

| Flooding source(s) | Location of referenced elevation | * Elevation in feet (NGVD)<br>+ Elevation in feet (NAVD)<br># Depth in feet above ground<br>^ Elevation in meters (MSL) |          | Communities affected |
|--------------------|----------------------------------|-------------------------------------------------------------------------------------------------------------------------|----------|----------------------|
|                    |                                  | Effective                                                                                                               | Modified |                      |

**Town of East Greenwich**

Maps are available for inspection at the Department of Public Works, 111 Pierce Street, East Greenwich, RI 02818.

**Van Zandt County, Texas, and Incorporated Areas**

|                  |                                                     |      |      |                                           |
|------------------|-----------------------------------------------------|------|------|-------------------------------------------|
| Mill Creek ..... | Approximately 400 feet upstream of State Highway 64 | None | +457 | Unincorporated Areas of Van Zandt County. |
|                  | Just downstream of State Highway 243 .....          | None | +467 |                                           |

\* National Geodetic Vertical Datum.

+ North American Vertical Datum.

# Depth in feet above ground.

^ Mean Sea Level, rounded to the nearest 0.1 meter.

\*\* BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Kevin C. Long, Acting Chief, Engineering Management Branch, Mitigation Directorate, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

**ADDRESSES****Unincorporated Areas of Van Zandt County**

Maps are available for inspection at 121 East Dallas Street, Room 204, Canton, TX 75103.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

**Deborah S. Ingram,**

*Acting Deputy Assistant Administrator for Mitigation, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. E9-28314 Filed 11-24-09; 8:45 am]

**BILLING CODE 9110-12-P**

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 214**

[Docket No. FRA-2008-0059, Notice No. 3]

**RIN 2130-AB96**

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

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** FRA proposes to amend its regulations on railroad workplace safety to reduce further the risk of serious injury or death to roadway workers. In particular, FRA proposes to require that railroads adopt specified on-track safety procedures to protect certain roadway work groups from the movement of

trains or other on-track equipment on "adjacent controlled track." FRA proposes to define "adjacent controlled track" to mean "a controlled track whose track center is spaced 19 feet or less from the track center of the occupied track." These on-track safety procedures would be required for each adjacent controlled track when a roadway work group with at least one of the roadway workers on the ground is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. FRA also proposes to require that railroads, contractors to railroads, and roadway workers comply with these procedures. The NPRM issued as "Notice No. 1" under this same docket number and published July 17, 2008 (73 FR 41214), was withdrawn by "Notice No. 2" published August 13, 2008 (73 FR 47124).

**DATES:** (1) Written comments must be received no later than January 25, 2010. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) FRA anticipates being able to resolve this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to December 28, 2009, one will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested

parties of the date, time, and location of any such hearing.

**ADDRESSES: Comments:** You may submit comments on this NPRM, identified by Docket No. FRA-2008-0059, Notice No. 3, by any of the following methods:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- **Mail:** Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, M-33, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery or Courier:** Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, M-33, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- **Fax:** 202-493-2251.

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

heading, below, in Section VIII.I. of this preamble.

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

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

#### SUPPLEMENTARY INFORMATION:

#### Table of Contents for Supplementary Information

- I. Impetus for Rulemaking
- II. Overview of the Existing Roadway Worker Protection (RWP) Rule
  - A. Applicability and Basic Definitions
  - B. Authorized Methods of Establishing On-Track Safety
  - C. Existing On-Track Safety Requirements for Roadway Work Groups With Respect to Adjacent Tracks
- III. Notice of Safety Advisory 2004–01
- IV. Recent Roadway Worker Accidents (1997–2008)
- V. Joint Petition to FRA for an Emergency Order
- VI. Current Rulemaking To Revise the RWP Rule
  - A. Overview of the RSAC [Railroad Safety Advisory Committee]
  - B. Proceedings in This Rulemaking to Date Generally
  - C. Proceedings concerning On-Track Safety Procedures for Adjacent Tracks, Including Response to Comments on the July 17, 2008 NPRM
    - 1. Joint Comments of BMWED and BRS
    - 2. Draft Comments of AAR
    - 3. Comments of Additional Interested Parties
- VII. Section-by-Section Analysis
- VIII. Regulatory Impact and Notices
  - A. Executive Order 12866 and DOT Regulatory Policies and Procedures
  - B. Regulatory Flexibility Act and Executive Order 13272
  - C. Paperwork Reduction Act
  - D. Federalism Implications
  - E. Environmental Impact
  - F. Unfunded Mandates Reform Act of 1995
  - G. Energy Impact
  - H. Trade Impact
  - I. Privacy Act

## I. Impetus for Rulemaking

As will be detailed in this NPRM, the recent increase in roadway worker fatalities that have occurred on an adjacent track (*i.e.*, under the existing rule, any track within 25 feet of the centerline of the track to which the roadway work group was assigned to perform one or more roadway worker duties) has caused considerable concern at FRA and throughout the industry, even prompting the filing of a joint petition for emergency order under 49 U.S.C. 20104 on April 11, 2008. *See* 49 CFR part 214, subpart C (“Roadway Worker Protection Rule” or “RWP Rule”). FRA had issued a notice of safety advisory to address this same issue in May of 2004; however, it appears that the salutary effects of the safety advisory, which produced a period of 16 months with no fatalities on an adjacent track, were not long-lasting, as four fatalities have since occurred on an adjacent track where a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. These proposed amendments to the Roadway Worker Protection Rule are based on the consensus language developed through the Roadway Worker Protection (RWP) Working Group of FRA’s Railroad Safety Advisory Committee (RSAC), which is comprised of various representatives of the groups that are affected by this rule (including railroad management, railroad labor organizations, and contractors). Because incidents involving adjacent controlled tracks appear to present clear evidence of significant risk that is not effectively addressed by the current regulation, FRA has concluded that moving forward with this proposal in advance of the other proposals contained in the RSAC consensus<sup>1</sup> is necessary and appropriate.

## II. Overview of the Existing RWP Rule

### A. Applicability and Basic Definitions

The RWP Rule requires each railroad that operates rolling equipment on track that is part of the general railroad

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

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

### B. Authorized Methods of Establishing On-Track Safety

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

Train approach warning is another common method of establishing on-

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

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

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

Section 214.335(c) of the RWP Rule currently requires that roadway work groups engaged in “large-scale maintenance or construction” be provided with on-track safety in the form of “train approach warning” for train or equipment movements on adjacent tracks if the adjacent tracks are not already included within the working limits. Under the current definition of “adjacent tracks,” on-track safety as discussed above is required for any tracks with track centers spaced less than 25 feet apart from the track center of the track to which a roadway work group is assigned to perform large-scale maintenance or construction. *See* §§ 214.7, 214.335(c). The track to which the roadway work group is assigned to perform the large-scale maintenance or construction is commonly referred to as the “occupied track.” Thus, in triple-main track territory, if a roadway work group is occupying the middle track (e.g., Main Track No. 2) in order to perform large-scale maintenance or

construction, and the track centers of the tracks on either side of the occupied track are within 25 feet of the track center of the occupied track, then on-track safety is required to be established on both adjacent tracks (e.g., Main Track Nos. 1 and 3). In some yards or territories, where track centers may be spaced only 12 feet apart, an occupied track (e.g., Yard Track No. 3) may have up to four adjacent tracks (e.g., Yard Track Nos. 1, 2, 4, and 5). In such cases, the current rule requires on-track safety to be established on all four adjacent tracks, in addition, of course, to the on-track safety required for the occupied track itself. *See* §§ 214.335(c) and 214.337(a).

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

### **III. Notice of Safety Advisory 2004–01**

After the occurrence of five roadway worker fatalities in one calendar year (2003), including one on an adjacent track, FRA responded on April 27, 2004, by issuing Notice of Safety Advisory 2004–01, which was later published in

the **Federal Register** on May 3, 2004. *See* 69 FR 24220. FRA issued this safety advisory to recommend certain safety practices, to review existing requirements for the protection of roadway workers from traffic on adjacent tracks, and to heighten awareness to prevent roadway workers from inadvertently fouling a track when on-track safety is not provided. *See id.*

The safety advisory explained that the requirements of the RWP Rule, including the requirement to provide adjacent track on-track safety for large-scale maintenance or construction in § 214.335(c), are only minimum standards. The advisory emphasized that railroads and railroad contractors are free to prescribe additional or more-stringent standards consistent with the rule. *See id.* at 24222 and § 214.301(b).

FRA recommended that railroads and contractors to railroads develop and implement basic risk assessment procedures for use by roadway workers to determine the likelihood that a roadway worker or equipment would foul an adjacent track prior to initiating work activities, regardless of whether those activities were “large-scale” or “small-scale.” The advisory provided examples of relevant factors to consider in making such an assessment. These factors included whether the work could be conducted by individuals positioned between the rails of a track on which on-track safety has been established, as opposed to being on the field side of such a track toward an adjacent track; whether there was a structure between the tracks to prevent intrusion (such as a fence between the tracks at a passenger train station and the tall beam of a through-plate girder bridge); the track-center distance, to ensure that the adjacent track would not be fouled if a worker were to inadvertently trip and fall; the nature of the work (inspection or repair); the sight distances; and the speed of trains on the adjacent track. *See* 69 FR 24222. FRA further noted that, upon completion of an on-site risk assessment, the on-track safety briefing required by § 214.315(a) would be the ideal instrument to implement preventive measures concerning adjacent tracks. *See id.*

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

- Use of working limits for activities where equipment could foul adjacent track (whether large-scale or small-scale activities);
- Use rotation stops to mitigate the dangers associated with on-track

equipment and trains passing on adjacent tracks;

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

#### IV. Recent Roadway Worker Accidents (1997–2008)

In the twelve years since the RWP Rule went into effect on January 15, 1997, there have been nine roadway worker fatalities on an adjacent track. Seven of those fatalities have occurred on a controlled track that was adjacent to the track on which a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment. FRA notes that there has been only one adjacent-track fatality where a roadway work group had been engaged in a common task with a lone hi-rail vehicle, defined in § 214.7 as “a roadway maintenance machine that is manufactured to meet Federal Motor Vehicle Safety Standards and is equipped with retractable flanged wheels so that the vehicle may travel over the highway or on railroad tracks.”<sup>3</sup> In addition, there have been no adjacent-track fatalities where a roadway work group had been engaged in a common task with a catenary maintenance tower car on the occupied track. This is likely because the duties normally performed by an employee operating a hi-rail or a catenary

maintenance tower car tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine. Given the above, FRA proposes that adjacent-track on-track safety not be required for roadway work groups engaged in a common task with a hi-rail or a catenary maintenance tower car, as discussed in the section-by-section analysis of paragraphs (b)(2) and (b)(3), respectively, in new proposed § 214.336.

Of the seven fatalities that occurred under the circumstances described above and which this rule proposes to address, three occurred during the period after the effective date of the rule and before the publication of the safety advisory on May 3, 2004, and four have occurred since that period. In the four-year period prior to May of 2004 (May 1, 2000–April 30, 2004), there has been one adjacent-track fatality known to have occurred under such circumstances, for a rate of .25 per year. In the four-year period since (May 1, 2004–April 30, 2008), there have been four adjacent-track fatalities, for a rate of one per year, which is four times the rate of the previous four-year period. While FRA recognizes that even one death can make rates change dramatically when the total number of deaths is small, the increase in the rate of these deaths despite the safety advisory leads FRA to conclude that regulatory action is needed to avert an escalating number of deaths. Moreover, given the extensive participation in developing these consensus regulatory provisions by representatives of all of the key interests involved in this issue, it is contrary to the public interest to wait for all of the other issues in the larger RWP rulemaking to be resolved or to engage in lengthy periods for notice and public comment before acting to prevent more deaths.

