

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Part 213**

[Docket No. FRA-2008-0036]

RIN 2130-AB90

**Track Safety Standards; Continuous Welded Rail (CWR)**

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

**ACTION:** Final rule.

**SUMMARY:** FRA is amending the Federal Track Safety Standards to promote the safety of railroad operations over continuous welded rail (CWR). In particular, FRA is promulgating specific requirements for the qualification of persons designated to inspect CWR track, or supervise the installation, adjustment, or maintenance of CWR track. FRA is also clarifying the procedures associated with the submission of CWR plans to FRA by track owners. The final rule specifies that these plans should add focus on inspecting CWR for pull-apart prone conditions, and on CWR joint installation and maintenance procedures. This final rule will also make other changes to the requirements governing CWR.

**DATES:** *Effective date:* This final rule is effective August 25, 2009.

*Compliance dates:* October 9, 2009 for Class I railroads; November 23, 2009 for Class II railroads; and February 22, 2010 for Class III railroads.

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**Background****I. Continuous Welded Rail (CWR)****A. General**

CWR refers to the way in which rail is joined together to form track. In CWR, rails are welded together to form one continuous rail that may be several miles long. Although CWR is normally one continuous rail, there can be joints<sup>1</sup> in it for one or more reasons: the need for insulated joints that electrically separate track segments for signaling purposes, the need to terminate CWR installations at a segment of jointed rail, or the need to remove and replace a section of defective rail.

**B. Statutory and Regulatory History for CWR**

FRA issued the first Federal Track Safety Standards in 1971. See 36 FR 20336 (October 20, 1971), codified at 49 CFR part 213. At that time, FRA addressed CWR in a rather general manner, stating, in 49 CFR 213.119, that railroads must install CWR at a rail temperature that prevents lateral displacement of track or pull-aparts of rail ends and that CWR should not be disturbed at rail temperatures higher than the installation or adjusted installation temperature.

In 1982, FRA removed § 213.119 because FRA believed it was so general in nature that it provided little guidance to railroads and it was difficult to enforce. See 47 FR 7275 (February 18, 1982) and 47 FR 39398 (September 7, 1982). FRA stated: "While the importance of controlling thermal stresses within continuous welded rail has long been recognized, research has not advanced to the point where specific safety requirements can be established." 47 FR 7279. FRA explained that continuing research might produce reliable data in this area in the future.

<sup>1</sup> Rail joints commonly consist of two joint bars that are bolted to the sides of two abutting ends of rail and contact the rail at the bottom surface of the rail head and the top surface of the rail base.

Congressional interest in CWR developed. With passage of the Rail Safety Enforcement and Review Act (Pub. L. 102-365, September 3, 1992), Congress required the Secretary of Transportation (Secretary) to evaluate procedures for installing and maintaining CWR and its attendant structure. In 1994, Congress further directed the Secretary to specifically evaluate cold weather installation procedures for CWR with passage of the Federal Railroad Safety Reauthorization Act of 1994 (Pub. L. 103-440, November 2, 1994), codified at 49 U.S.C. 20142. As delegated by the Secretary, see 49 CFR 1.49(m), FRA evaluated those procedures in connection with information gathered from the industry and FRA's own research and development activities. FRA then addressed CWR procedures by adding § 213.119 during its 1998 revision of the Track Safety Standards. See 63 FR 33992 (June 22, 1998).

Section 213.119, as added in 1998, requires railroads to develop and submit to FRA, written CWR plans containing procedures that, at a minimum, provide for the installation, adjustment, maintenance, and inspection of CWR, as well as a training program and minimal recordkeeping requirements. Section 213.119 does not dictate which procedures a railroad must use in its CWR plan; however, it states that each track owner with track constructed of CWR shall have in effect and comply with a plan that contains written procedures which address the installation, adjustment, maintenance, and inspection of CWR, the inspection of CWR joints, and a training program for the application of those procedures. It allows each railroad to develop and implement its individual CWR plan based on procedures which have proven effective for it over the years. The operative assumption was that geophysical conditions vary so widely among U.S. railroads that, in light of what was then known about CWR, CWR plans should vary to take account of them. Accordingly, procedures can vary from railroad to railroad.

On August 10, 2005, President Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) (Pub. L. 109-59). Section 9005(a) of SAFETEA-LU amended 49 U.S.C. 20142 by adding a new subsection (e). This new subsection required that within 90 days after its enactment, FRA require (1) each track owner using CWR track to include procedures (in its procedures filed with FRA pursuant to § 213.119) to improve the identification of cracks in rail joint bars; (2) instruct

FRA track inspectors to obtain copies of the most recent CWR programs of each railroad within the inspectors' areas of responsibility and require that inspectors use those programs when conducting track inspections; and (3) establish a program to review CWR joint bar inspection data from railroads and FRA track inspectors periodically. This new subsection also provided that whenever FRA determines that it is necessary or appropriate, FRA may require railroads to increase the frequency of inspection, or improve the methods of inspection, of joint bars in CWR.

Pursuant to this mandate, on November 2, 2005, FRA revised the Track Safety Standards by publishing an interim final rule (IFR), 70 FR 66288, which addresses the inspection of rail joints in CWR. FRA requested comment on the IFR and provided the Railroad Safety Advisory Committee (RSAC) with an opportunity to review the comments on the IFR. To facilitate this review, on February 22, 2006, RSAC established the Track Safety Standards Working Group (Working Group). The Working Group was given two tasks: (1) To resolve the comments on the IFR, and (2) to make recommendations regarding FRA's role in oversight of CWR programs, including analyzing the data to determine effective management of CWR safety by the railroads. The first task, referred to as "Phase I" of the CWR review, included analyzing the IFR on the inspection of joint bars in CWR territory, reviewing the comments on the IFR, and developing recommendations for the final rule. With guidance from the Working Group, FRA published a final rule on October 11, 2006, 71 FR 59677, which addressed the comments on the IFR, adopted a portion of the IFR, and made changes to other portions. The final rule became effective October 31, 2006, and is codified at 49 CFR part 213.

