

will allow public health resources to be more effectively reprioritized for other containment and mitigation efforts and will stimulate air travel. Continuing activities will include an illness reporting system and a passenger education process carried out in tandem with other enhanced public health measures implemented within the passenger air transportation system in collaboration with industry. This notice does not affect those other public health measures, which will remain in place as long as appropriate. Appropriate traveler health education materials will continue to be made available to passengers arriving from foreign countries. Health education information will continue to be displayed at ports of entry.

#### Notification of Termination of Arrival Restrictions

Pursuant to 19 U.S.C. 1433(c), 19 CFR 122.32, 49 U.S.C. 114, and 49 CFR 1544.305 and 1546.105, and effective as of 12:01 a.m. Eastern Daylight Time (EDT) on September 14, 2020 for all affected flights arriving at a U.S. airport, the Secretary hereby terminates the arrival restrictions announced at 85 FR 6044 (Feb. 4, 2020); 85 FR 7214 (Feb. 7, 2020); 85 FR 12731 (Mar. 4, 2020); 85 FR 15059 (Mar. 17, 2020); 85 FR 15714 (Mar. 19, 2020); and 85 FR 31957 (May 28, 2020).

#### Signature

The Acting Secretary of DHS, Chad F. Wolf, having reviewed and approved this document, has delegated the authority to electronically sign this document to Ian J. Brekke, Deputy General Counsel, DHS Office of the General Counsel, for purposes of publication in the **Federal Register**.

**Ian J. Brekke,**

*Deputy General Counsel, U.S. Department of Homeland Security.*

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## DEPARTMENT OF LABOR

### Occupational Safety and Health Administration

#### 29 CFR Part 1926

[Docket ID OSHA-2015-0012]

RIN 1218-AD07

#### Cranes and Derricks in Construction: Railroad Roadway Work

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Final rule.

**SUMMARY:** OSHA is revising the standard for cranes and derricks in construction to provide specific exemptions and clarifications with regard to the application of the standard to cranes and derricks used for railroad roadway work. These exemptions and clarifications recognize the unique equipment and circumstances in railroad roadway work and reflect the preemption of some OSHA requirements by regulations promulgated by the Federal Railroad Administration (FRA). The revised standard provides a clearer understanding of which regulatory requirements are applicable, resulting in a more effective regulatory program and ultimately improved safety.

**DATES:** *Effective date:* This final rule is effective on November 16, 2020.

**ADDRESSES:** In accordance with 28 U.S.C. 2112(a)(2), the agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, Room S-4004, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, to receive petitions for review of the final rule.

*Docket:* To read or download material in the electronic docket for this rulemaking, go to <http://www.regulations.gov> or to the OSHA Docket, Room N-3653, OSHA, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone: (202) 693-2350, TTY number (877) 889-5627. Some information submitted (e.g., copyrighted material) is not available publicly to read or download through this website. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office. Contact the OSHA Docket Office for assistance in locating docket submissions.

#### FOR FURTHER INFORMATION CONTACT:

*General information and press inquiries:* Mr. Frank Meilinger, OSHA Office of Communications; telephone: (202) 693-1999; email: [Meilinger.Francis2@dol.gov](mailto:Meilinger.Francis2@dol.gov).

*Technical inquiries:* Mr. Jens Svenson, OSHA Directorate of Construction; telephone: (202) 693-2020; fax: (202) 693-1689; email: [svenson.jens@dol.gov](mailto:svenson.jens@dol.gov).

*Copies of this Federal Register document and news releases:* Electronic copies of these documents are available at OSHA's web page at <http://www.osha.gov>.

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#### I. Background

OSHA published the Cranes and Derricks in Construction standard on August 9, 2010 (29 CFR part 1926, subpart CC, 75 FR 47906). The crane standard resulted from years of work by a negotiated rulemaking committee that drew from a wide range of stakeholders to include industry and labor best practices to draft regulatory requirements to prevent crane tip overs, electrocution from crane contact with power lines, workers being struck by the equipment or loads, crane collapse because of improper assembly, and other hazards associated with the operation of cranes in construction work. The crane standard added many new provisions, addressing topics such as requirements to ensure safe ground conditions underneath equipment, mandatory safety devices, distance from power lines, inspection procedures, workplace area controls to prevent workers from entering hazardous areas, and new operator certification requirements.

On October 7, 2010, the Association of American Railroads and a number of individual railroads (hereafter collectively referred to as AAR) filed a petition challenging the rule. That petition remains before the United States Court of Appeals for the District of Columbia Circuit (Case No. 10-1386), but after AAR provided more background and additional information about existing practices in the railroad industry, the parties reached a settlement in which OSHA agreed to issue an interpretation of the standard as it relates to railroads and to propose revisions to the regulatory text of the crane standard. The settlement followed extensive discussions with AAR and officials from FRA and the principal labor organization representing affected employees, the Brotherhood of Maintenance of Way Employees Division (Teamsters) (BMWED). OSHA also reviewed the settlement with the Brotherhood of Railroad Signalmen (BRS). In deciding to enter into the settlement, OSHA acknowledged the lack of a record of significant injuries or fatalities resulting from the use of cranes or derricks for railroad track construction and maintenance and the

consensus between labor and management groups that the proposed exemptions and alternatives would continue practices generally accepted as safe in the railroad industry. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the crane standard. In 2018, OSHA published a notice of proposed rulemaking (NPRM) seeking public comment on the proposed regulatory changes for the railroad industry that had been included in the settlement agreement (83 FR 34076 (July 19, 2018)).

Subsequent to the settlement agreement executed between AAR and OSHA in September 2014, FRA issued a final regulation involving, among other issues, safety-related training requirements for the use of railroad cranes and railroad roadway maintenance machines (hereafter, RMMs will mean [railroad] roadway maintenance machines) equipped with a hoisting device.<sup>1</sup> This regulation also included other revisions to FRA regulations addressing the use of RMMs (79 FR 66460, November 7, 2014).

As dictated by Section 4(b)(1) of the Occupational Safety and Health (OSH) Act (29 U.S.C. 653), to the extent FRA regulations exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health, OSHA is preempted from applying regulatory requirements of its own to the corresponding working conditions addressed. On March 19, 2019, following the publication of OSHA's NPRM, FRA provided OSHA further information clarifying that FRA intends to preempt the potential

<sup>1</sup> The railroad industry relies on a number of different pieces of equipment to deliver and position the ballast rock that supports the railroad ties, the ties that support the rail, and the rail itself. Railroads also use the equipment to install railroad signal posts and to keep the tracks and the areas immediately alongside the track free from debris and other impediments to trains. The railroad industry classifies this equipment collectively as "roadway maintenance machines," which are defined in FRA regulations as devices "powered by any means of energy other than hand power . . . being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary" (49 CFR 214.7). The "roadway" referenced in this definition does not refer to a road over which cars or trucks would travel; within the railroad industry it refers to the area encompassing the tracks, track support, and nearby items that could foul the track (see, e.g., the definition of "roadway worker" in 49 CFR 214.7). Most of this equipment falls within the scope of OSHA's Cranes and Derricks Standard in subpart CC because it is "power operated equipment" and includes some form of hoisting device that allows the equipment to be used to "hoist and lower and horizontally move a suspended load" (see 29 CFR 1926.1400(a)).

applicability of most of the OSHA requirements addressed in OSHA's NPRM (see Docket ID: OSHA-2015-0012-0015) through FRA regulations. Thus, OSHA concludes that those affected parts of the OSHA crane standard do not apply with regard to the operation of RMMs.

Although any exemption from OSHA requirements resulting from the preemption of OSHA statutory authority by FRA would apply whether or not the OSHA regulations include any specific exemptions, OSHA believes it is still appropriate to amend the Code of Federal Regulations (CFR) to include the explicit exemptions for RMMs in the OSHA crane standard. Having the exemptions specified in the OSHA crane standard will provide additional clarity for employers in the railroad industry, including contractors, who may be unfamiliar with the legal implications of FRA's action. A clearer understanding of which regulatory requirements are applicable will ultimately result in a more effective regulatory program and improved safety.

Thus, as explained in this preamble, OSHA is adding certain exemptions and clarifications to the crane standard. Some of these exemptions recognize the unique equipment and circumstances in railroad roadway work, while others reflect the preemption of some OSHA requirements by FRA.

This rule is an E.O. 13771 deregulatory action. Details on the estimated costs and cost savings for this rule can be found in the final rule's economic analysis in section III of this preamble.

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule not a "major rule" as defined by 5 U.S.C. 804(2).

## II. Summary and Explanation of the Final Rule

The following discussion summarizes and explains each new or revised provision in this final rule and the substantive differences between the revised and previous version of OSHA's crane operator requirements in subpart CC of 29 CFR part 1926.

### A. Exemption for Flash-Butt Welding Trucks and Equipment With Similar Attachments

This final rule adds paragraph (c)(18) to § 1926.1400 of the crane standard, as proposed, in order to exclude flash-butt welding trucks and equipment with similar attachments from the requirements of part 1926, subpart CC.

Flash-butt welding trucks are RMMs with low-hanging workhead attachments. These machines are equipped with an attachment designed to suspend and move a welding workhead low and close to the rails in order to precisely weld two sections of rail together. Other machines that fall within this exemption are similarly designed to suspend and move specific operation workheads low to the rails. This class of machines does not have any other hoisting device. AAR provided examples of these machines to OSHA prior to publication of the proposed rule (see Docket ID: OSHA-2015-0012-0008).

Because these machines are not capable of raising and suspending the workhead more than a few feet above the ground or roadbed, and the weight and structure of the workhead does not appear to present any danger of equipment tipover at any point during the workhead's full range of motion, OSHA believes that equipment in this class does not present the types of safety hazards OSHA intended to address in the crane standard.

In response to the proposed rule, OSHA received two public comments that addressed this issue directly. One comment was submitted jointly by BRS and BMWED (see Docket ID: OSHA-2015-0012-00014). The labor organizations stated that they generally support the proposal to revise § 1926.1400(c) to expressly exempt flash-butt welding trucks and other RMMs equipped only with hoisting devices used to suspend and move their workhead assemblies low and close to the rails. The labor organizations also noted that the adoption of the proposed exemption "does not appear to compromise worker safety."

