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49 CFR Part 214

Railroad Workplace Safety; Adjacent-Track On-Track Safety for Roadway Workers; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 214

[Docket No. FRA–2008–0059, Notice No. 1]

RIN 2130–AB93

Railroad Workplace Safety; Adjacent-Track On-Track Safety for Roadway Workers

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to amend its regulations on railroad workplace safety to reduce further the risk of serious injury or death to roadway workers. In particular, FRA proposes to require that railroads adopt specified on-track safety procedures to protect certain roadway work groups from the movement of trains or other on-track equipment on ''adjacent track.'' FRA proposes to define ''adjacent track'' as ''any controlled track whose track center is 19 feet or less from the track center of the occupied track.'' These on-track safety procedures would be required for each adjacent track when a roadway work group with at least one of the roadway workers on the ground, is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. FRA also proposes to require that railroads, contractors to railroads, and roadway workers comply with these procedures.

DATES: Written comments must be received no later than August 18, 2008. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to August 18, 2008, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: *Comments:* You may submit comments on this NPRM, identified by Docket No. FRA–2008–0059, Notice No. 1, by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, M–33, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590.
- *Hand Delivery or Courier:* Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, M–33, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- *Fax:* 202–493–2251.

Instructions: For detailed instructions on submitting comments, and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this preamble. Note that all comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. Please see the ''Privacy Act'' subheading under the ''Regulatory Impact and Notices'' heading, below, in section VIII.I. of this preamble.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* anytime, or to the Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays. Follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: Kenneth Rusk, Staff Director, Track Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS–15, Mail Stop 25, Washington, DC 20590 (telephone 202–493–6236); or Anna Winkle, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC–12, Mail Stop 10, Washington, DC 20590 (telephone 202–493–6166 or 202–493–6052).

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I. Public Participation

The Administrative Procedure Act (5 U.S.C. 551–559) permits an agency to dispense with notice of rulemaking when it is otherwise not required by statute and the agency ''for good cause finds that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(B). FRA finds that the typically long periods for notice and public participation are, in this case, unnecessary and contrary to the public interest for the reasons set forth below; thus, an abbreviated comment period of 30 days is appropriate for this NPRM.

As will be detailed in this NPRM, the recent increase in roadway worker fatalities that have occurred on an adjacent track (*i.e.*, under the existing rule, any track within 25 feet of the centerline of the track to which the roadway work group was assigned to perform one or more roadway worker duties) has caused considerable concern at FRA and throughout the industry, even prompting the filing of a joint petition for emergency order under 49 U.S.C. 20104 on April 11, 2008. *See* 49 CFR part 214, subpart C (''Roadway Worker Protection Rule'' or ''RWP Rule''). FRA issued a notice of safety advisory to address the issue in May of 2004; however, it appears that the salutary effects of the safety advisory, which produced a period of 16 months with no fatalities on an adjacent track, were not long-lasting, as four fatalities have since occurred on an adjacent track where a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. FRA believes that these proposed amendments to the Roadway Worker Protection Rule are non-controversial in nature because they are based on and substantively the same as the consensus language developed

through the Roadway Worker Protection (RWP) Working Group of FRA's Railroad Safety Advisory Committee (RSAC), which is comprised of various representatives of the groups that are affected by this rule (including railroad management, railroad labor organizations, and contractors). Moreover, FRA finds that, based on the data available, any further delay in issuance of this NPRM [1] and a subsequent final rule would fail to reduce the risk of additional fatalities on adjacent track that are likely to occur late this year or early next year in the absence of further regulatory action.

In summary, FRA believes that the identification of a serious and escalating safety concern which FRA's actions to date have not been sufficient to remedy and the non-controversial nature of the proposed amendments justify a comment period of 30 days, rather than the normal 60 days, in this NPRM. FRA will consider, however, any comments received after that date to the extent possible without incurring additional expense or delay.

II. Overview of the Existing RWP Rule

A. Applicability and Basic Definitions

The RWP Rule requires each railroad that operates rolling equipment on track that is part of the general railroad system of transportation to ''adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad.'' *See* 49 CFR 214.3, 214.303(a).[2] ''On-track safety'' is defined as ''a state of freedom from the danger of being struck by a moving railroad train or other railroad equipment, provided by operating and safety rules that govern track occupancy by personnel, trains and on-track equipment.'' *See* § 214.7. The roadway workers that must be afforded on-track safety are any employees of a railroad, or of a contractor to a railroad, whose duties include ''inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts * * *.'' *See* § 214.7, ''Roadway worker.''

B. Authorized Methods of Establishing On-Track Safety

Several methods are authorized to be used to provide on-track safety for roadway workers, and many of those methods involve establishing ''working limits,'' which is defined in part as ''a segment of track with definite boundaries established in accordance with [part 214] upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track.'' *See* §§ 214.7 and 214.319. Working limits may be established on controlled track (*i.e.*, ''track upon which the railroad's operating rules require that all movements of trains must be authorized by a train dispatcher or a control operator'') through exclusive track occupancy (§ 214.321), foul time (§ 214.323), or train coordination (§ 214.325). *See* §§ 214.7 and 214.319. Regardless of which method is chosen, the working limits are only permitted to be under the control of a qualified roadway worker in charge, and all affected roadway workers must be notified and either clear of the track or provided on-track safety through train approach warning (in accordance with § 214.329) before the working limits are released to permit the operation of trains or other on-track equipment through the working limits. *See id.*

Train approach warning is another common method of establishing on-track safety in which a trained and qualified watchman/lookout provides warning to roadway worker(s) of the approach of a train or on-track equipment in sufficient time to enable each roadway worker to move to and occupy a previously arranged place of safety not less than 15 seconds before a train moving at the maximum speed authorized on that track would arrive at the location of the roadway worker. *See* §§ 214.329 and 214.7 ''Watchman/lookout.'' Train approach warning is sometimes used as a temporary form of on-track safety when a roadway worker in charge needs to nullify the on-track safety previously established by working limits in order to permit a train or piece of on-track equipment to enter the roadway work group's working limits. Train approach warning permits the roadway workers to continue working for longer if the working limits span several miles and the train or equipment will not be passing by the work area for some time due to a speed restriction, the distance away, or the train or equipment halting its movement. It should be noted that switching temporarily to ''train approach warning'' is permissible only if the change was previously discussed in detail with the roadway work group either in the on-track safety job briefing prior to beginning work or in an updated on-track safety job briefing pursuant to § 214.315(d). *See* § 214.315.

C. Existing On-Track Safety Requirements for Roadway Work Groups with Respect to Adjacent Tracks

Section 214.335(c) of the RWP Rule currently requires that roadway work groups engaged in ''large-scale maintenance or construction'' be provided with on-track safety in the form of ''train approach warning'' for train or equipment movements on adjacent tracks if the adjacent tracks are not already included within the working limits. Under the current definition of ''adjacent tracks,'' on-track safety as discussed above is required for any tracks with track centers spaced less than 25 feet apart from the track to which a roadway work group is assigned to perform large-scale maintenance or construction. *See* §§ 214.7, 214.335(c). The track to which the roadway work group is assigned to perform the large-scale maintenance or construction is commonly referred to as the ''occupied track.'' Thus, in triple-main track territory, if a roadway work group is occupying the middle track (*e.g.*, Main Track No. 2) in order to perform large-scale maintenance or construction, and the track centers of the tracks on either side of the occupied track are within 25 feet of the occupied track, then on-track safety is required to be established on both adjacent tracks (*e.g.*, Main Track Nos. 1 and 3). In some yards or territories, where track centers may be spaced only 12 feet apart, an occupied track (*e.g.*, Yard Track No. 3) may have up to four adjacent tracks (*e.g.*, Yard Track Nos. 1, 2, 4, and 5). In such cases, the current rule requires on-track safety to be established on all four adjacent tracks, in addition, of course, to the on-track safety required for the occupied track itself. *See* §§ 214.335(c) and 214.337(a).

Although the term ''large-scale maintenance or construction'' is not specifically defined in the regulation, FRA noted in the preamble to the 1996 final rule establishing the RWP Rule that the principle behind the reference to large-scale maintenance or construction ''is the potential for distraction, or the possibility that a

[1] While the consensus language relating to adjacent track issues that was developed through the RSAC was originally intended to be published as part of a larger NPRM, FRA has decided to propose these adjacent-track-related provisions in this separate NPRM so that an appropriate provision will be in effect in a more timely fashion than if the provision were one of many in the larger rulemaking that would need to undergo internal review and approval and public notice and comment. The remaining provisions not related to adjacent track will be proposed in a separate NPRM at a later date, as part of the larger RWP rulemaking.

[2] All references in this preamble to a section or other provision of a regulation are to a section, part or, other provision in title 49, Code of Federal Regulations unless otherwise specified.

roadway worker or roadway maintenance machine might foul the adjacent track and be struck by an approaching or passing train,'' and further stated that ''conditions in which the risk of distraction is significant'' require measures to provide on-track safety on adjacent tracks. *See* 61 FR 65959, 65971 (December 16, 1996). To further clarify what was meant by the term ''large-scale maintenance or construction,'' FRA adopted the recommendation of the Roadway Worker Safety Advisory Committee, which described large-scale track maintenance and/or renovations, such as but not limited to, ''rail and tie gangs, production in-track welding, ballast distribution, and undercutting.'' *See id.* Under such guidance, many railroads were not providing on-track safety on adjacent tracks for surfacing operations, small tie renewal operations, or similar maintenance operations that, while smaller in scale, still included one or more on-track roadway maintenance machines or coupled equipment. Fatalities occurred on the adjacent track during such operations when on-track safety was not established on the adjacent track or had been temporarily or permanently nullified or suspended to permit the passage of a train or other on-track equipment.

