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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2005–20514; Directorate Identifier 2005–CE–08–AD; Amendment 39–14025; AD 2005–07–01]

RIN 2120–AA64

Airworthiness Directives; the Cessna Aircraft Company Models 208 and 208B Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to Airworthiness Directive (AD) 2005–07–01, which was published in the **Federal Register** on March 25, 2005 (70 FR 15223), and applies to all the Cessna Aircraft Company (Cessna) Models 208 and 208B airplanes. We incorrectly referenced the affected airplane models as C208 and C208B throughout the document. The correct airplane models are 208 and 208B. This action corrects the regulatory text.

DATES: The effective date of this AD remains March 29, 2005.

FOR FURTHER INFORMATION CONTACT: Paul Pellicano, Aerospace Engineer (Icing), FAA, Small Airplane Directorate, c/o Atlanta Aircraft Certification Office (ACO, One Crown Center, 1985 Phoenix Boulevard, Suite 450, Atlanta, GA 30349; telephone: (770) 703–6064; facsimile: (770) 703-6097.

SUPPLEMENTARY INFORMATION:

Discussion

On March 21, 2005, FAA issued AD 2005–07–01, Amendment 39–14025 (70 FR 15223, March 25, 2005), which applies to all the Cessna Models 208 and 208B airplanes.

We incorrectly referenced the affected airplane models as C208 and C208B throughout the document. The correct airplane models are 208 and 208B. This action corrects the regulatory text.

This AD requires you to incorporate information into the applicable section of the Airplane Flight Manual (AFM) to assure that the pilot has enough information to prevent loss of control of the airplane while in-flight during icing conditions.

Need for the Correction

This correction is needed to ensure that the affected airplane models numbers are correct and to eliminate misunderstanding in the field.

Correction of Publication

■ Accordingly, the publication of March 25, 2005 (70 FR 15223), of Amendment 39–14025; AD 2005–07–01, which was the subject of FR Doc. 05–5915, is corrected as follows:

■ Starting on page 15223 through page 15227, replace all references to Models C208 and C208B airplanes with Models 208 and 208B airplanes.

§ 39.13 [Corrected]

■ On page 15225, in § 39.13 [Amended], in paragraph (c), replace Models C208 and C208B with Models 208 and 208B.

■ On page 15226, in § 39.13 [Amended], in paragraph (e)(1), replace Model C208 airplanes and Model C208B airplanes with Model 208 airplanes and Model 208B airplanes.

■ On page 15226, in § 39.13 [Amended], in paragraphs (e)(2) and (e)(3), replace Model C208 airplanes with Model 208 airplanes.

■ On page 15226, in § 39.13 [Amended], in paragraphs (e)(4) and (e)(5), replace Model C208B airplanes with Model 208B airplanes.

■ Action is taken herein to correct this reference in AD 2005–07–01 and to add this AD correction to § 39.13 of the Federal Aviation Regulations (14 CFR 39.13).

The effective date remains March 29, 2005.

Issued in Kansas City, Missouri, on April 1, 2005.

David R. Showers,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 05–7052 Filed 4–7–05; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1981

RIN 1218–AC12

Procedures for the Handling of Discrimination Complaints Under Section 6 of the Pipeline Safety Improvement Act of 2002

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations governing the employee protection (''whistleblower'') provisions of Section 6 of the Pipeline Safety Improvement Act of 2002 (''Pipeline Safety Act''), enacted into law December 17, 2002. This rule establishes procedures and time frames for the handling of discrimination complaints under the Pipeline Safety Act, including procedures and time frames for employee complaints to the Occupational Safety and Health Administration (''OSHA''), investigations by OSHA, appeals of OSHA determinations to an administrative law judge (''ALJ'') for a hearing *de novo,* hearings by ALJs, review of ALJ decisions by the Administrative Review Board (acting on behalf of the Secretary) and judicial review of the Secretary's final decision.

DATES: This final rule is effective on April 8, 2005.

FOR FURTHER INFORMATION CONTACT: Richard E. Fairfax, Director, Directorate of Enforcement Programs, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3112, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2100.

SUPPLEMENTARY INFORMATION:

I. Background

The Pipeline Safety Improvement Act of 2002 (''Pipeline Safety Act''), Public Law 107–355, was enacted on December 17, 2002. Section 6 of the Act, codified at 49 U.S.C. 60129, provides protection to employees against retaliation by an employer, defined as a person owning or operating a pipeline facility or a contractor or subcontractor of such a person, because they provided

information to the employer or the Federal Government relating to Federal pipeline safety violations or filed, testified, or assisted in a proceeding against the employer relating to any violation or alleged violation of any Federal law relating to pipeline safety, or because they are about to take any of these actions. These rules establish procedures for the handling of whistleblower complaints under the Pipeline Safety Act.

