DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 229

[Docket No. FRA 2000–8545, Notice No. 1]

RIN 2130–AA89

Locomotive Cab Sanitation Standards

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

ACTION: Notice of proposed rulemaking.

SUMMARY: FRA proposes to amend its regulations by adding standards that address toilet and washing facilities for employees who work in locomotive cabs. The proposal provides exceptions for certain existing equipment and operations, and establishes servicing requirements.

DATES: *Written Comments:* Written comments must be received on or before March 5, 2001. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

Public Hearing: A public hearing will be held, if requested, in Washington, D.C. to allow interested parties the opportunity to comment on specific issues addressed in the NPRM. FRA will announce at a later date in the **Federal Register** if a hearing has been requested and the date and location of the hearing.

ADDRESSES: *Written Comments:* Submit one copy to the Department of Transportation Central Docket Management Facility located in Room PL–401 at the Plaza level of the Nassif Building, 400 Seventh Street, S.W., Washington, D.C. 20590. All docket material on the proposed rule will be available for inspection at this address and on the Internet at *http://doms.dot.gov.* Docket hours at the Nassif Building are Monday-Friday, 10:00 a.m. to 5:00 p.m., excluding Federal holidays. Persons desiring notification that their comments have been received should submit their comments with a stamped, self-addressed postcard. The postcard will be returned to the addressee with a notation of the date on which the comments were received.

Public Hearing: If requested by a member of the public, the date and location of a public hearing will be announced in this publication. Requests for a public hearing must be in writing, and must be addressed to the FRA docket clerk at the address above.

FOR FURTHER INFORMATION CONTACT: Brenda Hattery, Office of Safety Compliance, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590 (telephone: 202–493–6326), or Christine Beyer, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, D.C. 20590 (telephone: 202–493–6027).

SUPPLEMENTARY INFORMATION:

Background

I. Statutory and Regulatory Framework

The Federal Railroad Administration (FRA) has broad statutory authority to regulate all areas of railroad safety. 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. The older safety laws were enacted in piecemeal approach and addressed specific fields of railroad safety. Pertinent to this proceeding, the Locomotive Inspection Act (the ''LIA''), enacted in 1911, prohibits the use of unsafe locomotives and authorizes FRA to issue standards for locomotive maintenance and testing. (Formerly 45 U.S.C. 22–34, now 49 U.S.C. 20701–20703.) In order to further FRA's ability to respond effectively to contemporary safety problems and hazards as they arise in the railroad industry, the Congress enacted the Federal Railroad Safety Act in 1970 (the ''Safety Act''). (Formerly 45 U.S.C. 421, 431 *et seq.*, now Subtitle V of Title 49.) The Safety Act grants the Secretary rulemaking authority over all areas of railroad safety and confers all 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.)

Pursuant to this statutory authority, FRA promulgates and enforces a comprehensive regulatory program to address railroad track, signal systems, railroad communications, rolling stock, operating practices, passenger train emergency preparedness, alcohol and drug testing, locomotive engineer certification, and workplace safety. In the area of workplace safety, the agency has issued a variety of standards designed to protect the health of railroad employees. For instance, FRA promulgated ladder and handhold requirements for rail equipment in order to prevent employee falls (49 CFR Part 231), and requires locomotive cab floors and passageways to remain clear of debris and oil to prevent employee slips, trips, and falls (49 CFR 229.119). In Part 218, FRA requires blue signal protection to prevent employees working on railroad equipment from injuries due to the unexpected movement of the equipment. FRA addresses the risk of falling from railroad bridges and of being struck by moving trains in 49 CFR Part 214.

As a general rule, FRA exercises its statutory jurisdiction over railroad employee working conditions where employees are engaged in duties that are intrinsic to railroad operations, that could not occur in typical industrial settings, and when the hazard falls within the scope of FRA's expertise to regulate. Often, railroad working conditions are so unique that a regulatory body other than FRA would not possess the requisite expertise to determine appropriate safety standards. Historically, the concept of ''railroad safety'' has been viewed to include the health and safety of employees when they are engaged in railroad operations. In its Statement of Policy concerning employee workplace safety published in 1978, FRA stated

> The term ''safety'' includes health-related aspects of railroad safety to the extent such considerations are integrally related to operational safety hazards or measures taken to abate such hazards.

43 FR 10585. Hazards that impact the health of railroad employees engaged in railroad operations may also result in adverse impacts on railroad safety, and so there is often a logical connection between railroad safety and employee health.

In part 229 of Title 49 of the Code of Federal Regulations, FRA established minimum federal safety standards for locomotives. These regulations prescribe inspection and testing requirements for locomotive components and systems, and minimum locomotive cab safety requirements. However, FRA's existing locomotive safety standards do not require sanitation facilities for employees working in the cab.

The statutory and regulatory treatment of locomotive cab sanitation by the pertinent federal and state bodies is complex, and has caused some confusion in the industry. For purposes of this rulemaking, it is important to understand where the legal tensions occur. Generally, requirements for sanitation in the workplace are governed by the U.S. Occupational Safety and Health Administration (OSHA); [1] however a Federal agency can oust OSHA jurisdiction by issuing sanitation standards of its own, as FRA

[1] *See,* 29 CFR Part 1910 (general industry standards); 29 CFR Part 1926 (construction industry standards); 29 CFR Part 1917 (marine terminals); 29 CFR Part 1918 (longshoring operations); and 29 CFR Part 1928 (agricultural operations).

is proposing to do in this proceeding.[2] OSHA's sanitation standards generally apply to permanent places of employment, and some courts have determined that a locomotive constitutes a 'permanent place of employment' for purposes of OSHA's jurisdiction.[3] However, by operation of an existing legislative option, a state may withdraw from the Federal OSHA program, and develop and enforce its own occupational safety and health regulations.[4] If a locomotive is situated in a 'Federal-OSHA state,' the Federal OSHA standard would most likely apply, so long as the pertinent reviewing court concurred with the determination that a locomotive constitutes a permanent place of employment. However, if the locomotive resides in a 'State-Plan state,' any state locomotive sanitation standard may be nullified because the LIA has been interpreted to occupy the field of locomotive safety, including appurtenances in locomotives. Consequently, the LIA would preempt state provisions relating to appurtenances in locomotives,[5] and federal courts have held that a toilet constitutes an appurtenance.[6] Conversely, and despite the prevailing alternate view, certain state courts in 'Federal-OSHA states' have ruled that the LIA does not preempt state regulation of flush toilets on locomotives, and those states have promulgated and enforce such standards within their boundaries.[7]

In 1992, Congress enacted Section 10 of The Rail Safety Enforcement and Review Act (RSERA) (Public Law 102–365, September 3, 1992, codified at 49 U.S.C. 20103, note) in response to concerns raised by employee organizations, congressional members, and recommendations of the National Transportation Safety Board concerning working conditions in locomotive cabs. In this legislation, Congress included mandates concerning locomotive crashworthiness and cab working conditions. Section 10 of RSERA, entitled Locomotive Crashworthiness and Working Conditions, required FRA ''to consider prescribing regulations to improve the safety and working conditions of locomotive cabs'' throughout the railroad industry. In order to determine whether regulations would be necessary, Congress asked FRA to

> assess the extent to which environmental, sanitary and other working conditions in locomotive cabs affect productivity, health and the safe operation of locomotives.

The interest Congress placed on locomotive cab sanitation reflected concerns for railroad safety, employee productivity, and the serious health consequences that may result if employees are exposed to unsanitary conditions or lack access to facilities. It is widely known that exposure to human fecal matter or untreated sewage waste can lead to diarrheal diseases such as amebiasis, giardiasis, shigellosis and viral diseases such as hepatitis. Transmission of some illnesses can occur through physical contact with waste, or with the toilet or other surfaces used by an infected human. Given the right environmental conditions, transmission may also occur through inhalation of affected microorganisms. In addition, disease transmission may occur through hand-to-mouth ingestion after physical contact with an infected source. The risk of contracting these illnesses underscores the importance of maintaining clean, operable toilet and washing facilities in the workplace, including locomotive cabs.

In addition to the disease transmission concerns outlined above, there are health affects that may arise when access to toilet facilities is limited or prevented. Healthy adults consuming the recommended amounts of fluids can expect to void once every four hours during the day and once during the night. The urination process begins when the kidneys filter waste and water from the blood to form urine. The urine travels to the bladder and the nervous system sends 'full' signals to the muscles that it is time to urinate. If urination doesn't occur when needed, incontinence, urinary tract infections, and kidney infections may occur. Prolonged distention of the bladder may lead to a disturbance of the elastic components of the bladder wall, which could weaken the evacuation power of the bladder. When the bladder is unable to empty completely, residual urine remains and can cause infection. Delaying bowel movements can lead to chronic constipation and other intestinal problems, and chronic constipation is often a factor in abnormal bladder emptying. In addition, a variety of health conditions may alter or increase the need to urinate and defecate, including pregnancy, benign prostate hypertrophy, prostate cancer, prostatitis, renal stone disease, hypertension, diabetes, stroke, and conditions of the central nervous system and spinal cord. These factors underscore the importance of providing adequate access to toilet and washing facilities for employees in the workplace.[8]

In response to the Congressional mandate set forth in Section 10 of RSERA, FRA studied a variety of working conditions in locomotive cabs, including sanitation, noise, temperature, air quality, ergonomics, and vibration. FRA prepared the Locomotive Crashworthiness and Cab Working Conditions Report to Congress (''Report''), dated September 1996, that outlines the results of these studies. (The Report is available for review in the docket of this matter.)

II. The Report to Congress

FRA conducted a survey of locomotive cab sanitation facilities and an evaluation of the chemicals used to clean, disinfect, and deodorize toilets. The primary focus of the survey was equipment owned by Class I railroad carriers, but units operated by small entities were also included in the study. FRA found a wide range of conditions in the course of the survey. The conditions varied due to many factors, including weather, type of sanitation system in place, carrier maintenance and service programs, and locomotive model. In addition, some locomotives surveyed were not equipped with sanitation facilities.

FRA surveyed 234 locomotives during both typical and environmentally extreme working conditions. As the Report states, FRA found unsanitary, unpleasant conditions, and in some instances, inoperable units. FRA inspectors observed dirty floors and toilet seats, missing toilet seats, poor ventilation, offensive odors, and lack of

[2] 29 U.S.C. 653(b)(1).

[3] *State of Maine* v. *Springfield Terminal Ry.,* CV–90–258, citing *Gade* v. *National Solid Waste Management Ass'n,* 505 U.S. 88 (1992).

[4] 29 U.S.C. 667.

[5] *Napier* v. *Atlantic Coast Line RR.,* 272 U.S. 605 (1926).

[6] *CSX Transportation* v. *Pitz,* 699 F.Supp. 127 (W.D. Mich. 1988).

[7] *Norfolk and Western Ry.* v. *Pennsylvania Public Utility Comm'n,* 413 A.2d 1037 (Pa. 1980).

[8] *See,* Rowland RG, Foster RS, Donohoe JP, *Adult and Pediatric Urology,* St. Louis, Mosby-Year Book, Inc. (1996); Barry MJ, Fowler, FJ, Bin L, Pitts CJ, Mulley AG, *The Natural History of Patients with Benign Prostatic Hyperplasia as Diagnosed by North American Urologists,* J. Urol., 157, 10–15, (1997); Lapides, J., *The Key to Urinary Infection,* The Female Patient, 5, 11–13 (1980); Lapides, J., *Primary Cause of Recurrent Urinary Tract Infection in Women,* Journal of Urology, 100, 552–555 (1968); Darlow, H.M. and Bale, W. R., *Infective Hazards of Water-Closets,* Lancet 1: 1196–1200 (1959); Hendlev, J., Wenzel, H., Gwaltney, H., *Transmission of Rhinovirus C Colds by Self-Inocculation,* New England Journal of Medicine, 288, 1361–1364 (1973); Gaber, C., Wallis, C., and Melnick, J., *Microbiological Hazards of Household Toilets: Droplet Production and the Fate of Residual Organisms,* Applied Microbiology 30: 229–236 (1975); U.S. Occupational Safety and Health Administration, *Field Sanitation, Final Rule,* 52 FR 16050 (1987).

toilet paper. During the winter months, FRA inspectors noted that certain toilet systems would freeze and become inoperable. Of the cabs surveyed, approximately thirty percent were deficient in some manner related to the use of sanitation facilities.

During the survey, FRA determined that both employees and railroads play a role in the condition of sanitary facilities; poor sanitary conditions aboard locomotives are caused by inadequate maintenance and/or heavy use or misuse by operating crews. FRA determined that most railroad carriers have programs in place to service toilet and washing units, and that the program requirements often vary from property to property depending on degree of use, toilet system in place, and weather conditions. In addition, FRA found that adherence to the servicing programs is uneven throughout the industry, and that in many situations, poor servicing is the primary cause of unsanitary, offensive sanitation facilities.

FRA also determined that nearly all of the cleaning agents used to disinfect and deodorize locomotive cabs are over-the-counter products available to the general public. However, a small percentage of the cleaning agents used involve health risks, and so management supervision and employee training must take place in order to safeguard employee health. The Report explains that the locomotive safety standards (49 CFR part 229) do not require sanitation facilities in locomotive cabs, and some of the oldest equipment surveyed had no sanitation facilities on board. The Report also notes that there is some disparity in the legal treatment of sanitation in locomotive cabs among state and federal regulatory and enforcement bodies (as discussed in greater detail above), and confusion exists among industry members concerning applicable standards and guidelines.

In conclusion, the Report notes FRA's concern about the potential for disparate regulatory treatment of sanitation in locomotives, and the unsanitary conditions that existed on some properties. Nonetheless, given the significant role that basic servicing plays in creating a sanitary workplace, and the relative ease with which servicing programs may be instituted, FRA was hopeful that the issue of locomotive sanitation could be resolved through management and labor cooperation to resolve the problem of absent, defective, or unsanitary facilities on locomotive cabs.

III. Railroad Safety Advisory Committee Recommendations to FRA

Following publication of the Report, FRA continued to receive employee complaints about the state of sanitation in locomotive cabs, and the health and safety risks associated with working in an unsanitary area. Generally, throughout the national railroad system, employees continued to encounter dirty conditions and facilities in need of maintenance, and in some circumstances, difficulty in obtaining access to facilities at all.

FRA also received complaints from employees of one carrier concerning the disposal method required by a particular sanitation system in use. The system, by design, involves the placement and temporary storage of plastic bags containing untreated waste into sealed waste containers, and presents perceived health concerns to some who handle the bags, and others in proximity to the waste containers. In addition, there were concerns about the expansion of this system as the railroad's territory increased, the increase of 'power sharing' arrangements among the carriers, and the administrative difficulties that would arise in maintaining disparate systems as railroad equipment is mixed among carriers.

Finally, some State agencies expressed frustration with FRA concerning the practical effect of the interplay of OSHA's program, the broad preemption provisions found in the LIA, and the uneven treatment given locomotive sanitation by the state and federal courts. The presence of LIA preemption and the inconsistent application of locomotive cab sanitation standards prevented certain State agencies from regulating this area of sanitation.

In light of these concerns, FRA determined that cab sanitation must be revisited and addressed so that cab employees would have access to adequate sanitary facilities, and to ensure uniform application of the law. Despite the considerable acrimony that had developed in the industry surrounding this issue, FRA remained convinced that it should be addressed cooperatively, with the assistance of the stakeholders who possess the knowledge and expertise to resolve the problem effectively. Therefore, on June 24, 1997, FRA presented the subject of locomotive cab working conditions, including sanitation, to the Railroad Safety Advisory Committee (RSAC).

RSAC was formed by FRA in March 1996 to provide a forum for consensual rulemaking and program development. The Committee includes representation from all of the agency's major customer groups, including railroad carriers, labor organizations, suppliers, manufacturers, and other interested parties. FRA typically assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. If a working group comes to consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of the RSAC, the proposal is formally recommended to FRA. If the working group is unable to reach consensus on recommendations for action, FRA will move ahead to resolve the issue through traditional rulemaking proceedings.

