

325(a) of the Communications Act of 1934, as amended.

Nature and Extent of Confidentiality: There is no need for confidentiality with this information collection.

Privacy Act Impact Assessment: No impact(s).

Needs and Uses: On June 29, 2009, the Commission adopted a Report and Order, Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations, MB Docket No. 07–172, FCC 09–59. In the Report and Order, the Commission adopted several rule changes that would allow AM stations to use FM translator stations to rebroadcast the AM signal. Therefore, 47 CFR 74.1284 is one of the rules that was changed as a result of the Commission adopting FCC 09–59. 47 CFR 74.1284 requires that the licensee of an FM translator station obtain prior consent to rebroadcast programs of any broadcast station or other FM translator. The licensee of the FM translator station must notify the Commission of the call letters of each station rebroadcast and must certify that written consent has been received from the licensee of that station.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–1999–6439, Notice No. 21]

49 CFR Part 222

Excess Risk Estimate for Highway-Rail Grade Crossings Along the Florida East Coast Railway Line

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

ACTION: Final rule.

SUMMARY: This final rule amends the regulations regarding the use of locomotive horns at public highway-rail grade crossings by establishing an excess risk estimate of 90.9 percent for public highway-rail grade crossings along the Florida East Coast Railway Company (FEC) line. When this final rule is effective, public authorities will be permitted to establish New Quiet Zones along the FEC line, in accordance with the existing regulations, through application of the excess risk estimate provided herein.

DATES: The effective date is November 9, 2009. However, public authorities may

begin to provide quiet zone-related documentation to FRA and other parties 30 days after September 9, 2009.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

On July 26, 1991, FRA issued Emergency Order No. 15 (EO 15), which requires FEC trains to sound train borne audible warning devices when approaching public highway-rail grade crossings. This Emergency Order preempts a Florida statute that became effective on July 1, 1984. The Florida statute authorized counties and municipalities to ban the use of train horns and whistles between the hours of 10 p.m. and 6 a.m. by FEC trains approaching public highway-rail grade crossings that were equipped with flashing lights, bells, crossing gates, and highway signs indicating train horns and whistles would not be sounded at night.

Amendments to EO 15, issued on August 31, 1993, permitted Florida communities to obtain relief from the EO through the implementation of alternative remedial measures on a crossing-by-crossing basis, provided the alternative remedial measures have been certified by the Florida Department of Transportation (FDOT) as being fully compliant with all relevant performance specifications. However, FRA's final rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings (49 CFR Part 222) issued on April 27, 2005, provides communities substantially greater flexibility in establishing quiet zones than that allowed to communities covered by EO 15. The final rule allows public authorities in the rest of the nation (with the exception of certain highway-rail grade crossings located in the six-county Chicago Region) to prohibit routine sounding of the locomotive horn at highway-rail grade crossings through the selective implementation of various grade crossing improvements on a corridor-wide basis, as opposed to implementing grade crossing improvements at each quiet zone crossing.

As early as January 13, 2000, when FRA issued a Notice of Proposed Rulemaking (NPRM) in this proceeding, FRA proposed to apply a higher excess risk estimate to FEC public crossings than other public highway-rail grade

crossings nationwide, based on FRA's analysis of the pre-ban and post-ban collision data associated with FEC public crossings. Since FRA's analysis of collision data at public highway-rail grade crossings nationwide did not include collision data associated with FEC public crossings that were subject to nighttime whistle bans, FRA also solicited public comment as to what extent the pre-ban and post-ban collision data associated with FEC public crossings may be relevant to public highway-rail grade crossings located in other areas.

Shortly thereafter, FRA conducted a public hearing on March 28, 2000 in Fort Lauderdale, Florida, during which FRA noted that it was grappling with the issue of whether or not a differential requirement for mitigating crossing risk should be instituted for FEC public crossings and solicited comments on this issue. After the March 28, 2000 public hearing, FRA received comments from a number of Florida cities, including Boca Raton, Palm Beach Gardens, and West Palm Beach, who urged FRA to make its proposed regulation applicable to FEC crossings and allow the Federal regulation to supersede EO 15. FRA addressed these comments in the preamble to its Interim Final Rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings (Interim Final Rule) and expressed its intent to rescind EO 15 and make the Federal regulation applicable to all highway-rail grade crossings within the State of Florida. However, FRA further stated that it would first need to resolve the issue of whether a regional estimate as to the effect of silencing the train horn should be applied to EO 15 crossings.

In an effort to re-examine the post-ban accident rate increases that occurred at FEC crossings subject to nighttime whistle bans, FRA conducted a public conference in Florida on April 15, 2005. At the conference, FRA again solicited comments on the appropriate excess risk estimate that should be applied by public authorities who wish to establish Federal quiet zones along the FEC line. Oral comments were provided at the public conference by representatives of nine organizations, including the United Transportation Union (UTU), the Brotherhood of Locomotive Engineers and Trainmen (BLET), the Brotherhood of Railroad Signalmen (BRS), FEC, PVB Consulting, Inc., the Broward County Metropolitan Planning Organization, the City of Hollywood, Florida, the City of Palm Beach Gardens, Florida, and FDOT.

The City of Hollywood, Florida expressed interest in establishing a

Federal quiet zone, noting that it has been working closely with the Tri-Rail Authority and FDOT to implement a four-quadrant gate system that appears to provide a level of safety comparable to that provided by routine sounding of the locomotive horn. In line with its previously submitted comments on FRA's proposed and final regulation, the City of Hollywood expressed its support of a rule that would strike a balance between quality of life concerns, while maintaining the current level of safety provided by routine sounding of the train horn.

The Broward County Metropolitan Planning Organization asserted that about ten percent of the State's population resides in Broward County (which contains a number of public highway-rail grade crossings along the FEC line) and that there are projections of an additional million residents over the next 20 to 25 years. The UTU also noted that the FEC highway-rail grade crossings at issue are located in an urban setting with a high number of tourists and non-English speaking immigrants. Due to international recognition of the locomotive horn as a universal signal of an approaching train, the UTU argued that the locomotive horn may be the sole device that could effectively warn pedestrians who access the FEC right-of-way of the impending arrival of the train, especially at night. Accordingly, the UTU urged FRA to retain the 195-percent excess risk estimate¹ that was derived from FRA's prior analysis on the effect of routine sounding of the locomotive horn at public highway-rail grade crossings along the FEC line.

Echoing its previously submitted comments on FRA's regulation, the BRS asserted that the data shows that grade crossing accidents increase when locomotive horn sounding is eliminated. Accordingly, the BRS stated that people who are unfamiliar with railroad operations are the people who really need the last-minute audible warning of approaching trains that is provided by the locomotive horn. As follow-up to its previously submitted statement on

FRA's regulation, during which a BLET representative noted that train crews are also placed at risk when accidents occur at highway-rail grade crossings, the BLET pointed out that none of the alternative safety measures and supplemental safety measures allowed under 49 CFR part 222 will lessen the traumatic stress syndrome that is often experienced by locomotive engineers after a grade crossing accident.

