

## PENNSYLVANIA—OZONE (8-HOUR STANDARD)—Continued

Designated Area	Designation <sup>a</sup>		Category/Classification	
	Date <sup>1</sup>	Type	Date <sup>1</sup>	Type
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Youngstown-Warren-Sharon, OH—PA Area: Mercer County .....	11/19/07	Attainment		
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<sup>a</sup> Includes Indian County located in each county or area, except otherwise noted.

<sup>1</sup> This date is June 15, 2004, unless otherwise noted.

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 229

[Docket No. FRA–2006–26174; Notice No. 2]

RIN 2130–AB83

#### Locomotive Safety Standards; Sanders

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

**ACTION:** Final rule.

**SUMMARY:** FRA is revising the existing requirements related to sanders on locomotives. This rule modifies the existing regulations by permitting additional flexibility in the use of locomotives with inoperative sanders. The rule provides railroads the ability to better utilize their locomotive fleets while ensuring that locomotives are equipped with operative sanders in situations where they provide the most benefit from a safety and operational perspective. The rule also makes the regulations related to operative sanders more consistent with existing Canadian standards related to the devices.

**DATES:** This final rule is effective December 18, 2007; petitions for reconsideration must be received on or before December 18, 2007. Petitions received after that date will be considered to the extent possible without incurring additional expense or delay.

**ADDRESSES:** *Petitions for reconsideration:* Any petitions for reconsideration related to Docket No. FRA–2006–24838, 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.

- *Fax:* 202–493–2251.

- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE., W12–140, Washington, DC 20590.

- *Hand Delivery:* 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

- *Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590 between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

**FOR FURTHER INFORMATION CONTACT:** George Scerbo, Office of Safety Assurance and Compliance, Motive Power & Equipment Division, RRS–14, Mail Stop 25, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590 (telephone 202–493–6247), or Michael Masci, Trial Attorney, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590 (telephone 202–493–6037).

#### SUPPLEMENTARY INFORMATION:

##### I. Statutory and Regulatory Background

FRA has broad statutory authority to regulate railroad safety. The Locomotive Inspection Act (formerly 45 U.S.C. 22–34, now 49 U.S.C. 20701–20703) was enacted in 1911. It prohibits the use of unsafe locomotives and authorizes FRA to issue standards for locomotive

maintenance and testing. In order to further FRA's ability to respond effectively to contemporary safety problems and hazards as they arise in the railroad industry, Congress enacted the Federal Railroad Safety Act of 1970 (Safety Act) (formerly 45 U.S.C. 421, 431 *et seq.*, now found primarily in chapter 201 of Title 49). The Safety Act grants the Secretary of Transportation rulemaking authority over all areas of railroad safety (49 U.S.C. 20103(a)) and confers powers necessary to detect and penalize violations of any rail safety law. This authority was subsequently delegated to the FRA Administrator (49 CFR 1.49) (Until July 5, 1994, the Federal railroad safety statutes existed as separate acts found primarily in title 45 of the United States Code. On that date, all of the acts were repealed, and their provisions were recodified into title 49).

Pursuant to its general statutory rulemaking authority, FRA promulgates and enforces rules as part of a comprehensive regulatory program to address the safety of railroad track, signal systems, communications, rolling stock, operating practices, passenger train emergency preparedness, alcohol and drug testing, locomotive engineer certification, and workplace safety. In the area of locomotive safety, FRA has issued regulations, found at 49 CFR part 229 ("part 229"), addressing topics such as inspections and tests, safety requirements for brake, draft, suspension, and electrical systems, and cabs and cab equipment. All references to parts and sections in this document shall be to parts and sections located in Title 49 of the Code of Federal Regulations. FRA continually reviews its regulations and revises them as needed to keep up with emerging technology.

On July 12, 2004, the Association of American Railroads (AAR), on behalf of itself and its member railroads, petitioned the FRA to delete the requirement as contained in 49 CFR 229.131. The petition and supporting documentation asserted that contrary to

popular belief, depositing sand on the rail will not have any significant influence on the emergency stopping distance of a train. Subsequent to the petition, FRA and interested industry members began identifying various issues related to locomotive safety standards with the intent that FRA would potentially address the issues through its Railroad Safety Advisory Committee (RSAC).

## II. RSAC Overview

In March 1996, FRA established the RSAC, which provides a forum for developing consensus recommendations on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

American Association of Private Railroad Car Owners (AARPCO)  
 American Association of State Highway & Transportation Officials (AASHTO)  
 American Chemistry Council  
 American Petrochemical Institute  
 American Public Transportation Association (APTA)  
 American Short Line and Regional Railroad Association (ASLRRA)  
 American Train Dispatchers Association (ATDA)  
 Amtrak  
 Association of American Railroads (AAR)  
 Association of Railway Museums (ARM)  
 Association of State Rail Safety Managers (ASRSM)  
 Brotherhood of Locomotive Engineers and Trainmen (BLET)  
 Brotherhood of Maintenance of Way Employees Division (BMWED)  
 Brotherhood of Railroad Signalmen (BRS)  
 Federal Transit Administration (FTA)\*  
 High Speed Ground Transportation Association (HSGTA)  
 International Association of Machinists and Aerospace Workers  
 International Brotherhood of Electrical Workers (IBEW)  
 Labor Council for Latin American Advancement (LCLAA)\*  
 League of Railway Industry Women\*  
 National Association of Railroad Passengers (NARP)  
 National Association of Railway Business Women\*  
 National Conference of Firemen & Oilers  
 National Railroad Construction and Maintenance Association  
 National Railroad Passenger Corporation (Amtrak)  
 National Transportation Safety Board (NTSB)\*