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

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

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

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

- *March 27, 2008:* A surfacing gang was working on double-main track territory. The surfacing gang foreman was standing in the foul of the adjacent track while his surfacing crew worked on the number two main track (the occupied track). A train operating on the adjacent track struck the foreman. No on-track safety was in effect on the adjacent track involved at the time of the incident. The track centers were spaced approximately 14 feet, 7 inches apart, and the maximum authorized speed on the adjacent track was 70 mph. The foreman was the only roadway worker on the ground at the time of the incident.

While the above discussion focuses on those fatalities that have occurred on an adjacent track where a roadway work group, with at least one of the roadway workers on the ground, was engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track, it is important to discuss some of the common circumstances in all nine of the fatalities that have occurred on an

<sup>3</sup> In that case, the roadway workers were under the impression that adjacent-track on-track safety was in effect, but it was not, due to a miscommunication.

adjacent track since the rule went into effect, as these circumstances were considered by FRA in its decision to issue this NPRM. The first common circumstance is the type of track. All nine of the fatalities occurred on "controlled" track, rather than "non-controlled" track. This was taken into consideration in writing FRA's proposed definition of "adjacent controlled track," which would be included in proposed new § 214.336(a)(3) and would be limited to controlled tracks whose track centers are spaced 19 feet or less from the track center of the occupied track. The term would only be applicable to § 214.336 and would not replace the broader term "adjacent tracks," which is defined in § 214.7.

Second, all nine of the fatalities occurred on an adjacent track that was quite closely-spaced to the track that the roadway work group was occupying. Six of the adjacent tracks had track centers that were spaced approximately 14 feet or less from the respective track centers of the tracks that the roadway work groups were occupying, and all nine of the adjacent tracks were spaced 15 feet or less from the track centers of the respective occupied tracks. This common circumstance was also taken into consideration in FRA's proposed definition of "adjacent controlled track," which would have a narrower applicability for purposes of proposed § 214.336 than the term "adjacent tracks," because it would not include tracks with track centers that were spaced more than 19 feet (but less than 25 feet) away from the track center of the occupied track.

The third common circumstance of the nine fatalities on adjacent track is the time of year. Four of the fatalities occurred during the first quarter (January–March), none of the fatalities occurred in the second and third quarters of the year (April–June and July–September, respectively), and the other five fatalities occurred during the fourth quarter (October–December). As noted earlier in Section I., above, because incidents involving adjacent controlled tracks appear to present clear evidence of significant risk that is not effectively addressed by the current regulation, FRA has concluded that moving forward with this proposal in advance of the other proposals contained in the RSAC consensus is necessary and appropriate in order to reduce the risk of additional fatalities on adjacent track that are likely to occur late this year or early next year in the absence of further regulatory action.

## V. Joint Petition to FRA for an Emergency Order

On April 11, 2008, the Brotherhood of Maintenance of Way Employees Division (BMWED) and the Brotherhood of Railroad Signalmen (BRS) filed a joint petition requesting that FRA issue an emergency order under 49 U.S.C. 20104(a) requiring adjacent-track protection for roadway work groups. The petition noted that similar requests, which were filed on October 7, 2005, November 7, 2003, and December 21, 1999, were denied by FRA. The petitioners expressed their belief that, under the existing provisions of the rule, roadway workers will continue to suffer preventable serious injuries and death. The petitioners asserted that FRA should require railroads and their contractors to establish on-track safety on adjacent tracks ("adjacent-track on-track safety") for a wider range of work activities. In FRA's January 5, 2006 denial of the October 2005 petition, FRA noted that the RSAC working group tasked to review and revise the RWP Rule ("RWP Working Group") was "committed to presenting comprehensive draft language \* \* \* that would more closely tailor the solution to the problem." And while the RWP Working Group did in fact draft this language, and both the Working Group and the full RSAC were able to reach consensus on such language, BMWED and BRS were concerned that the language, which has not been published as an NPRM, would not become a final rule for a considerable period of time, leaving the possibility for further preventable fatalities. BMWED and BRS urged FRA to issue an emergency order that would adopt the adjacent-track consensus language of the RWP RSAC.

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

As an emergency order does not require prior notice to the affected party or an opportunity to be heard prior to issuance of the order, Congress declared that such an order may be invoked only where an unsafe condition or practice "causes an emergency situation involving a hazard of death or personal injury." 49 U.S.C. 20104. By letter dated

June 4, 2008, FRA denied the joint petition for emergency order, noting that the increased rate of adjacent-track-related fatalities cited in the joint petition makes a strong case for regulatory action, but does not constitute an emergency situation "that has developed suddenly and unexpectedly in which the danger is immediate." To address this serious safety concern, FRA decided to issue a separate NPRM with an abbreviated comment period, as further discussed in Section VI.C., below.

## VI. Current Rulemaking To Revise the RWP Rule

### A. Overview of the RSAC

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

- American Association of Private Railroad Car Owners (AARPCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- ATDA;
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- BMWED;
- BRS;
- Chlorine Institute;
- Federal Transit Administration (FTA)\*;
- Fertilizer Institute;
- High Speed Ground Transportation Association (HSGTA);
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;
- International Brotherhood of Electrical Workers (IBEW);
- Labor Council for Latin American Advancement\*;
- League of Railway Industry Women\*;
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women\*;

- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRC);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB)\*;
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte\*;
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada\*;
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);
- Transportation Security Administration (TSA)\*; and
- United Transportation Union (UTU).

\* Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The individual task force then provides that information to the working group for consideration. If a working group comes to unanimous consensus on recommendations for action, the package is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working

group or RSAC is unable to reach consensus on a recommendation for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

#### *B. Proceedings in This Rulemaking to Date Generally*

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

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

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

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

#### *C. Proceedings Concerning On-Track Safety Procedures for Adjacent Tracks, Including Response to Comments on the July 17, 2008 NPRM*

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

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

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

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

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

occupied track during such adjacent track movement.”

For paragraph (d), the Working Group recommended “Equipment may not foul an adjacent controlled track unless protected by working limits and there are no movements authorized through the working limits by the roadway worker in charge.”

And for paragraph (e), the Working Group recommended “The mandatory provisions for adjacent controlled track protection under this subpart are not applicable to work activities involving—

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

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

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

Upon reviewing the joint petition of the BRS and BMWED for an emergency order, the consensus language of the Working Group quoted above, and the relevant accident data concerning roadway workers fouling adjacent tracks, FRA decided to issue a separate NPRM<sup>4</sup> to lower the safety risk associated with roadway workers fouling adjacent tracks. Although FRA’s safety advisory may have had an initial effect and have raised awareness enough to help keep the number of all categories of roadway worker fatalities in 2004 and through almost six months in 2005 at zero, the effect was not sustained enough to combat the rise of roadway worker fatality incidents since late June of 2005, when the first roadway worker fatality occurred after the issuance of the safety advisory, or since October of

2005, when the first adjacent track roadway worker fatality occurred.

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

FRA published an NPRM addressing adjacent-track on-track safety on July 17, 2008 (73 FR 41214), but formally withdrew the notice on August 13, 2008 (73 FR 47124). The withdrawal stated, in part—“[i]n crafting the NPRM, FRA presented the RSAC consensus language in the preamble verbatim and transparently explained its rationale for all changes it made to the consensus language. As this was an NPRM, FRA sought comment on the entire proposal, including those portions that FRA sought to clarify.

“FRA recognizes that inadvertent errors do sometimes occur in formulating a proposal and expects that interested parties would provide comments to both FRA and all other interested parties through the established comment process detailed in the NPRM. Given the alleged discrepancies between the consensus language and the proposed rule, the need to clarify the essential issues and move toward resolution of the safety concern at hand, and the ex parte communications regarding this proposed rule, FRA has decided to withdraw this rulemaking and will take such further regulatory steps as safety requires.”

*Id.* Due to the inherent dangers of roadway workers working in multiple-track territories among machines, FRA has decided to revisit the issues and language of the withdrawn NPRM in light of the comments received, formal and informal, and issue this revised NPRM. In accordance with the

Department of Transportation’s Policy (Order No. 2100.2 (1970)), all communications (including emails) between FRA employees and other parties since the publication of the July 17, 2008 NPRM and prior to its withdrawal were reduced to writing and placed in the public docket. While some comments were marked “draft” or received after the withdrawal of the NPRM, FRA has decided to post them to the docket, since they were still taken into consideration in drafting this NPRM. A summary of the comments received follows, below.

#### 1. Joint Comments of BMWED and BRS

BMWED and BRS filed a joint request to extend the comment period to 60 days on July 28, 2008, as well as preliminary joint comments detailing their concerns with the substance of FRA’s initial NPRM on August 10, 2008 (just after FRA issued the withdrawal notice, but prior to the publication of the notice in the **Federal Register**). FRA has considered all of the comments submitted by BMWED and BRS, formal and informal, and recognizes areas where the initial proposed rule text could be adjusted to address their concerns with FRA’s initial proposal, while still addressing FRA’s concerns with the consensus language that was recommended to FRA by RSAC. While BMWED also commented on the rule through ex parte communications, as posted to the docket, FRA believes that the joint initial comments address these same concerns, as well as those summarized in the joint request to extend the comment period, in one document; thus, FRA will be referencing the comments made in the preliminary joint comments, rather than those made through ex parte communications and the joint request to extend the comment period.

The first issue raised in the joint comments was the proposed removal of the definition of the term “Adjacent tracks” in § 214.7. BMWED and BRS stated that the removal of the definition in § 214.7 would remove tens of thousands of miles of non-controlled track from the scope of the regulation. FRA disagrees with this interpretation of the NPRM, since the proposed removal of the definition is not what would have removed non-controlled track from the scope of adjacent-track on-track safety; rather, it was the substantive provision itself that the RSAC recommended and that formed the basis for FRA’s proposal that would have removed it. Since the term was no longer being used anywhere else in part 214, it would have caused confusion to have a definition that included non-

<sup>4</sup> As noted in Section I. of this document, the provisions related to adjacent-controlled-track on-track safety were originally intended to be published as part of a larger NPRM concerning part 214, but have been proposed here as a separate NPRM to expedite the effective date of such provisions.

controlled tracks within 25 feet of the occupied track and controlled tracks greater than 19 feet, but less than 25 feet from the occupied track, without any relevance to a substantive provision. BMWED and BRS believe that leaving the definition in would give the roadway worker in charge the necessary discretion to establish on-track safety on an adjacent track, even when on-track safety is not mandated by FRA. FRA believes that this concern may be addressed by adjusting the proposed section concerning the on-track safety job briefing (§ 214.315) to use the term “adjacent tracks”<sup>5</sup> and adding language to that section regarding the roadway worker in charge, and by modifying the language in § 214.336 to make it clear that the new requirement does not prohibit the roadway worker in charge from establishing additional on-track safety on one or more adjacent tracks as he or she deems necessary.

