

**DATES:** Effective April 5, 2004.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 03-221, adopted February 12, 2004, and released February 19, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC, 20554. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Television broadcasting.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

#### § 73.606 [Amended]

■ 2. Section 73.606(b), the Table of Television Allotments under Mississippi, is amended by removing TV channel 35+ and adding TV channel 49+ at Tupelo.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 04-4261 Filed 2-25-04; 8:45 am]

**BILLING CODE 6712-01-P**

### FEDERAL COMMUNICATIONS COMMISSION

#### 47 CFR Part 73

[DA 04-374, MB Docket No. 03-234, RM-10699]

#### Digital Television Broadcast Service; Fargo, ND.

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commission, at the request of North Dakota Television License, Sub., substitutes DTV channel 44 for DTV channel 58 at Fargo, North Dakota. See 68 FR 66394, November 26, 2003. DTV channel 44 can be allotted to

Fargo, North Dakota, in compliance with the principle community coverage requirements of Section 73.625(a) at reference coordinates 47-20-32 N. and 97-17-20 W., with a power of 414, HAAT of 543 meters and with a DTV service population of 313,000. Since the community of Fargo is located within 400 kilometers of the U.S.-Canadian border, concurrence from the Canadian government was obtained for this allotment. With this action, this proceeding is terminated.

**DATES:** Effective April 5, 2004.

**FOR FURTHER INFORMATION CONTACT:** Pam Blumenthal, Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's Report and Order, MB Docket No. 03-234, adopted February 12, 2004, and released February 19, 2004. The full text of this document is available for public inspection and copying during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC. This document may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW., CY-B402, Washington, DC 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail [qualexint@aol.com](mailto:qualexint@aol.com).

#### List of Subjects in 47 CFR Part 73

Digital television broadcasting, Television.

■ Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

#### PART 73—[AMENDED]

■ 1. The authority citation for Part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334 and 336.

#### § 73.622 [Amended]

■ 2. Section 73.622(b), the Table of Digital Television Allotments under North Dakota, is amended by removing DTV channel 58 and adding DTV channel 44 at Fargo.

Federal Communications Commission.

**Barbara A. Kreisman,**

*Chief, Video Division, Media Bureau.*

[FR Doc. 04-4262 Filed 2-25-04; 8:45 am]

**BILLING CODE 6712-01-P**

### DEPARTMENT OF TRANSPORTATION

#### Federal Railroad Administration

#### 49 CFR Part 214

[Docket No. FRA-2000-8156, Notice No. 3]

RIN 2130-AB28

#### Roadway Maintenance Machine Safety

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

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** This document responds to petitions for reconsideration of FRA's July 28, 2003 final rule which prescribed safety standards for railroad on-track roadway maintenance machines and hi-rail vehicles. This document amends and clarifies the final rule.

**DATES:** *Effective Date:* The amendments to the final rule are effective April 26, 2004.

**ADDRESSES:** *Docket:* For access to the docket to read background documents or comments and petitions for reconsideration received, go to <http://dms.dot.gov> at any time or to Room PL-401 on the plaza level of the NASSIF Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Allison H. MacDowell, Staff Director, Office of Safety Enforcement, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590 (telephone: 202-493-6236); Allen Ludwig, Track Safety Specialist, Office of Safety Enforcement, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590 (telephone: 202-493-6474); or Daniel L. Alpert, Trial Attorney, Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590 (telephone: 202-493-6026).

#### SUPPLEMENTARY INFORMATION:

##### Introduction

On July 28, 2003, FRA published a final rule that prescribed safety standards for railroad on-track roadway maintenance machines and hi-rail vehicles. See 68 FR 44388. The final rule originated from a 1990 petition for rulemaking by the Brotherhood of Maintenance of Way Employees (BMWE) and was the product of a rulemaking effort conducted under the

auspices of FRA's Railroad Safety Advisory Committee (RSAC).

#### *RSAC Overview*

As background, RSAC provides a forum for developing consensus recommendations on rulemaking and other safety program issues, and includes representatives from all of FRA's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force or other subgroup reports to the working group. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation.