Railway Supply Institute (RSI)  
 Safe Travel America (STA)  
 Secretaria de Comunicaciones y Transporte\*  
 Sheet Metal Workers International Association (SMWIA)  
 Tourist Railway Association Inc  
 Transport Canada\*  
 Transport Workers Union of America (TWU)  
 Transportation Communications International Union/BRC (TCIU/BRC)  
 United Transportation Union (UTU)

\*Indicates associate membership

When appropriate, FRA assigns a task to the RSAC, and after consideration and debate, the RSAC may accept or reject the task. If a task is accepted, the RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the RSAC for a vote. If the proposal is accepted by a simple majority of the RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff has played an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal. If the working group or the RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

## III. Proceedings to Date

On February 22, 2006, FRA presented, and the RSAC accepted, the task of reviewing existing locomotive safety needs and recommending consideration of specific actions useful to advance the safety of rail operations. The RSAC established the Locomotive Safety

Standards Working Group (Working Group) to handle this task and develop recommendations for the full RSAC to consider. Members of the Working Group, in addition to FRA, included the following:

APTA  
 ASLRRA  
 Amtrak  
 AAR  
 ASRSM  
 BLET  
 BMWED  
 BRS  
 BNSF Railway Company (BNSF)  
 California Department of Transportation  
 Canadian National Railway (CN)  
 Canadian Pacific Railway (CP)  
 Conrail  
 CSX Transportation (CSXT)  
 Florida East Coast Railroad  
 General Electric (GE)  
 Genesee & Wyoming Inc.  
 International Association of Machinists and Aerospace Workers  
 IBEW  
 Kansas City Southern Railway (KCS)  
 Long Island Rail Road  
 Metro-North Railroad  
 MTA Long Island  
 National Conference of Firemen and Oilers  
 Norfolk Southern Corporation (NS)  
 Public Service Commission of West Virginia  
 Rail America, Inc.  
 Southeastern Pennsylvania Transportation Agency  
 SMWIA  
 STV, Inc.  
 Tourist Railway Association Inc.  
 Transport Canada  
 Union Pacific Railroad (UP)  
 UTU  
 Volpe Center  
 Wabtech Corporation  
 Watco Companies

The task statement approved by the full RSAC sought immediate action from the Working Group regarding the need for and usefulness of the existing regulation related to locomotive sanders. The task statement established a target date of 90 days for the Working Group to report back to the RSAC with recommendations to revise the existing regulatory sander provision. The Working Group conducted two meetings that focused almost exclusively on the sander requirement. The meetings were held on May 8–10, 2006, in St. Louis, Missouri, and on August 9–10, 2006, in Fort Worth, Texas. Minutes of these meetings have been made part of the docket in this proceeding. After broad and meaningful discussion related to the potential safety and operational benefits provided by equipping

locomotives with operative sanders, the Working Group reached consensus on a recommendation for the full RSAC.

On September 21, 2006, the full RSAC unanimously adopted the Working Group's recommendation on locomotive sanders as its recommendation to FRA. The RSAC recommendation included the Working Group's consensus rule text, and requested that FRA draft a regulatory proposal related to the use of sanders on locomotives performing switching service at outlying locations. The Working Group's discussion of outlying locations was based on an apparent need to distinguish locations that did not have sufficient access to a sand delivery system from those that do have such access. FRA reviewed and accepted the RSAC's recommendation and developed a regulatory proposal based on that recommendation. The specific regulatory language recommended by the RSAC was amended slightly for clarity and consistency, and FRA independently developed proposed provisions related to the use of sanders on locomotives used in switching service at outlying locations.

On March 6, 2007, FRA published a Notice of Proposed Rulemaking (NPRM). *See* 72 FR 9904. FRA solicited written comments from the public in the NPRM in accordance with the Administrative Procedure Act (5 U.S.C. 553). Consideration of public comment allows FRA to access additional viewpoints from interested parties and include them when appropriate. By the close of the comment period on May 7, 2007, two sets of comments were received. Comments were received on May 4, 2007 from the BLET, and on May 7, 2007 from the AAR. The comments can be classified into three general categories: (1) Responses to specific requests for comments that were made in the NPRM; (2) inquiries regarding the treatment of locomotives that switch position en route changing between lead and trailing positions in the consist under paragraph 229.131(b)(1) and (b)(2); and, (3) remarks concerning the portions of the NPRM that were developed independently by FRA (the definition of sand delivery system and paragraph 229.131(c)(1)).

In order to further clarify written comments received during the comment period, comments were discussed by the Working Group at the June 8, 2007 meeting in Chicago. The discussion, although limited in scope, furthered FRA's understanding of the written comments that were received. Obviously, there can be a tremendous benefit to clarity when in-person oral communication is permitted, including:

(1) An opportunity for a party to refine a comment based on one or more questions from the Agency or other party; (2) observations of verbal tone and physical expressions that facilitate better understanding; and (3) an opportunity to accommodate a party that is more effective at communicating orally than it is in writing. Based on its thorough review, FRA addresses each of the comments in the relevant regulatory paragraphs of the section-by-section analysis provided below.