The joint comments also describe a concern with the withdrawn NPRM’s proposed language in § 214.336(a)(1)(ii) that would have permitted a component of a roadway work group to resume all on-ground work and equipment movement after the “head-end” of a movement passed by the component’s location when trains are cleared through working limits at speeds greater than 25 mph. The joint comments insist that the RSAC Working Group’s intent was for work to stop for the entire movement, not just the head-end.

While drafting this section in the withdrawn NPRM, FRA made a good faith determination of the meaning of the consensus language and could not distinguish whether the Working Group meant “head-end” or entire “movement.” (This determination is reflected in the preamble, and comments were requested.) Based on AAR’s errata review comments and FRA’s review of the January 10–11, 2006 Working Group meeting minutes, it appeared possible that an error was made, with respect to the “head-end only” requirement, by the Working Group in creating the final draft of the consensus language that was eventually presented to the full RSAC for approval. The draft being discussed at the January meeting allowed work to commence at the head-end during movement at 30 mph, but required that the entire movement pass before allowing work to

commence at speeds greater than 30 mph. The Working Group reached consensus on the “concepts of the proposal” for this item at its February 1–2, 2006 meeting.<sup>6</sup> While it was clear from the Working Group meeting minutes that the speed threshold of 30 mph was being negotiated (railroad management proposed that it be raised to 40 mph, while railroad labor proposed that it be lowered to 10 mph), the meeting minutes did not clearly capture the discussion that led to the use of the term “movement,” rather than “head-end” or “entire movement.”

Upon reviewing other documents from that meeting, FRA has determined that railroad management’s proposal that included the 40-mph threshold also appears to have conceded that the entire movement must pass before permitting work to resume, regardless of speed. While it is possible that the concession of the entire movement passing was conditioned upon railroad labor accepting railroad management’s proposal as a whole (including the 40-mph threshold), FRA did not receive any further comments from AAR or any of its members on this issue, despite the request for comments on this issue in the July 17, 2008 NPRM. Since the consensus language eventually approved by the full RSAC most closely resembled that which railroad labor proposed to the Working Group, FRA has decided to edit the language in this NPRM to require that all work not subject to an exception be permitted to resume only after the entire movement (*i.e.*, the trailing-end of the movement) has passed by the location of the roadway work group component. This requirement would apply regardless of the speed of the movement.

Regarding the limited work activities that would be permitted to continue under FRA’s initial proposal when trains are passing on an adjacent controlled track at speeds of 25 mph or less, BMWED and BRS note that the language proposed by FRA in paragraph (a)(2) differed from the consensus language in paragraph (c)(3) (indicating that work conducted “exclusively between the rails of the occupied track, or to the field side of the occupied track

with no adjacent track” would be permitted to continue, provided that the work was not conducted within 25 feet of the front or rear of any roadway maintenance machine). BMWED and BRS expressed their concern that it would be unsafe to permit work to the field side if working limits are not specifically required on any adjacent track on that side.

While paragraph (c)(3) of the consensus language permitted all work to continue to the field side of the occupied track only if there was no adjacent track present, the consensus language did not impose such a limitation in the broad exception for on-ground work on the field side of the occupied track in paragraph (e)(2) (now proposed paragraph (e)(1)). FRA’s original proposal would have permitted certain work to continue to the field side, provided that on-track safety (including train approach warning) had been established in accordance with this subpart on any adjacent track on that side.

In consideration of the concern raised by BMWED and BRS in their joint comments, FRA has adjusted the language originally proposed so as to better ensure the safety of the workers on that side of the occupied track. In addition to permitting work to continue while exclusively positioned on the field side of an occupied track that has no adjacent track on that side, the new proposal would also permit work to continue while exclusively positioned on the field side of an occupied track that has an adjacent track on that side provided that working limits have been established on the closest adjacent track on that side and there are no movements authorized through the working limits by the roadway worker in charge on that adjacent track. The above proposed conditions for conducting work while positioned on the field side have been summarized in the definition of a new term, “clear side,” in § 214.336(a)(3), so as to avoid having to repeat these conditions in the rule text proposed in paragraphs (c) and (e)(1) of this section. In applying the exception in proposed paragraph (e)(1), FRA notes that the “clear side” portion of the proposal would have the effect of requiring that working limits be established on an adjacent track (on the field side where the on-ground roadway workers are exclusively positioned) that is non-controlled and whose centerline is 25 feet from the centerline of the occupied track, while no form of on-track safety (*i.e.*, working limits or train approach warning) would be required on the adjacent controlled track that is located on the other side of the occupied track

<sup>5</sup> The consensus language stated “information about any tracks adjacent to the track to be occupied.” One could interpret this language to have included a discussion of adjacent tracks without regard to a set distance, since the term limiting the distance to 25 feet was not used. The term “adjacent tracks” would thus limit the discussion to those within 25 feet.

<sup>6</sup> On page 13 of the meeting minutes, the facilitator “reminded the group that the vote would be on the concepts of the proposal and the language may change and be simplified when finalized.” A representative of AAR then asked if everyone agreed on “the principles of the write-up.” At the March 15–16, 2006 meeting, the “RWP Working Group Table” included the language that was eventually approved by the full RSAC (except that “employee in charge” was changed to “roadway worker in charge” in paragraph (d)) and indicated “Consensus 02/02/06. Draft language from 02/02/06 revised by consolidating the exceptions.”

and whose centerline is within 12 feet of the occupied track. FRA seeks comment as to the frequency with which these, or similar, circumstances would occur, and whether the “clear side” portion of the exception in proposed paragraph (e)(1) imposes an unreasonable burden.

Another issue that BMWED and BRS would like FRA to reconsider is the proposed requirement for railroads to provide training or issue a bulletin with the proposed new requirements for adjacent-track on-track safety. The proposed requirement that railroads issue a bulletin or other document to the roadway workers was intended as a stop-gap measure, together with extended on-track safety job briefings, since most railroads provide their employees with annual training at the beginning of the calendar year. This was not a new concept, as the proposal was based on a similar provision in Emergency Order No. 24, and because FRA believes that this, in conjunction with job briefings on the issue, is the approach most railroads take to train their employees when an operating rule change goes into effect mid-year. BMWED and BRS, however, noted in their joint comments that this was not adequate training, and expressed their fear that this would shift the burden for effective training from the employer to unsuspecting employees. They also noted a concern that the proposed requirement for the employers to obtain a written receipt or acknowledgement may also affect their memberships’ legal rights under the Federal Employers’ Liability Act. Because of the timing of the withdrawal of the NPRM, FRA believes that it can coordinate this NPRM and final rule to correspond with the railroad’s annual training cycle for roadway worker protection, thus making the requirement to issue a bulletin unnecessary as a stop-gap measure.

Finally, the joint comments note that FRA’s initial proposal also differs from the RSAC consensus language because FRA proposed to move the section of the rule that pertains to adjacent-track on-track safety from § 214.335(c) to a new proposed § 214.336. FRA does not agree with these comments and denies that moving language from one section to another, for clarification purposes, changes the substance and intent of the provision. Currently, § 214.335 of the existing regulation for on-track safety for roadway work groups contains only one short provision that is applicable to adjacent track protection, that is, paragraph (c). The RSAC recognized that this provision is vague as to what circumstances mandate adjacent-track on-track safety, and this was the very

reason for the RSAC’s recommendation to amend it. Because of the complex revisions to the regulation with respect to adjacent-track on-track safety, and to avoid having too many levels of subparagraphs in the rule text, FRA believes it is necessary to create a new section. A new section would not change the substance or application of the regulation in any way, and additions to regulations often require the restructuring of subsections in order to promote clear, concise interpretation.

## 2. Draft Comments of AAR

AAR submitted draft comments to FRA on September 16, 2008. Although the draft comments were received after the date that the NPRM was formally withdrawn, FRA has decided to post them to the docket and discuss them in this NPRM, in an effort to continue FRA’s transparency in these proceedings as well as to encourage an open discussion and resolution of the related issues at this NPRM stage, rather than at the later, final rule stage.

The first issue concerns the applicability of proposed § 214.336(a) to “a roadway work group with at least *one of the roadway workers on the ground*” (emphasis added). AAR urges FRA to return to the consensus language, which applied “when roadway work group(s) consisting of *roadway workers on the ground* and on-track self-propelled equipment are engaged in a common task on an occupied track” (emphasis added). AAR is concerned that this subtle change would bring several work activities into the scope of the rule that were not intended to be covered by the Working Group consensus language. Specifically, AAR is concerned about work activities such as “an employee remaining within the gage of the occupied track fueling a machine; getting off equipment to load anchors, spikes, or other equipment; deploying a laser device for a tamping machine; and checking cross level.” AAR proposes that FRA amend part of the first sentence of § 214.336(a) from “with at least one of the roadway workers on the ground” to “with more than one roadway worker on the ground,” and make further conforming amendments by deleting the phrase “one or more” in paragraphs (b)(1), (2), and (3).

FRA had proposed to amend this portion of the consensus language for clarity, since the consensus language (“when roadway work group(s) consisting of roadway workers on the ground and on-track self-propelled or coupled equipment are engaged in a common task on an occupied track”) contained the words “roadway work group(s)” and “equipment,” both of

which could be interpreted as plural and result in confusion concerning how many roadway workers needed to be on the ground before this section would apply. FRA specifically chose the clarifying words “one or more roadway workers on the ground” because FRA believed that this was the intent of the Working Group, since there was no safety rationale for excluding roadway work groups that consist of only two roadway workers. In choosing this language, FRA assumed that in a two-person roadway work group, one roadway worker was assigned to operate the equipment, and the other was assigned to perform duties on the ground in a common task with the machine and presumably its operator. The potential for distraction of the one roadway worker on the ground in a roadway work group consisting of only two roadway workers is the same as for each of the two roadway workers on the ground in a roadway work group consisting of three roadway workers. Moreover, FRA analysis of the agency’s accident investigations of these types of incidents has revealed that four<sup>7</sup> of the seven fatalities on an adjacent track occurred with only one of the roadway workers on the ground that had been engaged in a common task with an on-track roadway maintenance machine.

AAR also requested that the exception for hi-rails in proposed § 214.336(b)(2) of the former NPRM be expanded to include rail-bound geometry and detection equipment, since the level of distraction posed by this equipment is similar to that of hi-rails. AAR suggests that the language in that section be amended by adding “or self-propelled track geometry or detector car.” FRA notes that while a rail-bound geometry car tends to be much larger than a hi-rail, it seems that the level of distraction is similar for a roadway worker on the ground who is field-verifying a measurement behind a geometry car and a roadway worker on the ground who is replacing a bolt behind a hi-rail; nonetheless, FRA seeks comment as to whether this type of equipment should be added to the exception.

The comments further request that an exception be added (*i.e.*, that no adjacent-controlled-track on-track safety be required) when there is a physical barrier between the occupied track and the adjacent controlled track. AAR indicates that there are several locations where there is a physical barrier, such as a fence, between tracks operated by

<sup>7</sup> The dates and locations of those incidents were October 9, 1999 (Juniata, NE), October 30, 2003 (Argyle, IA), March 12, 2007 (Piketon, OH), and March 27, 2008 (Emporia, KS).

different railroads, especially where the corridor is shared by both freight and passenger railroads. AAR believes that this barrier is sufficient to protect against movements on an adjacent track located on the other side of the barrier, and suggests that a fourth exception be added as follows: "Work on occupied track where there is a physical barrier such as a fence between the occupied track and the adjacent track." While FRA agrees that a continuous permanent or semi-permanent barrier could be sufficient to prevent accidental fouling of an adjacent controlled track located on the other side of the barrier, FRA is concerned that the language that AAR has suggested is overly broad and could be interpreted to allow orange construction cones or barrels connected with flimsy plastic "fences" to be sufficient. FRA seeks comment on whether a fourth exception should be added and, if so, whether it should be limited to where there is a continuous permanent or semi-permanent physical barrier of a certain height, such as a chain-linked fence at least 4' in height or a concrete barrier of at least 32" in height, between the occupied track and the adjacent controlled track.

