Agency deference has not come so far that we will uphold regulations wherever it is possible to conceive a basis for administrative action * * * Thus the mere fact that there is ''some rational basis within the knowledge and experience of the (regulators)'' under which they ''might have concluded'' that the regulation was necessary to discharge their statutorily authorized mission, will not suffice to validate agency decisionmaking * * * Our recognition of Congress need to vest administrative agencies with ample power to assist in the difficult task of governing a vast and complex industrial Nation carries with it the correlative responsibility of the agency to explain the rationale and factual basis for its decision, even though we show respect for the agency's judgement in both.[53]

Whether USDA has discretionary authority under the AWA to exclude these animals was addressed in *Madigan*. Judge Richey found that USDA's argument for discretionary authority under the Act was ''strained and unlikely.'' [54] USDA has not shown that excluding birds, rats, and mice is reasonable. Therefore, USDA should redefine ''animal'' in accordance with the AWA.

C. USDA Was Arbitrary and Capricious in Refusing AAVS's Petition To Initiate Rulemaking Proceedings

The only explanation USDA gave for denying AAVS' petition for rulemaking was that it was not economically practical.[55] In denying AAVS' petition, USDA analyzed the increase cost that would result from regulating birds, rats, and mice. Based on that information, USDA decided not to grant these animals AWA protection. USDA's reliance on budgetary constraints is arbitrary and capricious because the agency failed to consider the many parts of the Act that are self implementing.[56]

In *Madigan*, the court explained that ''birds, rats, and mice could be included in the definition without requiring the expenditure of significant agency resources'' because the AWA includes many provisions that are self-implementing by the regulated industry.[57] By regulating these animals, researchers would be required to treat animals humanely without any action from the agency. In *Madigan*, the court held that USDA's denial of ALDF's rulemaking petition based upon the availability of resources and increase cost was arbitrary and capricious and not in accordance with law.[58] Based upon the *Madigan* decision, USDA's denial of a rulemaking petition to redefine ''animal'' based solely on economic reasons is not valid. Therefore, USDA should grant this petition by initiating rulemaking proceedings to regulate birds, rats, and mice consistently with the AWA.

V. Agency Action Requested

The AWA's purpose and plain meaning, Congress' legislative intent, and the reasoning in *Madigan* show that birds, rats, and mice should be granted protection under the AWA. Furthermore, the USDA has acknowledged that it has the authority to regulate rats and mice and has admitted that the agency was considering developing regulations for these animals.[59] However, the agency's continual delay in addressing this matter along with its justification for denying these animals protection is unreasonable and demands further consideration.

Therefore, for the reasons cited in this petition, the petitioner requests that the USDA immediately amend its current definition to include mice, rats, and birds under the AWA. The proposed regulation should be amended to read as follows:

Animal means any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warm-blooded animal, which is being used, or is intended for use for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. This term excludes horses not used for research purposes and other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs, including those used for hunting, security, or breeding purposes.

Except as described above, petitioners know of no other similar issue, act, or transaction to this petition currently being considered or investigated by any USDA office, other federal agency, department, or instrumentality, state municipal agency or court, or by any law enforcement agency.

As required by 7 CFR Subtitle A § 1.28, the USDA is required to give this petition prompt consideration. Petitioner is requesting a substantive response to this petition within ninety (90) calendar days. In the absence of an affirmative response, petitioners will be compelled to consider litigation in order to achieve the agency actions requested.

The undersigned certifies that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data known to the petitioner which are unfavorable to the petition.

On behalf of the petitioners,
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Tracie Letterman, Esq.,
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Attorneys for Petitioners.

[FR Doc. 99–1920 Filed 1–27–99; 8:45 am]
BILLING CODE 3410–34–P

[53] *Bowen* v. *Am. Hosp. Ass'n.*, 476 U.S. 610, 627 (1986) (citations omitted).

[54] Animal Legal Defense Fund, 781 F. Supp. at 800–806

[55] USDA response at 1–2.

[56] *See* eg., 7 U.S.C. 2143 (a)(7)(A) (requiring each research facility to provide information on procedures that may produce pain or distress in animals and also provide assurances that alternatives were considered) 7 U.S.C. 2136 (every research facility shall register with the Secretary).

[57] 781 F. Supp. at 803.

[58] *Id.*

[59] 54 FR 10,823.

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–225–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 757 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 757 series airplanes. This proposal would require revising the Airworthiness Limitations Section of the Instructions for maintenance manual [757 Airworthiness Limitations Instructions (ALI)]. The revision would incorporate certain inspections and compliance times to detect fatigue cracking of principal structural elements (PSE). This proposal is prompted by analysis of data that identified specific initial inspection thresholds and repetitive inspection intervals for certain PSE's to be added to the ALI. The actions specified by the proposed AD are

intended to ensure that fatigue cracking of various PSE's is detected and corrected; such fatigue cracking could adversely affect the structural integrity of these airplanes.