The Working Group then turned to the second task, referred to as "Phase II" of RSAC's referral, which involves an examination of all the requirements of § 213.119 concerning CWRB—not focused only on those concerning joints in CWR. As discussed below, the Working Group reported its findings and recommendations to RSAC at its February 20, 2008 meeting. RSAC approved the recommended consensus regulatory text proposed by the Working Group, which accounts for the majority of the notice of proposed rulemaking (NPRM) that FRA published on December 1, 2008 at 73 FR 73078. FRA received five comments during the public comment period for the NPRM,

which the agency will address in the discussion of this final rule.

## II. Railroad Safety Advisory Committee (RSAC) Overview

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 RSAC 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 RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);  
 American Association of State Highway & Transportation Officials (AASHTO);  
 American Chemistry Council;  
 American Petrochemical Institute;  
 American Public Transportation Association (APTA);  
 American Short Line and Regional Railroad Association (ASLRRA);  
 American Train Dispatchers Association (ATDA);  
 Association of American Railroads (AAR);  
 Association of Railway Museums (ARM);  
 Association of State Rail Safety Managers (ASRSM);  
 Brotherhood of Locomotive Engineers and Trainmen (BLET);  
 Brotherhood of Maintenance of Way Employes Division (BMWED);  
 Brotherhood of Railroad Signalmen (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 (LCLAA);\*  
 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;  
 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 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 recommendations for action, FRA moves ahead to resolve the issue through traditional rulemaking proceedings.

## III. RSAC Track Safety Standards Working Group

As noted above, RSAC established the Track Safety Standards Working Group on February 22, 2006. To address Phase I of RSAC's referral, the Working Group convened on April 3–4, 2006; April 26–28, 2006; May 24–25, 2006; and July 19–20, 2006. The results of the Working Group's efforts were incorporated into the final rule that was published on October 11, 2006. To address Phase II of RSAC's referral, the Working Group convened on January 30–31, 2007; April 10–11, 2007; June 27–28, 2007; August 15–16, 2007; October 23–24, 2007; and

January 8–9, 2008. The Working Group's finding and recommendations were then presented to the full RSAC on February 20, 2008, as noted above.

The members of the Working Group, in addition to FRA, include the following:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), Consolidated Rail Corporation (Conrail), CSX Transportation, Inc. (CSX), The Kansas City Southern Railway Company (KCS), Norfolk Southern Railway Company (NS), and Union Pacific Railroad Company (UP);

Amtrak;

APTA, including members from Port Authority Trans-Hudson Corporation (PATH), LTK Engineering Services, Northeast Illinois Regional Commuter Railroad Corporation (Metra), and Peninsula Corridor Joint Powers Board (Caltrain);

ASLRRRA (representing Class III/ smaller railroads);

ASRSM (represented by staff from the California Public Utilities Commission (CPUC));

BLET;

BMWED;

BRS;

Kandrew, Inc.;

Transportation Technology Center, Inc. (TTCI); and

UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center (Volpe Center) attended all of the meetings and contributed to the technical discussions. In addition, NSTB staff attended all of the meetings and contributed to the discussions as well.

FRA has worked closely with the RSAC in developing its recommendations and believes that the RSAC has effectively addressed concerns with regard to FRA's management of CWR and rail carriers' effective implementation of their CWR plans. FRA has greatly benefited from the open, informed exchange of information during the meetings. There is a general consensus among the railroads, rail labor organizations, State safety managers, and FRA concerning the primary principles FRA sets forth in this final rule. The Working Group has also benefited in particular from participation of NTSB staff. FRA believes that the expertise possessed by the RSAC representatives enhances the value of the recommendations, and FRA has made every effort to incorporate them in this final rule.

The Working Group was unable to reach consensus on one item that FRA

has elected to include in this final rule. The Working Group did not reach consensus with regard to the change to 49 CFR 213.119(c), which describes the joint installation and maintenance procedures that track owners must include in their CWR plans. The FRA representatives to the Working Group felt strongly that the text is necessary to include in the final rule, as the failure of CWR joints was the principal basis for the 2006 final rule. The FRA members believed that the integrity of CWR joints could not be definitively maintained without requiring that the specific installation and maintenance procedures delineated in § 213.119(c) be included in the track owner's CWR plan. On the other hand, the rail carrier representatives argued that such specific requirements would interfere with their freedom to modify installation and maintenance procedures as they saw fit. Nevertheless, it is FRA's position that the text is necessary to prevent the failure of CWR joints and has included this singular, non-consensus item into the rule text of this final rule.

#### IV. FRA's Approach to CWR in This Final Rule

As opposed to the more narrow approach taken by FRA when publishing the final rule on inspections of joints in CWR (Oct. 11, 2006; 71 FR 59677), FRA broadly reviewed all of § 213.119 for purposes of this final rule. In collaboration with the Working Group, FRA examined compliance with § 213.119 in general and concerns brought forward by the industry. At the end of the first Working Group meeting, FRA decided to focus the review on the following issues: the training/re-training of individuals qualified to maintain and inspect CWR; the submission of CWR plans to FRA; the availability of a carrier's plan at CWR work sites; special inspections of CWR; the definition of CWR; ballast; and anchoring requirements.

##### A. Qualifications and Training of Individuals on CWR

During the rulemaking on inspections of joints in CWR, the BMWED suggested that there should be annual re-training of track inspectors on joint bar inspections in CWR. FRA understood this comment as pertaining to CWR training in general and resolved to address this concern as part of the Phase II task of broadly reviewing § 213.119. In carrying out this task, and because of the concern raised by the BMWED, the Working Group decided that it would be beneficial to review accident data from Class I and shortline railroads to determine whether accidents on CWR

could be attributed to training deficiencies of track inspectors. The Working Group established the Accident Review Task Force (AR Task Force) to facilitate this review and analysis, and it was comprised of FRA and the following Working Group members:

AAR, including BNSF, CSX, CP, NS, and UP;

Amtrak;

APTA, including Metra;

ASLRRRA;

BMWED; and

BRS.