Because FRA staff is actively involved at the working group and subgroup levels in discussing issues and options and drafting proposed rule language, and because the RSAC recommendation constitutes the consensus of some of the industry's leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

#### *Proceeding to Date*

In 1996, FRA requested that RSAC address rulemaking revisions to the Track Safety Standards, found at 49 CFR part 213. RSAC agreed to the task and formed the Track Working Group to help develop the revisions. The Track Working Group decided by consensus

that a new set of regulations addressing the safety of on-track roadway maintenance machines should be developed in a separate rulemaking. After publication of revisions to the Track Safety Standards in 1998, the Track Working Group appointed a six-member Task Group to help develop regulations addressing the safety of on-track roadway maintenance machines and hi-rail vehicles. The Task Group consisted of representatives from FRA, Association of American Railroads (AAR), BMW, Norfolk Southern Railway Co., and an equipment supplier. The Task Group drafted proposed rule text which the Track Working Group recommended to the full RSAC for approval. RSAC approved the recommendations. FRA agreed that the recommendations provided a good basis for a proposed rule and subsequently published a Notice of Proposed Rulemaking (NPRM) on Roadway Maintenance Machine Safety on January 10, 2001. See 66 FR 1930.

FRA received comments from five organizations in response to the proposed rule. In February 2002, the Task Group met with most of the commenters, as well as other representatives from the industry, to clarify and further discuss the comments and suggestions provided by the commenters. The Task Group, by unanimous vote, made recommendations to the Track Working Group as to how the final rule should respond to each of the comments. The Track Working Group presented these recommendations to the full RSAC, which also agreed with them by unanimous vote. FRA considered the comments received on the NPRM and the recommendations of RSAC in preparing the final rule. FRA largely adopted the recommendations of RSAC in preparing the final rule, as explained in the preamble to the rule. See 68 FR 44388.

Following publication of the final rule, the AAR and the Union Pacific Railroad Company (UP) filed petitions seeking FRA's reconsideration and clarification of certain provisions of the rule. The specific issues raised by these petitioners, and FRA's response to their petitions, are discussed in detail in the "Section-by-Section Analysis" portion of the preamble, below. The "Section-by-Section Analysis" portion of the preamble addresses each provision of the final rule which FRA has amended or clarified. This will enable the regulated community to more readily compare this document with the preamble discussions contained in the final rule and will thereby aid in

understanding the requirements of the rule.

#### **Section-by-Section Analysis**

##### *Section 214.507 Required Safety Equipment for New On-Track Roadway Maintenance Machines*

This section contains requirements for safety equipment for all new on-track roadway maintenance machines. In the final rule, paragraph (a)(4) provided that all new on-track roadway maintenance machines have windshields made of safety glass or other material with similar properties, such as Lexan, as well as power windshield wipers. 68 FR 44409. In cases where traditional windshield wipers are incompatible with the windshield material, the final rule provided that a suitable alternative be available that offers the operator of the machine an equivalent level of vision. *Id.*

UP filed a petition seeking clarification whether the requirements of paragraph (a)(4) excluded those machines that would either require a windshield to be applied to a void space or otherwise provide no protection or other value to the operator. UP agreed that machines with enclosed cabs should be equipped with windshields to protect the operator, but raised the concern that there are many types of machines that either do not have the framework to accommodate a windshield or cannot practically be equipped with windshields. UP stated that such machines vary in weight from 10,000 to 30,000 pounds, are used in production gang consists, and do not travel long distances or at high speeds.

