

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 234**

[Docket No. FRA–2009–0032; Notice No. 5]

RIN 2130–AC20

**State Highway-Rail Grade Crossing Action Plans**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule complies with a statutory mandate that the Secretary of Transportation (Secretary) issue a rule to require the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State highway-rail grade crossing action plans. The final rule addresses the development, review, and approval of these highway-rail grade crossing action plans. This final rule also removes the preemption provision of this regulation.

**DATES:** This final rule is effective August 27, 2010.

**FOR FURTHER INFORMATION CONTACT:** Ron Ries, Office of Safety, FRA, 1200 New Jersey Ave. SE., RRS–23, Mail Stop 25, Washington, DC 20590 (Telephone 202–493–6299), or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Ave., SE., Mail Stop 10, Washington, DC 20590 (Telephone 202–493–6072).

**SUPPLEMENTARY INFORMATION:****I. Proceedings to Date**

Pursuant to FRA's direct final rulemaking procedures set forth at 49 CFR 211.33, FRA first published the State Highway-Rail Grade Crossing Action Plans as a direct final rule in the **Federal Register** on September 2, 2009 (74 FR 45336). FRA received one adverse comment regarding the direct final rule. Pursuant to 49 CFR 211.33(d), FRA withdrew the direct final rule and issued a notice of withdrawal to the **Federal Register**. However, due to regulatory production schedules and time constraints, the direct final rule was not withdrawn before its effective date. As a result, on November 13, 2009, FRA published a removal of the direct final rule provisions in the **Federal Register**, which removed the changes effected by the direct final rule, and contemporaneously published a notice of proposed rulemaking (NPRM).

Subsequent to the publication of the NPRM, FRA received written requests for a public hearing. FRA held a public

hearing in Washington, DC on February 22, 2010, and extended the comment period for an additional fourteen (14) days following the hearing, up to and including March 8, 2010. The hearing enabled the exchange of information regarding FRA's proposed amendments, and allowed the public to articulate their issues and concerns regarding the NPRM. FRA received oral and written testimony at the hearing as well as written comments during the extended comment period. A copy of the hearing transcript was placed in Docket No. FRA–2009–0032, which is available at <http://www.regulations.gov>.

When developing this final rule, FRA carefully considered all of the comments, information, data, and proposals submitted to Docket No. FRA–2009–0032 and discussed during the hearing. In addition, FRA's extensive knowledge and experience was relied upon when developing this final rule. FRA addresses the comments in the section-by-section analysis and elsewhere as appropriate.

**II. Background**

This final rule is intended to comply with section 202 of the Rail Safety Improvement Act of 2008 (RSIA08), Public Law 110–432, Division A, which was signed into law on October 16, 2008. Section 202 requires the Secretary (delegated to the Federal Railroad Administrator by 49 CFR 1.49) to identify the ten States that have had the most highway-rail grade crossing collisions, on average, over the past three years, and to require those States to develop State highway-rail grade crossing action plans, within a reasonable period of time, as determined by the Secretary. Section 202 further provides that these plans must identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations, and must focus on crossings that have experienced multiple accidents or are at high risk for such accidents.

**a. Comments—In General**

FRA received a number of comments of a personal nature about highway-rail grade crossing safety. FRA greatly appreciates the time, effort, and commitment of the persons who submitted these comments. FRA understands that it can be very difficult to share these personal events. FRA considers these comments, along with all of the other comments it receives. These comments are an important and positive contribution to the discussion of highway-rail grade crossing safety.

**b. State Identification**

As discussed, Congress expressly directed FRA to identify the ten States that have had the most highway-rail grade crossing collisions, on average, over the past three years. FRA maintains a database of highway-rail grade crossing accidents/incidents occurring at public and private grade crossings, as such events must be reported to FRA pursuant to 49 CFR 225.19. From this database, FRA identified the ten States with the most reported highway-rail grade crossing accidents/incidents at public and private grade crossings during 2006, 2007, and 2008, to be, as follows: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas. FRA will issue letters to these identified States and copies of such letters will be placed in the public docket of this proceeding.

Comments to the NPRM stated that the methodology used to identify the States did not account for the rate or frequency of highway-rail grade crossings and motor vehicle traffic, and that a more appropriate measure for determining highway-rail grade crossing collisions within a State would be to measure the number of collisions relative to the number of vehicles and the number of highway-rail grade crossings, as well as consideration of the actions already taken by that State that have directly resulted in the reduction of highway-rail grade crossing collisions. The final rule does not adopt these suggestions because the statute expressly directed FRA to use the particular methodology articulated in the final rule (i.e., to identify the ten States that have had the most highway-rail grade crossing collisions, on average, over the past three years). See RSIA08 section 202(a).