PVB Consulting, Inc. argued that the root cause of the 195-percent increase in the nighttime accident rate at impacted FEC grade crossings during the five-year period that followed the enactment of nighttime whistle bans in Florida was the absence of education, engineering, and enforcement initiatives. PVB Consulting noted that a more aggressive program should have been undertaken to educate area citizens of the pros and cons of nighttime whistle bans, combined with increased police presence and crossing cameras at impacted crossings. Asserting that the provisions of this part will facilitate the use of education, engineering and enforcement initiatives at quiet zone crossings, PVB Consulting stated that the nationwide excess risk estimate of 66.8 percent should be applied to gated public highway-rail grade crossings along the FEC line.

The City of Palm Beach Gardens and the Broward County Metropolitan Planning Organization expressed interest in establishing city-wide or county-wide excess risk estimates, which would be based on available demographic data. However, FRA indicated that it would be difficult to calculate reliable city-wide or county-wide excess risk estimates that would have an acceptable level of statistical significance due to the small number of crossings that would be subject to analysis.

FDOT and FEC also provided oral and written comments, which will be discussed in more detail below.

A. FDOT

FDOT submitted two sets of written comments to FRA after FRA's April 15, 2005 public conference dated August 17, 2005 and January 13, 2006, respectively. In its written comments, FDOT asserted that local communities in the State of Florida should have the opportunity to exercise their right to designate a Federal quiet zone based on the same nationwide standard that is currently applied to other local communities. In support of this assertion, FDOT quoted FRA reports that referenced a similar increase in the accident rate (200 percent) after whistle bans were implemented in Oregon.

However, FDOT noted that Oregon communities who wish to establish quiet zones are permitted to use the nationwide 66.8-percent excess risk estimate when calculating the increase in risk that may result from prohibiting routine locomotive horn use at grade crossings located within proposed quiet zone corridors. FDOT further noted that FRA had proposed to apply an even lower excess risk estimate (17.3 percent) to certain gated highway-rail grade crossings in the Chicago Region. Thus, FDOT requested that FRA permit local communities in Florida that are located on the FEC line to take advantage of the nationwide 66.8-percent excess risk estimate that is currently applied to public highway-rail grade crossings that are proposed for inclusion in a Federal quiet zone.

FRA notes that while there may have been some similarities between the regional whistle ban experience in Oregon and Florida, the Oregon and Florida whistle ban experience differ widely in scope. Local whistle bans in Oregon affected 26 highway-rail grade crossings located in two cities, which experienced two pre-ban collisions and nine post-ban collisions. In contrast, as of December 31, 1989, local whistle ban ordinances in Florida affected 511 highway-rail grade crossings, at which 39 pre-ban collisions and 115 post-ban collisions occurred.

In FRA's interim final rule, FRA proposed to apply an excess risk estimate of 17.3 percent to gated highway-rail grade crossings in the Chicago Region that were subject to pre-existing locomotive horn sounding restrictions. This proposal was derived from FRA's analysis of the effect of locomotive horn use at these crossings. FRA's analysis indicated that gated crossings in the Chicago Region that had been subject to pre-existing locomotive horn sounding restrictions (which accounted for the biggest concentration of "whistle bans" in the country prior to the issuance of FRA's Final Rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings) had a statistical profile that was distinctly different from gated crossings in the rest of the nation that were subject to local whistle bans. FRA notes that a number of unique factors may have contributed to this result, including the discretionary compliance by railroads with local no-whistle policies.

FDOT also asserts that FRA's analysis of the Florida whistle ban experience was flawed because FRA failed to consider utilization of the affected rail corridor(s) by the railroad. As reflected in FRA's Report on Florida's Train Whistle Ban issued in October 1995,

¹ The excess risk estimate is a figure that represents the amount by which collision frequency has been estimated to increase when routine sounding of the locomotive horn at public highway-rail grade crossings is restricted. When FRA conducted a study on the effect of nighttime whistle bans on the accident rate at public highway-rail grade crossings along the FEC line, FRA found that the nighttime accident rate at impacted FEC crossings increased 195 percent after nighttime whistle bans were imposed. This 195-percent increase in the nighttime accident rate at impacted FEC crossings is the 195-percent excess risk estimate that the UTU representative has urged FRA to apply to all public highway-rail grade crossings along the FEC line.

FRA compared the accident data on the basis of Accidents per Crossing Month. FDOT asserts that this approach is flawed because it does not measure the true opportunity for an incident to occur. FDOT asserts that the true opportunity for grade crossing accidents to occur should be normalized using the number of trains that operated over the subject grade crossing (which could be reflected by grade crossing activation rates), as opposed to measuring the accident rate as a unit of time.

FRA acknowledges that train traffic volume could have an impact on the accident rate at specific highway-rail grade crossings. However, any potential

impact would necessarily depend on highway traffic patterns as well. Obviously, for a grade crossing accident to occur, train and highway traffic must be present at the crossing at the same time. However, FRA focused its analysis on comparisons between the number of nighttime accidents reported at FEC crossings subject to nighttime whistle bans with the number of accidents associated with two control groups, in order to determine the impact of nighttime whistle bans at those crossings.

Assuming that the number of trains operating along the FEC line remained constant during the study period, FDOT

also noted a large differential between pre-ban accident rates at FEC grade crossings that were subject to nighttime whistle bans and corresponding pre-ban accident rates at FEC grade crossings that remained unaffected by nighttime whistle bans, when analyzed in relation to the number of crossing activations per accident. In light of this data, which has been presented below, FDOT asserts that there must be a measurable, causal element that has not yet been thoroughly considered in previous analyses on this issue:

| | Pre-ban crossing activations per accident (approximate) | Post-ban crossing activations per accident (approximate) |
|------------------|---|--|
| FEC w/Ban | 289,000 | 96,000 |
| FEC No Ban | 135,000 | 162,000 |
| CSX No Ban | 40,000 | 62,000 |

Despite FDOT's objection to the method used by FRA to calculate crossing accident rates, FDOT's comparison of the pre-ban and post-ban accident rates at FEC crossings that were subject to nighttime whistle bans seems to reinforce FRA's earlier findings that the risk level at FEC highway-rail grade crossings subject to nighttime whistle bans deteriorated significantly after routine locomotive horn sounding practices were discontinued. According to calculations provided by FDOT, there was approximately one accident for every 289,000 crossing activations at FEC grade crossings that would later be impacted by nighttime whistle bans. During the five-year period following implementation of nighttime whistle bans, however, there was approximately one accident for every 96,000 crossing activations at FEC grade crossings subject to nighttime whistle bans.

FRA disagrees with the conclusion that the data presented by FDOT must be interpreted as being indicative of a measurable element that has not yet been thoroughly considered by previous analyses on this issue. Even though accident rates associated with FEC grade crossings that were subject to nighttime whistle bans may differ from accident rates associated with FEC grade crossings that were not impacted by nighttime whistle bans when evaluated in relation to the number of crossing activations per accident, this result is potentially misleading. As noted above, any potential impact associated with train traffic volume must be evaluated in light of highway traffic patterns at the

specific highway-rail grade crossings at issue before any conclusion should be drawn as to the existence of a measurable element that has not yet been thoroughly considered by previous analyses on this issue.