Another comment was received from the AAR (see Docket ID: OSHA-2015-0012-00011, p. 7). The AAR stated that "flash-butt welding trucks and other roadway maintenance machines with low-hanging workhead attachments should be exempted from the requirements of the OSHA Crane Standard and so should be added to the equipment specifically exempted under [§ 1926.1400(c)]."

OSHA is revising § 1926.1400(c) to expressly exempt flash-butt welding trucks and other RMMs equipped only with hoisting devices used to suspend and move their workhead assemblies low and close to the rails, as proposed.

### B. New 29 CFR 1926.1442 To Address Railroad Equipment

Title 29 CFR 1926.1442, which addresses severability, is currently the last section of the crane standard. OSHA

is redesignating the severability provision currently in 29 CFR 1926.1442 as § 1926.1443 to enable the addition of a new § 1926.1442 dedicated to the RMMs addressed in this rulemaking.

Rather than insert the various new RMM exceptions throughout subpart CC, this final rule consolidates them into a single section for the convenience of the affected parties and to maintain the organizational integrity of subpart CC. Aside from the § 1926.1400(c)(18) exclusion for flash-butt welding trucks and similar equipment, § 1926.1442 will contain all of the new provisions addressed through the settlement.

OSHA received one comment directly addressing this change. The BRS, in a joint comment with the BMWED, supported the consolidation indicating it would be convenient for all affected parties. (See Docket ID: OSHA–2015–0012–0014, p. 2.)

Thus, OSHA is finalizing the redesignation of this section as proposed.

#### C. Scope of New § 1926.1442

New § 1926.1442(a) sets out the scope of the new exemptions. The limited exemptions for railroads in the new § 1926.1442 apply to work on the construction of railroad tracks and supporting structures, including the railroad ties supporting the tracks, the ballast and the road bed that support the track and ties, and the poles and other structures on which railroad signal devices and signage are mounted.

The exemptions do not apply to other types of construction activities that may be related to railroads, such as the construction of buildings, retaining walls, fences, or platforms controlled by railroads. When the exemptions do not apply, the crane standard continues to apply to construction activities conducted by employers in the railroad industry as it does to employers in other industries.<sup>2</sup>

In the proposed rule, OSHA had proposed to limit the scope of the exemptions in § 1926.1442 only to construction of railroad tracks and supporting structures other than bridge construction (83 FR at 34079). In this final rule, OSHA is applying these exemptions to equipment covered by

subpart CC that meets the definition of “Roadway Maintenance Machine” as defined in 49 CFR 214.7, regardless of whether the equipment is used for railroad bridge construction work or for other construction work involving railroad tracks and supporting structures. In its comments in response to the proposed rule, AAR noted that “FRA regulations also cover bridge construction work” and that accordingly “the distinction found in proposed § 1926.1442(a) for bridge construction work is no longer appropriate and not legally accurate (see Docket ID: OSHA–2015–0012–00011, p. 5).

The scope of these exemptions in the final rule reflects the extent to which FRA has acted to preempt OSHA regulatory authority in accordance with section 4(b)(1) of the OSH Act, as discussed earlier. See 79 FR 66460 and FRA’s communication to OSHA in Docket ID: OSHA–2015–0012–0015. FRA made clear in its 2019 communication to OSHA that it intended to preempt the relevant provisions of OSHA’s standard without regard to whether they applied to bridge construction or not (see, e.g., FRA’s response to OSHA’s first question: “. . . [FRA regulations] oust OSHA’s similar construction standards, including standards relating to bridge construction . . .”). The distinction for bridge construction work in proposed § 1926.1442(a) is no longer appropriate and therefore was not included in this final rule. To prevent the removal of the proposed distinction for bridge work from inadvertently expanding the exemptions beyond activities regulated by FRA, however, the final rule specifies that the exemptions apply only to the extent that the RMM activities remain subject to the authority of FRA. For example, OSHA’s exemptions would apply to railroad bridge construction subject to subpart B of 49 CFR part 214 (Bridge Worker Safety Standards), but the use of cranes to construct a highway bridge over railroad track would not be exempt to the extent that FRA lacks authority to regulate that activity to ensure the safe operation of that equipment. OSHA’s crane standard, including its requirements for operator training, certification, and evaluation, would apply in full to the latter class of construction activity.

#### D. Section 1926.1442(b)(1) Operator Certification, Training, and Evaluation

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act, which exempts from the Act the working conditions of certain employees with respect to which other Federal agencies exercise statutory

authority to prescribe and enforce occupational safety and health standards.

Following OSHA’s promulgation of the crane standard in subpart CC, FRA promulgated training requirements for operators of RMMs equipped with hoisting devices. FRA’s rule included a clear statement in the preamble that after the effective date of the new rule, “FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA’s regulation related to crane operator qualification and certification found at 29 CFR 1926.1427” (79 FR 66460, 66475 (November 7, 2014)). FRA had previously issued its proposed rule with a similar statement prior to OSHA’s settlement agreement with AAR, so the draft regulatory language in OSHA’s settlement agreement included a proposed exemption from the operator certification requirements of § 1926.1427. In the NPRM for this rulemaking, OSHA went further and stated that it read FRA’s final-rule statement as preempting all OSHA requirements that would apply to the training, certification, and assessment of operators of RMMs (83 FR at 34079). OSHA therefore proposed to exempt all of the operator “qualification and certification” requirements in § 1926.1427, as well as the operator training requirements in § 1926.1430, and sought comment on whether any additional provisions should be cited in the exemption (83 FR at 34080).

OSHA received two comments, both agreeing that FRA’s statement should be read as broadly preempting all of OSHA’s operator training, evaluation, and certification requirements with respect to operators of RMMs. A joint comment from the labor organizations BRS and BMWED affirmed that the hazards OSHA had identified when promulgating the operator certification requirements do exist in the railroad industry but did not object to OSHA’s exemption for certification and training so long as “this exemption does not relieve the FRA from its responsibility to assure that these hazards are addressed.” (See Docket ID: OSHA–2015–0012–0014.)

AAR, whose comment was endorsed by several other commenters, asserted that FRA regulation prohibits OSHA from enforcing requirements regarding “all aspects of operator training,” including “the evaluation and assessment of roadway maintenance machine operators.” (See Docket ID: OSHA–2015–0012–0011, pp. 4–5.) AAR also noted that OSHA, in a separate rulemaking, had proposed new training and evaluation requirements for

<sup>2</sup> The crane standard already incorporates additional provisions addressing railroad activities. (See, e.g., § 1926.1420(b)(2) (communications near railroads).) Some of those provisions already exempt railroad employers from certain requirements, and those exemptions would continue to apply. New § 1926.1442(a) states that all other “requirements” would continue to apply, but exemptions for railroad activities already in the crane standard would continue to exempt such activities.

operators of three specific categories of cranes for which operator certification was not required: §§ 1926.1436(q) (Qualification and training for derricks), 1926.1440(a) (Sideboom cranes), and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) (see *Cranes and Derricks in Construction: Operator Qualification*, 83 FR 23534, 23568–23569 (May 21, 2018)). AAR recommended that OSHA expressly exempt operators of RMMs from the training and evaluation provisions proposed in those sections.

OSHA agrees with AAR and is therefore expanding the exemptions in final rule § 1926.1442(b)(1). Like the proposed rule, the final rule includes an explicit exemption from the training, certification, and evaluation requirements for these operators in §§ 1926.1427 and 1926.1430, to provide clear notice to employers in the railroad industry that might not otherwise be aware of the effect of FRA's rule on OSHA's standard. The final rule goes further. Although OSHA did not ultimately include any operator evaluation requirements in § 1926.1436(q), § 1926.1440(a), or § 1926.1441(a),<sup>3</sup> the exemption in this final rule also applies to operator qualification requirements in §§ 1926.1436(q), 1926.1440(a), and 1926.1441(a), as AAR requested, based on FRA's statement of intent to exercise jurisdiction over all aspects of operator training.

The exemption in § 1926.1442(b)(1) also extends to the requirements for the assessment and evaluation of crane operators. Under § 1926.1427, as amended in 2018, employers are required to evaluate their operators to ensure competency to operate specific cranes. Although FRA's final rule predated the promulgation of OSHA's assessment and evaluation requirements, OSHA reads FRA's statements about replacing OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427 as intended to preempt all OSHA requirements that would apply to the training, certification, assessment, and evaluation of operators of RMMs.

#### *E. Section 1926.1442(b)(2) Rail Clamps, Rail Stops, and Work-Area Controls*

This final rule paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Final rule § 1926.1442(b)(2) exempts employers from three requirements.

Section 1926.1442(b)(2)(i) and (ii) provides exemptions from subpart CC requirements for using rail stops and rail clamps on equipment covered by subpart CC. Under § 1926.1442(b)(2)(iii), OSHA provides an exemption from work area controls specified by § 1926.1424(a)(2) when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b).

FRA's interpretation of its regulations in its communication to OSHA stated clearly that it intended the regulations at 49 CFR part 214 (specifically, §§ 214.307, 214.341(b), and 214.357(b)) to preempt all three categories of OSHA's requirements when operating RMMs: "FRA regulations ensure employers put in place sufficient protections to prevent the types of hazards that OSHA intended to prevent through its work-area control, rail clamp and rail stop requirements." (See Docket ID: OSHA–2015–0012–0015.)

Comments received in response to the proposal were supportive of the proposed exemptions for rail stops, rail clamps, and work area controls. (See Docket IDs: OSHA–2015–0012–0011, p. 7–8; OSHA–2015–0012–0014, p. 2.) In light of FRA's stated intention to preempt OSHA's provisions in these areas without the limitations OSHA had included in the proposed rule, the exemptions in this final § 1926.1442(b)(2) are expanded from the proposal. In the proposed rule, OSHA had included caveats to these exemptions; in the final rule, the proposed caveats have been removed, consistent with the extent of FRA's regulatory requirements.

#### *F. Section 1926.1442(b)(3) Out-of-Level Work*

This paragraph provides exemptions in accordance with section 4(b)(1) of the OSH Act.