II. Summary of Statutory Procedures

The Pipeline Safety Act whistleblower provisions include procedures that allow a covered employee to file, within 180 days of the alleged discrimination, a complaint with the Secretary of Labor (''the Secretary'').[1] Upon receipt of the complaint, the Secretary must provide written notice both to the person or persons named in the complaint alleged to have violated the Act (''the named person'') and to the Secretary of Transportation of the filing of the complaint, the allegations contained in the complaint, the substance of the evidence supporting the complaint, and the rights afforded the named person throughout the investigation. The Secretary must then, within 60 days of receipt of the complaint, afford the named person an opportunity to submit a response and meet with the investigator to present statements from witnesses, and conduct an investigation. However, the Secretary may conduct an investigation only if the complainant has made a *prima facie* showing that the alleged discriminatory behavior was a contributing factor in the unfavorable personnel action alleged in the complaint and the named person has not demonstrated, through clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

After investigating a complaint, the Secretary will issue a determination letter. If, as a result of the investigation, the Secretary finds there is reasonable cause to believe that discriminatory behavior has occurred, the Secretary must notify the named person of those findings, along with a preliminary order which requires the named person to: Take affirmative action to abate the violation, reinstate the complainant to his or her former position together with the compensation of that position (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and provide compensatory damages to the complainant, as well as costs and attorney's and expert fees reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued. The complainant and the named person then have 60 days after the date of the Secretary's notification in which to file objections to the findings and/or preliminary order and request a hearing on the record. The filing of objections under the Pipeline Safety Act will stay any remedy in the preliminary order except for preliminary reinstatement. If a hearing before an administrative law judge is not requested within 60 days, the preliminary order becomes final and is not subject to judicial review.

If a hearing is held, the Pipeline Safety Act requires the hearing to be conducted ''expeditiously.'' The Secretary then has 90 days after the ''conclusion of a hearing'' in which to issue a final order, which may provide appropriate relief or deny the complaint. Until the Secretary's final order is issued, the Secretary, the complainant, and the named person may enter into a settlement agreement which terminates the proceeding. At the complainant's request, the Secretary will assess against the named person a sum equal to the total amount of all costs and expenses, including attorney's and expert witness fees, reasonably incurred by the complainant for, or in connection with, the bringing of the complaint upon which the Secretary issued the order. The Secretary also may award a prevailing employer a reasonable attorney's fee, not exceeding $1,000, if he or she finds that the complaint is frivolous or has been brought in bad faith. Within 60 days of the issuance of the final order, any person adversely affected or aggrieved by the Secretary's final order may file an appeal with the United States Court of Appeals for the circuit in which the violation occurred or the circuit where the complainant resided on the date of the violation. Finally, the Pipeline Safety Act makes persons who violate these newly created whistleblower provisions subject to a civil penalty of up to $1,000. This provision is administered by the Secretary of Transportation.

III. Summary and Discussion of Regulatory Provisions

On April 5, 2004, the Occupational Safety and Health Administration published in the **Federal Register** an interim final rule promulgating rules that implemented section 6 of the Pipeline Safety Improvement Act of 2002 (''Pipeline Safety Act''), Public Law 107–355, 69 FR 17587–17595. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by June 4, 2004.

OSHA did not receive any substantive comments during the public comment period. Nor does OSHA believe that modifications to the interim final rule are necessary. Accordingly, the interim final rule published on April 4, 2004, will be repromulgated as the final rule.

Section 1981.100 Purpose and Scope

This section describes the purpose of the regulations implementing the Pipeline Safety Act and provides an overview of the procedures covered by these regulations.

Section 1981.101 Definitions

In addition to general definitions, the regulations contain the Pipeline Safety Act definition of ''employer,'' and the statutory definitions of ''gas pipeline facility,'' ''hazardous liquid pipeline facility,'' ''person,'' and ''pipeline facility'' codified in chapter 601 of subtitle VIII of title 49 of the United States Code.

Section 1981.102 Obligations and Prohibited Acts

This section describes the several categories of whistleblower activity that are protected under the Act and the type of conduct that is prohibited in response to any protected activity. As under the Energy Reorganization Act (''ERA'') and the environmental whistleblower statutes listed at 29 CFR 24.1(a), refusals to engage in practices made unlawful under applicable Federal law relating to the industry in which the employee is employed are protected activities under the Act if the employee has identified the alleged illegality to the employer. See 49 U.S.C. 60129(a)(1)(B); *Timmons* v. *Franklin Electric Cooperative,* Case No. 97–141, 1998 WL 917114 (DOL Adm. Rev. Bd, Dec. 1, 1998); 29 CFR 24.2(c)(2). The employee does not have to prove that the allegedly illegal practice actually violated a Federal pipeline safety law. See *Gilbert* v. *Federal Mine Safety & Health Review Commission,* 866 F.2d 1433, 1439 (DC Cir. 1989). The employee must only prove that the refusal to work was properly communicated to the employer

[1] Responsibility for receiving and investigating these complaints has been delegated to the Assistant Secretary for OSHA. Secretary's Order 5–2002 (67 FR 65008, October 22, 2002); Secretary's Order 1–2002 (67 FR 64272, October 17, 2002). Hearings on determinations by the Assistant Secretary are conducted by the Office of Administrative Law Judges, and appeals from decisions by administrative law judges are decided by the Administrative Review Board. See Secretary's Order 1–2002.

and was based on a reasonable and good faith belief that engaging in that work was a practice made unlawful by a Federal law relating to pipeline safety. See *Liggett Industries, Inc.* v. *Federal Mine Safety and Health Review Commission,* 923 F.2d 150, 151 (10th Cir. 1991); *Eltzroth* v. *Amersham Medi-Physics, Inc.,* Case No. 98–002, 1999 WL 232896 *9 (DOL Adm. Rev. Bd, Apr. 15, 1999).