FRA continues to agree with the Working Group's determination that locomotive sanders provide limited safety benefits and that the primary benefits derived from the devices are operational. Accordingly, this final rule retains the NPRM's goal of preserving the limited safety benefits of the devices while addressing the overly restrictive nature of the existing provision. This rule provides appropriate relief from the existing requirement by creating a more precise standard. The final rule requires sander maintenance based on operational realities instead of the current time-based standard. The final rule provides relief according to specific identified operational conditions. The rule distinguishes between the following conditions: lead and non-lead locomotives; locomotives in road service and switching service; and, locomotives at locations with or without a sand delivery system. These distinctions better reflect current railroad operations while maintaining the current level of safety provided by sanders. The rule also harmonizes the sander requirement with the existing Canadian requirements by placing a fourteen-day limit on service for lead locomotives in road service with inoperative sanders.

Throughout the preamble discussion of this rule, FRA refers to comments, views, suggestions, or recommendations made by members of the Working Group. When using this terminology, FRA is referring to views, statements, discussions or positions identified or contained in the minutes of the Working Group meetings. These documents have been made part of the docket in this proceeding and are available for public inspection as discussed in the **ADDRESSES** portion of this document. These points are discussed to show the origin of certain issues and the course of discussions on those issues at the working group level. We believe this helps illuminate factors FRA has weighed in making its regulatory decisions, and the logic behind those decisions. The reader should keep in mind, of course, that only the full RSAC makes recommendations to FRA, and it

is the consensus recommendation of the full RSAC on which FRA is acting.

#### IV. Technical Background

The NPRM provided a comprehensive technical discussion addressing the usefulness of sand in the operation of locomotives. *See* 72 FR 9906–08. The discussion evaluated: the effect of sand on adhesion, and braking distance; as well as the current use of sand as instructed by railroad operating rules and training. The discussion demonstrates that having operative sanders benefits the locomotive, and that the benefit could be realized while allowing greater operational flexibility. Two expected benefits from the use of sand concern extended range dynamic braking and lite locomotives. FRA expects the use of sand in conjunction with extended range dynamic braking will provide some benefit. Extended range dynamic braking is currently used extensively to slow trains and (with rolling resistance and perhaps the independent brake) bring them to a stop. Locomotive engineers may utilize dynamic brakes rather than the automatic train brake, where possible, in order to conserve fuel and avoid undesired emergency brake applications. FRA also expects that sand applied on multiple axles could be an important contributor to maintaining satisfactory stopping distances of lite locomotive consists under unfavorable conditions (wet rail, etc.). Locomotives are frequently moved in order to reposition power throughout the fleet. For these lite locomotives, sand will remain on the rail long enough to assist adhesion between the wheels and the rail for a lite locomotive consist. FRA does not believe it is necessary to reiterate the technical discussion in this final rule and directs parties interested in that discussion to the NPRM. *See* 72 FR 9906–08.

#### V. Current Regulatory Impediments

Relaxing the locomotive sanding requirement will maintain safety and will allow railroads to better utilize their locomotive fleets. The current requirement allows a locomotive found with a defective sander to continue in service to the next forward location where repairs can be made or the next calendar day inspection, whichever occurs first. Under the new requirement contained in this final rule, a lead locomotive in an over-the-road train may continue to be utilized by the railroad for up to fourteen days; in the case of a trailing locomotive, it may continue to be utilized by the railroad until placed in a facility with a sand

delivery system or departure from an initial terminal.

The final rule recognizes the reality that sanding may reach optimal effectiveness even where one or more locomotive sanders in a consist is inoperative. Locomotives are routinely equipped with two sanders at each end. Often a consist will contain multiple locomotives. Each locomotive in a multiple-locomotive consist distributes sand to the rail. As a result, when each of the locomotives in a multiple locomotive consist are operating with all sanders operative, the train potentially distributes more sand to the rail than it will utilize. At that point, the effect of the sand on the train would be the same if one or two sanders in the consist were inoperative.

Requirements for sanders can be traced back to the steam locomotive era. At that time, sanding the rail was thought to enhance adhesion between the steam locomotive wheel and the rail. Modern diesel locomotives rely on wheel slip and wheel creep devices, as well as sand, to provide adhesion between the wheel and rail. Where sanders are inoperative on a diesel locomotive, the total loss of adhesion would be less than it would have been for a steam locomotive. Notably, any reduced adhesion would limit the ability of the locomotive to pull its train. Loss of the ability to pull the train is a productivity concern that is not being addressed by this final rule.

This final rule also recognizes the fact that sanding the rail in braking mode provides little additional adhesion to a train, because train handling depends primarily on train brakes to maintain train dynamics. The locomotive braking has limited effect. As stated in the technical discussion contained in the NPRM, by the time the locomotives in the consist have passed over the sanded rail, little to no sand remains on the rail and little or no benefit is provided to train braking.

