

*Unfunded Mandates Reform Act of 1995*

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*Executive Order 12866*

Although this rule is being promulgated in conjunction with the Immigration and Naturalization Service, a domestic agency, the Department of State does not consider this rule to be a "significant regulatory action" under Executive Order 12866, section (3)(f), Regulatory Planning and Review. Therefore, in accordance with the letter to the Department of State of February 4, 1994 from the Director of the Office of Management and Budget, it does not require review by the Office of Management and Budget.

*Executive Order 13132*

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

*Paperwork Reduction Act*

This rule does not impose any new reporting or record-keeping requirements under the Paperwork Reduction Act.

**List of Subjects in 22 CFR Part 42**

Aliens, Immigrants, Passports and visas.

■ For the reasons set forth in the preamble, the Department is amending the regulations at 22 CFR part 42 to read as follows:

**PART 42—[AMENDED]**

■ 1. The authority citation for part 42 is revised to read as follows:

**Authority:** 8 U.S.C. 1104; Pub. L. 107–56, sec. 421.

■ 2. Amend § 42.32(d) by adding a new paragraph (9) to read as follows:

**§ 42.32 Employment-based preference immigrants.**

\* \* \* \* \*

(d) \* \* \*

(9) Certain Victims of the September 11, 2001 terrorist attacks. (i) Entitlement to status. An alien shall be classifiable as a special immigrant under INA 203(b)(4) as specified in section 421 of Public Law 107–56, if:

(A) The consular officer has received a petition approved by the INS to accord such classification, or official notification of such an approval, and the consular officer is satisfied from the evidence presented that the alien is entitled to that classification; or

(B) The alien is the spouse or child of an alien so classified in paragraph (d)(9)(i) of this section and is accompanying or following to join the principal alien.

(ii) *Ineligibility exemption.* An alien classified under paragraph (d)(9)(i) of this section shall not be subject to the provisions of INA 212(a)(4).

(iii) *Priority date.* Aliens entitled to status under paragraph (d)(9)(i) of this section shall be assigned a priority date as of the date the petition was filed under INA 204 for classification under section INA 203(b)(4) and visas shall be issued in the chronological order of application submission. However, in the event that the annual limit for immigrants under INA 203 is reached, the alien may retain the earlier priority date of the petition that was revoked.

\* \* \* \* \*

Dated: January 3, 2003.

**Maura Harty,**

*Assistant Secretary for Consular Affairs,  
Department of State.*

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**DEPARTMENT OF TRANSPORTATION****Federal Highway Administration****23 CFR Parts 140 and 646**

[FHWA Docket No. FHWA–97–2681]

FHWA RIN 2125–AD86

**Railroad-Highway Projects**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Final rule.

**SUMMARY:** The FHWA adopts as final an interim final rule that amends the regulation on railroad-highway projects and reimbursement for railroad work on Federal-aid highway projects. The purpose of adopting the interim final rule as final is to reflect the statutory changes brought about by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) and to provide State transportation departments with clarification and more flexibility in implementing current law.

**EFFECTIVE DATE:** June 9, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. Rudolph Umbs, Office of Safety (HSA–1), (202) 366–2177, or Mr. Raymond Cuprill, Office of the Chief Counsel (HCC–30), (202) 366–0791. Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:****Electronic Access**

Internet users can access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a computer, modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may also reach the Office of the Federal Register's home page at: <http://www.archives.gov> and the Government Printing Office's web page at: <http://www.access.gpo.gov/nara>.

**Background**

The FHWA published an interim final rule on parts 140 and 646, on August 27, 1997, at 62 FR 45326. Interested persons were invited to submit comments to FHWA Docket No. FHWA–97–2681. The interim final rule amended the

regulation on railroad/highway projects and reimbursement for railroad work on Federal-aid highway projects. The changes were made to conform these regulations to the changes brought about by the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) (Pub. L. 102–240, 105 Stat. 1914). Additionally, the changes were to provide State transportation departments with clarification and more flexibility in implementing the current law. Other changes required railroads to submit final billings within one year following completion of the railroad work; remove the requirement of a State's certification that work is complete; remove the "G" Funds terminology; and increase the ceiling for lump sum agreements from \$25,000 to \$100,000. This interim final rule has been in effect since August 27, 1997. To date, the FHWA received five comments to the docket. The last comment was received in October 1997. Since the interim final rule has been in effect in 1997, the FHWA has determined that the regulation is working effectively and efficiently and without significant burden to the State transportation departments and railroad companies. Consequently, we are adopting the interim final rule as final without any changes.