Section 1981.103 Filing of Discrimination Complaint

This section explains the requirements for filing a discrimination complaint under the Pipeline Safety Act. To be timely, a complaint must be filed within 180 days of when the alleged violation occurs. Under *Delaware State College* v. *Ricks,* 449 U.S. 250, 258 (1980), this is considered to be when the discriminatory decision has been both made and communicated to the complainant. In other words, the limitations period commences once the employee is aware or reasonably should be aware of the employer's decision. *Equal Employment Opportunity Commission* v. *United Parcel Service,* 249 F.3d 557, 561–62 (6th Cir. 2001). Complaints filed under the Act must be made in writing, but do not needto be made in any particular form. With the consent of the employee, complaints may be made by any person on the employee's behalf.

Section 1981.104 Investigation

The Pipeline Safety Act contains the statutory requirement that a complaint shall be dismissed if the complaint, supplemented as appropriate by interviews with the complainant, fails to make a *prima facie* showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Also included in this section is the statutory requirement that an investigation of the complaint will not be conducted if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct, notwithstanding the *prima facie* showing of the complainant. Upon receipt of a complaint in the investigating office, the Assistant Secretary notifies the named person of these requirements and the right of each named person to seek attorney's fees from an ALJ or the Administrative Review Board if the named person alleges that the complaint was frivolous or brought in bad faith.

Under this section also, the named person has the opportunity within 20 days of receipt of the complaint to meet with representatives of OSHA and present evidence in support of its position. If, upon investigation, OSHA has reasonable cause to believe that the named person has violated the Act and therefore that an award of preliminary relief for the complainant is warranted, OSHA again contacts the named person with notice of this determination and provides the substance of the relevant evidence upon which that determination is based, consistent with the requirements of confidentiality of informants. The named person is afforded the opportunity, within 10 business days, to provide written evidence in response to the allegation of the violation, meet with the investigators, and present legal and factual arguments as to why preliminary relief is not warranted. This section provides due process procedures in accordance with the United States Supreme Court decision under the Surface Transportation Assistance Act (''STAA'') in *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252 (1987).

Section 1981.105 Issuance of Findings and Preliminary Orders

This section provides that, on the basis of information obtained in the investigation, the Assistant Secretary will issue a finding whether there is reasonable cause to believe that the complaint has merit. If the finding is that the complaint has merit, the Assistant Secretary will order appropriate preliminary relief. The letter accompanying the findings and order advises the parties of their right to file objections to the findings of the Assistant Secretary and to request a hearing, and of the right of the named person to request attorney's fees from the ALJ, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. If no objections are filed within 60 days of receipt of the findings, the findings and any preliminary order of the Assistant Secretary become the final findings and order of the Secretary. If objections are timely filed, any order of preliminary reinstatement will take effect, but the remaining provisions of the order will not take effect until administrative proceedings are completed. Legislative history under the Pipeline Safety Act indicates that Congress intended to assure that the mere filing of an objection would not automatically stay the preliminary order, but that an employer could file a motion for a stay. 148 Cong. Rec. S11068 (Nov. 14, 2002) (section-by-section analysis). Thus, § 1981.106(b)(1) of this rule provides that although the portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order, the named person may file a motion with the Office of Administrative Law Judges for a stay of the Assistant Secretary's preliminary order. OSHA believes, however, that a stay of a preliminary reinstatement order would be appropriate only in the exceptional case. In other words, a stay only would be granted where the named person can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public.

Where the named party establishes that the complainant would have been discharged even absent the protected activity, there would be no reasonable cause to believe that a violation has occurred. Therefore, a preliminary reinstatement order would not be issued. Furthermore, a preliminary order of reinstatement would not be an appropriate remedy where, for example, the named party establishes that the complainant is, or has become, a security risk based upon information obtained after the complainant's discharge in violation of the Pipeline Safety Act. In *McKennon* v. *Nashville Banner Publishing Co.,* 513 U.S. 352, 360–62 (1995), the Supreme Court recognized that reinstatement would not be an appropriate remedy for discrimination under the Age Discrimination in Employment Act where, based upon after-acquired evidence, the employer would have terminated the employee upon lawful grounds. Finally, in appropriate circumstances, in lieu of preliminary reinstatement, OSHA may order that the complainant receive the same pay and benefits that he received prior to his termination, but not actually return to work. Such ''economic reinstatement'' frequently is employed in cases arising under section 105(c) of the Federal Mine Safety and Health Act of 1977. See, *e.g.*, *Secretary of Labor on behalf of York* v. *BR&D Enters., Inc.,* 23 FMSHRC 697, 2001 WL 1806020 **1 (June 26, 2001). ''Economic reinstatement'' also might be appropriate on those occasions in which an employer can establish that sufficient independent grounds exist for staying an immediate order of preliminary reinstatement.

