees and on the usage of calculators and cameras, under certain circumstances. These restrictions in EO 26 likely achieved little to no safety benefits, but they may have created substantial, unquantifiable opportunity costs, the removal of which makes this proposed rule more cost-effective. The costs that may be induced by this proposed rule over the twenty-year period considered include both direct costs and indirect costs. The direct costs may include the cost of revising operational testing and inspections programs; the cost of conducting additional operational testing and inspections; the cost of training employees; and the cost of calculators and cameras for train crew use. Indirect costs may include the opportunity cost of railroad operating employees' time spent in safety briefings. The summed total of the estimated direct costs over the first twenty years of the proposed rule equals about $12.7 million at a 3 percent discount rate and about $9.5 million at a 7 percent discount rate (in 2009 dollars). Additionally, the indirect costs that may result from this proposed rule are estimated to equal about $30.2 million at a 3 percent discount rate and $22.4 million at a 7 percent discount rate. The majority of the costs associated with implementation of the proposed rule would be costs that are already being incurred through the implementation of EO 26. The table below summarizes both the direct and indirect costs considered in the RIA, summed over the twenty-year period analyzed and discounted to present value using 3 percent and 7 percent discount rates.

	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Direct costs:		
Revising programs	$48,007.64	$45,834.97
Performing operational tests	633,087.44	468,318.78
Training	11,586,287.79	8,635,014.44
Cameras	334,951.39	252,434.85
Calculators	75,080.95	74,083.90
Total direct costs	12,677,415.21	9,475,686.94
Indirect costs:		
Opportunity cost of additional time spent in safety briefings	30,238,989.11	22,368,926.84
Total indirect costs	30,238,989.11	22,368,926.84

Although FRA has not estimated the benefits of this rule, FRA has performed break-even analyses using differing assumptions regarding the frequency and severity of future accidents caused by or linked to electronic device usage. In most scenarios considered, it would not require an unreasonable decrease in the annual probability of such an accident in order for the proposed rule to at least break even—in fact, for most cases considered, decreases in relevant accident probability of less than 0.10 would make the proposed rule cost-beneficial. As an alternative framework, FRA compared the costs of the proposed rule to the minimum number of statistical fatalities that would need to be prevented for the rule to be cost-beneficial. Considering direct costs alone, if the new regulation prevented the loss of one-fifth of the value of a statistical life each year of the twenty-year period examined, the regulation would yield positive net benefits. If considering direct and indirect costs, the regulation would yield positive net benefits if it prevented the loss of just half of the value of a statistical life each year over the twenty-year period examined. In other words, prevention of one fatal accident every two years would justify the requirements of the proposed rule. For some perspective on the achievability of such prevention, FRA notes that over the period from 2000 to 2008, electronic device usage in trains likely caused or contributed to accidents resulting in at least 30 fatalities and over 100 injuries—an average of over three deaths per year, as well as significant train delay and property damages. The table below lists the benefits considered in the RIA.

Benefit
Fatalities avoided.
Injuries avoided.
Property damage avoided.

Given the frequency and severity of accidents together with the observed rising incidence of improper uses of cell phones and other electronic devices, FRA is confident that the elimination of improper electronic device usage by railroad operating employees, as proposed in this rule, will yield safety benefits that will exceed the costs. FRA requests comments on the Regulatory Impact Analysis.

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA developed this NPRM in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

As discussed in earlier sections of this preamble, FRA has discovered numerous examples proving the danger of distracting electronic devices. This rulemaking is intended to limit distractions caused by use of cellular telephones and other electronic devices in an effort to improve railroad safety and prevent incidents where loss of human life, injuries, and property damage may have been attributable to distraction by these devices. In 2008 FRA issued Emergency Order No. 26 restricting the on-duty use of cellular telephones and other electronic devices. This FRA action was in part a response to the September 12, 2008 Chatsworth accident, which resulted in 25 deaths, numerous injuries, and more than $7 million in damages. The BLET and the UTU filed a Petition for Review of that Order citing some valid concerns. FRA is now proposing to codify most of the requirements of the Order with some modifications to accommodate changes previously recommended by a Petition for Review of that Order as well as a number of amendments that FRA believes are appropriate.

