with industry owners and operators. The Coast Guard believes that in many industries, owners and operators are more aware of safety requirements and do more to make sure their employees follow those requirements when they must document their compliance with those requirements.

4. *Rig No. 12 report.* The Coast Guard devotes significant resources to studying the causes of accidents that result in serious property losses, injury, or death, so that similar accidents can be avoided in the future. Lessons learned from tragedy make special demands on us to give them serious consideration and to implement them if possible. In the docket for this rulemaking at *http://www.Regulations.gov*, we are placing the formal investigation report into a commercial diving death at Cliff's Drilling Rig No. 12 in 1996. The report includes 13 recommendations and the Coast Guard is considering adopting most of these, in some cases with modifications.

5. *Regulatory priorities.* We have indicated our interest in industry standards, third-party audits, compliance documentation, and the Rig No. 12 report recommendations. In addition, we invite you to comment on overall regulatory approaches or on specific regulatory requirements that you believe should be a priority for this rulemaking. We are also inviting comments on current industry practices and changes in circumstances from conditions existing in 1998.

6. *Costs and Benefits.* We request comments on the costs and benefits of regulatory revisions suggested by the commenters. Providing us with specific information on the costs and benefits of regulatory suggestions will assist us with fully evaluating the merits of such suggestions. We are especially interested in information providing data on the cost of regulatory suggestions on small entities, and State, local, and tribal governments.

Dated: December 22, 2008.

Brian M. Salerno,

Assistant Commandant for Marine Safety, Security and Stewardship, U.S. Coast Guard.

[FR Doc. E8–31415 Filed 1–5–09; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

49 CFR Part 1301

[STB Ex Parte No. 676]

Rail Transportation Contracts Under 49 U.S.C. 10709

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rule.

SUMMARY: The Surface Transportation Board (Board or STB) proposes to amend its rules to provide that where an agreement for rail carriage contains the disclosure statement to be set forth in this new rule, the Board will not find jurisdiction over a dispute involving the rate or service under the agreement and will treat that agreement as a rail transportation contract governed by 49 U.S.C. 10709; and conversely where an agreement for rail carriage fails to contain the disclosure statement, the Board will find jurisdiction over a dispute involving the rate or service under the agreement, absent clear and convincing evidence that the parties intended to enter into a rail transportation contract governed by 49 U.S.C. 10709; and the shipper was made aware that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction.

DATES: Comments on this proposal are due by February 5, 2009. Reply comments are due by March 9, 2009.

ADDRESSES: Comments may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E–FILING link on the Board's Web site, at *http://www.stb.dot.gov*. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, *Attn.:* STB Ex Parte No. 676, 395 E Street, SW., Washington, DC 20423–0001.

Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Timothy Strafford at (202) 245–0356. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.)

SUPPLEMENTARY INFORMATION: In a Notice of Proposed Rulemaking in STB Ex Parte No. 669 served on March 29, 2007 (2007 NPRM) and published in the **Federal Register** on April 4, 2007 (72 FR 16316–18), the Board sought to address two concerns arising from hybrid rail pricing mechanisms such as the one involved in *Kansas City Power & Light Company* v. *Union Pacific Railroad Company*, STB Docket No. 42095 (STB served Mar. 27, 2007) (*KCPL*), which, despite having characteristics of a rail transportation contract beyond the Board's jurisdiction under 49 U.S.C. 10709, are designated by the carrier as common carriage rates subject to the Board's jurisdiction.

The first concern was uncertainty. Although Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board's jurisdiction, 49 U.S.C. 10709(c), the statute provides no clear demarcation between a contract rate and common carriage rate. The issue of whether a rate is a contract rate or common carriage rate has been examined on a case-by-case basis in light of the parties' intent. *See Aggregate Volume Rate on Coal, Acco, UT to Moapa, NV*, 364 I.C.C. 678, 689 (1981). With the enactment of the ICC Termination Act of 1995 (ICCTA), it became more difficult to distinguish between the two types of rates, as railroads are no longer required to file with the agency either tariffs containing their common carriage rates or summaries of their non-agricultural contracts.

The second concern was that increased use of hybrid pricing arrangements could create an environment where collusive activities in the form of anticompetitive price signaling could occur. Although the terms of a rail transportation contract generally are kept confidential, the terms and conditions of common carriage rates must be publicly disclosed upon request, 49 U.S.C. 11101, thereby increasing the possibility of collusive behavior in a highly concentrated industry.

