List of Subjects in 14 CFR Part 91

Air traffic control, Aircraft, Airmen, Aviation safety, Reporting and recordkeeping requirements.

The Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends Chapter I of Title 14, Code of Federal Regulations as follows:

PART 91—GENERAL OPERATING AND FLIGHT RULES

■ 1. The authority citation for part 91 continues to read as follows:

Authority: 49 U.S.C. 106(g), 1155, 40103, 40113, 40120, 44101, 44111, 44701, 44704, 44709, 44711, 44712, 44715, 44716, 44717, 44722, 46306, 46315, 46316, 46504, 46506–46507, 47122, 47508, 47528–47531, articles 12 and 29 of the Convention on International Civil Aviation (61 Stat. 1180).

■ 2. Amend § 91.703 by revising paragraph (a)(3) to read as follows:

§ 91.703 Operations of civil aircraft of U.S. registry outside of the United States.

(a) * * *

(3) Except for §§ 91.117(a), 91.307(b), 91.309, 91.323, and 91.711, comply with this part so far as it is not inconsistent with applicable regulations of the foreign country where the aircraft is operated or annex 2 of the Convention on International Civil Aviation; and

* * * * *

Issued in Washington, DC on February 15, 2008.

Robert A. Sturgell,

Acting Administrator.

[FR Doc. E8–3583 Filed 2–25–08; 8:45 am]

BILLING CODE 4910–13–P

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

14 CFR Part 1266

[NOTICE: (08–014)]

RIN 2700–AB51

Cross-Waiver of Liability

AGENCY: National Aeronautics and Space Administration.

ACTION: Final rule.

SUMMARY: The National Aeronautics and Space Administration (NASA) is amending its regulations which provide the regulatory basis for cross-waiver provisions used in the following two categories of NASA agreements: agreements for International Space Station (ISS) activities pursuant to the ''Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station'' (commonly referred to as the ISS Intergovernmental Agreement, or IGA); and launch agreements for science or space exploration activities unrelated to the ISS.

DATES: *Effective Date:* These amendments become effective April 28, 2008.

FOR FURTHER INFORMATION CONTACT: Steven A. Mirmina, Senior Attorney, Office of the General Counsel, NASA Headquarters, 300 E Street, SW., Washington, DC 20546; telephone: 202/358–2432; e-mail: *steve.mirmina@nasa.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

On October 23, 2006, NASA published a notice of proposed rulemaking (NPRM), Cross-Waiver of Liability, 71 FR (**Federal Register**) 62061 (October 23, 2006), which discussed the background of Part 1266 and the use of cross-waivers in various NASA agreements. The NPRM also explained the considerations underlying NASA's proposed amendments to Part 1266, which were: (1) To update and ensure consistency in the use of cross-waiver of liability provisions in NASA agreements; and (2) to address shifts in areas of NASA mission and program emphases that warrant an adjustment of the NASA cross-waiver provisions so that they remain current.

II. Description of Final Rule and Discussion of Comments

In this Final Rule, NASA makes clerical edits to the wording in sections 1266.100 (Purpose) and 1266.101 (Scope). In sections 1266.102 (Cross-waiver of liability for agreements for activities related to the International Space Station) and 1266.104 (Cross-waiver of liability for launch agreements for science or space exploration activities unrelated to the International Space Station), NASA generally makes clerical changes, adds a new definition of the term ''transfer vehicle,'' defines the term ''Party'' in section 1266.102 and revises the term's definition in section 1266.104, clarifies the scope of the sixth group of potential claims to which the cross-waiver of liability shall not apply, and deletes the specific reference to Expendable and Reusable Launch Vehicles (ELVs and RLVs, respectively) from section 1266.104.

In response to the NPRM of October 23, 2006, NASA received comments from four entities: The Boeing Company (Boeing); Marsh USA, Inc. (Marsh); United Space Alliance (USA); and the European Space Agency, which subsequently withdrew its comments. In general, the commenters supported the proposed amendments, but with several suggested changes. The commenters also submitted some general questions about the Rule. In an effort to provide additional information on its intentions and plans, NASA will address these questions in section M in this document.

A. Deleting Section 14 CFR 1266.103

In the NPRM, NASA proposed deleting section 1266.103, regarding the cross-waiver of liability during Space Shuttle (Shuttle) operations, in light of direction from President George W. Bush that the Shuttle be retired from service by 2010 and the fact that, with the exception of the fifth Hubble Servicing Mission, currently scheduled for August 2008, current mission plans envision no other Shuttle missions unrelated to the ISS. Because the ISS cross-waiver in section 1266.102 covers Shuttle operations for missions to the ISS, NASA determines that there is no longer a need to retain the section of Part 1266 requiring a separate cross-waiver of liability to be used during Shuttle operations. The commenters urged NASA to retain section 1266.103 for as long as Shuttle operations continue and prime contracts and subcontracts with cross-waiver and indemnity provisions remain in place. The commenters contend that although current mission plans envision no other non-ISS missions for the Shuttle, those plans could change and therefore it would be premature to delete section 1266.103. One commenter noted that the Shuttle program ''may be extended for up to an additional five years if the options under the current Space Program Operations Contract are fully exercised, with unknown missions into the future.'' (Marsh at page 2)

Having reviewed and considered the points raised by the commenters, NASA will proceed with the removal of section 1266.103 for several legal and policy reasons. With the exception of the fifth Hubble Servicing Mission, NASA has stated that the remaining Shuttle flights will be dedicated solely to ISS missions.[1] Since any NASA agreements

[1] See, for example, the Written Statement of Michael D. Griffin, Administrator, National Aeronautics and Space Administration, Before the Senate Commerce, Science and Transportation

Continued

for Shuttle missions to the ISS would already be covered by section 1266.102, which governs cross-waivers of liability for agreements for activities related to ISS, there is no longer a need to retain section 103.