## VI. Section-by-Section Analysis

### *Amendments to 49 CFR Part 229*

#### Section 229.5 Definitions

FRA is adding the term “sand delivery system” in this section. The term will mean a permanently stationed or fixed device designed to deliver sand to locomotive sand boxes that do not require the sand to be manually delivered or loaded. A sand delivery system will be considered permanently stationed if it is at a location at least five days a week for at least eight hours per day.

FRA is also adding the term “initial terminal.” The definition of this term

will be identical to that currently contained in 49 CFR 232.5 and 238.5. The term will mean “a location where a train is originally assembled.”

#### Section 229.9 Movement of Non-Complying Locomotives

FRA is amending this section to exempt locomotives operated under paragraphs 229.131(b) and (c)(1) from the movement for repair provision contained in § 229.9. In general, § 229.9 currently provides movement for repair requirements for equipment found with non-complying conditions under part 229. Paragraphs 229.131(b) and (c)(1) in this rule contain specific requirements relating to the movement and continued use of locomotives with defective sander equipment. Because the paragraphs specifically address movement for repair, applying § 229.9 would be superfluous or conflicting, and is no longer necessary.

FRA is also making a clarifying amendment to this section of part 229. Section 229.9 currently contains the following exception that reads: “[e]xcept as provided in \* \* \* 229.125(h).” The exception relates to locomotive auxiliary lights and although a correct citation when originally inserted into the regulations, later amendments to that section resulted in redesignation of the paragraphs. The exception should refer to § 229.125(g). Like § 229.131(b) and (c)(1), § 229.125(g) sets forth movement for repair requirements specific to that section. Consequently, FRA is making this clarification in this regulatory proceeding.

#### Section 229.131 Sanders

*Paragraph (a).* This paragraph establishes a general requirement that locomotives be equipped with operative sanders before departing an initial terminal. Any time a locomotive is in use before leaving the initial terminal, it will be required to have operative sanders. The term “in use” has been consistently applied to mean when a locomotive is capable of being used. Thus, the locomotive does not have to actually be used to be in use. Examples of a locomotive in use are when a locomotive has been inspected, or a locomotive is on a ready track. FRA agrees with the RSAC’s recommendation that the initial terminal would be an appropriate place to initially require operative sanders, because it is a place where sander maintenance can usually be accomplished without imposing a significant burden on the railroad. In many instances, locations where trains are initiated are equipped with sand

delivery systems and are capable of making repairs to the sander mechanisms. FRA notes that this rule will permit locomotives to be released from daily locomotive inspections with inoperative sanders. However, the rule will require sanders to be repaired or handled for repair under § 229.9 if defective when the locomotive is preparing to depart from an initial terminal. In instances where repairs cannot be performed, a locomotive may be dispatched from an initial terminal but only under the strict provisions contained in § 229.9. Thus, the locomotive could only continue in use to the nearest forward location where necessary repairs could be effectuated or to the locomotive’s next calendar day inspection, whichever occurs first. FRA further notes that if a locomotive is at an initial terminal for its train and that location has a sand delivery system or is otherwise capable of making sander repairs, then the locomotive may not legally depart that location with inoperative sanders. FRA also intends to make clear that a locomotive’s sanders will only be considered operative if appropriate amounts of sand are deposited on each rail in front of the first power operated wheel set in the direction of movement.

FRA recognizes that this rule will be less restrictive than the movement for repair provisions currently contained in § 229.9. In most instances, locomotives will likely encounter an initial terminal less frequently than a daily inspection. This will facilitate more efficient railroad operations. Under the current provision, a railroad will take a locomotive out of service when a sander defect is found at the daily inspection. By requiring operative sanders less frequently, the new requirement allows the railroad to keep the locomotive in service for longer periods of time. With more locomotives in service, the railroad will be able to better utilize its power throughout its fleet.

*Paragraph (b).* This paragraph contains the requirements for handling locomotives used in road service where sanders become inoperative after departure from an initial terminal. Road service will be distinguished from yard service because the type of service affects the need for sand. Locomotives performing road service will likely be in longer trains and run at higher speeds than those performing switching service. The existing definition of switching service, as it appears in §§ 229.5 and 232.5, provides background for the distinction between road service and switching service. Switching service means “assembling cars for train movements \* \* \* or

moving rail equipment in connection with work service that does not constitute a train movement." Any movement that is not considered "switching service" would be considered "road service." Therefore, any service which constitutes a "train movement" would be considered "road service" for purposes of this section. The preamble to the final rule related to part 232 (66 FR 4104, January 17, 2001) contains detailed discussion of the factors that are to be considered when determining what constitutes a "train movement." See 66 FR 4148–49.

*Paragraph (b)(1).* This paragraph establishes requirements related to lead locomotives being used in road service where sanders are discovered to be inoperative after departure from an initial terminal. Once inoperative sanders are discovered on these locomotives, there are four triggers that will determine how long a lead locomotive will be permitted to remain in service with inoperative sanders. The triggers are: the next initial terminal; a location where it is placed in a facility with a sand delivery system; its next periodic inspection under § 229.23; or fourteen calendar days from the date the sanders are first discovered to be inoperative, whichever occurs first.