FDOT also asserts that FRA's Final Report on Florida's Train Whistle Ban ("1995 FRA Report") issued in September 1995, does not provide sufficient background information to support the pre-ban and post-ban accident rates associated with FEC crossings subject to nighttime whistle bans. In particular, FDOT notes that the 1995 FRA Report does not explain how the "Number of Crossing Months" value was calculated for these crossings.

FRA disagrees with this assertion. In Appendix C to the 1995 FRA Report, FRA provided an explanation of how the "Number of Crossing Months" value was calculated for FEC crossings that were subject to nighttime whistle bans. An explanation was also provided on page 9 of the Second Edition of FRA's Report on Florida's Train Whistle Ban ("1992 FRA Report") issued in September 1992. As stated in these reports, the "Number of Crossing Months" value was calculated by multiplying the number of crossings impacted by each local ordinance by the number of months during which the local ordinance was in effect and then totaling the results for all FEC crossings that were subject to nighttime whistle bans. FRA provided background information on the data used to calculate the effect of nighttime whistle bans, so that interested parties could

review, verify and comment upon FRA's findings.

FDOT also asserts that the pre-ban and post-ban accident rates for FEC crossings that were subject to nighttime whistle bans should not have been calculated using the same "Number of Crossing Months" value. FRA acknowledges that different "Number of Crossing Months" values were used to calculate the pre-ban and post-ban accident rates associated with FEC No Ban and CSX crossings. However, FRA purposefully used the same "Number of Crossing Months" value when evaluating pre-ban and post-ban accident rates for FEC crossings subject to nighttime whistle bans. As stated above, the "Number of Crossing Months" value for FEC crossings subject to nighttime whistle bans was calculated by multiplying the number of crossings impacted by each local ordinance times the number of months during which the local ordinance was in effect and then totaling the results for all crossings that were subject to nighttime whistle bans. For example, there was only one month of post-ordinance accident data available for crossings in Holly Hill, Florida because the applicable whistle ban ordinance did not take effect until November 4, 1989. Therefore, researchers used only one month of pre-ordinance data (October 1989) in their analysis. In contrast, FRA compared 59 months of pre-ban accident data (February 1980 through December 1984) with 59 months of post-ban accident data (February 1985 through December 1999) for FEC

highway-rail grade crossings located in Lantana and New Smyrna Beach. Since the variables used to calculate this "Number of Crossing Months" value would not change when evaluating pre-ban or post-ban accident totals associated with FEC crossings that were subject to nighttime whistle bans, FRA used the same "Number of Crossing Months" value to calculate pre-ban and post-ban accident rates for these highway-rail grade crossings.

In contrast, the FEC No Ban and CSX crossings that were studied were not subject to nighttime whistle bans. Therefore, FRA calculated the "Number of Crossing Months" value by multiplying the number of crossings under consideration times the number of months in either the pre-ban or post-ban study period. Since these variables would necessarily change when evaluating pre-ban or post-ban accident data, FRA used different "Number of Crossing Months" values to calculate pre-ban and post-ban accident rates for the FEC No Ban and CSX crossings that were studied.

FDOT notes the exemplary collision history associated with five improved highway-rail grade crossings in Broward, Palm Beach and Dade counties (counties that also contain FEC grade crossings). Four of these grade crossings have undivided approaches and are equipped with four-quadrant gate systems. The remaining grade crossing, which is equipped with four-quadrant gates and medians, constituted the only official quiet zone within the State of Florida on the date on which FDOT's comments were filed. FDOT asserts that there have not been any vehicle-train collisions at any of these improved highway-rail grade crossings since the installation of four-quadrant gate systems.

FDOT also provides an accident history summary for 27 CSX grade crossings located in the Palm Beach, Broward, and Dade counties, which have been improved through engineering improvements since 1995. These engineering improvements include six-inch barrier curbs and four-quadrant gate systems. Applying FDOT's accident rate analysis discussed above, FDOT compared the accident rate for the 27 improved grade crossings to pre-ban and post-ban accident rates for 224 CSX crossings that were comparable to the FEC crossings that were subject to nighttime whistle bans. FDOT concluded that the estimated accident rate for the 27 improved grade crossings (one accident for every 174,000 crossing activations) is much lower than the estimated pre-ban and post-ban accident rates for the 224 CSX

crossings that were comparable to the FEC crossings that were subject to nighttime whistle bans. This would seem to indicate that engineering improvements, such as four-quadrant gate systems and non-traversable curbs, installed at comparable grade crossings along the FEC line could compensate for an increase in risk caused by the absence of warning provided by the locomotive horn.

In its second set of written comments dated January 13, 2006, FDOT provided additional information about the significant changes that have occurred since EO 15 was issued, which have improved safety at grade crossings within the State of Florida. FDOT notes that there has been expanded use of bilingual and tri-lingual signs and rail awareness campaigns to provide information about highway-rail grade crossing hazards via literature, television, and radio media, as well as rail crossing safety placards and slogans on bus, transit and commuter rail terminals. In addition, numerous engineering design improvements in the area of highway-rail grade crossing safety have been implemented, including the installation of median treatments and the increased use of constant warning time devices that are interconnected with traffic control devices. As of January 13, 2006, FDOT asserted that active highway-rail grade crossing warning devices had been installed at over 71 percent of public highway-rail grade crossings within the State of Florida and that there were an increasing number of four-quadrant gate systems. An automated video monitoring and surveillance system has also been installed at the McNab Road quiet zone crossing, which allows the system to collect real-time data on vehicle flow, crossing usage, and train volume for use by the railroad and regional roadway transportation authorities.

B. FEC

FEC is a regional, Class II railroad that, as of October 12, 2005, operated over approximately 719 highway-rail grade crossings along Florida's east coast. FEC asserts that it operates through some of the most heavily populated communities in the country and intersects some of the most heavily traveled roadways in Florida. In response to the FRA public conference that was held on April 15, 2005, FEC submitted two sets of written comments, dated April 15, 2005 and October 12, 2005. In these comments, FEC requested that FRA retain the current 195 percent excess risk estimate for public FEC highway-rail grade crossings.

In support of this request, FEC notes that the risks when locomotive horns are silenced at public FEC grade crossings have been separately studied, analyzed, and reviewed in-depth. As a result of these studies, FRA has consistently found that the imposition of nighttime whistle bans at public FEC highway-rail grade crossings resulted in at least a 195-percent increase in the nighttime accident rate at these crossings. In fact, the nationwide 66.8-percent excess risk estimate was derived from studies of nationwide grade crossing data that excluded collision information related to FEC crossings. Asserting that the 66.8-percent nationwide excess risk estimate is simply not applicable to public FEC highway-rail grade crossings, FEC argues that the 195-percent excess risk estimate should continue to apply to ensure that the substitution of supplementary (or alternative) safety measures at certain crossings within a proposed quiet zone will adequately compensate for the increased risk that results from the lack of routine locomotive horn use.