III. Notice of Safety Advisory 2004–01

After the occurrence of five roadway worker fatalities in one calendar year (2003), including one on an adjacent track, FRA responded on April 27, 2004, by issuing Notice of Safety Advisory 2004–01, which was later published in the **Federal Register** on May 3, 2004. *See* 69 FR 24220. FRA issued this safety advisory to recommend certain safety practices, to review existing requirements for the protection of roadway workers from traffic on adjacent tracks, and to heighten awareness to prevent roadway workers from inadvertently fouling a track when on-track safety is not provided. *See id.* The safety advisory explained that the requirements of the RWP Rule, including the requirement to provide adjacent track on-track safety for large-scale maintenance or construction in § 214.335(c), are only minimum standards; railroads and railroad contractors are free to prescribe additional or more-stringent standards consistent with the rule. *See id.* at 24222 and § 214.301(b). FRA recommended that railroads and contractors to railroads develop and implement basic risk assessment procedures for use by roadway workers to determine the likelihood that a roadway worker or equipment would foul an adjacent track prior to initiating work activities, regardless of whether those activities were ''large-scale'' or ''small-scale.'' The safety advisory provided examples of relevant factors to consider in making such an assessment, including whether the work could be conducted by individuals positioned between the rails of a track on which on-track safety has been established, as opposed to being on the field side of such a track toward an adjacent track; whether there was a structure between the tracks to prevent intrusion (such as a fence between the tracks at a passenger train station and the tall beam of a through-plate girder bridge); the track-center distance, to ensure that the adjacent track would not be fouled if a worker were to inadvertently trip and fall; the nature of the work (inspection or repair); the sight distances; and the speed of trains on the adjacent track. *See* 69 FR 24222. FRA further noted that, upon completion of an on-site risk assessment, the on-track safety briefing required by § 214.315(a) would be the ideal instrument to implement preventive measures concerning adjacent tracks. *See id.*

In addition to the above recommendation concerning basic risk assessment, FRA recommended that railroads and contractors to railroads consider taking the following actions:

- Use of [sic] working limits for activities where equipment could foul adjacent track (whether large-scale or small-scale activities);
- Use rotation stops to mitigate the dangers associated with on-track equipment and trains passing on adjacent tracks;
- Review procedures for directing trains through adjacent track working limits, and enhance such procedures when necessary;
- Install adjacent track warning signs/devices in the operating cab of on-track machines to remind roadway maintenance machine operators to not inadvertently depart the equipment onto a track where there may be trains and other on-track equipment passing;
- Provide additional training and monitoring to [their] employees, emphasizing the need to cross tracks in a safe manner (i.e., single file and after looking in both directions);
- Reinforce to individual roadway workers that it is critical not to foul a track except in the performance of duty and only when on-track safety has been established. This training could be accomplished through training sessions, as well as daily job briefings; and
- Institute peer-intervention measures by which workers are encouraged to intervene when observing another roadway worker engaging in potentially non-compliant and unsafe activity. *See id.*

IV. Recent Roadway Worker Accidents (1997–2008)

Since the RWP Rule went into effect on January 15, 1997, there have been nine roadway worker fatalities on an adjacent track. Seven of those fatalities have occurred on a controlled track that was adjacent to the track on which a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment. FRA notes that there has been only one adjacent-track fatality where a roadway work group had been engaged in a common task with a lone hi-rail vehicle, defined in § 214.7 as ''a roadway maintenance machine that is manufactured to meet Federal Motor Vehicle Safety Standards and is equipped with retractable flanged wheels so that the vehicle may travel over the highway or on railroad tracks.''[3] In addition, there have been no adjacent-track fatalities where a roadway work group had been engaged in a common task with a catenary maintenance tower car on the occupied track. This is likely because the duties normally performed by an employee operating a hi-rail or a catenary maintenance tower car tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine. Given the above, FRA proposes that adjacent-track on-track safety not be required for roadway work groups engaged in a common task with a hi-rail or a catenary maintenance tower car, as discussed in the section-by-section analysis of paragraphs (b)(2) and (b)(3), respectively, in new proposed § 214.336.

Of the seven fatalities that occurred under the circumstances described above and which this rule proposes to address, three occurred during the period after the effective date of the rule and before the publication of the safety advisory on May 3, 2004, and four have occurred since that period. In the four-year period prior to May of 2004 (May 1, 2000–April 30, 2004), there has been one adjacent-track fatality known to have occurred under such circumstances, for a rate of .25 per year. In the four-year period since (May 1, 2004–April 30, 2008), there have been four adjacent-track fatalities, for a rate of

[3] In that case, the roadway workers were under the impression that adjacent-track on-track safety was in effect, but it was not, due to a miscommunications.

one per year, which is four times the rate of the previous four-year period. While FRA recognizes that even one death can make rates change dramatically when the total number of deaths is small, the increase in the rate of these deaths despite the safety advisory leads FRA to conclude that prompt regulatory action is needed to avert an escalating number of deaths. Moreover, given the extensive participation in developing these consensus regulatory provisions by representatives of all of the key interests involved in this issue, it is contrary to the public interest to wait for all of the other issues in the larger RWP rulemaking to be resolved or to engage in lengthy periods for notice and public comment before acting to prevent more deaths.

The following is a brief summary of the results of FRA's investigations of the four most recent incidents that resulted in these unfortunate fatalities:

• *October 5, 2005:* A roadway surfacing gang tamper operator, with 28 years of service, was walking up to the front of the tamper to put away the light buggies as his surfacing gang, having just completed its work, was getting ready to travel to clear the number two main track. The operator was walking east on the side of the tamper between the two main tracks when he was struck by a westbound train on the adjacent track. The track centers were spaced approximately 13 feet apart, and the train was traveling at an estimated speed of 40 miles per hour (mph).

• *March 12, 2007:* A surfacing gang was occupying the number one main track in a double-main territory. The surfacing gang foreman (the roadway worker in charge), who earlier had notified the other members of the gang of pending movement on the adjacent track, was standing in the gage of the same adjacent track when he was struck by a train. It remains unclear why he was fouling the adjacent track at the time of the incident. The track centers were spaced approximately 13 feet, 6 inches apart, and the maximum authorized speed on the adjacent track was 50 mph.

• *February 10, 2008:* A train struck a roadway worker inside an interlocking on a triple-main track territory. The worker was part of a gang that consisted of approximately 10 workers that were engaged in the repair of a crossover on the middle main track with a tamper. Foul time was being used as adjacent-track on-track protection, but this protection was removed by the roadway worker in charge, who gave permission to the dispatcher to permit a train to operate on the adjacent track through the roadway work group working limits. As the train entered the interlocking on a limited clear signal indication for a crossover move past the work area, one of the roadway workers attempted to cross the track in front of the train and was struck. The track centers were spaced approximately 13 feet apart, and the maximum authorized speed for the train on the adjacent track was 45 mph.

• *March 27, 2008:* Information at this time is preliminary, but it is understood that a surfacing gang was working on multiple-track territory. The surfacing gang foreman was standing in the foul of the adjacent track while his surfacing crew worked on the number two main track. A train operating on the same adjacent track struck the foreman. No on-track safety was in effect on the adjacent track involved at the time of the incident. The track centers were spaced approximately 14 feet, 7 inches apart, and the maximum authorized speed on the adjacent track was 70 mph.

While the above discussion focuses on those fatalities that have occurred on an adjacent track where a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track, it is important to discuss some of the common circumstances in all nine of the fatalities that have occurred on an adjacent track since the rule went into effect, as these circumstances were considered by FRA in its decision to issue this NPRM. The first common circumstance is the type of track. All nine of the fatalities occurred on ''controlled'' track, rather than ''non-controlled'' track. This was taken into consideration in writing FRA's proposed definition of ''adjacent track,'' which would be included as part of proposed new § 214.336(a), would essentially replace the term ''adjacent tracks'' in § 214.7, and would be limited to controlled tracks whose track centers are spaced 19 feet or less from the track center of the occupied track.

Second, all nine of the fatalities occurred on an adjacent track that was quite closely-spaced to the track that the roadway work group was occupying. Six of the adjacent tracks had track centers that were spaced approximately 14 feet or less from the respective track centers of the tracks that the roadway work groups were occupying, and all nine of the adjacent tracks were spaced 15 feet or less from the track centers of the respective occupied tracks. This common circumstance was also taken into consideration in FRA's proposed definition of ''adjacent track,'' which would no longer include tracks with track centers that were spaced more than 19 feet (but less than 25 feet) away from the track center of the occupied track.

The third common circumstance of the nine fatalities on adjacent track is the time of year. Four of the fatalities occurred during the first quarter (January–March), none of the fatalities occurred in the second and third quarters of the year (April–June and July–September, respectively), and the other five fatalities occurred during the fourth quarter (October–December). As noted earlier in Section I., above, if this pattern continues, any further delay in issuance of this rule would fail to reduce the risk of additional fatalities on adjacent track that are likely to occur late this year or early next year in the absence of further regulatory action. Thus, FRA has decided to proceed with an NPRM with an abbreviated comment period.