Section 1981.106 Objections to the Findings and the Preliminary Order

To be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC, within 60 days of receipt of the findings. The date of the postmark, facsimile transmittal, or e-mail communication is considered the date of the filing; if the filing of objections is made in person, by hand-delivery or other means, the date of receipt is considered the date of the filing.

The filing of objections is also considered a request for a hearing before an ALJ. This section also provides that a named party seeking attorney's fees for the filing of a frivolous complaint or a complaint brought in bad faith should initially make its request for such fees to the Chief Administrative Law Judge.

Section 1981.107 Hearings

This section adopts the rules of practice of the Office of Administrative Law Judges at 29 CFR Part 18, Subpart A. In order to assist in obtaining full development of the facts in whistleblower proceedings, formal rules of evidence do not apply. The section specifically provides for consolidation of hearings if both the complainant and the named person object to the findings and/or order of the Assistant Secretary.

Section 1981.108 Role of Federal Agencies

The ERA and STAA regulations provide two different models for agency participation in administrative proceedings. Under STAA, OSHA ordinarily prosecutes cases where a complaint has been found to be meritorious. Under ERA and the other environmental whistleblower statutes, on the other hand, OSHA does not ordinarily appear as a party in the proceeding. The Department has found that in most environmental whistleblower cases, parties have been ably represented and OSHA's participation in the administrative litigation is not a prerequisite for the protection of the public interest served by these proceedings. The Department believes this is likely to be the situation in cases involving allegations of retaliation for providing pipeline safety information. Therefore, this provision utilizes the approach of the ERA regulation at 29 CFR 24.6(f)(1). The Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative litigation. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case at any stage of the administrative proceeding; petition for review of a decision of an administrative law judge, including a decision based on a settlement agreement between complainant and the named person, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the Administrative Review Board proceeding. We anticipate that ordinarily the Assistant Secretary will not participate in Pipeline Safety Act proceedings, except to approve settlements as described in 29 CFR 1981.111(d). However, the Assistant Secretary may choose to do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Department of Transportation, at that agency's discretion, also may participate as amicus curiae at any time in the proceedings. OSHA believes it is unlikely that its decision ordinarily not to prosecute meritorious Pipeline Safety Act cases will discourage employees from making complaints about pipeline safety.

Section 1981.109 Decision of the Administrative Law Judge

This section sets forth the content of the decision and order of the administrative law judge, and includes the statutory standard for finding a violation. The section further provides that the Assistant Secretary's determination as to whether to dismiss the complaint without an investigation or conduct an investigation pursuant to § 1981.104 is not subject to review by the ALJ, who hears the case de novo on the merits.

Section 1981.110 Decision of the Administrative Review Board

The decision of the ALJ is the final decision of the Secretary unless a timely petition for review is filed with the Administrative Review Board. Appeals to the Board are not a matter of right, but rather petitions for review are accepted at the discretion of the Board. Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the Board for review of that decision. The parties must specifically identify the findings and conclusions to which they take exception, or the exceptions are deemed waived by the parties. The Board has 30 days to decide whether to grant the petition for review. If the Board does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. If the Board grants the petition, the Act requires the Board to issue a decision not later than 90 days after the date of the conclusion of the hearing before the ALJ. The conclusion of the hearing for this purpose is deemed to be the conclusion of all proceedings before the administrative law judge—*i.e.*, 10 days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed in the interim. If a timely petition for review is filed with the Board, any relief ordered by the ALJ, except for a preliminary order of reinstatement, is inoperative while the matter is pending before the Board. This section further provides that, when the Board accepts a petition for review, its review of factual determinations will be conducted under the substantial evidence standard. This standard also is applied to Board review of ALJ decisions under the whistleblower provisions of STAA and the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. See 29 CFR 1978.109(b)(3) and 1979.110(b).

As with § 1981.106(b)(1), § 1981.110(b) of this rule provides that in the exceptional case, the Board may grant a motion to stay a preliminary order of reinstatement that otherwise will be effective while review is conducted by the Board. As explained above, however, OSHA believes that a stay of a preliminary reinstatement order would only be appropriate where the named person can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public.

Section 1981.111 Withdrawal of Complaints, Objections, and Findings; Settlement

This section provides for the procedures and time periods for withdrawal of complaints, the withdrawal of findings by the Assistant Secretary, and the withdrawal of objections to findings. It also provides for approval of settlements at the investigative and adjudicative stages of the case.

Section 1981.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the Administrative Review Board to submit the record of proceedings to the

appropriate court pursuant to the rules of such court.

Section 1981.113 Judicial Enforcement

This section describes the Secretary's power under the statute to obtain judicial enforcement of orders and the terms of a settlement agreement. It also provides for enforcement of orders of the Secretary by the person on whose behalf the order was issued.

Section 1981.114 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the Secretary may, upon application and notice to the parties, waive any rule as justice or the administration of the Act requires.