Staff from the Volpe Center and NTSB also participated in this effort, which focused on researching and analyzing accident data from the years 2000 to 2007 for major causal factors of accidents on CWR. The AR Task Force initially reviewed over 1100 accident/incident report forms from January 2000 to August 2007. After taking into consideration the location of the most severe accidents/incidents, the AR Task Force narrowed its review to exclude accidents/incidents on Class 1 and excepted track, as defined in 49 CFR part 213. The final review included over 200 reports that met the objectives and criteria for study.

The AR Task Force determined that a high volume of accidents was due to misalignment of track, caused by sunkinks or buckling of the track. The AR Task Force also discovered that each incident studied occurred after track work had been performed recently, and, surprisingly, that the carriers' CWR engineering standards were not being followed in conducting various types of track work. In particular, the research disclosed failure to adequately de-stress the track following a previous derailment; failure to maintain the neutral temperature of the rail and to record the amount of rail added or removed during installation; failure to adjust or replace deficient anchors; and failure to place the proper speed restrictions and/or maintain a sufficient length of time and/or tonnage on disturbed track. Moreover, upon review of the railroads' CWR program plans, FRA noted that the railroads were not providing comprehensive guidelines for the training/retraining of their employees in the application of CWR procedures.

Given the concerns raised, the Working Group decided that it was necessary to ensure that individuals are properly qualified and trained to install, adjust, maintain, and inspect CWR track. Section 213.7 previously delineated how a railroad must designate (1) qualified persons to supervise restorations and renewals of

track, (2) qualified persons to inspect track, and (3) persons who may pass trains over broken rails and pull-aparts. However, the section contained no explicit provision for individuals to supervise restorations and renewals of track, or for individuals to inspect track, specific to CWR. In order to address qualification and training concerns specific to individuals qualified on CWR, the Working Group recommend adding a new paragraph (c) to § 213.7. See the Section-by-Section Analysis, below, for further discussion of the changes to this section.

#### B. Submission of CWR Plans to FRA

The second issue that was raised at the Working Group discussions involved the submission of CWR plans to FRA. FRA representatives raised the concern that rail carriers were presenting plans to FRA's Office of Safety<sup>2</sup> that were not the current plans, were unenforceable because of their vagueness, and did not contain all of the procedures in a single, comprehensive document. The Working Group therefore discussed: (1) The need to develop a mechanism for updating and submitting CWR program procedures in a timely manner to FRA's Office of Safety; (2) notification and re-submission criteria for any and all modifications to program plans; (3) the need for CWR procedures to be contained in a single document; and (4) the desirability of track owners submitting changes to CWR procedures to FRA prior to implementation, as immediate implementation can cause problems with enforcement activities and information being available to FRA personnel in the field.

The Working Group determined that there was a need to establish procedures for the submission and implementation of modified CWR plans to maintain consistency with the continued growth of the industry through developments in engineering and technology. Initially, rail carrier representatives did not agree with FRA's position on the need for changes to their CWR procedures to be sent to FRA prior to their implementation. They contended that changes in CWR procedures should be effective immediately, without having to submit the changes to FRA in advance. For example, the rail carrier representatives stated that the ability to change their plans as they wished would help them to more expeditiously incorporate recent developments based upon engineering and accident review findings. However, since FRA enforces

the plan that the track owner has on file with FRA, if track owners change their plans without first notifying FRA, the agency cannot properly enforce their plans. The rail carrier representatives acknowledged this issue and agreed to FRA's proposal that any change to a CWR plan be submitted to FRA at least 30 days prior to its implementation. Nevertheless, FRA makes clear that a track owner is allowed to immediately implement more restrictive measures than provided for in the plan on file with FRA. The track owner can, of course, do more than the minimum measures provided for in its plan, such as to address an immediate safety concern. However, the track owner would not be able to do less than the minimum measures provided for in its plan without first following the proposed procedures for changing the plan.

The rail carrier representatives stated that they would like to know when FRA has received a submitted CWR plan. FRA agreed that this request was reasonable, and agreed to include a provision in the regulation stating that FRA will issue a written statement acknowledging receipt of the plan to the track owner. The Working Group also discussed that the current regulatory text was vague as to what FRA did with a plan once it was received. FRA has determined that the best course of action is to allow for the agency to review a plan and, if it is disapproved, to state the reasons for the disapproval. This is intended to allow the track owner to better understand and remedy the deficiencies that FRA identifies with its plan. The final regulatory text also provides a process by which the track owner could appeal an initial rejection of its CWR plan by FRA. This process is further discussed in the Section-by-Section Analysis, below.

#### C. Availability of CWR Written Procedures at CWR Work Sites

With the passage of SAFETEA-LU in 2005, Congress mandated that FRA instruct its track inspectors to obtain the most recent copies of rail carriers' CWR plans and to use these plans when conducting track inspections. In response, FRA posted the CWR plans received by the Office of Safety on FRA's Intranet site, where they are available to all Federal and State inspectors, and has instructed all of its inspectors to use these plans when conducting track inspections.

The Working Group discussed the desirability of having copies of the carrier's written CWR procedures at every work site. FRA and labor representatives maintained that updated

revisions and modifications to the CWR plans should be made available to the carrier personnel responsible for the installation, adjustment, maintenance, and inspection of CWR; railroads should maintain/retain these procedures and guidelines within their engineering manuals. FRA proposed to the Working Group that the railroads provide a copy of their CWR program plans to be maintained on-site during the performance of duties either with the employee in charge or the qualified employee conducting the work. This type of practice would ensure that personnel understand the track owner's CWR policies and procedures.

The Working Group reached consensus that the track owner should make available, in one comprehensive manual, a copy of the track owner's CWR plan, including all revisions, appendices, updates, and referenced materials, at every job site where personnel are assigned to install, inspect, and maintain CWR.