Indeed, for future missions, retention of section 103 could potentially result in less-than-fully reciprocal waivers of liability among users involved in Shuttle launch activities (since the scope of ''Protected Space Operations'' under section 103 is broader than the scope of ''Protected Space Operations'' under section 102). Under section 103, the cross-waiver encompasses parties to any NASA agreement for Shuttle launch services; however, the cross-waiver established by the IGA, and implemented by section 102, encompasses only parties to agreements for ISS activities. If NASA were to prolong the use of cross-waivers under section 103 for non-ISS Shuttle missions, while parties to agreements for Shuttle missions to the ISS remain bound by cross-waivers under section 102, parties to agreements for the non-ISS missions would be waiving claims against ISS participants but, conversely, ISS participants would not necessarily be waiving claims against them. The potential for less than fully reciprocal waivers has existed since the Rule first went into effect in 1991, but has resulted in no actual conflicts. This is due primarily to the fact that the Shuttle was rapidly transitioned from performing orbital missions on a cooperative or reimbursable basis to being dedicated almost exclusively to ISS assembly. However, the potential existence of less-than-fully reciprocal waivers should not continue. Section 309 of the Space Act,[2] codified at 42 U.S.C. § 2458c, confirms and clarifies the authority of the NASA Administrator to conclude reciprocal cross-waivers in cooperative agreements. To reduce the potential for inconsistency among NASA mission agreements containing cross-waiver provisions of differing scope, NASA has decided to remove section 103.

Although NASA has stated that, with the exception of the Hubble Servicing Mission, the Shuttle is to be used solely for servicing the ISS (and, thus, all NASA agreement cross-waivers for ISS Shuttle missions will be based on the provisions of section 102), the question remains: what would NASA do if the Agency is subsequently authorized to use the Shuttle for an activity unrelated to the ISS? In this hypothetical case, the provisions of section 104, which provide the regulatory basis for cross-waivers of liability for launch agreements for science or space exploration activities unrelated to the ISS, could be utilized.

NASA is mindful of the concerns raised by industry relative to maintaining stability in Shuttle contracts. In this regard, for as long as Shuttle operations continue and prime contracts and subcontracts remain in place, the risk allocation provisions of those contracts, like all other provisions of those contracts, will continue to be operative. With respect to NASA's implementation of changes to the NASA procurement regulations, the Proposed Rule provided that, ''To be made fully effective, the cross-waivers required by this Part will necessitate concomitant changes to NASA procurement regulations. NASA plans to implement these changes as expeditiously as possible after this Proposed Rule becomes final.'' In response to the NPRM, NASA was asked whether there is a schedule for implementation of the changes to the corresponding clauses in the NASA Federal Acquisition Regulation (FAR) Supplement (NFS) to reflect the current revisions to 14 CFR 1266. NASA plans to alter the NASA procurement regulations, i.e., the NFS, soon after this Rule becomes final.

B. Defining the Term ''Party'' in Section 1266.102

NASA received the comment that the term ''Party'' in section 1266.102 was not defined and that a definition was necessary to apply the cross-waiver requirements to NASA ISS contractors. The comment suggested that the term ''Party'' be defined as follows: '' 'Party' means a person or entity that signs an agreement involving the ISS.''

NASA agrees that defining the term ''Party'' in section 1266.102 would add clarity to the Rule. Thus, NASA will define the term ''Party'' in 1266.102 as follows: ''The term 'Party' means a party to a NASA agreement involving activities in connection with the ISS.'' The definition will be placed in subsection 1266.102(b)(1) in order to make parallel the order of definitions in section 1266.102 and in section 1266.104. The definition of the term ''Partner State,'' which was formerly located in 1266.102(b)(1), will be moved to a new subsection 1266.102(b)(8).

C. Tailoring the Scope of the Cross-waiver

NASA received the comment that subsections 1266.102(a) and 1266.104(a) contain a misleading sentence: ''Provided that the waiver of claims is reciprocal, the parties may tailor the scope of the cross-waiver clause in these agreements to address the specific circumstances of a particular cooperation.'' The commenter contended that this sentence is not clear and could lead to inconsistent waivers in NASA agreements.

NASA understands the concern and will strike the sentence proposed in the NPRM. As background, the authority to tailor cross-waiver provisions is a feature of certain framework agreements between the U.S. and other countries for cooperation in the exploration and use of outer space. These international agreements cover a wide range of activities, ranging from launching missions into outer space to simple terrestrial activities (e.g., exchanges of data). For a simple terrestrial data exchange, it is not necessary to utilize a cross-waiver provision as extensive as what would be needed in an agreement to launch a spacecraft and, thus, in the context of a framework agreement, the sentence is appropriate. However, for purposes of this Rule, which addresses high-risk launches to, and operations in, outer space, NASA agrees with the commenters on the need for consistent cross-waivers in this specific area.