AAR also recommended that FRA permit the machine operator to perform work on the ground within 25 feet of the front or rear of the roadway maintenance machine that he or she is operating, during adjacent-controlled-track movements of 25 mph or less. It would be impractical not to allow the operator to step off of his machine and walk directly behind it. Accordingly, AAR suggests that the proposed paragraph 214.336(a)(2)(i) (now proposed as § 214.336(c)) be amended by adding after the word "movement" the phrase "unless the employee is operating the machine." FRA believes that the phrase "unless the employee is the assigned operator of the machine" would better address AAR's concerns, since presumably the employee would place the machine in the idle position and set the brakes before alighting and, therefore, would not be operating or moving the machine from the ground. FRA seeks comment as to whether this amendment should be added.

Finally, AAR requested that FRA reconsider the proposed training and recordkeeping requirements in the initial NPRM. While recognizing that training is vital, AAR urges FRA to make the effective date for training on the new requirements consistent with the railroads' training schedules. Regarding the proposed recordkeeping requirements, AAR notes that the requirement for a written acknowledgment is "burdensome,

unwarranted, and violates both Congressional and OMB mandates," and requests that FRA permit railroads to use electronic signatures in lieu of handwritten signatures. While FRA is not opposed to permitting electronic signatures under the circumstances proposed in the initial NPRM, the proposed recordkeeping requirement has been deleted from this NPRM, making this a moot point.

### 3. Comments of Additional Interested Parties

FRA received a number of brief comments. The July 30, 2008 joint comments submitted by ATDA, BLET, and UTU, expressed support for the BMWED and BRS' joint request to extend the comment period on the initial NPRM to 60 days. Other brief comments raised different concerns, which have been summarized, below.

Three general comments were submitted to the docket. The first general comment was submitted by John Walsh. He indicates that while part 214 is intended to provide for the safety of railroad workers, it also preempts State laws concerning the railroads. As such, he believes that FRA's regulations should also require railroads to provide for the protection of emergency workers, including firefighters, emergency medical technicians (EMTs), and those working under their direction and control. He recommends that railroads annually notify every firefighting agency with tracks in their jurisdiction of whom to contact whenever the firefighters or EMTs are operating within the railroad's right of way, and that railroads have procedures in place to restrict train traffic in the area until the firefighters' or EMTs' incident commander grants the railroad permission to allow trains to pass through the incident area. As Mr. Walsh's comments are outside the scope of part 214, it appears that this request would be more appropriate if filed in the form of a petition for a new rulemaking under 49 CFR 211.11.

The second general comment was submitted by Michael McGinley, who indicates that he is a retiree from the Southern California Regional Rail Authority (Metrolink) engineering department. He states that the weakest link is the widespread failure of locomotive engineers to comply with sounding warning signals upon seeing roadway workers, and expressed his belief that this may be due to the part 214 requirements being taught to the engineering department employees and not to the transportation department employees. He recommends that the application of the present regulations be

reinforced through the operating practices perspective and focus on the locomotive engineers. While FRA is not proposing to amend the section that relates to audible warning (§ 214.339) in this NPRM, FRA notes that this is one of the most common violations cited under part 214, and many railroads have taken steps to reinforce and raise awareness of these requirements through increased training and efficiency testing. Thus, FRA does not believe that this section should be amended at this time.

The third general comment was submitted by Frederic W. Yocum, who is a retired railroader who served on RSAC. He suggests that FRA amend the language to add the phrase "or desirable" to the language proposed in the initial NPRM so as to read "nothing in this section prohibits the roadway worker in charge from establishing adjacent-track on-track safety as he or she deems necessary *or desirable*" (*emphasis added*). He notes that there are probably occasions on which the roadway worker in charge would want to increase safety by establishing adjacent-track on-track safety, but would not meet the standard of "necessary" if taken literally. FRA recognizes that the roadway worker in charge needs the flexibility to establish on-track safety as he or she deems necessary for completion of the work, but is mindful not to provide unfettered discretion, which could result if the words "or desirable" were to be added. If the nature of the work that is being performed by the roadway work group will likely cause one of the roadway workers in the group to foul an adjacent track, then additional on-track safety is necessary. FRA has added language to the new proposed section to ensure that the roadway worker in charge has the discretion to establish on-track safety on one or more adjacent tracks (regardless of whether the track is controlled or non-controlled) as necessary, consistent with both the purpose and requirements of subpart C of part 214.

In addition to these comments, FRA also received comments from Todd Cotie, Health and Safety Coordinator for the United Steelworkers Local 2004, representing 3,200 track maintenance workers across Canada. He recommends that trains be ordered to reduce their speed to a maximum of 30 mph when passing in proximity to workers on adjacent mainline tracks, since a slower train would allow engineers and work crews more time to notice and react to various situations that occur from the passing train. This recommendation is based on various rules, including the speed restriction for trains passing in

proximity to occupied on-track living accommodations (boarding cars) that are eight feet away on the adjacent track, just as roadway workers would be. As another example, Mr. Cotie submitted a copy of a February 7, 2008 letter from CN regarding the train clearing guidelines for the protection of employees who work under Canadian Rail Operating Rules (CROR) Rule 42. These guidelines appear to require that trains be instructed by the Rule 42 foreman to proceed through limits at a speed not exceeding 30 mph if the employees cannot clear to a location at least 19 feet away from the nearest rail of the track on which the train is approaching. Mr. Cotie believes that the few minutes of delay that would result in slowing a 60-mph freight or 100-mph passenger train to 30 mph when passing work crews is well worth assuring the security of the workers. FRA believes that its proposal in this NPRM assures the security of the roadway workers while taking into consideration the productivity costs to the railroads. A detailed analysis of this balancing is discussed in the regulatory evaluation, which has been posted to the docket.

## VII. Section-by-Section Analysis

### *Proposed Amendments to 49 CFR Part 214, Railroad Workplace Safety*

#### Subpart C—Roadway Worker Protection Section 214.315 Supervision and Communication

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

maintenance machines that will foul any adjacent track. In such cases, the briefing shall include procedural instructions addressing the nature of the work to be performed and the characteristics of the work location to ensure compliance with this part."

On December 18, 2007, FRA emailed the Working Group members and requested an errata review of a document in which FRA had compiled all of the consensus items. In its errata review comments, AAR requested that FRA clarify that the provision is not intended to require a discussion on the on-track safety of an adjacent track unless on-track safety is required on that track by part 214. FRA agrees that this is not the intent of the proposed requirement, and has added the language "if required by this subpart or deemed necessary by the roadway worker in charge" to the consensus rule text, which has been proposed as new paragraph (a)(3). The language concerning the roadway worker in charge's discretion was added to emphasize that the roadway worker in charge would still be permitted to establish on-track safety on an adjacent track, regardless of whether it is controlled or non-controlled, if it is reasonably necessary given the nature of the work that is to be performed. This proposed section would still require the on-track safety job briefing to include information concerning any "adjacent tracks" (as defined in § 214.7), so as to serve as a warning to each roadway worker of the potential danger in fouling such a track, even if no on-track safety is required for that particular track because it does not meet the definition of "adjacent controlled track" in proposed § 214.336(a)(3). While the second sentence of the consensus language began with the phrase "in such cases," FRA has deleted that language, and proposes to move the rest of the language into a new paragraph (a)(4), since the on-track safety job briefing must always address the nature of the work to be performed and the characteristics of the work location to ensure compliance with this subpart, regardless of whether there is an adjacent track present.

FRA has further clarified in a proposed revision to introductory paragraph (a) that this section lists only the minimum items that must be discussed in an on-track safety briefing. The words "at a minimum" were added, and the rest of existing paragraph (a) has been moved to proposed paragraphs (a)(1) and (a)(2).

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

FRA proposes to amend this section by deleting paragraph (c) and creating new requirements in a separate section to address adjacent-controlled-track on-track safety procedures for certain roadway work groups, § 214.336, for the reasons discussed below. Existing paragraph (c) reads: "Roadway work groups engaged in large-scale maintenance or construction shall be provided with train approach warning in accordance with § 214.327 for movements on adjacent tracks that are not included within working limits."

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

#### Section 214.336 Adjacent-Controlled-Track On-Track Safety Procedures for Certain Roadway Work Groups

##### Paragraph (a), Procedures; General

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

In developing language to address the increasing number of roadway worker fatalities on an adjacent track, the Working Group considered that most of the fatalities on an adjacent track occurred when a roadway work group with at least one of the roadway workers on the ground, was engaged in a common task with on-track, self-propelled equipment on an occupied track. In those circumstances, the potential for a roadway worker in the group to be distracted from the danger of an oncoming train was great due to the noise and dust generated by operation of the roadway maintenance machines, the need to avoid entanglement in the operation of those

machines, and the need to monitor the quality of the work being performed. This set of factual circumstances became the basis for the proposed new criteria for triggering the requirement to establish adjacent-track on-track safety in introductory paragraph (c)(1) of the consensus language, and in paragraph (a)(1) of proposed new § 214.336, which, as a general rule, would require that on-track safety be established for each adjacent controlled track when a roadway work group with at least one of the roadway workers on the ground, is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. In particular, the on-track safety would have to be provided in accordance with § 214.319 (Working limits, generally) (which includes § 214.321 (Exclusive track occupancy), § 214.323 (Foul time), and § 214.325 (Train coordination)), or § 214.329 (Train approach warning provided by watchmen/lookouts).

The general rule would be set forth in paragraph (a), which would also direct the reader to the three exceptions described in proposed paragraph (e). The more specific procedures for adjacent-controlled-track on-track safety would be set forth in paragraphs (b) and (c), concerning movements on an adjacent controlled track at over 25 mph, and at 25 mph or less, respectively. Paragraph (a)(2) provides that if an occupied track has two adjacent controlled tracks, and one of these adjacent controlled tracks has one or more movements authorized at 25 mph or less, and the other adjacent controlled track has one or more concurrent movements authorized at over 25 mph, the more restrictive procedures in paragraph (b) would apply. This would require that all work (*i.e.*, both on-ground work and roadway maintenance machine or coupled equipment movement) on or fouling the occupied track or either of the adjacent controlled tracks cease, since, as will be further discussed below, there would be no "clear side" on which to continue even on-ground work on the field side. See proposed § 214.336(e)(1).