In the 2007 NPRM, the Board proposed to address these two concerns by interpreting the term ''contract'' in 49 U.S.C. 10709 as embracing ''any bilateral agreement between a carrier and a shipper for rail transportation in which the railroad agrees to a specific rate for a specific period of time in exchange for consideration from the shipper, such as a commitment to tender a specific amount of freight during a specific period or to make specific investments in rail facilities.''

Both shippers and carriers opposed that proposal. After reviewing their comments, the Board concluded that its original proposal might have unintended and undesirable

consequences, and it decided to discontinue that proceeding.[1]

Nevertheless, we remained concerned with the lack of any clear demarcation between common carriage rates and contract pricing arrangements and the resulting ambiguity regarding the Board's jurisdiction. This ambiguity was exhibited in two recent Board proceedings regarding Option 2 of the Union Pacific Railway Company's (UP's) Circular 111.[2] In the first proceeding, the shipper, Kansas City Power & Light Company, agreed with UP that Circular 111 is a tariff. *See KCPL.* In the second proceeding, the shipper, Ameren Energy and Fuels Services Company, argued that Circular 111 is a contract. *See Union Pacific Railroad Company—Petition for Declaratory Order*, STB Finance Docket No. 35021 (STB served May 15, 2007). The fact that two sophisticated shippers regarded the same document, with the same language, in completely opposite ways underscores the need for greater clarity.

Thus, we sought an alternative, less-intrusive way to distinguish contracts from common carriage agreements.[3] Specifically, we sought public comment on whether the Board should require that each carrier provide a formal written disclosure statement when it seeks to enter into a rail transportation contract under 49 U.S.C. 10709. That statement would explicitly advise the shipper that the carrier intends the document to be a rail transportation contract and that any transportation under the document would not be subject to regulation by the Board. The statement would further advise the shipper that it has a statutory right to request a common carriage rate that the carrier would then have to supply promptly, and that such a rate might be open to challenge before the Board. We also sought comment on whether to include a requirement for a written informed consent statement in which the shipper acknowledges, and states its willingness to forgo, its regulatory options.

The Board received comments from Arkansas Electric Cooperative Corp. (AECC); the Association of American Railroads (AAR); BNSF Railway Company (BNSF); CSX Transportation, Inc. (CSXT); Edison Electric Institute (EEI); National Grain and Feed Association (NGFA); the National Industrial Transportation League (NITL); Norfolk Southern Railway Company (NS); Occidental Chemical Corp. (OxyChem); Olin Corp. (Olin); PPG Industries, Inc. (PPG); Progressive Rail, Inc. (PGR); Union Pacific Railroad Company (UP); United Transportation Union-General Committee of Adjustment, GO–386 (UTU); the U.S. Clay Producers Traffic Association, Inc. (Clay Producers); and the Western Coal Traffic League (WCTL). We have reviewed the record and taken each of these comments into account in the development of the proposed rule.

Proposed Rule

The somewhat different rule we now propose, which is set forth in the regulatory text of this document, seeks to provide a more objective means of determining whether the parties' intent was to use a common carriage tariff subject to the Board's jurisdiction or to agree to a rail transportation contract outside the Board's jurisdiction under 49 U.S.C. 10709.[4] A need for a clear demarcation between tariffs and contracts has become evident in recent Board proceedings and is recognized by many within the industry.[5] By proposing a rule that would encourage full disclosure to shippers of their regulatory options at the time of contract formation, the proposed rule should further Congress' dual intent to offer regulatory protection to shippers that desire such protection, while encouraging private rail transportation contracts for those shippers that prefer such arrangements. The rule proposed here would not require the inclusion of a disclosure statement; rather, it would simply set forth the criteria that the Board would apply to determine its jurisdiction based on the presence or absence of such a statement.

The significant change between this proposal and our prior proposal is the removal of the informed consent requirement. The anticipated benefits of the informed consent proposal are outweighed by the potential for unintended consequences that could hamper contracting for rail carriage. Carriers made a strong case that the informed consent requirement would unnecessarily complicate the contract process and delay the timely implementation of contracts, especially when contracts are negotiated electronically or in the case of signatureless contracts.[6] And shippers made a strong case that, by signing an informed consent statement, they would be unable to argue in court that a unilateral agreement is a contract of adhesion.[7] We believe that a prominently displayed disclosure statement that provides explicit notice to the shipper of the nature of the agreement would further Congress' concern that shippers not opt out of our regulatory protections unknowingly. Nevertheless, the incremental benefit of imposing an additional informed consent requirement does not appear to merit the hindrance and delay to modern contract formation that it might cause.