#### D. Special Inspections

During Phase I of the Working Group's assignment, it was determined that the issue of special inspections of CWR during cold weather be tabled until Phase II. During preliminary Phase II discussions, the Working Group recognized that this issue would be better resolved by enlisting additional resources for further technical engineering research and analysis. The Working Group therefore formed the Technical Issues Task Force (TI Task Force), which was principally comprised of members from the Volpe Center and Kandrew, Inc., an independent engineering contractor engaged to represent the interests of the AAR. Technical concerns discussed by the TI Task Force included: Speed restrictions for track work following mechanized stabilization (*i.e.*, how slow orders are lifted); maintaining the desired rail installation temperature range; inspecting for curve movement; the relationship between ambient and rail temperature; special inspections (cold weather effects on rail); and rail anchoring requirements. The TI Task Force reported to the Working Group that all of these issues should be handled either individually or jointly in special CWR inspections.

#### E. Definition of CWR

CWR refers to the way in which rail is joined together to form track. In CWR, rails are welded together to form one continuous rail that may be several miles long. Although CWR is nominally one continuous rail, rail joints may exist for many different reasons. CWR is

<sup>2</sup> In November 2008 the Office of Safety was renamed the Office of Railroad Safety.

currently defined as rail that has been welded together into lengths exceeding 400 feet. Labor representatives questioned whether the railroads would consider CWR into which a joint has been installed (to repair a rail break or remove a detected defect, for example) to be jointed rail and no longer subject to the railroad's CWR maintenance policy. FRA's position is that rail designated as CWR when installed remains CWR irrespective of whether it contains a joint or joints.

#### F. Ballast

In its ongoing review of CWR plans, FRA noted that some track owners included a definition of what constitutes "sufficient ballast" in their plans. Some plans cited specific measurements prescribing the amount of ballast appropriate for various track locations. During the Working Group meetings, labor representatives proposed that FRA adopt a definition of minimum sufficient ballast. The labor representatives also requested additional information from the Volpe Center to address concerns about how track ballast affects track strength. The ensuing discussion highlighted the fact that the track owners' CWR plans (which are submitted to FRA) are supplemented in practice by additional railroad-specific policies and procedures ("best practices") which are often more restrictive. Rail carrier representatives were reluctant to have explicit ballast requirements in their CWR plans, due to the concern that ballast conditions may not always be maintained to the presumably more stringent internal standards.

The Track Safety Standards define ballast in § 213.103 as material which will transmit and distribute the load of the track and railroad rolling equipment to the subgrade; restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails; provide adequate drainage for the track; and maintain proper track crosslevel, surface, and alignment. It is FRA's position that § 213.103 appropriately defines the term "ballast" for use by the regulated industry.

#### G. Anchoring

The Working Group discussed rail anchoring specifically in terms of controlling longitudinal force near joints installed at the end of CWR strings and near joints within CWR strings. A CWR string is understood to be a length of CWR rail set aside by the railroad for installation in the track. Of concern is the relative effectiveness of anchoring

patterns—every tie versus every other tie in conventional, wood tie construction. Railroads typically do not change anchoring patterns when installing joints within CWR strings, and generally have policies to remove the joint when practical. At the end of CWR strings some railroads under certain circumstances box-anchor every tie for a prescribed distance to help control the longitudinal forces at the transition. This is not a universally accepted practice. The primary effect of this practice is to reduce the longitudinal force carried by the joint when the rail is in tension. As the force carried by the joint increases, the predicted life of the joint shortens. Please see the discussion in the Section-by-Section Analysis for § 213.119(c) to see the options that FRA gives track owners to strengthen a joint by relieving the tensile forces that it endures.

The Working Group also focused on when the joint would be removed, and proposed time limits for certain actions based on the performance of the joint in practice. One of the concerns is that as the joint fails the existing stress-free temperature of the rail may significantly be reduced, and, hence, require subsequent adjustment. Although the technical aspects of this issue were agreed upon by the Working Group, consensus was not reached on including specific requirements in the regulatory text. Please see the Section-by-Section Analysis for further discussion on this issue.

#### V. Response to Public Comment

FRA received comments from the American Association for Justice, AAR, BMWED, Metra, and NTSB during the public comment period for the NPRM. FRA has reviewed and analyzed each issue brought up by the comments, which the agency will address in this discussion and in the final rule text.

##### Preemption

The American Association for Justice (AAJ) commented that FRA should revise its section entitled "Executive Order 13132" to delete any language regarding the preemption of State common law claims. AAJ stated that, contrary to the agency's assertions, the former Federal Railroad Safety Act of 1970 (FRSA) does not authorize the preemption of State common law claims. AAJ claimed that FRA regulations have never lawfully preempted State law claims. The petition also stated that Congress reiterated its intent to preserve State tort claims against negligent railroads. Finally, AAJ argued that agency rules must clearly follow the FRSA's limited

preemption language, and that State common law should govern railroad safety issues.

Contrary to AAJ's claim, FRA's Federalism Statement correctly recites that the rule preempts State common law standards of care. The Supreme Court has spoken clearly on the subject of preemption State common law by 49 U.S.C. 20106 (Section 20106). The question was squarely presented to the Court in *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993), in which one of the respondent's claims was that, despite FRA's track standards (49 CFR part 213) which permit a maximum speed of 60 m.p.h. over the class four track involved in the case and train speed at the collision below 60 m.p.h., "petitioner [CSX] breached its common-law duty to operate its train at a moderate and safe rate of speed." *Id.* at 673. The Court's answer was "[w]e hold that, under the FRSA, Federal regulations adopted by the Secretary of Transportation pre-empt respondent's negligence action only insofar as it asserts that petitioner's train was traveling at an excessive speed." *Id.* at 676. In reaching that judgment, the Court reasoned that "[a]ccording to § [20106], applicable Federal regulations may pre-empt any State 'law, rule, regulation, order, or standard relating to railroad safety.' Legal duties imposed on railroads by the common law fall within the scope of these broad phrases." *Id.* at 664. The Supreme Court very plainly held that the State common-law standard of care was preempted by FRA's Track Safety Standards, but that the underlying negligence action was not. That is completely in accord with the amendment Congress enacted to Section 20106 in section 1528 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act of 2007).