FRA is certifying that the proposed rule will result in "no significant economic impact on a substantial number of small entities." The reasons for this certification are explained in the following section of this preamble.

1. Description of Regulated Entities and Impacts

The "universe" of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this NPRM. In this case, the "universe" is comprised solely of small railroads.

"Small entity" is defined in 5 U.S.C. 601 (Sec. 601). Sec. 601(3) defines "small entity" as having the same meaning as "small business concern" under Sec. 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Sec. 601(4) likewise includes within the definition of "small entities" not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operations. Additionally, Sec.601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be and still be classified as a "small entity" is 1,500 employees for "Line-Haul Operating" railroads, and 500 employees for "Short-Line Operating" railroads.[10]

SBA size standards may be altered by Federal agencies in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.[11] Currently, the revenue requirement is $20 million or less in annual operating revenue, adjusted annually for inflation ($32,113,449 for 2008). This threshold is based on the Surface Transportation Board's threshold for a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[12] FRA is using this definition for this rulemaking.

Approximately 700 railroads meet the criteria for small entity and report operational data to FRA. We are using this as our estimate of the universe of small entities that could be directly impacted by the proposed rule. Many of these railroads rely on cell phones for train operations.

Like EO 26, the proposed rule contains exceptions that would allow railroads that have less than 400,000 annual employee hours and that rely on wireless communication devices for certain train operations to continue to do so, with the same restriction that such usage be limited to performing the employees' railroad duties. The primary benefactors of this flexibility are small railroads. FRA is clarifying that the exception in the Order for railroad operating employees to use a railroad-supplied or railroad-authorized electronic device to conduct train or switching operations "under conditions authorized under 49 CFR Part 220" is intended to accommodate small railroad

[10] "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR Part 121. *See also* NAICS Codes 482111 and 482112.

[11] *See* 68 FR 24891, May 9, 2003.

[12] For further information on the calculation of the specific dollar limit, *see* 49 CFR part 1201.

operations. The locomotives of the trains exempt from the requirement to have a working radio on the lead locomotive do not operate at high speeds, do not handle regular passenger traffic, are only permitted to operate over joint territory in specific, low-speed circumstances, and must have working wireless communications aboard the controlling locomotive of trains containing placarded hazardous material loads.

The proposed rule contains additional flexibility that would reduce the impact relative to EO 26. Having considered the Petition for Review of the Order, FRA is proposing to (1) Allow deadheading railroad operating employees who are not in the cab of a controlling locomotive to use electronic devices if that use does not interfere with an employee's personal safety or performance of safety-related duties; (2) allow use of cameras to document safety hazards or violations, except in the cab of the controlling locomotive of a moving train; and (3) exclude stand-alone calculators from all restrictions within this subpart as long as the calculator is used for an authorized business purpose and does not interfere with the performance of any employee's safety-related duties. In addition, FRA is proposing an exception for medical devices to encompass both devices that enhance an ability to perform safety-related tasks, such as hearing aid, and other devices that protect an employee's health and well-being.

In general, small railroad costs associated with compliance with EO 26 would continue to accrue under FRA's proposal. Additional burden to such railroads would come from the requirement to provide instruction to its operating employees on the substance of the proposed regulation as well as the need to update their written programs to qualify its operating employees for compliance with operating rules implementing the requirements proposed. FRA anticipates that this instruction will be achieved through means such as distribution of written materials to employees, job briefings by supervisors or roving instructors, and question and answer services. FRA estimates that the cost of such instruction will come to about 15 minutes per employee in the first year of the rule. Approximately 91,000 train and engine employees would be impacted, and about 20 percent of these would be small railroad employees. Assuming a cost per hour of employee trained of $43.37, the total cost of this additional instruction would be approximately $200,000 for small railroads or an average of $300 per railroad. Revision of programs is not expected to entail more than one labor hour per railroad. These two one-time costs would likely not significantly burden any small railroads.

Additional railroad costs transferred from EO26 include the costs associated with performing operational tests and conducting periodic training. Given that operational tests and training associated with this regulation would be conducted with other required operational testing and training, the additional annual cost will total about as much as the cost in the first year for instruction and program revision. Again, this cost would likely not significantly burden small railroads.

