the First Circuit in *Boston Edison* [5] to eliminate uncertainty regarding whether the *Mobile-Sierra* ''public interest'' or the ''just and reasonable'' standard applies in the face of contractual silence.[6] Specifically, the court in *Boston Edison* suggested that the Commission prescribe prospectively the terms that parties would have to use to invoke the ''public interest'' standard. That is not what the Commission has done here. Instead of telling contracting parties what language they can use to invoke the ''public interest'' standard, the Commission provides that the parties need take no action, nor use any language, to invoke that standard. Under the NOPR, the ''public interest'' standard will be available at all times, in all circumstances, when the contract is silent. Thus, a ''public interest'' standard becomes the default standard, and the Commission prescribes terms that parties must include in their contract to keep their statutory right to a ''just and reasonable'' standard. This turns the statute on its head.

In addition, the NOPR does not explain that the *Boston Edison* court went on to opine that ''FERC has reasonably broad powers to regulate the substantive terms of filings that it accepts and allows to become effective,'' which may ''include the power to require prospectively, by regulation that all contracts set their rates subject to FERC's just and reasonable standard.'' [7] That is the action that the Commission should be proposing today.

The Commission erroneously relies on the initial *Mobile* [8] and *Sierra* [9] cases as support for its proposal to default to the *Mobile-Sierra* ''public interest'' standard in FPA section 206 or NGA section 5 proceedings. The NOPR states that these cases stand for the proposition that the Supreme Court interpreted contractual silence as requiring the ''public interest'' standard of review. The implication is that the Court requires a ''public interest'' standard of review in FPA section 206 and NGA section 5 proceedings initiated by a buyer or the Commission. That is not the case. *Mobile* and *Sierra* involved what standard of review should apply when regulated sellers with contracts already on file with the Commission attempted to unilaterally raise the contractual rate by filing for a new rate under section 205 and section 4 and showing that the new rate was just and reasonable. These cases did not involve what standard of review should apply when a buyer or the Commission challenges the rate on file as unjust and unreasonable under FPA section 206 or NGA section 5. Here, the Commission proposes to bind itself to the stricter *Mobile-Sierra* ''public interest'' standard of review when acting under section 206 or section 5 where parties are silent as to the applicable standard of review. *Mobile* and *Sierra* do not support this proposed action.

The proposed regulation also departs abruptly from the Commission's precedent on what standard of review applies when the Commission acts *sua sponte* or on behalf of non-parties.[10] Yet the NOPR relies on this same precedent to support its assertion that the Commission is not bound to employ a ''public interest'' standard of review when the Commission undertakes an initial review of an agreement.[11]

III. Certainty and Stability in Energy Markets

I disagree with the NOPR's assertion that the proposed regulation will provide certainty and stability in energy markets. Adopting a *Mobile-Sierra* ''public interest'' standard as the new default standard of review in section 206 and section 5 proceedings with respect to these jurisdictional agreements will inject uncertainty and instability into the industries. As the NOPR recognizes, the ''public interest'' standard of review is not clearly defined. Courts have variably described this standard as ''practically insurmountable'' [12] and as not being ''considered 'practically insurmountable' in all circumstances.'' [13] The First Circuit has opined that ''[i]t all depends on whose ox is gored and how the public interest is affected.'' [14] Adoption of a new, default ''public interest'' standard of review opens the door to uncertainty and extensive future litigation to resolve its meaning.

To achieve the goal of certainty and stability in energy markets, the Commission should act to preserve the application of the statutory ''just and reasonable'' standard of review as the default when the parties' intent is unspecified or unclear. The ''just and reasonable'' standard has been used extensively over the last 70 years to review rates, terms and conditions in both the electricity and gas industries. It is well-known and well-defined. It has guided contracting in these industries for the life of them. It has provided a clear benchmark against which to draft a contract and craft performance of that contract. There is no evidence that this standard has been a problem for contracting parties, or for the industries themselves. There is no evidence that this standard has been a hindrance to contract sanctity. In fact, this NOPR acknowledges as much by proposing to continue to apply the ''just and reasonable'' standard to electric transmission and gas transportation service agreements. Certainty and stability in the electric and gas industries will only be fostered by consistent regulation.