Paragraph (a)(3) would add definitions of three new terms used exclusively in § 214.336 ("adjacent controlled track," "clear side," and "occupied track"), and one existing term ("adjacent tracks") that is defined in § 214.7, but which would be repeated in this section to ensure that the reader is aware that two similar terms are being used in this section, with different meanings. For purposes of this section, "adjacent controlled track" would mean "a controlled track whose track center is

spaced 19 feet or less from the track center of the occupied track." In contrast, the definition of "adjacent tracks" (in § 214.7) includes any tracks, controlled or non-controlled, whose track centers are spaced less than 25 feet apart. FRA proposes to adopt this narrower definition of "adjacent controlled track" based on the roadway worker fatality data discussed above in "IV. Recent Roadway Worker Accidents (1997–2008)," which show that the adjacent tracks on which the roadway worker fatalities occurred were all controlled tracks and that the track centers of these controlled tracks were within 15 feet of the track centers of the occupied track. In light of these data, the Working Group agreed that 19 feet would be a reasonable and safe threshold to trigger the requirement to establish on-track safety on an adjacent track and that it would be reasonable to cover controlled tracks within that 19-foot zone but to exclude non-controlled tracks. FRA notes that the lack of fatalities on non-controlled adjacent tracks may be attributable to the reduced operating speeds on non-controlled tracks, where railroad operating rules generally require that movements must stop short of obstructions within half the range of vision. The Working Group discussed, and the full RSAC recommended for inclusion in § 214.335(c), that on-track safety be required for "adjacent controlled track within 19 feet of the centerline of the occupied track" for certain work activities. FRA agrees with this analysis and has reflected it in the proposed definition of "adjacent controlled track." Note, however, that this section also uses the broader term "adjacent track" or "adjacent tracks" in paragraphs (c)(2)(i), (e)(1), and (f), as further discussed, below.

The third proposed definition in § 214.336(a) is for the term "clear side." FRA proposes to define the term for purposes of § 214.336 to mean "the field side of the occupied track that either has no adjacent track on that side, or has an adjacent track or tracks on that side and working limits have been established in accordance with this subpart on the closest adjacent track on that side and there are no movements authorized through the working limits by the roadway worker in charge on that adjacent track." This term was added so that the above language would not need to be included in the rule text in proposed paragraphs (c) and (e)(1) of this section. It should be noted that there are two field sides to each occupied track, beginning at each rail and continuing outward and away from

the track center of the occupied track. One or both field sides may meet the definition of "clear" at some point during the work period (depending on the presence of an adjacent track on one or both sides and the method and circumstances of the on-track safety established on the adjacent track or tracks), but since the term is only used when making the determination as to whether work must cease due to one or more movements on an adjacent-controlled track, there could be only one "clear side" at the time of that determination.

FRA believes that the work permitted to continue under the circumstances described in proposed paragraphs (c) and (e)(1) should not be limited to only those situations where there is no adjacent track present. While paragraph (c)(3) of the consensus language (pertaining to single or multiple adjacent-track movements at a speed of 25 mph or less) permitted all work to continue to the field side of the occupied track only if there was no adjacent track present during such movements, the consensus language did not impose such a limitation in the broad exception for on-ground work on the field side of the occupied track in paragraph (e)(2) (now proposed paragraph (e)(1)). FRA's original proposal would have permitted certain work to continue, provided that on-track safety (including train approach warning) had been established in accordance with this subpart on any adjacent track on that side. In consideration of the joint comments submitted by BMWED and BRS, FRA has adjusted the language originally proposed so as to better ensure the safety of the workers on that side of the occupied track.

Specifically, under the proposed sections that use the term "clear side," certain work would be permitted to continue on the field side furthest from the adjacent controlled track if working limits (including those established by making the track inaccessible per § 214.327 if the adjacent track is non-controlled) have been established on that track, and the roadway worker in charge has not authorized any movements through the working limits of that adjacent track. This proposal would allow the roadway worker in charge to better monitor and control the on-track safety of roadway workers performing work in triple-track territory, especially since the designated place of safety during an adjacent-controlled-track movement may very well be the field side towards another adjacent track on which no movement is occurring. Train approach warning would not be

permitted, since a train would be free to move on the adjacent track on that side without the roadway worker in charge's permission or knowledge. FRA believes that this new language addresses the safety concern raised in the joint comments.

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

Paragraphs (b), Procedures for Adjacent-Controlled-Track Movements Over 25 mph; and (c), Procedures for Adjacent-Controlled-Track Movements 25 mph or Less

In an effort to make the section easier to understand, FRA has reorganized the section into proposed paragraph (b), which lists the procedures to follow for one or more adjacent-controlled-track movements over 25 mph (*i.e.*, if a train or other on-track equipment is authorized to move on an adjacent controlled track at a speed greater than 25 mph), and proposed paragraph (c), which lists the procedures to follow when one or more adjacent-controlled-track movements are authorized at a speed of 25 mph or less.<sup>8</sup> As noted

above in the discussion of paragraph (a)(2), if an occupied track has two adjacent controlled tracks, and one of these adjacent controlled tracks has one or more movements authorized at 25 mph or less, and the other adjacent controlled track has one or more concurrent movements authorized at over 25 mph, the more restrictive procedures in paragraph (b) would apply.

Proposed paragraph (b)(1) would generally require that each roadway worker in the roadway work group stop any work on the ground and stop the movement of any roadway maintenance machine or coupled equipment in the fouling space of the occupied track and the adjacent controlled track, and occupy a predetermined place of safety. If on-track safety has been established on the adjacent controlled track through train approach warning in accordance with § 214.329 (either as the sole method of on-track safety or in addition to working limits), all work would have to cease upon receiving a watchman/lookout warning. *See* § 214.336(b)(1)(ii). On the other hand, if working limits have been established on the adjacent controlled track and the roadway work group has not been assigned a watchman/lookout, all work would have to cease upon receiving notification that the roadway worker in charge intends to authorize one or more train movements or other on-track equipment movements through the working limits on an adjacent controlled track. *See* § 214.336(b)(1)(i). This notification would have to occur before the roadway worker in charge releases the working limits, in order to comply with existing § 214.319(c).

FRA notes that the language in proposed paragraph (b)(1) that would generally require roadway workers to cease all on-ground work within the fouling space of the occupied track could potentially be interpreted by some as conflicting with the language in proposed paragraph (e)(1), which would permit on-ground work on the clear (field) side, a portion of which would be within the fouling space of the occupied track. While proposed paragraphs (a) and (e) both contain language indicating, directly or indirectly, that paragraph (e) would apply

notwithstanding any conflicting language in proposed paragraphs (a) through (c), to ensure that there is no confusion as to the interrelation of these sections, FRA has added the phrase "except as provided in paragraph (e) of this section" at the beginning of proposed paragraph (b)(1) and seeks comment regarding whether this was the intent of the consensus language. FRA does not believe that this same clarification would be necessary in proposed paragraph (c), since proposed paragraph (c) refers the reader to proposed paragraph (b).

In its errata review comments on the FRA document compiling all of the Working Group consensus language, AAR requested that FRA clarify whether work would be permitted to resume at a particular location after the head-end of the movement had passed or after the entire train had passed, under the RSAC-recommended § 214.335(c)(2). As discussed in section VI.C.1., above, upon an extensive review of all related meeting documents, FRA has determined that railroad management's proposal appears to have conceded that the entire movement must pass before permitting work to resume, regardless of speed. While it is possible that the concession of the entire movement passing was conditioned upon railroad labor accepting railroad management's proposal as a whole (including the proposal of a 40-mph threshold), FRA did not receive any further comments from AAR or any of its members on this issue, despite the request for comments on this issue in the July 17, 2008 NPRM. FRA did, however, receive joint comments from BMWED and BRS on this issue. The joint comments noted the hazards presented to roadway workers by abnormal consist conditions (*e.g.*, "shifted loads/shifted ladings, loose banding, dragging chains/binders, loose brake piping, loose/swinging boxcar doors, [and] fragmented brake shoes") and by "dust, rust, debris, stone, and track construction/maintenance materials" which may become airborne while trains pass roadway workers. Given these potential hazards and the information available in the related meeting documents, FRA proposes to require that all work not subject to an exception be permitted to resume only after the entire movement (the trailing-end of the movement) has passed by the location of the roadway work group component. *See* proposed § 214.336(b)(2). This would apply regardless of the speed of the movement, since the procedures for adjacent-controlled-track movements at 25 mph or less are the same as for those

<sup>8</sup> If a roadway worker in charge, in his or her discretion, authorizes a train through working limits on an adjacent controlled track at 30 mph, but the train is actually traveling at a speed of only 20 mph, the procedures in proposed paragraph (b), regarding adjacent-controlled-track movements over 25 mph, would still apply. Where exclusive track

occupancy is the method of on-track safety established on the adjacent controlled track, FRA notes that existing § 214.321(d) provides that movements of trains and roadway maintenance machines within working limits shall be made only under the direction of the roadway worker having control over the working limits, and further notes that such movements shall be at restricted speed unless a higher speed has been specifically authorized by the roadway worker in charge of the working limits.

at over 25 mph, unless the work being performed is subject to an exception. See proposed § 214.336(c).

In modifying the language in consensus paragraphs (c)(2) (concerning when work would be permitted to resume) and (c)(3) (concerning which work would be permitted to continue during adjacent-controlled-track movements of 25 mph or less) for inclusion in its proposal, FRA realized that these same paragraphs did not address situations where train approach warning was the established method of adjacent-controlled-track on-track safety (either as the sole method, or in combination with working limits). Where train approach warning is the sole method of adjacent-controlled-track on-track safety, there are no working limits established on the adjacent controlled track, and trains are not being “cleared through adjacent-controlled-track working limits” by the roadway worker in charge. Regarding consensus paragraph (c)(3) (concerning which work would be permitted to continue during adjacent-controlled-track movements of 25 mph or less), this simply means that this type of work would always be permitted so long as train approach warning was in effect, since a train or other on-track equipment would not be authorized to exceed 25 mph. Regarding consensus paragraph (c)(2) (concerning when work would be permitted to resume), this means that the watchman/lookout may not know (depending on the span of the working limits and the available sight distance) how many movements at any given time are operating within the same segment of track on the adjacent-controlled-track as that of the working limits established on the occupied track. Thus, it would be reasonable for work to resume after the trailing-end of a train passes unless and until the watchman/lookout provides a warning for a subsequent train. To address these oversights, FRA made adjustments to the consensus language in paragraphs (c)(2) and (c)(3) in proposed §§ 214.336(b)(2)(i) and 214.336(c), respectively.

As the roadway workers are presented with similar safety risks and would still receive notification of the train or other on-track equipment movements, regardless of the method of adjacent-track on-track safety established, FRA has decided to adopt language in proposed § 214.336(b)(2)(i), that would clarify that a component of a roadway work group may resume on-ground work and movement of any roadway maintenance machine or coupled equipment on the occupied track only after the trailing-end of all trains or

other on-track equipment moving on the adjacent controlled track (for which a notification or warning has been received in accordance with paragraph (b)(1) of this section) has passed and remains ahead of<sup>9</sup> that component of the roadway work group. Thus, if there are three trains cleared through the working limits by the roadway worker in charge, and there is no watchman/lookout assigned, the roadway workers would not, under this proposal, be permitted to resume work until the trailing-end of all three trains had passed by (and remained ahead of) that component of the roadway work group. However, if there are three trains operating within the same segment of track on the adjacent-controlled-track as that of the working limits established on the occupied track, and there is sufficient space between each of the trains to provide adequate warning to clear the track, the watchman/lookout may provide a warning for the first train, and work would be permitted to resume after the trailing-end of that train passed by (and remained ahead of) that component of the roadway work group, until such time as the watchman/lookout provided a warning for the second train, and so forth.