UP submitted to the docket several pictures of an example of such a machine, a rail anchor applicator. According to UP, the machine weighs approximately 10,000 pounds and, by design, does not have an enclosed cab. UP explained that, while it is possible to install a windshield on one or both sides of the operator by building a framework for the windshield, such a windshield would exist only to comply with a regulation and would not provide any protection or other value to the operator. UP stated that such a windshield would be an obstacle to the safe operation of the machine because it would be constantly in the way when loading anchors and operating the machine. Further, UP stated that windows on such a machine could not practically be equipped with wipers, would be a constant cleaning problem, and could impair the operator's vision. In addition to rail anchor applicators, UP cited the following machines as not

appropriate for being equipped with windshields:

- Anchor spreaders;
- Anchor squeezers;
- Anchor remover machines;
- Multi-screw spiker machines;
- Multi-unscrew spiker machines;
- Multi drill/screw spiker machines;
- Production clip applicator/remover

machines;

- Rail heater cars;
- Rail lifter production plate

inserters;

- Spike driving machines;
- Spike puller machines; and
- Production profile grinders.

UP added that the basic configuration of some of these machines may change in the future and that, if future design changes result in a need for, or added value of, a windshield, UP would support the installation of a windshield.

Having reviewed UP's petition, FRA makes clear that it did not intend the rule to require that windshields be installed on all new on-track roadway maintenance machines. FRA intended to require that when windows are installed on new on-track roadway maintenance machines, they are made of safety glass or other material with similar properties. In addition, FRA intended that all such machines with windshields have power windshield wipers or suitable alternatives that provide the operator an equivalent level of vision if windshield wipers are incompatible with the windshield material.

Clearly, all machines with enclosed cabs, which necessarily require a windshield for the operator to see through, are subject to the requirements of this section. Yet, FRA does not intend to define the requirements of this section expressly in terms of machines with enclosed cabs. FRA believes its intent is more clearly conveyed by revising the text to state that the requirements of this paragraph apply only to new on-track roadway maintenance machines designed with windshields. FRA has amended the rule accordingly. Consequently, if a new on-track roadway maintenance machine is designed with a windshield, the windshield must be made of safety glass, or its equivalent, and be cleaned by power windshield wipers, or a suitable alternative means as appropriate.

In regard to the rail anchor applicator and other on-track roadway maintenance machines cited by UP for exclusion from the requirements of this paragraph, such machines are not subject to this paragraph's requirements as long as they are not designed with windshields. Based on UP's

representation that these machines are not designed with windshields, they are thereby excluded from the requirements of this paragraph as long as that representation remains true.

*Section 214.513 Retrofitting of Existing On-Track Roadway Maintenance Machines; General*

This section specifies a schedule of retrofit items applicable to all existing on-track roadway maintenance machines. Pursuant to § 214.7, an existing on-track roadway maintenance machine is defined as any on-track roadway maintenance machine other than a new on-track roadway maintenance machine. Consequently, an existing on-track roadway maintenance machine is any on-track roadway maintenance machine in existence or ordered on or before December 26, 2003, or completed on or before September 27, 2004.

Paragraph (a) of the final rule required that each roadway worker transported on an existing on-track roadway maintenance machine have a safe and secure position that also provides protection from moving parts of the machine that could entangle clothing or body extremities. *See* 68 FR 44409. Following publication of the final rule, it became clear to FRA that this paragraph should be combined with § 214.517(g) of the final rule. Section § 214.517(g) also contained requirements for safe and secure positions for roadway workers riding on existing roadway maintenance machines. *See* 68 FR 44410. Specifically, § 214.517(g), like all of § 214.517, applied to existing on-track roadway maintenance machines manufactured on or after January 1, 1991, and required such machines to be equipped with handholds, handrails, or a secure seat or bench position for each roadway worker transported on the machine. *Id.*

FRA believes it unnecessary and potentially confusing to have two requirements in two separate sections concerning safe and secure positions for roadway workers riding on existing on-track roadway maintenance machines. Although the final rule carried forward these same requirements as proposed in the NPRM, the requirements contained in § 214.513(a) should have been combined with those contained in § 214.517(g) of the final rule. For a position to be "safe and secure" for a roadway worker to ride on an existing on-track roadway maintenance machine, the position must necessarily have handholds or handrails, or both, which the worker may grasp, or a secure seat or bench on which the worker may sit.

In fact, in the preamble discussion of § 214.513(a) in the final rule, FRA stated that safe and secure positions include seats or foot platforms with handholds so that the roadway worker can maintain a stable and balanced position on the machine as it is moving down the track. *See* 68 FR 44397.