Another comment stated that the criteria for selecting the States should be limited to reported highway-rail grade crossing collisions at public crossings. However, again, the statute directed FRA to identify the ten States that have had the most highway-rail grade crossing collisions, and, as such, did not limit the criteria to only public crossings. See *Id.*

**c. Time Period To Develop State Action Plan and Duration of Plan**

Section 202 of RSIA08 instructs FRA to determine a reasonable period of time within which the ten identified States must develop a State highway-rail grade crossing action plan and the period of time to be covered by such a plan. Based on previous experience working with States on highway-rail grade crossing action plans, FRA has determined that

States can reasonably develop such plans within one year from the date this regulation goes into effect, and that such plans should cover a period of five years. A five-year period is appropriate because many of the remedial actions that may be included in these plans (e.g., closures and grade separations) may take up to five years to implement. In addition, any identified State that has already developed an action plan in conjunction with a recommendation from DOT's Office of Inspector General must ensure compliance with this final rule and must resubmit the plan as required.

#### *d. Assistance and Coordination*

FRA is available, including FRA regional grade crossing managers and FRA experts from the grade crossing and trespasser prevention division, to provide assistance to States in developing and carrying out, as appropriate, the State highway-rail grade crossing action plans. FRA's Safetydata Web site (<http://www.safetydata.fra.dot.gov>) also contains detailed data that may be of use in the development of the plans. In addition, the State highway-rail grade crossing action plans may be coordinated with other State or Federal planning requirements. For example, States may want to coordinate such plans with their Strategic Highway Safety Plans that are required by SAFETEA-LU, as appropriate.

A comment stated that the NPRM was redundant with the States' obligation to prepare a Highway Safety Improvement Plan, and would result in a burdensome duplication of efforts. As discussed, this rulemaking is required by statute. See RSIA08 section 202. In addition, as noted above, States may coordinate their action plans with their Strategic Highway Safety Plans.

#### *e. Conditioning the Awarding of Grants*

Section 202 of RSIA08 also empowers FRA to condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501, to an identified State under this section on the development of such State's plan. Although FRA does not anticipate employing this authority, FRA reserves its right to pursue such a course of action in the event that an identified State fails to comply with this final rule.

A comment to the NPRM stated that FRA had limited its enforcement authority by "excusing" its authority to condition certain grants to States based on their compliance with the plan requirements. However, FRA believes that the final rule adequately conveys that FRA may condition the awarding of

grants under 49 U.S.C. 20158, 20167, or 22501, to an identified State on the development of such State's plan, and does not diminish FRA's enforcement authority.

### **III. Section-by-Section Analysis**

#### *Section 234.1 Scope*

This section contains the scope provisions related to this part. An amendment to this paragraph includes reference to § 234.11, State Highway-Rail Grade Crossing Action Plans, as being within this part's scope.

A comment to the NPRM asserts that this rulemaking should not be included in part 234 of Title 49 of the Code of Federal Regulations, and that, instead, should be included in a separate part. FRA believes that it is perfectly appropriate to include the provisions contained in this final rule in part 234 and finds the assertion without merit. Thus, FRA adopts the provision as proposed.

#### *Section 234.3 Application*

This section outlines the application of this part. The amendment to this paragraph excepts § 234.11, State Highway-Rail Grade Crossing Action Plans, from the specific applicability provisions contained in this section. A comment to the NPRM requested that FRA provide guidance or otherwise clarify whether two particular rail systems were exempt from the requirements of part 234. This rulemaking, however, is not the appropriate setting to make jurisdiction determinations regarding particular rail systems. Such jurisdiction determinations are more appropriately handled through direct contact with FRA's Office of Chief Counsel.

#### *Section 234.4 Preemptive Effect*

The final rule removes this section from part 234. Although FRA proposed amending this section in the NPRM, FRA now believes that this section is unnecessary because 49 U.S.C. 20106 sufficiently addresses the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision concerning the regulation's preemptive effect is duplicative and unnecessary. Consequently, FRA believes that it is not necessary to address the comments submitted regarding this section of the NPRM.

#### *Section 234.6 Penalties*

This section details the civil and criminal penalties that a person may be subject to when violating the requirements of this part. The amendments to this section provide that a violation of § 234.11, State Highway-

Rail Grade Crossing Action Plans, will not give rise to either a civil or criminal penalty. In addition, a technical amendment is made to the criminal penalty section. Specifically, the citation to section 209(e) of the Federal Railroad Safety Act of 1970, as amended (45 U.S.C. 438(e)) is removed and replaced with a citation to 49 U.S.C. 21311(a).

#### *Section 234.11 State Highway-Rail Grade Crossing Action Plans*

Paragraph (a) of this section explains that the purpose of this section is to reduce collisions at highway-rail grade crossings in the ten identified States that have had the most highway-rail grade crossing collisions, on average, over the past three years. This paragraph makes clear that this regulation does not restrict any other State, or other entity, from adopting a highway-rail grade crossing action plan, nor does it restrict any of the identified States from adopting a plan with additional or more stringent requirements not inconsistent with this regulation.

Paragraph (b) of this section makes clear that this section applies to the ten States with the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008.