Given the Board's lack of jurisdiction over contracts under 49 U.S.C. 10709, some comments suggest that any rule should focus only on common carriage,[8] an area clearly within our jurisdiction.[9] But to exercise jurisdiction over matters properly before us, we must be able to distinguish between common carriage and contract pricing arrangements in situations where the terms and conditions can appear to be identical.[10]

This proposal should establish a practical way to allow a clear demarcation between contract and

[1] A complete review of the comments submitted in STB Ex Parte No. 669 and the Board's reasons for rejecting that approach and pursuing a different approach by instituting STB Ex Parte No. 676 is provided in *Rail Transportation Contracts Under 49 U.S.C. 10709*, STB Ex Parte No. 676, *et al.* (STB served Mar. 12, 2008) (*ANPR*).

[2] UP's Circular 111, ''Unit Train Coal Common Carrier Circular Applying On: Unit Coal Trains from the Powder River Basin of Wyoming,'' contains two classes of rates for customers. One class, referred to as Option 1, contains a higher rate with no volume requirement. The second class, referred to as Option 2, contains a lower rate with commitments from both parties for term, volume, rates, and service.

[3] *See ANPR supra.*

[4] This proposed rule would apply only to agreements between shippers and carriers for rail service. As PGR has pointed out, a disclosure statement is not needed for contracts between carriers, such as freight handling, haulage, and switching agreements. Nor would the proposed rule be intended to apply to separate contracts for accessorial services such as demurrage and storage, transloading to and from other modes, incidental warehousing during transloading, and local drayage.

[5] *See* AECC at 2; CSXT at 4; Clay Producers at 1; WCTL at 4.

[6] *See* AAR note 5 at 12; CSXT at 3; NS at 5; UP at 7.

[7] *See* Olin at 2.

[8] *See* AAR at 5; BNSF at 4; CSXT at 7; NS at 3; WCTL at 5.

[9] Although the Board has authority to define how it will determine what constitutes a tariff, doing so could overlap with the jurisdiction of the courts. For instance, NITL and others have argued that we should define common carriage to include unilateral rate offerings. *See* NITL at 5. However, there are unilateral agreements that are recognized by courts as contracts and we have no authority to question a court's judgment on these matters.

[10] It is well-settled that the Board has jurisdiction to determine its jurisdiction. *See Burlington N., Inc.* v. *Chicago & N.W. Transp. Co.*, 649 F.2d 556, 558 (8th Cir. 1981); *cf. Wms. Gas Processing-Gulf Coast Co.* v. *FERC*, 475 F.3d 319, 323 (D.C. Cir. 2006) (FERC must draw the line between non-jurisdictional gathering and jurisdictional transportation of natural gas, a line that is ''not always clear'').

common carrier rates. With respect to the proposed disclosure statement provision, set forth in the proposed new § 1301.1 [11] the disclosure statement should be placed prominently at the top of the first page of the agreement, in type size at least as large as the type used for the body of the agreement.[12] We are not proposing that carriers be required to use the disclosure statement but rather that the inclusion of this statement in an agreement would establish clear and objective evidence that the parties intended to enter into a contract under 49 U.S.C. 10709 and that their dispute thus lies outside the Board's jurisdiction. Absent the inclusion of such a disclosure statement, we would find that an agreement for rail transportation is a common carriage tariff and would take jurisdiction over a rate or service complaint absent clear and convincing evidence both that the parties intended to enter into a rail transportation contract and that the shipper was made aware that it could request a common carriage tariff that would be subject to STB jurisdiction.

This disclosure statement provision should be a workable mechanism to solve the demarcation problem between contracts and tariffs without hindering contracting or inappropriately encouraging the use of tariffs. Use of the disclosure statement by carriers should adequately allay shipper and carrier concerns in this regard.[13] Nevertheless, we remain open to comments not only on the proposed rule itself but also regarding the language of the disclosure statement to ensure that it would not inadvertently encourage a common carriage agreement over a rail transportation contract.

The disclosure statement provision should promote regulatory efficiency by establishing a transparent mechanism to determine our jurisdiction over a rate or service complaint instead of having to glean the parties' intent based on the unique facts of each case before us. The parties should benefit by the associated reduction in legal fees in actions before the Board and in court.