V. Joint Petition to FRA for an Emergency Order

On April 11, 2008, the Brotherhood of Maintenance of Way Employes Division (BMWED) and the Brotherhood of Railroad Signalmen (BRS) filed a joint petition requesting that FRA issue an emergency order requiring adjacent-track protection for roadway work groups. The petition notes that similar requests, which were filed on October 7, 2005, November 7, 2003, and December 21, 1999, were denied by FRA. The petitioners expressed their belief that, under the existing provisions of the rule, roadway workers will continue to suffer preventable serious injuries and death. The petitioners assert that FRA should require railroads and their contractors to establish on-track safety on adjacent tracks (''adjacent-track on-track safety'') for a wider range of work activities. In FRA's January 5, 2006 denial of the October 2005 petition, FRA noted that the RSAC working group to review and revise the RWP Rule (''RWP Working Group'') was ''committed to presenting comprehensive draft language * * * that would more closely tailor the solution to the problem.'' And while the RWP Working Group did in fact draft this language, and both the Working Group and the full RSAC were able to reach consensus on such language, BMWED and BRS are concerned that the language, which has not been published as an NPRM, would not become a final rule for a considerable period of time, leaving the possibility for further preventable fatalities. BMWED and BRS urge FRA to issue an emergency order that would adopt the adjacent-track consensus language of the RWP RSAC.

On April 18, 2008, the American Train Dispatchers Association (ATDA) filed a letter in support of the BMWED and BRS joint petition. In the letter, ATDA agreed that preventable injuries and deaths continue to occur because of a lack of positive regulation mandating adjacent-track on-track safety and urged FRA to issue an emergency order based upon the RSAC-approved and consensus-based replacement language for § 214.235(c), as indicated in the joint petition.

VI. Current Rulemaking To Revise the RWP Rule

A. Overview of the RSAC

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to FRA's Administrator on rulemakings and other safety program issues. The Committee includes representation from all of the agency's major customer groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

- American Association of Private Railroad Car Owners (AAPRCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers Association (ATDA);
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- BMWED;
- BRS;
- Chlorine Institute;
- Federal Transit Administration (FTA)*;
- Fertilizer Institute;
- High Speed Ground Transportation Association (HSGTA);
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers (IBEW);
- Labor Council for Latin American Advancement*;
- League of Railway Industry Women*;
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women*;
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRC);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB)*;
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte*;
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada*;
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);
- Transportation Security Administration (TSA)*; and
- United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is 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. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full 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 play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, 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 or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on a recommendation for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

B. Proceedings in This Rulemaking to Date Generally

On January 26, 2005, the RSAC formed the RWP Working Group (''Working Group'') to consider specific actions to advance the on-track safety of employees of covered railroads and their contractors engaged in maintenance-of-way activities throughout the general system of railroad transportation, including clarification of existing requirements. The assigned task was to review the existing rule, technical bulletins, and a safety advisory dealing with on-track safety. The Working Group was to consider implications and, as appropriate, consider enhancements to the existing rule. The Working Group would report to the RSAC any specific actions identified as appropriate, and would report planned activity to the full Committee at each scheduled Committee meeting, including milestones for completion of projects and progress toward completion.

The Working Group is comprised of members from the following organizations:

- Amtrak;
- APTA;
- ASLRRA;
- ATDA;
- AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway Company (CN), Canadian Pacific Railway, Limited (CP), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSXT), Kansas City Southern (KCS), Norfolk Southern Corporation (NS), and Union Pacific Railroad Company (UP);
- Belt Railroad of Chicago;
- BLET;
- BMWED;
- BRS;
- Federal Railroad Administration (FRA);
- Indiana Harbor Belt Railroad (IHB);
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- Montana Rail Link;
- NRC;
- Northeast Illinois Regional Commuter Railroad Corporation (Metra);
- RailAmerica, Inc.;
- Southeastern Pennsylvania Transportation Authority (SEPTA);
- United Transportation Union (UTU); and
- Western New York and Pennsylvania Railroad (WNY&P).

The Working Group held 12 multi-day meetings. The group worked diligently and was able to reach consensus on 32 separate items.

C. Proceedings Concerning On-Track Safety Procedures for Adjacent Tracks

One of the items on which the Working Group was able to reach consensus dealt specifically with the adjacent-track on-track safety issue in § 214.335. The consensus language developed by the Working Group for this topic, which was approved by the full RSAC and formally recommended to FRA, is as follows:

§ 214.335 On-track safety procedures for roadway work groups.

* * * * *

(c) On-track safety is required for adjacent controlled track within 19 feet of the centerline of the occupied track when roadway work group(s) consisting of roadway workers on the ground and on-track self-propelled or coupled equipment are engaged in a common task on an occupied track.

(1) Except as provided by paragraph (c)(3) of this section, when trains are cleared through working limits on an adjacent controlled track, or when watchman/lookout warning in accordance with § 214.329 is the form of adjacent on-track safety, roadway workers shall occupy a predetermined place of safety and all on-ground work and equipment movement activity within the fouling space of the occupied track shall cease upon notification of pending adjacent track movement (working limits) or upon receiving the watchman/lookout warning.

(2) When single or multiple movements are cleared through adjacent controlled track working limits, on-ground work and equipment movement on the occupied track may resume only after all such movements on adjacent track have passed each component of the Roadway Work Group(s). If the train stops before passing all roadway workers, the employee in charge shall communicate with the engineer prior to allowing the work to resume.

(3) When single or multiple movements are cleared through adjacent controlled track working limits at a speed no greater than 25 mph, work performed exclusively between the rails of the occupied track, or to the field side of the occupied track with no adjacent track, may continue upon notification of each roadway worker of movement on adjacent track. On-ground work shall not be performed within 25 feet to the front or 25 feet to the rear of roadway maintenance machine(s) on the occupied track during such adjacent track movement.

(d) Equipment may not foul an adjacent controlled track unless protected by working limits and there are no movements authorized through the working limits by the roadway worker in charge.

(e) The mandatory provisions for adjacent controlled track protection under this subpart are not applicable to work activities involving—

(1) A hi-rail vehicle as defined in § 214.7, provided such hi-rail vehicle is not coupled to railroad cars. Where multiple hi-rail vehicles are engaged in a common task, the on-track safety briefing shall include discussion of the nature of the work to be performed to determine if adjacent controlled track protection is necessary. Nothing in this subpart prohibits the roadway worker in charge of the hi-rail vehicle from establishing adjacent controlled track protection, as he/she deems necessary.

(2) On-ground roadway workers exclusively performing work on the field side of the occupied track.

(3) Catenary maintenance tower cars with roadway workers positioned on the ground within the gage of the occupied track for the sole purpose of applying or removing grounds. Nothing in this subpart prohibits the roadway worker in charge of the catenary maintenance tower car from establishing adjacent track protection, as he/she deems necessary.

Upon reviewing the joint petition of the BRS and BMWED for an emergency order, the consensus language of the Working Group quoted above, and the relevant accident data concerning roadway workers fouling adjacent track, FRA has decided to issue this NPRM to lower the safety risk associated with roadway workers fouling adjacent track. Although FRA's safety advisory may have had an initial effect and have raised awareness enough to help keep the number of all categories of roadway worker fatalities in 2004 and through almost six months in 2005 at zero, the effect was not sustained enough to combat the rise of roadway worker fatality incidents since late June of 2005, when the first roadway worker fatality occurred after the issuance of the safety advisory, or since October of 2005, when the first adjacent track roadway worker fatality occurred.

In light of recent roadway worker fatality trends, FRA has determined that the agency must propose a more prescriptive approach to prevent further fatalities. The need to mandate adjacent-track on-track safety was recognized by FRA, members of the Working Group, and members of the full RSAC. The consensus language developed by the Working Group and recommended by the full RSAC is expected to reduce the risk of roadway worker fatalities due to fouling an adjacent track while working in conjunction with on-track equipment on an occupied track. As part of the process in drafting the NPRM in the larger RWP rulemaking,[4] FRA circulated the consensus rule text concerning adjacent track and other items for errata review. Both AAR and BMWED submitted comments on this provision. To address these issues, and other potential ambiguities discovered upon a closer review of the rule text, FRA has reorganized and modified the consensus text in issuing this NPRM, as discussed below in the section-by-section analysis.

[4] As noted in Section I. of this document, the provisions related to adjacent track were originally intended to be published as part of a larger NPRM concerning Part 214, but have been proposed here as a separate NPRM to expedite the effective date of such provisions.

VII. Section-by-Section Analysis

Amendments to 49 CFR Part 214, Railroad Workplace Safety

Subpart A—General

Section 214.7 Definitions

FRA proposes to modify this section by removing the definition of ''adjacent tracks.'' As also discussed under § 214.336, FRA proposes to convert the term ''adjacent tracks'' to the singular, then move the definition of ''adjacent track'' from § 214.7 to the only section where the term would actually be used, and finally define the new term more narrowly by limiting it to a controlled track whose track center is located 19 feet or less from the track center of the occupied track. The current definition of ''adjacent tracks'' includes any tracks, controlled *or non-controlled*, whose track centers are spaced *less than 25 feet apart.*

As discussed above in ''IV. Recent Roadway Worker Accidents (1997–2008),'' in all nine of the fatal accidents that occurred on ''adjacent tracks'' as currently defined, the adjacent track was a controlled track with a track center that was spaced 15 feet or less from the track center of the occupied track. Six of the adjacent tracks had track centers that were spaced approximately 14 feet or less from the respective track centers of the tracks that the roadway work groups were occupying. In examining whether to expand the types of work activities requiring adjacent-track on-track safety in § 214.335(c), the Working Group also considered whether the recommended amendments to the section would be over-inclusive when applied in conjunction with the existing definition of ''adjacent tracks.'' After examining the accident data, the Working Group agreed that 19 feet would be a reasonable and safe threshold to trigger the requirement to establish adjacent-track on-track safety and that it would be reasonable to cover controlled tracks within that 19-foot zone but to exclude non-controlled tracks. FRA notes that the lack of fatalities on non-controlled adjacent tracks may be attributable to the reduced operating speeds on non-controlled tracks, where railroad operating rules generally require that movements must stop short of obstructions within half the range of

vision. The Working Group discussed and the full RSAC recommended for inclusion in § 214.335(c) that on-track safety be required for ''adjacent controlled track within 19 feet of the centerline of the occupied track'' for certain work activities. FRA agrees with this analysis and has reflected it in the proposed definition of ''adjacent track.''