FRA agrees with the Working Group's determination that the four triggering events will ensure that sanders are repaired in a timely fashion while providing railroads the ability to better utilize their locomotive fleets. Under the existing rule, a locomotive can move only until the next daily inspection with inoperative sanders. Utilizing four different triggers allows the railroad a greater degree of operational flexibility. Each trigger provides a logical point at which sander maintenance should and can be conducted without impacting a railroad's operation to a significant degree. The initial terminal is an appropriate place to require inoperative sanders for the reasons stated in paragraph 229.131(a). When a locomotive is placed in a facility that has a sand delivery system it is appropriate to require a railroad to provide sander maintenance. Placed in a facility is intended to mean actually placed on trackage with access to the sand delivery system, and not merely passing through a location with a sand delivery system on the premises. Similarly, when a locomotive is given its required periodic inspection it is expected that the location will be capable of providing repairs and additional sand to the locomotive sanders with little burden. Permitting a lead locomotive to remain in service for no longer than fourteen days is

reasonable as it permits the locomotive to reach the destination of a long-distance train run, ensures timely repairs to the sanders, and is more consistent with the current Canadian requirement.

One commenter sought clarification on how FRA will enforce this rule when a lead locomotive is switched to a trailing position en route. As three of the triggering events are identical for both lead and trailing locomotives, they would be equally applicable to either type of locomotive and further clarification is unnecessary. With regard to how the calendar-day triggering event will be applied, FRA agrees that further clarification would be beneficial. After a lead locomotive is switched to a trailing position, the days will continue to be counted pursuant to the fourteen day requirement (along with the three other triggers) of this paragraph. For example, if locomotive XYZ–12345 is operating in the lead position and is found to have an inoperative sander on Monday June 25, the calculation of days pursuant to this paragraph begins on that day. Monday, June 25 is day one. On Tuesday, June 26, locomotive XYZ–12345 is switched to a trailing position in the consist. While in a trailing position, the days continue to be counted. Tuesday, June 26 is counted as day two. Under this scenario, the fourteenth calendar day for locomotive XYZ–12345 is Sunday July 8. Therefore, if the inoperative sander is not repaired prior to being used on or after July 9, the operating railroad would be in violation of this paragraph.

Comments were also received regarding the definition of sand delivery system. One commenter suggested adding a requirement to have each railroad identify to FRA all facilities that fit within the definition, and obtain permission from FRA to close the facility or reduce hours. While this comment is insightful, FRA believes that the commenter's suggested requirement would be inconsistent with the spirit of the RSAC's consensus rule text. The rule aims to maintain safety while better accommodating current operational realities by providing more flexibility when appropriate. Adding this requirement would create a more rigid process that would significantly increase the burden on both FRA and the railroads with a marginal effect on safety. According to the rule that was proposed, railroads will be required to repair inoperative sanders when the locomotive is placed in a facility equipped with a sand delivery system. Formally identifying and changing locations through an approval process would cause delay. The delay would

adversely affect operations and inhibit appropriate flexibility.

Another commenter sought clarification regarding two related issues: (1) Whether a mobile unit, for example a mobile truck, could be considered a sand delivery system; and, (2) how the five day per week, eight hour per day, requirement will be calculated? The rule does not provide for special treatment for mobile units. Any unit that fits the definition will be treated as a sand delivery system, including mobile units. Railroads are expected to utilize all available information to accurately anticipate which locations will be equipped with a sand delivery system for each week. At a minimum, locations where on average a sand delivery system is permanently stationed (i.e. is at the location at least five days per week for at least eight hours per day) over the previous four weeks, would be determined to be a location equipped with a sand delivery system for the following week. This determination may be refuted by the railroad with additional information.

*Paragraph (b)(2).* This paragraph contains the requirements for handling trailing locomotives that are being used in road service when sanders are discovered to be inoperative after departure from an initial terminal. Once inoperative sanders are discovered, the rule sets forth three triggering events that will determine how long a trailing locomotive will be permitted to remain in service with inoperative sanders. The triggering events in this paragraph are identical to those in paragraph (b)(1) except for the elimination of the fourteen day requirement. FRA agrees with the Working Group's determination that the need to provide sand to a trailing locomotive is less critical than it is for a lead locomotive. The engineer operating the train or locomotive consist may be more familiar with the lead locomotive than with the trailing locomotive. The engineer is likely to be operating from the lead locomotive, and thus, that locomotive is less likely to be switched out of the consist while moving over the road.

The term "trailing locomotive," as used in this paragraph, specifically refers to a locomotive that is located behind the lead locomotive in a train or locomotive consist. The NPRM specifically included "distributed power locomotives." A distributed power locomotive, as defined in § 229.5, is a locomotive that is part of a distributed power system that provides control to a number of locomotives dispersed in a consist from command signals originating in the lead

locomotive. Distributed power locomotives are also trailing locomotives because they are located behind the lead locomotive in the train. FRA sought and received comments concerning the relevance of listing "trailing locomotives" and "distributive power locomotives" in the rule text. Both commenters confirmed that distributive power locomotives are a type of trailing locomotive. Thus, distributive power locomotives are covered by this paragraph whether or not they are specifically mentioned, because they are covered by the term "trailing locomotive." FRA believes that it is unnecessary to list both terms and is removing the words "distributive power locomotive" in the final rule.