Because this rule would apply to all small railroads, we have concluded that a substantial number of small entities will be impacted. However, the overall impact on small railroads is not expected to be significant. FRA believes that the costs to small railroads associated with the proposed rule are not significant and are very similar to those currently incurred under EO 26. FRA requests comments on all aspects of this analysis.

2. Certification

Pursuant to the Regulatory Flexibility Act, the Federal Railroad Administration Administrator certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads could be affected by the proposed rule, they would not be significantly impacted.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new and current information collection requirements, and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
220.8—Waivers	728 Railroads	6 petitions	1 hour	6 hours.
220.25—Instruction in Proper Use of Radio Communication.	728 Railroads	91,000 trained Employees.	30 minutes	45,500 hours.
—Subsequent Years	728 Railroads	12,540 trained Employees.	30 minutes	6,270 hours.
—Operational Testing of Employees	728 Railroads	100,000 tests	5 minutes	8,333 hours.
220.37—Testing of Radios and Wireless Devices.	728 Railroads	780,000 tests	30 seconds	6,500 hours.
220.61—Transmission of Mandatory Directives:				
—Copying of Mandatory Directives	728 Railroads	7,200,000 copies	1.5 minutes	180,000 hours.
—Marking Mandatory Directives	728 Railroads	624,000 marks	15 seconds	2,600 hours.
NEW REQUIREMENTS				
220.307—Use of Railroad-Supplied Electronic Device as Specified in Writing.	728 Railroads	728 amended RR Op. codes.	1 hour	728 hours.
—Engineer and Train Crew Briefings To Use RR-Supplied Electronic Device Inside/Outside of Locomotive Cab.	91,000 Employees	5,460,000 briefings	1 minute	91,000 hours.
220.313—Instruction: Railroad Written Program of Instruction.	728 Railroads	728 amended programs.	1 hour	728 hours.
—Implementation: Training of Employees.	91,000 Employees	91,000 trained Employees.	15 minutes	22,750 hours.
—Records: Successful Completion of Training.	728 Railroads	91,000 records	5 minutes	7,583 hours.

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Approval Process: Disapproval of RR Written Program of Instruction or Written Response in Support of Program.	728 Railroads	6 revised programs/ written resp.	60 minutes	6 hours.
220.315—Operational Tests/Inspections—Revision of RR Program of Operational Tests and Inspections Under Part 217 To Include This Subpart.	728 Railroads	Burden Incl. Under OMB No. 2130–0035.	Burden Incl. Under OMB No. 2130–0035.	Burden Incl. Under OMB No. 2130–0035.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 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.

For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, FRA Office of Safety, Information Clearance Officer, at 202–493–6292, or Ms. Kimberly Toone, FRA Office of Administration, Information Clearance Officer, at 202–493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Toone at the following addresses: *robert.brogan@dot.gov*; *kimberly.toone@dot.gov.*

Written comments may also be sent to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget at 725 17th St., NW., Washington, DC 20503 or sent electronically via e-mail at the following address: *oira_submissions@omb.eop.gov.*

OMB is required to 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 which 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. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

D. Environmental Impact

FRA has evaluated this NPRM in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this NPRM that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

E. Federalism Implications

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), 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, the 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, the agency consults with 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.

Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. This NPRM proposes a regulation that is related to railroad safety and, accordingly, is intended to result in a final rule that has preemptive effect pursuant to section 20106. The requirements of the final rule would be intended to establish a uniform Federal safety standard that must be met, and State requirements covering the same subject would be displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of State law, including common law. This is consistent with past practice at FRA, and within the Department of Transportation.

When FRA prescribes a final rule in this rulemaking, the final rule would not preempt an action under State law

seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care that would be established by the final rule, including a plan or program that would be required by the final rule. Provisions of a plan or program that exceed the requirements of the final rule would not be included in the Federal standard of care. This is also consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132. This NPRM will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among various levels of government. This NPRM will not have federalism implications that impose any direct compliance costs on State and local governments. Consequently, FRA concludes that this NPRM has no federalism implications.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), 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 (2 U.S.C. 1532) 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 the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $141,300,000 or more in any 1 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 NPRM will not result in the expenditure, in the aggregate, of $141,300,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." *See* 66 FR 28355 (May 22, 2001). Under the Executive Order a "significant energy action" is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this NPRM is not a "significant energy action" within the meaning of the Executive Order.

H. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of DOT's dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

I. Executive Order 12988 (Civil Justice Reform)

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

List of Subjects in 49 CFR Part 220

Communications, Penalties, Railroads, Railroad safety.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 220 of chapter II, subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 220—[AMENDED]

1. The authority citation for part 220 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20103, note, 20107, 21301–21302, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

2. Revise § 220.1 to read as follows:

§ 220.1 Scope.

This part prescribes minimum requirements governing the use of wireless communications in connection with railroad operations. In addition, this part sets forth prohibitions, restrictions, and requirements that apply to the use of personal and railroad-supplied cellular telephones and other electronic devices. So long as these minimum requirements are met, railroads may adopt additional or more stringent requirements.

3. Section § 220.5 is amended by adding definitions for "Earpiece," "Electronic device," "Fouling a track," "In deadhead status," "Medical device," "Personal electronic device," "Railroad operating employee," "Railroad-supplied electronic device," and "Switching operation," and revising the definition of "Train" to read as follows:

§ 220.5 Definitions.

* * * * *

Earpiece means a small speaker that is inserted in or held next to the ear for use in transmitting sounds related to an electronic device.

Electronic device means an electronic or electrical device used to conduct oral, written, or visual communication; place or receive a telephone call; send or read an electronic mail message or text message; look at pictures; read a book or other written material; play a game; navigate the Internet; navigate the physical world; play, view, or listen to a video; play, view, or listen to a television broadcast; play or listen to a radio broadcast other than a radio broadcast by a railroad; play or listen to music; execute a computational function; or, perform any other function that is not necessary for the health or safety of the person and that entails the risk of distracting the employee or another railroad operating employee from a safety-related task. This term does not include—

(1) Electronic control systems and information displays within the locomotive cab or on a remote control transmitter necessary for a locomotive engineer to operate a train or conduct switching operations; or

(2) A digital watch whose only purpose is as a timepiece.

* * * * *

Fouling a track means the placement of an individual in such proximity to a track that the individual could be struck by a moving train or other on-track equipment, or in any case is within four feet of the nearest rail.

* * * * *

In deadhead status means awaiting or in deadhead transport from one point to another as a result of a railroad-issued verbal or written directive.

* * * * *

Medical device means an instrument, apparatus, implement, machine, contrivance, implant, or other similar or related article (including a component part), or accessory that is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease or other conditions.

Personal electronic device means an electronic device that was not provided to the railroad operating employee by the employing railroad for a business purpose.

Railroad operating employee means a person performing duties subject to—

(1) 49 U.S.C. 21103, "Limitation on duty hours of train employees" (*i.e.,* an individual engaged in or connected with the movement of a train, including a hostler);

(2) 49 U.S.C. 21103 as it was in effect on October 15, 2008, the day before the enactment of the Rail Safety Improvement Act of 2008, Public Law 110–432, Div. A, 122 Stat. 4848, October 16, 2008 (*i.e.,* train employees providing commuter rail passenger transportation or intercity rail passenger transportation as defined in 49 U.S.C. 24102); or

(3) Any Federal Railroad Administration regulations prescribed pursuant to 49 U.S.C. 21109 governing hours of service related to train employees.

* * * * *

Railroad-supplied electronic device means an electronic device provided to a railroad operating employee by the employing railroad for an authorized business purpose.

* * * * *

Switching operation means the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a train movement.

* * * * *

Train for purposes of Subparts A and B, means one or more locomotives coupled with or without cars, requiring an air brake test in accordance with 49 CFR Part 232 or Part 238, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains. The term, for purposes of Subpart C, means:

(1) A single locomotive,

(2) Multiple locomotives coupled together, or

(3) One or more locomotives coupled with one or more cars.

* * * * *

4. Add a new Subpart C to part 220 to read as follows:

Subpart C—Electronic Devices

Sec.
220.301 Purpose and application.
220.303 General use of electronic devices.
220.305 Use of personal electronic devices.
220.307 Use of railroad-supplied electronic devices.
220.309 Permitted uses.
220.311 Railroad operating employees in deadhead status.
220.313 Instruction.
220.315 Operational tests and inspections; further restrictions on use of electronic devices.