#### Summary of Comments

The FHWA received five comments to the docket. The FHWA received comments from Ronald J. Ornee, representing the County of Los Angeles Department of Public Works; Stephanie D. Roth, representing the Railway Progress Institute (now known as the Railway Supply Institute, effective January 1, 2003); Dwight M. Bower, representing the State of Idaho Transportation Department; Michael J. Rush, representing the Association of American Railroads; and Tom Zeinz, representing the Illinois Central Railroad (which merged with the Canadian National Railway Company on July 1, 1999).

The County of Los Angeles Department of Public Works comments support the FHWA's revisions as stated in the interim final rule.

The Railway Progress Institute (RPI) submitted two recommendations. The RPI recommended that the lump sum payment arrangement for reimbursement for railroad adjustments as stated in § 646.216(d)(3)(ii) should be increased from \$100,000 to \$150,000. The RPI believes that this should be increased to "reflect the rise in the number of gated crossings, which are more costly to maintain." The RPI also recommended that the Appendix Subpart of Part 646 should be revised to

use foot-pound units instead of metric in order to eliminate the possibility of miscalculations, which could affect the safety of grade crossings.

The State of Idaho Transportation Department (IDDOT) submitted three recommendations. The IDDOT recommends changing § 646.216(d)(3) to eliminate the phrase "with its own forces," to clarify the flexibility of the railroads' use of subcontracted work performed on behalf of the railroads. The second recommendation is to change § 646.216(3)(d)(i) to include the phrase "and other eligible work," to allow other specialized services provided to be included in State-railroad agreements. The third recommendation was to eliminate § 646.216(d)(3)(ii), due to its concern that services provided may exceed \$100,000 (e.g., the average cost for installing warning devices and surfacing for a single-track at-grade crossing was \$140,000 and \$90,000, respectively, at the time of the docket comment submittal).

The Association of American Railroads (AAR) submitted several recommendations. The AAR recommended changing § 140.922(a) to include text regarding a time frame for payments received by the railroad company, based on the date the State transportation department received the progress billings.

The AAR recommended adding text at the end of § 140.922(b) that stipulates a time frame of the acceptance of billable work. The AAR recommended that this text include (1) a time frame for the State transportation department report project inspection results to the FHWA and railroad company; (2) when a project will be considered complete and accepted if no comments are received; and (3) a time frame when the railroad company shall receive payment from the State transportation agency.

#### The AAR's recommendation

Finally, the AAR recommended changes to § 140.922(c) to reduce the audit period from three years from the date final payment is received by the railroad, to one year after the date the final bill was received by the State transportation department. The AAR recommends that additional text is included stating after the one-year period, the final bill shall be accepted and approved, except as agreed to by the railroad and the State transportation department. The AAR provided these recommendations as a means to assist the FHWA with its efforts to assist State transportation departments in their efforts to obtain timely final billings from the railroads.

The Illinois Central Railroad (ICRR) submitted four recommendations that pertained to § 140.922(b). The ICRR recommended that the FHWA include text regarding inspections of the completed work by the State transportation department and the amount of time that should be allotted for the inspection. Second, the ICRR recommended is to include text that would require State transportation department's payment to the railroads to be made within 45 days, otherwise the railroad shall be entitled to receive interest at prevailing rates from the State transportation department on any outstanding amounts. Third, the ICRR recommended to include text that the State transportation departments shall have one year to conduct a final audit of the railroad's final billing before the said billing is considered accepted and final payment is made in full. Finally, the ICRR recommended including text that requires the State transportation department to conduct an audit and base FHWA's reimbursement to the State transportation department on the audited amount. The ICRR believes that these recommendations would facilitate State transportation departments to expedite its project closure and payment process.