As revised, § 214.513(a) requires that each existing on-track roadway maintenance machine have a safe and secure position with handholds, handrails, or a secure seat or bench position for each roadway worker transported on the machine, and each such position shall be protected from moving parts of the machine. As noted above, FRA believes that this revision to § 214.513(a) and consolidation of the rule do not substantively change the rule's requirements.

*Section 214.517 Retrofitting of Existing On-Track Roadway Maintenance Machines Manufactured On or After January 1, 1991*

This section specifies requirements for existing on-track roadway maintenance machines manufactured on or after January 1, 1991. Consequently, on-track roadway maintenance machines manufactured prior to 1991 are exempt from the requirements contained in this section. Existing on-track roadway maintenance machines that are subject to the requirements of this section must conform to these requirements after March 28, 2005.

Paragraph (b) of this section in the final rule provided that an existing on-track roadway maintenance machine have an operative heater when the ambient temperature is less than 50 degrees Fahrenheit, if the machine were or had been equipped with a heater. *See* 68 FR 44409, 44410. In preparing the final rule, FRA had modified the text of the proposed rule which, in part, specifically applied to a machine "equipped with a heater by the manufacturer." *See* 66 FR 1944. FRA's modification to the text of the proposed rule made clear that the requirement also applied to machines that had previously been equipped with heaters that had since been removed. In addition, FRA revised the text that limited the application of this section to heaters equipped by the manufacturers of the on-track roadway maintenance machines. FRA noted that heaters could have been installed after the machines were manufactured, and it was not evident to FRA why heaters installed after manufacture should not be subject to the requirements of this paragraph. *See* 68 FR 44399.

In petitioning for reconsideration of this paragraph's requirements, the AAR

stated that FRA should not apply this paragraph's requirements to machines that are or have previously been equipped with unauthorized heaters installed by railroad employees. Therefore, the AAR suggested that FRA amend paragraph (b) by limiting its application to heaters "installed by the manufacturer or the railroad." FRA has adopted the AAR's suggestion. FRA recognizes that it did not intend to include within this paragraph's requirements heaters that had not been installed by the manufacturer or the railroad, and FRA believes that the suggested change fully addresses FRA's concern as stated in the final rule. As amended, paragraph (b) requires that each existing on-track roadway maintenance machine manufactured on or after January 1, 1991, have an operative heater when the machine is operated at an ambient temperature less than 50 degrees Fahrenheit and is equipped with, or has been equipped with, a heater installed by the manufacturer or the railroad.

As discussed in the analysis of § 214.513(a) above, FRA has removed paragraph (g) of § 214.517. Please see the above discussion of § 214.513(a) for a detailed explanation as to why this paragraph has been removed.

#### *Section 214.518 Safe and Secure Positions for Riders*

This section contains the requirements for identifying safe and secure positions for roadway workers riding on on-track roadway maintenance machines. The final rule prohibits a roadway worker (other than the machine operator) from riding on any on-track roadway maintenance machine unless a safe and secure position for each roadway worker on the machine is clearly identified by stenciling, marking, or other written notice. See 68 FR 44410. The final rule also provided that this requirement become applicable as of the effective date of the final rule, September 26, 2003.

The AAR petitioned for reconsideration of this section's applicability date. The AAR pointed out that the proposed rule would have given railroads one year to implement the requirement to identify safe and secure positions for roadway workers riding on on-track roadway maintenance machines. See 66 FR 1944. The AAR noted that FRA decided not to defer implementation of the requirement in the final rule for one year because FRA found it less burdensome than the proposed requirement. See 68 FR 44400. The proposed rule would have required railroads to provide written notice on all roadway maintenance machines—to

identify safe and secure positions for workers on machines permitted to transport them, as well as to make known the prohibition against riding on machines on which workers were not permitted to ride. Instead, the final rule requires railroads to provide written notice only on machines permitted to transport riders. Nonetheless, the AAR stated that a deferral of the applicability date is necessary. According to the AAR, in many cases railroads would be unable to use stencils or decals to comply with the requirement since they could not be designed, made, and applied in such a short time frame. Without a deferral of the applicability date, the AAR believed that railroads would be forced to use written documentation, and noted that written documentation may be less effective than more permanent indications such as stencils and decals. The AAR asserted that a six-month deferral of the applicability date would give railroads sufficient time to implement an effective program to apply stencils and decals. The AAR added that it would also give railroads time to apply these stencils and decals while maintenance is performed on roadway maintenance machinery that is out of service during the fall and winter months.