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a discrimination complaint, § 1981.103) which was previously reviewed and approved for use by the Office of Management and Budget (''OMB'') under 29 CFR 24.3 and assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

V. Administrative Procedure Act

This rule is a rule of agency procedure and practice within the meaning of Section 553 of the Administrative Procedure Act (''APA''), 5 U.S.C. 553(b)(A). Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments was not required for these regulations, which provide procedures for the handling of discrimination complaints. Although this rule was not subject to the notice and comment procedures of the APA, the Assistant Secretary provided the public with an opportunity to submit comments on the interim rule. No substantive comments on the rule were received.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this final rule. It is unnecessary to delay the effective date of the final rule because no changes have been made to the interim final rule, which already has been in effect since April 5, 2004.

VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule should be treated as a ''significant regulatory action'' within the meaning of Section 3(f)(4) of Executive Order 12866 because the Pipeline Safety whistleblower provision is a new program and because of the importance to the Department of Transportation's pipeline safety program that ''whistleblowers'' be protected from retaliation. Executive Order 12866 requires a full economic impact analysis only for ''economically significant'' rules, which are defined in Section 3(f)(1) as rules that may ''have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.'' Because the rule is procedural in nature, it is not expected to have a significant economic impact; therefore no economic impact analysis has been prepared. For the same reason, the rule does not require a Section 202 statement under the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531 *et seq.*). Furthermore, because this is a rule of agency procedure or practice, it is not a ''rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)), and does not require Congressional review. Finally, this rule does not have ''federalism implications.'' The rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government'' and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation simply implements procedures necessitated by enactment of the Pipeline Safety Act, in order to allow resolution of whistleblower complaints. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

Document Preparation: This document was prepared under the direction and control of the Acting Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 1981

Administrative practice and procedure, Employment, Investigations, Pipelines, Pipeline safety, Reporting and Record keeping requirements, Safety, Transportation, Whistleblowing.

Signed at Washington, DC this 30th day of March, 2005.

Jonathan L. Snare,

Acting Assistant Secretary for Occupational Safety and Health.

■ Accordingly, for the reasons set out in the preamble, 29 CFR part 1981, which was published as an interim rule at 69 FR 17587, April 5, 2004, is adopted as final and republished without change as follows:

PART 1981–PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER SECTION 6 OF THE PIPELINE SAFETY IMPROVEMENT ACT OF 2002

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

Sec.
1981.100 Purpose and scope.
1981.101 Definitions.
1981.102 Obligations and prohibited acts.
1981.103 Filing of discrimination complaint.
1981.104 Investigation.
1981.105 Issuance of findings and preliminary orders.

Subpart B—Litigation

1981.106 Objections to the findings and the preliminary order and request for a hearing.
1981.107 Hearings.
1981.108 Role of Federal agencies.
1981.109 Decision and orders of the administrative law judge.
1981.110 Decision and orders of the Administrative Review Board.

Subpart C—Miscellaneous Provisions

1981.111 Withdrawal of complaints, objections, and findings; settlement.
1981.112 Judicial review.
1981.113 Judicial enforcement.
1981.114 Special circumstances; waiver of rules.

Authority: 49 U.S.C. 60129; Secretary of Labor's Order 5–2002, 67 FR 65008 (October 22, 2002).

Subpart A—Complaints, Investigations, Findings and Preliminary Orders

§ 1981.100 Purpose and scope.

(a) This part implements procedures under section 6 of the Pipeline Safety Improvement Act of 2002, 49 U.S.C. 60129 (''the Pipeline Safety Act''), which provides for employee protection

from discrimination by a person owning or operating a pipeline facility or a contractor or subcontractor of such person because the employee has engaged in protected activity pertaining to a violation or alleged violation of any order, regulation, or standard under chapter 601, subtitle VIII of title 49 of the United States Code or any other provision of Federal law relating to pipeline safety.

(b) This part establishes procedures pursuant to the Pipeline Safety Act for the expeditious handling of discrimination complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under the Pipeline Safety Act, investigations, issuance of findings and preliminary orders, objections to findings and orders, litigation before administrative law judges, post-hearing administrative review, and withdrawals and settlements.

§ 1981.101 Definitions.

Act or *Pipeline Safety Act* means section 6 of the Pipeline Safety Improvement Act of 2002, Public Law 107–355, December 17, 2002, 49 U.S.C. 60129.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under the Act.

Complainant means the employee who filed a complaint under the Act or on whose behalf a complaint was filed.

Employee means an individual presently or formerly working for a person owning or operating a pipeline facility or a contractor or subcontractor of such a person, an individual applying to work for a person owning or operating a pipeline facility or a contractor or subcontractor of such a person, or an individual whose employment could be affected by a person owning or operating a pipeline facility or a contractor or subcontractor of such a person.

Employer means a person owning or operating a pipeline facility or a contractor or subcontractor of such a person.

Gas pipeline facility includes a pipeline, a right of way, a facility, a building, or equipment used in transporting gas or treating gas during its transportation.

Hazardous liquid pipeline facility includes a pipeline, a right of way, a facility, a building, or equipment used or intended to be used in transporting hazardous liquid.