Subpart C—Roadway Worker Protection

Section 214.315 Supervision and Communication

Given the importance of an on-track safety job briefing in roadway workers' understanding of the nature of the work they will be conducting and the conditions under which they will conduct it, FRA also thinks that the existing requirements in § 214.315 for a job briefing ''when an employer assigns duties to a roadway worker that call for that employee to foul a track'' should be expanded to cover the new proposed procedures for adjacent-track on-track safety in § 214.336 if such procedures are required for that assignment. With a few minor changes, the text concerning the additional components of an on-track safety job briefing that is proposed in this NPRM was also consensus language developed by the Working Group and recommended by the full RSAC. The consensus language relating to adjacent-tracks was proposed as a new paragraph (a)(2) in § 214.315, to read as follows:

(2) Information about any tracks adjacent to the track to be occupied, on-track safety for such tracks, and identification of roadway maintenance machines that will foul any adjacent track. In such cases, the briefing shall include procedural instructions addressing the nature of the work to be performed and the characteristics of the work location to ensure compliance with this part.

On December 18, 2007, FRA e-mailed the Working Group members and requested an errata review of a document in which FRA had compiled all of the consensus items. In its errata review comments, AAR requested that FRA clarify that the provision is not intended to require a discussion on the on-track safety of an adjacent track unless on-track safety was required on that track by part 214. FRA agrees that this is not the intent of the proposed requirement, and has added the language ''if required by this subpart'' to the consensus rule text, which has been proposed as new paragraph (a)(3). This proposed section would still require the on-track safety job briefing to include information concerning any ''tracks adjacent'' (in the general sense of the word ''adjacent'') to the track to be fouled, so as to serve as a warning to each roadway worker of the potential danger in fouling such a track, even if no on-track safety is required for that particular track because it does not meet the definition of ''adjacent track.'' FRA has further clarified in a proposed revision to introductory paragraph (a) that this section lists only the minimum items that must be discussed in an on-track safety briefing. The words ''at a minimum'' were added, and the rest of existing paragraph (a) has been moved to proposed paragraphs (a)(1) and (a)(2).

Section 214.335 On-Track Safety Procedures for Roadway Work Groups, General

FRA proposes to amend this section by deleting paragraph (c) and replacing it with a new section to address adjacent-track on-track safety for roadway work groups, § 214.336, for the reasons discussed below. Existing paragraph (c) reads as follows:

(c) Roadway work groups engaged in large-scale maintenance or construction shall be provided with train approach warning in accordance with § 214.327 for movements on adjacent tracks that are not included within working limits.

The proposal would also amend the heading of § 214.335 to reflect the general nature of the remaining requirements in that section.

Section 214.336 Adjacent-Track On-Track Safety for Roadway Work Groups; Procedures, Training, and Recordkeeping

Paragraphs (a), Procedures; general; and (b), Exceptions to the requirement for adjacent-track on-track safety

As discussed in section II.C., above, § 214.335(c) currently requires adjacent-track on-track safety for a roadway work group only if such a work group is engaged in ''large-scale maintenance or construction.'' Under this criterion and the limited guidance provided in the preamble to the final rule, many railroads have not been providing on-track safety on adjacent tracks for surfacing operations, small tie-renewal operations, or similar maintenance operations that, while smaller in scale, still include on-track, self-propelled equipment. This proposed new section seeks to eliminate this interpretive issue by establishing new, more objective criteria for determining whether adjacent-track on-track safety is required for a roadway work group. Fatalities have occurred in connection with such operations, which many believe the existing language should be interpreted to cover.

In developing language to address the increasing number of roadway worker fatalities on an adjacent track, the Working Group considered that most of the fatalities on an adjacent track occurred when a roadway work group with at least one of the roadway workers on the ground, was engaged in a common task with on-track, self-propelled equipment on an occupied track. In those circumstances, the potential for a roadway worker in the group to be distracted from the danger of an oncoming train was great due to the noise and dust generated by operation of the roadway maintenance machines, the need to avoid entanglement in the operation of those machines, and the need to monitor the quality of the work being performed. This set of factual circumstances became the basis for the proposed new criteria for triggering the requirement to establish adjacent-track on-track safety in introductory paragraph (c)(1) of the consensus language, and in paragraph (a) of proposed new § 214.336, which, as a general rule, would require that on-track safety be established for each adjacent track when a roadway work group with at least one of the roadway workers on the ground, is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. In particular, the on-track safety would have to be provided in accordance with § 214.319 (Working limits, generally); § 214.321 (Exclusive track occupancy); § 214.323 (Foul time); § 214.325 (Train coordination); or § 214.329 (Train approach warning provided by watchmen/lookouts). The general rule in paragraph (a) would have three exceptions described in proposed paragraph (b).

Paragraph (a) would also add definitions of two terms used in § 214.336: ''adjacent track'' and ''occupied track.'' For purposes of this section (the only section where the term is used), ''adjacent track'' would mean ''a controlled track whose track center is spaced 19 feet or less from the track center of the occupied track.'' The current definition of ''adjacent tracks'' (in § 214.7) includes any tracks, controlled *or non-controlled*, whose track centers are spaced *less than 25 feet apart*. As the term ''adjacent track'' was used several times in the recommended consensus language of § 214.335(c), and to avoid any confusion of terms, FRA proposes to remove the definition of ''adjacent tracks'' from § 214.7, to convert the term to the singular, and to adopt this new, narrower definition of ''adjacent track'' based on the roadway worker fatality data discussed above under the section-by-section analysis of § 214.7, which show that the adjacent

tracks on which the roadway worker fatalities occurred were all controlled tracks and the track centers of these controlled tracks were within 15 feet of the track centers of the occupied track.

The second proposed definition to be used for purposes of § 214.336 is ''occupied track.'' FRA proposes to define the term ''occupied track'' to mean the track on which a roadway maintenance machine or coupled equipment is located while engaged in a common task with a roadway work group. FRA replaced the consensus language of ''on-track, self-propelled or coupled equipment'' with ''on-track roadway maintenance machine or coupled equipment'' so as to use a term that is already defined in part 214. It should be noted that while the language that would trigger the requirement to establish adjacent-track on-track safety contains the term ''on-track roadway maintenance machine'' (which excludes hi-rails), the proposed definition of ''occupied track'' contains the broader term ''roadway maintenance machine'' (which includes hi-rails), since a roadway work group that is engaged in a common task with a hi-rail would still be ''occupying'' the track, regardless of whether adjacent-track on-track safety would be required during that task. The language in RSAC-recommended paragraph (a) was also modified in light of the proposed new definition of ''adjacent track,'' namely by moving references to ''controlled track'' and the 19-foot track center distance and placing them in the definition.

The Working Group also considered whether it is safe to permit work to continue under certain limited circumstances, and proposed some exceptions in paragraphs (c)(2)–(c)(3) and (e)(1)–(e)(3) of the consensus language, which the full RSAC later recommended to FRA. FRA has adopted all of the exceptions recommended by the full RSAC in this proposal and has reorganized and modified the text for clarity, in response to comments received from the AAR and the BMWED in their errata review of the consensus language, and to address other potential ambiguities discovered upon a closer review of the rule text.

In an effort to make the section easier to understand, FRA has reorganized the section into proposed paragraph (a)(1), which lists the procedures to follow for adjacent-track movements over 25 mph (*i.e.*, if a train or other on-track equipment is authorized to move on an adjacent track at a speed greater than 25 mph), and proposed paragraph (a)(2), which lists the procedures to follow when adjacent-track movements are authorized at a speed of 25 mph or less.[5] Proposed paragraph (a)(1) would require that each roadway worker in the roadway work group stop any work on the ground and stop the movement of any roadway maintenance machine or coupled equipment in the fouling space of the occupied track and the adjacent track, and occupy a predetermined place of safety. If on-track safety has been established on the adjacent track through train approach warning in accordance with § 214.329, all work would have to cease upon receiving a watchman/lookout warning. On the other hand, if working limits have been established on the adjacent track and the roadway work group has not been assigned a watchman/lookout, all work would have to cease upon receiving notification that the roadway worker in charge intends to authorize one or more train movements or other on-track equipment movements through the working limits on an adjacent track. This notification would have to occur before the roadway worker in charge releases the working limits, in order to comply with existing § 214.319(c).

In its errata review comments on the FRA document compiling all of the Working Group consensus language, AAR requested that FRA clarify whether work would be permitted to resume at a particular location after the head-end of the movement had passed or after the entire train had passed, under the RSAC-recommended § 214.335(c)(2). A review of the available accident data shows that none of the fatalities that occurred on the adjacent track were due to an employee walking into the side of the train; rather, the employees walked in front of the train's path. Thus, it is reasonable to permit work to resume after the head-end of the movement has passed the location of each component of the roadway work group (provided that the roadway workers do not later advance to a position ahead of the head-end), and the relevant language in consensus text in paragraph (c)(2) has been modified accordingly by FRA in its proposed paragraph (a)(1)(ii).