One commenter asked how FRA will enforce this rule when a trailing locomotive is switched to the lead en route. FRA agrees that this issue will benefit from clarification. A locomotive will be considered a lead locomotive anytime it is placed in the lead position of the consist. If a locomotive is switched into the lead en route, and the sanders are known to be inoperative, the fourteen day requirement prescribed in paragraph (b)(1) applies to that locomotive (along with the three other triggers contained in paragraph (b)(1)) starting on the day when it is switched to the lead. For purposes of counting the amount of days that the locomotive has been in the lead, the calendar day that the locomotive is switched into the lead will count as day one. The date that the locomotive is placed in the lead is required to be recorded on that locomotive's bad order tag. Updating the bad order tag on the day that the locomotive is switched to the lead, to reflect the date that the locomotive was switched to the lead, will ensure that the railroad and FRA will be able to conveniently know the status of that locomotive relative to the requirements of this rule.

*Paragraph (c).* This paragraph establishes requirements for handling locomotives used in switching service where sanders become inoperative. The Working Group and the full RSAC recommended that the use of sand on locomotives performing switching service should be distinguished from locomotives being used in road service as described above in paragraph (b). Included as part of the RSAC's recommendation to FRA in this area, was a request that FRA unilaterally develop criteria for the handling of locomotives being used in switching service that experience inoperative sanders. The request specifically related to the identification of what constitutes locomotives at "outlying locations" and

the identification of the triggering events for repairing inoperative sanders on such locomotives. FRA accepted this recommendation. FRA considered the discussions and views provided by members of the Working Group when developing this portion of the rule.

Rather than attempt to define what constitutes an "outlying location," FRA believes that the most appropriate method of distinguishing between switching locomotives and the locations where they operate, is to base the determination on the existence of a sand delivery system at the location. FRA believes that locomotives being used in switching service at a location with a sand delivery system should be able to be maintained and handled for repair in a more timely manner, with less disruption to railroad operations, than locomotives being used in switching service at locations without sand delivery systems. If there is no sand delivery system at a location, then the railroad is required to send maintenance vehicles or crews to the location or is required to move the locomotive to another location to effectuate necessary repairs. This can have a significant impact on the efficiency and continuity of switching operations at certain locations. Thus, paragraphs (c)(1) and (c)(2) separate the requirements for maintaining the sanders on locomotives being used in switching service based on the presence of a sand delivery system at the location where the locomotive is being used.

*Paragraph (c)(1).* This paragraph contains requirements for handling locomotives being used in switching service at locations that are not equipped with a sand delivery system. In order to remain consistent with the overall design of the recommendation submitted by the RSAC, FRA believes that some operational flexibility needs to be provided to locomotives being used in switching service at locations not capable of quickly delivering sand or making necessary repairs. As noted above, the simplest way of making this determination is based on whether or not the location has a sand delivery system. FRA believes that seven days is a reasonable amount of time to permit railroads to provide necessary sander attention to a locomotive being used in switching service at a location that does not have a sand delivery system. This amount of time is consistent and within the time frame in which locomotives used in switching service will need some other type of maintenance or attention, most likely re-fueling. The seven day mark appears to be a reasonable outer-limit for the requirement. The second triggering

event in this paragraph is if the locomotive becomes due for its periodic inspection pursuant to § 229.23 of this part.

In the NPRM, FRA solicited and received comments on this paragraph. While one commenter agreed that the proposed seven day time-line was reasonable; another commenter suggested dividing the requirement into two distinct groups to allow for more precise treatment. The commenter explained that a requirement based on a given number of days would be appropriate for the inoperative sanders that are inoperative because they lack sand, however, sanders that are inoperative due to a mechanical defect should be repaired sooner if mechanical forces have an opportunity to inspect the locomotive. This suggestion has some merit, but would likely overburden enforcement resources. Dividing the requirement into two categories would add another layer of complexity to the rule. Enforcing two separate categories would raise additional issues that require further FRA investigation. For example, FRA would need to find out why the sander is inoperative in order to determine how to properly enforce the requirement. FRA believes that the less complex scheme from the proposed rule will be more effective.

*Paragraph (c)(2).* This paragraph establishes requirements for handling locomotives used in switching service at locations equipped with a sand delivery system. FRA agrees with the opinions of the Working Group and full RSAC that sanders on these types of locomotives can be maintained with little burden on a railroad's operation as they are already at the location where sand can be delivered and effective repairs can be effectuated. Therefore, FRA accepts the RSAC's recommendation and retains the existing requirements applicable to these locomotives. Consequently, when sanders become inoperative on these locomotives they will have to be handled in accordance with the provisions contained in § 229.9.

*Paragraph (d).* This paragraph will ensure that any locomotive with inoperative sanders is properly tagged under the tagging provisions contained in § 229.9(a). As paragraphs (b) and (c)(1) provide railroads with more flexibility with regard to using a locomotive with inoperative sanders than what is currently permitted by § 229.9, FRA wants to ensure that proper notification and records are maintained on in-service locomotives with inoperative sanders. Thus, FRA will require that locomotives operating with defective sanders be tagged in

accordance with the provisions contained in § 229.9(a). This will also ensure that the individuals operating the locomotive are fully informed as to the fact that the locomotive they are operating does not have working sanders.