DATES: Comments must be received by March 15, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–225–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Patrick Safarian, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, Washington; telephone (425) 227–2775; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 98–NM–225–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–225–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

In accordance with airworthiness standards requiring ''damage-tolerance assessments'' [reference current section 1529 of parts 23, 25, 27, and 29 of the Federal Aviation Regulations (FAR); section 4 of parts 33 and 35 of the FAR; section 82 of part 31 of the FAR; and the Appendices referenced in those sections], all products certificated to comply with those sections must have Instructions for Continued Airworthiness (or, for some products, maintenance manuals) that include an Airworthiness Limitations Section. That section must set forth:

- Mandatory replacement times for structural components,
- Structural inspection intervals, and
- Related approved structural inspection procedures necessary to show compliance with the damage-tolerance requirements.

Compliance with the terms specified in the Airworthiness Limitations Section is required by FAR sections 43.16 (for persons maintaining products) and 91.403 (for operators).

As airplanes gain service experience, or as the result of post-certification testing and evaluation, it may become necessary to add additional life limits or structural inspections in order to ensure the continued structural integrity of the airplane. The manufacturer may revise the Airworthiness Limitations Section to include new or more restrictive life limits and inspections. However, in order to require compliance with those revised life limits and/or inspection intervals, the FAA must engage in rulemaking. Because loss of structural integrity would result in an unsafe condition, it is appropriate to impose these requirements through the airworthiness directive (AD) process.

Actions Taken by the Manufacturer

Boeing recently has completed extensive analyses and testing of fatigue cracking of principal structural elements (PSE) on certain Model 757 series airplanes, which included:

- Crack growth analysis,
- Service experience analysis,
- Crack growth testing,
- Fatigue testing, and
- Analysis of the effectiveness of applicable non-destructive inspection
- Techniques to detect cracking and other anomalies.

The results of the testing and analyses demonstrated the need to incorporate certain inspections into the current Airworthiness Limitations Instructions (ALI).

New Revision of ALI

The FAA has reviewed and approved Boeing Document D622N001–9, Revision ''MAY 1997,'' titled ''757 Maintenance Planning Data Document (MPD) Section 9, Airworthiness Limitations and Certification Maintenance Requirements (CMRs).'' That document is the ALI of the maintenance manual to which this proposed AD refers. That document describes specific initial inspection thresholds and repetitive inspection intervals for certain PSE's [identified as structural significant items (SSI) in the ALI]. That document explicitly identifies, for the first time, all of the PSE's that are to be inspected in accordance with the requirements of the ALI.

Although the Boeing document includes thresholds for all PSE's, in many cases the identified threshold is 50,000 total flight cycles for passenger airplanes. Because none of the affected airplanes is likely to reach this threshold for a number of years, Boeing has not yet developed the specific inspection procedures for these PSE's. However, these procedures will be developed well before any airplane reaches the threshold, and the FAA may consider further rulemaking when they become available.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require operators to revise the 757 ALI to incorporate Boeing Document D622N001–9, Revision ''MAY 1997'' of the ALI. However, nothing in this proposed AD is intended to affect any of the requirements related to the life limits or certification maintenance requirements that are contained elsewhere in the ALI. This proposed AD is intended to address only those PSE inspections that are referred to in Chapter B. (''Airworthiness Limitations—Structural Inspections'') of Boeing Document D622N001–9, Revision ''MAY 1997.''

Explanation of Action Taken by the FAA

As stated previously, in order to require compliance with these inspection intervals and life limits, the FAA must engage in rulemaking, namely, the issuance of an AD. For products certificated to comply with the referenced part 25 requirements, it is within the authority of the FAA to issue an AD requiring a revision to the Airworthiness Limitations Section that includes reduced life limits, or new or different structural inspection requirements. These revisions then are mandatory for operators under FAR section 91.403(c), which prohibits operation of an airplane for which airworthiness limitations have been issued unless the inspection intervals specified in those limitations have been complied with.

Once that document is revised, as required, and the AD has been fully complied with, the life limit or structural inspection change remains enforceable as a part of the Airworthiness Limitations. (This is analogous to AD's that require changes to the Limitations Section of the Airplane Flight Manual.)

Requiring a revision of the Airworthiness Limitations, rather than requiring individual inspections, is advantageous for operators because it allows them to record AD compliance status only once—at the time they make the revision—rather than after every inspection. It also has the advantage of keeping all Airworthiness Limitations, whether imposed by original certification or by AD, in one place within the operator's maintenance program, thereby reducing the risk of non-compliance because of oversight or confusion.