In its written comments dated October 12, 2005, FEC asserts that FDOT is questioning the results of the FRA studies on Florida's Train Whistle Ban without sufficient explanation and without full, supporting data. Although FEC noted FDOT's contentions that certain recalculations are needed and further considerations should be undertaken by FRA in view of the fact that Florida has 14 operating railroads, FEC asserts that FDOT summarily concluded its comments by asking that the 66.8-percent nationwide excess risk estimate be applied to all highway-rail grade crossings within the State of Florida, without providing any evidence that this estimate would be appropriate for public FEC highway-rail grade crossings.

FRA remains confident that its prior analysis of the effect of nighttime whistle bans produced a statistically significant estimate of the effect of prohibiting routine nighttime locomotive horn use at public FEC highway-rail grade crossings during the mid-1980s to early 1990s. However, FRA is also cognizant of the fact that engineering improvements have had a recognizable effect on grade crossing safety at public highway-rail grade crossings throughout the State of Florida. As noted by FDOT in its written comments, grade crossing accident rates have significantly declined at "improved" CSX highway-rail grade crossings in Palm Beach, Broward, and Dade counties after engineering improvements such as four-quadrant

gate systems and non-traversable curbs have been implemented. Thus, it would appear that the supplementary safety measures identified in Appendix A to 49 CFR Part 222 would provide a comparable increase in safety upon implementation at comparable FEC crossings. The difficulty presented by this proceeding is determining comparability. FRA has once again attempted to determine local conditions in order to establish comparability as much as possible.

II. Calculation of the 90.9-Percent Excess Risk Estimate for Public Highway-Rail Grade Crossings Along the FEC Line

In addition to the increased nighttime accident rate at gated FEC grade crossings that were subject to nighttime whistle bans, FRA's analysis indicated that there was a 67-percent increase in nighttime accident rates at 224 comparable CSX highway-rail grade crossings that were not subject to nighttime whistle bans. These CSX grade crossings were carefully screened, so that the characteristics of these CSX grade crossings would closely match FEC grade crossings that were subject to nighttime whistle bans during the study period. FRA's analysis also indicated that there was a 23-percent increase in nighttime accident rates at 89 public FEC highway-rail grade crossings that were not subject to nighttime whistle bans ("FEC No Ban" grade crossings). Upon further review of the accident data, FRA has determined that these nighttime accident rate increases are particularly relevant to the determination of the excess risk estimate that should be applied to public highway-rail crossings along the FEC line. It appears reasonable to conclude that there would have been an increase in the nighttime accident rate at FEC grade crossings subject to nighttime whistle bans similar to that experienced at the CSX and FEC No Ban grade crossings, regardless of the change in locomotive horn sounding practices. Operating under this premise, FRA calculated the average nighttime accident rate increases for the group of 313 CSX and FEC grade crossings that were not subject to nighttime whistle bans per the following formula:

$$\text{Average Rate Increase} = ((89 \text{ FEC No Ban Grade Crossings} * 23\% \text{ increase in their accident rate}) + (224 \text{ Comparable CSX Grade Crossings} * 67\% \text{ increase in their accident rate})) / 313 \text{ Total CSX and FEC No Ban Crossings}$$

Accordingly, the average nighttime accident rate increase for the group of 313 public highway-rail grade crossings,

comprised of comparable CSX grade crossings and FEC No Ban grade crossings was 54.5 percent during the post-ban study period.

These distinct nighttime accident rate increases, which occurred during the post-ban study period at the 224 comparable CSX grade crossings and 89 FEC No Ban grade crossings, were not incorporated into FRA's calculation of the 195-percent nighttime accident rate increase at FEC grade crossings that were subject to nighttime whistle bans. Therefore, FRA has revised its previous estimate of the impact of nighttime whistle bans during the post-ban period on FEC grade crossings that were subject to nighttime whistle bans by "backing out" any effect related to a generalized increase in general crossing risk in the region. As discussed above, the comparison sets chosen were FEC No Ban grade crossings and comparable CSX grade crossings, and the study period and selection criteria were the same as for the FEC grade crossings that were subject to nighttime whistle bans. It was observed that collisions at FEC grade crossings subject to nighttime whistle bans increased 195 percent during the post-ban study period (from a constructive value of 100, representing the total of pre-ban accidents, to 295, the sum of the prior level and the increase), while FEC No Ban grade crossings and comparable CSX grade crossings in the control group increased 54.5 percent (from a constructive base value of 100, representing the total of prior accidents, to 154.5). The percentage of increase required to achieve 295 from the 154.5 base for the control group is approximately 90.9 percent (e.g., $.909 * 154.5 = 140.441$, and $140.441 + 154.5 = 294.941$). Thus, FRA concludes that a good measure of the increase in collision risk from silencing the train horn in the region is on the order of 90.9 percent.

FRA is aware that many changes have occurred in the region since the period in question. These include engineering improvements, demographic changes, increases in road traffic levels, and likely some improvements in public education and awareness related to crossing safety. Many of these changes apply to FEC crossings that are currently subject to EO 15 and to crossings not so affected. There is no particular reason to believe, however, that—as to the differential risk involved—the 90.9 percent estimate would not be valid.

FRA is cognizant of the fact that the FEC bans were nighttime-only bans and that 24-hour quiet zones may be sought in the future. FRA has no body of information that would permit it to

apply a different excess risk estimate in connection with 24-hour bans. Engineering improvements are the principal means used by communities under Part 222 to achieve risk reduction and quality for quiet zones. So far as FRA is aware, engineering improvements are equally effective regardless of time of day. Indeed, communities along the FEC line will benefit in terms of qualifying for quiet zones for many locations where lengthy medians and other arrangements are in place. Improvements that have been made in the interim on the CSX/Tri-Rail corridor, including simple four-quadrant gate arrangements, show how success can be fully achieved. Although FRA might speculate that 24-hour effects are less dramatic (e.g., because motorists expect the horn to sound, and it does not sound for a portion of the day), FRA has no empirical basis to do this. To the extent that we err, we err in favor of the safety objectives behind the legislation giving rise to FRA's regulation on the Use of Locomotive Horns at Highway-Rail Grade Crossings.

III. Rescission of FRA Emergency Order No. 15

On the effective date of this final rule, EO 15 will be rescinded and the provisions of this part will apply to highway-rail grade crossings along the FEC line. Therefore, locomotive horn sounding will continue to be required at all public highway-rail grade crossings along the FEC line that are not located within Federal quiet zones. In addition, as of the effective date of this final rule, locomotive horn sounding at public highway-rail grade crossings along the FEC line will have to be conducted in accordance with the requirements contained in section 222.21 of this part.

As discussed in the preamble to the interim final rule, FEC submitted comments noting that FRA's proposed regulation did not address its intended effect on pre-existing restrictions on the sounding of locomotive horns at highway-rail grade crossings that remain on the books. While FEC explained that it assumed that all local ordinances preempted by EO 15 would remain null and void when FRA's regulation on the Use of Locomotive Horns at Highway-Rail Grade Crossings is made applicable to all highway-rail grade crossings within the State of Florida, FEC requested that FRA specifically address the status of impacted crossings in the final rule so as to avoid any confusion among former whistle ban jurisdictions.