Section 1926.1442(b)(3) exempts RMMs from restrictions on out-of-level work. These OSHA restrictions, including the requirements to comply with out-of-level manufacturer procedures in § 1926.1402(b), the inspection requirements in § 1926.1412(d)(1)(xi), and the requirement that machines have out-of-level indicators in § 1926.1415(a)(1), address the risk of equipment tipover and loss of control of the load.

The record in this rulemaking indicates that out-of-level operation is a longstanding and necessary practice in the railroad industry. Industry practices already account for load-chart adjustments and other standard practices to address out-of-level work. In 2010, OSHA responded to the unique nature of railroad work conditions with

an exception to the out-of-level work prohibition for railroad equipment but limited the exception to include only equipment traveling on the tracks (see § 1926.1402(f)). Following the rulemaking, AAR explained that many RMMs, like a swing loader crane, often travel next to the track (as opposed to on it) but frequently must work out-of-level because the ballast and road bed are sloped. OSHA therefore proposed an expanded exemption that would have applied to RMMs even when operated off the track but would have required a registered professional engineer (RPE) or another qualified person to make adjustments to the manufacturer-provided load charts that typically anticipate operation on level ground (83 FR at 34080).

All of the comments addressing this provision supported the exemption. One commenter supported OSHA and agreed that "these proposals, if promulgated, would maintain safety and health protections while reducing employers' compliance burdens." (See Docket ID: OSHA–2015–0012–0010.) Another commenter also expressed support for the exemption and stated that it is "helpful." (See Docket ID: OSHA–2015–0012–0011, p. 8.)

A third commenter suggested that the "approvals must be in writing and be included in the 'Instructions Document' required under 214.341(b)." This commenter also suggested that the option of allowing a qualified person to make additional adjustments should be removed because "the equipment manufacturer and an RPE are the only professionals qualified with the knowledge and expertise necessary to adjust load charts for railroad operations." (See Docket ID: OSHA–2015–0012–0014, p. 3.)

FRA subsequently communicated to OSHA that it intends its regulations at 49 CFR part 214, subparts C and D, including §§ 214.341 and 214.357, to "govern the safe operation of roadway maintenance machines (including those with cranes) such that they oust OSHA's similar construction standards . . . that would otherwise require operators of this equipment to comply with crane manufacturer's procedures." (See Docket ID: OSHA–2015–0012–0015.) FRA also stated that its regulations "do not directly limit out-of-level work, but that issue may be indirectly addressed in a manufacturer's instructions or the instructions established by an employer that replace the manufacturer's instructions." (Id.) OSHA interprets this response as indicating that OSHA is foreclosed from imposing conditions on out-of-level work.

<sup>3</sup> See explanation in OSHA's final rule for *Cranes and Derricks in Construction: Operator Qualifications*, 83 FR 56198, 56209 (November 9, 2018).

Therefore, OSHA is issuing this exemption in this final rule as a broad exemption from the prohibition on out-of-level work without any of the conditions required in the proposal.

*G. Section 1926.1442(b)(4) Dragging a Load Sideways*

The exemption in § 1926.1442(b)(4) in this final rule provides relief from the prohibition in § 1926.1417(q) against using cranes or derricks to drag a load sideways. It has been an existing practice during many track construction projects for RMMs to drag rail or ties sideways. The practice of dragging long pieces of rail sideways off the ties or to position them on top of the ties is routine and critical to the process of track construction. This practice does not have a ready alternative, does not involve lifts more than a few feet off the ground, and the movement of the load is predictable because the procedure is repeated over and over with the same materials.

None of the commenters opposed this exemption. One comment in response to the proposed rule expressed general support for “the exemptions in the Proposed Rule and the changes made pursuant to the settlement agreement between OSHA and AAR.” (See Docket ID: OSHA–2015–0012–0011, p. 9.) Another comment supported this exemption, stating that “the long existing practice of dragging a load sideways in the rail industry is absolutely crucial for the rail industry to perform.” (See Docket ID: OSHA–2015–0012–0014, p. 3.)

Therefore, OSHA is including this exemption in the final rule as proposed.

*H. Section 1926.1442(b)(5) Boom-Hoist Limiting Device*

Section 1926.1442(b)(5) of this final rule clarifies existing § 1926.1416(d)(1), which requires equipment manufactured after December 16, 1969, to have a boom-hoist limiting device. Traditionally, boom hoists wind wire rope around a revolving drum. At the other end of the wire rope is a ball, to which a hook or other device can be attached, that can be pulled up toward the tip of the boom. The boom hoists continue to wind until stopped by the operator, a limiting device, or by damaging the machine. The process is somewhat analogous to a fisherman winding line on a rod and reel: If too much winding occurs, the lure is pulled into the rod tip; more winding bends and breaks the rod or detaches the lure. The limiting device prevents similar results on boom-hoist equipped cranes and derricks by automatically stopping winding when the ball is pulled too

close to the tip of the boom. On hydraulic cylinder/piston equipped booms, the § 1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. Thus, OSHA proposed to exempt RMMs using a hydraulic piston for raising and lowering the boom from the requirement for a boom-hoist limiting device in § 1926.1416(d)(1) (83 FR at 34081).

Both commenters addressing this provision supported the exemption. (See Docket ID: OSHA–2015–0012–0011, p. 9 and OSHA–2015–0012–0014, p. 3.) One of the commenters noted that “the Sec. 1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. . . . We support this proposed section and the clarification it brings” (see Docket ID: OSHA–2015–0012–0014, p. 3).

Therefore, OSHA is including this provision in the final rule as proposed.

*I. Section 1926.1442(b)(6) Manufacturer Guidance for Modifications Covered by § 1926.1434*

Section 1926.1442(b)(6) in this final rule provides an exemption for certain railroad machines from the requirements of § 1926.1434, which requires employers to obtain and follow the equipment manufacturer’s guidance for equipment modifications. OSHA’s proposed exemption was conditioned on procedural prerequisites such as the employer obtaining approval from an RPE for equipment modifications not permitted by the manufacturer (83 FR at 34081). The AAR and the two labor organizations (BRS and BMWED) addressed the issue and supported the exemptions, while the latter comment requested that engineer approval be in writing. (See Docket ID: OSHA–2015–0012–0011, p. 7; OSHA–2015–0012–0014, p. 3.)

As discussed earlier with respect to out-of-level work, however, in 49 CFR 214.341 and 214.357 FRA has chosen to address the issue of manufacturer’s guidance and how it will allow departure from that guidance. FRA communicated to OSHA that FRA views its regulations as preempting OSHA’s jurisdiction to require compliance with manufacturer instructions and guidance. (See Docket ID: OSHA–2015–0012–0015.) Therefore, to reflect the extent of FRA’s preemption, OSHA has included this exemption in the final rule without the associated procedural prerequisites proposed in the corresponding paragraph.

*J. Section 1926.1442(b)(7) Other Manufacturer Guidance*

Section 1926.1442(b)(7) in this final rule provides an exemption for certain RMMs from the requirements of several other sections of subpart CC that require employers to follow the manufacturer’s guidance, instructions, procedures, prohibitions, limitations, or specifications. The requirements are found in §§ 1926.1404(j), (m), and (q); 1926.1417(a), (r), (u), and (aa); 1926.1433(d)(1)(i); and 1926.1441. Under the final rule, these requirements do not apply if the employer is subject to the requirements of 49 CFR part 214.

As with the exemptions from manufacturer requirements in § 1926.1442(b)(6), OSHA’s proposed exemption had also been conditioned on procedural prerequisites such as obtaining the approval of an RPE (83 FR at 34082). Again, the AAR and the two labor organizations (BRS and BMWED) provided the only comments specifically addressing the issue and the comments supported the exemptions while the latter comment requested that engineer approval be in writing. (See Docket ID: OSHA–2015–0012–0011, p. 7; OSHA–2015–0012–0014, p. 3.)

FRA’s statement that it views the regulations at 49 CFR 214.341 and 214.357 as preempting OSHA requirements to comply with manufacturer requirements is also applicable to the exemption in § 1926.1442(b)(7). (See Docket ID: OSHA–2015–0012–0015.)

Therefore, to reflect the extent of FRA’s preemption, OSHA has included this exemption in the final rule without the associated procedural prerequisites proposed in the corresponding paragraph.

**III. Final Economic Analysis and Regulatory Flexibility Analysis**

Executive Orders 12866 and 13563, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)) require OSHA to estimate the costs, assess the benefits, and analyze the impacts of certain rules that the agency promulgates. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The estimated cost savings for employers for this final rule are the difference between the full cost of the 2010 rule and the residual costs left after the exemptions of this final rule are in place, which is a savings of \$17.1 million per year at a discount rate of 3

percent.<sup>4</sup> This final rule is not economically significant within the meaning of Executive Order 12866, nor is it a major rule under the Unfunded Mandates Reform Act or Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). In addition, this rule complies with Executive Order 13563.

When it issued the final crane standard in 2010, OSHA prepared a final economic analysis to ensure compliance with the OSH Act and Executive Order 12866 (58 FR 51735) (September 30, 1993). OSHA also published a Final Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). On September 26, 2014, the agency included additional economic analysis when it published a final rule extending the employer duty to ensure operator competency and the deadline for all crane operators to become certified (79 FR 57785). Because OSHA did not have sufficient data at the time, OSHA did not include in either rulemaking a complete assessment of the economic impact on the railroad industry.

This final economic analysis (FEA) not only addresses the economic impact on the railroad industry of the revisions to the crane standard, but also completes the analysis of the impact of the entire crane standard on the railroad industry. This analysis relies on the data used for the proposed rule in the preliminary economic analysis (PEA) for this rulemaking (83 FR at 34082–87). OSHA requested public comment on the PEA but did not receive any comments challenging the validity of the economic estimates provided in the PEA.