Paragraph (c) of this section requires each of the ten identified States to develop a State highway-rail grade crossing action plan and to submit such plans to FRA for review and approval not later than one year after the date this regulation goes into effect. This paragraph also details the specific requirements of the State highway-rail grade crossing action plans. This paragraph requires that such plans shall: identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations; focus on crossings that have experienced multiple accidents or are at high risk for such accidents; and cover a five-year period.

Paragraph (d) of this section identifies the FRA contact information to which the identified States must direct the highway-rail grade crossing action plans for review and approval and details the process for handling such plans. This paragraph makes clear that FRA will review and approve or disapprove a State highway-rail grade crossing action plan within 60 days of receiving the plan. This paragraph further states that, if the proposed State highway-rail grade crossing action plan is disapproved, FRA will notify the affected State as to the specific areas in which the proposed plan is deficient, and the State will have to correct all deficiencies within 30 days following receipt of written notice from

FRA. Lastly, this paragraph states that FRA may condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501 to an identified State on the development of an FRA approved State highway-rail grade crossing action plan.

FRA received a number of comments about the State highway-rail grade crossing action plans proposed in the NPRM.

One comment requested that, in the event a submitted State action plan is disapproved by FRA, the notice of disapproval articulate the action plan's deficiencies and recommend corrections. FRA intends, in the disapproval notice, to provide sufficient information to enable a State to successfully correct its plan.

Another comment stated that the NPRM did not address how proposed action plans were to be evaluated by FRA, and what standards would be applicable, including the applicable engineering criteria. As an initial matter, the State action plans are planning documents and, as such, it was not necessary to develop specific engineering criteria. FRA will evaluate the action plans to ensure that the specific statutory requirements, as articulated in this final rule, are met. FRA expects that, at a minimum, identified States will analyze highway-rail grade crossing collision data for commonalities that may indicate particular areas that need improvements. For example, one State that voluntarily prepared an action plan found that most multiple-collision crossings were in close proximity to a highway-highway intersection. Further investigation determined that there was a general lack of knowledge on interconnecting highway traffic signals with automatic warning devices at highway-rail grade crossings (which subsequently led the State to provide training on the interconnection). That State's plan then provided specific items that should be considered when evaluating such crossings.

Another comment sought clarification on whether the action plans should provide specific safety solutions for specific highway-rail grade crossings, or whether the plans should provide specific safety solutions for highway-rail grade crossings more broadly. A similar comment stated that the NPRM did not contain any criteria for determining how many highway-rail grade crossings should be addressed in the action plans, and whether any engineering criteria should be applied in selecting specific crossings for inclusion in the action plans. To clarify, the final rule is intended to require the identified States to develop action plans that identify

specific safety solutions for highway-rail grade crossings broadly. With that said, the rule also requires the States to focus on crossings that have experienced multiple accidents or are at high risk for such accidents. As such, a component of the action plans may include safety solutions for specific highway-rail grade crossings.

A comment also asserted that the NPRM departed from prior Federal-State relationships regarding highway-rail grade crossings. However, as discussed above, this rulemaking was promulgated pursuant to a statutory mandate. *See* RSIA08 section 202.

Another comment to the NPRM claimed that highway-rail grade crossing safety could be increased by modifying 23 U.S.C. 130 to allow for more flexibility in the use of Federal dollars for consolidation crossing efforts. A similar comment emphasized the importance of retaining a dedicated funding source for highway-rail grade crossing improvements. Other comments stated that Federal funds should be taken from highway-rail grade crossing education efforts, such as Operation Lifesaver, and redirected to implementing safety improvements in highway-rail grade crossings in the identified States. FRA understands that increased Federal funding may facilitate the closure of redundant crossings and otherwise improve highway-rail grade crossings; however, this issue is outside the scope of this rulemaking and the involved statutory mandate.

Several comments also asserted that the NPRM was an unfunded mandate that would burden the identified States and penalize their citizens, and that railroads, instead of the identified States, should plan and implement safety improvements to highway-rail grade crossings. Another comment claimed that the independent preparation of the action plans is not an efficient use of the States' resources and that, instead, the States should collaborate with each other and review best practices for effective safety programs. However, as previously discussed, a statute expressly directed FRA to promulgate this rulemaking and, specifically, to identify ten States, and to impose certain requirements on those States. *See* RSIA08 section 202. Moreover, States may work with each other, along with FRA staff, to further facilitate the process. Comments also noted that requiring only ten States to put forth such plans, with each State having varying levels of expertise and creating individualized plans, would result in a rule that would be neither national nor uniform. However, again, FRA promulgated this rule pursuant to

a specific statutory mandate. *See Id.* Moreover, there is no requirement that States have uniform highway-rail grade crossing safety action plans as each State may have different issues to address.