D. Relocating the Sentence Regarding the Term ''Related Entity''

NASA received the comment that the following sentence was misplaced in subsection 1266.102(b)(2)(iii): ''The term 'related entity' may also apply to a State, or an agency or institution of a State, having the same relationship to a Partner State as described in paragraphs (b)(2)(i) through (b)(2)(iii) of this section or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph (b)(3)(iv) of this section.'' The comment pointed out that the sentence may have been erroneously inserted into subparagraph (b)(2)(iii) before the final sentence of that subparagraph ''* * * The term 'contractors' and 'subcontractors' include suppliers of any kind.'' The comment suggested that it should follow subparagraph (iii) as a separate statement or subparagraph. NASA agrees with the comment and has revised the Rule as suggested. The sentence defining contractors and subcontractors to include suppliers serves as a general clarification of the term ''related entity'' and should stand alone, thus, applying to all three subsections, rather than being included as part of one of the subsections as formerly drafted. NASA will also make a corresponding change in subsection 1266.104(b)(2).

Committee—Subcommittee on Space, Aeronautics, and Related Sciences, November 15, 2007.

[2] The National Aeronautics and Space Act of 1958, as amended, 42 U.S.C. 2451, *et seq.*

E. Clarifying ''This Agreement'' Versus ''the Agreement''

NASA received the comment that the use of the term ''this Agreement'' was confusing in subsection 1206.102(c)(4)(ii) in the parenthetical language to the second exception of the cross-waiver, i.e., ''Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to this Agreement or is otherwise bound by the terms of this cross-waiver)* * *'' (italics added) The term ''this Agreement'' appears in a related context in subsection 1206.104(c)(4)(ii). The comment queried whether the word ''Agreement'' should be capitalized and whether it should be a defined term.

NASA understands the source of this confusion and will correct both sections to read ''the agreement'' rather than ''this Agreement,'' as recommended by the comment. It may be useful in this context to recall a principal purpose of this Rule. Rather than prescribing standard text to be inserted automatically into a NASA agreement, the regulation instead provides the regulatory basis for cross-waiver clauses to be incorporated into NASA agreements either related to the ISS (section 102) or for launch agreements involving science or space exploration activities unrelated to the ISS (section 104). As such, when a specific cross-waiver is incorporated into a NASA agreement, several conforming changes will need to be made to the text as it appears in this Rule. For one, references in the Rule to ''the agreement'' (referring to a NASA agreement in which a cross-waiver provision will be inserted) will need to be changed to ''this Agreement'' in the text of the agreement itself. It seems unnecessary to define the term ''the agreement,'' because it should be evident that the agreement being referred to is the Space Act agreement containing the cross-waiver. In this context, it may also be useful to clarify that the agreements to which this Rule applies are agreements concluded pursuant to NASA's authority under sections 203(c)(5) and (c)(6) of the Space Act. These agreements do not include procurement contracts governed by the Federal Acquisition Regulations System, 48 CFR Part 1 *et seq.*

F. Defining the Terms ''ELV'' and ''RLV''

Another comment NASA received recommended that the definition of ''launch vehicle'' found in 1266.104(b)(4) be amended to specifically include ELVs and RLVs. After further consideration, NASA has determined that the proposed change is unnecessary. The term ''launch vehicle'' is defined as ''an object or any part thereof intended for launch, launched from Earth, or returning to Earth which carries payloads or persons or both.'' ELVs and RLVs are already included in this definition. A fundamental premise of NASA cross-waivers of liability is that they are to be broadly construed to achieve the desired objectives of furthering space exploration, use, and investment. One way to further this goal is to avoid unnecessary, narrow delineations in terminology. For example, the term ''Expendable Launch Vehicles'' should encompass Evolved Expendable Launch Vehicles (EELV). An EELV is one type of ELV. Similarly, ELVs and RLVs, for that matter, are types of launch vehicles. Thus, there appears to be no compelling reason why ELVs and RLVs should be separately defined.

Indeed, the comment prompted reexamination of the title to section 1226.104 which, at the Proposed Rule stage, was ''Cross-waiver of liability for science and space exploration agreements for missions launched by Expendable Launch Vehicles or Reusable Launch Vehicles.'' In order to streamline the Rule and avoid unnecessary, narrow delineations in terminology, NASA has decided to delete the reference in section 1266.104 to whether vehicles launching science or space exploration missions are expendable or reusable. Two factors led to this conclusion: (1) NASA would utilize the same cross-waiver for science or space exploration missions unrelated to the ISS, irrespective of the type of vehicle selected to launch the mission into orbit; and (2) NASA has no current plans to develop a fully reusable launch vehicle. Although the Shuttle has both expendable and reusable components, technically the vehicle is neither an Expendable nor a fully Reusable Launch Vehicle. Vehicles being developed in the Constellation program will utilize a mix of reusable and expendable components. Thus, the title of section 1266.104 has been changed to ''Cross-waiver of liability for launch agreements for science or space exploration activities unrelated to the International Space Station.'' This formulation closely parallels the title to section 1266.102 ''Cross-waiver of liability for agreements for activities related to the International Space Station.'' Deletion of the reference to the specific type of vehicle used to launch a science or space exploration mission into orbit necessitates a corresponding change to the definition of ''Party'' in section 104, as is explained in section G.

G. Revising the Term ''Party'' in Section 1266.104

As mentioned in the previous section, NASA will alter the definition of the term ''Party'' to reflect the deletion of the reference to ELVs and RLVs from section 104 and clarify the Rule's application. Thus, NASA will revise the definition proposed in the NPRM as follows: ''The term 'Party' means a party to a NASA agreement for science or space exploration activities unrelated to the ISS that involve a launch.''