When FRA presented the subject of locomotive cab working conditions to RSAC in June 1997, the agency stated the purpose of the task as follows: to safeguard the health of locomotive crews and to promote the safe operation of trains. RSAC accepted this task, formed a Locomotive Cab Working Conditions Working Group (''Working Group''), and designated this assignment Task No. 97–2. As to sanitation, RSAC asked the Working Group to

> Research comparable workplace requirements in an effort to develop minimum acceptable regulations, guidelines, or standards as appropriate for the locomotive cab environment.

The Working Group established by RSAC consists of representatives of the following organizations, in addition to FRA:

American Association of State Highway & Transportation Officials
American Public Transit Association
American Short Line and Regional Railroad Association
Association of American Railroads
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employes (Nonvoting Member)
International Brotherhood of Electrical Workers
National Railroad Passenger Corporation (Amtrak)
Railway Progress Institute
Sheet Metal Workers' International Association
Transport Workers Union of America
United Transportation Union

The Working Group's goal was to produce recommendations for locomotive cab sanitation standards

warranted by an assessment of the available information and data, including the FRA survey of sanitary facilities and complaint information. The Working Group, or its designated subgroup, met regularly over a period of 15 months to discuss locomotive cab sanitation in the railroad industry. The discussions covered all aspects of sanitation facilities in the locomotive cab, including toilet systems, washing facilities, potable water, ventilation, lighting, trash disposal, provisions for toilet paper and bottled water, servicing, and unique operations or characteristics that might require specialized regulatory treatment.

As a result of its deliberations, the Working Group provided to the full RSAC recommendations for locomotive cab sanitation standards. On December 7, 2000, the full RSAC voted to forward these recommendations to FRA for rulemaking action, and in large measure, this Notice of Proposed rulemaking (NPRM) incorporates the Working Group's product. FRA worked closely with the Working Group in the development of its recommendations, and believes they comprehensively and effectively address sanitation for cab employees. FRA has greatly benefitted from the open, informed exchange of information that has taken place in the Working Group meetings. Although all participants may not agree on each recommendation offered, there is general consensus among labor, management, and manufacturers concerning the primary principles FRA sets forth in this NPRM. FRA believes that the expertise the Working Group industry representatives possess enhance the value of the recommendations, and FRA has made every effort to incorporate them in this proposal. Also, FRA and the Working Group will reassemble after the comment period for this NPRM has closed to consider all comments received, and make recommendations concerning development of a final standard.

IV. Regulatory Treatment of Sanitation by Other Governmental Agencies

In addition to incorporating many of the recommendations of the Working Group in this proposal, FRA reviewed the existing body of regulatory requirements concerning sanitation in the workplace across the governmental spectrum, in order to gain insight on useful regulatory approaches to a subject that is fraught with subjectivity and potential enforcement difficulties. FRA has utilized language and fundamental concepts from these standards, where appropriate, to ensure that railroad employees receive at least an equivalent level of protection as other employees in the United States. Listed below is a summary of the regulatory treatment of potable water, toilet and washing facilities, and access to facilities, which FRA reviewed in preparation of this proposal. This summary is not exhaustive, but attempts to capture the overall regulatory approach taken to the topic of sanitation in the workplace.

Potable Water

In common parlance, potable water is water that is fit or safe to drink. Generally, regulations promulgated by the U.S. Food and Drug Administration (FDA) and the U.S. Environmental Protection Agency (EPA) govern the quality and public consumption of water. As part of FDA's program to control communicable diseases (21 CFR part 1240) and to control interstate conveyance sanitation (21 CFR part 1250), FDA requires operators of a conveyance engaged in interstate traffic to provide only potable water for drinking and culinary purposes. 21 CFR 1240.80 and 1250.82. Interstate traffic is ''the movement of any conveyance or the transportation of persons or property'' within a State and between states, but does not include movement exclusively for repair, rehabilitation, or storage. 21 CFR 1240.3(h). The term ''conveyance'' means any land or air carrier, and most passenger ships and towing vessels. 21 CFR 1250.3(e).

OSHA regulates the quality of water in most workplaces, and requires employers to provide potable water for drinking, washing, and cooking. 29 CFR 1910.141(b), 29 CFR 1926.51(a). These OSHA standards would not apply to workplaces covered by another federal agency's regulations on point; where Memoranda of Understanding between OSHA and other federal agencies oust OSHA's authority; where operation of statutory preemption clauses oust OSHA's authority; or where OSHA has approved a State to address occupational safety and health issues. 29 U.S.C. 651, *et seq.* (For the most part, states that have chosen to run their own occupational safety and health program, issue standards quite similar to the federal OSHA standard, except where a local concern requires more rigorous treatment.)

FDA defines potable water as water that meets EPA's Primary Drinking Water Regulations, which are set forth in 40 CFR part 141. EPA's primary drinking water standards do not succinctly define potable water; rather, the standards set maximum contaminant levels (MCL's) for organic and inorganic chemicals and contaminants, turbidity, radium, particle radioactivity, and other hazardous agents that may not be exceeded in public water systems. The EPA standards also prescribe monitoring, notification, filtration, and disinfection requirements, and address the control of lead and copper in public water systems. Therefore, FDA requires public water systems used for human consumption to meet all of the MCL's and administrative standards set forth in EPA's standards.

OSHA defines potable water in essentially identical fashion [29 CFR 1910.141(a)(v), 29 CFR 1926.51(a)(6)], but the definition includes an outdated citation, which may unnecessarily confuse the issue. OSHA states that potable water is water that meets the quality standards set forth in the U.S. Public Health Service Drinking Water Standards, located at 42 CFR part 72. The Public Health Service administered federal safe drinking water programs prior to EPA, but EPA's current standards (40 CFR part 141) supersede the old regulations referred to in OSHA's definition.

Where nonpotable water is in use, FDA and OSHA require operators and employers to post signs to indicate that the water is not suitable for drinking, washing, or culinary purposes. 29 CFR 1910.141(b)(2), 29 CFR 1926.51(b), 21 CFR 1250.67(b). In addition, systems that carry nonpotable water or other nonpotable substances must be designed and operated to prevent backflow or seepage into the potable water system. 29 CFR 1910.141(b)(2); 29 CFR 1926.51(b); 21 CFR 1250.30(d), 1250.42, and 1250.67. Nonpotable water may be used for cleaning work premises in limited circumstances and where the nonpotable water doesn't contain unsanitary or harmful products such as chemicals and fecal coliform. Nonpotable water may not be used for cleaning areas where food preparation takes place, or in toilet, shower or wash rooms. 29 CFR 1920.141(2).

FDA requires water systems in conveyances to be ''complete and closed from the filling ends to the discharge taps, except for protected vent openings.'' In addition, filling pipes or connections used for filling tanks on conveyances, must be positioned on both sides of all new railway conveyances and on existing conveyances when they undergo heavy repairs. The filling connections must be easy to clean, and located and protected to minimize the risk of contamination. On all new or reconstructed conveyances, water coolers must be an integral part of the closed water system.

Water filters may be used only if they are maintained to prevent contamination. Constant temperature bottles and other containers used for storing potable water must be kept clean and subjected to effective bacteriological treatment as necessary to prevent any contamination. 21 CFR 1250.42. (In another section of part 1250, FDA defines ''new railroad conveyance'' as ''any conveyance placed into service for the first time after July 1, 1972.'' 21 CFR 1250.51. Presumably this definition applies to all requirements in part 1250, but that is unclear from the structure of the subpart.)

FDA has authority to approve water systems. Generally, FDA approves watering points that meet EPA's Primary Drinking Water Regulations, and where the methods of delivery, facilities used for delivery, and the sanitary conditions surrounding the delivery of water prevent the introduction, transmission, or spread of communicable diseases. This approval may be based on the investigations of State departments of health. 21 CFR 1240.83. The FDA will approve the treatment of water aboard conveyances if the system or apparatus produces potable water. This approval may be based on investigations conducted by State representatives. 21 CFR 1240.90.

The states may regulate the quality and consumption of water through their general public health authority. Generally, the states define and treat the subject of potable water in the same way that federal agencies do. The term is defined in a number of ways, but all have essentially the same meaning: Water that has been approved by the State department of health (Tennessee); water that is fit for human consumption in accordance with accepted water supply principles and practices (Illinois); water that complies with the standard for water systems under the California Safe Drinking Water Act (California); water that is safe for drinking, culinary, and domestic purposes, and which meets the requirements of the department of health (Colorado); or water having bacteriological, physical, radiological, and chemical qualities that make it safe and suitable for human drinking, cooking, and washing uses (Louisiana). The states generally require that only potable water be used for human consumption, and any sources that contain nonpotable water must be marked as unsuitable for consumption.

Toilet and Washing Facilities

OSHA's general industry standards (29 CFR part 1910) and construction industry standards (29 CFR part 1926) set forth federal standards for toilet and washing facilities that apply to most workplaces. The general industry standards require employers to provide toilet facilities at all places of employment, except where mobile crews or typically unattended work locations are involved. 29 CFR 1910.141(c). In the case of mobile crews and unattended work stations, employers may avoid providing toilet facilities, so long as ''these employees working at these locations have transportation immediately available to nearby toilet facilities.'' OSHA defines toilet facility as a fixture maintained within a toilet room for the purposes of defecation or urination, or both. 29 CFR 1910.141(a)(2). The general industry standards require employers to provide specific numbers of toilets, based on the number of employees at the site. The sewage disposal method must not endanger the health of the employees. 29 CFR 1910.141(c).

With regard to temporary labor camps, OSHA's general industry standards require employers to provide toilet facilities ''adequate for the capacity of the camp.'' 29 CFR 1910.142(d). The toilet rooms must be located within 200 feet of the sleeping rooms, and the number of toilets provided must be in a ratio of one per 15 employees. 29 CFR 1910.142(d). The toilet rooms must be lighted naturally or artificially with other ''safe lighting at all hours of the day and night,'' and ''an adequate supply of toilet paper must be provided.'' Toilets must ''be kept in a sanitary condition'' and ''cleaned at least daily.'' 29 CFR 1910.142(d).

OSHA's construction standards require employers to provide toilets at all sites. Under temporary field conditions, employers must provide at least one toilet. 29 CFR 1926.51(c). However, job sites not equipped with a sanitary sewer must have a privy, chemical toilet, recirculating toilet, or combustion toilet, unless prohibited by local health codes. 29 CFR 1926.51(c)(3). These requirements do not apply to mobile crews so long as the crews have ''transportation readily available to nearby toilet facilities.'' 29 CFR 1926.51(c)(4).

In addition to the construction and general industry standards, OSHA has promulgated standards for marine work sites, longshoring operations, and agricultural workers. The standards for marine terminals (29 CFR 1917.127) and longshoring operations (29 CFR 1918.95) are nearly identical. Marine terminal employers must provide ''accessible washing and toilet facilities sufficient for the sanitary requirements of employees.'' Longshoring operations must ''provide accessible washing and toilet facilities sufficient for the sanitary requirements of employees'' that are ''readily accessible at the work site.'' The marine and longshoring facilities must include water, soap, hand towels or blowers, and fixed or portable toilets with latch-equipped doors, and the washing and toilet facilities must ''be regularly cleaned and maintained in good order.''

OSHA's regulations for field sanitation in the agricultural industries (29 CFR 1928.110) apply to any agricultural establishment where 11 or more employees are engaged on any given day in hand-labor operations in the field. OSHA defines toilet facility here as

> a fixed or portable facility designed for the purpose of adequate collection and containment of the products of both defecation and urination, which is supplied with toilet paper adequate to employee needs. Toilet facility includes biological, chemical, flush and combustion toilets and sanitary privies.

These toilet facilities must be ''adequately ventilated,'' screened, and have doors that can be locked. The toilet facilities must be ''maintained in accordance with appropriate public health sanitation practices,'' must ''be operational and maintained in clean and sanitary condition,'' and ''disposal of wastes from facilities shall not cause unsanitary conditions.''

FDA has promulgated standards for toilet facilities on conveyances. Toilet and lavatories for food-handling employees must be of ''suitable design and construction'' and must be ''maintained in a clean condition.'' 21. CFR 250.38. In addition, FDA requires that

> where toilet and lavatory facilities are provided on conveyances they shall be so designed as to permit ready cleaning. On conveyances not equipped with retention facilities, toilet hoppers shall be of such design and so located as to prevent spattering of water filling pipes or hydrants.

21 CFR 1250.50. When railroad conveyances that are ''occupied or open to occupancy by travelers, are at a station or servicing area,'' toilets must be kept locked unless measures are taken to prevent contamination of the area or station. 21 CFR 1250.51(c). Human waste may not be discharged from any new railroad conveyance, except at servicing areas approved by the FDA. However, human waste that has been treated to prevent the spread of communicable diseases may be discharged from conveyances, except at stations. 21 CFR 1250.51(a). New railroad conveyance used here means any equipment placed into service after

July 1, 1972. Equipment initiated into service prior to July 1972, may not discharge untreated waste, except where a passenger conveyance operator has filed for and received an extension of time in which to comply. 21 CFR 1250.51(b).

OSHA's general industry standards require that washing facilities ''be maintained in a sanitary condition.'' Lavatories must be provided in all places of employment. However, lavatories need not be present where mobile crews or unattended work sites are involved, so long as employees at these locations have ''transportation readily available to nearby washing facilities.'' 29 CFR 1910.141(d). Each lavatory must have hot and cold, or tepid running water; hand soap or similar cleansing agent; and hand towels or blowers. For purposes of these requirements, lavatory is ''a basin or similar vessel used exclusively for washing of the hands, arms, face, and head.'' 29 CFR 1910.141(a).

OSHA's construction industry standards require employers to provide adequate washing facilities for

> employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees. Such facilities shall be in near proximity to the work site and shall be so equipped as to enable employees to remove such substances.

29 CFR 1926.51(f). Washing facilities must be ''maintained in a sanitary condition.'' Lavatories must be provided at all work sites, except where mobile crews or unattended work sites are involved and employees at these locations have ''transportation readily available to nearby washing facilities.'' Lavatories must have hot and cold, or tepid running water; hand soap or similar cleansing agents; and hand towels or blowers. 29 CFR 1926.51(f).

OSHA's regulations for marine terminals and longshoring activities require employers to provide washing facilities that include, hot, cold, or tepid running water at one accessible location. Where work is being done away from permanent facilities, potable water may provided in lieu of running water. 29 CFR 1917.127(a); 29 CFR 1918.95(a). Also, the facilities must include soap, and hand towels or blowers. The washing facilities must be ''regularly cleaned and maintained in good order.''

OSHA's washing standards for agricultural operations where 11 or more employees are working on any given day, require one hand washing facility for every 20 employees. 29 CFR 1928.110(c)(2). Hand washing facility means a ''basin, container, or outlet with an adequate supply of potable water, soap and single-use towels.'' 29 CFR 1928.110(b). Washing facilities must be maintained

> in accordance with appropriate public health sanitation practices, including * * * hand washing facilities shall be refilled with potable water as necessary to ensure an adequate supply and shall be maintained in a clean and sanitary condition. * * *

29 CFR 1928.110(c)(3).

Generally, the federal OSHA workplace sanitation standards preempt state workplace sanitation standards, except where a state has chosen to operate its own occupational safety and health regulatory program. These programs must be approved by OSHA. [The State-Plan States are Alaska, Arizona, California, Connecticut, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (covers public employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, Wyoming.] The State-Plan states inspect and enforce their state standards utilizing state personnel. Any fines collected go into the federal general treasury fund, which are usually syphoned back to OSHA and then to the state.

For the most part, the State-Plan states adopt and enforce the federal OSHA general industry (29 CFR part 1910) and construction industry (29 CFR part 1926) standards concerning sanitation facilities in the workplace. However, some of the State-Plan states may adopt a different standard. For instance, California has issued regulations in the State Labor Code, Sanitary Conditions in Factories and Establishments, which provide

> Every factory, workshop, mercantile or other establishment in which one or more persons are employed, shall be kept clean and free from the effluvia arising from any drain or other nuisance, and shall be provided, within reasonable access, with a sufficient number of toilet facilities for the use of the employees. Where there are five or more employees who are not all of the same gender, a sufficient number of separate toilet facilities shall be provided for the use of each sex, which shall be plainly so designated.