The PEA used the same methodology applied to other industries in the 2010 economic analysis of the crane standard. In conducting the preliminary analysis, the agency relied mainly on the best available economic data provided by AAR to the agency as part of the settlement agreement. The agency provided a list of questions to AAR. To help answer the questions, AAR decided to send out a survey to its Class I freight railroad members. It then returned the results, along with other general responsive information, to OSHA. Those responses (referenced as AAR 2015), as well as some estimates from the economic analysis supporting the September 26, 2014, operator certification deadline extension final

<sup>4</sup> At a discount rate of 7 percent, the cost savings are \$18.6 million per year. Due to rounding as shown in the text versus the underlying exact spreadsheet calculations, some text calculations may vary from the exact presented totals. All dollar amounts in the text are brought forward to 2018 dollars.

rule (79 FR 57785), form the basis of the original PEA, and hence this FEA. The major changes between this FEA and the PEA are wages and prices updated to 2018 dollars as well as decreased costs due to expansion of several of the exemptions.

As noted earlier in this document, in spring 2019 (following the publication of OSHA's NPRM), FRA provided OSHA additional information clarifying that FRA intends that its regulations preempt the potential applicability of a number of the OSHA requirements addressed in OSHA's NPRM. (See Docket ID: OSHA–2015–0012–0015.) In this final rule, OSHA is amending the CFR to include these corresponding exemptions. This step of codifying exemptions was requested by AAR to remove any ambiguity regarding the application of these provisions of the crane standard to the railroad industry. In the discussion that follows, OSHA has identified the reduction in costs that result from employers not being required to comply with these provisions. For consistency with the analysis provided in the PEA, OSHA has continued to rely on the same baseline costs identified in the PEA, which makes it easier to quantify the cost reductions that result from compliance with fewer provisions of the crane standard.

One of the major impacts of the expanded exemptions is that whereas the settlement agreement had limited the exemptions to activities other than bridgework (meaning that the equipment or activities for bridgework would be subject to the general requirements in OSHA's crane standard), FRA stated that it was preempting the applicable provisions in OSHA's proposed rule without regard to whether they related to bridgework. Thus, PEA costs associated with bridgework are no longer counted as costs of this final rule.

FRA's preemption interpretation and OSHA's corresponding exemptions in this final rule relieve the railroad industry of many cost burdens related to the crane standard. OSHA estimates that the 2010 rule would have cost the railroad industry \$24.7 million annually in 2018 dollars. The residual total of the 2010 crane rule after the exemptions of this final rule is \$7.6 million in costs for the railroad industry. Thus, railroad employers will save \$17.1 million per year at a discount rate of 3 percent. At a discount rate of 7 percent, the 2010 rule would have cost the railroad industry \$26.2 million annually, has a residual total of costs of \$7.6 million, and hence has cost savings of \$18.6 million. When the agency uses a

perpetual time horizon to allow for cost comparisons under E.O. 13771, the annualized cost savings are \$4.1 million per year in 2016 dollars with 7 percent discounting.<sup>5</sup> These cost savings are conservative in that several exemptions, described below, are not estimated quantitatively (the associated costs were not estimated in the 2010 rule) but those exemptions could appreciably increase total cost savings if they could be calculated.

#### A. Scope of the Exemptions

The railroad industry is typically divided into three "classes" of railroads according to a revenue-based classification scheme developed by the Surface Transportation Board (STB).<sup>6</sup> Class I railroads are the largest railroads with the greatest amount of revenue and primarily comprise seven large freight railroads and the Amtrak passenger rail service. They operate over the vast majority of track across the country. Class II and III railroads are smaller freight railroad companies, various commuter lines, and other specialty lines that operate over much smaller sections of track or operate on track owned by the Class I railroads.

OSHA has imperfect information about the three classes of railroads. The AAR survey covered only the Class I freight railroads. AAR was also able to provide additional information it obtained from Amtrak, but due to incomplete national statistics for the railroad industry, OSHA has not been able to obtain corresponding data for Class II and Class III railroads.

Therefore, for this final rule, the agency has followed the same procedure as it did in the PEA and used indirect estimates to scale up partial data to create estimates for the industry as a whole. The U.S. Department of Transportation states that Class I freight railroads operated 94,400 miles (68%) of the 139,400 total miles in the U.S. system.<sup>7</sup> Amtrak stated that it maintains 852 miles of track (Amtrak, 2017). In combination with Class I freight track, the total Class I track estimate is therefore 95,252 (94,400 miles operated

<sup>5</sup> This perpetual cost calculation is in 2016 dollars for a horizon starting in 2020.

<sup>6</sup> See 49 CFR part 1201, General Instructions 1–1. Class I railroads are those with annual carrier operating revenues of more than \$250 million, Class II railroads are those with operating revenues between \$20 million and \$250 million, and Class III railroads have annual operating revenues of less than \$20 million.

<sup>7</sup> "The United States had almost 140,000 railroad route-miles in 2014, including about 94,400 miles owned and operated by the seven Class I freight railroads. Amtrak, local, and regional railroads operated the remaining 45,000 miles." (DOT/BTS, 2016, p. 16 (internal citation omitted)).

by Class I freight + 852 miles operated by Amtrak) out of the total U.S. track of 139,400. AAR also stated that its members operate 6,935 RMMs that might fall within the scope of OSHA's crane standard (AAR, 2015), and Amtrak stated that it operates 303 RMMs that might fall within that standard (Amtrak, 2017). Assuming that non Class-I railroads use RMMs in the same way as Class I railroads, OSHA is able to estimate the total number of potentially covered RMMs by scaling up the total number of Class I RMMs by the ratio of total track to Class I track, or 1.46 (139,400/(94,400 + 852)).<sup>8</sup> With the total number of Class I RMMs at 7,238 (6,935 freight + 303 Amtrak), the final estimate of all RMMs is 10,593 (7,238 × 1.46). To the extent that Class I railroads perform track work for other segments of the railroad industry, this markup will be an overestimate. The agency solicited comment but received none on this issue and so used the same methodology for this FEA.

Based on information provided by FRA's Office of Safety Analysis, OSHA estimates that there are a total of 775 railroads (OSHA discussion with FRA staff, September 9, 2014). AAR reported that in 2012 the total number of freight railroads, including the 7 Class I freight railroads, was 574 (AAR, 2014). The remainder of the railroads are passenger and commuter railroads, plant railroads (that do not operate on the general railroad system of transportation<sup>9</sup>), freight car manufacturers, freight car repair facilities or companies that provide specialized rail services and switching and terminal railroads. The agency assumes 2012 data continue to approximate industry conditions today.

To account for the cost savings from the final rule exemptions, the number of RMMs must be broken out into two subcategories. There is a small group of RMMs that would fit into the full exemption for flash-butt welding trucks and similar equipment under § 1926.1400(c)(18). AAR reported that its members had 22 RMMs that would fall within the exemption (AAR, 2015), while Amtrak indicated that none of its RMMs would do so (Amtrak, 2017).<sup>10</sup> Using the same ratio to account for these

exempt RMMs in Class II and III railroads, OSHA estimates that there is a total of 32 pieces of such exempt RMMs across the entire railroad industry (1.46 × 22). Therefore, OSHA estimates that 7,216 (7,238 – 22) Class I RMMs, and an industry total of 10,561 (10,593 – 32) RMMs, would fall under at least some provisions of the crane rule. Again, OSHA did not receive any comment on these estimates, which are unchanged from the PEA.

#### B. Non-Operator Base Costs of 2010 Crane Standard for Railroads

When OSHA promulgated the crane standard in 2010, the agency did not include an economic analysis of the costs imposed by that standard on the railroad industry. In order to estimate cost savings of this final rule, the agency must now estimate the costs the railroad industry would have been subject to if it had been required to comply with all requirements of the 2010 crane standard. OSHA has now estimated those costs, first in the PEA and now updated for this FEA. Table B–9 of the 2010 final rule (75 FR at 48104) shows that railroads are in the “Own but Do Not Rent” sector of the industry profile. The agency estimated the costs of the 2010 final rule by using the costs for the “Own but Do Not Rent” sector as a proxy for railroad costs, scaling these aggregate costs by the size of the railroad industry. In the PEA the agency recognized this proxy may be imperfect and solicited comment on these estimates but received none, and so has continued to use them for this FEA (83 FR at 34083).

In the PEA, OSHA noted that costs other than operator certification would have been incurred by railroad employers using equipment covered by OSHA's crane standard (*id.*). Most 2010 rule provisions other than operator certification and training are not operator specific, so the agency, as it did in the PEA, estimated the cost of the 2010 requirements by identifying the per-crane non-operator cost of the 2010 final rule and applying that cost (inflated to 2018 dollars using the GDP deflator) to the number of affected RMMs in the railroad sector.

The “Own but Do Not Rent” sector in Table B–9 (75 FR at 48104) has total operator certification costs of \$30,606,452 and overall total costs of \$62,651,984, leaving \$32,045,531 in non-certification costs (\$62,651,984 – \$30,606,452).<sup>11</sup> The

“Own but Do Not Rent” sector was listed as having 50,807 cranes and other covered equipment (Table B–11, 75 FR at 48107). Thus, excluding operator certification costs, OSHA's 2010 cost estimates for the “Own but Do Not Rent” sector amounted to \$631 per machine (\$32,045,531/50,807). Using the 1.15 GDP deflator factor for 2010–2018, this cost brought forward to 2018 dollars is \$724 (Bureau of Economic Analysis (BEA), 2018).

Based on this per-machine cost of the 2010 rule and the estimate of 10,593 total pieces of railroad equipment covered by the 2010 rule, the total annual base non-operator cost of the 2010 rule to the entire railroad industry would be \$7,673,147 (10,593 × \$724.38; 2018 dollars). The exception for flash-butt welding trucks and similar equipment removes 32 RMMs and lowers the cost in 2018 dollars to \$7,649,824 (10,561 × \$724.38), which is a savings of \$23,323.

These are the base non-operator costs only. There are two pieces of equipment specific to cranes on rails that would have a special impact on railroads absent the exemptions: Rail clamps and rail stops. These were not included in the 2010 rule base costs and are addressed next.