In modifying the language in consensus paragraph (c)(2) for inclusion in its proposal, FRA realized that this same paragraph did not address whether such work would be permitted to continue if a train or other on-track equipment, due to the maximum timetable speed of 25 mph, were operating at speeds no greater than 25 mph on an adjacent track, where train approach warning was the established method of adjacent-track on-track safety. As the roadway workers are presented with similar safety risks and would still receive notification of the train or other on-track equipment movements, regardless of the method of adjacent-track on-track safety established, FRA has decided to adopt clarifying language and has combined consensus paragraphs (c)(1) and (c)(2) into a new paragraph (a)(1)(ii) in this NPRM. Under the proposal, a component of a roadway work group may resume on-ground work and movement of any roadway maintenance machine or coupled equipment on the occupied track only after the head-end of all trains or other on-track equipment moving on the adjacent track (either authorized through the working limits by the roadway worker in charge or for which a watchman/lookout has provided a warning) has passed and remains ahead of that component of the roadway work group. This provision may be best explained through examples showing how the proposed requirements would apply under various factual scenarios.

For example, if a roadway worker in charge were to authorize three trains through the working limits, and only working limits were in effect, the work would not be permitted to continue until all three movements had passed the roadway work group component's location. If train approach warning procedures were also in effect under the same circumstances, the roadway work group component would be allowed to continue all work after the head-end of the first train passed, (so long as the work remained behind the head-end and would not foul the adjacent track) until receiving the warning for the second train, and so on.

On the other hand, if the train or other on-track equipment were to stop before its head-end passed all of the roadway workers in the roadway work group (or if a roadway worker in the roadway work group moved to a position on or fouling the occupied track in advance of the head-end of the adjacent-track movement), the work to be performed on or while fouling the occupied track ahead of the train or other on-track equipment on the adjacent track would be permitted to resume only if adjacent-

[5] If a roadway worker in charge, in his discretion, authorizes a train through working limits on an adjacent track at 30 mph, but the train is actually traveling at a speed of only 20 mph, the procedures in proposed paragraph (a)(1), regarding adjacent-track movements over 25 mph, would still apply. Where exclusive track occupancy is the method of on-track safety established on the adjacent track, FRA notes that existing § 214.321(d) provides that movements of trains and roadway maintenance machines within working limits shall be made only under the direction of the roadway worker having control over the working limits, and further notes that such movements shall be at restricted speed unless a higher speed has been specifically authorized by the roadway worker in charge of the working limits.

track on-track safety is currently in effect or re-established. In most cases, this would likely mean that on-track safety through train approach warning (§ 214.329) is still in effect or has been re-established on the adjacent track. In the remaining cases, this would mean that the roadway worker in charge has communicated with the train engineer or equipment operator and obtained or regained control of such train or other on-track equipment. Of course, any work that would foul the *adjacent* track on which the movement is occurring would not be permitted to resume immediately upon the head-end of the movement passing by the roadway work group component, as adjacent track on-track safety cannot be re-established for that adjacent track at least until the entire train or other on-track equipment movement has passed (and remains past) the roadway work group component's location, unless the train or other on-track equipment were stopped and under the control of the roadway worker in charge.

The proposed procedures to be followed for adjacent-track movements of 25 mph or less are the same as those procedures for adjacent-track movements over 25 mph, except that work would be permitted to continue in certain circumstances without regard to when the head-end passed the roadway work group's location, due to the low speed of the movements. In proposed paragraph (a), FRA makes clear that if an occupied track has two adjacent tracks, and one of the tracks has one or more adjacent-track movements authorized at 25 mph or less, and the other has one or more concurrent adjacent-track movements authorized at over 25 mph, the more restrictive procedures in paragraph (a)(1) would apply.

The circumstances under which work may continue during low-speed movements on adjacent tracks have been included in proposed paragraphs (a)(2)(i)-(a)(2)(ii). In both sets of circumstances, any work that would be permitted to continue after notification of an adjacent-track movement would have to be performed more than 25 feet away from the front or rear of any roadway maintenance machine that is on or fouling the occupied track. While existing § 214.341(a)(5) requires each employer to include in its on-track safety program specific provisions addressing spacing ''between machines and roadway workers to prevent personal injury,'' the rule does not prescribe a specific distance, as certain work activities may require a roadway worker to work closer to a machine than others. Many railroads that subscribe to the General Code of Operating Rules (''GCOR''), for example, have adopted a 15-foot work zone in which roadway workers are not permitted to enter without first communicating with the operator of the equipment and establishing safe work procedures. *See* GCOR Rule 136.7.3. The Working Group proposed a larger work zone of 25 feet to help lessen the distraction and danger posed by a roadway maintenance machine working on or fouling an occupied track, as both an on-ground roadway worker and an operator of a roadway maintenance machine will be performing work with the additional distraction of one or more adjacent-track movements. FRA proposes to adopt this recommendation as one of the circumstances for permitting work to continue as described in proposed paragraphs (a)(2)(i) and (a)(2)(ii).

The first set of circumstances is when work is performed exclusively while positioned between the rails of the occupied track, provided that any on-ground work is performed more than 25 feet away from the front or rear of any roadway maintenance machine that is on or fouling the occupied track during such an adjacent-track movement. The rationale for permitting work to continue between the rails is that a roadway worker who is positioned between the rails of the occupied track is in little danger of fouling the adjacent track. This proposed condition is similar to an existing provision in § 214.103(d) that permits bridge workers to perform minor repair work exclusively between the rails without any fall protection. As this condition has worked well in the bridge worker area, FRA proposes to adopt the RSAC-recommended condition in the roadway worker area.

The first set of circumstances is when work is performed exclusively while positioned between the rails of the occupied track, provided that any on-ground work is performed more than 25 feet away from the front or rear of any roadway maintenance machine that is on or fouling the occupied track during such an adjacent-track movement. The rationale for permitting work to continue between the rails is that a roadway worker who is positioned between the rails of the occupied track is in little danger of fouling the adjacent track. This proposed condition is similar to an existing provision in § 214.103(d) that permits bridge workers to perform minor repair work exclusively between the rails without any fall protection. As this condition has worked well in the bridge worker area, FRA proposes to adopt the RSAC-recommended condition in the roadway worker area.

It should be noted that paragraph (a)(2) only directly addresses the types of work that a component of a roadway work group may continue performing while waiting for the head-end of an adjacent-track movement to pass by that component's location. It does not directly address when all other work (*i.e.*, work that paragraph (a)(2) does *not* cover) may resume. Thus, roadway workers who are assigned to perform work not covered by paragraph (a)(2) must look to the procedures in paragraph (a)(1) for guidance. For example, since on-ground work that would be performed near a roadway maintenance machine (*i.e.*, within 25 feet of the front or rear of a machine that is on or fouling the occupied track) is not covered by paragraph (a)(2), such work would not be permitted to resume until the conditions in paragraph (a) had been fulfilled. That is to say, such work (as well as all other work not covered by paragraph (a)(2) that would not foul the adjacent track) would be permitted to resume only after the head-end of all movements (authorized through the working limits by the roadway worker in charge or for which a watchman/lookout has provided a warning) have passed by (and remain ahead of) the roadway work group component's location.

The second set of circumstances for permitting work to continue when a movement on the adjacent track is authorized at 25 mph or less is when work is performed to the field side of the occupied track furthest from the adjacent track where the movement is occurring, provided that there is no danger posed by an adjacent track on that side (*i.e.*, either no adjacent track is on that side or else on-track safety has been established on any adjacent track on that side), and provided that any on-ground work is performed more than 25 feet away from the front or rear of any roadway maintenance machine on or fouling the occupied track during such adjacent track-movement. Both the Working Group and FRA recognize that if there is little danger of a roadway worker fouling an adjacent track (*e.g.*, Main Track No. 1) while positioned between the rails of the occupied track (*e.g.*, Main Track No. 2), a roadway worker is in even less danger of fouling that adjacent track if he or she is positioned on the field side of the occupied track furthest from the adjacent track. If, however, there is another adjacent track present (*e.g.*, Main Track No. 3) on the field side farthest from the adjacent track on which a train or other on-track

equipment movement has been authorized (*e.g.*, Main Track No. 1), then the roadway worker would potentially be in danger for fouling the other adjacent track (*e.g.*, Main Track No. 3). FRA makes clear that even if adjacent-track on-track safety in the form of working limits had been established on the other adjacent track, the roadway worker would still be in potential danger if he or she were to foul the other adjacent track if the protection had in effect been nullified by the roadway worker in charge authorizing a train or other on-track equipment movement through the working limits on that other adjacent track.