A comment to the NPRM also suggested that the final rule provide that the State action plans be protected from subpoenas and Freedom of Information Act (FOIA) requests. The final rule does not adopt this suggestion. FRA has articulated a process for requesting confidential treatment of documents provided to FRA in connection with its enforcement of statutes or FRA regulations related to railroad safety. *See* 49 CFR 209.11. Moreover, the statute requiring the action plans does not provide for such a confidentiality provision. *See* RSIA08 section 202.

A comment also asserted that the identified States do not generally have the required expertise to prepare the required action plans. Again, FRA promulgated this rule pursuant to a statutory mandate. *See Id.* In addition, FRA believes that the identified States will be able to successfully develop these plans. Furthermore, FRA is available, including FRA regional grade crossing managers and FRA experts from the grade crossing and trespasser prevention division, to provide assistance to States in developing and carrying out, as appropriate, the State highway-rail grade crossing action plans.

Comments also stated that the NPRM should not only focus on two safety solutions for highway-rail grade crossings. These comments suggested that there are other safety solutions, in addition to crossing closure and grade separation solutions discussed in the NPRM, and that grade separation is expensive and not viable for most circumstances. The final rule, however, makes reference to the crossing closure and grade separation solutions because the statute mandated that the plans address highway-rail grade crossing closures or grade separations. *See* RSIA08 section 202(a). Moreover, the final rule does not prohibit the plans from also addressing other viable safety solutions.

One comment asserted that the NPRM did not provide any specific requirements for the State action plans, and suggested that engineering evaluations of the safety issues in the identified States be required. As an initial matter, the final rule does provide specific requirements for the action plans, including that they: identify specific solutions for improving safety at crossings (including highway-rail grade crossing closures or grade

separations), and focus on crossings that have experienced multiple accidents or are at high risk for such accidents. These requirements, moreover, do not prohibit the identified States from performing engineering evaluations. In fact, an action plan may identify a specific problem that will require engineering evaluations to be performed at highway-rail grade crossings that meet certain criteria.

Other comments recommended that the action plans should: encourage States to address obstructed motorist sight lines at highway-rail grade crossings; incorporate the American Association of State Highway and Transportation Officials (AASHTO) line of sight parameters; and include on-the-ground assessments of grade crossings. As an initial matter, this final rule does not prohibit the identified States from addressing motorist sight lines, or other safety approaches, in their action plans. Moreover, the final rule relies on the ability of the identified States to identify problem areas and to develop strategies to mitigate such problems. And, as discussed, those specific strategies may be included in an action plan.

A comment also suggested that the identified States should not rely on historic data, in trying to improve crossing safety. The NPRM, however, did not discuss the States' use of historic data, beyond noting in the preamble that the development of such plans would enhance these States' ability to interpret historical accident information, among many other things. Another comment contended that the NPRM was inadequate because it did not constitute a long-term plan, was a one-time effort to address safety problems at highway-rail grade crossings, and did not impose any implementation requirements, or any requirements for periodically updating the action plans. As discussed above, this rule was promulgated pursuant to a specific statutory mandate. *See* RSIA08 § 202. FRA believes that the final rule is faithful to the statutory requirements. In addition, the final rule does not prohibit the identified States from making the action plans permanent, with periodic updates.

Several comments to the NPRM sought new highway-rail grade crossing regulations and made more general suggestions regarding improving crossing safety. For example, one comment suggested the promulgation of a uniform Federal safety standard of active warning devices for highway-rail grade crossings. Another comment

submitted draft legislation addressing highway-rail grade crossing safety. And, one other comment stated that it is essential to prepare draft uniform highway-rail grade crossing safety standards that incorporate Department of Transportation publications, industry studies, and AASHTO publications. Finally, one comment stated that: There needs to be widespread installation of crossing gates and lights; there needs to be more research of, and improvements to, crossing safety devices; and any minimum standard of safety must not stifle the incentives for continuing improvement in both technology and application. FRA appreciates this dialogue regarding the improvement of highway-rail grade crossing safety; however, all of these comments seek actions that are beyond the scope of this rulemaking.

A comment also stated that the identified States should develop an inventory of all highway-rail grade crossings in order to identify and address the most dangerous crossings. FRA appreciates the suggestion, but again notes that this specific request is beyond the scope of this rulemaking. FRA also notes that States and railroads are required to provide annual updates to the U.S. DOT Crossing Inventory, and that such information is available to the States. In addition, most States currently have their own crossing inventory databases. Another comment to the NPRM stated that FRA should use FRA's database as a tool for identifying areas of opportunity, instead of burdening the identified States with these responsibilities. Still another comment to the NPRM asserted that FRA should assign this responsibility to the railroads as well as the identified State's Department of Transportation, in a collaborative effort to improve the safety of highway-rail grade crossings. As previously discussed, this rulemaking is mandated by statute. *See* RSIA08 section 202. In addition, the U.S. DOT Crossing Inventory is available to the States, and most States have their own crossing inventory databases. Moreover, FRA staff will be available to the States to help facilitate this process.