Subpart C—Electronic Devices

§ 220.301 Purpose and application.

(a) The purpose of this subpart is to reduce safety risks resulting from railroad operating employees being distracted by the inappropriate use of electronic devices, such as mobile telephones (cell phones or cellular phones) and laptop computers.

(b) The applicability of this subpart is governed by § 220.3; this subpart, however, does not affect the use of working wireless communications pursuant to Subparts A and B.

(c) The restrictions of this Subpart C do not apply—

(1) To the working radio; or

(2) When a working radio failure occurs and an electronic device is used in accordance with railroad rules.

§ 220.303 General use of electronic devices.

A railroad operating employee shall not use an electronic device if that use would interfere with the employee's or another employee's performance of safety-related duties.

§ 220.305 Use of personal electronic devices.

A railroad operating employee must have each personal electronic device turned off with any earpiece removed from the ear—

(a) When on a moving train;

(b) When any member of the crew is—

(1) On the ground, or

(2) Riding rolling equipment during a switching operation; or

(c) When any railroad employee is assisting in preparation of the train for movement.

§ 220.307 Use of railroad-supplied electronic devices.

(a) *General restriction.* A railroad operating employee may use a railroad-supplied electronic device only for an authorized business purpose as specified by the railroad in writing.

(b) *Use by locomotive engineers operating controls.* A locomotive engineer operating the controls of a train shall not use a railroad-supplied electronic device—

(1) When on a moving train;

(2) When any member of the crew is—

(i) On the ground, or

(ii) Riding rolling equipment during a switching operation; or

(3) When any railroad employee is assisting in preparation of the train for movement.

(c) *Use in freight and passenger locomotive cabs generally.* In addition to the restrictions on locomotive engineers described in paragraph (b) of this section, a railroad operating employee who is not in deadhead status shall not use a railroad-supplied electronic device in the cab of a controlling locomotive except for a mobile telephone or remote computing device which the employee may use only if, before use—

(1) A safety briefing that includes all crewmembers is held; and

(2) All crewmembers agree that it is safe to use the railroad-supplied mobile telephone or remote computing device.

(d) *Use outside freight locomotive cabs.* A freight train crewmember who is not in deadhead status may use a railroad-supplied electronic device outside the cab of a controlling freight locomotive only if all of the following conditions are met:

(1) The crewmember is not fouling a track;

(2) Operations are suspended; and

(3) All members of the crew have been briefed that operations are suspended.

§ 220.309 Permitted uses.

Notwithstanding any other limitations in this subpart, a railroad operating employee may use the following, if that use does not interfere with any employee's performance of safety-related duties—

(a) The digital storage and display function of an electronic device to refer to a railroad rule, special instruction, timetable, or other directive, if such use is authorized under a railroad operating rule or instruction.

(b) An electronic device as necessary to respond to an emergency situation involving the operation of the railroad or encountered while performing a duty for the railroad.

(c) An electronic device to take a photograph or video to document a safety hazard or a violation of a rail safety law, regulation, order, or standard, provided that—

(1) The device's primary function is as a camera for taking still pictures or

videos (A camera that is part of a cell phone or other multi-functional electronic device is not included in this exception.);

(2) The camera, unless otherwise permitted, is turned off immediately after the documentation has been made; and

(3) If the camera is used in the cab of a moving train, the use is only by a crewmember other than the locomotive engineer.

(d) A stand-alone calculator if used for an authorized business purpose.

(e) A medical device that is consistent with the railroad's standards for medical fitness for duty.

(f) A wireless communication device to conduct train or switching operations if the railroad operating employee is part of a crew assigned to a train that is exempt from the requirement of a working radio under § 220.9(b) when the employing railroad has fewer than 400,000 annual employee work hours.

§ 220.311 Railroad operating employees in deadhead status.

(a) Notwithstanding other restrictions in this subpart, a railroad operating employee who is in deadhead status and not inside the cab of a controlling locomotive may use an electronic device only if the employee is not using the device in such a way that interferes with any employee's personal safety or performance of safety-related duties.