The Supreme Court's interpretation of Section 20106 was confirmed and further explained in a subsequent case also involving a grade crossing wreck, but alleging that the railroad negligently failed to maintain adequate warning devices at the grade crossing in question. The Supreme Court held:

Sections 646.214(b)(3) and (4) [the Federal Highway Administration regulations mandating the installation of particular warning devices when certain conditions exist] "cover the subject matter" of the adequacy of warning devices installed with the participation of Federal funds. As a result, the FRSA pre-empts respondent's State tort claim that the advance warning signs and reflectorized crossbucks installed at the Oakwood Church Road crossing were inadequate. Because the TDOT used Federal funds for the signs' installation, §§ 646.214(b)(3) and (4) governed the

selection and installation of the devices. And because the TDOT determined that warning devices other than automatic gates and flashing lights were appropriate, its decision was subject to the approval of the FHWA. See § 646.214(b)(4). Once the FHWA approved the project and the signs were installed using Federal funds, the Federal standard for adequacy displaced Tennessee statutory and common law addressing the same subject, thereby pre-empting respondent's claim.

*Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 358–359 (2000). It could not be clearer that, before Congress amended Section 20106 in 2007, it provided for preemption of State common law by DOT regulations.

Congress was moved to amend Section 20106 by two court cases, *Lundeen v. Canadian Pacific Ry. Co.*, 507 F.Supp.2d 1006 (D.Minn. 2007), and *Mehl v. Canadian Pacific Ry., Ltd.*, 417 F.Supp.2d 1104 (D.N.D. 2006), which left without a legal remedy tort plaintiffs injured in a hazardous material release from a train wreck in Minot, North Dakota. The judge's opinion in *Lundeen* said:

Preemption bars private claims for FRA violations. Congress has given the Secretary of Transportation "exclusive authority" to impose civil penalties and request injunctions for violations of the railroad safety regulations. <sup>FN4</sup> 49 U.S.C. 20111(a); *Abate v. S. Pac. Transp. Co.*, 928 F.2d 167, 170 (5th Cir. 1991) ("The structure of the FRSA indicates that Congress intended to give Federal agencies, not private persons, the sole power of enforcement.").

FN4. The single exception to the Secretary's exclusive authority exists when the Federal government fails to act promptly. In such cases, State government agencies can file suit, impose penalties, or seek injunctions. 49 U.S.C. 20113.

Indeed, the FRSA has "absolved railroads from any common law liability for failure to comply with the safety regulations." *Mehl*, 417 F.Supp.2d at 1120. This is the regulatory scheme which Congress has imposed. And when Congress has clearly spoken, any relief from its regime must come from Congress rather than the Courts. Private actions against railroads based on Federal regulations are preempted.

*Lundeen*, *supra* at 1016.

The amendment to Section 20106 made by section 1528 of the 9/11 Commission Act of 2007 did not change the text the Supreme Court had interpreted. Instead, Congress enacted a very precise cure for the problem presented by *Lundeen* and *Mehl* by amending Section 20106 to renumber the then-existing language as subsection (a), and adding two new subsections as follows:

(b) *Clarification regarding State law causes of action.*—(1) Nothing in this section shall be construed to preempt an action under State law seeking damages

for personal injury, death, or property damage alleging that a party—

(A) Has failed to comply with the Federal standard of care established by a regulation 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), covering the subject matter as provided in subsection (a) of this section;

(B) Has failed to comply with its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries; or

(C) Has failed to comply with a State law, regulation, or order that is not incompatible with subsection (a)(2).

(2) This subsection shall apply to all pending State law causes of action arising from events or activities occurring on or after January 18, 2002.

(c) *Jurisdiction.*—Nothing in this section creates a Federal cause of action on behalf of an injured party or confers Federal question jurisdiction for such State law causes of action.

New subsection (b) clarifies that, as the Supreme Court held in *Easterwood*, regulations or orders issued by the Secretary of Transportation preempt the State standard of care, but not the underlying cause of action in tort, thereby preserving the ability of injured parties to seek redress in court.

Since FRA's Track Safety Standards (49 CFR part 213) were involved in both *Easterwood* and *Lundeen*, they are especially apt for illuminating FRA's interpretation of the amended statute. The Track Safety Standards substantially subsume the subject matters of standards for railroad track and train speeds over it and, therefore, preempt State standards, both statutory and common law, pertaining to those subjects. Nevertheless, under Section 20106(b)(1)(A), a private plaintiff may bring a tort action for damages alleging injury as a result of violation of the Track Safety Standards, such as train speed exceeding the maximum speed permitted under 49 CFR 213.9 over the class of track being traversed. Similarly, under Section 20106(b)(1)(B), a private plaintiff may bring a tort action for damages alleging injury as a result of violation of a railroad's CWR plan required by the Track Safety Standards (the key issue in *Lundeen*). Provisions of a railroad's CWR plan which exceed the requirements of this part are not included in the Federal standard of care. Under Section 20106(b)(1)(C), a private plaintiff may bring a tort action for damages alleging injury as a result of violation of a State law, regulation, or order that is not incompatible with subsection (a)(2), such as Ohio's

regulation of minimum track clearances in rail yards found not to be preempted in *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517 (6th Cir. 2001).