#### C. Rail Clamps and Rail Stops

Rail clamps are one type of equipment that would no longer be required in the railroad industry under the exemption in § 1926.1442(b)(2)(i) in this final rule. AAR told OSHA that the railroad industry does not typically use rail clamps for most operations and indicated that 5,663 additional rail clamps beyond what the Class I railroad industry has in stock would need to be purchased to comply with the existing crane rule (AAR, 2015). Further communication from AAR stated that Amtrak would need 157 additional clamps (Amtrak, 2017). These rail clamps would have imposed new up-

previous standard. Therefore, this analysis relies exclusively on operator certification costs as the costs avoided by the exemption for railroads from OSHA's operator training and certification requirements. OSHA promulgated a revision to the crane standard in 2018 that included some additional costs for evaluating operators and some additional savings from removing the requirement for multiple operator certifications for different crane capacities (see 83 FR 56198, 56236–56239 (Nov. 9, 2018)). The new exemption in § 1926.1442(b)(1) applies to all crane operator training, certification, and evaluation requirements. Thus, the exemption in this railroad rulemaking ensures that there is no economic impact on the railroad industry from the 2018 final rule.

Costs for operator certification are annualized over 5 years, reflecting the 5 year length for which a certificate is valid. All other costs are the same each year and so do not need to be annualized.

<sup>8</sup> From this point forward, this FEA refers to the ratio of total track to Class I track (1.46) as “the standard markup.”

<sup>9</sup> The general railroad system of transportation refers to “the network of standard gage track over which goods may be transported throughout the nation and passengers may travel between cities and within metropolitan and suburban areas.” 49 CFR part 209, appendix A.

<sup>10</sup> For the purposes of this analysis, OSHA has treated all flash-butt welding trucks and similar equipment as covered by the standard absent the proposed exemption.

<sup>11</sup> In the 2010 rulemaking, OSHA did not include any additional costs for operator training, other than certification exam preparation, because operator training was already required under the

front, maintenance, and replacement costs on the industry.

In the PEA, OSHA estimated a total initial cost for rail clamps of \$51,104,943, plus an additional \$4,897,557 annual cost for maintenance.<sup>12</sup> OSHA requested comment but received none and is therefore incorporating the same costs into this final economic analysis. OSHA derived these costs first by applying the standard markup of 1.46 to estimate the total railroad industry-use clamps as 8,517 ( $1.46 \times (5,663 + 157)$ ). OSHA then estimated the up-front cost for each unit. AAR's survey reported as follows: "The majority of the railroads indicated that the unit cost for a rail clamp is \$5,000–\$6,000. However, one of the railroads contacted a manufacturer and obtained a unit cost of \$10,000." (AAR, 2015 p. 5). OSHA's costs are estimated to reflect the average costs for most firms, so the agency selected the higher-end of the typical cost of \$6,000 from the AAR survey. Therefore, the total initial cost for rail clamps would have been \$51,104,943 ( $8,517 \times \$6,000$ ). Annualized over 10 years at a discount rate of 3 percent, the annualized cost would have been \$5,991,058. Annual maintenance costs per clamp are estimated at \$575 for a total annual maintenance cost of \$4,897,557 ( $8,517 \times \$575$ ).<sup>13</sup>

Railroads would have also incurred replacement costs as clamps reach the end of their useful lifespan. From the AAR 2015 survey, the number of replacement clamps needed over 10 years for Class I freight railroads would have been 4,223. OSHA did not receive an estimate for the number of replacement clamps that Amtrak or the Class II and III railroads would use, so the agency developed an estimate for additional replacement clamps based on the ratio of Class I freight railroad track to all other track. The resulting markup factor for purely Class I freight track as compared to the entire U.S. railroad industry track is 1.48 (139,400 miles of total U.S. track/94,400 miles of Class I freight track). Applying this freight markup to the total number of replacement clamps produces an estimate of 6,236 for the entire industry ( $4,223 \times 1.48$ ). If 10 percent of these clamps were replaced each year, then

with the unit cost equal to the purchase price of \$6,000, annual replacement costs would have totaled \$3,741,650 ( $6,236 \times 10\% \times \$6,000$ ).<sup>14</sup> Added together, the railroad industry will save \$14,630,265 annually by avoiding the costs for rail clamps (\$5,991,058 initial annualized cost + \$4,897,557 maintenance + \$3,741,650 replacement clamps).

Rail stops are the second type of equipment exempted by § 1926.1442(b)(2)(ii) in this final rule. In order to comply with the 2010 crane standard, AAR indicated that 11,326 additional rail stops beyond what the Class I freight railroads have in stock would need to be purchased (AAR, 2015). Amtrak indicated it would need an additional 314 stops (Amtrak, 2017). The standard (track-based) markup derived earlier in this FEA and applied to the sum of Class I rail stops and Amtrak rail stops produces an estimated 17,035 additional rail stops for the entire industry ( $1.46 \times (11,326 + 314)$ ). The unit cost of a rail stop is \$300 each (AAR, 2015); therefore, the total initial cost of rail stops would have been \$5,110,494 ( $17,035 \times \$300$ ). Annualized over 10 years at a discount rate of 3%, the annual cost would have been \$599,106. Annual maintenance costs per stop are \$30 (AAR, 2015); therefore, total maintenance cost would have been \$511,049 ( $17,035 \times \$30$ ).

OSHA also estimated annual replacement costs for these additional rail stops. The number of additional replacement stops for the Class I freight railroads needed over 10 years is 10,436 (AAR, 2015). OSHA did not receive information regarding the number of additional replacement stops required for Amtrak or the Class II and III railroads. OSHA again uses the markup of the ratio of all U.S. railroad track to Class I freight railroad track, which is 1.48. The number of additional replacement stops needed for the whole industry would have been 15,410 ( $1.48 \times 10,436$ ). If 10 percent of the replacement stops will be introduced each year then 1,541 replacement railroad stops will be required each year ( $15,410 \times 0.10$ ). The estimate of the annual unit cost for these replacement stops is the unit cost for buying a new rail stop of \$300.<sup>15</sup> Hence the total

annual cost for additional replacement rail stops is \$462,324 ( $1,541 \times \$300$ ). Added together, annual cost savings to the railroad industry of this exemption from the 2010 crane standard for railroad stops are \$1,572,479 (\$599,106 initial annualized cost + \$511,049 maintenance + \$462,324 replacement stops).

The total annual costs savings of both railroad stops and clamps in 2015 dollars is \$16,202,744 ( $\$14,630,265 + \$1,572,479$ ). In 2018 dollars, the annual cost savings for both railroad stops and clamps is \$17,067,100.<sup>16</sup>

#### D. Work Area Controls

OSHA estimates no economic impact from the exemption in § 1926.1442(b)(2)(iii) from compliance with the crane standard's work-area controls requirements. FRA already requires a number of work area controls to prevent injury to those working on or around railroad equipment, and FRA has stated its intent that the railroad industry is now fully exempted from this provision of OSHA's crane standard. OSHA noted in the PEA that even absent the preemption, OSHA believes that the railroads could comply with OSHA's requirements without incurring significant new costs. Therefore, OSHA did not identify a new cost for this requirement nor treat the final rule as resulting in any cost saving. OSHA requested comment on this approach but received none. Therefore, OSHA has maintained the same approach in this FEA.

#### E. Out-of-Level Work

The 2010 crane rule economic analysis did not estimate any cost increase due to the prohibition on out-of-level work applicable to RMMs traveling off of railroad tracks, and in the PEA for this rulemaking, OSHA did not estimate any cost savings attributable to the corresponding exemption from this requirement. OSHA requested comment but received none and therefore does not estimate

<sup>12</sup> While most costs here are the same each year, both rail clamps and stops have an initial upfront cost. The agency annualizes all initial costs over 10 years, its standard procedure. For replacement costs it also uses a 10 year horizon. All final costs presented use this 10 year horizon for annualization when needed.

<sup>13</sup> The estimate of \$575 is the midpoint of the range in the AAR survey of \$450 to \$700 ( $\$575 = (\$450 + \$700)/2$ ).

<sup>14</sup> If the total pool of working clamps is kept constant, as we assume, then the maintenance costs for the replacement clamps are already accounted for in the annual maintenance costs for the original pool.

<sup>15</sup> As in the preceding footnote, maintenance costs for these replacement stops will already be accounted for in the maintenance costs for the original pool under the assumption of a constant total pool.

<sup>16</sup> In the PEA, OSHA estimated that 94 percent of equipment requiring rail clamps and rail stops would be exempted under the proposal, but some rail clamps and rail stops would still be required for bridgework (not exempt under the proposal). OSHA accordingly reduced the cost savings by \$1,053,284 (see 83 FR 34085). The final rule, however, recognizes the FRA's preemption of all of OSHA's requirements for rail clamps and rail stops in the railroad industry, without any distinction for bridgework. Thus, in this FEA the savings attributable to rail clamps and rail stops is slightly higher than in the PEA because there are no rail clamp or rail stop costs for the railroad industry. The cost savings of \$17,067,100 in 2018 dollars is calculated from the cost savings in 2015 dollars of \$16,202,744 times the 2015–2018 GDP deflator markup of 1.053 (rounded).

any cost or cost savings in this FEA for the exemption for out-of-level work.

#### F. Dragging a Load Sideways

The 2010 crane rule economic analysis estimated no increased cost due to this provision, and OSHA has likewise included no cost saving for this exemption in this final rule. It is possible that the exemption does result in significant cost savings. AAR indicated that RMMs regularly need to drag long portions of rail sideways during the process of installing or replacing the rail, ties, or underlying roadbed. Therefore, AAR asserted that the prohibition on dragging a load sideways would force railroad employers to substantially change current practices for track installation and replacement. If such changes were feasible, they would likely incur significant cost. However, because OSHA did not previously estimate any increased costs for this provision, OSHA did not include any cost saving in the PEA. OSHA solicited comment on this approach but received none and is therefore not estimating any cost savings in this FEA, even though it recognizes that the total cost savings of this final rule may therefore be underestimated.

#### G. Boom-Hoist Limiting Device

The 2010 crane rule economic analysis estimated that such boom hoist limiting devices would generally already be in place, where needed. Therefore, OSHA did not include any new costs for this requirement in 2010. OSHA did not estimate any cost savings for this exemption in the PEA and received no comment on that decision, and in this FEA there are no resulting cost savings from this exemption.