Following the AAR's submission, FRA sought clarification as to whether the AAR intended exclusively to use stencils and decals to identify safety and secure riding positions on roadway maintenance machines—without the need to identify such positions on documents kept on the machines. The AAR stated that it expected stencils and decals to be used in the vast majority of cases because they are more "permanent." Nevertheless, the AAR believed the option to identify safe and secure riding positions on documents kept on the machines to be essential, because in some cases stencils or decals are not practical. The AAR cited the example of large machines that can hold many people, such as the P-811 tie laying machine, for which stencils or decals would not be sufficient to identify safe and secure positions for riders. The AAR stated that written instructions would be more effective to communicate where to ride on this type of machine, as well as on large and complex machines such as big tampers, liners, and undercutters. In addition, the AAR noted that there will be machines on which stencils and decals cannot be readily applied to identify safe and secure riding positions. In this regard, the AAR cited the example of a safe riding location consisting of a grated floor and a pole for a rider to hold, but

without a logical place to apply a stencil or a decal identifying the proper place for riding on the machine.

Having reconsidered the requirements of this section, FRA has decided to defer this section's applicability date. As amended, the requirements of this section become applicable on or after March 1, 2004. FRA understands from the AAR's submission that in the vast majority of cases railroads will use stencils or decals to identify safe and secure riding positions on roadway maintenance machines. FRA encourages the use of stencils or decals, or both, to identify safe and secure riding positions for workers on roadway maintenance machines. In addition, FRA recognizes that a significant number of roadway maintenance machines are out of service during the months of cold weather. Consequently, during this time, railroads would have the opportunity to stencil or apply decals to out-of-service roadway maintenance machines as they undergo normal maintenance, thereby minimizing the cost of compliance. FRA believes that deferring the applicability date to March 1, 2004, affords railroads sufficient time to stencil or apply decals to identify safe and secure riding positions on those machines they intend to so mark. Moreover, FRA expects that for those machines whose safe and secure riding positions will be identified on documents kept on the machines, and therefore will not necessitate the work of physically marking the positions, extending the applicability date to March 1, 2004, is clearly sufficient. (FRA notes that it makes no specific finding as to the impracticability or impracticality of stenciling or applying decals to the roadway maintenance machines cited by the AAR in its clarifying submission, as railroads continue to have the option of using documents kept on the machines to identify safe and secure riding positions in circumstances as they deem appropriate.)

FRA makes clear that, even though it is extending the time to identify safe and secure positions for workers riding on roadway maintenance machines, it is not extending the time to provide the safe and secure positions themselves for workers riding on these machines. For instance, pursuant to § 214.513, each "existing" on-track roadway maintenance machine must have a safe and secure position with handholds, handrails, or a secure seat or bench position for each roadway worker transported on the machine, as noted above. Each position must also be protected from moving parts of the machine. Since an "existing" on-track roadway maintenance machine is any

on-track roadway maintenance machine in existence or ordered on or before December 26, 2003, or completed on or before September 27, 2004, the regulation will continue to require that every worker riding a roadway maintenance machine be provided a safe and secure position. FRA is extending only the compliance date to identify such positions on the machines.

*Section 214.521 Flagging Equipment for On-Track Roadway Maintenance Machines and Hi-rail Vehicles*

This section requires that flagging kits be available when on-track roadway maintenance machines and hi-rail vehicles are operated over trackage subject to a railroad operating rule requiring flagging. Flagging kits must comply with the requirements specified in the operating rules of the railroad over which the equipment is operated. This requirement applies to each on-track roadway maintenance machine and hi-rail vehicle that is operated alone or as the leading or trailing piece of equipment in a roadway work group operating under the same occupancy authority. Flagging kits are not required for roadway maintenance machines and hi-rail vehicles that are operated in the middle of a single roadway work group. However, the vehicles must be under the same occupancy authority to be considered part of a single group.