Secondly, in response to the NPRM, NASA received a comment which suggested that the definition of the term ''Party'' in section 1266.104 be revised from ''a party to a NASA agreement* * *'' to read ''person or entity.'' While the rationale for the comment is not entirely clear, it appears that the comment may be confusing the term ''Party'' with subsequent references to ''persons'' or ''entities'' referenced later in the Rule, i.e., in the terms of the actual cross-waiver found in subsection (c)(1) ''This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations'' (emphasis added). The terms are distinct. A ''Party'' is a defined term—a party to a NASA agreement. However, entities other than parties to NASA agreements could potentially be injured by a particular activity. For this reason, the cross-waiver is carefully constructed to identify those within its scope. The terms ''persons'' or ''entities'' are descriptive and generic; they refer to persons (real or juridical) who may be involved in or brought into Protected Space Operations by virtue of their activities.

H. Clarifying the Duration of ''Protected Space Operations''

NASA received the identical comment from Boeing, Marsh, and USA that, in subsection 1266.104(b)(6), NASA should not proceed with removal of the following sentence: ''Protected Space Operations begins at the signature of the agreement and ends when all activities done in implementation of the agreement are completed.'' All three commenters asserted that this change should be rejected, because ''[t]his restricts the scope of cross-waivers for the protection of NASA ELV or RLV contractors and sub-contractors.'' (See USA comments at page 5, Marsh comments at page 4, and Boeing comments at page 2.)

NASA accepts these suggestions and will retain the sentence in the Final Rule. The proposed deletion had been grounded in recognition that, as a general matter, the cross-waiver in any NASA agreement becomes effective, like all terms of any agreement unless otherwise specified, at the time the agreement itself becomes effective and ends upon termination or expiration of the agreement. However, the sentence is useful in clarifying that the obligations of the agreement's cross-waiver will survive expiration or termination of the agreement itself, since Protected Space Operations does not end until all activities done in implementation of the agreement are completed. Although NASA agreements typically include a ''Continuing Obligations'' clause recognizing that certain obligations of the parties, including those related to liability and risk of loss, shall continue to apply after expiration or termination of the agreement, it is useful to retain this express acknowledgement in the text of the waiver itself.

I. Defining the Term ''Transfer Vehicle''

In subsection 1266.104(b)(6)(i), ''Protected Space Operations'' is defined to include: ''Research, design, development, test, manufacture, assembly, integration, operation, or use of launch *or transfer vehicles*, payloads, or instruments, as well as related support equipment and facilities and services.'' (Emphasis supplied.) One comment recommended that the term ''transfer vehicle'' required definition. The comment contended that a clarification would enhance understanding of the Rule and its applicability to other vehicles being developed under the Constellation program and otherwise. In the current definition section, the term ''launch vehicle'' (defined as ''an object or any part thereof intended for launch, launched from Earth, or returning to Earth which carries payloads or persons, or both'') addresses vehicles that operate between the Earth and space, but does not address vehicles intended to operate solely in outer space.

NASA agrees that defining the term ''transfer vehicle'' would add clarity to the Rule. Moreover, as a logical corollary of defining transfer vehicles, NASA has decided to clarify the Rule's application to landers. NASA's planned successor to the Shuttle, the Orion spacecraft, would feature, for its lunar landing missions, a Lunar Surface Access Module (LSAM). In NASA's view, when the LSAM or any transfer vehicle is launched, it would be a payload and, thus, within the existing definition of Protected Space Operations. The term ''payload'' is broadly defined to include ''all property to be flown or used on or in a launch vehicle.'' However, when a lander or transfer vehicle becomes operational, it could no longer be considered a ''payload'' but, rather, a space vehicle.

NASA will insert the following new definition of ''transfer vehicle'' in subsection 1266.104(b)(9): ''The term 'transfer vehicle' means any vehicle that operates in space and transfers payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A transfer vehicle also includes a vehicle that departs from and returns to the same location on a space object.'' Pursuant to this definition, a ''transfer vehicle'' would include a lander that had become operational, since landers operate between a space object and the surface of a celestial body. Before it becomes operational, the lander would be considered a payload. For purposes of this Rule, it is not necessary to define the precise point when the LSAM becomes operational, because it would be within Protected Space Operations at launch as a payload and then, subsequently, as a transfer vehicle. In either case, it would fall within the definition of Protected Space Operations.

Since NASA does intend that this Rule apply to current and future NASA mission agreements, including vehicles still to be developed under the Constellation program, the definition of Protected Space Operations will be amended to include a reference to transfer vehicles, since operational transfer vehicles would be neither launch vehicles nor payloads. Thus, the Final Rule makes minor changes to the definition of ''Protected Space Operations'' in both subsections 1266.102(b)(6) and 1266.104(b)(6) for accuracy and consistency.

For subsection 1266.102(b)(6), the definition of ''Protected Space Operations'' will be changed from ''* * * all launch vehicle activities, ISS activities, and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of the IGA * * *'' to ''all launch *or transfer* vehicle activities, ISS activities, and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of the IGA * * *'' with the addition of the words ''or transfer'' between the words ''launch'' and ''vehicle.'' As the term ''transfer vehicle'' has been used but not defined in section 1266.102, NASA will create a new subsection 1266.102(b)(7) adding the above definition of ''transfer vehicle'' to the ISS section of this Rule.

For subsection 1266.104(b)(6), the definition of ''Protected Space Operations'' will be changed from: ''* * * all ELV or RLV activities and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an agreement for launch services * * *'' to ''* * * all *launch or transfer vehicle* activities and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an agreement for launch services * * *.''