#### H. Manufacturer Guidance for Modifications Covered by § 1926.1434

The 2010 crane rule economic analysis estimated that there would be no new costs due to this provision because it was similar enough to the previous subpart N crane standard. In the PEA, the agency did not identify any cost savings from the proposed exemption (83 FR at 34085). OSHA received no comment on that approach and therefore again does not estimate any cost savings for the exemption, even as expanded in the final rule.

#### I. Operator Certification and Assessment

Because FRA explicitly preempted OSHA's operator training and certification requirements when it issued its own operator training rules for railroads, in the PEA OSHA did not include any cost or savings related to

operator training or certification. In this final rule OSHA has expanded its exemption to encompass all of the operator qualification requirements in the crane standard, including the evaluation requirements OSHA promulgated in 2018, consistent with the PEA. None of those changes, however, impact OSHA's economic analysis in the FEA because they are based on the recognition that FRA's explicit statement preempting OSHA's operator certification and training encompassed operator evaluations.

#### J. Total Annual Cost and Savings

Finally, adding together the rail clamp/stop costs and the base non-operator costs, the total annual cost of the 2010 rule to the railroad industry would have been \$24,740,247 (\$17,067,100 + 7,673,147). The non-operator costs left after excluding the items addressed in the exemptions, from above, are \$7,649,824, a reduction of \$17,090,423 (\$24,740,247 – \$7,649,824). These calculations are at a discount rate of 3 percent, using 2018 dollars. At a discount rate of 7 percent, also using 2018 dollars, the reduction is \$18,579,485.

#### K. Economic Impacts and Feasibility

This section investigates the economic impacts of both the 2010 rule and this final rule, whether they are economically feasible for the railroad industry as a whole, and whether the agency can certify that both rules will not have a significant economic impact on a substantial number of small entities. Since the railroad industry will incur only a fraction of the full costs attributable to the 2010 crane standard, a finding that the 2010 crane rule would have no significant economic impact implies the same for this final rule.

In the PEA, OSHA preliminarily determined that the crane rule is economically feasible for the railroad industry and the agency certified that the proposed rule would not have a significant impact on a substantial number of small entities (83 FR at 34086–87). OSHA requested comment on those determinations but received none. The final rule does not include any provisions that added any costs not identified in the PEA, so the agency reaches the same conclusions with respect to the final rule. These conclusions rest on the same analysis as the PEA, which is repeated here.

OSHA applies two threshold tests to look at economic feasibility for firms overall, regardless of size: Whether the rule's costs as a percentage of revenues for a sector as a whole are below 1 percent, and whether those costs as a

percentage of profits are below 10 percent. For small entities there are also two threshold tests: Whether the costs for small entities are 1 percent of their revenues or below, and whether those costs are 5 percent or less of the small entities' profits. None of these threshold tests are hard ceilings or determinative; they are guidelines the agency uses to examine whether there are any potential economic feasibility issues that require additional study. As for the overall totals estimated above, the agency must use indirect estimates since no public firm-by-firm information exists.

OSHA relies on the Small Business Administration's (SBA) size standards to classify a company as "small." The SBA size standard for a small entity in the railroad industry is employment of 1,500 or less (SBA, 2017). The seven Class I freight railroads employ a total of 162,819 employees, or an average of 23,260 employees per firm (162,819/7) (AAR, 2014). The agency estimates that all 7 freight railroads will be above the 1,500-employee SBA size standard. Non-Class I freight railroads employ 18,445, and with 574 firms their average number of employees is 33 (18,445/574). Put together, total freight employment is 181,264 employees (162,819 + 18,445). Amtrak has more than 20,000 employees and is also well above the small entity threshold.<sup>17</sup> While there is likely to be a skew among non-Class I railroads, and some of these railroads may actually exceed the threshold for small businesses, for the purposes of this analysis the agency treats all 767 non-Class I firms (775 railroads – 8 Class I railroads) as below the SBA size standard of 1,500 employees.

According to AAR, the Class I freight railroads in 2012 had revenue of \$67.6 billion out of the total of \$71.6 billion for the entire freight industry, so the share of Class I freight revenues is 94 percent (67.6/71.6), while \$4 billion (71.6 – 67.6) are the revenues for small freight railroads (AAR, 2014). OSHA did not receive revenue estimates regarding non-freight railroads, so applying the standard freight-only markup to those totals to account for passenger rail and other included entities, OSHA estimates \$105.7 billion (\$71.6b × 1.48) and \$5.9 billion (\$4b × 1.48), respectively, for total railroad and small railroad revenue. Using the GDP deflator to convert these amounts to 2018 dollars

<sup>17</sup> While the number of Amtrak employees is not changed from the PEA, the source has been updated to reflect a 2018 publication. See Amtrak's FY 2018 Company Profile, p. 2, available at <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/Amtrak-Corporate-Profile-FY2018-0319.pdf>.

results in \$116.7 billion and \$6.5 billion in revenue, respectively.

OSHA applied AAR's report of 2012 operating income (profits) for Class I railroads to estimate the average profits of non-Class I railroads. Class I freight railroads' net income was \$11.9 billion (AAR, 2014), and assuming that the Class I net income share was the same as its operating revenue share, OSHA derives a total freight industry net income of \$12.6 billion (\$11.9b/.94) in 2012, and hence small freight railroad total net income of \$704 million (\$12.6b - \$11.9b) in 2012. OSHA did not receive income estimates regarding non-freight railroads, so applying the standard freight-only markup to those totals to account for passenger rail and other included entities, OSHA estimates \$18.6 billion (\$12.6b × 1.48) and \$1.0 billion (\$704b × 1.48), respectively, for total railroad and small railroad net income. Using the GDP deflator to convert these amounts to 2018 dollars results in \$20.4 billion and \$1.1 billion in net income, respectively.

Finally, OSHA allocates costs to the small railroads. The share of employment, rather than revenue, was judged to be a better proxy to estimate the costs of the 2010 crane rule for small railroads. From the information provided earlier, Class I freight employment is about 90 percent of total freight railroad employment (162,819/181,264). With total railroad industry costs of \$24.7 million, and, as usual, assuming the same ratio applies to non-freight railroads, total small railroad industry costs are \$2.5 million (\$24.7 million × (1 - .90)). The revenues, profits, and costs are set out in Table 1.

TABLE 1—TOTAL AND SMALL RAILROAD INDUSTRY ESTIMATED FINANCIAL STATISTICS

Description	2018 dollars
<b>Revenue:</b>	
Total Revenue .....	\$117 billion.
Small Entity Revenue ....	\$6.5 billion.
<b>Profit:</b>	
Total Profit .....	\$20.4 billion.
Small Entity Profit .....	\$1.1 billion.
<b>Cost:</b>	
Total Cost .....	\$24.7 million.
Small Entity Cost .....	\$2.5 million.

The ratio of the 2010 crane rule's costs to revenue for all railroads is 0.02 percent (\$24.7m/\$117 billion) and for small railroads is 0.04 percent (\$2.5m/\$6.5 billion). The ratio of the 2010 crane rule's costs to profits for all railroads is 0.12 percent (\$24.7m/\$20.4 billion) and for small railroads it is 0.23 percent (\$2.5m/\$1.1 billion). Both easily pass OSHA's standard threshold impacts

tests of costs being below 1 percent of revenue and 10 percent of profits (5 percent of profits for small entities).

For this final rule, from the above, the total residual costs for the railroad industry as a whole are \$7,649,824. Using the same 10 percent share for small railroads gives total costs for small railroads of \$778,428. The ratio of this final rule's costs to revenue for all railroads is 0.01 percent (\$7.6m/\$117 billion) and for small railroads is 0.01 percent (\$0.8m/\$6.5 billion). The ratio of this final rule's costs to profits for all railroads is 0.04 percent (\$7.6m/\$20.4 billion) and for small railroads it is 0.07 percent (\$0.8m/\$1.1 billion). These also easily pass OSHA's standard threshold impacts tests of costs being below 1 percent of revenue and 10 percent of profits (5 percent of profits for small entities).

This analysis at a few places has noted the possibility of some underestimation of the costs in previous analyses of the 2010 crane standard for the railroad industry, and thus cost savings attributable to this final rule. Even a doubling of costs for the railroad industry would still result in estimated impacts far below threshold limits and so would not affect feasibility findings even if all of the provisions of the 2010 rule had been applied to the railroad industry.

OSHA found that the 2010 crane standard is economically feasible for all affected industries because the "[c]osts of 0.2 percent of revenues and 4% of profits will not threaten the existence of the construction industry, affected general industry sectors, or the use of cranes in affected industry sectors," and no change in the competitive structure of those industries was expected (75 FR at 48112). The analysis here shows that the costs of the 2010 rule on railroads are negligible compared to revenues and profits. Even more so for the residual costs of this final rule. This supports both OSHA's finding that the 2010 final rule is economically feasible for all affected industries (including railroads) and a finding that the residual costs left after the exemptions in this OSHA final rule are also economically feasible.

When OSHA determined in 2010 that the crane standard would not have a significant impact on a substantial number of small entities, OSHA found that in no case would a small entity have to increase prices more than 0.18 percent or, if costs could not be passed on, absorb costs comprising more than 5.0 percent of profits (75 FR at 47913, 48115). As discussed above, as applied to small railroads, the 2010 rule would be just 0.12 percent of revenues and 0.23 percent of costs, which shows that

the 2010 final rule finding of no significant impact on a substantial number of small entities still holds true when railroads are included. The residual costs for this final rule for small railroads are even smaller, so the agency certifies that this final rule will have not have a significant impact on a substantial number of small entities.

L. Overhead Cost Adjustment

The agency notes that it did not include an overhead labor cost when it calculated the costs of the crane rule in 2010 and did not add overhead costs solely for the railroad industry in the PEA accompanying this rulemaking. OSHA did not receive any comments opposing that decision, and the agency is not including any such costs in this FEA. OSHA noted in the PEA that there is not one broadly accepted overhead rate and that the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to examine the cost elements that fit the definition of "overhead" and there are a range of overhead estimates currently used within the Federal Government. For example,<sup>18</sup> the Environmental Protection Agency has used 17 percent,<sup>19</sup> and Government contractors have been reported to use an average of 77 percent.<sup>20</sup> Some overhead costs, such as advertising and marketing, vary with output rather than with labor costs. Other overhead costs vary with the number of new employees. Rent or payroll processing costs may change little with the addition of 1 employee in a 500-employee firm, but those costs may change substantially with the addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (e.g., computers, printers, copiers) would be small and very difficult to measure with accuracy (e.g., computer use costs associated with

<sup>18</sup> For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at <https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf>.