Cal. Lab. Code section 2350. The State has also issued several sanitation standards for food establishments that include employee facilities. In general, the standards provide that sanitation facilities must be kept separate from food processing and handling, toilet paper must be provided, and the facilities must be ''maintained in a clean and sanitary condition.'' Cal Health & Saf Code section 113335. For milk product plants, California provides that ''a suitable toilet, with self-closing door, and lavatory facilities, soap, and clean towels shall be provided for employees.'' Cal Food & Agr Code section 33777. Also, California adopted a standard for toilets in railroad cabooses:

> It shall be unlawful for any owner or operator of a railroad running through * * * California * * * to operate for or transport the public or its employees in a caboose which is not provided with flush-type toilet facilities, or chemical type toilet facilities. * * *

Cal Pub Util Code section 7614.

Oregon has promulgated sanitation standards that vary slightly from the federal OSHA standards. For instance, Oregon's sanitation requirements for construction projects provide that every construction project estimated to cost $1 million or more must have toilet facilities and facilities for maintaining personal cleanliness for employees. The workplace must include flush toilets, and washing facilities with warm water, wash basins, and soap. ORS section 654.150. Oregon also enforces sanitation standards for agricultural workers, and requires toilet facilities to be ''maintained in clean and sanitary condition.'' In addition, ''hand washing facilities must provide clean water, soap or other suitable cleansing agent, paper towels, and a method for disposal of used towels.'' ORS section 654.174.

Aside from these State-Plan state regulations, a few states that are generally covered by the federal OSHA program have promulgated sanitation standards for employees not covered by the OSHA's standards. Texas issued sanitation standards that apply to employees of city, county, and state offices, who are typically exempted from OSHA's protections. These regulations require that ''adequate toilet facilities'' and water closets be provided, and that the sewage or treatment system comply with the local health authority requirements. 25 TAC section 295.106(n)(2). For purposes of this requirement, ''toilet facility'' is a water-flushed fixture maintained in a toilet room for the purpose of defecation, and ''water closet'' is a toilet facility that is connected to a sewer and flushed with water. 25 TAC section 295.106(d).

The Texas standard also includes ventilation rates that must be met. If there is no applicable local ventilation requirement, the standard imposes a rate measured in cubic feet, per minute, per person. Also, the standard references ventilation recommendations published by the American Society of Heating and Ventilation Engineers and

the American Conference of Governmental Industrial Hygienists. The standard requires toilet rooms to be provided with a minimum ventilation rate of 35 cubic feet of air per minute, per water closet or urinal installed. 25 TAC section 295.106(k). An ''adequate supply of toilet paper with holder shall be provided at every water closet.'' 25 TAC section 295.106(n). The Texas standard also permits the use of chemical toilets, so long as they are maintained ''in a sanitary condition'' and are the type approved by local health authorities. 25 TAC section 295.106(q).

Also, Texas has issued sanitation regulations that apply to temporary places of employment, including maintenance-of-way operations on railroads, agricultural operations, transitory or seasonal work, and work of a mobile nature that may involve a series of locations and movement between them. 25 TAC section 295.161. These regulations do not apply to places of employment already covered by federal OSHA standards or to the operation of railroad rolling stock. Employers who have no more than ''6 employees working at a temporary place of employment on any work day may, on such days,'' are exempt from providing toilet and hand washing facilities, so long as the employer arranges for ''immediate transportation'' to nearby facilities. Employers must provide toilet facilities for all temporary places of employment, that are ''readily accessible to all employees during all working hours and rest periods.'' The facility may be fixed or portable. 25 TAC section 295.166(a). Toilet facility is a ''plumbing device for the purpose of defecation or urination, or both, including water closets and biological or chemical toilets and urinals.'' 25 TAC section 295.162. Toilet rooms and facilities must be

> maintained in a sanitary condition, free of objectionable toilet odors, during all work hours and rest periods. * * * An adequate supply of toilet paper in a suitable holder shall be maintained for each toilet. Covered waste receptacles shall be provided in all toilet rooms used by women.

25 TAC section 295.166(a)(6). Texas has one of the few standards that attempts to define ''sanitary condition.'' It is ''that condition of good order and cleanliness which precludes the probability of disease transmission.'' 25 TAC section 295.162.

This Texas standard also sets specifications for toilets at fixed facilities and portable toilets. At fixed facilities, the toilets must be in a compartment equipped with a latch, installed so that the space around it can be easily cleaned, and provided with some sort of ventilation. Portable toilet facilities must be readily accessible, private, ventilated mechanically or by use of screening, and where waste is stored in a tank, the tank must be vented to the outside. 25 TAC section 295.166(b). In temporary places of employment, employers must provide hand washing facilities that are convenient and maintained in a sanitary condition. They must have running, potable water, a ''suitable cleansing agent,'' and hand towels and proper receptacles for disposal. 25 TAC section 295.167(a).

Access to Sanitation Facilities

The federal OSHA general industry and construction industry standards require employers to provide sanitation facilities at nearly all work sites. However, where mobile crews or unattended work locations are involved, sanitation facilities are not required on-site so long as employees ''have transportation immediately available to nearby toilet facilities'' that otherwise meet the federal requirements. 29 CFR 1910.141; 29 CFR 1926.51(c). In addition to the concept of the presence of facilities, the employer must permit employees to use the available facilities as the need arises. In a recent interpretation released April 6, 1998, OSHA explains that employers may not impose unreasonable restrictions on employee use of sanitary facilities. In support of this interpretation, OSHA states that this view is implicit in the language of the regulation. Furthermore, OSHA states that individuals vary greatly as to the frequency with which they need to use sanitary facilities. This is due to a variety of factors, including pregnancy, stress incontinence, prostatic hypertrophy, use of certain medications, environmental factors such as cold temperatures, high fluid intake, and diet. Access to toilet facilities as needed is critical to preventing the adverse health affects that may develop from voluntary retention.

OSHA regulates access to sanitary facilities in the marine terminal, longshoring, and agricultural workplaces as well. In the marine terminal standards, the access issue is handled minimally: ''the employer must provide accessible washing and toilet facilities sufficient for the sanitary requirements of employees.'' 29 CFR 1917.127 (a). The treatment is similar in the longshoring regulation: ''Accessible washing and toilet facilities sufficient for the sanitary requirements of employees shall be readily accessible at the work site.'' 29 CFR 1918.95(a).

OSHA's agricultural field sanitation standards (29 CFR 1928.110) provide more detail in outlining how an employer must provide access to sanitary facilities. Toilet and hand washing facilities must be ''accessibly located'' and in close proximity to each other. The facilities must be located ''within a one-quarter mile walk'' of each hand laborer's location in the field. If this is not possible because of the local terrain, the facility must be located ''at the point of closest vehicular access.'' Also, access to on-site toilet and hand washing facilities is not required at all for employees who perform field work for a period of 3 hours or less, including transportation time to and from the field during the work day. Employers must notify employees of the location of the sanitation facilities and water, and must give employees ''reasonable opportunities during the workday to use them.'' OSHA also requires agricultural employers to explain the importance of good hygiene, such as using all facilities, drinking sufficient water, washing hands, and so forth.

For the most part, the states regulate access to sanitation facilities in similar fashion. There are a few notable exceptions. Texas' standard for sanitation at temporary places of employment requires that where a site has only 6 employees on any given work day, the employer may avoid providing on-site facilities so long as the employer has arranged for ''immediate transportation for these persons to travel to and from nearby facilities.'' 25 TAC 295.161(d). Also, the Texas standard sets a maximum unimpeded walking distance of no more than 440 yards (400 meters or ¼ mile) from the work site to the facility. If the walk is impeded (requires some climbing), the distance must be shorter, and not to exceed 5 minutes. If it is not possible to comply with this travel distance, the employer must provide facilities at the nearest possible location, and must arrange for transportation during both work and rest periods for immediate travel to and from the facilities. The time needed to reach the facility may not exceed 5 minutes. 25 TAC 295.161(f). The Texas sanitation standard for temporary workplaces also requires that facilities be ''readily accessible to all employees during all working hours and rest periods.'' 25 TAC 295.166(a).

North Dakota has issued sanitation regulations that address access in a different manner than OSHA. The North Dakota standard requires facilities to be

> readily accessible to all employees. Toilet facilities so located that employees must use

more than one floor-to-floor flight of stairs to or from them are not considered as readily accessible. As far as is practicable, toilet facilities should be located within two hundred feet of all locations at which workers are regularly employed.

N.D. Admin. Code 33–03–20–06.

Section-by-Section Analysis

It is important to note that FRA's proposed rule text set forth below differs in some respects from the other federal and state standards because of the unique characteristics of the railroad operating environment. The working environment for railroad cab employees is quite different than the typical American worker. Existing locomotive toilet systems and corresponding maintenance needs are not uniform throughout the industry. Employees may work on a different locomotive and a variety of routes each day of the week. Employee assignments and actual time spent in the cab may vary significantly during a typical week, and toilet systems might vary significantly on each of these occasions. The time it takes to complete a particular route might vary greatly from day-to-day, due to traffic, load, and weather conditions. Small operators typically possess older equipment, and some units may not be equipped with toilet facilities at all. On these properties, employees may generally have access to adequate sanitation facilities along the right-of-way, but there may be occasions when that is difficult to achieve.

There are significant economic and operational barriers to requiring a ''one-size-fits-all'' sanitation standard, given all of these factors, and consequently FRA has made every effort in this proposal to be flexible. The basic requirement set forth in the proposal is that each cab employee should have access to clean, operable toilet facilities, as the need arises for each individual. There may be instances where that basic principle is frustrated, but FRA believes the proposal minimizes that likelihood to the fullest extent possible.

Definitions

The NPRM begins with proposed definitions for key terms used, which would be placed in section 229.5 with the other definitions established for part 229. The definitions are set forth alphabetically. For the terms commuter service, switching service, and transfer train service, please see the detailed discussion of the exceptions to the general requirements, discussed in conjunction with section 229.137(b) below. The proposed definition of the term modesty lock relates to a rudimentary lock that would be required on the door of the sanitation compartment. As proposed, the modesty lock is a lock or latch that is operated by the occupant of the sanitation compartment to provide privacy while in use. It is not required that a modesty lock be designed to prevent deliberate forced entry. For example, some locks could be designed to provide emergency access, to accommodate carrier concerns that access may be required in the event of an accident or health problem. Such access could be gained, for example, by using a coin to turn a slotted pin or using a pencil inserted into a hole to slide a latch. Such simple measures would prevent inadvertent intrusion, thereby maintaining privacy while allowing prompt emergency access. Most locomotives are now equipped with a modesty lock that would meet the proposed definition, and these existing locks vary from property to property. In addition, there are a variety of products available on the market that would meet the requirements of this proposed definition, which vary in price, sophistication, and size. For example, a very simple surface-applied slide latch may be employed to meet the requirements of the proposed definition. At this time, FRA sees no need to prescribe more specific requirements for the modesty lock, so that each railroad carrier may choose the best device among the variety of products available to suit their equipment and cost needs, and so that existing locks which serve the intended purpose of privacy may remain in place.

The proposed definition for potable water references the requirements of the U.S. Environmental Protection Agency drinking water standards, which are recognized as the pertinent reference standard. This proposed definition also states that commercially available bottled water is deemed to be potable water for purposes of the sanitation standards. So long as employees have potable water available in adequate supply for drinking and washing purposes, that is bottled and a recognized commercial product, the running water that might be present in the sanitation facility on some locomotives would not have to strictly meet the EPA drinking water guidelines. On many older locomotives in use, tanks of water are present, and may have been used at one time for drinking and washing purposes. Nothing in this proposal would require the removal of these water tanks. However, with the advent of bottled water, and the knowledge that it is sometimes difficult to maintain ''potable'' water in the large, on-board tanks, carriers typically now provide packs of bottled water to cab employees. Also, on many of the newer locomotives, there is no large water holding tank for employee use, and carriers with these units also utilize the convenience and safety aspects of commercially available bottled water. FRA sees no adverse consequences associated with this usage, and believes it may decrease the risk of illness to cab employees.

The NPRM proposes definitions for the terms sanitary and unsanitary, respectively, which involve the absence or presence of filth, trash, and waste that would cause a reasonable person to believe that the condition might constitute a health hazard; and persistent odor sufficient to deter normal use of the facility or to give rise to a reasonable concern with respect to exposure to hazardous fumes. FRA believes that providing these definitions would add clarity to this issue and would ultimately help the industry to comply with the proposed standard. These terms when used in ordinary discussion are somewhat subjective, and might produce different inferences among different people. Therefore, FRA's proposed definition incorporates the perceptions of a reasonable person, or the average reaction to sanitation facilities, and includes specific examples that would constitute unsanitary conditions. Sanitary conditions are thus defined as the absence of those conditions. The list provided in the proposal is illustrative, not exhaustive, and should serve as guidance to the industry of what FRA would consider noncompliant. Undoubtedly, FRA inspectors and the industry will have to utilize on-the-spot judgments in order to distinguish conditions that are acceptable from those that are not. These proposed definitions are inserted to guide those local decisions in an area that can be very subjective. FRA invites comment on these definitions, including additional or alternate language that may enhance the clarity of the terms.

In discussions subsequent to the last Working Group meeting, some of the railroad representatives expressed frustration at the subjective nature of defining terms like ''sanitary'' and ''unsanitary'' and proposed an alternate definition for the term ''sanitary.''

The railroad's suggested language suggests that only an ''accumulation'' of filth, trash, or human waste is unacceptable whereas visible dirt would not constitute an unsanitary condition. On this point, the RSAC parties generally accept that immaculate conditions cannot be expected, any more than one would expect such

conditions in a public rest room in an airport or office building. However, sanitation compartments are expected to be clean and tidy following periodic servicing and cleaning. However, since the duty to remedy an unsanitary condition arises only at the daily inspection, it is particularly appropriate to specify a standard that describes conditions most people would find unacceptable. The definitions of sanitary and unsanitary that appear in the proposed rule text reflect consideration of this issue of accumulation by including the phrase ''any significant amount of filth, trash, or human waste.''

The Working Group further discussed another important issue raised by the railroads' suggested language: what perception must the reasonable person have before a condition is unacceptable? What amount of filth, trash, or human waste is considered significant by the reasonable person? FRA's approach to the subject is governed by the need to encourage use of sanitary facilities on a regular basis as a matter of good health. Even if a condition is objectively harmless (as determined by later laboratory analysis), the fact that it gives the appearance of possible unhealthfulness could discourage use of the facility and contribute to degraded health.

The railroads' suggested language tries to address the topic of to what extent the railroad is responsible for conditions there were left behind by careless employees or trespassers. To limit the disruption of service because of conditions over which the carrier has limited control, the carriers suggested that certain conditions be treated as unsanitary only if ''caused by mechanical or maintenance failure in the compartment.'' This language may present enforcement difficulties for FRA in determining whether a mechanical or maintenance failure has occurred. This raises issues that could legitimately bear on the exercise of FRA enforcement discretion, yet FRA believes such issues shouldn't serve as a defense to failure to address unsanitary conditions at the daily inspection. No railroad employee should have to contend with unsanitary conditions left behind by a trespasser or prior employee user of the facility.

With the exception of branch lines discussed elsewhere in the preamble, as of the daily inspection, railroads should be prepared to clean a sanitation compartment and service a toilet facility or to place the unit in a trailing position if the sanitation compartment is no longer sanitary or operative.

FRA invites comment on these proposed definitions from all interested parties. This is a very difficult area, and one in which other regulatory bodies have opted to leave these terms undefined. Nonetheless, FRA would like to arrive at suitable definitions for these subjective terms that are consistent with the spirit of the Working Group discussions, and that provide adequate notice to the industry as to what constitutes compliance.

FRA proposes to define sanitation compartment as an enclosed compartment on a locomotive that contains a toilet for employee use. Depending on the type of locomotive, these compartments may be located in the nose of the unit or behind the engineer's seat. Further discussions below explain in detail what each sanitation compartment must contain.

FRA proposes to define toilet facility as a system that automatically or on command of the user removes waste to a place where it is treated, eliminated, or retained such that no solid or non-treated liquid waste is thereafter permitted to be released into the bowl, urinal, or room and that prevents harmful discharges of gases or persistent offensive odors. FRA developed this proposed definition with the assistance of the Working Group. There are a variety of toilets available on the market for use on board locomotives, and FRA did not wish to exclude the use of any of the systems that effectively meet human sanitation needs. Therefore, this definition attempts to establish performance criteria that all of the adequate facilities meet when operating as intended.