Given the potential danger posed by concurrent movements on two adjacent tracks, it is important to note that while the proposed § 214.336 would apply to each adjacent track individually, the impact on the type of work that would be permitted to continue on the occupied track must be examined as a whole. Thus, where a roadway worker receives notification of adjacent-track movements authorized at 25 mph or less that are occurring concurrently on both adjacent tracks, FRA proposes that the roadway worker would not be permitted to work to either field side of the occupied track, as the movement on one adjacent track would not permit any work to the field side closest to it, and the movement on the other adjacent track would not permit any work to the field side closest to it. *See* proposed paragraph (a)(2)(ii). On-ground work closer than 25 feet, and all other work (including work to the field side) that would not foul *either* adjacent track, would be permitted to continue once the head-end of all movements (authorized through by the roadway worker in charge or for which a watchman/lookout has provided a warning) has passed by (and remains ahead of) the roadway work group component's location. Field-side work that would foul the closest adjacent track would not be permitted to resume until on-track safety has been re-established on the closest adjacent track; thus, work would not be permitted to resume until the entire length (*i.e.*, not just the head-end) of all movements on the closest adjacent track (authorized through the working limits by the roadway worker in charge or for which a watchman/lookout has provided a warning) has passed by (and remains ahead of) the roadway work group component's location.

The Working Group also discussed, and the RSAC recommended, three exceptions when adjacent-track on-track safety would not have to be established at all. *See* consensus paragraphs (e)(1)–(e)(3). FRA proposes to adopt all three exceptions in this NPRM. *See* proposed § 214.336(b).

The first proposed exception to the requirement for adjacent-track on-track safety would be for an on-ground roadway worker performing work while exclusively positioned on the field side of the occupied track, provided that there should essentially be no danger posed by any other adjacent track. In particular, there would be no danger posed by any other adjacent track either because there is no adjacent track on the field side of the occupied track or, even though there is an adjacent track on the field side of the occupied track, on-track safety has been established in accordance with the RWP Rule on that adjacent track.

The second exception to the requirement for adjacent-track on-track safety would be for a hi-rail vehicle on the occupied track, provided such hi-rail vehicle is not coupled to any equipment. *See* proposed § 214.336(b)(2). As discussed in section IV. of this preamble, there has been only one adjacent-track fatality where a roadway work group had been engaged in a common task with a hi-rail vehicle as defined in § 214.7, and the roadway workers in that case were under the impression that adjacent-track on-track safety was in effect when, due to a miscommunication, it was not. Given the circumstances of the one fatality and because the duties normally performed by an employee operating a hi-rail tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine, FRA proposes that adjacent-track on-track safety not be required for roadway work groups engaged in a common task with a hi-rail. The consensus language for this exception also included language indicating that where multiple hi-rails are engaged in a common task, the on-track safety briefing shall include discussion of the nature of the work to be performed to determine if adjacent-track on-track safety is necessary. FRA has removed this language in its proposal because the roadway worker in charge must always consider the nature of the work to be performed to determine the appropriate level of on-track safety. In fact, the consensus language emphasizes that nothing in this subpart prohibits the roadway worker in charge from establishing adjacent-track on-track safety as he or she deems necessary.

The third proposed exception to the requirement for adjacent-track on-track safety is for a catenary maintenance tower car with one or more roadway workers positioned on the ground exclusively within the gage of the occupied track for the sole purpose of applying or removing grounds. As discussed in section IV. of this preamble, there have been no adjacent-track fatalities where a roadway work group had been engaged in a common task with a catenary maintenance tower car on the occupied track and the duties normally performed by an employee operating a catenary maintenance tower car tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine.

In its errata review comments on the FRA document compiling all of the Working Group consensus language that was recommended to FRA by the RSAC, BMWED noted that from the manner in which the consensus exceptions (paragraphs (e)(1)–(e)(3)) were constructed, one could interpret that the roadway worker in charge of on-ground roadway workers exclusively performing work on the field side of the occupied track described in consensus paragraph (e)(2) would not be afforded the same right to establish a greater level of adjacent-track on-track safety as the roadway worker in charge of the hi-rail vehicle or catenary maintenance tower car described in paragraphs (e)(1) and (e)(3), respectively. FRA agrees that the provisions should be consistent. The section has been reorganized so that the language indicating that nothing in this subpart prohibits the roadway worker in charge from establishing adjacent-track on-track safety as he or she deems necessary has been removed from paragraphs (e)(1) and (e)(3) and moved into the body of the introductory text of proposed new paragraph (b) so as to apply to all three exceptions in proposed paragraphs (b)(1)–(b)(3). Consensus paragraph (e)(1) (now proposed paragraph (b)(2)) was also amended to remove the words ''as defined in § 214.7'' from the hi-rail exception, since each time that a term defined in § 214.7 is used in part 214, FRA intends the term to be interpreted in the manner in which it is defined in § 214.7, unless otherwise noted.

Regarding the prohibition in consensus paragraph (d) against ''equipment'' fouling an adjacent track unless protected by working limits, FRA has changed the term to ''roadway maintenance machine'' to clarify that this prohibition is meant to be broad and would include hi-rails that are part of the roadway work group. *See* proposed § 214.336(b)(3). While a hi-rail alone would not trigger the requirement to establish adjacent-track on-track safety, once a hi-rail has become part of

a roadway work group involving at least one roadway worker on the ground and ''an on-track roadway maintenance machine or coupled equipment,'' the hi-rail would be subject to this prohibition against fouling, as well as to the machine spacing requirement in consensus paragraph (c)(3). *See* proposed §§ 214.336(a)(2), 214.336(a)(3), and 214.336(b)(2). Further, FRA clarifies that the prohibition was not meant to be so broad that a roadway worker would not be permitted to use readily portable tools or equipment similar to a jackhammer, such as a pneumatic tamping gun or a spike driver, on an adjacent track while afforded on-track safety through train approach warning. FRA would urge that employers and employees use common sense in determining which tools or equipment they would permit to be used or use under train approach warning. If there is any doubt as to whether the equipment could be readily removed, the employee must not foul the track with those tools or equipment under watchman/lookout (*i.e.*, train approach warning) protection.

Paragraph (c), Training, and (d), Recordkeeping, of § 214.336

Training and recordkeeping requirements were also added to ensure compliance with this new section. Proposed new paragraph (c) provides that before an employer (''a railroad, or a contractor to a railroad, that directly engages or compensates individuals to perform any of the duties defined in [part 214]'') assigns an employee to perform roadway worker duties for which adjacent-track on-track safety is required, the employer shall provide such an employee either with training on this section or a copy of a railroad-issued bulletin, order, general order, notice, operating rule, or other document adopting the adjacent-track on-track safety requirements of this section. See § 214.7. FRA expects that each railroad would revise its on-track safety program and documents required by §§ 214.303 and 214.309 as necessary to include the requirements of this proposed new section. Issuing a bulletin, order, general order, notice, or other document adopting the adjacent-track on-track safety requirements of this section would suffice until a more permanent update is made. A contractor to a railroad would have to ensure that its employees are aware of this change and of any other changes to a railroad's operating and safety rules related to this proposed new section, and FRA would ask each railroad to cooperate with its contractors to have these documents or any other updates to its on-track safety program and documents required by §§ 214.303 and 214.309 available for contractors performing roadway worker duties on its property. The proposed requirements for providing training or a copy of a railroad-issued document (*i.e.*, that adopts the new adjacent-track on-track safety requirements) is intended to allow railroads and contractors to railroads the maximum flexibility, while still ensuring that employees are aware of the requirements prior to performing a roadway worker duty for which adjacent-track on-track safety would be required. Thus, an employee performing only the duty of a lone worker would not need to be trained by the effective date of this rule, under the proposed requirements. A railroad or a contractor to a railroad would also be able comply with this proposed training requirement by providing its employees with an extended on-track safety job briefing that discusses the new requirements prior to assigning them to perform a roadway worker duty affected by this section.

Proposed new paragraph (d) would require each employer to obtain from each affected employee a written receipt or acknowledgement of the delivery of a copy of the adjacent-track on-track safety training or document required by paragraph (c), and retain such a receipt or acknowledgement until the employee receives, pursuant to § 214.343, recurrent training that includes discussion of the procedures for adjacent-track on-track safety required by this section. If the training is received for the first time as part of an employee's recurrent training, a record kept pursuant to § 214.343(d) will serve as the receipt or acknowledgement for purposes of this section. If an employee receives training for the first time, but not as part of recurrent training and does not receive recurrent training within two years of the initial training (*e.g.*, if the employee is on extended leave or no longer works for the employer), then the record would no longer need to be kept. Further, under the proposed language, records of the written receipts or acknowledgements would need to be made available to representatives of FRA and States participating under part 212 for inspection and copying during normal business hours.

VIII. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM has been evaluated in accordance with existing policies and procedures, and determined not to be significant under both Executive Order 12866 and DOT policies and procedures. *See* 44 FR 11034 (Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this NPRM. Document inspection and copying facilities are available at the Federal Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection on the Internet at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2008–0059, Notice No. 1.

Certain of the requirements reflect current industry practice, or restate existing regulations, or both. As a result, in calculating the costs of this NPRM, FRA has neither included the costs of those actions that would be performed voluntarily in the absence of a regulation, nor has FRA included the costs of those actions that would be required by an existing regulation.

This evaluation includes quantitative measurements and qualitative discussions of implementation costs for this proposed rule. The costs would primarily be imposed by a small increase in job briefing time and additional resources spent to provide protection for the safe conduct of other than large-scale maintenance and construction of track adjacent to track with train movements. Training and recordkeeping costs would also accrue. The benefits would primarily accrue from a reduction in roadway worker casualties (fatalities and injuries). Business benefits stemming from avoided train delays and property damages would also accrue.