#### Conclusion

This interim final rule has been in effect since August 27, 1997. The FHWA has not received any additional comments to this interim final rule since October 27, 1997. The transportation community has been conforming to the interim final rule for almost six years, and the FHWA believes that the commerce practices between State transportation departments and railroad companies has benefited from the this rule. The interim final rule was part of FHWA's effort to implement the President's Regulatory Invention Initiative and Executive Order 12866 (Regulatory Planning and Review; 58 FR 51735) by allowing administrative and fiscal flexibility for both the State and railroads as a means to implement current law. The interim final rule has provided the necessary flexibility to States and railroads since 1997.

For the reasons stated above the FHWA adopts as a final rule the interim final rule published on August 27, 1997, at 62 FR 45326.

#### Rulemaking Analyses and Notices

*Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures*

The FHWA has determined that this action is not a significant regulatory

action within the meaning of Executive Order 12866 or the U.S. Department of Transportation regulatory policies and procedures. The economic impact of this rule will be minimal. This action merely adopts as final the interim final rule that has been in effect since August 27, 1997.

This final rule will not adversely affect, in a material way, any sector of the economy. In addition, these changes will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs.

#### *Regulatory Flexibility Act*

In compliance with the Regulatory Flexibility Act (Pub. L. 96–354, 5 U.S.C. 601–612), the FHWA has evaluated the effects of this final rule on small entities and has determined it will not have a significant economic impact on a substantial number of small entities. This final rule adopts as final the interim final rule that clarifies, streamlines, and simplifies Federal-aid highway-railway crossing program policies for modification and management. This rule reduces the administrative burden on the States associated with the Federal-aid highway-railway crossing program actions.

#### *Unfunded Mandates Reform Act of 1995*

This rule does not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year.

Additionally, the definition of “Federal mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal government. The railroad-highway program permits this type of flexibility to the States.

#### *Executive Order 13132 (Federalism)*

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, and the FHWA has determined that this action does not have sufficient federalism implications to warrant the preparation of a Federalism assessment. The FHWA also determined that this action does not preempt any State law or State regulation or affect the States’

ability to discharge traditional State governmental functions.

By adopting as final the interim final rule, this rule assists the States by providing more flexibility and clarification in implementing railroad-highway regulations.

#### *Executive Order 12372 (Intergovernmental Review)*

Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.

#### *Paperwork Reduction Act*

This action does not contain a collection of information requirement under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3520.

#### *National Environmental Policy Act*

The FHWA has analyzed this action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347) and has determined that this action will not have any effect on the quality of environment.

#### *Executive Order 13175 (Tribal Consultation)*

The FHWA has analyzed this action under Executive Order 13175, dated November 6, 2000. This action will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. Therefore, a tribal summary impact statement is not required.

#### *Executive Order 13211 (Energy Effects)*

We have analyzed this action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order, because it is not a significant rule and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

#### *Executive Order 12988 (Civil Justice Reform)*

This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

#### *Executive Order 13045 (Protection of Children)*

We have analyzed this action under Executive Order 13045, protection of Children from Environmental Health Risks and Safety Risks. This action is not an economically significant rule and does not concern an environmental risk to health or safety that may disproportionately affect children.

#### *Executive Order 12630 (Taking of Private Property)*

This action will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Government Actions and Interference with Constitutionally Protected Property Rights.

#### *Regulation Identification Number*

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### **List of Subjects**

##### *23 CFR Part 140*

Bonds, Claims, Grant programs-transportation, Highways and roads, Railroads.

##### *23 CFR Part 646*

Grant programs-transportation, Highways and roads, Insurance, Railroads.

In consideration of the foregoing, and under the authority of 23 U.S.C. 109(e), 120(c), 130, 133(d)(1), and 315; and 49 CFR 1.48(b), the interim final rule amending 23 CFR parts 140 and 646, that was published at 62 FR 45326 on August 27, 1997, is adopted as a final rule without change.

Issued on: May 1, 2003.

**Mary E. Peters,**

*Federal Highway Administrator.*

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