Named person means the person alleged to have violated the Act.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Person means a corporation, company, association, firm, partnership, joint stock company, an individual, a State, a municipality, and a trustee, receiver, assignee, or personal representative of a person.

Pipeline facility means a gas pipeline facility and a hazardous liquid pipeline facility.

Secretary means the Secretary of Labor or persons to whom authority under the Act has been delegated.

§ 1981.102 Obligations and prohibited acts.

(a) No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee's request, engaged in any of the activities specified in paragraphs (b)(1) through (5) of this section.

(b) It is a violation of the Act for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee because the employee has:

(1) Provided, caused to be provided, or is about to provide or cause to be provided to the employer or the Federal Government, information relating to any violation or alleged violation of any order, regulation, or standard under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety;

(2) Refused to engage in any practice made unlawful by chapter 601, in subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, if the employee has identified the alleged illegality to the employer;

(3) Provided, caused to be provided, or is about to provide or cause to be provided, testimony before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or testimony in any proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety;

(4) Commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety, or a proceeding for the administration or enforcement of any requirement imposed under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety; or

(5) Assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law relating to pipeline safety.

(c) This part shall have no application to any employee of an employer who, acting without direction from the employer (or such employer's agent), deliberately causes a violation of any requirement relating to pipeline safety under chapter 601, subtitle VIII of title 49 of the United States Code or any other Federal law.

§ 1981.103 Filing of discrimination complaint.

(a) *Who may file.* An employee who believes that he or she has been discriminated against by an employer in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination.

(b) *Nature of filing.* No particular form of complaint is required, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.

(c) *Place of filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: *http://www.osha.gov*.

(d) *Time for filing.* Within 180 days after an alleged violation of the Act occurs (*i.e.*, when the discriminatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been discriminated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such discrimination. The date of the postmark, facsimile transmittal, or e-

mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery or other means, the complaint is filed upon receipt.

(e) *Relationship to section 11(c) complaints.* A complaint filed under the Pipeline Safety Act that alleges facts which would constitute a violation of section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint filed under both the Pipeline Safety Act and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of the Pipeline Safety Act will be deemed to be a complaint filed under both the Pipeline Safety Act and section 11(c). Normal procedures and timeliness requirements for investigations under the respective laws and regulations will be followed.

§ 1981.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the named person of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). The Assistant Secretary will also notify the named person of his or her rights under paragraphs (b) and (c) of this section and paragraph (e) of § 1981.110. A copy of the notice to the named person will also be provided to the Department of Transportation.

(b) A complaint of alleged violation shall be dismissed unless the complainant has made a prima facie showing that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint.

(1) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity or conduct;

(ii) The named person knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.

(2) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the named person knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the unfavorable personnel action. Normally the burden is satisfied, for example, if the complaint shows that the adverse personnel action took place shortly after the protected activity, giving rise to the inference that it was a factor in the adverse action. If the required showing has not been made, the complainant will be so advised and the investigation will not commence.

(c) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, an investigation of the complaint shall not be conducted if the named person, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct. Within 20 days of receipt of the notice of the filing of the complaint, the named person may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating his or her position. Within the same 20 days, the named person may request a meeting with the Assistant Secretary to present his or her position.

(d) If the named person fails to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the behavior protected by the Act, the Assistant Secretary will conduct an investigation. Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of title 29 of the Code of Federal Regulations.

(e) Prior to the issuance of findings and a preliminary order as provided for in § 1981.105, if the Assistant Secretary has reasonable cause, on the basis of information gathered under the procedures of this part, to believe that the named person has violated the Act and that preliminary reinstatement is warranted, the Assistant Secretary will again contact the named person to give notice of the substance of the relevant evidence supporting the complainant's allegations as developed during the course of the investigation. This evidence includes any witness statements, which will be redacted to protect the identity of confidential informants where statements were given in confidence; if the statements cannot be redacted without revealing the identity of confidential informants, summaries of their contents will be provided. The named person will be given the opportunity to submit a written response, to meet with the investigators to present statements from witnesses in support of his or her position, and to present legal and factual arguments. The named person will present this evidence within 10 business days of the Assistant Secretary's notification pursuant to this paragraph, or as soon afterwards as the Assistant Secretary and the named person can agree, if the interests of justice so require.

§ 1981.105 Issuance of findings and preliminary orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary shall issue, within 60 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the named person has discriminated against the complainant in violation of the Act.

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with a preliminary order providing relief to the complainant. The preliminary order shall include, where appropriate, a requirement that the named person abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; and payment of compensatory damages. Where the named person establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), a preliminary order of reinstatement would not be appropriate. At the complainant's request the order shall also assess against the named person the complainant's costs and expenses (including attorney's and expert witness fees) reasonably incurred in connection with the filing of the complaint.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and the preliminary order will be sent by certified mail, return receipt requested, to all parties of record. The letter accompanying the

findings and order will inform the parties of their right to file objections and to request a hearing, and of the right of the named person to request attorney's fees from the administrative law judge, regardless of whether the named person has filed objections, if the named person alleges that the complaint was frivolous or brought in bad faith. The letter also will give the address of the Chief Administrative Law Judge. At the same time, the Assistant Secretary will file with the Chief Administrative Law Judge, U.S. Department of Labor, a copy of the original complaint and a copy of the findings and order.