Accordingly, for the reasons discussed above, I respectfully dissent.

Suedeen G. Kelly

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[5] *Boston Edison Co.* v. *FERC*, 233 F.3d 60 (1st Cir. 2000).

[6] The *Boston Edison* court noted that even cases within the D.C. Circuit ''do not form a completely consistent pattern.'' *Id.* at 67, citing *Texaco Inc.* v. *FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998) and *Union Pacific Fuels, Inc.* v. *FERC*, 129 F.3d 157, 161–62 (D.C. Cir. 1997) (where the D.C. Circuit, faced with contracts in which parties did not expressly state what standard of review would apply to rate changes initiated by the Commission held in the former case that the Commission could only modify the contract under a ''public interest'' standard but, in the latter case, that the Commission could apply a ''just and reasonable'' standard).

[7] *Boston Edison*, 233 F.3d at 68.

[8] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

[9] *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[10] *See ITC Holdings Corp.*, 102 FERC ¶ 61,182 (2003); *Southern Company Services*, 67 FERC ¶ 61,080 (1994); and *Florida Power & Light Co.*, 67 FERC ¶ 61,141 (1994).

[11] *See* NOPR at P 10 & n. 19.

[12] *Papago Tribal Util. Auth.* v. *FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983), cert. denied, 467 U.S. 1241 (1984).

[13] *Northeast Utils. Serv. Co.*, 55 F.3d 686, 692 (1st Cir. 1995). *See also Potomac Electric Power Co.* v. *FERC*, 210 F.3d 403, 408 (D.C. Cir. 2000) (court concurring with the First Circuit's finding that when acting *sua sponte* or at the request of a third party to change rates, the Commission is not bound to a standard of review that is ''practically insurmountable'').

[14] 55 F.3d at 691.

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 219

RIN 0596–AC43

National Forest System Land Management Planning

AGENCY: Forest Service, USDA.

ACTION: Notice of proposed rulemaking; request for comment.

SUMMARY: The Forest Service is proposing a technical change to the transition language contained in the 2005 planning rule (70 FR 1023; Jan. 5, 2005). The current transition language

requires plan revisions initiated after January 5, 2005, to conform to the requirements in the 2005 planning rule. In response to a court order affecting only the Tongass National Forest, the proposed amendment would allow the Tongass National Forest to revise its land management plan to address the errors identified by the court either under the 2005 Rule or the planning regulations in effect before November 9, 2000.

DATES: Comments must be received in writing by February 3, 2006. Comments received after this date may be considered and placed in the record at the discretion of the Forest Service.

ADDRESSES: Send written comments to: USDA FS Planning Rule Technical Amendment, P.O. Box 21628, Juneau, AK 99802–1628, Attn: Cherie Shelley; via e-mail to *planning_rule_technical _amendment@fs.fed.us;* or by facsimile to Planning Rule Technical Amendment Comments at (907) 586–7852. Comments also may be submitted by following the instructions at the Federal eRulemaking portal at *http://www.regulations.gov*. If comments are sent by e-mail or facsimile, the public is requested not to send duplicate comments via regular mail. Please confine comments to issues pertinent to the proposed rule, explain the reasons for any recommended changes and, where possible, reference the specific wording being addressed. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The agency cannot confirm receipt of comments. Persons wishing to inspect the comments need to call (907) 586–8886 to facilitate an appointment.

FOR FURTHER INFORMATION CONTACT: Cherie Shelley, Director, Ecosystem Planning, Alaska Region, Forest Service, USDA at (907) 586–8887, or Dave Barone, Planning Specialist, Ecosystem Management Coordination Staff, Forest Service, USDA at (202) 205–1019.