## VII. Regulatory Impact and Notices

### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; February 26, 1979). FRA has prepared and placed in the docket a regulatory analysis addressing the economic impact of this rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Federal Railroad Administration, 1200 New Jersey Ave., SE., W12-140, Washington, DC 20590.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of cost and benefit streams expected from the adoption of this rule. For the twenty year period the estimated quantified costs are minimal. For this same period the estimated quantified benefits have a Net Present Value of \$70.6 million.

The major benefits anticipated from implementing this rule include: A reduction in the number of times locomotives have sand loaded or the number of times the sanders are made operative. This reduction produces a reduction in injuries related to the operation of filling sand boxes on the locomotive and the number of missed days related to these injuries. Finally, the rule would harmonize the sander requirement with the Canadian rule by placing a fourteen day limit on service for lead locomotives being used in road service with inoperative sanders.

### *Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Analysis of Impact on Small Entities (AISE) that assesses the small entity impact of this rule. Document inspection and copying facilities are available at the Federal Docket Management Facility located at 1200 New Jersey Ave., SE., W12-140,

Washington, DC 20590. Docket material is also available for inspection on the Internet at <http://www.regulations.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590; please refer to Docket No. FRA-2005-23080.

"Small entity" is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a "small entity" in the railroad industry is a railroad business "line-haul operation" that has fewer than 1,500 employees and a "switching and terminal" establishment with fewer than 500 employees. SBA's "size standards" may be altered by Federal agencies, in consultation with SBA and in conjunction with public comment.

Pursuant to that authority FRA has published a final statement of agency policy that formally establishes "small entities" as being railroads that meet the line-haulage revenue requirements of a Class III railroad. *See* 68 FR 24891 (May 9, 2003). Currently, the revenue requirements are \$20 million or less in annual operating revenue. The \$20 million limit is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment (49 CFR part 1201). The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity.

For this rule over 600 railroads could potentially be affected. The rule will impact all locomotives except those propelled by steam power. Given this application, only railroads that operate steam locomotives exclusively, will be unaffected. For those railroads that will be affected the impact will be minimal, if any. The focus is on permitting additional flexibility in the use of locomotives with inoperative sanders. It is anticipated that the additional flexibility will produce mostly positive impacts, i.e., savings and injury reductions.

The AISE developed in connection with this Final Rule concludes that this rule will not have a significant economic impact on a substantial number of small entities. Thus, FRA certifies that this rule is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or

Executive Order 13272. In order to determine the significance of the economic impact for the final rule's Regulatory Flexibility Act requirements, FRA invited comments in the NPRM. No comments were received.

### *Paperwork Reduction Act*

The rule contains a substantive change of one section of the existing regulation, § 229.131. The modification would not change the current information collection activity. The information collection burden associated with the final rule already exists under § 229.9. OMB clearance for the current rule has been granted and no further approval is sought at this time.

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. The OMB control number assigned for information collection related to this rule is OMB No. 2130-0004.

### *Federalism Implications*

FRA has analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132, issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. *See* 64 FR 43255. This rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government. This rule will not have federalism implications that impose any direct compliance costs on State and local governments.

FRA notes that the RSAC, which endorsed and recommended the majority of the rule to FRA, has as permanent members two organizations representing State and local interests: AASHTO and the Association of State Rail Safety Managers (ASRSM). Both of these State organizations concurred with the RSAC recommendation endorsing this rule. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or of any other representatives of State government. Consequently, FRA concludes that this rule has no federalism implications, other than the preemption of state laws covering the subject matter of this rule, which occurs by operation of law under



49 U.S.C. 20106 whenever FRA issues a rule or order.

#### *Environmental Impact*

FRA has evaluated this regulation 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 regulation 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. Section 4(c)(20) reads as follows:

(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. \* \* \* The following classes of FRA actions are categorically excluded:

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.

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 regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

#### *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 expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$132,300,000 or more (adjusted annually for inflation) 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 rule will not result in the expenditure, in the aggregate, of \$132,300,000 or more in any one year, and thus preparation of such a statement is not required.

#### *Privacy Act*

FRA wishes to inform all potential petitioners for reconsideration that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; pages 19477-78) or you may visit <http://www.regulations.gov>.

#### **List of Subjects in 49 CFR Part 229**

Locomotives, Railroad safety, and Sanders.

#### **The Final Rule**

■ For the reasons discussed in the preamble, FRA amends part 229 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

#### **PART 229—[AMENDED]**

■ 1. The authority citation for part 229 continues to read as follows:

**Authority:** 49 U.S.C. 20102-03, 20107, 20133, 20137-38, 20143, 20701-03, 21301-02, 21304; 28 U.S.C. 2401, note; and 49 CFR 1.49(c), (m).

■ 2. Section 229.5 is amended by adding alphabetically the definitions of "initial terminal" and "sand delivery system" to read as follows:

#### **§ 229.5 Definitions.**

\* \* \* \* \*

*Initial terminal* means a location where a train is originally assembled.

\* \* \* \* \*

*Sand delivery system* means a permanently stationed or fixed device designed to deliver sand to locomotive sand boxes that do not require the sand to be manually delivered or loaded. A sand delivery system will be considered permanently stationed if it is at a location at least five days a week for at least eight hours per day.