Unlike EO 15, the provisions contained within this part only have a limited preemptive effect on State laws governing the use of locomotive audible

warning devices other than the locomotive horn at public highway-rail grade crossings. As reflected in section 222.21(e) of this part, FRA regulations do not require the sounding of locomotive audible warning devices other than the locomotive horn at public highway-rail grade crossings. However, if State law requires the sounding of a locomotive audible warning device other than the locomotive horn at public highway-rail grade crossings, then the requirements contained in subsections (b) and (d) of section 222.21 of this part will apply to the sounding of the locomotive audible warning device.

In addition, as of the effective date of this final rule, the provisions contained within this part will have limited preemptive effect on State laws governing the use of train borne audible warnings at private highway-rail grade crossings, as well as pedestrian grade crossings. For example, section 222.45 prohibits routine locomotive horn sounding at private highway-rail grade crossings and pedestrian grade crossings located within duly established Federal quiet zones. FRA regulations do not, however, require the sounding of locomotive audible warning devices at private highway-rail grade crossings or pedestrian grade crossings. Only if State law requires the sounding of locomotive audible warning devices at private highway-rail grade crossings or pedestrian grade crossings will the requirements set forth in this part apply.²

In the preamble to the interim final rule, FRA discussed the types of quiet zones (i.e., New Quiet Zone versus Pre-Rule Quiet Zone) that could be established by public authorities seeking to restrict routine locomotive horn sounding at highway-rail grade crossings which are currently subject to EO 15. As stated in the preamble, since the authorizing Florida statute and related local ordinances that imposed nighttime whistle bans at certain FEC crossings were not enforced or observed on October 9, 1996, and no quiet zones containing FEC crossings had been established as of that date pursuant to the procedures set forth in the EO 15 amendments, public authorities who wish to establish Federal quiet zones that include highway-rail grade

² If State law requires locomotive horn sounding at private highway-rail grade crossings or pedestrian grade crossings, the requirements contained in section 222.21 of this part will apply. However, if State law requires the sounding of a locomotive audible warning device other than the locomotive horn at private highway-rail grade crossings or pedestrian grade crossings, then the requirements of subsections (b) and (d) of section 222.21 of this part will apply to the sounding of that locomotive audible warning device.

crossings currently subject to EO 15 will not be able to qualify for Pre-Rule Quiet Zone status. Therefore, any public authority seeking to establish a Federal quiet zone that contains any highway-rail grade crossing currently subject to EO 15 will need to comply with the requirements for New Quiet Zones (or New Partial Quiet Zones) contained in 49 CFR Part 222.

On or after the effective date of this final rule, public authorities will, however, be authorized to implement wayside horns at public highway-rail grade crossings equipped with flashing lights and gates, pursuant to the requirements contained within this part, as an alternative to the audible warning provided by routine sounding of the locomotive horn.³ FRA acknowledges that, when EO 15 was issued, FRA was not prepared to endorse the implementation of wayside horns at highway-rail grade crossings along the FEC line as an acceptable substitute for routine sounding of the locomotive horn. However, subsequent to the issuance of EO 15, a number of studies were conducted on the effectiveness of wayside horn installations, the results of which indicated that the use of wayside horns at highway-rail grade crossings equipped with flashing lights and gates has merit under certain well-defined conditions.⁴ In addition to a significant reduction in noise impacts on the surrounding community when compared to routine locomotive horn sounding practices, these studies revealed that the implementation of wayside horn systems at highway-rail grade crossings equipped with active warning devices does not appear to degrade safety after routine locomotive horn sounding practices have been discontinued. FRA also notes that, in its comments on the NPRM and interim final rule, FDOT expressed support for the use of wayside horns in certain instances where it is impossible or impracticable to install supplementary safety measures. While FRA does not agree that the use of wayside horns should be limited to situations where the implementation of supplementary

³ A wayside horn system typically consists of horns mounted on poles that are placed at the highway-rail grade crossing. A horn is directed towards each direction of oncoming vehicular traffic. The system is activated by the same track circuits used to detect the train's approach for purposes of other automated warning devices at the crossing (flashing lights and gates) and produces an audible warning similar to warning provided by an approaching train.

⁴ A detailed discussion of the studies that were conducted on the effectiveness of wayside horn system installations can be found in FRA's Interim Final Rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings (68 FR 70586, 70607-70609).

safety measures would be impractical or impossible, based on the results of studies that evaluated the effectiveness of wayside horn installations, the provisions of part 222 which address the implementation of wayside horn systems will apply to highway-rail grade crossings along the FEC line as of the effective date of this final rule.

IV. Section-By-Section Analysis

Appendix G—Excess Risk Estimates for Public Highway-Rail Grade Crossings

Appendix G has been added to this part to establish a 90.9-percent excess risk estimate for public highway-rail grade crossings that are located along the FEC line. The excess risk estimate is a figure that represents the amount by which collision frequency has been estimated to increase when routine locomotive horn sounding is restricted at public highway-rail grade crossings. Please refer to the previous section titled, "Calculation of the 90.9-Percent Excess Risk Estimate for Public Highway-Rail Grade Crossings Along the FEC Line", for more information about the calculations that were used to derive the excess risk estimate for public highway-rail grade crossings located along the FEC line.

Appendix G only provides an excess risk estimate for public FEC crossings that are equipped with flashing lights and gates. FRA has not provided excess risk estimates for passive FEC crossings or public FEC crossings that are only equipped with flashing lights because public authorities will only be permitted to establish New Quiet Zones (or New Partial Quiet Zones) on the FEC line. As stated in section 222.35(b), all public highway-rail grade crossings located in New Quiet Zones or New Partial Quiet Zones must be equipped with active grade crossing warning devices comprising both flashing lights and gates.

Public authorities who are interested in establishing a New Quiet Zone (or New Partial Quiet Zone) on the FEC line are advised to use FRA's Quiet Zone Calculator, which can be accessed from FRA's Web site at <http://www.fra.dot.gov>. FRA's Quiet Zone Calculator will automatically apply the 90.9-percent excess risk estimate to public highway-rail grade crossings along the FEC line. The calculator can be used as a tool by public authorities for determining which combination of Supplementary Safety Measures and Alternative Safety Measures (if any) will be necessary to reduce their Quiet Zone Risk Index to an acceptable level for quiet zone establishment (i.e., the Nationwide Significant Risk Threshold

or the Risk Index With Horns). Please refer to Appendix C of this part for a detailed guide to the establishment of quiet zones under this part.

Appendix H—Schedule of Civil Penalties

The former Appendix G to this part has been redesignated as Appendix H. No other revisions have been made to this Appendix.

V. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule has been evaluated and determined not to be a “significant

regulatory action”, as defined in section 3(f) of Executive Order 12866, nor a “significant regulation” under the Regulatory Policies and Procedures order issued by DOT (44 FR 11034). FRA has determined that this final rule will have a minimal cost impact with positive net benefits. Under this final rule, locomotive horn sounding will continue to be required at public grade crossings along the FEC line, unless the public authority decides to include the public grade crossing within a Federal quiet zone. Due to the voluntary nature of quiet zone establishment, Florida cities and counties will establish quiet zones only if the quiet zone benefits

exceed the costs. FRA estimates that this rule will potentially affect the 72 governmental jurisdictions (cities, counties, towns, townships, villages, etc.) that are located along the FEC line. Of these 72 jurisdictions, the municipalities most likely to be affected are the 15 cities and seven counties listed below that had whistle bans during the 1980s and early 1990s, who may wish to re-impose restrictions on routine locomotive horn sounding at grade crossings through the establishment of Federal quiet zones.