On the other hand, if the train or other on-track equipment were to stop before its trailing-end passed all of the roadway workers in the roadway work group, then the work to be performed on or while fouling the occupied track ahead of the trailing-end of the train or other on-track equipment on the adjacent controlled track would be permitted to resume only if adjacent-controlled-track on-track safety has been established. See proposed § 214.336(b)(2)(ii). In most cases, this would likely mean that on-track safety through train approach warning (§ 214.329) has been established on the adjacent track. See proposed § 214.336(b)(2)(ii)(A). In the remaining cases, this would mean that the roadway worker in charge has communicated with the train engineer or equipment operator and established that such train or other on-track equipment shall move only under his or her direction. See proposed § 214.336(b)(2)(ii)(B).

It should be noted that the train approach warning option provided in proposed § 214.336(b)(2)(ii)(A) would

<sup>9</sup> The language “and remains ahead of” was added to this section to ensure that a roadway worker who has been passed (e.g., at milepost 10) would not be permitted to then move up (e.g., by hi-rail or walking to milepost 11) and perform work on the occupied track at a point alongside of (or ahead of) a train that has stopped on the adjacent controlled track (e.g., with its trailing-end located at milepost 10.9 and its head-end located at milepost 11.2).

not be permitted alongside the train (or for a certain distance on the occupied track ahead of the location of the train on the adjacent controlled track), since the train, if it were traveling at the “maximum speed authorized on that track” would already be at the roadway worker’s location (or, at certain distances, would be able to reach the roadway worker’s location sooner than 15 seconds) and would not permit the roadway worker any (or sufficient) time to clear. Under such circumstances, work would not be permitted to resume until the conditions proposed in § 214.336(b)(2)(ii)(B) have been met, or until the train resumes its movement and its trailing-end passes the roadway worker’s location, whichever comes first.

The proposed procedures to be followed for adjacent-track movements of 25 mph or less are the same as those procedures for adjacent-track movements over 25 mph, except that work would be permitted to continue in certain circumstances without regard to when the trailing-end passed the roadway work group’s location, due to the low speed of the movements. In proposed paragraph (a)(2), FRA makes clear that if an occupied track has two adjacent controlled tracks, and one of the tracks has one or more adjacent-controlled-track movements authorized at 25 mph or less, and the other has one or more concurrent adjacent-controlled-track movements authorized at over 25 mph, the more restrictive procedures in paragraph (b) would apply.

The circumstances under which work may continue during low-speed movements on adjacent controlled tracks have been included in proposed paragraph (c). Unless the work falls under one of the exceptions in proposed paragraph (e), the work that would be permitted to continue after receiving a warning or notification of an adjacent-controlled-track movement would have to be performed more than 25 feet in front of or behind any roadway maintenance machine that is on or fouling the occupied track. While existing § 214.341(a)(5) requires each employer to include in its on-track safety program specific provisions addressing spacing “between machines and roadway workers to prevent personal injury,” the rule does not prescribe a specific distance, as certain work activities may require a roadway worker to work closer to a machine than others. Many railroads that subscribe to the General Code of Operating Rules (“GCOR”), for example, have adopted a 15-foot work zone in which roadway workers are not permitted to enter without first communicating with the

operator of the equipment and establishing safe work procedures. See GCOR Rule 136.7.3. The Working Group proposed a larger work zone of 25 feet to help lessen the distraction and danger posed by a roadway maintenance machine working on or fouling an occupied track, as both an on-ground roadway worker and an operator of a roadway maintenance machine will be performing work with the additional distraction of one or more adjacent-controlled-track movements. FRA proposes to adopt this recommendation as one of the circumstances for permitting work to continue as described in proposed paragraph (c).

FRA believes that the intent of the consensus language regarding the 25-foot zone in paragraph (c) was to ensure that roadway workers were not performing on-ground work within 25 feet of the forward or rearward path of a moving machine; thus, workers would still be permitted to work alongside a machine on a clear side (to verify the quality of the work being performed by that machine, for example). A roadway worker that is performing duties alongside a roadway maintenance machine would, of course, need to be mindful of the machine's footprint (which would include any brooms or wings of a machine, if extended) in deciding where to position himself or herself in performing such duties. FRA believes that the procedures addressing spacing "between machines and roadway workers to prevent personal injury" that are required by existing § 214.341(a)(5) should adequately address the risk of working alongside a machine (under any circumstance, not just during movements on adjacent controlled track); however, FRA seeks comment regarding the adequacy of these procedures.

Proposed paragraph (c) would permit work to continue that is performed "exclusively while positioned on or between the rails of the occupied track or to the clear side" of the occupied track, provided it is performed outside of the 25-foot work zone discussed above. The rationale for permitting work to continue while positioned between the rails is that a roadway worker who is positioned between the rails of the occupied track is in little danger of fouling the adjacent controlled track. This proposed condition is similar to an existing provision in § 214.103(d) that permits bridge workers to perform minor repair work exclusively between the rails (so long as the weight-bearing portion of the roadway worker's body is between the rails) without any fall protection. As this condition has worked well in the bridge worker area,

FRA proposes to adopt the RSAC-recommended condition in the roadway worker area.

The other set of circumstances in proposed paragraph (c) for permitting work to continue when a movement on the adjacent controlled track is authorized at 25 mph or less is when work is performed to the "clear side" of the occupied track, provided that it is performed outside of the 25-foot work zone. As discussed above in the analysis of proposed paragraph (a)(3) of this section, the "clear side" means "the field side of the occupied track that either has no adjacent track on that side, or has an adjacent track or tracks on that side and working limits have been established in accordance with this subpart on the closest adjacent track on that side and there are no movements authorized through the working limits by the roadway worker in charge on that adjacent track." Both the Working Group and FRA recognize that if there is little danger of a roadway worker fouling an adjacent controlled track (e.g., Main Track No. 1) while positioned between the rails of the occupied track (e.g., Main Track No. 2), a roadway worker is in even less danger of fouling that adjacent controlled track if he or she is positioned on the field side of the occupied track furthest from the adjacent controlled track. If, however, there is another adjacent track present (e.g., Main Track No. 3, whether controlled or non-controlled) on the field side farthest from the adjacent controlled track on which a train or other on-track equipment movement has been authorized (e.g., Main Track No. 1), then the roadway worker would potentially be in danger of fouling the other adjacent track (e.g., Main Track No. 3). FRA makes clear that even if on-track safety in the form of working limits had been established on the other adjacent track (e.g., Main Track No. 3), the roadway worker would still be in potential danger if he or she were to foul that adjacent track if the protection had in effect been nullified by the roadway worker in charge authorizing a train or other on-track equipment movement through the working limits on that other adjacent track. This is why FRA is proposing that work would be permitted on that side only if it truly is a "clear side."

Given the potential danger posed by concurrent movements on two adjacent controlled tracks, it is important to note that while proposed § 214.336 would apply to each adjacent controlled track individually, the impact on the type of work that would be permitted to continue on the occupied track must be examined as a whole. Thus, where a

roadway worker receives notification of adjacent-controlled-track movements authorized at 25 mph or less that are occurring concurrently on both adjacent tracks, FRA proposes that the roadway worker would not be permitted to work on either field side of the occupied track, as the movement on one adjacent controlled track would not permit any work on the field side closest to it, and the movement on the other adjacent (controlled or non-controlled) track would not permit any work on the field side closest to it. See proposed paragraph (c)(2). Under these circumstances, there would be no "clear side" on which to perform even on-ground work as provided in the general exception in proposed paragraph (e)(1).

It should also be noted that paragraph (c) only directly addresses the types of work that a component of a roadway work group may continue performing while waiting for the trailing-end of an adjacent-controlled-track movement to pass by that component's location. It does not directly address when all other work (i.e., work that paragraph (c) does not cover) may resume. Thus, roadway workers who are assigned to perform work not covered by paragraph (c) must look to the procedures in paragraph (b)(2) for guidance. For example, since on-ground work that would be performed between the rails and near a roadway maintenance machine (i.e., in the 25-foot zone in front of or behind a machine that is on or fouling the occupied track) is not covered by paragraph (c), such work would not be permitted to resume until the conditions in paragraph (b)(2) had been fulfilled. That is to say, such work (as well as all other work that must cease as noted in paragraph (b) that is not permitted to continue by paragraph (c) and not subject to one of the general exceptions in paragraph (e)) would be permitted to resume only after the trailing-end of all movements (for which a notification or warning has been received in accordance with paragraph (b)(1) of this section) have passed by (and remain ahead of) the roadway work group component's location. Paragraph (d), Procedures for a roadway maintenance machine or coupled equipment fouling an adjacent controlled track.

Regarding the prohibition in consensus paragraph (d) against "equipment" fouling an adjacent controlled track unless protected by working limits, FRA has changed the term to "roadway maintenance machine" to clarify that this prohibition is meant to be broad and would include hi-rails that are part of the roadway work group or otherwise working within the same working limits as the roadway

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

#### Paragraph (e), Exceptions to the Requirement for Adjacent-Controlled-Track On-Track Safety

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

The first proposed exception to the requirement for adjacent-controlled-track on-track safety would be for one or more on-ground roadway workers performing work while exclusively positioned on the clear (field) side of the occupied track, provided that there should essentially be no danger posed by any other adjacent track. In particular, there would be no danger posed by any other adjacent track either because there is no adjacent track on the field side of the occupied track or, even though there is an adjacent track on the field side of the occupied track, working limits have been established in accordance with this subpart on the closest adjacent track on that side and there are no movements authorized through the working limits on that adjacent track. Regarding the language “while exclusively positioned on the clear side,” FRA notes that this language

refers to the positioning of the weight-bearing portion of the roadway worker's body. This interpretation is consistent with FRA's interpretation of a similar provision in the bridge worker area (*see* § 214.103(d)) and also with the working group's intent that the exception in proposed paragraph (e)(1) be written so as to permit an on-ground roadway worker to change out a stone on a rail grinder, which may require that part of his or her body (*e.g.*, his or her hands) be within the gage of the occupied track.

As noted above in the discussion of proposed paragraphs (b)(1) and (c), this exception would apply notwithstanding any conflicting language in proposed paragraphs (a) through (c). Thus, on-ground work within the fouling space of the occupied track on the clear (field) side would still be permitted to continue during adjacent-controlled-track movements occurring on the other field side of the occupied track, regardless of the speed of those movements. Moreover, this on-ground work would not be subject to the condition that the on-ground work permitted to continue must be conducted more than 25 feet in front of or behind any roadway maintenance machine on or fouling the occupied track. FRA seeks comment as to whether the 25-foot zone should apply to the work performed in paragraph (e)(1) as well.

The second exception to the requirement for adjacent-controlled-track on-track safety would be for a hi-rail vehicle on the occupied track, provided such hi-rail vehicle is not coupled to any equipment and not operating on the same occupied track and within working limits of a roadway work group as described in paragraph (a) of this section. *See* proposed § 214.336(e)(2). As discussed in Section IV. of this preamble, there has been only one adjacent-track fatality where a roadway work group had been engaged in a common task with a hi-rail vehicle as defined in § 214.7, and the roadway workers in that case were under the impression that adjacent-track on-track safety was in effect when, due to a miscommunication, it was not. Given the circumstances of the one fatality and because the duties normally performed by an employee operating a hi-rail tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine, FRA proposes that adjacent-track on-track safety not be required for roadway work groups engaged in a common task with a hi-rail.