To clarify FRA's intent concerning some of the language proposed with respect to toilet facility, ''automatically * * * removing the waste'' does not mean that waste is removed by gravity. Rather, this language is intended to cover systems that possess sensors which flush waste once the occupant leaves the toilet area. It is FRA's understanding that some toilets that may be used on locomotives utilize this feature, and FRA believes it is an effective tool. However, FRA does not intend that systems, without a device to separate the waste tank from the user (such as a deflector), which simply permit waste to flow to holding tanks below the toilet bowl and remain there until emptied, meet this proposed definition. These systems are prone to overfilling and noxious odors, and may go uncleaned for some time because the cleaning or emptying process is very unpleasant and hence doesn't get accomplished. The term ''on command of the user'' means that a flush mechanism is present and functions as intended.

The definition for toilet facility also includes the terms ''harmful'' and ''offensive,'' which may give rise to differing subjective interpretations. FRA and the Working Group discussed these words and ultimately determined that a certain amount of subjectivity is inevitable when personal preferences for cleanliness are involved. Individuals may differ as to what seems ''offensive'' or even ''harmful.'' FRA intends that the toilet system must effectively remove or treat the waste so that odors generated in the toilet area do not linger and penetrate the cab working environment. FRA will use its reasonable judgment in determining whether odors rise to the level of offensiveness or harmfulness.

FRA proposes to define washing system as a system for use by employees to maintain personal cleanliness. As defined here, the facility may include a secured sink, water, antibacterial soap and paper towels; or antibacterial waterless soap; or antibacterial moist towelettes and paper towels; or any combination of antibacterial cleansing agents. It is critical that all employees have available to them a system in which they are able to clean and sanitize their hands after using the toilet. FRA wishes to be as flexible as possible in prescribing washing systems for locomotive cabs. There are a variety of antibacterial agents available on the market that effectively sanitize and disinfect after toilet use. In addition, there are many locomotive units that do not possess sinks and running water for employees to use as washing facilities. As a result of discussions with the Working Group, it is FRA's understanding that most cab crews receive a package of items for use on each trip, and this ''crew pack'' typically includes the sort of washing system that is permitted by this definition. Therefore, so long as employees are provided with one of the options included in the definition, or others that may be developed in the future that provide an equivalent level of sanitation, this portion of the sanitation requirement has been met.

Members of the Working Group expressed concern about restrictions on the placement of ''crew packs.'' Some items in these packages are used by employees while in the sanitation compartment, but these packages also include items that employees use while working or eating in the cab, such as paper towels. In addition, crew packs are available for pick up by locomotive crews at on-duty points throughout the railroad network, and employees often grab several of them to keep in the cab. It is likely that some of these packs won't be placed in the sanitation

compartment when brought on board, and will be placed, as a convenience, near the employee cab stand for use throughout the work shift. For these reasons, FRA sees no reason to require by regulation that crew packs remain at all times in the sanitation compartment and so, this proposal would not place restrictions on the placement or contents of crew packs issued by the railroad carrier.

FRA will revisit these definitions to determine if they may be streamlined without losing clarity, and whether we should provide additional definitions for terms used in the rule text. For instance, a definition of ''defective'' might be helpful to understanding the application of this rule. FRA invites comment from the industry about all of the definitions proposed here and any other terms that should be defined.

Amendment to Section 229.9, Movement of Non-Complying Locomotives

FRA proposes to add paragraph (g) to section 229.9, which prescribes requirements for the movement of non-complying locomotives. The purpose of this addition is to clarify that the provisions set forth in proposed sections 229.137 and 229.139 establish criteria for the movement or handling of locomotives that are discovered to have defective or unsanitary sanitation compartments at the time of the daily inspection. These new, proposed criteria for units with defective sanitation compartments would supercede those set forth in paragraphs (a)–(c) of section 229.9, which require moving designated locomotives as lite or dead, under certain circumstances, and sometimes require en route failures to be addressed at the nearest forward point where the necessary repairs can be accomplished. These new, proposed criteria for units with defective sanitation compartments would also supercede the language in section 229.21(a) and (b), that requires defective items to be repaired prior to departure. As FRA and the Working Group examined the issue of sanitation on locomotives, it was determined that alternative requirements would be more appropriate for the handling of locomotives that are otherwise fit for service, but possess a defective toilet or ventilation system in the sanitation compartment. The power available in these units can be utilized in the train consist, without introducing safety hazards associated with the equipment and train movement. The hazards employees face in the presence of defective or unsanitary facilities are addressed by the requirements set forth in the new proposed sections 229.137 and 229.139. However, FRA invites comment on this and all other provisions set forth in the NPRM.

Amendment to Section 229.21, Daily Inspection

FRA proposes to revise section 229.21 to be consistent with the new proposed requirements in sections 137 and 139. As currently written, section 229.21 requires railroad carriers to repair all items noted on the daily inspection report prior to using the locomotive. However, the new sections 137 and 139 would permit locomotive units with certain non-complying conditions to remain in service beyond the date on which the daily inspection occurs. For instance, carriers may utilize a locomotive with a defective toilet facility in switching service for a period of up to 10 days, at which time the unit must be repaired or used in the trailing position. Also, the railroad may continue to use a locomotive that possesses a defective modesty lock until the next 92-day inspection, at which time the modesty lock must be repaired. The fourth sentence of paragraphs (a) and (b) have been revised to note this change as a result of the new proposed requirements in sections 137 and 139. In addition, the fifth sentence of paragraphs (a) and (b) has been modified to note that the railroads may choose to record repairs of conditions that don't comply with sections 229.137 and 229.139 electronically, rather than on the daily inspection report. Some of the carriers have stated that they have electronic repair reporting systems in place that work more efficiently than paper records. FRA sees no reason to thwart these ongoing programs, so long as they are capable of being audited and effectively track repairs.

Section 229.137(a) Sanitation, General Requirements

This portion of the proposed sanitation standard sets forth the primary requirements for equipping lead locomotives in use with sanitation facilities. FRA's primary concern is providing locomotive crews in the lead units with access to private toilet and washing facilities, that are equipped with adequate ventilation, toilet paper, and trash containers. Paragraph (a)(1) proposes that each lead locomotive in use must contain a sanitation compartment, except as indicated in paragraph (b) where proposed exceptions to this requirement are set forth, or where a unit is designed such that no sanitation compartment exists. For instance, certain locomotive units used by Amtrak have toilet facilities located in the engine room, which is enclosed by a door and otherwise meet the requirements of this paragraph. For purposes of this standard, FRA proposes that the engine room on those Amtrak units constitutes the sanitation compartment for those units.

The sanitation compartment must be adequately ventilated; equipped with a door that closes and possesses a modesty lock; equipped with a toilet facility that meets the requirements of the definition described above; equipped with a washing system that meets the requirements of the definition described above, unless the railroad otherwise provides the washing products to employees when they report for duty or occupy the cab for duty (typically in crew packs), or where the locomotive possesses a stationary sink that is located outside the sanitation compartment; equipped with sufficient toilet paper to meet employee needs, unless the railroad carrier otherwise provides toilet paper to employees when they report for duty or occupy the cab for duty (typically in crew packs); and equipped with a trash receptacle, unless the railroad carrier otherwise provides portable trash receptacles for use in the sanitation compartment to employees upon reporting for duty or occupying the cab for duty (typically in crew packs).

With respect to ventilation in the sanitation compartment, the Working Group and FRA determined that, on much of the existing equipment, a simple vent in the sanitation compartment that opens to facilitate the exchange of fresh air with air in the toilet area sufficiently addresses ventilation. According to discussions with the Working Group, which consists of parties who use and maintain locomotives, these vents adequately diffuse offensive odors, so long as the toilet is sanitary and operating. This vent must be capable of opening or closing on command or control of the user in order to meet the requirement of ''adequately ventilated.'' Other ventilation systems in place on older locomotive equipment must operate as intended, evacuating the air in the sanitation compartment, in order to meet the proposed standard.

The ventilation systems on new locomotive equipment is more complex. The cab's air flow is controlled and pressurized to maximize air flow and equipment performance, and minimize noise levels in the cab. In order to meet the proposed requirement concerning ventilation for these newer units, that portion of the ventilation system required to provide air movement in the sanitation compartment must be

operative, or other, effective alternative provisions for ventilation of the sanitation compartment must be made.

If the ventilation system for the sanitation compartment is defective as of the daily inspection, the railroad carrier may not use the unit in the lead position, unless repaired. If not repaired, the railroad carrier may use the locomotive in trailing position, in switching service consistent with the requirements of section 137, paragraph (b)(1)(ii), or in transfer train service consistent with the requirements of section 137, paragraph (b)(1)(iii). The rationale for permitting this usage when the ventilation system is inoperative, is that trailing units are typically unoccupied, and so no harm would come from utilizing the locomotive in that position, and the exceptions set forth in section 139(b)(1)(ii) and (iii) require the carriers to provide access to adequate facilities elsewhere.

It is important to note that a clean, operable toilet facility will prevent harmful gases or persistent, offensive odors from developing in the first place, and so the most productive way to eliminate the risk of noxious air in the cab is to focus attention on maintaining the toilet facility properly. It is also important to note that if the toilet room door is designed to be equipped with seals, when the seals are maintained and replaced as needed, odors are less likely to migrate to the interior of the cab. If applicable, replacing faulty sanitation compartment door seals would be advisable to further protect the cab occupants from offensive odors, although this proposal does not require such replacement.

In section 137(a)(2), FRA proposes that the sanitation compartment must possess a door that closes, and the door must be equipped with a modesty lock. A door which closes is one that, by design or device, stays shut when the user closes it. For instance, a typical interior, residential door with a door knob is a door that closes. Also, a door that possesses a spring device that pulls the door closed after opening constitutes a door that closes. Similarly, doors used to enclose bathrooms on airplanes close when pulled shut, by way of a device similar to a door knob, and would meet the proposed standard set forth here. (These doors also possess modesty locks to prevent unwanted intrusion). FRA does not mandate the type of closing door the locomotive must possess, so long as the door closes by design or on command of the user. This proposed requirement is necessary to provide basic privacy to employees using the sanitation facilities. A modesty lock is a device operated by the occupant from inside the toilet compartment that prevents entry by a person who is not aware that the compartment is occupied. A modesty lock can typically be disabled from the outside in the event of an emergency that requires entry from outside the toilet compartment. FRA believes employees should have the expectation of privacy when using toilet facilities, consistent with similar standards issued by other regulatory bodies and common sense. A door that closes and that possesses a modesty lock provides that privacy.

The railroad carriers on the Working Group expressed some concerns about a modesty lock that would prevent entry in the event of an emergency, such as an accident or health problem. As defined in this proposal, the railroads may utilize modesty locks that can be disabled in an emergency, so long as the lock prevents an accidental or unnecessary intrusion. FRA does not prescribe specific requirements concerning the form of the modesty lock in this NPRM. Some of the railroad carriers utilize fairly sophisticated, expensive devices, and some utilize an inexpensive, rudimentary slide device. These achieve the desired level of privacy, and also provide the employer with the ability to enter the compartment in the event of an emergency. Either would meet the requirement proposed in this paragraph. As FRA understands it, most locomotives are currently equipped with closing doors that have modesty locks, and if not, the costs associated with adding modesty locks to unequipped units are minimal. In the Working Group discussions, the industry representatives indicated that all units could be equipped with modesty locks by [18 months after publication of the final rule].

As currently drafted, this proposal would require all sanitation compartments to be equipped with a closing door as of the daily inspection. However, if the modesty lock is defective as of the daily inspection, the railroad carrier would not be required to remove a locomotive from service. The carrier would be required to repair the modesty lock on or before the next 92-day inspection required by part 229.

The requirements proposed in § 229.137(a)(3)–(a)(4) require toilets and washing systems in lead locomotives in use. FRA understands that there are many varieties of toilet facilities that function effectively on board locomotives, and there are likely to be technological improvements that will bring about new units in the future. The proposal takes a performance approach to toilet and washing systems, rather than specifying units by name in the definition, so that effective existing systems and systems not yet developed, would not be unintentionally excluded.

As discussed above, FRA does not wish to prescribe a particular type of washing system. However, each lead locomotive must have one of the systems outlined in the proposed definition available for employee use. As currently proposed, this paragraph states that the washing system must be located in the sanitation compartment, unless it is otherwise provided to employees when they report for duty, enter the cab for duty, or where the locomotive possesses a stationary sink that is not located in the sanitation compartment. Based on discussions with the Working Group, FRA understands that on some locomotives washing systems are located in the toilet compartment, but in many cases they are provided to employees in crew packs. Many railroads give crew packs to employees as they begin each work shift, and they typically contain antibacterial soap, paper towels or moist towelettes, toilet paper, and perhaps bottled water. As stated above, FRA sees no need to require the railroad carrier to maintain washing products in the sanitation compartment, so long as employees receive them in crew packs at the beginning of their shift. The crew packs will be made available to crews at their reporting point or onboard the locomotive. The employer must provide these items to employees in order to meet the proposed standard.

This paragraph also permits sinks located adjacent to the sanitation compartment to remain outside the sanitation compartment. According to information received from the Working Group, at least one Class I railroad carrier maintains locomotives with stationary sinks that are not in, or capable of being placed in, the sanitation compartment. FRA sees no safety or health risk associated with this configuration and, therefore, the proposed standard would not prohibit this.

Section 229.137(a)(5) proposes that the sanitation compartment contain toilet paper in sufficient quantity to meet employee needs, unless the railroad carrier otherwise provides employees with toilet paper when they report for duty or occupy the cab for duty. FRA chose not to prescribe a specific amount of toilet paper for each employee in the cab, believing that this issue is best handled through common sense decision making at the local level. As FRA understands it, some railroad carriers maintain toilet paper in the sanitation compartment, and some rely

on crew packs for dissemination of toilet paper. FRA believes either method is adequate, so long as reasonable amounts of toilet paper are provided to meet typical daily needs. If it is determined during the daily inspection that a locomotive is not equipped with sufficient toilet paper, the unit must be equipped prior to departure. For most railroads, this requirement would be accomplished by the use of crew packs, which contain ample toilet paper for each employee's work shift.

Section 229.137(a)(6) proposes to require that each sanitation compartment contain a trash receptacle, unless the railroad carrier provides portable trash receptacles in the employee crew packs. This proposed requirement attempts to provide flexibility to the railroad carrier where space limitations in locomotive sanitation compartments prevent the application of an across-the-board requirement for permanent trash cans or similar fixtures in all sanitation compartments. Therefore, as drafted here, the trash receptacle may be a permanent trash can or similar fixture located in the sanitation compartment, or the trash receptacle may be a small plastic bag that hangs from the door handle or is posted to an interior wall. In addition, where the space limitations in the sanitation compartment prohibit placing any sort of trash receptacle in the sanitation compartment, portable trash bags that can be included in the employee crew packs may be placed outside the sanitation compartment. In these instances, the Working Group and FRA expect that the trash bags will be placed at a location that is as far from the cab stand as possible, such as in the nose of the cab. FRA and members of the Working Group wish to segregate sanitation-related trash from the area where employees work and often eat during the course of the work shift. In large measure, where a trash receptacle cannot be placed in the sanitation compartment, the location of the portable trash bags will be controlled by the employees working in the cab, who have a natural interest in keeping the sanitation-related trash away from the work and eating areas of the cab.

As currently drafted, if it is determined during the daily inspection that the sanitation compartment is not equipped with a trash receptacle, or the crew has not been provided one in a crew pack, the railroad carrier must equip the locomotive with a trash receptacle prior to departure. This may be accomplished by placing a trash receptacle in the sanitation compartment, or by providing portable trash receptacles to employees in their crew packs when they report for duty or occupy the cab for duty.

Section 229.137(b) Exceptions

Paragraph (b) of section 229.137 sets forth exceptions to the general requirements proposed in paragraph (a), discussed above. Paragraph (b)(1)(i)–(v), set forth exceptions to the general requirement of a sanitation compartment in each lead locomotive in use. These exceptions are proposed in order to accommodate certain unique circumstances.