There were several comments that were more general in nature. One comment asserted that the highest priority of any requirement in the design and operation of any highway facility should be safety. With respect to highway-rail grade crossings, the subject of this rulemaking, FRA believes safety improvement is critical, and this general

concept is reflected in the final rule. Another comment claimed that the NPRM did not appear to have been prepared by a person with engineering expertise in highway-rail grade crossing safety, and that the NPRM's objective was "political." FRA strongly disagrees with this characterization. This final rule is being promulgated pursuant to specific requirements articulated by a Congressionally enacted statute, and FRA believes the final rule is faithful to those requirements. Lastly, one comment stated that the NPRM should not restrict locomotive engineers. FRA does not believe that the final rule imposes any further restrictions on locomotive engineers.

#### IV. Regulatory Impact and Notices

##### *Executive Order 12866 and DOT Regulatory Policies and Procedures*

This discussion represents the regulatory impact analysis (RIA). There is not a separate RIA for inclusion in the public docket. This final rule has been evaluated in accordance with existing policies and procedures, and has been determined not to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). The ten States identified for compliance with the development of the State highway-rail grade crossing action plans are Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas. These ten States will incur the burden associated with implementation of this final rule. The estimated total quantified compliance cost for these ten States is approximately \$259,000 over the next year. The benefits resulting from the prevention of collisions at highway-rail grade crossings are expected to exceed the burden of developing the action plans. This analysis includes a quantitative burden measurement and a qualitative benefit discussion for this final rule.

The primary burden imposed will be for State labor resources spent to comply with the development of the mandated action plans. FRA estimates that, on the average, each State will assign the plan development responsibilities to a team composed of a program manager, a project engineer, a budget analyst, a business specialist, and a legal expert. Table A lists the aggregate salary estimates and man-year allocations for the entire mandated population.

TABLE A—AGGREGATED SALARY SUMMARY OF THE 10 IDENTIFIED STATES

Position	Salary	Hourly rate	Labor hours	Estimate
Program Manager, Transportation .....	\$483,000.00	\$39.90	40	\$2,793.27
Project Engineer .....	69,000.00	33.17	80	4,644.23
Budget Analyst .....	52,000.00	25.00	40	1,750.00
Business Specialist, Transportation .....	43,000.00	20.67	400	14,471.15
Legal Expert .....	68,000.00	32.69	40	2,288.46
				25,947.12

The estimated cost is found as the product of the hourly rate, the labor hours, and an estimated overhead rate. Overhead is considered at 75% of the hourly rate. *Example Calculation:*

$[(\$39.90 \text{ per hour}) * (40 \text{ hours}) * (1 + .75 \text{ (overhead rate)})] = \$2,793.27$ .

The final rule requires that FRA review and approve each submitted plan consistent with the statutory mandate. FRA anticipates that the

average review time for each of the initial submissions will be 6 hours per plan. Table B lists the aggregated Federal burden associated with the review and approval of the required plans.

TABLE B—FEDERAL COMPLIANCE SUMMARY

Tasking	States	Labor hours	Rate	Estimate
Plan Submission Review .....	10	6	\$52.50	\$5,512.50
				5,512.50

To summarize quantitatively, the State burden that will be imposed by this final rule was derived from the estimated sum of the original burden submission from the ten identified

States and the burden resubmission from the quantum that may not comply during the initial submission. FRA considers \$259,000 to represent the aggregated State burden for the one year

period of this requirement. Listed in Table C is the aggregated burden summary.

TABLE C—AGGREGATED BURDEN SUMMARY

	Estimate	Quantity	Total estimates
State Submission Burden .....	\$25,947.12	10	\$259,471.15
			259,471.15

The development of State highway-rail grade crossing action plans will likely result in a reduction in highway-rail grade crossing safety collisions. Development of such plans will enhance these States' ability to view their population of grade crossings, interpret historical accident information, evaluate the overall state of highway-rail grade crossing safety, and identify particular areas in need of attention. Any patterns of collisions or causal factors will become more readily apparent as a result of the detailed study, assessment, and status reporting involved in the development of the State action plan. In these plans, each State will identify specific solutions for improving safety at individual crossings, including crossing closures or grade separations, with special focus on those crossings that are found to have experienced multiple accidents or that show a heightened risk for accidents. Identification of high risk corridors may also occur as a result of the analysis

component of the State action plan. As each State's highway-rail grade crossing action plan may be coordinated with other State or Federal planning requirements, additional benefits may be obtained through closer integration of grade crossing safety issues into the overall State transportation safety planning efforts.