The consensus language for this second exception also included

language indicating that where multiple hi-rails are engaged in a common task, the on-track safety briefing shall include discussion of the nature of the work to be performed to determine if “adjacent controlled track protection” is necessary. FRA has added a cross-reference to proposed § 214.315(a)(4) to this language in its proposal because the roadway worker in charge must always consider the nature of the work to be performed to determine the appropriate level of on-track safety. In fact, the consensus language emphasizes that nothing in this subpart prohibits the roadway worker in charge from establishing adjacent controlled track protection as he or she deems necessary. Consensus paragraph (e)(1) (now proposed paragraph (e)(2)) was also amended to remove the words “as defined in § 214.7,” since each time that a term defined in § 214.7 is used in part 214, FRA intends the term to be interpreted in the manner in which it is defined in § 214.7, unless otherwise noted. As discussed in section VI.C.2., above, FRA seeks comment as to whether this proposed exception should be expanded to include rail-bound geometry and detection equipment.

The third proposed exception to the requirement for adjacent-controlled-track on-track safety is for a catenary maintenance tower car with one or more roadway workers positioned on the ground exclusively within the gage of the occupied track for the sole purpose of applying or removing grounds. As discussed in Section IV. of this preamble, there have been no adjacent-track fatalities where a roadway work group had been engaged in a common task with a catenary maintenance tower car on the occupied track and the duties normally performed by an employee operating a catenary maintenance tower car tend to be less distracting to on-ground roadway workers and produce less dust and noise than a typical on-track roadway maintenance machine. FRA proposes to add this exception, with the same caveat added as for hi-rails, which is that once the catenary maintenance tower car is operating on the same occupied track and within the working limits of a roadway work group as described in paragraph (a) of this section, the exception would no longer apply.

As discussed in section VI.C.2., above, AAR is requesting that a fourth exception be added when there is a physical barrier between the occupied track and the adjacent controlled track. FRA seeks comment on whether a fourth exception should be added, and if so, whether it should be limited to “where there is a continuous permanent

or semi-permanent physical barrier of a certain height, such as a chain-linked fence of at least 4' in height or a concrete barrier of at least 32" in height, between the occupied track and the adjacent controlled track."

**Paragraph (f), Discretion of Roadway Worker in Charge**

In BMWED's errata review comments on the FRA document compiling all of the Working Group consensus language that was recommended to FRA by the RSAC, BMWED noted that from the manner in which the consensus exceptions (paragraphs (e)(1)-(e)(3)) were constructed, one could interpret that the roadway worker in charge of on-ground roadway workers exclusively performing work on the field side of the occupied track described in consensus paragraph (e)(2) would not be afforded the same right to establish a greater level of adjacent-track on-track safety as the roadway worker in charge of the hi-rail vehicle or catenary maintenance tower car described in paragraphs (e)(1) and (e)(3), respectively. FRA agrees that the provisions should be consistent. The section has been reorganized so that the language in paragraph (e)(3) stating that "[n]othing in this subpart prohibits the roadway worker in charge of the catenary maintenance tower car from establishing adjacent track protection, as he/she deems necessary" has been removed from paragraph (e)(3) (along with similar language in paragraph (e)(1) and slightly reworded and moved into a new paragraph (f) so as to apply generally to proposed § 214.336, including all three exceptions in

proposed paragraphs (e)(1)-(e)(3). Proposed paragraph (f) reads—*"Discretion of roadway worker in charge.* Nothing in this subpart prohibits the roadway worker in charge from establishing on-track safety on one or more adjacent tracks as he or she deems necessary consistent with both the purpose and requirements of this subpart."

**VIII. Regulatory Impact and Notices**

**A. Executive Order 12866 and DOT Regulatory Policies and Procedures**

This NPRM has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this NPRM. Document inspection and copying facilities are available at the Federal Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection on the Internet at <http://www.regulations.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA-2008-0059, Notice No. 3.

Certain of the requirements reflect current industry practice, or restate

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

This evaluation includes quantitative measurements and qualitative discussions of implementation costs for this proposed rule. The costs would primarily be imposed by a small increase in job briefing time and additional resources spent to provide on-track safety for the safe conduct of other than large-scale maintenance and construction of track located adjacent to (and within a certain distance of) one or more controlled tracks on which train movements may be occurring. Training costs would also accrue. The benefits would primarily accrue from a reduction in roadway worker casualties (fatalities and injuries). Business benefits stemming from avoided train delays and property damages would also accrue.

FRA estimates that the present value (PV, 7%) of the total 20-year costs that the industry would be expected to incur to comply with the requirements in this NPRM would be \$130.7 million. FRA also estimates that the PV (7%) of the total 20-year benefits accruing to society from the implementation of the requirements would be \$131.9 million. The following table includes a summary of the regulatory impact analysis (RIA) costs and benefits, broken down by section of the rule and benefit category, respectively:

**COST AND BENEFIT SUMMARY**

| Costs<br>(by section of rule)                  | Reference:<br>section of RIA | Total: PV, 7%<br>(in millions—<br>rounded) |
|------------------------------------------------|------------------------------|--------------------------------------------|
| Section 214.315—Job Briefings .....            | 9.2                          | \$1.21                                     |
| Section 214.335—On Track .....                 | 9.4                          | 127.59                                     |
| Other (Signalmen, Lone Workers) .....          | 9.4                          | 1.70                                       |
| Section 214.336—Training .....                 | 9.4                          | 0.16                                       |
| <b>COST Total for NPRM .....</b>               |                              | <b>130.65</b>                              |
| Benefits<br>(by benefit category)              | Reference:<br>section of RIA | Total: PV, 7%<br>(in millions—<br>rounded) |
| Casualty Mitigation—Fatality .....             | 10.1                         | \$49.16                                    |
| Casualty Mitigation—Injury .....               | 10.2                         | 30.83                                      |
| Nonfatal Injury Prevention .....               | 10.3                         | 5.65                                       |
| Adjacent Track Revision .....                  | 10.4                         | 6.04                                       |
| Damage Reduction .....                         | 10.5                         | 0.64                                       |
| Reporting and Recordkeeping—Cost Savings ..... | 10.6                         | 0.01                                       |
| Business Industry Benefit .....                | 10.7                         | 39.60                                      |
| <b>BENEFIT Total for NPRM .....</b>            |                              | <b>131.94</b>                              |

FRA believes that taking into account non-quantifiable benefits, including reduced train delays and property damages resulting from roadway worker incidents, the benefits associated with this proposed rule would justify the implementation costs. FRA requests comment on all of the assumptions used in the regulatory evaluation to calculate the costs and benefits.

#### *B. Regulatory Flexibility Act and Executive Order 13272*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. FRA has prepared and placed in the docket a Small Entity Impact Assessment and Evaluation that assesses the small entity impact of this NPRM. Document inspection and copying facilities are available at the Docket Management Facility, U.S. Department of Transportation, West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection on the Internet at <http://www.regulations.gov>. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA-2008-0059, Notice No. 3.

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

The U.S. Small Business Administration (SBA) stipulates in its "Size Standards" that a "for profit" railroad business firm may not have more than "1,500 employees for "Line-Haul Operating" Railroads and 500 employees for "Switching and Terminal Establishments" to be considered as a "small entity." <sup>10</sup> "Small entity" is

defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. SBA's "size standards" may be altered by Federal agencies upon consultation with SBA and in conjunction with public comment.

Pursuant to that authority, FRA has published a final policy that classifies "small entities" as, *inter alia*, being railroads that meet the line haulage revenue requirements of a Class III railroad.<sup>11</sup> 49 CFR part 209, appendix C. Currently, the revenue requirements are 20 million inflation-adjusted dollars or less in annual operating revenue. The 20-million limit is based on the Surface Transportation Board's threshold of a Class III railroad carrier, which is adjusted by applying the railroad revenue deflator adjustment.<sup>12</sup> The same dollar limit on revenues is established to determine whether a railroad shipper or contractor is a small entity. FRA is using this definition of "small entity" for regulatory flexibility purposes in this rulemaking.

There are approximately 665 small railroads.<sup>13</sup> Potentially all small railroads could be impacted by this proposed regulation. However, because of certain characteristics that these railroads typically have, there should not be any impact on the majority of them. Most have only single-track operations. Some small railroads such as the tourist and historic railroads, operate across the lines of other railroads that would bear the burden or impact of the proposed rules requirements. Finally, other small railroads, if they do have more than a single track, typically have operations that are light enough such that the railroads have generally always performed the pertinent trackside work with the track and right-of-way taken out of service, or conducted the work during hours that the track is not used.

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

jurisdictions exceed 50,000 in population. *See* 49 CFR part 209, appendix C.

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

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

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

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

#### *C. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new and current information collection requirements, and the estimated time to fulfill each requirement are as follows:

<sup>11</sup> *See* 68 FR 24891 (May 9, 2003).

<sup>12</sup> For further information on the calculation of the specific dollar limit, please reference 49 CFR part 1201.

<sup>13</sup> 715 railroads—50 (large freight, medium freight, passenger, and commuter railroads) = 665 small railroads.

<sup>10</sup> "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR part 121.