J. Capitalizing the Word ''Agreement'' in Subsection 1266.104(b)(6)(ii)

NASA received the comment that the word ''Agreement'' in subsection 1266.104(b)(6)(ii) should not be capitalized. NASA agrees with the comment and will remove the initial capital letter in the following sentence: ''The term 'Protected Space Operations' excludes activities on Earth that are conducted on return from space to develop further a payload's product or process for use other than for activities within the scope of an Agreement for launch services.'' The term ''Agreement'' in that sentence will be changed to lowercase—this provision parallels the definition of the term ''Protected Space Operations'' of section 1266.102 in regard to ISS products or processes. Removal of the capitalization of the word ''Agreement'' is also elaborated above, in section E, and the reader is referred to that section for further discussion.

K. Rewording the Sixth Exception to the Cross-waiver

In NASA's experience, the wording of the sixth exception to the cross-waiver has occasionally raised questions on the part of NASA's agreement partners and contractors regarding the purpose and scope of the exception. Subsections 1266.102(c)(4)(vi) and 1266.104(c)(4)(vi) had each provided that, notwithstanding the other provisions of the section, the cross-waiver of liability shall not be applicable to ''Claims by or against a Party arising out of or relating to the other Party's failure to meet its contractual obligations set forth in the Agreement.''

The Final Rule seeks to clarify the exception. The purpose of the exception is to avoid any interpretation that the cross-waiver would be a defense to a claim arising from a party's failure to perform any obligation set forth in an agreement. The waiver cannot be used by a party as a means of shielding itself

from claims for nonperformance. To clarify this point, NASA will replace the current formulation found in the sixth exception to the cross-waiver with the following: ''(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under the agreement.''

L. Clarifying the Scope of the Cross-waiver in Section 1266.104(c)(1)

In reviewing the NPRM, NASA noticed a minor omission in the wording of the cross-waiver in 1266.104(c)(1) that occurred during the editing/publication process. The words ''whatever the legal basis for such claims'' were inadvertently omitted from the first part of the sentence. Thus, they will be returned to the text to ensure that the waiver in 1266.104(c)(1) closely parallels the ISS waiver in 1266.102(c)(1). Thus, that part of the sentence in its entirety will read: ''The cross-waiver shall apply to any claims fordamage, whatever the legal basis for such claims, against: * * *.'' This change is a clarification and not a substantive change. The sentence previously stated that ''the cross-waiver shall apply to any claims for damage against: * * *.'' The modification underscores that the words ''any claims for damage'' mean any claims, whatever their legal basis.

M. Responding to General Questions Received

Although NASA has no obligation to respond to questions received in response to the NPRM, NASA appreciates the opportunity to answer the questions that were submitted and provide additional explanation regarding certain aspects of the Rule.

1. Will NASA extend this Rule to neighboring launch vehicle or launch site operators?

NASA received the following question: Since NASA is expanding the scope of the cross-waiver in section 104 to address comanifested payloads on the same vehicle, ''* * * why not extend the cross-waivers to all NASA contractors/subcontractors involved in ELV or RLV activities on the same launch site?'' (USA comments at page 2)

As background, launch operators of different launches often work in close proximity at a single launch site. For example, when launch operator A launches from one launch pad, launch operator B may be within the impact limit lines or a hazard area created by the launch. Nonetheless, for security or mission assurance reasons, launch operator B may wish to keep some of its personnel working at the second launch pad, even during the launch of launch operator A's launch vehicle.

The Federal Aviation Administration (FAA) has studied thoroughly the issue of neighboring launch operators. In the above example, the FAA considers that the launch operators are engaged in activities in support of separate launches. Furthermore, the launch operators share no privity of contract for the launch that is about to take place. ''For these reasons, the FAA treats them as 'the public' with respect to each other.'' [3] In the regulations which govern licensing and safety requirements for operation of a launch site (14 CFR 420.5), the FAA defines the ''public'' as ''people and property that are not involved in supporting a licensed launch, and includes those people and property that may be located within the boundary of a launch site, * * * and any other launch operator and its personnel.'' To ensure consistency, NASA will utilize the same approach, particularly in light of the possibility that an FAA-licensed commercial launch and a NASA program launch could occur at the same site. Thus, absent any contractual relationship between the launch operators for the separate launch activities at issue (and, thus, absent any effective cross-waiver), NASA will consider neighboring launch operators to be members of the public with respect to each other. As a result, any claims by or against them would be outside the scope of the cross-waiver.

2. Are individual employees waiving their claims?

In both subsections 1266.102(c)(1)(iv) and 1266.104(c)(1)(iv), the Rule provides that the cross-waiver shall apply to any claims for damage, whatever the legal basis for such claims, against ''* * * the employees of any of the entities identified in paragraphs (c)(1)(i) through (c)(1)(iii) of this section.'' NASA received the following questions: ''Does this language mean that employees of an entity (or their survivors) cannot sue another Party? Doesn't this say that, by virtue of employment, the employee waives rights that it otherwise would have?'' (USA comments at page 3)

The answer to both questions is ''no.'' The quoted language in no way affects the rights of any employee (or the employee's survivors) to present a claim for damage. By its terms, the language states that it is limited to claims against employees of the entities listed in subsections (c)(1)(i) through (c)(1)(iii) (emphasis added). Claims of or by an individual are not extinguished. In fact, claims of an individual are specifically excluded from the cross-waiver's scope by virtue of subsection (c)(4)(ii), which provides: This cross-waiver shall not be applicable to ''* * * claims made by a natural person, his/her estate, survivors or subrogees * * *'' Thus, no individual employee's claims are barred under the Rule's language. This was the case under the original Rule published in 1991, and it remains so.