During the three-year time period, 2006 through 2008, the ten States with the most grade crossing collisions, as currently reported, accounted for 51 percent, or almost 4,200 accidents, of all grade crossing collisions nationwide. Highway vehicle damage accounted for more than \$28.5 million during this three-year time period, and a combined total of 546 lives were lost. Economic research indicates that \$6.0 million per statistical life saved is a reasonable estimate of people's willingness to pay for transportation safety improvements. Therefore, FRA estimates an accumulated \$3.28 billion to represent the statistical value of the lives lost as

a result of grade crossing collisions in these ten States. Finally, there were 1,666 injuries over the same three-year time period in these ten States. Assuming very conservatively, for purposes of this analysis, that these injuries were all minor in nature (e.g., injuries that may not require professional medical treatment and where recovery is usually rapid and complete) and thus assigning a cost of \$12,000 per injury (i.e., 0.2% of the value of a statistical life), injury costs for this three-year period totaled close to \$20 million. Thus, the cost to society of the average incident in the three-year time period was \$796,000. Prevention of just one such incident would more than exceed the cost of implementing this rule. FRA believes that it is reasonable to expect that such an incident may be prevented by the implementation of this rule. In addition to the safety benefits, other potential benefits will include: Increased train and highway traffic mobility by reducing collisions, fewer

demands on emergency services to respond to crossing collisions, and some improvement in air quality by reducing emissions from vehicles that are unable to move due to crossing collisions.

The findings of this analysis are sensitive to its assumptions. The burden estimates are largely driven by the composition of the State's team and the level of effort expended by each individual. Such factors may vary from

team to team. FRA realizes that the level of expertise per State, per team, per member, will vary and, therefore, has applied a 20 percent sensitivity factor above and below the baseline as follows:

TABLE D—AGGREGATED SENSITIVITY ANALYSIS SUMMARY

	Estimate	Low	High
Aggregated Submission Burden .....	\$259,471.15	\$207,576.92	\$ 311,365.38

Thus, when defining the projected cost burden to the individual States within the framework of team complexion and with regard to the estimated sensitivity of the individual expertise of the employee selected, FRA finds that it is reasonable to estimate that the burden could range from \$20,800 to \$31,100 per State. FRA finds that the total cost burden associated with this final rule ranges from \$208,000 to \$311,000.

In commenting on FRA's RIA of the NPRM, one commenter contended that the action plans should be prepared by licensed professional engineers practicing in the transportation area with expertise in grade crossing design, operations, and safety. Although it may be necessary to use such an engineer to implement aspects of an action plan, FRA believes that the development of the actions plans do not require the direction of such engineers. Another commenter questioned the identified States ability to develop action plans under the NPRM's time and cost parameters, and suggested that the States will develop general plans proposing "one-size-fits-all" solutions. As discussed previously, FRA believes that the identified States will be able to successfully develop these plans in the allotted timeframe. Furthermore, FRA is available, including FRA regional grade crossing managers and FRA experts from the grade crossing and trespasser prevention division, to provide assistance to States in developing and carrying out, as appropriate, the State highway-rail grade crossing action plans. In addition, FRA believes that each identified State will develop an action plan tailored to address that State's particular safety issues. One commenter also questioned FRA's estimate of the cost of preparing the

actions plans and stated that the estimate of \$26,000 per State was an under-valuation. As described above, the time and cost parameters represent an aggregation of information and estimates obtained from a sample of the States as to their own individual estimates necessary to comply with the provisions of the final rule. In addition, the estimated cost per State of approximately \$26,000 is an average composed of estimated costs significantly larger and smaller.

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

The Regulatory Flexibility Act of 1980 (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. An agency must prepare a final regulatory analysis, unless it determines and certifies that the rule would not have a significant economic impact on a substantial number of small entities.

"Small entity" is defined in 5 U.S.C. 601. Section 601(3) defines a "small entity" as having the same meaning as "small business concern" under § 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) includes not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operations within the definition of "small entities." Additionally, § 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates "size

standards" for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a "small entity") is 1,500 employees for "Line-Haul Operating" railroads, and 500 employees for "Short-Line Operating" railroads.<sup>1</sup>

SBA size standards may be altered by Federal agencies in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.<sup>2</sup> Currently, the revenue requirements are \$20 million or less in annual operating revenue, adjusted annually for inflation. The \$20 million limit (adjusted annually for inflation) 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>3</sup>

This rule would apply to States—none of which is small as defined above. Thus, pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), FRA certifies that this rule will not have a significant economic impact on a substantial number of small entities, as it only affects ten identified States.

#### *Paperwork Reduction Act*

The information collection requirements in this final 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 section that contains the new information collection requirements is noted below, and the estimated burden times to fulfill each requirement are as follows:

<sup>1</sup> "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR part 121. See also NAICS Codes 482111 and 482112.

<sup>2</sup> See 68 FR 24891 (May 9, 2003).

<sup>3</sup> For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

CFR Section	Respondent universe	Total annual responses	Average time per response (hours)	Total annual burden hours
234.11—State Highway-Rail Grade Crossing Action Plans:				
—Development and Submission of Plans .....	10 States .....	10 plans .....	600	6,000
—Disapproval of State Highway-Rail Grade Crossing Action Plan and Submission of Revised Plan.	10 States .....	5 revised plans .....	80	400

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202–493–6292 or Ms. Kimberly Toone at 202–493–6132 or via e-mail at the following addresses: [Robert.Brogan@dot.gov](mailto:Robert.Brogan@dot.gov); [Kimberly.Toone@dot.gov](mailto:Kimberly.Toone@dot.gov).