Paragraph (b)(1)(i) would exempt locomotives used in commuter operations where employees have access to sanitation facilities at frequent intervals, either at stations or elsewhere on the train. For purposes of this proposal, commuter service means commuter or short-haul railroad passenger service in a metropolitan or suburban area, and commuter service that was operated by the Consolidated Rail Corporation on January 1, 1979, that runs on rails or electromagnetic guideways, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation. (*See*, 49 CFR part 209, Appendix A) This definition is consistent with the types of railroads that Congress intended to be subject to FRA's jurisdiction under the Safety Act; see 49 U.S.C. 20102(1). Most commuter runs are relatively short in duration, providing multiple times during the day's work shift when facilities can be used at downtown or outlying terminals. Typically, cab crews on commuter operations may use sanitation facilities in the stations they service in the course of their route, or in the passenger cars they are hauling. Therefore, FRA sees no need to require the locomotive cabs on commuter operations to also possess a sanitation facility. In most cases, the configuration of commuter locomotives differs from traditional freight locomotives. Most do not currently possess sanitation compartments and there may be no additional space to add such a compartment.

This exception makes clear that the sanitation facilities employees use must be provided by the commuter railroad carrier. In other words, the employer may not utilize this exception to the general requirement if employees are forced to use sanitation facilities in businesses along the right-of-way that have no connection to the employer, such as restaurants, manufacturing plants, or convenience stores. FRA believes that each commuter railroad operation subject to these standards is responsible for providing sanitation facilities, and employees must not be placed in situations where they are forced to request permission to use the sanitation facilities of foreign establishments during the workday. So long as these conditions are met, and because the nature of commuter operations affords employees the opportunity for frequent access throughout the shift, FRA sees no reason to impose a new, costly requirement for cab toilets on commuter railroad locomotives.

Paragraph (b)(1)(ii) would permit all locomotives engaged in switching service, where employees have access to railroad carrier-provided sanitation facilities outside of the cab, to operate without a sanitation compartment in the cab. For purposes of this paragraph, switching service is defined as the classification of freight cars according to commodity or destination; assembling cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing locomotives and cars for repair or storage; or moving rail equipment in connection with work service that does not constitute a train movement. This definition has developed over time in the railroad industry, and as used here, is consistent with customary usage.

This exception is similar to and based on the same general principle as the exception proposed for commuter service. Employees engaged in switching service are typically in the cab for relatively short periods of time, and have access to sanitation facilities in rail yard buildings or at railroad carrier facilities along the right-of-way as needed. Generally, these employees are not captive in a locomotive cab for interminable time periods, where a sanitation facility clearly must be provided. Therefore, FRA proposes that locomotives involved in switching service need not possess a toilet in the cab, so long as employees have ready access to railroad carrier-provided sanitation facilities along the right-of-way or in yard facilities at frequent intervals during the work shift. If a railroad carrier is unable to conform with this concept, this proposed exception could not apply. If the switching routes place cab employees at remote locations where railroad carrier sanitation facilities are not accessible to employees, then the carrier must provide a locomotive that is equipped with all of the items required by paragraph (a) of this section, which is discussed below. (It is important to note that this NPRM would prohibit the removal of toilet facilities from locomotives engaged in switching service, where those locomotives are

equipped with a toilet on the effective date of the final standards. This is discussed in greater detail below.)

Paragraph (b)(1)(iii) relates to transfer trains, and tracks the same logic as the exceptions proposed for commuter operations and switching service. Transfer trains are trains that travel between a point of origin and a point of final destination not exceeding twenty miles and do not perform switching service. *See*, 49 CFR 232.13(e)(1) (Specifying the air brake test required for transfer trains.) Because the cab employees engaged in transfer train service generally have the opportunity to use railroad carrier-provided sanitation facilities, as needed during the course of their work shift, FRA proposes that the existing locomotives used in transfer service need not possess a sanitation compartment. These employees are less likely to face long periods of time in the locomotive without access to sanitation facilities in rail yard buildings or at railroad carrier-owned facilities along the right-of-way. If the railroad carrier is unable to provide such facilities to accommodate employee needs, then the carrier must utilize locomotives that possess toilet facilities that otherwise meet the requirements of this proposal. (It is important to note that this NPRM would prohibit the removal of toilet facilities from locomotives engaged in transfer service, where those locomotives are equipped with a toilet on the effective date of the final standards. Also, all locomotives manufactured after the effective date of the final rule in this matter must be equipped with a toilet facility accessible without going outside the locomotive. These requirements are discussed in greater detail below.)

Paragraph (b)(1)(iv) proposes to exempt locomotives of Class III railroad carriers that are not equipped with toilet facilities, and that are not engaged in switching or transfer train service, from the requirement of having a toilet facility in the cab. However, as is stated in the proposed exception, these Class III railroad carriers must provide or arrange for sanitation facilities along the right-of-way. (It is important to note that the NPRM would prohibit the removal of toilet facilities from locomotives, if those locomotives are equipped with a toilet on the effective date of the final standards. This is discussed in detail below.)

Class III railroad carriers are small businesses with limited capital margins. (The current definition of these entities, as established by the Surface Transportation Board, is a railroad carrier that earns $20 million or less in annual operating revenues.) Typically, purchasing new locomotives would be out of the question for these companies, and spending considerable funds to retrofit old units could mean that critical safety programs in other disciplines would suffer. The older locomotive equipment generally cascades down to the Class III railroad carriers, and over time the Class III railroad carriers will acquire toilet-equipped locomotives. Currently, many of the older locomotive units are not equipped with toilet facilities, and some of the units actually lack space for toilet facilities, depending on the purpose it was originally intended to serve. FRA believes that it would create great financial hardship for these entities to require sanitation retrofits or new locomotive purchases. Some of the small operators might simply opt out of the market, and for others, the diversion of funds could create safety problems elsewhere. Therefore, FRA proposes this exception to ensure that the proposed sanitation standards do not give rise to additional safety concerns or destroy otherwise productive business concerns. However, the Class III railroad carriers that choose to avail themselves of this exception must provide or arrange for adequate sanitation facilities, which means they must be available to employees readily, frequently, and as needed along the right-of-way.

This proposed exception would not permit a Class III railroad carrier to advise employees to use sanitation facilities at restaurants and other public establishments that have no business connection to the carrier. These Class III employers may not assume that employees will locate sufficient sanitation facilities on their own. The Class III railroad carrier must take affirmative action to see that the cab employees have frequent access as needed to adequate sanitary facilities. If it is not possible for the railroad carrier to provide adequate sanitary facilities along the right-of-way, then it is expected that the carrier will consult with customers or other businesses along the route for the specific purpose of garnering access to adequate sanitation facilities for employees who must work in cabs without sanitation compartments. In addition, the Class III railroad carrier must communicate to employees the locations and, as appropriate, hours of availability of access to the sanitation facilities provided by the carrier via customers or other businesses along the route. FRA and the Working Group expect that the Class III carrier will consider 24-hour railroad operations in these determinations, and which facilities will be available during every work shift.

Paragraph (b)(1)(v) proposes that the locomotives of scenic, tourist, historic, or excursion railroads, which are not steam-powered, which operate on the general system, and are otherwise covered by the locomotive safety standards set forth in 49 CFR part 229 would not be required to be equipped with compliant toilet facilities, so long as employees working in these locomotives have access to appropriate facilities at frequent intervals during their work shift. The rationale for this proposal is similar to the proposed exceptions for Class III entities. The railroads addressed by this paragraph, for the most part, have limited profit margins and utilize older equipment that may not possess sanitation facilities on board. The costs to retrofit these units would adversely impact the viability of these operations, and on some of the present equipment, may not be possible. FRA believes that so long as the employees who work on these units are provided appropriate facilities throughout the course of the work shift, there would be no reason to require these locomotives to be equipped with sanitation facilities. FRA invites comment on this, and all other proposals set forth in the NPRM, particularly with respect to long-distance excursion operations that typically employ locomotives already equipped with toilet facilities. Finally, it's important to note that representatives of tourist and excursion railroads have suggested that FRA modify the language in this paragraph to clarify that the tourist operator is responsible for providing access to adequate toilet facilities rather than the railroad owner of the track on which the tourist organization travels. FRA believes that this would be advisable in the final rule, and invites comment on it now.

It is difficult to define with specificity the terms ''ready access'' and ''frequent intervals,'' which are used in paragraphs (b)(1)(i)–(b)(1)(v) of this section of the NPRM. FRA and the Working Group spent a great deal of time discussing the terms and the concepts they infer. All struggled with appropriate language that would capture the concepts accurately and still provide sufficient flexibility to accommodate the changeable nature of railroad operations. The Working Group discussed establishing specific time periods or distances traveled that might equate to a satisfactory and concise definition of these terms. However, members of the Working Group recognized that individuals' access needs vary greatly from person-to-

person and from day-to-day. Further, the Working Group noted that it may take 5 hours to traverse 5 miles on a given day, depending on traffic, weather, load, and other considerations. Therefore, the Working Group rejected the notion of a hard and fast time or mileage limit as an appropriate solution to this question.

Instead, the Working Group offered an explanation of the concept of adequate access to sanitation facilities, where locomotives covered by these exceptions are not equipped with a toilet facility: The crew members would have immediate accommodations made by the local railroad carrier officials on reasonable demand or need by a crew member to provide access to a railroad carrier's sanitation facilities at frequent intervals during the course of their work shift. As used here, the term ''immediate accommodations'' means that the employer would begin the process of providing access to sanitation facilities when the employee requests it.

The general principle that FRA and the Working Group intend to capture with these terms is that employees would have access to sanitation facilities, as the need arises, that are located in close proximity to the work site, and that are owned or operated by the railroad carrier. In many circumstances, these terms simply mean an employee could disembark from a locomotive in a yard, use a toilet in a nearby building, and then return to the locomotive cab. However, if employees work in remote locations where sanitation facilities do not exist, the railroad carrier would be required to provide employees with alternate transportation to a nearby site, in order to make use of one of the proposed exceptions listed above. These terms follow the logic of the OSHA standards and recent interpretation, which place priority on access as the need arises. This principle is important because of the adverse health effects that may occur if access is denied. Also, this principle enhances an employee's ability to focus on the work being done, and improves the likelihood that safe train movements will occur.

It is important to note that each of these exceptions would require the carriers to provide facilities that ''meet otherwise applicable sanitation standards.'' With this language, FRA intends that the alternate sanitation facilities offered by the carrier must meet the standards for sanitation equipment and servicing that apply to that workplace. For instance, if the alternate facility is located in an office building along the right-of-way that falls within the authority of OSHA for purposes of sanitation, FRA expects that the carrier will ensure that those OSHA standards concerning the presence and condition of toilet and washing facilities will be met. If this proposed standard is adopted as a final rule, FRA would be exercising jurisdiction over cab employee access to sanitary facilities, specific sanitation equipment on rolling stock, and the servicing and use of that equipment on rolling stock. FRA does not intend to oust OSHA's existing authority with respect to sanitation equipment, or its maintenance, where it exists elsewhere.

Paragraphs (b)(2)(i) and (b)(2)(ii) propose temporary exceptions to the requirement of a toilet facility that conforms with the proposed definition of toilet facility, until those nonconforming toilet facilities have been replaced with compliant ones. Paragraph (b)(2)(i) addresses a specific type of toilet facility that a Class I railroad carrier possesses on approximately 500 locomotive units. This toilet, referred to as a ''Bogan,'' is similar to portable toilets that are often used at outdoor events, where the need for mobile, basic toilet facilities exists. This toilet, which does not meet the requirements of the proposed definition for toilet facility, has no flush mechanism and simply permits waste to flow to a tank below the toilet seat for storage, treatment, and periodic disposal. Chemicals are placed in the storage tank to treat the waste and minimize odors that would otherwise accumulate. Maintenance of these toilets may be a greater challenge than is the case with more contemporary technology, and failure to properly maintain them could result in unacceptable conditions.

The Class I railroad carrier owner of the Bogan toilets is replacing these units as they become defective, and is retiring them as the locomotives on which they are situated are retired. The Bogan toilets are being replaced with toilets that incorporate advanced technology. For that reason, the Working Group recommended that FRA permit these toilets to remain in use until they are retired by the railroad carrier as part of the railroad carrier's retirement plan. The proposed rule text permits the Bogan toilet to remain in service on this Class I railroad carrier until they become defective or are replaced with conforming units, whichever occurs first. Although FRA would prefer more modern systems in place on all locomotives, FRA is not presently aware of an imminent, serious safety or health risk associated with this type of unit that would mandate immediate removal. Given the costs associated with toilet retrofit and the railroad carrier's own plan to replace the units, FRA believes that in this instance an exception is appropriate. Finally, it is important to note that this carrier objects to and disagrees with any inference or statement that the current systems in place are inadequate or are not properly maintained.

As written, this exception would apply only to the Class I railroad carrier that FRA knows possesses these toilet systems. FRA is unaware of any other railroad carriers that utilize this toilet. However, FRA requests comments from the industry as to whether this system exists on other properties, and if so, what plans those employers may have for retiring or replacing the toilets. If the system is more prevalent than FRA now believes it is, final rule text language may need to be altered to accommodate the use of the systems on those properties. In making this determination, FRA would consider a variety of factors, including the number of toilets involved, the operational characteristics of the railroad operations in which the toilets are used, the programs the employer has in place to retire or retrofit the toilets, the economic status of the railroad carrier involved, and the effectiveness of the existing maintenance and servicing program for the toilet. As is stated above, FRA wishes to restrict and eventually eliminate the use of toilets that do not meet the definition of toilet facility proposed in this NPRM. In connection with this exception and the exception set forth in paragraph (b)(2)(ii) below, it is important to note that certain enforceable state standards may require flush toilets for cab employees, and the final standard FRA issues in this proceeding would preempt those standards. Therefore, FRA wishes to make every effort to minimize the use of non-flush systems in this proceeding. Clearly, FRA and the Working Group have no desire to issue or recommend standards that ultimately permit the use of systems that are more rudimentary than those permitted by existing state standards. However, FRA understands that certain accommodations may be necessary in the short term in order to achieve that goal.

Paragraph (b)(2)(ii) addresses a similar situation that exists on another Class I railroad carrier, in which the toilet facility in place on a majority of the carrier's locomotives does not comply with the proposed definition of toilet facility. These toilet facilities utilize carrier-provided plastic liners to collect human waste; these liners are then sealed, placed in sealed waste containers, and delivered by the

employees to the carrier for disposal. Although the carrier believes that this system adequately addresses sanitation needs for cab employees, concerns about the system have been raised by employees, landowners along the right-of-way, and certain State agencies. Further, as the carrier recognizes, proper administration of this system off the carrier's home lines sometimes is not practicable, and ''power sharing'' arrangements in the railroad industry are growing. FRA agrees that this system should be retired, but also recognizes the significant capital and labor costs associated with a massive retrofit campaign. The carrier has initiated a replacement program in which approximately 30 locomotives per month are being retrofitted with new toilet facilities that would satisfy this proposed rule. In addition, this carrier has decided not to deliver locomotives with the older toilet facilities in the lead position to other carriers in interchange, and this proposal would incorporate that restriction for the period of retrofit. Finally, this carrier has stated its intention to make every reasonable effort to place compliant locomotives in the lead position on its system wherever possible. This sort of consist management commitment is sometimes difficult to achieve, given the competing priorities that other safety requirements and safety risks present. However, FRA and the Working Group are satisfied at this point in time that the retrofit program and the carrier's commitment to place locomotives with compliant toilets in the lead where possible, is the best solution to the problem presented. Based on the number of units in need of retrofit, FRA and the Working Group estimate that all of the carrier's locomotives are capable of being in compliance with the proposed sanitation standards by July 1, 2003. Therefore, based on all information currently available, FRA proposes to permit the Class I railroad carrier to operate locomotives in the lead position on its lines with non-compliant units until July 1, 2003. After that date, all lead units would be required to possess compliant toilet facilities. Finally, it is important to note that this carrier objects to and disagrees with any inference or statement that the current systems in place are inadequate or are not properly maintained.