Railroads have suggested using a safe harbor approach, instead of a disclosure statement, to allow various ways to demonstrate the parties' intentions.[14] Shippers suggest alternatively that any ambiguity on the face of a document should be construed against the carrier as the drafter of the document.[15] Neither of these approaches would promote efficiency, however, as they would require the Board to examine extraneous evidence beyond the document to determine the parties' intent in every instance.

Finally, Olin expressed concern that the Board not preempt by rule state law as to what constitutes a contract, or on whether one can have an enforceable contract on rates without other agreed-upon terms and conditions.[16] We do not intend for inclusion of the disclosure statement in an agreement to be dispositive in court that a contract exists, or to preclude shippers from making an argument that the document is a contract of adhesion or raising any other defense in state court. The proposed rule is simply intended to be a mechanism for assisting the Board in determining the Board's jurisdiction to adjudicate a rate or service complaint involving rail transportation arrangements.

Ancillary Matters

Two additional concerns have been raised in the shippers' comments regarding how carriers negotiate contracts for rail service. They relate to unilateral contracts and bundling.

Unilateral contracts, or signatureless contracts, are contract offers made by a carrier that a shipper accepts by tendering shipment. Shippers suggest that this practice should be considered a tariff subject to Board jurisdiction, as there is no bilateral negotiation.[17] But this practice is generally beyond the jurisdiction of the Board; carriers may offer and shippers may accept these contracts, as long as state courts recognize them as such. Instead, we propose to regard unilateral or signatureless agreements that lack the disclosure language as common carrier tariffs subject to our jurisdiction, unless there is clear and convincing evidence both that the parties intended to enter into a rail transportation contract and that the shipper was made aware that it could request a common carriage tariff that would be subject to STB jurisdiction.

Bundling occurs when a shipper and carrier negotiate multiple movements at one time. Shippers claim that carriers often refuse to provide common carriage rates until contract negotiations are exhausted, or they withdraw contract offers on all movements if a tariff rate is requested on any movement.[18] The purpose of the proposed rule is to provide clarity regarding when an arrangement is one for common carriage and thus within the Board's jurisdiction. We will not complicate this proceeding by addressing negotiating practices. Carriers have a common carrier obligation to provide service upon reasonable request. Allegations of violations of that obligation are best considered by individual complaint.

Conclusion

This proposal is consistent with the Board's jurisdiction and regulatory responsibilities. The proposed rule would have no substantive effect on contracting; the Board is not proposing to dictate how parties negotiate. Nor would the proposal seek to dictate to a court of competent jurisdiction how to interpret, apply, or determine what constitutes a contract. However, as rail transportation contracts and tariffs can be indistinguishable, all parties should know what they are agreeing to and what rights may be available to them, including any right to seek regulatory relief.

The proposed rule, if adopted, would apply prospectively only, and would not be applicable to existing contracts, existing amendments, or existing supplements to contracts.[19] But if the proposed rule is adopted, all subsequent contracts, amendments and supplements, even those that attach to contracts signed before the effective date of the new rule, would need to contain the disclosure statement in order to be conclusively presumed to be a contract under 49 U.S.C. 10907 and thus outside of the Board's jurisdiction.

Pursuant to 5 U.S.C. 605(b), the Board certifies that the proposed action would not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

List of Subjects

49 CFR Part 1301

Administrative practice and procedure, and Railroads.

Authority: 49 U.S.C. 721(a) and 10709.

[11] The disclosure language is based on language suggested by WCTL. *See* WCTL at 12.

[12] Some shipper groups expressed concern that a contract disclosure provision would be useless, and possibly harmful to shippers, if the language is not easily discernable on the front of the document. *See* Clay Producers at 2–3. We are proposing to specify the expected location and minimum type size in order to address this concern.

[13] *See* AAR at 10; BNSF at 3; UP at 7; WCTL at 11.

[14] *See* AAR at 13; BNSF at 5; NS at 4; WCTL at 7.

[15] *See* WCTL at 6.

[16] *See* Olin at 2.

[17] *See* NITL at 5.

[18] *See* EEI at 4; Oxychem at 2; Olin at 3.

[19] We agree with public comments to the ANPR suggesting that any rule should only apply prospectively. *See* AAR at 14.

Decided: December 30, 2008.

By the Board, Chairman Nottingham, Vice Chairman Mulvey, and Commissioner Buttrey.

Jeffrey Herzig,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to add part 1301 of title 49, chapter X, of the Code of Federal Regulations as follows:

PART 1301—RAIL TRANSPORTATION CONTRACTS

Authority: 49 U.S.C. 721(a) and 10709.