(c) The findings and the preliminary order will be effective 60 days after receipt by the named person pursuant to paragraph (b) of this section, unless an objection and a request for a hearing has been filed as provided at § 1981.106. However, the portion of any preliminary order requiring reinstatement will be effective immediately upon receipt of the findings and preliminary order.

Subpart B—Litigation

§ 1981.106 Objections to the findings and the preliminary order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and preliminary order, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file any objections and/or a request for a hearing on the record within 60 days of receipt of the findings and preliminary order pursuant to paragraph (b) of § 1981.105. The objection or request for attorney's fees and request for a hearing must be in writing and state whether the objection is to the findings, the preliminary order, and/or whether there should be an award of attorney's fees. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20001 and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b)(1) If a timely objection is filed, all provisions of the preliminary order will be stayed, except for the portion requiring preliminary reinstatement, which shall not be automatically stayed. The portion of the preliminary order requiring reinstatement will be effective immediately upon the named person's receipt of the findings and preliminary order, regardless of any objections to the order. The named person may file a motion with the Office of Administrative Law Judges for stay of the Assistant Secretary's preliminary order.

(2) If no timely objection is filed with respect to either the findings or the preliminary order, the findings or preliminary order, as the case may be, shall become the final decision of the Secretary, not subject to judicial review.

§ 1981.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, part 18 of title 29 of the Code of Federal Regulations.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or unless otherwise agreed to by the parties. Hearings will be conducted de novo, on the record. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(c) If both the complainant and the named person object to the findings and/or order, the objections will be consolidated and a single hearing will be conducted.

(d) Formal rules of evidence will not apply, but rules or principles designed to assure production of the most probative evidence will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 1981.108 Role of Federal agencies.

(a)(1) The complainant and the named person will be parties in every proceeding. At the Assistant Secretary's discretion, the Assistant Secretary may participate as a party or as amicus curiae at any time at any stage of the proceedings. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision approving or rejecting a settlement agreement between the complainant and the named person.

(2) Copies of pleadings in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) The Secretary of Transportation may participate as amicus curiae at any time in the proceedings, at the Secretary of Transportation's discretion. At the request of the Secretary of Transportation, copies of all pleadings in a case must be sent to the Secretary of Transportation, whether or not the Secretary of Transportation is participating in the proceeding.

§ 1981.109 Decision and orders of the administrative law judge.

(a) The decision of the administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (b) of this section, as appropriate. A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint. Relief may not be ordered if the named person demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of any protected behavior. Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 1981.104(b) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the administrative law judge will hear the case on the merits.

(b) If the administrative law judge concludes that the party charged has violated the law, the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including

attorney and expert witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $1,000.

(c) The decision will be served upon all parties to the proceeding. Any administrative law judge's decision requiring reinstatement or lifting an order of reinstatement by the Assistant Secretary will be effective immediately upon receipt of the decision by the named person, and will not be stayed by the filing of a timely petition for review with the Administrative Review Board. All other portions of the judge's order will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the Administrative Review Board.

§ 1981.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the administrative law judge, or a named person alleging that the complaint was frivolous or brought in bad faith who seeks an award of attorney's fees, must file a written petition for review with the Administrative Review Board (''the Board''), which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the administrative law judge will become the final order of the Secretary unless, pursuant to this section, a petition for review is timely filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. To be effective, a petition must be filed within 10 business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, the decision of the administrative law judge will become the final order of the Secretary unless the Board, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review. If a case is accepted for review, the decision of the administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement will be effective while review is conducted by the Board, unless the Board grants a motion to stay the order. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard.

(c) The final decision of the Board shall be issued within 90 days of the conclusion of the hearing, which will be deemed to be the conclusion of all proceedings before the administrative law judge—*i.e.*, 10 business days after the date of the decision of the administrative law judge unless a motion for reconsideration has been filed with the administrative law judge in the interim. The decision will be served upon all parties and the Chief Administrative Law Judge by mail to the last known address. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board concludes that the party charged has violated the law, the final order will order the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the Board shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred.

(e) If the Board determines that the named person has not violated the law, an order will be issued denying the complaint. If, upon the request of the named person, the Board determines that a complaint was frivolous or was brought in bad faith, the Board may award to the named person a reasonable attorney's fee, not exceeding $1,000.

Subpart C—Miscellaneous Provisions

§ 1981.111 Withdrawal of complaints, objections, and findings; settlement.

(a) At any time prior to the filing of objections to the findings or preliminary order, a complainant may withdraw his or her complaint under the Act by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal. The Assistant Secretary will notify the named person of the approval of any withdrawal. If the complaint is withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(b) The Assistant Secretary may withdraw his or her findings or a preliminary order at any time before the expiration of the 60-day objection period described in § 1981.106, provided that no objection has yet been filed, and substitute new findings or preliminary order. The date of the receipt of the substituted findings or order will begin a new 60-day objection period.