Following publication of the final rule, FRA recognized that this section could state more clearly which equipment is subject to the requirements. Accordingly, FRA has slightly revised the rule text and changed the section's format to make the requirements clearer. However, FRA has made no substantive change to the requirements of this section. FRA has simply restated the requirements in a different way to make them more comprehensible.

*Appendix A to Part 214—Schedule of Civil Penalties*

Appendix A to this part contains the schedule of civil penalties associated with violations of the regulations under subpart D to part 214. FRA is making one change to this schedule in conformance with a change to § 214.517, which is discussed above.

**Regulatory Impact/Notices**

*Executive Order 12866 and DOT Regulatory Policies and Procedures*

Prior to issuing the July 28, 2003 final rule, FRA prepared and placed in the docket a regulatory analysis addressing the economic impact of the final rule. The rule was evaluated in accordance

with existing policies and procedures and was considered to be non-significant under both Executive Order 12866 and DOT policies and procedures (see 44 FR 11034, February 26, 1979). (For a more detailed discussion, see 68 FR 44405.) This response to the petitions for reconsideration of the final rule is likewise considered to be non-significant under both Executive Order 12866 and DOT policies and procedures. This regulatory action generally clarifies the requirements contained in the rule or allows for greater flexibility in complying with the rule. In particular, deferring the applicability date of § 214.518 will reduce the cost of complying with the rule. However, the actual cost reduction has not been calculated. Nevertheless, this regulatory action will have a minimal net effect on FRA's original analysis of the benefits and costs associated with the final rule.

*Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of rules to assess their impact on small entities. Prior to issuing the July 28, 2003 final rule, FRA prepared and placed in the docket a Regulatory Flexibility Assessment (RFA) which assessed the small entity impact by the rule. FRA certified that the final rule is not expected to have a "significant" economic impact on a "substantial" number of small entities under the Regulatory Flexibility Act and Executive Order 13272. (For a more detailed discussion, see 68 FR 44405, 44406.) This response to the petitions for reconsideration of the final rule generally clarifies the requirements contained in the rule or allows for greater flexibility in complying with the rule. Consequently, FRA certifies that this regulatory action is not expected to have a "significant" economic impact on a "substantial" number of small entities under the Regulatory Flexibility Act and Executive Order 13272. FRA concludes that there are no substantial economic impacts on small units of government, business, or other organizations arising from this regulatory action.

*Paperwork Reduction Act*

This response to the petitions for reconsideration of the final rule changes none of the information collection requirements contained in the final rule. It changes neither any individual requirement's burden nor the total burden for this collection of information.

*Environmental Impact*

FRA has evaluated this response to the petitions for reconsideration of the final rule in accordance with its procedures for ensuring full consideration of the environmental impact of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and DOT Order 5610.1c. This regulatory action meets the criteria that establish this as a non-major action for environmental purposes.

*Federalism Implications*

FRA has analyzed this response to the petitions for reconsideration of the final rule in accordance with the principles and criteria contained in Executive Order 13132 issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. See 64 FR 43255. In the NPRM, FRA acknowledged that the rule as proposed could have federalism implications. The governance of safety of hi-rail vehicles could have an unintended effect on State laws addressing the safety of these vehicles as they are operated over roads and highways, even though the rule is meant to cover the safety of hi-rail vehicles only while they are operated on railroad tracks. Although the requirements for hi-rail vehicles are not intended to preempt any State laws addressing motor vehicles, FRA requested comment concerning what State laws, if any, could be impacted by this rule. FRA received no comment in response to the request.

The RSAC, which recommended the proposed rule, has as permanent members two organizations representing State and local interests: the American Association of State Highway and Transportation Officials and the Association of State Rail Safety Managers. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. In light of the above, FRA concludes that this response to the petitions for reconsideration of the final rule has no federalism implications.