<sup>19</sup> U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002.

<sup>20</sup> Grant Thornton LLP, 2015 Government Contractor Survey. (<https://www.grantthornton.com/-/media/content-page-files/public-sector/pdfs/surveys/2015/Gov-Contractor-Survey.ashx>).

2 hours for rule familiarization by an existing employee).

If OSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and had adopted an overhead rate of 17 percent on base wages, as was done in a sensitivity analysis in the FEA in support of OSHA's 2016 final rule on Occupational Exposure to Respirable Crystalline Silica, such a rate would have only affected the non-operator certification costs estimated from the 2010 rule. Because labor costs were only part of those costs, including this overhead adjustment would have increased the average cost per machine from \$631 to \$684, an 8 percent increase. Using this larger per-machine cost in the rest of the analysis would increase the final cost savings of this final rule from \$17.090 million to \$17.092 million at a discount rate of 3 percent, an increase of 0.01 percent. It would also have increased cost savings from \$18.579 million to \$18.581 million at a discount rate of 7 percent, also an increase of 0.01 percent. The agency presented a similar calculation in the PEA and received no comment.

#### M. Technological Feasibility

A safety standard must be technologically feasible. See *UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994). A standard is technologically feasible when the protective measures it requires already exist, when available technology can bring the protective measures into existence, or when that technology is reasonably likely to develop (see *Am. Textile Mfrs. Inst. v. OSHA*, 452 U.S. 490, 513 (1981); *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991)). All requirements of the final rule applicable to the railroad industry have now been in place since the promulgation of the crane standard in 2010, and the only feasibility issues for the railroad industry raised with OSHA were addressed through the settlement with AAR and reflected in the exemptions in this final rule. For example, AAR raised concerns that it would not be feasible for railroads to avoid dragging rails sideways, and OSHA is now exempting railroads from the prohibition on dragging loads sideways. Beyond the issues raised by AAR and addressed in the settlement, the agency is not aware of any special infeasibility issues that are unique to the railroad industry. The 2010 technological feasibility analysis is equally applicable to the railroad industry, so OSHA finds that the crane standard is technologically feasible for the railroad industry.

#### References

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- AAR, 2015. Association of American Railroads. "AAR's Response to OSHA Economic Questions," memo from AAR to OSHA, June 22, 2015. (Docket ID: OSHA-2015-0012-0005)
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#### IV. Legal Authority

The purpose of the OSH Act, 29 U.S.C. 651 *et seq.*, is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. 29 U.S.C. 654, 655(b), and 658. A safety or health standard "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when a significant risk of material harm exists in the workplace and the standard would substantially reduce or eliminate that workplace risk. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980). In the 2010 crane rulemaking, OSHA made such a determination with respect to the use of all cranes and derricks in construction, including cranes used in the railroad industry (75 FR at 47913, 47921-22).

This rule includes a number of exemptions and does not impose any new requirements on employers. Therefore, it does not require an additional significant-risk finding (see *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988)).

OSHA standards must also be economically and technologically feasible, as discussed earlier in section III.M. of this document. In that section, OSHA finds that the crane standard, as amended by this rulemaking, is both economically and technologically feasible for the railroad industry.

This final rule includes a number of exemptions and does not impose any new requirements on employers. OSHA has the authority to promulgate these exemptions because the Act authorizes the Secretary to "modify" or "revoke" any occupational safety or health standard. 29 U.S.C. 655(b). The Supreme Court has acknowledged that regulatory agencies do not establish rules of conduct to last forever, and agencies may revise their rules if supported by a reasoned analysis for the change. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). As explained earlier in this preamble, OSHA is exercising this authority as part of a settlement agreement. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the crane standard, and there is consensus between labor and management groups that the exemptions and alternatives would continue practices generally accepted as safe in the railroad industry.

#### V. Paperwork Reduction Act

##### A. Overview

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) and implementing regulations (5 CFR part 1320) require agencies to consider the impact of paperwork and other information collection burdens imposed on the public.<sup>21</sup> A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless it is approved by the Office of Management and Budget (OMB) under the PRA and displays a valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person may generally be subject to penalty for

<sup>21</sup> The PRA defines "collection of information" as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format" (44 U.S.C. 3502(3)(A)).

failing to comply with a collection of information that does not display a valid OMB Control Number. See 5 CFR 1320.5(a) and 1320.6.

#### B. Solicitation of Comments

On July 19, 2018, OSHA published a **Federal Register** proposed rule that allowed the public an opportunity to comment on the proposed Information Collection Request (ICR) containing the information collection requirements in the proposed rule, as required by 44 U.S.C. 3507. Concurrent with the proposed rule, OSHA submitted the ICR (*ICR Reference Number 201707-1218-005*) to OMB for review in accordance with 44 U.S.C. 3507(d).

On August 24, 2018, OMB issued a Notice of Action (NOA) indicating that the terms of the previous clearance for the Cranes and Derricks ICR approved under OMB Control Number 1218-0261 would remain in effect and it was withholding approval for the ICR submission associated with the NPRM. OMB requested that “[p]rior to publication of the final rule, the agency should provide a summary of any comments related to the information collection and their response, including any changes made to the ICR as a result of comments. In addition, the agency must enter the correct burden estimates.”

The proposed rule invited the public to submit comments to OMB, in addition to OSHA, on the proposed information collection requirements with regard to the following:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency’s functions, including whether the information is useful;
- The accuracy of OSHA’s estimate of the burden (time and cost) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the compliance burden on employers, for example, by using automation or other technologies for collecting and transmitting information.

OSHA received no public comments directly addressing the proposed ICR. However, OSHA did receive several comments that, while expressing support for the various proposed exemptions requiring approvals from RPEs, recommended those approvals be in writing. (See Docket ID: OSHA-2015-0012-0011, p. 7; OSHA-2015-0012-0014, p. 3.) OSHA also received a number of comments, described earlier in this preamble, in response to

provisions of the proposed rule that contained information collection requirements in the proposed exemptions (see, e.g., proposed § 1926.1442(b)(2)(i) and (iii)). For the reasons explained earlier in this preamble, OSHA did not include any of the proposed information collection in the final rule. OSHA did, however, consider the comments when it developed the revised ICR associated with the final rule. Summaries of these comments and OSHA’s responses are found above in Section III, Summary and Explanation of the Proposed Amendments to subpart CC, and in the agency’s final ICR analysis.

Concurrent with publication of this final rule, the Department of Labor submitted the final ICR, containing the full analysis and description of the burden hours and costs associated with the final rule, to OMB for approval. A copy of this ICR will be available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201906-1218-001](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201906-1218-001) on the day following publication of the final rule. OSHA will publish a separate notice in the **Federal Register** that will announce the results of OMB’s review. The agency will ensure that the OMB control number for the standard is codified in § 1926.5, which is the central section in which OSHA displays any approved collection under the Paperwork Reduction Act.

#### C. Summary of Information Collection Requirements

When OSHA published the crane standard in 2010, the agency did not clearly identify any railroad respondents to the information collection requirements in that standard. The agency is now requesting OMB approval to add railroad respondents to a number of existing information collection requirements that are subject to review by OMB under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et. seq.) and the implementing regulations (5 CFR part 1320).

The final rule does not revise the regulatory text of any existing information collection requirements in the Cranes and Derricks in Construction Standard (29 CFR part 1926, subpart CC) Information Collection (IC) previously approved by OMB. It does, however, modify the number of respondents affected by information collection requirements in the IC. This results in changes to the previous burden hour and/or cost estimates associated with the current OMB-approved information collection requirements contained in the IC.

The summary below is a brief description of the significant changes between the proposal’s information collection requirements and the final rule. As discussed earlier in the preamble, on March 19, 2019, following the publication of OSHA’s NPRM, FRA provided OSHA further information clarifying that FRA intends for its regulations to preempt most of the OSHA requirements addressed in OSHA’s NPRM (see Docket ID: OSHA-2015-0012-0015). Therefore, OSHA in this final rule expanded some of the exemptions from the proposed rule by removing conditions restricting the availability of those exemptions in response to FRA’s 2019 communication. Almost all of the changes between the proposed rule and the final rule result from this removal of conditions on the exemptions.

These differences are discussed in more specific detail in Section III, Summary and Explanation of the Amendments to subpart CC. The impact on information collection requirements is also discussed in more detail in Item 8 of the ICR. This summary does not address the provisions that are unchanged from the current, OMB-approved information collection requirements. Discussion and justification of these provisions can be found in the preamble to the final 2010 crane rule (75 FR at 48017) and also in the Supporting Statements for this final rule, as well as in the approved Information Collection. Due to the agency’s preemption determinations, none of the proposed information collection requirements that OSHA identified in the proposal (portions of proposed § 1926.1442(b)(2)(i) and (iii), (b)(3), (b)(6), (b)(6)(i)(A) and (B), (b)(7) introductory text, and (b)(7)(i)) are included in the final rule, as briefly explained below and in more detail above in Section III.

#### Rail Clamps and Work-Area Controls Exemptions

Section 1926.1442(b)(2)(i) of this final rule exempts the railroad equipment from the requirement in § 1926.1415(a)(6) for rail clamps when the manufacturer does not require them. When the manufacturer does require the clamps, the proposal would have allowed the employer to seek an exemption by obtaining an RPE’s determination that rail clamps are not necessary, which OSHA had identified as creating a collection of information. The final rule does not contain the proposed requirement for an RPE’s determination. Therefore, the final provision contains no information collection requirement.

Final § 1926.1442(b)(2)(iii) provides that the work-area controls specified by § 1926.1424(a)(2) do not apply when employers are subject to the on-track safety program requirements of 49 CFR 214.307(b), regardless of whether they have implemented the controls as required in the proposal. In the proposal, the potential for information collection could have come from the implementation of some controls. The agency does not consider this expanded exemption in this final rule to require any information collection.