FRA estimates that the present value (PV, 7%) of the total 20-year costs which the industry would be expected to incur to comply with the requirements in this NPRM is $137.8 million. FRA also estimates the PV (7%) of the total 20-year benefits accruing to society from the implementation of the requirements is $88.1 million. FRA believes that taking into account non-quantifiable benefits, including reduced train delays and property damages resulting from roadway worker incidents, the benefits associated with this proposed rule would justify the implementation costs.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket a Small Entity Impact Assessment and Evaluation that assesses the small entity impact of this NPRM. Document inspection and copying facilities are available at the Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection on the Internet at *http://www.regulations.gov.* Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2008–0059, Notice No. 1.

This Small Entity Impact Assessment and Evaluation concludes that this proposed rule would not have a significant economic impact on a substantial number of small entities. In order to determine the significance of the economic impact for the final rule's Regulatory Flexibility Act (RFA) requirements, FRA invites comments from all interested parties concerning data and information regarding the potential economic impact caused by this proposed rule, during the comment period.

The U.S. Small Business Administration (SBA) stipulates in its ''Size Standards'' a ''for profit'' railroad business firm may not have more than 1,500 employees for ''Line-Haul Operating'' Railroads, and 500 employees for ''Switching and Terminal Establishments'' to be considered as a ''small entity.''[6] ''Small entity'' is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. SBA's ''size standards'' may be altered by Federal agencies upon consultation with SBA and in conjunction with public comment.

Pursuant to that authority, FRA has published a final policy that classifies ''small entities'' as being railroads that meet the line haulage revenue requirements of a Class III railroad.[7] Currently, the revenue requirements are 20 million inflation-adjusted dollars or less in annual operating revenue. The $20-million limit is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.[8] The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA is using this definition of ''small entity'' for regulatory flexibility purposes in this rulemaking.

There are approximately 665 small railroads.[9] Potentially all small railroads could be impacted by this proposed regulation. However, because of certain characteristics that these railroads typically have, there should not be any impact on the majority of them. Most only have single-track operations. Some small railroads such as the tourist and historic railroads, operate across the lines of other railroads that would bear the burden or impact of the proposed rules requirements. Finally, others, if they do have more than a single track, typically have operations that are light enough such that the railroads have generally always performed the pertinent trackside work with the track and right-of-way taken out of service, or conducted the work during hours the track is not used.

In addition, FRA is not aware of any commuter railroads that qualify as small entities. This is likely because commuter railroad operations in the United States are part of larger governmental entities whose jurisdictions exceed 50,000 in population.

FRA is uncertain as to the number of contractors that would be affected by this issue. FRA is aware that some railroads hire contractors to conduct some of the functions of roadway workers on their railroads. However, most of the costs associated with the burdens from this rulemaking would ultimately get passed on to the pertinent railroad. Most likely, the contracts would be written to reflect that, and the contractor would bear no additional burden for the proposed requirements. In addition, FRA is uncertain as to the number of contractors that would be considered to be small entities. FRA requests any information during the rulemaking comment period related to contractors and the burdens that might impact them as a result of this proposed rulemaking.

No other small businesses (non-railroads) are expected to be impacted by this proposed rulemaking.

There are some minor recordkeeping requirements in the new section of the proposed rule. These proposed requirements relate to documenting that all affected roadway workers are trained on the new section. However, since FRA believes that no small railroads will be required to establish adjacent-track on-track safety to perform track work under the proposed requirements, these recordkeeping requirements are not expected to impact any small railroads. As noted prior, these railroads either only have a single track, and therefore no adjacent track to protect, or currently take all pertinent track out of service when performing track work.

The impacts from this regulation are primarily a result of the proposed requirements for roadway work groups to be provided on-track safety when working on a track within close proximity of an adjacent track. Again, since small railroads either do not have any adjacent track or conduct track work on the occupied track with an adjacent track when the adjacent track is out of service, there is no impact for small railroads. Since FRA does not anticipate that this proposed rule would impose any burdens on small entities, there is no alternative treatment proposed for small entities.

Having made these determinations, FRA certifies that this NPRM is not expected to have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act or Executive Order 13272.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 19995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements, and the estimated time to fulfill each requirement are as follows:

[6] ''Table of Size Standards,'' U.S. Small Business Administration, January 31, 1996, 13 CFR Part 121.

[7] *See* 68 FR 24891 (May 9, 2003).

[8] For further information on the calculation of the specific dollar limit, please reference 49 CFR part 1201.

[9] 715 railroads − 50 (large freight, medium freight, passenger, and commuter railroads) = 665 small railroads.

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
Form FRA F 6180.1119—Part 214 Railroad Workplace Safety Violation Report.	350 Safety Inspectors.	150 forms	4 hours	600	$24,000
214.303—Railroad On-Track Safety Programs:					
—Amendments to Programs	718 Railroads	20 prog. amend. + 584 prog. amend.	20 hours: 4 hours	2,736	139,536
—Subsequent Years: New Programs	5 New Railroads	5 safety prog	250 hours	1,250	63,750
214.313—Good Faith Challenges to On-Track Safety Rules.	20 Railroads	80 challenges	4 hours per challenge.	320	12,800
214.315/335—Supervision and Communication Job Briefings.	50,000 Roadway Workers.	16,350,000 briefings	2 minutes 30 seconds.	640,375	21,800,000
214.321—Exclusive Track Occupancy—Working Limits.	8,583 Roadway Workers.	700,739 written authorities.	1 minute	11,679	467,160
214.325—Train Coordination:					
—Establishing Working Limits through Communication.	50,00 Roadway Workers.	36,500 communications.	15 seconds	152	6,080
214.327—Inaccessible Track:					
—Working Limits on Non-controlled Track: Notifications.	718 Railroads	50,000 occurrences or notifications.	10 minutes	8,333	333,320
214.336—Procedures for Adjacent-Track Movements Over.					
25 mph (New Requirements) : Notifications/Watchmen/ Lookout Warnings.	100 Railroads	10,000 warnings	15 seconds	42	1,680
—Roadway Worker Communication with Train Engineers or Equipment Operators.	100 Railroads	3,000 communications.	1 minute	50	2,000
—Procedures for Adjacent-Track Movements 25 mph or less: Notifications/Watchmen/Lookout Warnings.	100 Railroads	3,000 warnings	15 seconds	13	520
—Roadway Worker Communication with Train Engineers or Equipment Operators.	100 Railroads	1,500 communic.	1 minute	25	1,000
—Training	718 Railroads	35,000 tr. empl	5 minutes	2,916	[1] 0
—Recordkeeping	718 Railroads	35,000 receipts + 35,000 coopies.	1 minute; 3 seconds	612	24,480
214.337—On-Track Safety Procedures for Lone Workers: Statements by Lone Workers.	718 Railroads	2,080,000 statements.	30 seconds	17,333	693,320
214.343/345/347/349/351/353/355—Training Requirements.	50,000 Roadway Workers.	50,000 tr. Empl	4.5 hours	225,000	9,000,000
—Records of Training	50,000 Roadway Workers.	50,000 records	2 minutes	1,667	85,017
214.503—Good Faith Challenges; Procedures for Notification and Resolution.—Notice of Unsafe Vehicle or Non-compliance with FRA rules.	50,000 Roadway Workers.	125 notifications	10 minutes	21	840
—Development of Resolution Procedures.	644 Railroads	10 procedures	2 hours	20	1,020
214.505—Req'd Environmental Control and Protection Systems for New On-Line Roadway Maintenance Machines with Enclosed Cabs.	644 Railroads	9 lists	1 hour	9	459
214.507—A-Built Light Weight on New Roadway Maintenance Machines.	644 Railroads	1,000 stickers	5 minutes	83	3,320
214.511—Req'd Audible Warning Devices for New On-Track Roadway Maintenance Machines.	644 Railroads	3,700 identified mechanisms.	5 minutes	308	12,320
214.513—Retrofitting of Existing On-Track Roadway Maintenance Machines:					
—Identification of Triggering Mechanism—Horns.	644 Railroads	200 mechanisms	5 minutes	17	680
214.515—Overhead Covers for Existing On-Track Roadway Maintenance Machines.	645 Railroads	500 requests + 500 responses.	10 minutes; 20 minutes.	250	11,837
214.517—Retrofitting of Existing On-Track Roadway Maintenance Machines Manufactured After 1990: Stenciling/Marking of Light Weight.	644 Railroads	500 stencils	5 minutes	42	1,680

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
214.518—Safe and Secure Position for Riders:					
—Positions identified by stencilings/markings/notices.	644 Railroads	1,000 stencils	5 minutes	83	3,320
214.523—Hi-Rail Vehicles	644 Railroads	2,000 insp. record	60 minutes	2,000	80,000
—Non-Complying Conditions	644 Railroads	500 tags + 500 reports.	10 minutes; 15 minutes.	208	8,320
214.527—Inspection for Compliance; Repair Schedules.	644 Railroads	550 tags + 550 reports.	5 minutes; 15 minutes.	184	7,360
214.533—Schedule of Repairs; Subject to Availability of Parts: Compliance Records.	644 Railroads	250 records	15 minutes	63	3,213

[1] Incl. RIA.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Poston at 202–493–6073.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Nakia Poston, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Poston at the following address: *robert.brogan@dot.gov*; *nakia.poston@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register.** Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register.**

D. Federalism Implications

FRA has analyzed this NPRM 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. This NPRM will not have a substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among various levels of government.

One of the fundamental federalism principles, as stated in section 2(a) of Executive Order 13132, is that ''Federalism is rooted in the belief that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.'' Congress expressed its intent that there be national uniformity of regulation concerning railroad safety matters when it enacted 49 U.S.C. 20106. That section provides that all regulations prescribed by the Secretary of Transportation with respect to railroad safety matters and the Secretary of Homeland Security with respect to railroad security matters preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order and that does not unreasonably burden interstate commerce. Nothing in this NPRM proposes to alter the preemptive effect of the RWP Rule.