SUPPLEMENTARY INFORMATION:

Background

On January 5, 2005, the Department of Agriculture published a final planning rule (70 FR 1023) governing the development of land management plans required by the National Forest Management Act. The 2005 planning regulations provide for a transition period from the previous planning regulations (1982 planning rule) to the new regulations (2005 planning rule). Specifically, § 219.14 of the 2005 planning rule allows plans to be amended under either the 1982 planning rule or the 2005 planning rule during the transition period; however, newly initiated revisions may only use the 2005 planning rule.

One of the differences between the 1982 planning rule and the 2005 planning rule is that the former required the development of an environmental impact statement (EIS) as part of the process to revise a land management plan. On August 5, 2005, the Ninth Circuit Court of Appeals issued a decision in *Natural Resources Defense Council* v. *U.S. Forest Service*, 421 F.3d 797, that found errors in the 1997 Final EIS and Record of Decision for the Tongass Land Management Plan. In its decision, the court made several statements indicating its intent that the Forest Service prepare a new EIS for a plan revision addressing the errors identified by the court. For this unique situation, this proposed rule will allow the Tongass National Forest to use the 1982 planning rule to revise its plan to meet the expectations of the U.S. Court of Appeals for the Ninth Circuit.

The Forest Service is seeking public comment on this proposed rule to amend 36 CFR 219.14(d)(1) to allow the Tongass National Forest to use either the 1982 planning rule or the 2005 planning rule for its next revision addressing the court's order.

Regulatory Certifications

Regulatory Impact

This proposed rule has been reviewed under USDA procedures and Executive Order 12866, Regulatory Planning and Review. It has been determined that this is not a significant rule. This rule will not have an annual effect of $100 million or more on the economy nor adversely affect productivity, competition, jobs, the environment, public health or safety, nor State or local governments. This rule will not interfere with an action taken or planned by another agency nor raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. Accordingly, this proposed rule is not subject to Office of Management and Budget review under Executive Order 12866.

Proper Consideration of Small Entities

This proposed rule has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). The proposed rule would make a technical amendment to the transition language of the 2005 planning rule, to allow the Tongass National Forest to use either the current planning regulations or the regulations in effect before November 9, 2000 for its next land management plan revision. An initial small entities flexibility assessment has been made, which indicates that the proposed rule will impose no additional requirements on the affected public, which includes small businesses, small not-for-profit organizations, or small units of government. Accordingly, it has been determined that this proposed rule will not have a significant economic impact on a substantial number of small entities as defined by SBREFA.

No Environmental Impact

This proposed rule would allow the Tongass National Forest to use either the existing planning regulations or the planning regulations in effect before November 9, 2000 for the next revision of its land management plan to respond to the court's order. As such, the proposed rule has no direct and immediate effects regarding the occupancy and actual use of the Tongass National Forest. Section 31.12 (2) of Forest Service Handbook 1909.15 (57 FR 43168; September 18, 1992) excludes from documentation in an environmental assessment or impact statement ''rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instruction.'' The 2005 planning regulations are a Service-wide program process. The agency's assessment is that this rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or an environmental impact statement.

Energy Effects

This proposed rule has been reviewed under Executive Order 13211 of May 18, 2001, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. It has been determined that this rule does not constitute a significant energy action as defined in the Executive order. Procedural in nature, this proposed rule would allow the Tongass National Forest to use either the regulations currently in place or the planning regulations in effect before November 9, 2000 for the next revision of its land management plan to respond to the court's order. This plan is a programmatic document that provides guidance and information for future project-level resource management

decisions. The revised plan may designate major rights-of-way corridors for utility transmission lines, pipelines, and water canals. The effects of such designations on energy supply, distribution, or use will be considered at the time such designations are proposed.