3. Will this Rule apply to the COTS program?

NASA was asked whether the cross-waiver will apply to NASA's Commercial Orbital Transportation Services (COTS) program. Announced on January 18, 2006, COTS is a NASA program that provides financial and other assistance to selected commercial launch companies with the goal of fostering a competitive market for resupplying the International Space Station.

First, NASA's cross-waiver Rule states explicitly that the cross-waiver will not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable. See subsections 1266.102(c)(6) and 1266.104(c)(6). 49 U.S.C. Subtitle IX, Chapter 701 is popularly referred to as the Commercial Space Launch Act.

Second, on August 18, 2006, NASA's Exploration Systems Mission Directorate announced that Space Exploration Technologies (SpaceX) and Rocketplane Kistler (RpK) were each winners for Phase I of the COTS program. NASA executed a funded agreement under the Space Act with each of the companies. For launch and re-entry, the agreements recognize that the cross-waiver and insurance requirements of the FAA license and permit process will govern the allocation of risks and liability of the U.S. Government, including NASA. However, both agreements also require the COTS participant to demonstrate rendezvous, proximity operations, docking or berthing, or other activities that are related to, or which could affect, the ISS. Thus, to the extent that the FAA licenses or permits do not apply to activities under the agreements, such as during on-orbit activities, and to the extent that such activities are related to the ISS, the provisions of this Rule regarding NASA's cross-waiver for ISS activities will apply. At such time as it becomes possible for NASA to acquire from a commercial provider the delivery to and return of crew and cargo from the ISS, NASA would contract for such

[3] See Department of Transportation, Federal Aviation Administration, Licensing and Safety Requirements for Launch, Supplemental Notice of Proposed Rulemaking, **Federal Register:** July 30, 2002 (Volume 67, Number 146) at page 49475.

services consistent with applicable procurement regulations, including the cross-waiver requirements of the NASA FAR Supplement (NFS), as discussed above in section A.

4. Does the term ''related entity'' include related legal entities of a contractor or subcontractor?

NASA received a question from USA regarding the scope of the term ''related entity.'' In subsections 1266.102(b)(2) and 1266.104(b)(2), given that the term ''related entity'' includes a contractor or subcontractor at any tier, the submitter asked, ''Does the reference to a 'contractor or subcontractor' include the related legal entities of the contractor or subcontractor? For example, is a subsidiary able to sue another 'party' since such entity is not the 'entity' that actually has a contract that would incorporate the cross-waiver?'' (USA comments at page 2)

Absent additional facts, under NASA's original cross-waiver regulation from 1991, there is nothing to indicate that an entity's parent or subsidiary would fall within the scope of the term ''related entity.'' The term ''related entity'' is defined under sections 102 and 104 of the Rule as, ''a contractor or subcontractor of a Party at any tier; a user or customer of a Party at any tier; or a contractor or subcontractor of a user or customer of a Party at any tier.''

However, the structure of the space launch industry has undergone significant change since the Rule was first published in 1991. Many contractors in the space business are utilizing alternative forms of business relationships. For example, USA is NASA's prime contractor for Shuttle and ISS operations. Established in 1996 as a limited liability company (LLC), USA is owned by The Boeing Company and Lockheed Martin Corporation in equal share. USA's primary business is operating and processing NASA's Shuttle fleet and the ISS at the Johnson and Kennedy Space Centers. This work is currently defined by the Space Program Operations Contract between NASA and USA. The contract runs from October 1, 2006, through September 30, 2010, which is the currently scheduled termination date for Shuttle operations. The contract includes five, one-year options that could extend the contract through Fiscal Year 2015—options intended for ISS operations and Shuttle close out activities. A second example of the changing nature of the space launch business can be seen in United Launch Alliance (ULA), which is a joint venture between Boeing and Lockheed Martin. ULA operates space launch systems for U.S. Government customers using the Atlas V, Delta II, and Delta IV launch vehicles.

Considering this evolving launch industry structure, there are foreseeable circumstances in which a party's parent or subsidiary may be considered a ''related entity.'' For example, where a parent or subsidiary corporation has loaned equipment to a NASA contractor or subcontractor and the equipment is subsequently damaged as a result of activities under a NASA agreement, there may well be a contractual arrangement between the companies under which the equipment transfer occurred. If no actual contract exists, such a loan of equipment alternatively could be construed as a bailment. In either circumstance, the parent or subsidiary could be considered a lower-tier NASA contractor or subcontractor and, thus, within the current definition of ''related entity.'' Under such circumstances, assuming that the entities causing and sustaining the damage were thereby engaged in activities within the scope of ''Protected Space Operations,'' a claim of the parent or subsidiary would be waived.

In essence, USA's question relates to the circumstances in which a party involved in activities pursuant to a NASA agreement should extend the cross-waiver to parents, subsidiaries, and other related legal entities. The answer to the question is found in the terms of the cross-waiver clause. While section (c)(1) of the clause contains the terms of the waiver, section (c)(2) of the clause obligates the party agreeing to the terms of section (c)(1) to extend those terms to the party's related entities. Whether a party is obliged to extend the cross-waiver to parents or subsidiaries will always depend on the specific facts of the cooperation. A related entity may be a parent, subsidiary, shareholder, partner, joint venture participant, or the like, if that entity is involved in Protected Space Operations under a NASA agreement. What makes a parent or subsidiary company a related entity is not its legal or corporate affiliation with a party, but rather its actions in becoming involved in Protected Space Operations under a NASA agreement. If a parent or subsidiary is not involved in Protected Space Operations, then there is no obligation for a party to extend (or ''flow down'') the cross-waiver to them. In such a circumstance, if a parent or subsidiary were not involved in Protected Space Operations and yet were to suffer damage as a true third party, then its claims for damage would not be barred by the cross-waiver.