Determination of Grace Period

This proposed AD allows operators up to three years after the effective date of this AD to accomplish the ALI revision required by this AD. This period provides operators of airplanes that are approaching or have already reached the 25,000-flight-cycle inspection threshold with a reasonable amount of time to plan and perform the inspections. The FAA notes that only one PSE in the ALI has an initial inspection threshold of 25,000 total flight cycles. The majority of PSE's in the ALI have an initial inspection threshold that corresponds to the design service objective of the affected airplane (i.e., 50,000 total flight cycles). In addition, the Model 757 Structures Working Group, whose membership is composed of many of the major operators worldwide and almost all U.S. operators, has been aware of the specific contents and requirements of this ALI revision since August 1996. These facts have led the FAA to determine that three years is an appropriate and reasonable grace period for operators to perform the earliest PSE inspections.

Cost Impact

There are approximately 764 Boeing Model 757 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 300 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed actions, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $18,000, or $60 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Although this proposed AD requires only a revision to the current ALI, the FAA recognizes that the inspections contained in the ALI would then be required by parts 43 and 91 of the FAR. The FAA estimates that it would take approximately 1,000 work hours to accomplish all of the ALI inspections. At an average labor rate of $60 per work hour, the cost to perform the ALI inspections (required by FAR parts 43 and 91, rather than by part 39) would be approximately $60,000 per airplane. The FAA notes that the majority of work hours needed to perform the inspections would be expended when an affected airplane reached the 50,000-flight-cycle threshold. Based upon current airplane utilization, the FAA estimates that no airplane would reach this threshold for at least 10 years.

Regulatory Impact

The regulations proposed herein 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. Therefore, in accordance with Executive Order 12612, it is determined that this proposal would not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

Boeing: Docket 98–NM–225–AD.

Applicability: Model 757 series airplanes having line numbers 1 through 764 inclusive, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To ensure continued structural integrity of these airplanes, accomplish the following:

(a) Within 3 years after the effective date of this AD, revise Section 9 of the Model 757 Maintenance Planning Data (MPD) Document entitled ''Airworthiness Limitations and Certification Maintenance Requirements (CMRs)'' to incorporate Chapter B. of Boeing Document D622N001–9, Revision ''MAY 1997.''

Note 2: The referenced Chapter B. contains a requirement that cracks found during the specified inspections be reported to the Seattle Aircraft Certification Office. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501, *et seq.*) and have been assigned OMB Control Number 2120–0056.

(b) Except as provided in paragraph (c) of this AD: After the actions required by paragraph (a) of this AD have been accomplished, no alternative inspections or inspection intervals shall be approved for the PSE's contained in Boeing Document D622N001–9, Revision ''MAY 1997.''

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on January 21, 1999.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–1979 Filed 1–27–99; 8:45 am]

BILLING CODE 4910–13–U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–157–AD]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking; reopening of comment period.

SUMMARY: This document revises an earlier proposed airworthiness directive (AD), applicable to all Dornier Model 328–100 series airplanes, that would have required repetitive lubrication of the engine control push-pull cables. That proposal was prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. This new action revises the proposed rule by adding a requirement to install heating tubes on the control cables in the cockpit area and in the left-hand and right-hand engine balconies, which would terminate the repetitive lubrication requirement. The actions specified by this new proposed AD are intended to prevent ice from building up on the engine control push-pull cables, which could result in friction or jamming of the engine controls, and consequent reduced controllability of the airplane.

DATES: Comments must be received by February 22, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–157–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays.

The service information referenced in the proposed rule may be obtained from FAIRCHILD DORNIER, DORNIER Luftfahrt GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 98–NM–156–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–156–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to add an airworthiness directive (AD), applicable to all Dornier Model 328–100 series airplanes, was published as a notice of proposed rulemaking (NPRM) in the **Federal Register** on July 7, 1998 (63 FR 36621). That NPRM would have required repetitive lubrication of the engine control push-pull cables. That NPRM was prompted by the issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. Ice building up on the engine control push-pull cables during flight prompted operators to descend to a lower altitude (higher temperature) to melt off any build-up. Such build-up of ice on the engine control push-pull cables, if not corrected, could result in friction or jamming of the engine controls, and consequent reduced controllability of the airplane.

Actions Since Issuance of Previous Proposal

When the previous NPRM was issued, the FAA indicated that the actions proposed in that NPRM were considered interim action and that further rulemaking action was being considered. The manufacturer now has developed a modification, which, when accomplished, would terminate the requirement for repetitive lubrication of the engine control push-pull cables. Consequently, the FAA has determined that further rulemaking action is indeed necessary in order to address the unsafe condition and ensure the continued safe operation of those airplanes; this