As written, this exception would apply only to the Class I railroad carrier that FRA knows possesses these toilet systems. FRA is unaware of any other railroad carriers that utilize this toilet. However, FRA requests comments from the industry as to whether this system exists on other properties, and if so, what plans those employers may have for retiring or replacing the toilets. If the system is more prevalent than FRA now believes it is, final rule text language may need to be altered to accommodate the use of the systems on those properties. In making this determination, FRA would consider a variety of factors, including the number of toilets involved, the operational characteristics of the railroad operations in which the toilets are used, the programs the railroad carrier has in place to retire or retrofit the toilets, the economic status of the railroad carrier involved, and the effectiveness of the existing maintenance and servicing program for the toilet. As is stated above, FRA wishes to restrict and eventually eliminate the use of toilets that do not meet the definition of toilet facility proposed in this NPRM. However, FRA understands that certain accommodations may be necessary in the short term in order to achieve that goal.

With respect to paragraphs (b)(2)(i) and (b)(2)(ii), it is important to clarify that the proposed exceptions relate only to the type of toilet facility in use. The other proposed requirements set forth in this NPRM would apply to these railroads and their equipment according to their terms. For instance, the requirements set forth in paragraphs (a)(1)–(2), and (a)(4)–(6) would apply to these locomotive units. Similarly, section 229.139, which relates to servicing and operative equipment, would require the units covered by paragraphs (b)(2)(i) and (b)(2)(ii) to operate as intended and be located in sanitation compartments that are ventilated and free of debris and waste.

Paragraph (c) of section 137 would prohibit a railroad carrier from placing a locomotive with an unsanitary or defective toilet facility in the lead position. This determination would be made as of the time of the daily inspection required by 49 CFR § 229.21. En route failures that occur after the daily inspection would impose no burden on the railroad carrier, until the next daily inspection is due. However, according to Working Group members, the current railroad practice with respect to en route toilet failures involves moving defective toilet units into a trailing position, where it is possible to do so. Although the NPRM does not require such movement, the enhanced focus on sanitation facilities that will naturally occur as a result of this standard should increase the likelihood that the practice will proliferate. In addition, Working Group members stated that currently, employees may require changes in train consist where imminent safety hazards are present. Nothing in this proposal would alter that process.

The requirement set forth in paragraph (c) reflects the fundamental need to provide employees with a clean, safe workplace. It is inconsistent with notions of decency and the minimum requirements for workplaces in other industries to expect employees to work effectively and safely if unsanitary waste or deplorable odors are present. The Working Group agrees with this principle and believes that the proposed standard in the NPRM is appropriate for the railroad industry.

In order for a locomotive to be placed or remain in the lead position as of the daily inspection, all aspects of the toilet facility must be operating as intended and it must be clean. The chemicals required by certain systems must be supplied in the appropriate amount so that the toilet will operate as intended; if the system calls for antifreeze, it must be present during winter months to prevent freezing; any integral flush mechanisms or sensors must operate as intended; and all components of the system intended to be present must be present.

As discussed above, FRA has proposed definitions for the terms 'unsanitary' and 'sanitary' to assist the industry and FRA inspectors to determine conditions that are noncompliant. FRA believes that most individuals have a general sense of conditions that would constitute unsanitary facilities, and FRA inspectors would utilize that sensible approach to enforcing this standard, but the definition should provide additional clarity to that process. As for mandating specific servicing requirements, FRA and the Working Group currently believe that the railroad carriers, in consultation with their labor forces, are in the best position to determine when toilet facilities must be emptied and cleaned. These decisions are based on a variety of factors, including degree of use, length of trip, weather conditions, size of crew, and the specifications of the system in place. However, FRA may consider adopting more specific requirements for servicing the toilets, due to concerns that have been raised by railroad employees, and this issue is discussed in greater detail below.

In discussions with members of the Working Group subsequent to the last Working Group meeting, some of the carriers raised concerns about the difficulties of providing a substitute locomotive that possesses a sanitary, operable toilet facility on branch lines in remote locations. The carriers stated

that in remote areas, there may be only one locomotive available and if it does not comply with the sanitation standards as of the daily inspection, the crew could not move the locomotive for repair or to another location where additional units would be available. Presumably, the crew would have to wait for a compliant locomotive to arrive at the remote location, and this would give rise to other issues, such as hours of service restrictions, traffic problems, and the availability of sanitation facilities. Therefore, this NPRM contains an exception to the requirement set forth in paragraph (c) for branch lines where locomotives with defective or unsanitary toilet facilities as of the daily inspection may be located and the facilities cannot be repaired, cleaned, or switched with another, compliant locomotive. Although this situation is probably rare, FRA and the Working Group believe it would be prudent to craft an exception to cover this scenario. The proposal includes this exception, but we invite comment from members of the industry on whether the language could be refined further to more artfully capture the narrow instances in which the exception is intended to apply. Conventional industry language may use the term ''branch line'' where it has broad meaning and application, and FRA does not wish to insert that broader meaning here. The exception is intended to cover remote locations where traffic is limited, and FRA invites comment on how the language might be improved to state this clearly. Paragraph (c)(i) sets forth all of the conditions that must be present in order for the railroad to utilize this exception and continue to use the locomotive:

—The defective or unsanitary condition must be discovered at a location where there are no other suitable (*i.e.,* has sufficient power to complete the haul) locomotives available for use, it isn't possible to switch another locomotive into the lead position, or which is not equipped for repair or cleaning;

—The locomotive, while noncompliant, didn't travel through a location where it could have been cleaned, repaired or switched with a compliant locomotive since its last required daily inspection;

—Upon reasonable request, the carriers must arrange for access to toilet facilities for employees assigned to work on the locomotive during the time they must work on it;

—If unsanitary conditions exist, the sanitation compartment door must be closed and sufficient ventilation provided to the cab compartment so that employees aren't exposed to strong, persistent chemical or human waste odors sufficient to deter use of the facility or to give rise to a reasonable concern with respect to exposure to hazardous fumes; and

—The locomotive must be repaired, cleaned or switched with a compliant unit at the next daily inspection or the next location at which such service can take place, whichever occurs first.

It is important to note that this exception cannot be used where a second locomotive exists, but it also contains a defective or unsanitary sanitation compartment. The proposed rule does not encourage deferral of necessary maintenance and cleaning where locomotives can reasonably be expected to be pressed into service as lead units at any time. This proposed exception is available only where there is just one locomotive available and it possesses a defective or unsanitary sanitation compartment, or where there is no additional track to use to facilitate switching a compliant locomotive into the lead position, and all of the other conditions listed above and in the rule text are present. Some members of the Working Group expressed concern about how this exception might play out when push-pull service is in use on a branch line. FRA invites comment on this issue from the industry. FRA does not believe that the proposal would be unworkable in push-pull service, but asks interested parties to discuss any difficulties that might arise.

It is also important to note that to use this exception, the proposed rule requires the railroad carrier to arrange for access to a toilet facility outside the lead locomotive, upon reasonable request of an employee assigned to work onboard the locomotive. While it remains the responsibility of the railroad to provide access to a toilet facility, in most cases, FRA expects access will be achieved by a means as simple as the crew making use of a toilet facility at a known place of business, such as a restaurant, that is regularly frequented by the crew during their breaks. On the other hand, access to a toilet facility outside the locomotive that meets otherwise applicable sanitation standards may not be available to the crew during the work shift for reasons such as personal safety while not on railroad property or simply that the time required for an employee to walk to a toilet facility may impede railroad operations. In such situations, the railroad may meet a reasonable request by providing transportation to a toilet facility during the work shift. This concept is distinct from the other exceptions in paragraph 137(b) of the proposed rule that use the terms ''ready access to carrier-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift.'' In view of the fact that the branch line situation typically involves remote locations where ''ready access'' may be unavailable and should occur rarely, the proposed rule would impose a different standard than is required in other operational settings.

Paragraph (d) of section 137 provides that if a railroad carrier determines that a toilet facility is defective or unsanitary at the time of the daily inspection, the carrier may utilize the unit in a trailing position. However, if the unit is subsequently used to haul employees, the unit must be cleaned prior to occupancy and defective toilet facilities must be clearly marked as unavailable for use. This paragraph and others that follow establish the requirement that occupied locomotives should not expose employees to unsanitary conditions. FRA recognizes that locomotive toilets periodically malfunction. The railroad carrier should not be penalized for these events, and under prescribed circumstances, should be able to utilize the available power in the equipment. However, the railroad carrier must minimize employee exposure to the hazards of untreated waste and other unsanitary conditions. Therefore, the carrier should clean any trailing units if they will be occupied, and must mark defective toilet facilities so that employees understand the toilet facility cannot be used.

During this process, the Working Group did not believe it necessary to recommend specific requirements for identifying defective sanitation units, and FRA sees no reason to do so either. The Working Group will reassemble to consider comments to this proposed rule and develop recommendations for the final standard, and so may reconsider this issue at that time. Currently, some carriers use a red tag to indicate defective conditions, and some railroads tape the toilet seat so that it cannot be used. Either method, and others that may be in use, are sufficient, so long as a reasonable person entering the cab would understand that the toilet facility is defective and should not be used.

Paragraph (e) proposes that when it is determined during the daily inspection that a road locomotive toilet facility is defective, but sanitary, the railroad carrier may move the locomotive into switching or transfer train service for a very brief period of time, consistent with the requirements for that service,

as discussed above. The unit may be used in this service for a period not to exceed 10 days, at which time it must be repaired or used in trailing position. If the railroad carrier chooses to utilize the equipment in this manner prior to its repair, the carrier must clearly mark the defective toilet facility so that a reasonable person would know not to use the toilet facility. The Working Group and FRA do not expect the railroads to reassign locomotives from road to yard service solely for the purpose of circumventing any part of this regulation. FRA understands that there are overriding incentives for railroads to keep road units with defective toilets in trailing road service until the next periodic inspection, rather than reassigning them to yard service. [It is also important to note here that this 10-day period may be shortened due to the fact the carriers may not need this amount of time to make effective repairs. See the discussion for proposed requirement for section 229.139(d) below for a more detailed discussion of this issue.]

Paragraph (f) of this section proposes that if the railroad carrier discovers during the daily inspection that a lead locomotive is not equipped with sufficient toilet paper, washing facilities, or a trash receptacle, the carrier must equip the unit prior to departure. This proposal reflects FRA's belief that it would be unwise to require a railroad carrier to change the consist makeup due to a lack of toilet paper, washing facilities, or a trash bag. However, FRA believes these items would be relatively easy to locate and supply to cab crews, and so should be provided before any employee is expected to depart. Therefore, the railroad carrier must simply equip the locomotive with these items prior to departure. As FRA understands present railroad practice, most railroad carriers supply these items to cab employees as they begin their work shift, and so this proposed requirement should not impose excessive burdens on the industry.

Paragraph (g) proposes that when it is discovered during the daily inspection that the sanitation compartment ventilation is defective, the carrier must repair it prior to departure, or place the locomotive in trailing position, in switching service consistent with the requirements of paragraph (b)(1)(ii), or in transfer service consistent with the requirements of (b)(1)(iii). As discussed earlier, the rationale for permitting this usage when the ventilation system is inoperative, is that trailing units are typically unoccupied, and so no harm would come from utilizing the locomotive in that position. In addition, the exceptions set forth in section 137(b)(1)(ii) and (iii) require the carriers to provide access to adequate facilities elsewhere, and so employees would be using ventilated facilities in those circumstances.

Paragraph (h) of section 137 provides that if the sanitation compartment is not equipped with a door that closes when pulled shut as of the daily inspection, the door must be repaired prior to departure, or the locomotive must be moved from lead position to trailing, transfer service, or switching service. In addition, this paragraph proposes that if the modesty lock, required to be present in order to prevent unintended intrusion, is defective as of the daily inspection, the locomotive may remain in use in the lead so long as the lock is repaired by the date on which the next 92-day inspection. [See discussion for section 229.139(e) below.] The rationale for this proposed paragraph is that the first priority for cab employees is to have the benefit of a door that closes while using toilet facilities, for each assignment in a lead locomotive in use. Therefore, the door must close as designed, as of the daily inspection. So long as the compartment door closes as it should, a unit with a defective modesty lock may remain in service until the date on which the next 92-day inspection would be required. FRA believes that affirming an employee's expectation of privacy while using toilet facilities will contribute to appropriate use of the facilities and consequent good health, and that this proposal accomplishes that end effectively. The proposal balances legitimate employee privacy needs, by requiring a door that closes, and the legitimate difficulties associated with making use of a locomotive while moving it to the correct repair facility, by permitting the locomotive with a defective modesty lock to remain in service for a limited time period.

Paragraph (i) provides that all locomotives which are equipped with a toilet facility on the effective date of the final sanitation rule, must retain and maintain those toilet facilities, even where the locomotive units might be relegated to switching service or transfer train service, where toilet facilities are not always required by this proposal. There is a small exception to this proposed requirement, which involves cabs that are not occupied. Where a railroad carrier downgrades a locomotive to ''booster'' or ''slug'' service, removing many of the interior appurtenances, so that the unit is no longer intended to be occupied in movement, the carrier may also remove the toilet facility. FRA strongly believes that this proposed paragraph is necessary to ensure that employee protections in the area of sanitation are not diminished as a result of this rulemaking. It would be ironic and unwise if FRA initiated a rulemaking, in consultation with industry representatives, to improve employee working conditions and railroad safety, which ultimately resulted in a workplace that was more hazardous to employees and railroad safety. Based on the proposed exceptions for switching and transfer train service, some railroad carriers might opt to remove toilet facilities in units being used in that service, to avoid maintenance and servicing costs. FRA proposes here to eliminate that alternative. Railroad carriers must retain toilets in equipped units in order to provide the most accommodating access to sanitation facilities available—an operable toilet on board the locomotive. Clearly, a toilet facility on the locomotive is preferable to one along the right-of-way. Employees can utilize it as the need arises, which diminishes the risk of health problems. They would not be forced to leave running equipment on the track or slow planned operations, which can create safety risks. Also, as older locomotives cascade down to the Class III railroads carriers, this proposal enhances the likelihood that small entities will inherit locomotives equipped with toilet facilities.

Paragraph (j) proposes that all new locomotive purchases made subsequent to the effective date of this rule, with two narrow exceptions, must include a toilet facility accessible to cab employees without walking outside. The design may require walking out of the cab into other compartments of the locomotive, but walking outside to use the toilet is disfavored. This paragraph reflects FRA's desire that all cab employees will work in a locomotive equipped with a toilet facility in the future.

The two narrow exceptions to this proposed requirement relate to switching units that are built exclusively for switching service and commuter locomotives designed exclusively for commuter service. With respect to the switching service exception, the Working Group and FRA recognize that these units that are created exclusively for yard service, and are often too small and oddly shaped to accommodate a toilet facility. Also, because of their size and configuration, these units are not used on long hauls over the road on which employees would clearly need toilet facilities in the cab. Under all circumstances, these

units would be used in yard service, where railroad carrier-provided sanitation facilities exist along the right-of-way, and are available for employee use. New units used in transfer train service would be required to be fitted with toilet facilities.

Similarly, the Working Group and FRA presently believe that commuter operations provide cab employees with sufficient access to sanitation facilities, along the right-of-way and elsewhere on the train. Therefore, FRA believes that the new construction requirements proposed in this paragraph need not include commuter locomotives.

With this requirement, FRA does not wish to chill innovation in the design of new equipment, but believes that toilet facilities should be located in close proximity to cab employees in lead locomotives, switching service, and transfer train service. Members of the industry agree that this proposal is appropriate.

Finally, paragraph (k) requires that where the washing system in place on the lead locomotive includes the use of water, the water must be potable. This proposed requirement is consistent with the principle that nonpotable water should not be used by humans for personal cleanliness, due to bacteria that may be present. As discussed above, railroad carriers may use waterless soaps, now available commercially, which would not require water; they may use bottled water that is potable; or they may use water in holding tanks located in the toilet compartment, so long as it meets the safe drinking water standards.