#### Out-of-Level Work Restriction Exemptions

OSHA's crane standard generally prohibits out-of-level operation of cranes unless approved by the manufacturer. Proposed § 1926.1442(b)(3) would have allowed out-of-level operation for certain railroad equipment purchased after November 8, 2010, under conditions that contained information collection requirements applicable in some scenarios: Manufacturer approval or modification or approval from an RPE or a qualified person.

The final rule provision § 1926.1442(b)(3) no longer requires any conditions on the exemption for out-of-level work for RMMs. Therefore, the final provision contains no information collection requirement.

#### Manufacturer Guidance for Modifications Covered by § 1926.1434 Exemptions

Current § 1926.1434 requires employers to obtain and follow the equipment manufacturer's guidance for equipment modifications except in certain circumstances. OSHA proposed an exception to simplify how a railroad employer may have used modified equipment without involving the manufacturer but continuing to include safety assurances. According to proposed § 1926.1442(b)(6), an employer may have used modified railroad roadway maintenance equipment regardless of manufacturer guidance when approved by a qualified RPE.

The final rule provisions § 1926.1442(b)(6)(i)(A) and (B) no longer contain any requirements related to an employer's need to seek the approval of a qualified RPE. Therefore, the final provision contains no information collection requirement.

#### Other Manufacturer Guidance Exemption

Several other sections of subpart CC require employers to follow the manufacturer's guidance, instructions,

procedures, prohibitions, limitations, or specifications. The proposed exemptions in § 1926.1442(b)(7) would have allowed employers to use RMMs without regard for the manufacturer's listed restrictions if approved in writing by an RPE familiar with the equipment. The final rule provision does not contain the conditions of proposed § 1926.1442(b)(7). Therefore, the final provision contains no information collection requirement.

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(2), the following paragraphs provide information about the ICR that OSHA prepared in conjunction with this rulemaking. Through this rulemaking, OSHA is updating the ICR to include all information collections for subpart CC of 29 CFR part 1926 (OSHA's Cranes and Derricks in Construction standard), as amended by OSHA's 2018 Operator Qualification rulemaking and this rulemaking.

*Title of Collection:* Cranes and Derricks in Construction.

*OMB Control Number:* 1218-0261.

*Affected Public:* Private Sector—businesses or other for-profits.

*Estimated Number of Respondents (Railroad Industry Only):* 775 railroad industry employers.

*Estimated Number of Responses (Railroad Industry Only):* 252,714.

*Estimated Annual Time Burden Hours (Railroad Industry Only):* 40,395.

*Estimated Annual Other Costs (capital, operation and maintenance) (Railroad Industry Only):* \$260,562.

*Total Estimated Number of Respondents:* 213,400 (212,625 existing employers + 775 railroad industry employers).

*Total Estimated Number of Responses:* 3,009,167.

*Total Estimated Annual Time Burden Hours:* 429,478.

*Total Estimated Annual Other Costs (capital, operation and maintenance):* \$2,547,063.

#### VI. Federalism

OSHA reviewed the revisions to the crane standard in accordance with the Executive order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting state policy options, consult with states prior to taking any actions that would restrict state policy options, and take such actions only when clear constitutional and statutory authority exists and the problem is national in scope. Executive Order 13132 provides for preemption of state law only with the expressed consent of Congress. Federal agencies

must limit any such preemption to the extent possible.

Under Section 18 of the OSH Act, Congress expressly provides that states and U.S. territories may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards. OSHA refers to such states and territories as "State Plan States." Occupational safety and health standards developed by State Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards (29 U.S.C. 667).

OSHA previously concluded from the analysis for the 2010 final rule that promulgation of subpart CC complies with Executive Order 13132 (see 75 FR at 48128-29). The revisions in this final rule do not change that conclusion.

#### VII. State Plans

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, State Plans must either amend their standards to be identical or "at least as effective as" the new standard or amendment, or show that an existing state standard covering this area is already "at least as effective" as the new Federal standard or amendment (29 CFR 1953.5(a)). State Plan adoption must be completed within six months of the promulgation date of the final Federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than an existing standard, State Plans do not have to amend their standards, although OSHA may encourage them to do so.

The provisions in this final rule are exemptions from existing OSHA requirements and will reduce compliance burdens on employers, and as such OSHA does not view any of the provisions as more stringent than the existing standard. Therefore, State Plans are encouraged to adopt comparable amendments to their standards but are not required to do so. In addition, OSHA notes that the FRA's exercise of its authority that preempted some provisions of OSHA's cranes standard with respect to railroads may also serve to preempt similar State rules, either pursuant to a state equivalent of section 4(b)(1) of the OSH Act or as the legal consequence of general Federal preemption of state laws.

The 28 states and territories with OSHA-approved State Plans are Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New

Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming, Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands have OSHA-approved State Plans that apply to state and local government employees only.

**VIII. Unfunded Mandates Reform Act of 1995**

OSHA reviewed this final rule in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 *et seq.*) and Executive Order 13132 (64 FR 43255). OSHA determined that this rule does not add new costs because the regulatory changes are exemptions.

OSHA’s standards do not impose any duties on state and local governments except in states that elect voluntarily to adopt a State Plan approved by the agency. OSHA is not aware of any tribal governments that operate railroads using equipment that would be subject to this rulemaking, and the regulatory changes create exceptions to the rule, not new duties. Consequently, this rule does not meet the definition of a “Federal intergovernmental mandate” (see Section 421(5) of the UMRA (2 U.S.C. 658(5))).

Therefore, for the purposes of the UMRA, the agency certifies that this final rule does not mandate that state, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than \$100 million in any year.

**IX. Consultation and Coordination With Indian Tribal Governments**

OSHA reviewed this final rule in accordance with Executive Order 13175 (65 FR 67249 (November 9, 2000)) and determined that it does not have “tribal implications” as defined in that order. The final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

**List of Subjects in 29 CFR Part 1926**

Construction industry, Cranes, Derricks, Occupational safety and health, Railroad roadway work.

**Authority and Signature**

This document was prepared under the direction of Loren Sweatt, Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S.

Department of Labor, Washington, DC 20210.

The agency issues the sections under the following authorities: 29 U.S.C. 653, 655, 657; 40 U.S.C. 3704; 33 U.S.C. 941; Secretary of Labor’s Order 1–2012 (77 FR 3912 (1/25/2012)); and 29 CFR part 1911.

Signed at Washington, DC, on August 3, 2020.

**Loren Sweatt,**

*Principal Deputy Assistant Secretary of Labor for Occupational Safety and Health.*

For the reasons stated in the preamble of this final rule, OSHA is amending 29 CFR part 1926 as follows:

**PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION**

**Subpart CC—Cranes and Derricks in Construction**

■ 1. The authority citation for subpart CC of 29 CFR part 1926 continues to read as follows:

**Authority:** 40 U.S.C. 3701 *et seq.*; 29 U.S.C. 653, 655, 657; Secretary of Labor’s Order No. 5–2007 (72 FR 31159) or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

■ 2. Amend § 1926.1400 by adding paragraph (c)(18) to read as follows:

**§ 1926.1400 Scope.**

\* \* \* \* \*  
(c) \* \* \*

(18) *Flash-butt welding trucks.* Flash-butt welding trucks or other roadway maintenance machines not equipped with any hoisting device other than that used to suspend and move a welding device or workhead assembly. For purposes of this paragraph (c)(18), the terms *flash-butt welding truck* and *roadway maintenance machine* refer to railroad equipment that meets the definition of “roadway maintenance machine” in 49 CFR 214.7 and is used only for railroad track work.

\* \* \* \* \*

**§ 1926.1442 [Redesignated as § 1926.1443]**

■ 3. Redesignate § 1926.1442 as § 1926.1443.

■ 4. Add a new § 1926.1442 to read as follows:

**§ 1926.1442 Railroad roadway maintenance machines.**

(a) *General rule.* Employers using equipment covered by this subpart that meets the definition of “roadway maintenance machine,” as defined in 49 CFR 214.7, must comply with the requirements in this subpart, except as provided in paragraphs (b)(1) through (7) of this section when subject to the

authority of the Federal Railroad Administration.

(b) *Exceptions—(1) Operator certification, training, and evaluation.* The requirements in §§ 1926.1427 (Operator qualification and certification) and 1926.1430 (Training) do not apply. The qualification and training requirements contained in §§ 1926.1436(q) (Qualification and training for derricks), 1926.1440(a) (Sideboom cranes), and 1926.1441(a) (Equipment with a rated hoisting/lifting capacity of 2,000 pounds or less) do not apply.

(2) *Rail clamps, rail stops, and work-area controls.* (i) The requirement for rail clamps in § 1926.1415(a)(6) does not apply;

(ii) The requirement for rail stops in § 1926.1415(a)(6) does not apply; and

(iii) The work-area controls specified by § 1926.1424(a)(2) do not apply.

(3) *Out-of-level work.* The restrictions on out-of-level work, and the requirements for crane-level indicators and inspections of those indicators (including the requirements in §§ 1926.1402(b), 1926.1412(d)(1)(xi), and 1926.1415(a)(1)), do not apply.

(4) *Dragging a load sideways.* The prohibition in § 1926.1417(q) on dragging a load sideways does not apply.

(5) *Boom-hoist limiting device.* The requirement in § 1926.1416(d)(1) for a boom-hoist limiting device does not apply to roadway maintenance machines when the cranes use hydraulic cylinders to raise the booms.

(6) *Manufacturer guidance for modifications covered by § 1926.1434.* The requirements to follow the manufacturer’s guidance set forth in § 1926.1434 do not apply if the employer is subject to the requirements of 49 CFR part 214.

(7) *Other manufacturer guidance.* The requirements to follow the manufacturer’s guidance, instructions, procedures, prohibitions, limitations, or specifications, set forth in § 1926.1404(j), (m), or (q); § 1926.1415(a)(6); § 1926.1417(a), (r), (u), or (aa); § 1926.1433(d)(1)(i); or § 1926.1441 do not apply if the employer is subject to the requirements of 49 CFR part 214.

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