List of Subjects in 14 CFR Part 1266

Space transportation and exploration.

III. The Amendment

■ In consideration of the foregoing, the National Aeronautics and Space Administration revises Part 1266 of Title 14, Code of Federal Regulations, to read as follows:

PART 1266—CROSS-WAIVER OF LIABILITY

Sec.

Authority: 42 U.S.C. 2458c and 42 U.S.C. 2473 (c)(1), (c)(5) and (c)(6).

§ 1266.100 Purpose.

The purpose of this Part is to ensure that consistent cross-waivers of liability are included in NASA agreements for activities related to the ISS and for NASA's science or space exploration activities unrelated to the ISS that involve a launch.

§ 1266.101 Scope.

The provisions at § 1266.102 are intended to implement the cross-waiver requirement in Article 16 of the intergovernmental agreement entitled, ''Agreement Among the Government of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America concerning Cooperation on the Civil International Space Station (IGA).'' Article 16 establishes a cross-waiver of liability for use by the Partner States and their related entities and requires that this reciprocal waiver of claims be extended to contractually or otherwise-related entities of NASA by requiring those entities to make similar waivers of liability. Thus, NASA is required to include IGA-based cross-waivers in agreements for ISS activities that fall within the scope of ''Protected Space Operations,'' as defined in § 1266.102. The provisions of § 1266.102 provide the regulatory basis for cross-waiver clauses to be incorporated into NASA agreements for activities that implement the IGA and the memoranda of understanding between the United States and its respective international partners. The provisions of § 1266.104 provide the regulatory basis for cross-waiver clauses to be incorporated into NASA launch agreements for science or

space exploration activities unrelated to the ISS.

§ 1266.102 Cross-waiver of liability for agreements for activities related to the International Space Station.

(a) The objective of this section is to implement NASA's responsibility to flow down the cross-waiver of liability in Article 16 of the IGA to its related entities in the interest of encouraging participation in the exploration, exploitation, and use of outer space through the International Space Station (ISS). The IGA declares the Partner States' intention that the cross-waiver of liability be broadly construed to achieve this objective.

(b) For the purposes of this section:

(1) The term ''Party'' means a party to a NASA agreement involving activities in connection with the ISS.

(2)(i) The term ''related entity'' means:

(A) A contractor or subcontractor of a Party or a Partner State at any tier;

(B) A user or customer of a Party or a Partner State at any tier; or

(C) A contractor or subcontractor of a user or customer of a Party or a Partner State at any tier.

(ii) The terms ''contractor'' and ''subcontractor'' include suppliers of any kind.

(iii) The term ''related entity'' may also apply to a State, or an agency or institution of a State, having the same relationship to a Partner State as described in paragraphs (b)(2)(i)(A) through (b)(2)(i)(C) of this section or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph (b)(6) of this section.

(3) The term ''damage'' means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential damage.

(4) The term ''launch vehicle'' means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries payloads or persons, or both.

(5) The term ''payload'' means all property to be flown or used on or in a launch vehicle or the ISS.

(6) The term ''Protected Space Operations'' means all launch or transfer vehicle activities, ISS activities, and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of the IGA, MOUs concluded pursuant to the IGA, and implementing arrangements. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of launch or transfer vehicles, the ISS, payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services. ''Protected Space Operations'' also includes all activities related to evolution of the ISS, as provided for in Article 14 of the IGA. ''Protected Space Operations'' excludes activities on Earth which are conducted on return from the ISS to develop further a payload's product or process for use other than for ISS-related activities in implementation of the IGA.

(7) The term ''transfer vehicle'' means any vehicle that operates in space and transfers payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A transfer vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(8) The term ''Partner State'' includes each Contracting Party for which the IGA has entered into force, pursuant to Article 25 of the IGA or pursuant to any successor agreement. A Partner State includes its Cooperating Agency. It also includes any entity specified in the Memorandum of Understanding (MOU) between NASA and the Government of Japan to assist the Government of Japan's Cooperating Agency in the implementation of that MOU.

(c)(1) Cross-waiver of liability: Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (c)(1)(iv) of this section based on damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for damage, whatever the legal basis for such claims, against:

(i) Another Party;

(ii) A Partner State other than the United States of America;

(iii) A related entity of any entity identified in paragraph (c)(1)(i) or (c)(1)(ii) of this section; or

(iv) The employees of any of the entities identified in paragraphs (c)(1)(i) through (c)(1)(iii) of this section.

(2) In addition, each Party shall, by contract or otherwise, extend the cross-waiver of liability, as set forth in paragraph (c)(1) of this section, to its related entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this section; and

(ii) Require that their related entities waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this section.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this section, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own related entity or between its own related entities;

(ii) Claims made by a natural person, his/her estate, survivors or subrogees (except when a subrogee is a Party to the agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for damage resulting from a failure of a Party to extend the cross-waiver of liability to its related entities, pursuant to paragraph (c)(2) of this section; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under the agreement.

(5) Nothing in this section shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter. 701 is applicable.

§ 1266.103 [Reserved].

§ 1266.104 Cross-waiver of liability for launch agreements for science or space exploration activities unrelated to the International Space Station.