(b) A railroad operating employee who is in deadhead status and located inside the cab of a controlling locomotive must have each electronic device turned off with any earpiece removed from the ear—

(1) When on a moving train;

(2) When any member of the crew is—

(i) On the ground, or

(ii) Riding rolling equipment during a switching operation; or

(3) When any railroad employee is assisting in preparation of the train for movement.

§ 220.313 Instruction.

(a) *Program.* Beginning [90 (or 120 where indicated) DAYS FROM THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], each railroad shall maintain a written program of instruction, training, and examination of each railroad operating employee and each supervisor of the railroad operating employee on the meaning and application of the railroad's operating rules implementing the requirements of this subpart if these requirements are pertinent to the employee's duties. If all requirements of this subpart are satisfied, a railroad may consolidate any portion of the instruction, training, or examination required by this subpart with the program of instruction required under § 217.11 of this chapter.

(1) The written program of instruction, training, and examination shall address the requirements of this subpart, as well as consequences of noncompliance.

(2) The written program of instruction, training, and examination shall include, but is not limited to, an explanation of the following:

(i) When a railroad operating employee must have personal electronic devices turned off with the earpiece removed from the ear as required by this subpart.

(ii) If a railroad supplies an electronic device to its railroad operating employees, when a railroad operating employee may use such a device. The employee must be trained on what constitutes an authorized business purpose.

(iii) The potential penalties and other consequences of committing a violation of this subpart, both those imposed by FRA and those imposed by the railroad, as well as any distinction between the requirements of this subpart and any more stringent requirements imposed by the railroad and the related distinction between the two sets of potential consequences.

(b) *Implementation schedule.* Each employee performing duties subject to the requirements in this subpart shall be initially trained prior to [90 (or 120 where indicated) DAYS FROM THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER].

(1) Beginning [90 (or 120 where indicated) DAYS FROM THE DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], no employee shall perform work requiring compliance with the operating rules implementing the requirements of this subpart unless the employee has been trained on these rules within the previous three years.

(2) The records of successful completion of instruction, examination and training required by this section shall document the instruction of each employee under this subpart.

(c) *Records.* Written records documenting successful completion of instruction, training, and examination of each employee and of his or her supervisors shall be made and shall be retained at the railroad's system headquarters and at the division headquarters for each division where the employee is assigned for three calendar years after the end of the calendar year to which they relate and made available to representatives of FRA for inspection and copying during normal business hours. Each railroad to which this part applies is authorized to retain a program, or any records maintained to prove compliance with such a program, by electronic recordkeeping in accordance with §§ 217.9(g) and 217.11(c) of this chapter.

(d) *Approval process.* Upon review of the program of instruction, training, and examination required by this section, the Associate Administrator for Railroad Safety/Chief Safety Officer may, for cause stated, disapprove the program. Notification of such disapproval shall be made in writing and specify the basis for the disapproval.

(1) If the Associate Administrator for Railroad Safety/Chief Safety Officer disapproves the program, the railroad has 35 days from the date of the written notification of such disapproval to—

(i) Amend its program and submit it to the Associate Administrator for Railroad Safety/Chief Safety Officer for approval; or

(ii) Provide a written response in support of the program to the Associate Administrator for Railroad Safety/Chief Safety Officer, who informs the railroad of FRA's final decision in writing.

(2) A failure to submit the program with the necessary revisions to the Associate Administrator for Railroad Safety/Chief Safety Officer in accordance with this paragraph is considered a failure to implement a program under this subpart.

§ 220.315 Operational tests and inspections; further restrictions on use of electronic devices.

(a) The railroad's program of operational tests and inspections under Part 217 of this chapter shall be revised as necessary to include this subpart and shall specifically include a minimum number of operational tests and inspections, subject to adjustment as appropriate.

(b) When conducting a test or inspection under Part 217 of this chapter, a railroad officer, manager, or supervisor is prohibited from calling the personal electronic device or the railroad-supplied electronic device used by a locomotive engineer while the train to which the locomotive engineer is assigned is moving.