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, DC 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address:

[oir\\_submissions@omb.eop.gov](mailto:oir_submissions@omb.eop.gov).

OMB is required to make a decision concerning the collection of information requirements contained in this direct final 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.

FRA cannot 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 this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

#### *Environmental Impact*

FRA has evaluated this final rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a

major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. 64 FR 28545, 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 final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

#### *Federalism Implications*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, “Federalism” (64 FR 43255, Aug. 4, 1999), which requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has determined that this final rule will not have substantial direct effects on the States, on the relationship between the national government and

the States, nor on the distribution of power and responsibilities among various levels of government. In addition, FRA has determined that this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of E.O. 13132 do not apply.

Although this final rule removes the preemption section of part 234, FRA notes that this part could have preemptive effect by the operation of law under the FRSA. 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to § 20106.

This final rule also amends FRA’s regulations by adding a provision for State highway-rail grade crossing action plans. This provision expressly provides that it does not restrict any State, not identified by the final rule, or other entity, from adopting a highway-rail grade crossing action plan, nor does it restrict any of the identified States from developing action plans with additional or more stringent requirements that are not inconsistent with this final rule.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132, and has determined that preparation of a federalism summary impact statement for this final rule is not required.

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

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

requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$141,300,000 or more in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$141,300,000 or more in any one year, and thus preparation of such a statement is not required.

#### *Energy Impact*

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

#### *Privacy Act Information*

Interested parties should be aware that anyone is able to search the electronic form of all comments received into any agency docket 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 (Volume

65, Number 70; Pages 19477–78), or you may visit <http://www.regulations.gov>.

#### **List of Subjects in 49 CFR Part 234**

Highway safety; Penalties; Railroad safety; and Reporting and recordkeeping requirements.

#### **The Rule**

■ In consideration of the foregoing, FRA amends part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

#### **PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY AND STATE ACTION PLANS**

■ 1. The authority citation for part 234 is revised to read as follows:

**Authority:** 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; Pub. L. 110–432, Div. A, § 202; and 49 CFR 1.49.

■ 2. The heading for part 234 is revised to read as set forth above.

■ 3. Section 234.1 is revised to read as follows:

##### **§ 234.1 Scope.**

This part imposes minimum maintenance, inspection, and testing standards for highway-rail grade crossing warning systems. This part also prescribes standards for the reporting of failures of such systems and prescribes minimum actions railroads must take when such warning systems malfunction. This part also requires particular identified States to develop State highway-rail grade crossing action plans. This part does not restrict a railroad or a State from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

■ 4. Section 234.3 is revised to read as follows:

##### **§ 234.3 Application.**

With the exception of § 234.11, this part applies to all railroads except:

(a) A railroad that exclusively operates freight trains only on track which is not part of the general railroad system of transportation;

(b) Rapid transit operations within an urban area that are not connected to the general railroad system of transportation; and

(c) A railroad that operates passenger trains only on track inside an installation that is insular; i.e., its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation

will not be considered insular if one or more of the following exists on its line:

- (1) A public highway-rail crossing that is in use;
- (2) An at-grade rail crossing that is in use;
- (3) A bridge over a public road or waters used for commercial navigation; or
- (4) A common corridor with a railroad, i.e., its operations are within 30 feet of those of any railroad.

#### **§ 234.4 [Removed]**

■ 5. Section 234.4 is removed.

■ 6. Section 234.6 is revised to read as follows:

#### **§ 234.6 Penalties.**

(a) *Civil penalty.* Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part, except for any violation of § 234.11 of this part, or causes the violation of any such requirement is subject to a civil penalty of at least \$650, but not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this rule. The railroad is not responsible for compliance with respect to any condition inconsistent with the technical standards set forth in this part where such variance arises as a result of actions beyond the control of the railroad and the railroad could not have prevented the variance through the exercise of due diligence. The foregoing sentence does not excuse any instance of noncompliance resulting from the actions of the railroad's employees, agents, or contractors.

(b) *Criminal penalty.* Whoever knowingly and willfully makes, causes to be made, or participates in the making of a false entry in reports required to be filed by this part, or files a false report or other document



required to be filed by this part, except for any document filed pursuant to § 234.11 of this part, is subject to a \$5,000 fine and 2 years imprisonment as prescribed by 49 U.S.C. 522(a) and 21311(a).

#### Subpart B—Reports and Plans

■ 7. The heading to subpart B is revised to read as set forth above.

■ 8. Section 234.11 is added to subpart B to read as follows:

##### **§ 234.11 State highway-rail grade crossing action plans.**

(a) *Purpose.* The purpose of this section is to reduce collisions at highway-rail grade crossings in the ten States that have had the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008. This section does not restrict any other State, or other entity, from adopting a highway-rail grade crossing action plan. This section also does not restrict any of the States required to develop action plans under this section from adopting a highway-rail grade crossing action plan with additional or more stringent requirements not inconsistent with this section.