Controlling Paperwork Burdens on the Public

This proposed rule does not contain any additional record keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and, therefore, imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Federalism

The agency has considered this proposed rule under the requirements of Executive Order 13132, Federalism. The agency has made a preliminary assessment that the rule conforms with the federalism principles set out in this Executive orders; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Based on comments received on this proposed rule, the agency will determine if any additional consultation will be needed with State and local governments prior to adopting a final rule.

Consultation With Tribal Governments

This proposed rule does not have tribal implications as defined in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, and, therefore, advance consultation with tribes is not required.

No Takings Implications

This proposed rule has been analyzed in accordance with the principles and criteria contained in Executive Order 12630, and it has been determined that the rule does not pose the risk of a taking of private property. This proposed rule only allows the Tongass National Forest to use either the existing planning regulations or the regulations in effect before November 9, 2000 for its next plan revision.

Civil Justice Reform

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. The agency has not identified any State or local laws or regulations that are in conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such a conflict was identified, the proposed rule, if implemented, would preempt the State or local laws or regulations found to be in conflict. However, in that case, (1) no retroactive effect would be given to this proposed rule; and (2) the Department would not require the parties to use administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the agency has assessed the effects of this proposed rule on State, local, and Tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or Tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

List of Subjects in 36 CFR Part 219

Administrative practice and procedure, Environmental impact statements, Indians, Intergovernmental relations, Forest and forest products, National forests, Natural resources, Reporting and recordkeeping requirements, Science and technology.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend subpart A of part 219 of title 36 of the Code of Federal Regulations as follows:

PART 219—PLANNING

Subpart A—National Forest System Land Management Planning

1. The authority citation for subpart A continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 1604, 1613.

2. Amend § 219.14 by revising paragraph (d)(1) to read as follows:

§ 219.14 Effective dates and transition.

* * * * *

(d)(1) Plan development and plan revisions initiated after January 5, 2005 must conform to the requirements of this subpart, except that the plan for the Tongass National Forest may be revised once under this subpart or the planning regulations in effect before November 9, 2000.

* * * * *

Dated: December 16, 2005.

Dale N. Bosworth,

Chief, USDA Forest Service.

[FR Doc. E5–8245 Filed 1–3–06; 8:45 am]

BILLING CODE 3410–11–P

CHEMICAL SAFETY AND HAZARD INVESTIGATION BOARD

40 CFR Part 1604

Accident Investigation Initiation Notice and Order To Preserve Evidence

AGENCY: Chemical Safety and Hazard Investigation Board.

ACTION: Proposed rule.

SUMMARY: The Chemical Safety and Hazard Investigation Board (CSB) proposes the adoption of the following regulation that is intended to notify the owner and/or operator of a facility that suffers an accidental release as defined by the Clean Air Act Amendments of 1990, (also referred to here as a chemical ''accident'' or ''incident''), that the CSB intends to deploy investigators to its facility, and that relevant evidence must be preserved. Under this regulation, site control would remain the responsibility of the owner and/or operator of the affected facility. However, owners/operators are required by this regulation to exercise care to ensure that the accident scene and relevant evidence found therein is adequately protected from alteration.

DATES: Written comments must be received on or before February 3, 2005.

ADDRESSES: You may submit written comments concerning this proposed rule, by the following method:

- Mail/Express delivery service: Chemical Safety and Hazard Investigation Board, Office of General Counsel, Attn: Christopher Warner, 2175 K Street, NW., Suite 650, Washington, DC 20037.

FOR FURTHER INFORMATION CONTACT: Christopher Warner, 202–261–7600.

SUPPLEMENTARY INFORMATION: Preserving physical evidence at an accident scene is an important component in all manner of investigations. In a chemical accident investigation, securing an accident scene and preserving the integrity of the evidence contained therein is critical, especially where significant explosions or fires have destroyed some or much of the relevant physical evidence at the accident site. According to one good-practice guideline on chemical accident