(a) The purpose of this section is to implement a cross-waiver of liability between the parties to agreements for NASA's science or space exploration

activities that are not related to the International Space Station (ISS) but involve a launch. It is intended that the cross-waiver of liability be broadly construed to achieve this objective.

(b) For purposes of this section:

(1) The term ''Party'' means a party to a NASA agreement for science or space exploration activities unrelated to the ISS that involve a launch.

(2) (i) The term ''related entity'' means:

(A) A contractor or subcontractor of a Party at any tier;

(B) A user or customer of a Party at any tier; or

(C) A contractor or subcontractor of a user or customer of a Party at any tier.

(ii) The terms ''contractor'' and ''subcontractor'' include suppliers of any kind.

(iii) The term ''related entity'' may also apply to a State or an agency or institution of a State, having the same relationship to a Party as described in paragraphs (b)(2)(i)(A) through (b)(2)(i)(C) of this section, or otherwise engaged in the implementation of Protected Space Operations as defined in paragraph (b)(6) of this section.

(3) The term ''damage'' means:

(i) Bodily injury to, or other impairment of health of, or death of, any person;

(ii) Damage to, loss of, or loss of use of any property;

(iii) Loss of revenue or profits; or

(iv) Other direct, indirect, or consequential damage.

(4) The term ''launch vehicle'' means an object, or any part thereof, intended for launch, launched from Earth, or returning to Earth which carries payloads or persons, or both.

(5) The term ''payload'' means all property to be flown or used on or in a launch vehicle.

(6) The term ''Protected Space Operations'' means all launch or transfer vehicle activities and payload activities on Earth, in outer space, or in transit between Earth and outer space in implementation of an agreement for launch services. Protected Space Operations begins at the signature of the agreement and ends when all activities done in implementation of the agreement are completed. It includes, but is not limited to:

(i) Research, design, development, test, manufacture, assembly, integration, operation, or use of launch or transfer vehicles, payloads, or instruments, as well as related support equipment and facilities and services; and

(ii) All activities related to ground support, test, training, simulation, or guidance and control equipment and related facilities or services. The term ''Protected Space Operations'' excludes activities on Earth that are conducted on return from space to develop further a payload's product or process for use other than for the activities within the scope of an agreement for launch services.

(7) The term ''transfer vehicle'' means any vehicle that operates in space and transfers payloads or persons or both between two different space objects, between two different locations on the same space object, or between a space object and the surface of a celestial body. A transfer vehicle also includes a vehicle that departs from and returns to the same location on a space object.

(c)(1) Cross-waiver of liability: Each Party agrees to a cross-waiver of liability pursuant to which each Party waives all claims against any of the entities or persons listed in paragraphs (c)(1)(i) through (c)(1)(iv) of this section based on damage arising out of Protected Space Operations. This cross-waiver shall apply only if the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations. The cross-waiver shall apply to any claims for damage, whatever the legal basis for such claims, against:

(i) Another Party;

(ii) A party to another NASA agreement that includes flight on the same launch vehicle;

(iii) A related entity of any entity identified in paragraphs (c)(1)(i) or (c)(1)(ii) of this section; or

(iv) The employees of any of the entities identified in paragraphs (c)(1)(i) through (c)(1)(iii) of this section.

(2) In addition, each Party shall extend the cross-waiver of liability, as set forth in paragraph (c)(1) of this section, to its own related entities by requiring them, by contract or otherwise, to:

(i) Waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this section; and

(ii) Require that their related entities waive all claims against the entities or persons identified in paragraphs (c)(1)(i) through (c)(1)(iv) of this section.

(3) For avoidance of doubt, this cross-waiver of liability includes a cross-waiver of claims arising from the Convention on International Liability for Damage Caused by Space Objects, which entered into force on September 1, 1972, where the person, entity, or property causing the damage is involved in Protected Space Operations and the person, entity, or property damaged is damaged by virtue of its involvement in Protected Space Operations.

(4) Notwithstanding the other provisions of this section, this cross-waiver of liability shall not be applicable to:

(i) Claims between a Party and its own related entity or between its own related entities;

(ii) Claims made by a natural person, his/her estate, survivors, or subrogees (except when a subrogee is a Party to the agreement or is otherwise bound by the terms of this cross-waiver) for bodily injury to, or other impairment of health of, or death of, such person;

(iii) Claims for damage caused by willful misconduct;

(iv) Intellectual property claims;

(v) Claims for damages resulting from a failure of a Party to extend the cross-waiver of liability to its related entities, pursuant to paragraph (c)(2) of this section; or

(vi) Claims by a Party arising out of or relating to another Party's failure to perform its obligations under the agreement.

(5) Nothing in this section shall be construed to create the basis for a claim or suit where none would otherwise exist.

(6) This cross-waiver shall not be applicable when 49 U.S.C. Subtitle IX, Chapter 701 is applicable.

Michael D. Griffin,

Administrator.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2007–0646; FRL–8527–1]

Approval and Promulgation of State Implementation Plans; Montana; Revisions to Administrative Rules of Montana, and Interstate Transport of Pollution

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is taking direct final action approving State Implementation Plan (SIP) revisions submitted by the State of Montana on June 28, 2000 and April 16, 2007. The revisions update Administrative Rules of Montana (ARM) provisions for Particulate Matter, and address Interstate Transport Pollution requirements of Section 110(a)(2)(D)(i) of the Clean Air Act. On June 28, 2000, the Governor of Montana submitted