\* \* \* \* \*

■ 3. Section 229.9 is amended by revising paragraph (a) introductory text to read as follows:

#### **§ 229.9 Movement of non-complying locomotives.**

(a) Except as provided in paragraphs (b), (c), § 229.125(g), and § 229.131(b) and (c)(1), a locomotive with one or more conditions not in compliance with this part may be moved only as a lite locomotive or a dead locomotive after the carrier has complied with the following:

\* \* \* \* \*

■ 4. Section 229.131 is revised to read as follows:

#### **§ 229.131 Sanders.**

(a) Prior to departure from an initial terminal, each locomotive, except for MU locomotives, shall be equipped with operative sanders that deposit sand on each rail in front of the first power operated wheel set in the direction of movement or shall be handled in accordance with the requirements contained in § 229.9.

(b) A locomotive being used in road service with sanders that become inoperative after departure from an initial terminal shall be handled in accordance with the following:

(1) A lead locomotive being used in road service that experiences inoperative sanders after departure from an initial terminal may continue in service until the earliest of the following occurrences:

(i) Arrival at the next initial terminal;

(ii) arrival at a location where it is placed in a facility with a sand delivery system;

(iii) the next periodic inspection under § 229.23; or

(iv) fourteen calendar days from the date the sanders are first discovered to be inoperative; and

(2) A trailing locomotive being used in road service that experiences inoperative sanders after departure from an initial terminal may continue in service until the earliest of the following occurrence:

(i) Arrival at the next initial terminal;

(ii) arrival at a location where it is placed in a facility with a sand delivery system; or

(iii) the next periodic inspection under § 229.23.

(c) A locomotive being used in switching service shall be equipped with operative sanders that deposit sand on each rail in front of the first power operated wheel set in the direction of movement. If the sanders become inoperative, the locomotive shall be handled in accordance with the following:

(1) A locomotive being used in switching service at a location not equipped with a sand delivery system



may continue in service for seven calendar days from the date the sanders are first discovered inoperative or until its next periodic inspection under § 229.23, which ever occurs first; and

(2) A locomotive being used in switching service at locations equipped with a sand delivery system shall be handled in accordance with the requirements contained in § 229.9.

(d) A locomotive being handled under the provisions contained in paragraph (b) and (c)(1) of this section shall be tagged in accordance with § 229.9(a).

Issued in Washington, DC, on October 16, 2007.

**Joseph H. Boardman,**

*Federal Railroad Administrator.*

[FR Doc. E7-20656 Filed 10-18-07; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

RIN 0648-XD25

#### Fisheries of the Northeastern United States; Atlantic Surfclam and Ocean Quahog Fisheries; Suspension of Minimum Atlantic Surfclam Size Limit for Fishing Year 2008

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

**ACTION:** Temporary rule; suspension of the Atlantic surfclam minimum size limit.

**SUMMARY:** NMFS suspends the minimum size limit of 4.75 inches (120 mm) for Atlantic surfclams for the 2008 fishing year. This action is taken under the authority of the implementing regulations for this fishery, which allow for the annual suspension of the minimum size limit based upon set criteria. The intended effect is to relieve the industry from a regulatory burden that is not necessary, as the majority of surfclams harvested are larger than the minimum size limit.

**DATES:** Effective January 1, 2008, through December 31, 2008.

**ADDRESSES:** Written inquiries may be sent to Patricia A. Kurkul, Regional Administrator, National Marine Fisheries Service, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930-2298.

**FOR FURTHER INFORMATION CONTACT:** Brian R. Hooker, Fishery Policy Analyst, (978) 281-9220; fax (978) 281-9135.

**SUPPLEMENTARY INFORMATION:** Section 648.72(c) of the regulations implementing the Fishery Management Plan (FMP) for the Atlantic Surfclam and Ocean Quahog Fisheries allows the Administrator, Northeast Region, NMFS (Regional Administrator) to suspend annually, by publication of a notification in the **Federal Register**, the minimum size limit for Atlantic surfclams. This action may be taken unless discard, catch, and biological sampling data indicate that 30 percent of the Atlantic surfclam resource is smaller than 4.75 inches (120 mm) and the overall reduced size is not attributable to harvest from beds where growth of the individual clams has been

reduced because of density-dependent factors.

At its June 2007 meeting, the Mid-Atlantic Fishery Management Council voted to recommend that the Regional Administrator suspend the minimum size limit for the 2008, 2009, and 2010 fishing years. In accordance with the provisions of the FMP, the Regional Administrator will publish the suspension of the surfclam minimum size if the proportion of undersized surfclams is under 30 percent of the total surfclam landings for each fishing year.

Commercial surfclam data for 2007 were analyzed to determine the percentage of surfclams that were smaller than the minimum size requirement. The analysis indicated that 8.99-percent of the overall commercial landings were composed of surfclams that were less than 4.75 inches (120 mm). Based on these data, the Regional Administrator adopts the Council's recommendation and suspends the minimum size limit for Atlantic surfclams from January 1 through December 31, 2008.

#### Classification

This action is authorized by 50 CFR part 648 and is exempt from review under Executive Order 12866.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: October 12, 2007.

**Emily H. Menashes,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E7-20639 Filed 10-18-07; 8:45 am]

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