It is a settled principle of statutory construction that, if the statute is clear and unambiguous, it must be applied according to its terms. *Carciari v. Salazar*, 555 U.S.—(2009). Read by itself, Section 20106(a) preempts State standards of care, but does not expressly state whether anything replaces the preempted standards of care for purposes of tort suits. The focus of that provision is clearly on who regulates railroad safety: The Federal government or the States. It is about improving railroad safety, for which Congress deems nationally uniform standards to be necessary in the great majority of cases. That purpose has collateral consequences for tort law which new Section 20106 subsections (b) and (c) address. New subsection (b)(1) creates three exceptions to the possible consequences flowing from subsection (a). One of those exceptions ((b)(1)(B)) precisely addresses an issue presented in *Lundeen* Congress wished to rectify: it allows plaintiffs to sue a railroad in tort for violation of its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries. That provision satisfies the arguments made in the Petition concerning the State tort claims Congress intended to preserve. None of those exceptions covers a plan, rule, or standard that a regulated entity creates for itself in order to produce a higher level of safety than Federal law requires, and such plans, rules, or standards were not at issue in *Lundeen*. The key concept of Section 20106(b) is permitting actions under State law seeking damages for personal injury, death, or property damage to proceed using a Federal standard of care. A plan, rule, or standard that a regulated entity creates pursuant to a Federal regulation logically fits the paradigm of a Federal standard of care—Federal law requires it and determines its adequacy. A plan, rule, or standard, or portions of one, that a regulated entity creates on its own in order to exceed the requirements of Federal law does not fit the paradigm of a Federal standard of care—Federal law does not require it and, past the point at which the requirements of Federal law are satisfied, says nothing about its adequacy. That is why FRA believes Section 20106(b)(1)(B) covers the former, but not the latter. The basic purpose of the statute—improving railroad safety—is best served by encouraging regulated entities to do more than the law requires and would

be disserved by increasing the potential tort liability of regulated entities that choose to exceed Federal standards, which would discourage them from ever exceeding Federal standards again.

In this manner, Congress adroitly preserved its policy of national uniformity of railroad safety regulation expressed in Section 2106(a)(1) and assured plaintiffs in tort cases involving railroads, such as *Lundeen*, of their ability to pursue their cases by clarifying that Federal railroad safety regulations preempt the standard of care, not the underlying causes of action in tort. Under this interpretation, all parts of the statute are given meanings that work together effectively and serve the safety purposes of the statute. Because the language of the statute is clear, there is no need to resort to the legislative history to properly interpret the statute. *See Ratzlaf v. United States*, 510 U.S. 135, 147–148 (1994) (“[W]e do not resort to legislative history to cloud a statutory text that is clear”).

#### *Disapproval of CWR plans*

BMWED strongly argued that it believes that FRA should disapprove, for cause stated, CWR plans within a specific time period so as not to allow a non-conforming plan to remain in effect for an extended period of time. Should manpower at FRA be an impediment to incorporating such specific time frames for disapproval of all track owners' CWR plans, BMWED argues that FRA should, at a minimum, adopt its suggested time frame of review of 5 months for Class I railroads, 10 months for Class II railroads, and 15 months for Class III railroads.

FRA appreciates BMWED's concerns, and has developed a good solution to this issue. FRA decided to have this final rule effective at different dates based on the Class of railroad. This final rule is effective 45 days after the publication date for Class I railroads, 90 days after the publication date for Class II railroads, and 180 days after the publication date for Class III railroads. Also, FRA has developed a new section, 213.118, which more clearly outlines FRA's plan review and approval process. Please see the extensive discussion on this section below.

#### *CWR Joint Bolt Requirements*

The AAR is not in favor of including § 213.119(c), which describes CWR joint installation and maintenance procedures, contending that its inclusion robs the industry of necessary future flexibility. These representatives did not believe it was necessary to incorporate the text into the rule if FRA knew that they had already proposed to

add the text to their individual CWR plans. The AAR members in the Working Group also argued this point during the meetings, stating that including this paragraph constituted “regulatory creep.” BMWED, on the other hand, agreed with the proposed text. FRA strongly feels that inclusion of the paragraph is necessary. With the history of high-profile derailments on CWR due to joint bar failure, as discussed in the October 11, 2006 final rule (71 FR 59677), FRA stresses the importance for CWR track owners to follow the installation and maintenance procedures in this paragraph. FRA also notes that the maintenance procedures were analyzed and discussed at length by the Working Group and found to represent sound industry guidance to avoid a derailment on CWR track due to poor joint installation or maintenance.

The BMWED mentioned that § 213.119(c)(3) should specify “bar(s)” instead of “bar.” FRA agrees with this assessment and has changed the final rule text accordingly. FRA has also elected to slightly revise the text to make the requirements more uniform.

#### *Rail Neutral Temperature*

In its comment, Metra argues that hunting,<sup>3</sup> a significant source for imposed dynamic lateral loading, typically occurs in lightly loaded commuter cars at about 60 mph in contrast to the typical onset of hunting in freight cars at about 40 mph. The commenter suggests that, for passenger and commuter trains, “Rail that has pulled apart, broken, or been cut for defect removal must be readjusted such that its neutral temperature is within the safe range. If the rail has not been so readjusted before the rail temperature exceeds a prescribed value, the railroad would either: (1) Apply a speed restriction of 25 mph, or (2) apply a speed restriction reducing the speed by one class of track or operate at 40 mph, whichever was greater, in conjunction with a daily inspection of the rail made during the heat of the day.” Thus, commuter railroads would reduce speed to 60 mph for passenger operations and inspect the location during the heat of the day or otherwise have to reduce the speed to 25 mph if the inspection could not be done during the heat of the day.

FRA responds that, while this is an important issue, it is not one that the agency has chosen to cover in the final regulatory text. The issue was mentioned in FRA's preamble

<sup>3</sup> Truck hunting is a rapid oscillation of a car truck usually occurring at speeds in excess of 45 miles per hour in cars that are empty or lightly loaded, where the flanges tend to ride up on the head of the rail.

discussion of the NPRM as an example of a technical issue that the Working Group discussed. FRA highlighted this issue as one that the agency would take into consideration when reviewing CWR plans. Pursuant to § 213.119(f), the track owner must describe in its plan procedures which govern train speed on CWR track when maintenance work, track rehabilitation, track construction, or any other event occurs which disturbs the roadbed or ballast section and reduces the lateral or longitudinal resistance of the track, and the difference between the average rail temperature and the average rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location. FRA instructs all track owners to specifically describe in their plans how they intend to do this. FRA will review all plans for compliance with § 213.119(f).