CONSOLIDATED PRIOR WHISTLE BAN JURISDICTIONS

| Municipality | Effective date | Small city | Large city | County | Total |
|--------------------------------|----------------|------------|------------|------------|-------------|
| Dade County | 7/29/1984 | | | 1 | |
| City of Hollywood | 11/11/1984 | | 1 | | |
| City of Daytona Beach | 11/12/1984 | | 1 | | |
| City of South Daytona | 11/19/1984 | 1 | | | |
| City of New Smyrna Beach | 1/7/1985 | 1 | | | |
| Martin County | 1/21/1985 | | | 1 | |
| City of Fort Lauderdale | 3/4/1985 | | 1 | | |
| City of Hallandale | 7/1/1985 | 1 | | | |
| City of Wilton Manors | 8/12/1985 | 1 | | | |
| City of Pompano Beach | 9/9/1985 | | 1 | | |
| City of Deerfield Beach | 11/27/1985 | | 1 | | |
| City of Oakland Park | 3/20/1986 | 1 | | | |
| Indian River County | 2/25/1987 | | | 1 | |
| City of Port Orange | 6/4/1988 | | 1 | | |
| St. Lucie County | 8/1/1988 | | | 1 | |
| St. Johns County | 9/27/1988 | | | 1 | |
| Palm Beach County | 3/25/1989 | | | 1 | |
| City of Sebastian | 7/14/1989 | 1 | | | |
| City of Ormond Beach | 10/9/1989 | 1 | | | |
| City of Holly Hill | 11/4/1989 | 1 | | | |
| Brevard County | 11/27/1989 | | | 1 | |
| City of Edgewater | 1/29/1990 | 1 | | | |
| Subtotal | | 9 | 6 | 7 | 22 |
| Percentage | | 41% | 27% | 32% | 100% |

Note 1: Cities that were later covered under a county whistle ban ordinance are not listed here.
 Note 2: A small city is one that has a population of less than 50,000 people (according to the SBA).
 Source: FRA Report “Florida’s Train Whistle Ban” (October 1995); U.S. Census Bureau.

FRA sampled three out of the 9 small cities (33 percent), two out of the six large cities (33 percent), and three out of the seven counties (43 percent) on the FEC line that had whistle bans during the 1980s and early 1990s. Thus, the total sample analyzed was a 36-percent sample (8/22 = 36%). These sampled jurisdictions were selected on the basis of being representative of the jurisdictions contained within each category of prior whistle ban jurisdictions. Based on a 36-percent sample of prior whistle ban jurisdictions along the FEC line, the average total cost of this final rule over 20 years for the 15 cities and seven counties that had whistle bans during the 1980s and early

1990s and may wish to re-impose restrictions on routine locomotive horn sounding is estimated to be about \$7.5 million or \$6.3 million in present value cost (in 2008 dollars, 7 percent discount rate). The table below shows a breakdown of these total costs by category.

TOTAL COSTS PER CATEGORY FOR PRIOR WHISTLE BAN JURISDICTIONS

| Category | Total (undiscounted) |
|--------------------|----------------------|
| Small Cities | \$549,000 |
| Large Cities | 840,000 |
| Counties | 6,104,000 |

TOTAL COSTS PER CATEGORY FOR PRIOR WHISTLE BAN JURISDICTIONS—Continued

| Category | Total (undiscounted) |
|-----------------------|----------------------|
| Grand Total Costs ... | 7,493,000 |

These costs will only be incurred if the local government believes the quiet zone benefits exceed the costs. As stated above, locomotive horn sounding will continue to be required at public grade crossings along the FEC line. However, this final rule will allow local governments along the FEC line to impose restrictions on locomotive horn

sounding at grade crossings, provided measures are taken to compensate for any excess risk associated with the locomotive horn sounding restrictions. Thus, the impact of this final rule is expected to be similar to that found in the analysis for new quiet zones that FRA conducted for the final rule titled, "Use of Locomotive Horns at Highway-Rail Grade Crossings", which was issued on April 27, 2005 (70 FR 21844). Because new quiet zone establishment requirements were designed to ensure that safety levels would be maintained and communities establish quiet zones only to the extent that they believe benefits from doing so will exceed costs, that analysis concluded that the rule would be cost beneficial. That argument applies to this rule as well.

Order DOT 2100.5 prescribes policies and procedures for simplification, analysis, and review of regulations. If the expected cost impact is so minimal that a proposed or final rule does not warrant a full evaluation, this order permits that a statement to that effect and the basis for it to be included in the preamble if a full regulatory evaluation of the cost and benefits is not prepared.

Such a determination has been made for this final rule. Thus, a full regulatory evaluation was not prepared. FRA has, therefore, determined that this final rule is not a "significant regulatory action" as defined in section 3(f) of Executive Order 12866, and is not a "significant regulation" as defined in DOT's Regulatory Policies and Procedures.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities, unless the agency certifies that the rule will have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act covers a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions.

The Small Business Administration (SBA) stipulates that governmental jurisdictions, which include cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000 people, are small entities. (5 U.S.C. 601) Among

the 66 governmental jurisdictions along the FEC line that would potentially be impacted by this final rule, data from the 2000 U.S. Census indicates that 49 jurisdictions had populations of less than 50,000 people, while 17 jurisdictions had populations of greater than 50,000 people.

Approximately 74 percent (49/66 = 74%) of the potentially affected governmental jurisdictions along the FEC line would be considered small entities under SBA criteria, based on data from the 2000 U.S. Census. For comparison purposes, data from the 2006 Population Estimates (source: U.S. Census Bureau) is also shown in the next table. Even though data from the 2000 U.S. Census reflects actual population counts, the estimated population figures contained in the 2006 Population Estimates are more up-to-date. (The next U.S. Census survey that will provide an actual population count will not be conducted until 2010.) The 49 small entities with known population counts that could be impacted by this final rule are listed in the table below:

SMALL ENTITIES ALONG THE FEC LINE

| Number | County | City | 2000 Census population | 2006 Population Estimates |
|--------|--------------|-------------------|------------------------|---------------------------|
| 1 | Brevard | Cocoa | 16,412 | 16,743 |
| 2 | Brevard | Malabar | 2,622 | 2,743 |
| 3 | Brevard | Mims | 9,147 | ??? |
| 4 | Brevard | Rockledge | 20,170 | 24,290 |
| 5 | Brevard | Titusville | 40,670 | 44,027 |
| 6 | Broward | Dania | 20,061 | 28,802 |
| 7 | Broward | Hallandale | 34,282 | 39,372 |
| 8 | Broward | Oakland Park | 30,966 | 42,384 |
| 9 | Broward | Wilton Manors | 12,697 | 12,909 |
| 10 | Dade | Coral Gables | 42,249 | 42,794 |
| 11 | Dade | Cutler Ridge | 24,781 | ??? |
| 12 | Dade | El Portal | 2,505 | 2,399 |
| 13 | Dade | Florida City | 7,843 | 9,445 |
| 14 | Dade | Goulds | 7,453 | ??? |
| 15 | Dade | Homestead | 31,909 | 53,767 |
| 16 | Dade | Medley | 1,098 | 1,050 |
| 17 | Dade | Miami Shores | 10,380 | 9,882 |
| 18 | Dade | Perrine (East) | 7,079 | 7,477 |
| 19 | Dade | Perrine (West) | 8,600 | 9,084 |
| 20 | Dade | North Miami Beach | 40,786 | 39,030 |
| 21 | Flagler | Bunnell | 2,122 | 1,706 |
| 22 | Indian River | Sebastian | 16,181 | 20,255 |
| 23 | Indian River | Vero Beach | 17,705 | 16,939 |
| 24 | Martin | Hobe Sound | 11,376 | ??? |
| 25 | Martin | Port Salerno | 10,141 | ??? |
| 26 | Martin | Sewalls Point | 1,946 | 2,024 |
| 27 | Martin | Stuart | 14,633 | 16,155 |
| 28 | Palm Beach | Belle Glade | 14,906 | 15,233 |
| 29 | Palm Beach | Belle Glade Camp | 1,141 | ??? |
| 30 | Palm Beach | Hypoluxo | 2,015 | 2,596 |
| 31 | Palm Beach | Jupiter | 39,328 | 48,847 |
| 32 | Palm Beach | Lake Park | 8,721 | 8,893 |
| 33 | Palm Beach | Lake Worth | 35,133 | 35,980 |
| 34 | Palm Beach | Lantana | 9,437 | 10,334 |
| 35 | Palm Beach | Mangonia Park | 1,283 | 1,262 |
| 36 | Palm Beach | Pahokee | 5,985 | 6,581 |

SMALL ENTITIES ALONG THE FEC LINE—Continued

| Number | County | City | 2000 Census population | 2006 Population Estimates |
|--------|------------|--------------------|------------------------|---------------------------|
| 37 | Palm Beach | Palm Beach Gardens | 35,058 | 48,914 |
| 38 | Palm Beach | Riviera Beach | 29,884 | 35,846 |
| 39 | Palm Beach | South Bay | 3,859 | 4,554 |
| 40 | Palm Beach | Tequesta | 5,273 | 5,942 |
| 41 | St. Johns | St. Augustine | 11,592 | 12,064 |
| 42 | St. Lucie | Fort Pierce | 37,516 | 39,365 |
| 43 | Volusia | Edgewater | 18,668 | 21,486 |
| 44 | Volusia | Holly Hill | 12,119 | 13,325 |
| 45 | Volusia | New Smyrna Beach | 20,048 | 22,732 |
| 46 | Volusia | Oak Hill | 1,378 | 1,575 |
| 47 | Volusia | Ormond Beach | 36,301 | 38,504 |
| 48 | Volusia | Port Orange | 45,823 | 54,851 |
| 49 | Volusia | South Daytona | 13,177 | 13,541 |

Source: U.S. Census Bureau.

Seventeen of these small entity jurisdictions had whistle bans in place during the 1980s and early 1990s. These seventeen jurisdictions, which are most likely to be affected by this final rule, are shown below:

SMALL ENTITY FEC WHISTLE BAN JURISDICTIONS

| Number | Municipality | County | Effective date of whistle ban | 2000 Census population | 2006 Population Estimates |
|--------|--------------------------|--------------|-------------------------------|------------------------|---------------------------|
| 1 | City of Hypoluxo * | Palm Beach | 9/24/1984 | 2,015 | 2,596 |
| 2 | Village of Tequesta * | Palm Beach | 10/23/1984 | 5,273 | 5,942 |
| 3 | City of South Daytona | Volusia | 11/19/1984 | 13,177 | 13,541 |
| 4 | Town of Lantana * | Palm Beach | 1/7/1985 | 9,437 | 10,334 |
| 5 | City of New Smyrna Beach | Volusia | 1/7/1985 | 20,048 | 22,732 |
| 6 | Town of Jupiter * | Palm Beach | 1/29/1985 | 39,328 | 48,847 |
| 7 | City of Lake Worth * | Palm Beach | 2/15/1985 | 35,133 | 35,980 |
| 8 | City of Hallandale | Broward | 7/1/1985 | 34,282 | 39,372 |
| 9 | City of Wilton Manors | Broward | 8/12/1985 | 12,697 | 12,909 |
| 10 | City of Oakland Park | Broward | 3/20/1986 | 30,966 | 42,384 |
| 11 | City of Fort Pierce ** | St. Lucie | 6/28/1986 | 37,516 | 39,365 |
| 12 | Town of Malabar *** | Brevard | 4/13/1988 | 2,622 | 2,743 |
| 13 | City of Titusville *** | Brevard | 5/20/1988 | 40,670 | 44,027 |
| 14 | City of Sebastian | Indian River | 7/14/1989 | 16,181 | 20,255 |
| 15 | City of Ormond Beach | Volusia | 10/9/1989 | 36,301 | 38,504 |
| 16 | City of Holly Hill | Volusia | 11/4/1989 | 12,119 | 13,325 |
| 17 | City of Edgewater | Volusia | 1/29/1990 | 18,668 | 21,486 |

* These cities were later covered under the Palm Beach County Ordinance (effective date of 3/25/89).

** These cities were later covered under the St. Lucie County Ordinance (effective date of 3/1/88).

*** These cities were later covered under the Brevard County Ordinance (effective date of 11/27/89).

Source: FRA Report "Florida's Train Whistle Ban" (October 1995); U.S. Census Bureau.

By the end of 1989, eight of these small entity whistle ban jurisdictions became part of county-wide whistle ban ordinances (as indicated in the table above). As these county-wide whistle ban ordinances cover governmental jurisdictions that have populations of more than 50,000 people, eight of the previously determined small entity whistle ban jurisdictions were removed from FRA's list of small entities that are most likely to be affected by this final rule. Thus, this rule will most likely affect nine small entities (17 - 8 = 9). These nine small entities along with the estimated cost associated with implementing upgrades are shown below.

SMALL ENTITIES MOST LIKELY TO BE AFFECTED BY THE FINAL REGULATION

| Number | Municipality | County | 2000 Census population | 2006 Population estimates | Estimated establishment costs (undiscounted) |
|--------|--------------------------|--------------|------------------------|---------------------------|--|
| 1 | City of South Daytona | Volusia | 13,177 | 13,541 | \$61,000 |
| 2 | City of New Smyrna Beach | Volusia | 20,048 | 22,732 | 93,000 |
| 3 | City of Hallandale | Broward | 34,282 | 39,372 | 70,000 |
| 4 | City of Wilton Manors | Broward | 12,697 | 12,909 | 61,000 |
| 5 | City of Oakland Park | Broward | 30,966 | 42,384 | 20,000 |
| 6 | City of Sebastian | Indian River | 16,181 | 20,255 | 61,000 |

SMALL ENTITIES MOST LIKELY TO BE AFFECTED BY THE FINAL REGULATION—Continued

| Number | Municipality | County | 2000 Census population | 2006 Population estimates | Estimated establishment costs (undiscounted) |
|--------|----------------------|---------|------------------------|---------------------------|--|
| 7 | City of Ormond Beach | Volusia | 36,301 | 38,504 | 61,000 |
| 8 | City of Holly Hill | Volusia | 12,119 | 13,325 | 61,000 |
| 9 | City of Edgewater | Volusia | 18,668 | 21,486 | 61,000 |

Source: FRA Report "Florida's Train Whistle Ban" (October 1995); U.S. Census Bureau.