(c) When an operational test involves stopping a train, interrupting a switching operation, or interrupting an activity involving another employee involved with the movement of the train (*e.g.,* through the use of a banner, signal, or radio communication), the limitations on the use of electronic devices set forth in this subpart

continue to be in effect although the train movement, switching operation, or other activity is temporarily suspended.

Issued in Washington, DC, on May 7, 2010.

Karen Rae,

Deputy Administrator, Federal Railroad Administration.

[FR Doc. 2010–11484 Filed 5–17–10; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–R8–ES–2009–0054]
[MO 92210–0–0009–B4]

RIN 1018–AW20

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Ambrosia pumila (San Diego ambrosia)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on our August 27, 2009, proposed rule to designate critical habitat for *Ambrosia pumila* (San Diego ambrosia). We also announce the availability of the draft economic analysis (DEA), revisions to proposed critical habitat, and an amended required determinations section of the proposal. We are reopening the comment period to allow all interested parties an opportunity to comment simultaneously on the proposed critical habitat, the associated DEA, the proposed addition of three subunits based on new information, and the amended required determinations section. If you submitted comments previously, you do not need to resubmit them because we have already incorporated them into the public record and will fully consider them in preparation of the final rule.

DATES: The comment period for the proposed rule published August 27, 2009, at 74 FR 44238, is reopened. We will consider comments from all interested parties received or postmarked on or before June 17, 2010. Please note that if you use the *Federal eRulemaking Portal* (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. Any comments that we receive after the closing date may not be considered in the final decision on this action.

ADDRESSES: You may submit comments by one of the following methods:

• Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions for submitting comments on docket number FWS–R8–ES–2009–0054.

• *U.S. mail or hand-delivery*: Public Comments Processing, Attn: FWS–R8–ES–2009–0054; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the **Public Comments** section below for more information).

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, U.S. Fish and Wildlife Service, Carlsbad Fish and Wildlife Office, 6010 Hidden Valley Road, Suite 101, Carlsbad, CA 92011; telephone (760) 431–9440; facsimile (760) 431–5901. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from the proposed rule is based on the best scientific data available and will be accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, and any other interested party during this reopened comment period on the proposed rule to designate critical habitat for *Ambrosia pumila* (San Diego ambrosia) that was published in the **Federal Register** on August 27, 2009 (74 FR 44238), including comments on the addition of subunits 3B, 4D, and 5B to the proposed critical habitat; the DEA of the revised proposed designation; and the amended required determinations provided in this document. We are particularly interested in comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation is not prudent.

(2) Specific information that may assist us in clarifying or identifying more specific primary constituent elements (PCEs). Available information does not identify a consistent pattern in specific life-history requirements and habitat types where this species is found. For these reasons, the PCEs in the proposed rule are broad and based on our assessment of the ecosystem settings in which the species has most frequently been detected and our best assessment regarding its life-history requisites. We specifically seek information that may assist us in defining those physical and biological features essential to the conservation of the species which may require special management considerations or protection, or in identifying specific areas outside the geographical area occupied by the species at the time it was listed that may be essential for the conservation of the species. In particular, answers to the following questions may be helpful to clarify or identify more specific PCEs of *A. pumila* habitat:

• Does the species reproduce via seed? If so, does the species rely on some aspect of its environment to trigger seed germination?

• What are the key factors determining why the species occupies the particular areas it occupies (but not other areas with the same habitat type)? For example, what role does proximity to waterways or vernal pools play?

(3) Specific information on:

• The amount and distribution of areas proposed as critical habitat for *Ambrosia pumila*;

• Areas occupied at the time of listing that contain features essential to the conservation of the species and why we should include or exclude these areas in the designation; and

• Areas not occupied at the time of listing that are essential for the conservation of the species and why.

(4) How the proposed critical habitat boundaries could be refined to more closely circumscribe the areas identified as essential. We also seek recommendations to improve the methodology used to delineate the areas proposed as critical habitat; we especially seek comments regarding how we might more accurately determine how much area beyond the surface covered by above-ground stems that we need to include for each occurrence of *Ambrosia pumila* in the critical habitat designation to ensure that habitat areas include unseen underground portions (rhizomes) of *A. pumila* plants (see step number 4 in the **Methods** section of the proposed critical habitat rule (74 FR 44246, August 27, 2009)).