#### *Inspection Interval*

AAR proposes that FRA return to the “intent of the current regulations and RSAC's intent by requiring railroads to specify when inspections should occur due to ambient temperature.” AAR argues that FRA offers no explanation of why it proposes to require railroads to specify an inspection interval at § 213.119(g)(2) or what it expects railroads to do to comply with such a requirement. FRA understands the confusion that the wording in the NPRM could have caused. Therefore, FRA has slightly modified the text in response to AAR's comment. The final rule states that the plan must “specify when the inspections will be conducted.”

#### *Fracture Reports*

NTSB noted that a track owner must generate a Fracture Report for every cracked or broken CWR joint bar and conduct special inspections to locate the defective joint bar. The track owner then sends this data to FRA for review and analysis so that FRA can assess the validity of joint bar inspections and determine their proper frequency or adjustment. NTSB is concerned that, after February 10, 2010, a track owner may petition FRA to conduct a technical conference to review the Fracture Report data and to assess whether there is a continued need for the collection of data. NTSB is concerned that FRA may authorize track owners to discontinue collecting fracture data that could help evaluate whether a railroad's CWR plan adequately addresses problematic joints. NTSB argues that the collection and assessment of fracture data are important and should continue.

FRA appreciates NTSB's concern with regard to the importance of Fracture

Reports, and also notes that FRA did not change the requirement of Fracture Reports with this final rule. Indeed, a track owner must continue to submit a Fracture Report to FRA for every cracked or broken CWR joint bar that is discovered during the course of an inspection pursuant to §§ 213.119(h), 213.233 or 213.235 on track that is required under § 213.119(h)(6)(i) to be inspected. FRA believes that NTSB's concern is premature for purposes of this rulemaking. FRA advises that the appropriate time to bring forth this concern would be at a technical conference called by FRA to assess whether there is a continued need for the collection of Fracture Report data.

#### *Additional Comments*

NTSB pointed out that, under § 213.119, a track owner could submit one plan to FRA, but then operate using a more restrictive plan. NTSB strongly argued that allowing a track owner to operate with two sets of CWR plans was not in the best interest of safety. Although FRA agrees with NTSB's comment that it is confusing to have two standards, FRA points out that the Track Safety Standards are minimum standards, and that the track owner is free to voluntarily follow more restrictive standards as a best practice.

AAR proposed that FRA eliminate the text at the end of § 213.121(f), which states that "locations when over 400 feet in length (with no-slip, joint-to-rail contact), are considered to be continuous welded rail track and shall meet all the requirements for continuous welded rail track prescribed in this part." FRA has always considered no-slip joint-to-rail contact designed joints to not be a break in rail continuity, and thus be defined as CWR. To avoid any confusion on this issue, FRA has elected to leave this portion of § 213.121(f) intact.

AAR also proposed that FRA delete the last sentence in § 213.119(k), which requires that CWR procedures be "maintained in one engineering standards and procedures manual." AAR claimed that it is not necessary to have all engineering standards and procedures in one document, but agrees that there is a benefit to having all CWR standards and procedures in one document. FRA agrees with this concern, and has changed the text to specify that CWR procedures be "maintained in one CWR standards and procedures manual."

#### *Errata*

Multiple commenters pointed out that the table at § 213.119(h)(6) contains

inadvertent errors, which FRA has corrected with this final rule.

#### **VI. Section-by-Section Analysis**

##### *Section 213.7 Designation of Qualified Persons to Supervise Certain Renewals and Inspect Track*

FRA is revising § 213.7 principally by adding a new paragraph (c), which creates a new requirement for the track owner to specifically designate individuals who are qualified to inspect CWR track or supervise the installation, adjustment, and maintenance of CWR track in accordance with the track owner's written procedures. This paragraph require that the designated individual have: (1) Current qualifications under either paragraphs (a) or (b) of this section; (2) successfully completed a comprehensive training course specifically developed for the application of written CWR procedures issued by the track owner; (3) demonstrated to the track owner that he/she knows and understands the requirements of the written CWR procedures, can detect deviations from those requirements, and can prescribe appropriate remedial action(s) to correct or safely compensate for those deviations; and (4) written authorization from the track owner to prescribe remedial action(s) to correct or safely compensate for deviations from the requirements in the CWR procedures and successfully completed a recorded examination on the procedures as part of the qualification process to be made available to FRA.

FRA has determined that, as CWR track has characteristics inherently different than those of traditional jointed rail, track owners should be required to designate which individuals are specifically qualified to inspect, or supervise the installation, adjustment, and maintenance of CWR. In addition to the qualifications that an individual must have under paragraph (a) to perform track maintenance work, or the qualifications under paragraph (b) to inspect track, an individual designated under paragraph (c) will have to be well-versed in the maintenance of CWR track as detailed in the track owner's CWR plan.

For guidance, FRA originally looked to § 213.305(c), which regulates the requirements of an individual qualified to inspect CWR track or supervise the installation, adjustment, and maintenance of CWR in accordance with the track owner's written procedures for train operations at track classes 6 and higher. The Working Group discussed the merits of the requirement in § 213.305(c)(2), which

states that an individual must have "successfully completed a training course of at least eight hours duration specifically developed for the application of written CWR procedures issued by the track owner." Carrier representatives maintained that the requirement to have an eight-hour course would interfere with current training methods. As the FRA representatives agreed that the comprehensive nature of the training course is more important than its duration, the Working Group reached consensus that the individual would have to successfully complete a comprehensive training course pursuant to paragraph (c)(2), which does not specify the duration of the training.

The Working Group also discussed the merits of requiring the individual to successfully complete an examination on the track owner's CWR procedures. In § 213.305(c)(4), individuals qualified on CWR for train operations at track classes 6 and higher must successfully complete a recorded examination on the track owner's CWR procedures. The paragraph states that this examination may be written, or it may be a computer file with the results of an interactive training course. Working Group members were concerned with the proposal that the examination be in a written context. It was argued that, quite often, a supervisor can better test someone's knowledge through practical application in the field as opposed to a written test. In order to accommodate this option for testing, FRA agreed to define the required examination in paragraph (c)(4) as "recorded" instead of written; therefore, track owners will have the flexibility to test an individual's knowledge how they best see fit. However, it should be noted that the results of the examination must be recorded so that FRA may inspect the basis for the qualification of an individual under paragraph (c).