*Unfunded Mandates Reform Act of 1995*

Pursuant to the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4) each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate

requirements specifically set forth in law.” (See Section 201). Section 202 of the Act further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement \* \* \*” detailing the effect on State, local and tribal governments and the private sector. This response to the petitions for reconsideration of the final rule will not result in the expenditure, in the aggregate, of \$100,000,000 or more in any one year, and thus preparation of a statement is not required.

#### Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” See 66 FR 28355; May 22, 2001. Under the Executive Order a “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this response to the petitions for reconsideration of the final rule in accordance with Executive Order 13211. FRA has determined that this regulatory action is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

#### Privacy Act

Anyone is able to search the electronic form of all public submissions to any of our dockets by the name of the individual making the submission (or signing the submission, if made on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register**

published on April 11, 2000 (Volume 65, Number 70; Pages 19477–78) or by visiting <http://dms.dot.gov>.

#### List of Subjects in 49 CFR Part 214

Bridges, Occupational safety and health, Penalties, Railroad safety, Reporting and record keeping requirements.

#### The Final Rule

■ In consideration of the foregoing, chapter II, subtitle B of title 49, Code of Federal Regulations is amended as follows:

#### PART 214—[AMENDED]

■ 1. The authority citation for part 214 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107 and 49 CFR 1.49.

■ 2. Section 214.507 is amended by revising paragraph (a)(4) to read as follows:

**§ 214.507 Required safety equipment for new on-track roadway maintenance machines.**

(a) \* \* \*

(4) A windshield with safety glass, or other material with similar properties, if the machine is designed with a windshield. Each new on-track roadway maintenance machine designed with a windshield shall also have power windshield wipers or suitable alternatives that provide the machine operator an equivalent level of vision if windshield wipers are incompatible with the windshield material;

\* \* \* \* \*

■ 3. Section 214.513 is amended by revising paragraph (a) to read as follows:

**§ 214.513 Retrofitting of existing on-track roadway maintenance machines; general.**

(a) Each existing on-track roadway maintenance machine shall have a safe and secure position with handholds, handrails, or a secure seat or bench position for each roadway worker transported on the machine. Each position shall be protected from moving parts of the machine.

\* \* \* \* \*

■ 4. Section 214.517 is amended by revising paragraph (b) as follows and removing paragraph (g):

**§ 214.517 Retrofitting of existing on-track roadway maintenance machines manufactured on or after January 1, 1991.**

\* \* \* \* \*

(b) An operative heater, when the machine is operated at an ambient temperature less than 50 degrees Fahrenheit and is equipped with, or has

been equipped with, a heater installed by the manufacturer or the railroad.

\* \* \* \* \*

■ 5. Section 214.518 is amended by revising it to read as follows:

**§ 214.518 Safe and secure positions for riders.**

On or after March 1, 2004, a roadway worker, other than the machine operator, is prohibited from riding on any on-track roadway maintenance machine unless a safe and secure position for each roadway worker on the machine is clearly identified by stenciling, marking, or other written notice.

■ 6. Section 214.521 is amended by revising it to read as follows:

**§ 214.521 Flagging equipment for on-track roadway maintenance machines and hi-rail vehicles.**

Each on-track roadway maintenance machine and hi-rail vehicle shall have on board a flagging kit that complies with the operating rules of the railroad if:

(a) The equipment is operated over trackage subject to a railroad operating rule requiring flagging; and

(b)(1) The equipment is not part of a roadway work group; or

(2) The equipment is the lead or trailing piece of equipment in a roadway work group operating under the same occupancy authority.

■ 7. Appendix A to part 214 is amended by removing the entry for section 214.517(g).

Issued in Washington, DC on February 9, 2004.

**Allan Rutter,**

*Federal Railroad Administrator.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018–AT57

### Endangered and Threatened Wildlife and Plants; Final Rule To Designate Critical Habitat for the Santa Ana Sucker (*Catostomus santaanae*)

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Santa Ana sucker (*Catostomus santaanae*) pursuant to the