§ 1301.1 Contract Disclosure Statement.

(a) The Board will not find jurisdiction over a dispute involving the rate or service under a rail transportation agreement where that agreement contains a disclosure statement that conforms with paragraphs (b) and (c) of this section. Conversely, where a rail transportation agreement fails to contain such a disclosure statement, the Board will find jurisdiction over a dispute involving the rate or service provided under that agreement, absent clear and convincing evidence both that the parties intended to enter into a rail transportation contract governed by 49 U.S.C. 10709 and that the shipper was made aware that it could request service under a common carrier tariff rate that would be subject to STB jurisdiction.

(b) The disclosure statement should appear at the top of the first page of the rail transportation agreement in type size at least as large as the type size used for the body of the agreement.

(c) The disclosure statement should read as follows:

Disclosure Statement—This agreement constitutes a rail transportation contract under 49 U.S.C. 10709. Contract arrangements are generally not subject to challenge before the Surface Transportation Board (''STB''), but can be enforced in a court of competent jurisdiction. Under federal rules found at 49 CFR 1300, railroads are required, upon request, to quote to shippers a rate for common carriage transportation (i.e., a non-contract rate). Pursuant to 49 U.S.C. 10701, the STB has jurisdiction (subject to some exceptions) over disputes arising out of common carriage (non-contract) rates.

[FR Doc. E8–31398 Filed 1–5–09; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R2–ES–2008–0130; MO 9221050083]

Endangered and Threatened Wildlife and Plants; Partial 90-Day Finding on a Petition To List 475 Species in the Southwestern United States as Threatened or Endangered With Critical Habitat

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 90-day petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 90-day finding on 270 species from a petition to list 475 species in the southwestern United States as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). We find that for these 270 species the petition does not present substantial scientific or commercial information indicating that listing these species may be warranted. Therefore, for these 270 species, we will not initiate a further status review in response to this petition. We ask the public to submit to us any new information that becomes available concerning the status of these 270 species or threats to them or their habitat at any time. This information will help us monitor and encourage the conservation of these species. An additional 5 species of the 475 included in the petition do not fall within the scope of the petition or are not a listable entity and, therefore, were not considered in this finding (*see* Petition).

DATES: The finding announced in this document was made on January 6, 2009. You may submit new information concerning this species for our consideration at any time.

ADDRESSES: This finding is available on the Internet at *http://www.regulations.gov.* Supporting information we used in preparing this finding is available for public inspection, by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Southwest Regional Ecological Services Office, 500 Gold Ave., SW., Albuquerque, NM 87102. Please submit any new information, materials, comments, or questions concerning these species or this finding to the above address.

FOR FURTHER INFORMATION CONTACT: Nancy Gloman, Assistant Regional Director, Southwest Regional Ecological Services Office (see **ADDRESSES**); telephone 505/248–6920; facsimile 505/248–6788. If you use a telecommunications device for the deaf (TDD), please call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(A) of the Act (16 U.S.C. 1531 *et seq.*) requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to indicate that a petitioned action may be warranted. We are to base this finding on information provided in the petition. To the maximum extent practicable, we are to make the finding within 90 days of our receipt of the petition, and publish our notice of this finding promptly in the **Federal Register**.

Our standard for ''substantial information,'' as defined in the Code of Federal Regulations at 50 CFR 424.14(b), with regards to a 90-day petition finding is ''that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.'' If we find that substantial information was presented, we are required to promptly commence a status review of the species.

In making this finding, we based our decision on information provided by the petitioner that we determined to be reliable after reviewing sources referenced in the petition and otherwise available in our files. We evaluated that information in accordance with 50 CFR 424.14(b). Our process for making this 90-day finding under section 4(b)(3)(A) of the Act is limited to a determination of whether the information in the petition meets the ''substantial information'' threshold.

Petition

On June 25, 2007, we received a formal petition dated June 18, 2007, from Forest Guardians (now WildEarth Guardians) requesting that the Service: (1) Consider all full species in our Southwest Region ranked as G1 or G1G2 by the organization NatureServe, except those that are currently listed, proposed for listing, or candidates for listing; and (2) list each species as either endangered or threatened with critical habitat. The petition incorporates all analyses, references, and documentation provided by NatureServe in its online database at *http://www.natureserve.org/* into the petition. The petition clearly identified itself as a petition and included the identification information,