Section 229.139 Sanitation, Servicing Requirements

Section 229.139 proposes minimum servicing standards to ensure that sanitation compartments in occupied locomotives are not unsanitary or defective. Paragraph (a) states that the railroad carrier must service the sanitation compartments of lead locomotives in use so that they are sanitary. This proposed requirement means that the floors, toilet facility, and washing system must be free of trash and waste. It is reasonable to expect that, as a locomotive is used, some amount of dust and trash would accumulate. However, in order to meet the requirements of paragraph (a), the trash must be removed at regular intervals, and used, soiled paper products or human waste may not be present on the floor.

Paragraph (b) of section 139 requires that all components required by paragraph (a) of section 137 for the lead locomotive must be present consistent with the requirements of sections 137 and 139, and must be maintained so that they operate as intended. In this NPRM, FRA does not dictate when and how railroad carriers must empty, clean, and service toilets. Members of the Working Group advised FRA that these decisions vary greatly from property to property, and depend on weather conditions, degree of use, and the toilet system in place. These members further advised that a federal standard that established specific thresholds and time limits could result in unnecessary costs for some entities, and could actually reduce the level of safety and sanitation on others. Based on that information, FRA proposes language that requires each railroad carrier to develop an effective servicing program that suits the traffic, use, weather, equipment and other needs of the system so that cab employees are not exposed to full toilet bowls, missing seats, offensive odors, frozen units, dirty floors, ineffective ventilation systems, or any other condition that can reasonably be deemed unsanitary.

Following the Working Group's final meeting on sanitation and after FRA initially formulated this NPRM, a labor organization submitted information to FRA concerning a toilet system prevalent in the industry that utilizes a bacteriological treatment system. When this system functions as intended, water (with no biohazards remaining) is discharged to the track structure. The commenter alleges that this system may expose employees along the right-of-way to untreated human waste, or to substances that are otherwise harmful if the railroad carrier fails to service the toilet properly. This toilet meets the proposed definition of toilet facility, and presumably would continue to exist in large numbers throughout the industry after publication of any final rule in this proceeding. The regulations of the FDA, discussed above, prohibit the discharge of untreated waste from railroad equipment placed in service after July 1, 1972, and permit the discharge of waste that has been suitably treated to prevent disease. The bacteriological toilet system at issue meets the requirements of this FDA standard, so long as the system is being serviced and maintained to operate as intended. Based on the information provided concerning instances in which railroad employees along the right-of-way may be placed at risk if this system is not maintained properly, FRA will consider whether more specific servicing requirements are necessary in the final rule.

For instance, FRA could require that all railroads follow a maintenance program for each of the toilet systems in service on their property for the purposes of the servicing requirements in section 139. FRA could simply establish a requirement that all railroads follow the manufacturer's maintenance program for the toilet system in use. Alternatively, FRA could establish a requirement that each railroad would develop a maintenance program to meet appropriate effectiveness measures for each part of the toilet system. For example, to work properly, the aerobic bacteriological treatment toilet system presently employed by some carriers requires that, first, the treatment remain aerobic, and second, that bacteria be killed as the effluent exits the system. Although other chemicals or technology methods may be available in the future, presently, this second step is performed through the use of chlorine. As the aerobic bacteriological process must remain intact and not go septic, converting to anaerobic conditions, clear effectiveness indicators are required. Indicators that the process is no longer intact include very strong, putrid odors; observance that a full treatment tank will not drain; or large air bubbles returning to the toilet bowl via the waste flap following the flush cycle. To ensure the effectiveness measure of a railroad's maintenance of the whole aerobic bacteriological treatment toilet system may require statistical sampling of effluent for live organisms, including the bacteria. FRA might also require that, if such a toilet system ceases to function properly, presenting a risk that untreated waste might be discharged to the track, the unit must be plugged to prevent any such leakage in order to be used in a trailing position pending servicing. FRA seeks comments from all industry members on these proposals, the rule text language set forth in the NPRM, alternative language that would effectively eliminate the risks that employees along the right-of-way may face, and any other hazards that may exist which FRA has not addressed in this paragraph. FRA notes that a performance-oriented approach to this issue is preferred by FRA and others in the Working Group. However, FRA needs more information to determine how successful implementation of a performance-oriented approach could be monitored. FRA seeks comments on the issues and options associated with this type of toilet system. These comments will be considered by the Working Group prior to issuance of a final rule.

Paragraph (c) of section 139 proposes that any unit used in switching service,

transfer train service, or in the trailing position that is equipped with a toilet facility, must be sanitary if the locomotive is occupied. This requirement would address those units that might fall within the exceptions proposed in sections 229.137(b)(1)(ii) and (b)(1)(iii) because of the operations they are engaged in, but nonetheless possess a toilet facility on board. If that is the case, employees may opt not to use the toilet facility, preferring to utilize other facilities along the right-of-way. However, carriers must not expose these employees to unsanitary conditions while they are in the units. Therefore, the toilet facilities may actually be defective while the unit is occupied, but they cannot be unsanitary.

Paragraph (d) proposes that where a locomotive is equipped with a toilet facility that has become defective, and the locomotive is utilized briefly in switching or transfer train service consistent with the requirements of sections 229.137(b)(1)(ii) and (b)(1)(iii), the railroad carrier must mark the toilet facility as defective. The locomotive with the defective, but sanitary toilet facility, can be used in switching or transfer train service for a period not to exceed 10 calendar days from the date on which it became defective, at which time it must be repaired. However, the facility must remain sanitary in this short period while it is occupied. The date on which the toilet facility became defective must be noted on the daily inspection report, so the unit will be repaired within the prescribed time period. The carriers may need to institute new internal procedures to ensure that these defects are corrected within the required time frame, because (as some members of the Working Group have suggested), defects that need not be repaired on a daily basis, as section 229.21 requires with many defective conditions, may be forgotten. This proposal would amend section 229.21(a) and (b) to permit the railroads to record repairs made electronically, rather than on the daily inspection report. Several carriers noted that they currently employ an electronic tracking system of defects and repairs, and would like to include violations of sections 229.137 and 229.139 in the existing electronic program. FRA wishes to facilitate this process, and so long as the system is capable of being audited, FRA does not believe it is necessary to regulate this internal mechanism with great specificity.

During this 10-day period, the exceptions set forth for switching and transfer train service would apply, and so the carrier would be required to provide the cab employees affected access to sanitation facilities to meet otherwise applicable sanitation standards. [As discussed previously, these defective units may also be utilized in trailing position where there is less likelihood that employees will be affected at all.]

Requiring that these defective units can remain in service for a period not to exceed 10 calendar days, at which time they must be repaired or used in trailing position, is consistent with FRA's and the Working Group's desire to preserve optimum access to sanitation facilities where they currently exist. If a locomotive is equipped with a toilet facility, FRA recognizes that it may become defective and yet the locomotive can continue to operate without jeopardizing the employee's health. However, the toilet facility should not be allowed to remain defective indefinitely. The Working Group and FRA do not expect the railroads to reassign locomotives from road to yard service solely for the purpose of circumventing any part of this regulation. FRA understands that there are overriding incentives for railroads to keep road units with defective toilets in trailing road service until the next periodic inspection, rather than reassigning them to yard service.

The 10-day period was selected as a result of Working Group discussions, in which the carriers noted that a period of 10 days may be required to get appropriate parts needed for repair to remote locations where these defective units may be situated. However, in subsequent discussions, the carriers indicated that they would likely haul the defective units to repair facilities, rather than wait for parts to be sent to remote locations. Also, Working Group members have stated that, in some instances, the carriers would only need additional time to make yard movements so that a compliant locomotive can replace the defective one. Therefore, FRA is considering reducing this 10-day time period to accurately reflect what would be reasonable given prevalent practice. FRA invites comment on this issue from interested parties concerning the time needed to haul units for repair, the time needed to replace the defective unit with another in the yard, and the extent to which those practices will occur.

Paragraph (e) proposes to require the railroad carrier to repair a defective modesty lock prior to the next 92-day inspection that the locomotive is subject to, pursuant to the requirements of part 229. This proposal was recommended by all members of the Working Group and balances the privacy concerns that led to the modesty lock requirement, against the industry's interest in keeping otherwise fit locomotives in service. FRA believes that this proposal reaches a reasonable accommodation of both aims.

In addition to the foregoing issues, the Working Group discussed blue signal protection for railroad employees involved in the servicing of the sanitation compartment, and the substance of those discussions should be illuminated here. FRA issued regulations that require protections for employees engaged in the inspection, testing, repair, and servicing of rolling equipment, where those activities require employees to work on, under, or between equipment, and where the danger of personal injury exists. See 49 CFR part 218. These regulations state that ''servicing'' does not include supplying locomotives with sanitary supplies. Therefore, employees engaged in replenishing toilet paper in the sanitation compartment would not be ''servicing'' the locomotive for purposes of part 218, and, therefore, would not require blue signal protection. However, other duties that employees may be engaged in relating to the repair, service, maintenance or emptying of the locomotive toilet facility likely would fall within the scope of Part 218 and would require the protections set forth there. This determination may depend on the toilet system in place, and so each railroad carrier must assess the need for blue signal protection on its property based on the configuration of the system in place and the functions employees perform relative to it.

Finally, this NPRM does not propose new lighting requirements for the sanitation compartment. The existing locomotive safety standards already require that ''Cab passageways and compartments shall have adequate illumination.'' 49 CFR 229.127(b). This existing requirement effectively addresses the need for lighting in the sanitation compartment. The compartment must be illuminated so that occupants can clearly see all appurtenances, fixtures, and items present within the toilet area.

Appendix

FRA plans to revise Appendix B to part 229, Schedule of Civil Penalties, to include penalties for violations of those provisions as set forth in this proposal that will become part of the final rule. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. See U.S.C. 553(b)(3)(A). Nevertheless, interested parties are

welcome to submit their views on what penalties may be appropriate.

Environmental Impact

FRA has evaluated this proposal in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*) and related directives. The regulation of sanitation facilities on locomotives gives rise to two potential environmental concerns. The first relates to the handling of chemicals used to treat human waste while in transit or in storage awaiting permanent disposal. These chemical substances and employee exposure to them are currently regulated by EPA and OSHA, respectively, in order to prevent degradation of the environment and harm to employees. Nothing in this proposal alters those regulations, which protect the environment and employees from the hazards associated with regulated chemicals.

The second concern relates to the disposal of untreated waste along the railroad right-of-way, which would give rise to potential environmental and employee health hazards. As FRA understands it, nearly all locomotives utilize sanitation systems that either treat or burn the waste on board and release products that do not introduce environmental or personal safety hazards; or haul the waste in treatment containers to a site where it is removed and stored for approved processing. In any event, regulations promulgated by the FDA prohibit the release of untreated human waste along the railroad right-of-way, and nothing in this proposal alters that requirement. Therefore, FRA has determined that this proposal will not have a deleterious impact on the environment.

Regulatory Impact

Executive Order 12866 and DOT Regulatory Policies and Procedures

This proposal 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 proposed rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, 7th Floor, Washington, DC. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, SW., Washington, DC 20590.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of costs and a qualitative discussion of the benefits expected from the adoption of this proposed rule. Over a twenty-year period, the Present Value (PV) of the estimated costs is $75.4 million.

The major costs anticipated from adopting this proposed rule include: the on-going maintenance and servicing of toilet facilities that are not currently being serviced properly; an increase in the daily inspection burden to include additional components of the sanitation compartment; and providing a separate trash receptacle in the sanitation compartment and the removal of trash receptacles in regular intervals.

The major benefits anticipated from implementing this final rule include: guaranteed access to sanitary facilities; assurance that toilet facilities are maintained in a clean and sanitary manner; and the assurance that cab employees will have potable water to use. In addition, railroads should incur some savings from having a national and uniform regulation governing sanitation facilities. In the long-term, the FRA should see a decrease in complaints and correspondence related to toilet facilities.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket an Initial Regulatory Flexibility Assessment (IRFA) which assesses the small entity impact of this proposal. Document inspection and copying facilities are available at 1120 Vermont Avenue, 7th Floor, Washington, DC. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Federal Railroad Administration, 400 Seventh Street, SW., Washington, DC 20590.

''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 an interim policy which formally establishes ''small entities'' as being railroads which meet the line haulage revenue requirements of a Class III railroad. 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 (STB'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. FRA proposes to use this alternative definition of ''small entity'' for this rulemaking. Since this is an alternative definition, FRA is using it in consultation with the SBA and requests public comments on its use.

For this rulemaking there are over 550 small railroads that could potentially be affected by these proposals. FRA estimates that small railroads own approximately 3,500 locomotives. In addition, the Agency estimates that only about one-third of these or less possess a toilet facility. FRA does not expect this proposal to impose a significant burden on small railroads because it provides them an exception from the requirement to have a functioning toilet in the lead occupied locomotive, so long as the railroad provides employee access to toilet and washing facilities at frequent intervals.

The impacts from this proposal are primarily a result of some of the compliance requirements for locomotives that have functioning toilet facilities. The most significant impacts are from compliance items associated with the proposed toilet facility requirements which include a trash receptacle in the toilet compartment, marking defective toilet facilities, and the daily inspection requirements. Most small railroads own locomotives that never had toilet facilities on them, or previously had them removed. FRA estimates that only six percent of the Regulatory Impact Analysis' (RIA) total cost over 20 years would impact small railroads.

The proposed requirement which impacts small railroads most is the requirement to provide ready access to appropriate toilet facilities. FRA has interpreted this requirement to mean that small railroad carriers must arrange for en route access to toilet facilities. The RIA has estimated that there would be a 2-hour burden per affected railroad during the first year of implementation. This burden is estimated to cost

$22,545. The burden for the following years is only 20 minutes per railroad per year to modify the toilet facility arrangements. FRA understands that it is common practice today for a Class III railroads to comply with the general requirements of providing ready access. Currently it is customary for a small railroad to drive out to a locomotive to carry a crew member to sanitary facilities when called. Hence, the concept of providing ready access to toilet facilities is not a new or significant burden for most Class III railroads since most of these railroads currently provide this service for their locomotive cab employees.

The Class III exemption from the requirement to have a toilet facility in the lead occupied locomotive is provided to ensure that feasible lower cost alternatives are provided for the potentially affected small entities. FRA and the Working Group understand the difficulties of retrofitting older locomotive units and see no reason to unduly burden small railroads, so long as access can be provided by alternative means. The Working Group and FRA believe that this exception is both necessary and acceptable.

The IRFA concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities. Thus, FRA certifies that this proposed rule is not expected to have a ''significant'' economic impact on a ''substantial'' number of small entities. In order to determine the significance of the economic impact for the final rule's Regulatory Flexibility Assessment (RFA), FRA invites comments from all interested parties concerning the potential economic impact on small entities caused by this proposed rule. The Agency will consider the comments and data it receives, or lack thereof, in making a decision on the RFA for the final rule.

Federalism

FRA has analyzed the proposed rule according to the principles of Executive Order 13132 (''Federalism''). FRA has determined that this proposal, if adopted as a final rule, may have federalism implications. FRA's final sanitation standards would preempt all state efforts to regulate the nature and type of access to sanitation facilities generally required for cab employees. Further, FRA's final sanitation standards would preempt the maintenance of sanitation facilities located on board trains. As discussed above, the Locomotive Inspection Act has been interpreted to occupy the field of locomotive safety, including the regulation of appurtenances in locomotives, such as toilets. Nonetheless, some state regulatory bodies have promulgated and enforce state standards that require toilet facilities in locomotive cabs. FRA's sanitation standards would preempt those state standards. FRA believes this regulatory action is warranted, however, based on principles of interstate commerce and the need for uniformity of national standards. In addition, some State agencies have expressed the need for federal regulation in this area to provide uniform treatment and to prevent situations in which employees work without sanitation facilities where the State is powerless to enforce its requirements, due to operation of the occupational safety and health and railroad safety laws.

Consistent with the requirements of Executive Order 13132, FRA has and will continue to consult with State agencies as this rulemaking proceeds. This will be achieved primarily through the full RSAC Committee, which includes representatives of State interests. FRA will publish a federalism impact statement in the final rule that explains the concerns of the States, a description of the consultations with the states, and a statement of the extent to which the concerns of the States have been met in any final standards that are issued.