| CFR section (if applicable)                                                                                                     | Respondent universe      | Total annual responses        | Average time per response | Total annual burden hours |
|---------------------------------------------------------------------------------------------------------------------------------|--------------------------|-------------------------------|---------------------------|---------------------------|
| Form FRA F 6180.119—Part 214 Railroad Workplace Safety Violation Report.                                                        | 350 Safety Inspectors .. | 150 forms .....               | 4 hours .....             | 600                       |
| 214.303—Railroad On-Track Safety Programs—Amendments to Programs .....                                                          | 60 Railroads .....       | 20 amend. + 584 amend. ....   | 20 hours; 4 hrs. ....     | 2,736                     |
| —Subsequent Years: New Programs .....                                                                                           | 5 New Railroads .....    | 5 new prog. ....              | 250 hours .....           | 1,250                     |
| 214.313—Good Faith Challenges to On-Track Safety Rules.                                                                         | 20 Railroads .....       | 80 challenges .....           | 4 hours per challenge ..  | 320                       |
| 214.315/335—Supervision and Communication—Job Briefings .....                                                                   | 50,000 Roadway Workers.  | 16,350,000 briefings ....     | 2 minutes per briefing .. | 545,000                   |
| —Adjacent-Track Safety Briefings (New Requirement).                                                                             | 24,500 Roadway Workers.  | 2,403,450 briefings .....     | 30 seconds per briefing   | 20,029                    |
| 214.321—Exclusive Track Occupancy—Working Limits.                                                                               | 8,583 Roadway Workers.   | 700,739 written authorities.  | 1 minute .....            | 11,679                    |
| 214.325—Train Coordination—Establishing Working Limits through Communication.                                                   | 50,000 Roadway Workers.  | 36,500 communications         | 15 seconds .....          | 152                       |
| 214.327—Inaccessible Track—Working Limits on Non-Controlled Track: Notifications.                                               | 718 Railroads .....      | 50,000 notifications .....    | 10 minutes .....          | 8,333                     |
| 214.336— <i>Procedures for Adjacent-Controlled-Track Movements Over 25 mph</i> (New Requirements)                               |                          |                               |                           |                           |
| —Notifications/Watchmen/Lookout Warnings                                                                                        | 100 Railroads .....      | 10,000 notific. ....          | 15 seconds .....          | 42                        |
| —Roadway Worker Communication with Train Engineers or Equipment Operators.                                                      | 100 Railroads .....      | 3,000 comm. ....              | 1 minute .....            | 50                        |
| <i>Procedures for Adjacent-Controlled-Track Movements 25 mph or Less</i>                                                        |                          |                               |                           |                           |
| —Notifications/Watchmen/Lookout Warnings                                                                                        | 100 Railroads .....      | 3,000 notific. ....           | 15 seconds .....          | 13                        |
| —Roadway Worker Communication with Train Engineers or Equipment Operators.                                                      | 100 Railroads .....      | 1,500 comm. ....              | 1 minute .....            | 25                        |
| 214.337—On-Track Safety Procedures for Lone Workers: Statements by Lone Workers.                                                | 718 Railroads .....      | 2,080,000 statements ..       | 30 seconds .....          | 17,333                    |
| 214.343/345/347/349/351/353/355—Training Requirements.                                                                          | 50,000 Roadway Workers.  | 50,000 tr. Empl .....         | 4.5 hours .....           | 225,000                   |
| —Additional On-Track Safety Training (New Requirement).                                                                         | 35,000 Roadway Workers.  | 35,000 tr. Empl .....         | 5 minutes .....           | 2,917                     |
| —Records of Training .....                                                                                                      | 50,000 Roadway Workers.  | 50,000 records .....          | 2 minutes .....           | 1,667                     |
| 214.503—Good Faith Challenges; Procedures for Notification and Resolution                                                       |                          |                               |                           |                           |
| —Notifications for Non-Compliant Roadway Maintenance Machines or Unsafe Condition.                                              | 50,000 Roadway Workers.  | 125 notifications .....       | 10 minutes .....          | 21                        |
| —Development of Resolution Procedures ...                                                                                       | 644 Railroads .....      | 10 procedures .....           | 2 hours .....             | 20                        |
| 214.505—Required Environmental Control and Protection Systems for New On-Track Roadway Maintenance Machines with Enclosed Cabs. | 644 Railroads .....      | 10 lists .....                | 1 hour .....              | 10                        |
| 214.507—As-Built Light Weight on New On-Track Roadway Maintenance Machines.                                                     | 644 Railroads .....      | 1,000 stickers .....          | 5 minutes .....           | 83                        |
| 214.511—Required Audible Warning Devices for New On-Track Roadway Maintenance Machines.                                         | 644 Railroads .....      | 3,700 identified mechanisms.  | 5 minutes .....           | 308                       |
| 214.513—Retrofitting of Existing On-Track Roadway Maintenance Machines.                                                         |                          |                               |                           |                           |
| —Identification of Triggering Mechanism—Horns.                                                                                  | 703 Railroads .....      | 200 mechanisms .....          | 5 minutes .....           | 17                        |
| 214.515—Overhead Covers for Existing On-Track Roadway Maintenance Machines.                                                     | 644 Railroads .....      | 500 requests + 500 responses. | 10 minutes; 20 minutes    | 250                       |
| 214.517—Retrofitting of Existing On-Track Roadway Maintenance Machines Manufactured on or after Jan. 1, 1991.                   | 644 Railroads .....      | 500 stencils .....            | 5 minutes .....           | 42                        |
| 214.518—Safe and Secure Position for Riders—Positions Identified by Stencils/Markings/Notices.                                  | 644 Railroads .....      | 1,000 stencils .....          | 5 minutes .....           | 83                        |
| 214.523—Hi-Rail Vehicles .....                                                                                                  | 644 Railroads .....      | 2,000 records .....           | 60 minutes .....          | 2,000                     |
| —Non-Complying Conditions .....                                                                                                 | 644 Railroads .....      | 500 tags + 500 reports        | 10 min.; 15 min .....     | 208                       |
| 214.527—Inspection for Compliance; Repair Schedules.                                                                            | 644 Railroads .....      | 550 tags + 550 reports        | 5 min.; 15 min .....      | 184                       |

| CFR section (if applicable)                                    | Respondent universe | Total annual responses | Average time per response | Total annual burden hours |
|----------------------------------------------------------------|---------------------|------------------------|---------------------------|---------------------------|
| 214.533—Schedule of Repairs; Subject to Availability of Parts. | 644 Railroads ..... | 250 records .....      | 15 minutes .....          | 63                        |

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

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

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

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

announced by separate notice in the **Federal Register**.

#### *D. Federalism Implications*

FRA has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132, issued on August 4, 1999, which directs Federal agencies to exercise great care in establishing policies that have federalism implications. *See* 64 FR 43255. This NPRM will not have a substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among various levels of government.

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

FRA notes that the above factors have been considered throughout the development of this NPRM both internally and through discussions within the RSAC forum, as described in Sections VI and VII of this preamble. The full RSAC, which, prior to the publication of this NPRM, reached consensus on proposed rule text and recommended the proposal to FRA, has as permanent voting members two organizations representing State and

local interests: AASHTO and ASRSM. As such, these State organizations concurred with the proposed requirements, which differ in only limited respects from the requirements contained in this NPRM. The RSAC regularly provides recommendations to the FRA Administrator for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the Federalism implications of this rulemaking from these representatives or from any other representative.

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

#### *E. Environmental Impact*

FRA has evaluated this NPRM in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (*see* 64 FR 28545 (May 26, 1999)) as required by the National Environmental Policy Act (*see* 42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this NPRM is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999). In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

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

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate

requirements specifically set forth in law.” Section 202 of the Act (2 U.S.C. 1532) further requires — “[b]efore promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (annually adjusted for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement.”

The written statement must detail the effect on State, local, and tribal governments and the private sector. This NPRM will not result in the expenditure, in the aggregate, of \$141,300,000 in any one year, and thus preparation of such a statement is not required.

#### G. Energy Impact

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

#### H. Trade Impact

The Trade Agreements Act of 1979 (Pub. L. 96–39, 19 U.S.C. 2501 *et seq.*) prohibits Federal agencies from engaging in any standards setting or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The

statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

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

#### I. Privacy Act

Anyone is able to search the electronic form of all comments received into any of FRA’s dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit <http://DocketsInfo.dot.gov>.

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

Occupational safety and health, Penalties, Railroad safety.

#### The Proposed Rule

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

#### PART 214—[AMENDED]

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

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

#### Subpart C—Roadway Worker Protection

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

##### § 214.315 Supervision and communication.

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

- (1) Information on the means by which on-track safety is to be provided for each track identified to be fouled;
- (2) Instruction on each on-track safety procedure to be followed;
- (3) Information about any adjacent tracks, on-track safety for such tracks, if required by this subpart or deemed necessary by the roadway worker in charge, and identification of any roadway maintenance machines that will foul such tracks; and

(4) A discussion of the nature of the work to be performed and the characteristics of the work location to ensure compliance with this subpart.

\* \* \* \* \*

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

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

\* \* \* \* \*

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

##### § 214.336 Adjacent-controlled-track on-track safety procedures for certain roadway work groups.

(a) *Procedures; general.* (1) Except as provided in paragraph (e) of this section, on-track safety is required for each adjacent controlled track when a roadway work group with at least one of the roadway workers on the ground is engaged in a common task with an on-track roadway maintenance machine or coupled equipment on an occupied track. The required on-track safety shall be established through working limits (§ 214.319) or train approach warning provided by watchmen/lookouts (§ 214.329) and as more specifically described in this section.

(2) If an occupied track has two adjacent controlled tracks, and one of these adjacent controlled tracks has one or more adjacent-controlled-track movements authorized at 25 mph or less, and the other adjacent controlled track has one or more concurrent adjacent-controlled-track movements authorized at over 25 mph, the more restrictive procedures in paragraph (b) of this section apply.

(3) As used in this section—  
“*Adjacent controlled track*” means a controlled track whose track center is spaced 19 feet or less from the track center of the occupied track.

“*Adjacent tracks*” means two or more tracks with track centers spaced less than 25 feet apart.

“*Clear side*” means the field side of the occupied track that either has no adjacent track on that side or has an adjacent track or tracks on that side and working limits have been established in accordance with this subpart on the closest adjacent track on that side and there are no movements authorized through the working limits by the roadway worker in charge on that adjacent track.

“*Occupied track*” means the track on which a roadway maintenance machine or coupled equipment is located while engaged in a common task with a roadway work group.

(b) *Procedures for adjacent-controlled-track movements over 25*

*mph.* Except as provided in paragraph (e) of this section, if a train or other on-track equipment is authorized to move on an adjacent controlled track at a speed greater than 25 mph, each roadway work group to which this section applies must comply with the following procedures:

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

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

(ii) A watchman/lookout warning, if on-track safety through train approach warning (§ 214.329) has been established on the adjacent controlled track either as the sole method of on-track safety or in addition to working limits.

(2) *Resuming work.* (i) A component of a roadway work group may resume on-ground work and movement of any roadway maintenance machine or coupled equipment on or fouling the occupied track only after the trailing-end of all trains or other on-track equipment moving on the adjacent controlled track (for which a notification or warning has been received in accordance with paragraph (b)(1) of this section) has passed and remains ahead of that component of the roadway work group.

(ii) If the train or other on-track equipment stops before its trailing-end has passed all of the roadway workers

in the roadway work group, the work to be performed on or fouling the occupied track ahead of the trailing-end of the train or other on-track equipment on the adjacent controlled track may resume only—

(A) If on-track safety through train approach warning (§ 214.329) has been established on the adjacent controlled track; or

(B) After the roadway worker in charge has communicated with the train engineer or equipment operator and established that further movements of such train or other on-track equipment shall be made only as permitted by the roadway worker in charge.

(c) *Procedures for adjacent-controlled-track movements 25 mph or less.* If a train or other on-track equipment is authorized to move on an adjacent controlled track at a speed of 25 mph or less, each roadway work group to which this section applies must comply with the procedures listed in paragraph (b) of this section, except that work that is performed exclusively while positioned on or between the rails of the occupied track or on the clear side may continue, provided that any on-ground work is performed more than 25 feet in front of or behind any roadway maintenance machine on or fouling the occupied track during such adjacent-controlled-track movement.

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

(e) *Exceptions to the requirement for adjacent-controlled-track on-track safety.* The procedures for adjacent-controlled-track on-track safety in paragraphs (a) through (c) of this section

do not apply to the following work activities:

(1) One or more on-ground roadway workers performing work while exclusively positioned on the clear side of the occupied track.

(2) A hi-rail vehicle on or fouling an occupied track while engaged in a common task with one or more roadway workers on the ground, provided that such hi-rail vehicle is not coupled to one or more railroad cars or operating on the same occupied track and within the working limits of a roadway work group as described in paragraph (a) of this section. In accordance with § 214.315(a)(3), where multiple hi-rail vehicles are engaged in a common task, the on-track safety briefing shall include discussion of the nature of the work to be performed to determine if adjacent-controlled-track on-track safety is necessary.

(3) A catenary maintenance tower car on or fouling an occupied track that is engaged in a common task with one or more roadway workers positioned on the ground within the gage of the occupied track for the sole purpose of applying or removing grounds, provided that such catenary maintenance tower car is not operating on the same occupied track and within the working limits of a roadway work group as described in paragraph (a) of this section.

(f) *Discretion of roadway worker in charge.* Nothing in this subpart prohibits the roadway worker in charge from establishing on-track safety on one or more adjacent tracks as he or she deems necessary consistent with both the purpose and requirements of this subpart.

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**Karen J. Rae,**

*Deputy Administrator.*

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