FRA notes that the above factors have been considered throughout the development of this NPRM both internally and through consultation within the RSAC forum, as described in Sections VI and VII of this preamble. The full RSAC, which, prior to the publication of this NPRM, reached consensus on the proposed rule text and recommended the proposal to FRA, has as permanent voting members two organizations representing State and local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements, which differ in only limited respects from the requirements contained in this NPRM. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative.

For the foregoing reasons, FRA believes that this NPRM is in accordance with the principles and criteria contained in Executive Order 13132.

E. Environmental Impact

FRA has evaluated this NPRM in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (*see* 64 FR 28545 (May 26, 1999)) as required by the National Environmental Policy Act (*see* 42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this NPRM is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed

environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999). In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4, 2 U.S.C. 1531), 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).'' Section 202 of the Act (2 U.S.C. 1532) further requires the following:

> [B]efore promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (annually adjusted for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement* * *

The written statement must detail the effect on State, local, and tribal governments and the private sector. This NPRM will not result in the expenditure, in the aggregate, of $132,300,000 in any one year, and thus preparation of such a statement is not required.

G. 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 (normally published in the **Federal Register**) 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 NPRM in accordance with Executive Order 13211. FRA has determined that this NPRM 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 Executive Order 13211.

H. Trade Impact

The Trade Agreements Act of 1979 (Pub. L. No. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

FRA has assessed the potential effect of this NPRM on foreign commerce and believes that its requirements are consistent with the Trade Agreements Act. The requirements imposed are safety standards, which, as noted, are not considered unnecessary obstacles to trade.

I. Privacy Act

Anyone is able to search the electronic form of all comments received into any of FRA's dockets by the name of the individual submitting the comment (or signing the comment, if submitted 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 (65 FR 19477–78), or you may visit *http://DocketsInfo.dot.gov.*

IX. List of Subjects in 49 CFR Part 214

Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

In consideration of the foregoing, FRA proposes to amend part 214 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 214—[AMENDED]

1. The authority citation for part 214 is revised to read as follows:

Authority: 49 U.S.C. 20102–20103, 20107, 21301–21302, 21304; 28 U.S.C. 2461, note; and 49 CFR 1.49.

Subpart A—General

§ 214.7 [Amended]

2. Section 214.7 is amended by removing the definition of ''Adjacent tracks''.

Subpart C—Roadway Worker Protection

3. Section 214.315 is amended by revising paragraph (a) to read as follows:

§ 214.315 Supervision and communication.

(a) When an employer assigns a duty to a roadway worker that calls for that employee to foul a track, the employer shall provide the employee with an on-track safety job briefing that, at a minimum, includes the following:

(1) Information on the means by which on-track safety is to be provided for each track identified to be fouled;

(2) Instruction on each on-track safety procedure to be followed; and

(3) Information about any tracks adjacent to the track to be fouled, on-track safety for such tracks, if required by this subpart, and identification of any roadway maintenance machines that will foul such tracks. In such cases, the on-track safety job briefing shall address the nature of the work to be performed and the characteristics of the work location to ensure compliance with this subpart.

* * * * *

4. Section 214.335 is amended by removing paragraph (c) and revising the section heading to read as follows:

§ 214.335 On-track safety procedures for roadway work groups, general.

* * * * *

5. New § 214.336 is added to read as follows:

§ 214.336 Adjacent-track on-track safety for certain roadway work groups; procedures, training, and recordkeeping.

(a) *Procedures; general.* Except as provided in paragraph (b) of this section, on-track safety is required for each adjacent track when a roadway work group with at least one of the roadway workers on the ground, is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. The required on-track safety shall be in accordance with § 214.319 (Working limits, generally); § 214.321 (Exclusive track occupancy); § 214.323 (Foul time); § 214.325 (Train coordination); or § 214.329 (Train approach warning provided by watchmen/lookouts) and as more specifically described in this paragraph (a). If an occupied track has two

adjacent tracks, and one of the tracks has one or more adjacent-track movements authorized at 25 mph or less, and the other has one or more concurrent adjacent-track movements authorized at over 25 mph, the more restrictive procedures in paragraph (a)(1) of this section apply. For purposes of this section, ''*adjacent track*'' means a controlled track whose track center is spaced 19 feet or less from the track center of the occupied track, and ''*occupied track*'' means the track on which a roadway maintenance machine or coupled equipment is located while engaged in a common task with a roadway work group.

(1) *Procedures for adjacent-track movements over 25 mph.* If a train or other on-track equipment is authorized to move on an adjacent track at a speed greater than 25 mph, each roadway work group to which this section applies must comply with the following procedures:

(i) Each roadway worker in the roadway work group shall cease any on-ground work and movement of any roadway maintenance machine or coupled equipment in the fouling space of the occupied track and the adjacent track, and occupy a predetermined place of safety upon receiving—

(A) A watchman/lookout warning, if on-track safety through train approach warning (§ 214.329) has been established on the adjacent track; or

(B) A notification in accordance with § 214.319(c) that the roadway worker in charge intends to authorize one or more train or other on-track equipment movements through the working limits on the adjacent track, if adjacent-track on-track safety has been established through working limits alone.

(ii) A component of a roadway work group may resume on-ground work and movement of any roadway maintenance machine or coupled equipment on or fouling the occupied track only after the head-end of all trains or other on-track equipment moving on the adjacent track (either authorized through the working limits by the roadway worker in charge or for which a watchman/lookout has provided a warning) has passed and remains ahead of that component of the roadway work group; however, if the train or other on-track equipment stops before its head-end has passed all of the roadway workers in the roadway work group (or if a roadway worker in the roadway work group moves to a position on or fouling the occupied track in advance of the head-end of the adjacent-track movement), the work to be performed on or fouling the occupied track ahead of the train or other on-track equipment on the adjacent track may resume only—

(A) If on-track safety through train approach warning (§ 214.329) is still in effect or has been re-established on the adjacent track; or

(B) After the roadway worker in charge has communicated with the train engineer or equipment operator and obtained or regained control of such train or other on-track equipment, if adjacent-track on-track safety has been established by working limits alone.

(2) *Procedures for adjacent-track movements 25 mph or less.* If a train or other on-track equipment is authorized to move on an adjacent track at a speed of 25 mph or less, each roadway work group to which this section applies must comply with the procedures listed in paragraph (a)(1) of this section, except that the following work may continue:

(i) Work that is performed exclusively while positioned between the rails of the occupied track, provided that any on-ground work is performed more than 25 feet away from the front or rear of any roadway maintenance machine on or fouling the occupied track during such adjacent-track movement;

(ii) Work that is performed exclusively to the field side of the occupied track furthest from the adjacent track where the movement is authorized, provided that—

(A) Either no adjacent track is on that side or on-track safety has been established in accordance with this subpart on any adjacent track on that side; and

(B) Any on-ground work is performed more than 25 feet away from the front or rear of any roadway maintenance machine on or fouling the occupied track during such adjacent-track movement.

(3) *Procedures for a roadway maintenance machine or coupled equipment fouling an adjacent track.* A roadway maintenance machine or coupled equipment shall not foul an adjacent track unless working limits have been established on the adjacent track and there are no movements authorized through the working limits by the roadway worker in charge.

(b) *Exceptions to the requirement for adjacent-track on-track safety.* Adjacent-track on-track safety is not required for the work activities described in paragraphs (b)(1) through (b)(3) of this section. Nothing in this section prohibits the roadway worker in charge from establishing adjacent-track on-track safety as he or she deems necessary.

(1) One or more on-ground roadway workers performing work while exclusively positioned on the field side of the occupied track, provided that either no adjacent track is on that side or on-track safety has been established in accordance with this subpart on any such adjacent track.

(2) A hi-rail vehicle on or fouling the occupied track while engaged in a common task with one or more roadway workers on the ground, provided such hi-rail vehicle is not coupled to one or more railroad cars.

(3) A catenary maintenance tower car on or fouling the occupied track that is engaged in a common task with one or more roadway workers positioned on the ground within the gage of the occupied track for the sole purpose of applying or removing grounds.

(c) *Training.* Prior to assigning an employee to perform roadway worker duties for which adjacent-track on-track safety is required, the employer shall provide the employee with—

(1) Training on the procedures for adjacent-track on-track safety required by this section; or

(2) A copy of a railroad-issued bulletin, order, general order, notice, operating rule, or other document adopting the procedures for adjacent-track on-track safety required by this section.

(d) *Recordkeeping.* (1) Each employer shall obtain from each affected employee a written receipt or acknowledgement of the adjacent-track on-track safety training or document required by paragraph (c). If the training is received for the first time as part of an employee's recurrent training, a record kept pursuant to § 214.343(d) serves as the receipt or acknowledgement for purposes of this section.

(2) Each employer shall retain the written receipt or acknowledgement required by paragraph (d)(1) of this section—

(i) Until the employee receives, pursuant to § 214.343, recurrent training that includes discussion of the procedures for adjacent-track on-track safety required by this section; or

(ii) For two years following the date the employee was provided with the training or document required by paragraph (d)(1) of this section.

(3) Records of the written receipts or acknowledgements shall be made available to representatives of FRA and States participating under 49 CFR part 212 for inspection and copying during normal business hours.

Issued in Washington, DC, on July 9, 2008.

Joseph H. Boardman,

Administrator.

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