Paperwork Reduction Act

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

CFR section	Respondent universe	Total annual responses	Average time per response (seconds)	Total annual burden hours (hours)	Total annual burden cost
229.137(d)—Sanitation—Locomotive Defective or Unsanitary Toilet Facility Placed in Trailing Service— Clear Markings— Unavailable for Use.	Class I & II railroads.	15,600 notices.	90	390	$3,250
229.137(e)–Sanitation—Locomotive Defective Toilet Facility—Clear Markings—Unavailable for Use.	Class I & II railroads.	5,200 notices	90	130	3,250
229.139(d)—Servicing—Locomotive Used in Transfer/Switching Service with Defective Toilet Facility—Date Defective.	Class I & II railroads.	936,000 notations.	30	780	19,500

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), the FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the function of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB contact Robert Brogan at 202–493–6292.

FRA believes that soliciting public comment will promote its efforts to reduce the administrative and paperwork burdens associated with the collection of information mandated by Federal regulations. In summary, FRA reasons that comments received will advance three objectives: (i) Reduce reporting burdens; (ii) ensure that it organizes information collection requirements in a ''user friendly'' format to improve the use of such information; and (iii) accurately assess the resources expended to retrieve and produce information requested. See 44 U.S.C. 3501.

Comments must be received no later than March 5, 2001. Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Robert Brogan, Federal Railroad Administration, RRS–21, Mail Stop 17,

1120 Vermont Ave., NW., MS–17, Washington. DC 20590.

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

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

Comments Requested

FRA has made every attempt in this proposal to capture the principles of accessible, sanitary, toilet and washing facilities for locomotive cab employees, in such a way that railroad operations will not be adversely affected. However, FRA invites comment from all interested parties on all aspects of this proposal. FRA and the Working Group made every effort to discuss and address cab sanitation comprehensively in this NPRM, but there may be issues, equipment, or operations that require further information and consideration. FRA requests comments from the public and experts on the scope and exceptions set forth in this proposal, the definitions established to identify equipment and procedures, the proposed servicing requirements, and anything not addressed by this proposal that deserves consideration.

List of Subjects in 49 CFR Part 229

Locomotives, Penalties, Railroad safety.

For the reasons set forth in the preamble, 49 CFR Part 229 is amended as follows.

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

Authority: 49 U.S.C. 20102–03, 20133, 20137–38, 20143, 20701–03, 21301–02, 21304; 49 CFR 1.49.

2. Section 229.5 is amended by adding in alphabetical order new definitions of ''Commuter service'', ''Modesty lock'', ''Potable water'', ''Sanitary'', ''Sanitation compartment'', ''Switching service'', ''Transfer train'', ''Toilet facility'', ''Unsanitary'', and ''Washing system'.

§ 229.5 Definitions.

* * * * *

Commuter service means commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979, that runs on rails or electromagnetic guideways, but does not include rapid transit operations in an urban area that are not connected to the general system of transportation. *See also,* 49 CFR part 209, Appendix A.

* * * * *

Modesty lock means a latch that can be operated in the normal manner only from within the sanitary compartment, that is designed to prevent entry of another person when the sanitary compartment is in use. A modesty lock may be designed to allow deliberate forced entry in the event of an emergency.

* * * * *

Potable water means water that meets the requirements of 40 CFR part 141, the Environmental Protection Agency's Primary Drinking Water Regulations, or water that has been approved for drinking and washing purposes by the pertinent state or local authority having jurisdiction. For purposes of this section, commercially available, bottled drinking water is deemed potable water.

* * * * *

Sanitary means the absence of any significant amount of filth, trash, human waste present in such a manner that a reasonable person would believe that the condition might constitute a health hazard; or of strong, persistent, chemical or human waste odors sufficient to deter use of the facility, or give rise to a reasonable concern with respect to exposure to hazardous fumes. Such conditions include, but are not limited to, a toilet bowl filled with human waste, soiled toilet paper, or other products used in the toilet compartment, that are present due to a defective toilet facility that will not flush or otherwise remove the waste; visible human waste residue on the floor or toilet seat that is present due to a toilet facility that overflowed; an accumulation of soiled paper towels or soiled toilet paper on the floor, toilet facility or sink; an accumulation of visible dirt or human waste on the floor, toilet facility, or sink; and strong, persistent chemical or human waste odors in the compartment.

Sanitation compartment means an enclosed compartment on a railroad locomotive that contains a toilet facility for employee use.

* * * * *

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

Transfer train means a train that travels between a point of origin and a point of final destination not exceeding 20 miles and that is not performing switching service.

Toilet facility means a system that automatically or on command of the user removes human waste to a place where it is treated, eliminated, or retained such that no solid or non-treated liquid waste is thereafter permitted to be released into the bowl, urinal, or room and that prevents harmful discharges of gases or persistent offensive odors.

Unsanitary means any condition in which any significant amount of filth, trash, human waste are present in such a manner that a reasonable person would believe that the condition might constitute a health hazard; or strong, persistent, chemical or human waste odors sufficient to deter use of the facility or to give rise to a reasonable concern with respect to exposure to hazardous fumes. Such conditions include, but are not limited to, a toilet bowl filled with human waste, soiled toilet paper, or other products used in the toilet compartment, that are present due to a defective toilet facility that will not flush or otherwise remove the waste; visible human waste residue on the floor or toilet seat that is present due to a toilet facility that overflowed; an accumulation of soiled paper towels or soiled toilet paper on the floor, toilet facility, or sink; an accumulation of visible dirt or human waste on the floor, toilet facility, or sink; and strong persistent chemical or human waste odors in the compartment.

Washing system means a system for use by railroad employees to maintain personal cleanliness that includes a secured sink or basin, water, antibacterial soap, and paper towels; or antibacterial waterless soap and paper towels; or antibacterial moist towelettes and paper towels; or any other combination of suitable antibacterial cleansing agents.

3. Section 229.9 is amended by adding paragraph (g) to read as follows:

§ 229.9 Movement of non-complying locomotives.

* * * * *

(g) Paragraphs (a), (b), and (c) of this section shall not apply to § 229.137 and § 229.139. Sections 229.137 and 229.139 set forth specific requirements for the movement and repair of locomotives with defective sanitation compartments.

4. Section 229.21 is amended by removing the fourth and fifth sentences of paragraph (a) and adding in their place three new sentences and by removing the fourth sentence of paragraph (b) and adding in its place three new sentences to read as follows:

§ 229.21 Daily inspection.

(a) * * * Except as provided in §§ 229.9, 229.137, and 229.139, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. Except with respect to conditions that don't comply with §§ 229.137 or 229.139, a notation shall be made on the report indicating the nature of the repairs that have been made. Repairs made for conditions that don't comply with §§ 229.137 or 229.139 may be noted on the report, or in electronic form. * * *

(b) * * * Except as provided in §§ 229.9, 229.137, and 229.139, any conditions that constitute non-compliance with any requirement of this part shall be repaired before the locomotive is used. Except with respect to conditions that don't comply with §§ 229.137 or 229.139, a notation shall be made on the report indicating the nature of the repairs that have been made. Repairs made for conditions that don't comply with §§ 229.137 or 229.139 may be noted on the report, or in electronic form. * * *

5. Sections 229.137 and 229.139 are added to subpart C to read as follows:

§ 229.137 Sanitation, general requirements.

(a) *Sanitation compartment.* Except as provided in paragraph (b) of this section, all lead locomotives in use shall be equipped with a sanitation compartment. Each sanitation compartment shall be:

(1) Adequately ventilated;

(2) Equipped with a door that:

(i) Closes, and

(ii) Possesses a modesty lock by [18 months after publication of the final rule];

(3) Equipped with a toilet facility, as defined in this part;

(4) Equipped with a washing system, as defined in this part, unless the railroad carrier otherwise provides the washing system to employees upon reporting for duty or occupying the cab for duty, or where the locomotive is equipped with a stationary sink that is located outside of the sanitation compartment;

(5) Equipped with toilet paper in sufficient quantity to meet employee needs, unless the railroad carrier otherwise provides toilet paper to employees upon reporting for duty or occupying the cab for duty; and

(6) Equipped with a trash receptacle, unless the railroad carrier otherwise provides portable trash receptacles to employees upon reporting for duty or occupying the cab for duty.

(b) *Exceptions.*

(1) Paragraph (a) of this section shall not apply to:

(i) Locomotives engaged in commuter service on which employees have ready access to railroad carrier-provided sanitation facilities outside of the locomotive or elsewhere on the train, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift;

(ii) Locomotives engaged in switching service on which employees have ready access to railroad carrier-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift;

(iii) Locomotives engaged in transfer train service on which employees have ready access to railroad carrier-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift;

(iv) Locomotives of Class III railroad carriers engaged in operations other than switching service or transfer train service, that are not equipped with a sanitation compartment as [of the effective date of this section]. Where an unequipped locomotive of a Class III railroad carrier is engaged in operations other than switching or transfer train service, employees shall have ready access to carrier-provided sanitation facilities outside of the locomotive that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift, or the carrier shall arrange for en route access to such facilities; and

(v) Locomotives of tourist, scenic, historic, or excursion operations, which are otherwise covered by this part because they are not propelled by steam power and operate on the general railroad system of transportation, but on which employees have ready access to railroad carrier-provided sanitation facilities outside of the locomotive, that meet otherwise applicable sanitation standards, at frequent intervals during the course of their work shift.

(2) Paragraph (a)(3) of this section shall not apply to:

(i) Locomotives of a Class I railroad carrier which, prior to [the effective date of this section], were equipped with a toilet facility in which human waste falls via gravity to a holding tank where it is stored and periodically emptied, which does not conform to the definition of toilet facility set forth in this section. For these locomotives, the requirements of this section pertaining to the type of toilet facilities required shall be effective as these toilets become defective or are replaced with conforming units, whichever occurs first. All other requirements set forth in this section shall apply to these locomotives as of [the effective date of this section]; and

(ii) With respect to the locomotives of a Class I railroad carrier which, prior to [the effective date of this section], were equipped with a sanitation system other than the units addressed by paragraph (b)(2)(i) of this section, that contains and removes human waste by a method that does not conform with the definition of toilet facility as set forth in this section, the requirements of this section pertaining to the type of toilet facilities shall apply on locomotives in use shall apply on July 1, 2003. However, the Class I railroad carrier subject to this exception shall not deliver noncompliant toilet facilities to other railroad carriers for use, in the lead position, during the time between [the effective date of this rule] and July 1, 2003. All other requirements set forth in this section shall apply to the locomotives of this Class I railroad carrier as of [the effective date of this section].

(c) *Defective, unsanitary toilet facility; prohibition in lead position.* Except as provided in paragraphs (c)(1) through (5) of this section, if the railroad carrier determines during the daily inspection required by § 229.21 that a locomotive toilet facility is defective or is unsanitary, or both, the railroad carrier shall not use the locomotive in the lead position. The railroad carrier may continue to use a lead locomotive with a toilet facility that is defective or unsanitary as of the daily inspection only where all of the following conditions are met:

(1) The unsanitary or defective condition is discovered at a location where there are no other locomotives available for use, it is not possible to

switch another locomotive into the lead position, or which is not equipped to clean the sanitation compartment if unsanitary or repair the toilet facility if defective;

(2) The locomotive, while noncompliant, did not pass through a location where it could have been cleaned if unsanitary, repaired if defective, or switched with another compliant locomotive, since its last daily inspection required by this part;

(3) Upon reasonable request of a locomotive crewmember operating a locomotive with a defective or unsanitary toilet facility, the railroad carrier arranges for access to a toilet facility outside the locomotive that meets otherwise applicable sanitation standards;

(4) If the sanitation compartment is unsanitary, the sanitation compartment door shall be closed and adequate ventilation shall be provided in the cab so that it is habitable; and

(5) The locomotive shall not continue in service in the lead position beyond a location where the defective or unsanitary condition can be corrected or replaced with another compliant locomotive, or the next daily inspection required by this part, whichever occurs first.

(d) *Defective, unsanitary toilet facility; use in trailing position.* If the railroad carrier determines during the daily inspection required by § 229.21 that a locomotive toilet facility is defective or is unsanitary, or both, the railroad carrier may use the locomotive in trailing position. If the railroad carrier places the locomotive in trailing position, the carrier shall not haul employees in the unit unless the sanitation compartment is made sanitary prior to occupancy. If the toilet facility is defective and the unit becomes occupied, the railroad carrier shall clearly mark the defective toilet facility as unavailable for use.

(e) *Defective, sanitary toilet facility; use in switching, transfer train service.* If the railroad carrier determines during the daily inspection required by § 229.21 that a locomotive toilet facility is defective, but sanitary, the carrier may use the locomotive in switching service, as set forth in paragraph (b)(1)(ii) of this section, or in transfer train service, as set forth in paragraph (b)(1)(iii) of this section for a period not to exceed 10 days. In this instance, the railroad carrier shall clearly mark the defective toilet facility as unavailable for use. After expiration of the 10-day period, the locomotive shall be repaired or used in the trailing position.

(f) *Lack of toilet paper, washing system, trash receptacle.* If the railroad carrier determines during the daily inspection required by § 229.21 that the lead locomotive is not equipped with toilet paper in sufficient quantity to meet employee needs, or a washing system as required by paragraph (a)(4) of this section, or a trash receptacle as required by paragraph (a)(6) of this section, the locomotive shall be equipped with these items prior to departure.

(g) *Inadequate ventilation.* If the railroad carrier determines during the daily inspection required by § 229.21 that the sanitation compartment of the lead locomotive in use is not adequately ventilated as required by paragraph (a)(1) of this section, the railroad carrier shall repair the ventilation prior to departure, or place the locomotive in trailing position, in switching service as set forth in paragraph (b)(1)(ii) of this section, or in transfer train service as set forth in paragraph (b)(1)(iii) of this section.

(h) *Door closure and modesty lock.* If the railroad carrier determines during the daily inspection required by § 229.21 that the sanitation compartment on the lead locomotive is not equipped with a door that closes, as required by paragraph (a)(2)(i) of this section, the railroad carrier shall repair the door prior to departure, or place the locomotive in trailing position, in switching service as set forth in paragraph (b)(1)(ii) of this section, or in transfer train service as set forth in paragraph (b)(1)(iii) of this section. If the railroad carrier determines during the daily inspection required by § 229.21 that the modesty lock required by paragraph (a)(2)(ii) of this section is defective, the modesty lock shall be repaired pursuant to the requirements of § 229.139(e).

(i) *Equipped units; retention and maintenance.* Except where a railroad carrier downgrades a locomotive to service in which it will never be occupied, where a locomotive is equipped with a toilet facility as of [the effective date of the final rule], the railroad carrier shall retain and maintain the toilet facility in the locomotive consistent with the requirements of this part, including locomotives used in switching service pursuant to paragraph (b)(1)(ii) of this section, and in transfer train service pursuant to paragraph (b)(1)(iii) of this section.

(j) *Newly manufactured units; in-cab facilities.* All locomotives manufactured after [Effective date of the final rule], except switching units built exclusively for switching service and locomotives built exclusively for commuter service shall be equipped with a sanitation compartment accessible to cab employees without exiting to the out-of-doors for use.

(k) *Potable water.* The railroad carrier shall utilize potable water where the washing system includes the use of water.

§ 229.139 Sanitation, servicing requirements.

(a) The sanitation compartment of each lead locomotive in use shall be sanitary.

(b) All components required by § 229.137(a) for the lead locomotive in use shall be present consistent with the requirements of this part, and shall operate as intended.

(c) The sanitation compartment of each occupied locomotive used in switching service pursuant to § 229.137(b)(1)(ii), in transfer train service pursuant to § 229.137(b)(1)(iii), or in a trailing position when the locomotive is occupied, shall be sanitary.

(d) Where the railroad carrier uses a locomotive pursuant to § 229.137(e) in switching or transfer train service with a defective toilet facility, such use shall not exceed 10 calendar days from the date on which the defective toilet facility became defective. The date on which the toilet facility becomes defective shall be entered on the daily inspection report.

(e) Where it is determined that the modesty lock required by § 229.137(a)(2) is defective, the railroad carrier shall repair the modesty lock on or before the next 92-day inspection required by this part.

Issued in Washington, D.C. on the 15th of December, 2000.

Jolene M. Molitoris,

Administrator.

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