(c) At any time before the findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal. If the objections are withdrawn because of settlement, the settlement will be approved in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements.* At any time after the filing of a complaint, and before the findings and/or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the named person agree to a settlement.

(2) *Adjudicatory settlements.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement will be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board will constitute

the final order of the Secretary and may be enforced pursuant to § 1981.113.

§ 1981.112 Judicial review.

(a) Within 60 days after the issuance of a final order by the Board (Secretary) under § 1981.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the Board is not subject to judicial review in any criminal or other civil proceeding.

(b) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the Board to the appropriate court pursuant to the rules of the court.

§ 1981.113 Judicial enforcement.

Whenever any person has failed to comply with a preliminary order of reinstatement or a final order or the terms of a settlement agreement, the Secretary or a person on whose behalf the order was issued may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 1981.114 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of the Act requires.

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 110

[CGD05–03–036]

RIN 1625–AA01

Anchorage Grounds; Baltimore Harbor Anchorage Project

AGENCY: Coast Guard, DHS.

ACTION: Final rule.

SUMMARY: The Coast Guard is amending the geographic coordinates and modifying the regulated use of the anchorages in Baltimore Harbor, MD. This amendment is necessary to ensure changes in depth and dimension to the Baltimore Harbor anchorages resulting from an Army Corps of Engineers anchorage-deepening project are reflected in the Federal regulations and on National Oceanic and Atmospheric Association charts. The modifications to the regulated uses of the anchorages accommodate changes to ships' drafts and lengths since the last revision of this regulation in 1968 and standardize the anchorage regulations throughout the Fifth Coast Guard District.

DATES: This rule is effective May 9, 2005.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket CGD05–03–036 and are available for inspection or copying at Commander, Fifth Coast Guard District (oan), 431 Crawford Street, Portsmouth, VA, 23704–5004 between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade Timothy Martin, Fifth Coast Guard District Aids to Navigation and Waterways Management Branch, (757) 398–6285.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On July 2, 2003, we published a notice of proposed rulemaking (NPRM) entitled Baltimore Harbor Anchorage Project in the **Federal Register** (68 FR 39503). We received one phone call commenting on the NPRM. No public hearing was requested, and none was held.

On January 14, 2004 we published a supplemental notice of proposed rulemaking (SNPRM) also entitled Baltimore Harbor Anchorage Project in the **Federal Register** (69 FR 2095) to solicit for comments on updates made to Anchorage 2. No public hearing was requested, and none was held.

On October 12, 2004 we published a supplemental notice of proposed rulemaking (SNPRM) again entitled Baltimore Harbor Anchorage Project in the **Federal Register** (69 FR 60592) to better align the anchorages with the Federal navigation project. No comments were received on the SNPRM. No public hearing was requested, none was held.

Background and Purpose

The U.S. Army Corps of Engineers received Congressional authorization for the Baltimore Harbor Anchorage project in September 2001. Dredging for the Baltimore Harbor Anchorage was completed in May 2003. The objective of this project was to increase the project depths of Anchorage No. 3 and No. 4 to 42ft and 35ft respectively.

The original Federal anchorage project for Baltimore Harbor was designed to accommodate cargo ships with maximum drafts of 33ft and lengths of 550ft. The dimensions of the anchorages changed to accommodate the larger ships that call on the Port that routinely approach 1000ft length overall with drafts of 36 to 38 feet or more. The new coordinates established for Anchorage Nos. 2, 3, and 4, also accommodate the widening of the Dundalk West Channel, a north/south Federal navigation project located between Anchorage No. 3 and Anchorage No. 4 and widening of the Dundalk East Channel bordering Anchorage No. 4. Anchorage No. 3 was divided into two sections: Anchorage 3 Lower (2200′ x 2200′ x 42ft mean lower low water (MLLW)) and Anchorage 3 Upper (1800′ x 1800′ x 42ft MLLW). Anchorage No. 4 was also modified (1850′ x 1800′ x 35ft MLLW).

Discussion of Comments and Changes

One comment was received regarding the new coordinates of the anchorages in response to the NPRM (68 FR 39503). Three changes where made based on that comment. The longitude for the fourth coordinate in Anchorage 3 Upper listed as 76° 33′53.6″ W was changed to 76° 32′ 53.6″ W. In Anchorage 2, the sixth position incorrectly listed as 39° 14′43.7″ N, 76° 2′63.6″ W was changed to 39°14′43.7″ N, 76° 32′53.6″ W. Also in Anchorage 2, the second coordinate listed as 39° 14′43.9″ N, 76° 32′27.0″ W was excluded.

Two changes were made to the two northwestern coordinates in Anchorage 2 after the comment period for the NPRM had expired. Therefore, we issued a SNPRM to solicit comments. No comments were received.

Minor changes were made to the geographic points making up Anchorages 1, 2, 5, 6 and 7 to aid in the graphical representations of those anchorages and better align them with the Federal navigation project. One decimal place was added to all coordinates to better define the anchorage boundaries. Therefore, we published a second SNPRM to solicit comments on the changes. No comments were received.

Regulatory Evaluation

This rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, Regulatory