The impact on these small entity jurisdictions will vary depending on whether they would have to implement additional safety measures to establish quiet zones and the type(s) of safety measures that may be appropriate for implementation. In addition, these small entity jurisdictions will need to decide whether to implement such measures or continue to allow the locomotive horns to be sounded. The impact of these decisions will also vary depending on the number of crossings in quiet zones, the population density of the community neighborhoods that immediately surround the affected grade crossings, and train traffic volume over the affected crossings. Even though this final rule will allow public authorities to establish Federal quiet zones that include grade crossings along the FEC line, the establishment of quiet zones is optional, so small entities will establish quiet zones only if the quiet zone benefits exceed the costs. Thus, FRA certifies that this final rule is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

There are no information collection requirements or burden per se associated with this final rule. However, once this final rule goes into effect, public authorities will be permitted to establish New Quiet Zones along the FEC line in accordance with 49 CFR 222. Presently, the entire information collection burden associated with Part 222 is approved under FRA OMB No. 2130-0560. FRA intends to revise this presently approved collection to account for any changes in burden caused by this rulemaking and to request re-approval from OMB once this final rule takes effect.

D. Environmental Impact

FRA has evaluated this final rule in accordance with its "Procedures for Considering Environmental Impacts" ("FRA's Procedures") (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other

environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule 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. 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 final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

E. Federalism Implications

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 ("E.O. 13132"). E.O. 13132, which was issued on August 4, 1999, requires each agency that promulgates "any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute" to consult with State and local officials early in the process of developing the proposed regulation; and in a separately identified portion of the preamble to the regulation, to provide to the Director of the Office of Management and Budget "a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met * * *."

FRA has complied with E.O. 13132 in issuing this final rule. Even though this final rule does not impose substantial direct compliance costs on State and local governments, FRA consulted extensively with State and local officials prior to the issuance of the NPRM. In

addition, FRA has taken very seriously the concerns and views expressed by State and local officials as expressed in written comments, as well as testimony provided at the April 15, 2005 public conference, on the appropriate excess risk estimate that should be applied to public highway-rail grade crossings along the FEC line.

FRA received comments and written testimony on the appropriate excess risk estimate that should be applied to public highway-rail grade crossings along the FEC line from the Broward County Metropolitan Planning Organization, the City of Hollywood, Florida, the City of Palm Beach Gardens, Florida, and FDOT. While local jurisdictions expressed interest in establishing Federal quiet zones along the FEC line, the desire to balance quality of life concerns with the need to maintain the current level of safety provided by routine sounding of the locomotive horn, especially within densely populated areas, was also raised. As for the specific issue of the appropriate excess risk estimate that should be applied to public highway-rail grade crossings along the FEC line, FDOT urged FRA to apply the nationwide excess risk estimate of 66.8 percent to these crossings. FDOT also took issue with FRA's prior analysis on the effect of nighttime whistle bans on accident rates at public highway-rail grade crossings along the FEC line, which indicated a 195-percent increase in the accident rate at these crossings after nighttime whistle bans were imposed. An explanation of FRA's response to these concerns is provided in the **SUPPLEMENTARY INFORMATION** section of the preamble to this final rule.

Under 49 U.S.C. 20153, the Department was required to issue rules requiring locomotive horns to be sounded at every public highway-rail grade crossing. The statute also makes clear that the Federal government must take a leading role in establishing the framework for providing exceptions to the requirement that horns sound at every public highway-rail grade crossing. Through issuance of FRA's final rule on the Use of Locomotive

Horns at Highway-Rail Grade Crossings on August 17, 2006 (71 FR 47614), FRA established a nationwide framework for the establishment of Federal quiet zones within which routine locomotive horn sounding practices at grade crossings can be restricted and/or prohibited. However, FRA's final rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings did not apply to highway-rail grade crossings along the FEC line. Through issuance of this final rule, governmental jurisdictions within the State of Florida will be permitted to establish Federal quiet zones that include grade crossings located along the FEC line, pursuant to the procedures set forth in FRA's final rule on the Use of Locomotive Horns at Highway-Rail Grade Crossings.

Due to the voluntary nature of quiet zone establishment, any direct compliance costs that will be borne by State and local governments will be optional in nature. Accordingly, FRA has determined that this final rule will not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Compliance With the Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 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 that "before 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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$141,300,000 or more (adjusted annually 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" detailing the effect on State, local, and tribal governments and the private sector.

This final rule will not result in the expenditure of more than \$141,300,000 (adjusted annually for inflation) by the

public sector 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." 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 that: (1)(i) 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) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. This final rule has been evaluated in accordance with Executive Order 13211. FRA has determined that this final rule, which is not a significant regulatory action under Executive Order 12866, will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

H. Privacy Act Statement

Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document), 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) or you may visit www.regulations.gov.

List of Subjects in 49 CFR Part 222

Administrative practice and procedure, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

■ In consideration of the foregoing, FRA is amending part 222 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 222—[AMENDED]

■ 1. The authority citation for part 222 continues to read as follows:

Authority: 28 U.S.C. 2461, note; 49 U.S.C. 20103, 20107, 20153, 21301, 21304; and 49 CFR 1.49.

Appendix G to Part 222 [Redesignated as Appendix H]

■ 2. Appendix G to Part 222 is redesignated as Appendix H to Part 222.

§ 222.11 [Amended]

■ 3. Section 222.11 is amended by removing the reference "Appendix G to this part" and by adding the reference "Appendix H to this part" in its place.

■ 4. A new Appendix G to Part 222 is added to read as follows:

Appendix G to Part 222—Excess Risk Estimates for Public Highway-Rail Grade Crossings

BAN EFFECTS/TRAIN HORN EFFECTIVENESS
[Summary table]

| Warning type | Excess risk estimate |
|--|----------------------|
| Nation (Except Florida East Coast Railway and Chicago Region Crossings) | |
| Passive | 74.9. |
| Flashers only | 30.9. |
| Flashers with gates ... | 66.8. |
| Florida East Coast Railway Crossings | |
| Flashers with gates ... | 90.9. |
| Chicago Region Crossings | |
| Passive | To be determined. |
| Flashers only | To be determined. |
| Flashers with gates ... | To be determined. |

Note One: The warning type column reflects primary warning device types. FRA is aware that a variety of arrangements are in place at individual crossings.

Note Two: The "excess risk estimate" is a figure that represents the amount by which collision frequency has been estimated to increase when routine locomotive horn sounding is restricted at public highway-rail grade crossings.

Issued in Washington, DC, on August 28, 2009.

Karen J. Rae,
Deputy Administrator, Federal Railroad Administration.

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