(b) *Application.* This section applies to the ten States that have had the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008.

(c) *Action plans.* (1) The ten identified States shall each develop a State highway-rail grade crossing action plan and submit such a plan to FRA for review and approval not later than August 27, 2011.

(2) A State highway-rail grade crossing action plan shall:

(i) Identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations;

(ii) Focus on crossings that have experienced multiple accidents or are at high risk for such accidents; and

(iii) Cover a five-year time period.

(d) *Review and approval.* (1) State highway-rail grade crossing action plans required under paragraph (c) of this section shall be submitted for FRA review and approval using at least one of the following methods: Mail to the Associate Administrator for Railroad Safety/Chief Safety Officer, U.S. Department of Transportation, Federal Railroad Administration, 1200 New Jersey Ave., SE., Washington, DC 20590; or e-mail to

[rrs.correspondence@fra.dot.gov](mailto:rrs.correspondence@fra.dot.gov).

(2) FRA will review and approve or disapprove a State highway-rail grade

crossing action plan submitted pursuant to paragraph (d) of this section within 60 days of receipt.

(3) If the proposed State highway-rail grade crossing action plan is disapproved, FRA will notify the affected State as to the specific areas in which the proposed plan is deficient. A State shall correct all deficiencies within 30 days following receipt of written notice from FRA.

(4) FRA may condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501 to an identified State on the development of an FRA approved State highway-rail grade crossing action plan.

Issued in Washington, DC, on June 22, 2010.

**Karen Rae,**

*Deputy Administrator, Federal Railroad Administration.*

[FR Doc. 2010-15534 Filed 6-25-10; 8:45 am]

**BILLING CODE 4910-06-P**

#### DEPARTMENT OF COMMERCE

##### **National Oceanic and Atmospheric Administration**

##### **50 CFR Part 648**

**[Docket No. 100107011-0248-03]**

**RIN 0648-AY43**

##### **Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Framework Adjustment 21**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS is implementing measures specified in Framework Adjustment 21 (Framework 21) to the Atlantic Sea Scallop Fishery Management Plan (FMP), which was developed by the New England Fishery Management Council (Council). Framework 21 specifies the following management measures for the 2010 scallop fishery: Total allowable catch (TAC); open area days-at-sea (DAS) and Sea Scallop Access Area (access area) trip allocations; DAS adjustments if an access area yellowtail flounder (YTF) TAC is caught; limited access general category (LAGC) access area trip allocations; management measures to minimize impacts of incidental take of sea turtles as required by the March 14, 2008, Atlantic Sea Scallop Biological Opinion (Biological Opinion); minor adjustments to the LAGC individual fishing quota (IFQ) program; and minor

adjustments to the industry-funded observer program. This action also adjusts regulatory language to eliminate duplicative and outdated text, and to clarify provisions in the regulations that are currently unclear.

**DATES:** Effective June 28, 2010.

**ADDRESSES:** An environmental assessment (EA) was prepared for Framework 21 that describes the action and other considered alternatives and provides a thorough analysis of the impacts of the measures and alternatives. Copies of Framework 21, the EA, and the Initial Regulatory Flexibility Analysis (IRFA) are available upon request from Paul J. Howard, Executive Director, New England Fishery Management Council, 50 Water Street, Newburyport, MA 01950.

**FOR FURTHER INFORMATION CONTACT:** Emily Bryant, Fishery Policy Analyst, 978-281-9244; fax 978-281-9135.

##### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Framework 21 was developed and adopted by the Council in order to meet the FMP's objectives to prevent overfishing and improve yield-per-recruit from the fishery. The FMP requires biennial adjustments to ensure that the measures meet the fishing mortality rate (F) and other goals of the FMP and achieve optimum yield (OY) from the scallop resource on a continuing basis. Framework 21 measures will replace those that were specified for the March 1, 2010, start of the fishing year (FY). Framework 21 specifies measures only for FY 2010. Amendment 15 to the FMP, currently under development by the Council, will identify and implement annual catch limits and accountability measures to bring the FMP into compliance with the new requirements of the re-authorized Magnuson-Stevens Fishery Conservation and Management Act (MSA) for FY 2011 and beyond. Framework 22 will be developed by the Council to set the specifications for FYs 2011 and 2012.

The Council approved Framework 21 at its November 18, 2009, meeting and submitted Framework 21 to NMFS for review on December 21, 2009. At its November 2009 meeting, the Council focused on two F target alternatives that did not involve a new access area closure: A target F of 0.24 (TAC of 47.3 M lb), and a lower target F of 0.20 (TAC of 41.5 M lb), which was ultimately selected by the Council. The Council's quota allocation recommendation for FY 2010 became very controversial due to industry concerns over the FY 2010 economic impacts of what some