In adding paragraph (c) to this section, FRA is redesignating former paragraphs (c) and (d) as paragraphs (d) and (e), respectively. FRA is also making conforming changes to these paragraphs to cross-reference the new paragraph (c), in the same way that the former paragraphs of this section are cross-referenced. Although FRA is setting out the entire text of these paragraphs for clarity, the changes to the redesignated paragraphs involve only adding the cross-reference to the introductory text of the paragraphs, and removing the superfluous reference "of this part" in redesignated paragraph (d)(4).



*Section 213.118 Continuous Welded Rail (CWR); Plan Review and Approval*

FRA is amending the Track Safety Standards by adding new § 213.118. FRA determined to cover the plan review and approval process in § 213.118, and the required contents of the plan in § 213.119. This section delineates the process for submitting a CWR plan for approval to FRA.

*Paragraph (a).* In this paragraph, FRA requires that each track owner with track constructed of CWR must have in effect and comply with a plan that contains written procedures which address: The installation, adjustment, maintenance, and inspection of CWR; inspection of CWR joints; and a training program for the applications of those procedures. This paragraph is based on the text that formerly appeared at § 213.119. FRA has not changed the substance of this requirement.

*Paragraph (b).* In this paragraph, FRA explains that the track owner must file its CWR plan with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer ("Associate Administrator"). Within 30 days of receipt of the submission, FRA will review the plan for compliance with this subpart. FRA will approve, disapprove or conditionally approve the submitted plan, and will provide written notice of its determination. During Working Group discussions, FRA representatives expressed concern that this section's current introductory text does not explicitly address certain procedural issues associated with CWR plans. The previous text did not explain how a track owner would revise a CWR plan that has already been submitted to FRA, or what the process would be for FRA to require a revision to a plan, including the process to appeal a revision requirement. FRA is therefore clarifying that a track owner must file its CWR plan with the FRA Associate Administrator not less than 30 days before it implements its CWR plan, including submitting revisions to an existing CWR plan in order for the changes to take effect under the regulation.

In this paragraph, FRA decided that a plan may also be conditionally approved. FRA recognizes that there might be instances where it would be beneficial for the agency to conditionally approve a plan. For example, the agency might decide that a plan should be approved, but might need to look into new technology proposed in the plan. It is FRA's intent to later approve or disapprove a plan that it conditionally approves. FRA also intends to notify the track owner of a

conditionally approved plan of the time that the agency anticipates it will require in order to make a final determination. So that FRA does not stall the implementation of a plan that would otherwise be approved, FRA has decided to allow a plan to be conditionally approved.

*Paragraph (c).* In this paragraph, FRA states that the track owner's existing plan shall remain in effect until the track owner's new plan is approved or conditionally approved and is effective pursuant to paragraph (d). In the Working Group discussions, it was brought up that FRA had previously been unclear in what plan would be in effect while FRA reviewed a new plan. In this new paragraph, FRA clarifies that the track owner's existing plan is to remain in effect until the new plan is approved or conditionally approved and is in effect.

*Paragraph (d).* In this paragraph, FRA states that the track owner must, upon receipt of FRA's approval or conditional approval, establish the plan's effective date. The paragraph also requires that the track owner advise, in writing, FRA and all affected employees of the effective date. FRA decided to promulgate this provision because track owners have expressed to FRA that they needed time to implement a plan once FRA has approved it. Indeed, FRA recognizes the time and effort that it takes to issue a new CWR plan, and wants to ensure that track owners have the time to do this once a new CWR plan is approved by FRA. Therefore, FRA has decided to let the track owner establish an effective date of its approved or conditionally approved CWR plan provided that FRA and all affected employees are advised of the effective date in writing.

*Paragraph (e).* In this paragraph, for cause stated, FRA may, subsequent to plan approval or conditional approval, require revisions to the plan to bring the plan into conformity with this subpart. Notice of a revision requirement shall be made in writing and specify the basis of FRA's requirement. The track owner may, within 30 days of the revision requirement, respond and provide written submissions in support of the original plan. FRA renders a final decision in writing. Not more than 30 days following any final decision requiring revisions to a CWR plan, the track owner shall amend the plan in accordance with FRA's decision and resubmit the conforming plan. The conforming plan becomes effective upon its submission to FRA.

If the review indicates that revisions to the plan are needed to bring the plan into compliance with the requirements

of the rule, FRA will give notice of the revision requirement in writing to the track owner, including the basis of the revision requirement. FRA believes that this paragraph clarifies the process it will use when requiring CWR plans to be revised. It should be noted that, unlike when a plan is approved or conditionally approved, when a conforming plan that has been revised is submitted to FRA, it becomes effective on that date.

*Section 213.119 Continuous Welded Rail (CWR); Required Plan Contents*

FRA moved the text pertaining to CWR plan review and approval to new § 213.118. The introductory text to this section now states that the track owner must comply with the contents of the CWR plan approved or conditionally approved under § 213.118.

*Paragraphs (a) and (b).* Paragraphs (a) and (b) are published in their entirety with no changes.

*Paragraph (c).* FRA is designating previous paragraph (c) as paragraph (d), and adding a new paragraph (c) in its place. New paragraph (c) revises the requirements for CWR joint installation and maintenance procedures to be included in a track owner's CWR plan. The new paragraph requires that rail joints be installed per the requirement in § 213.121(e), which states, "In the case of continuous welded rail track, each rail shall be bolted with at least two bolts at each joint." The new paragraph further states that, in the case of a bolted joint installed during CWR installation after the publication date of the final rule, within 60 days the track owner must either: (1) Weld the joint; (2) install a joint with six bolts;<sup>4</sup> or (3) anchor every tie 195 feet in both directions of the joint. Finally, the new paragraph states that, in the case of a bolted joint in CWR experiencing service failure or a failed bar with a rail gap present, the track owner must either: (1) Weld the joint; or (2) replace the broken bar(s), replace the broken bolts, adjust anchors and weld the joint within 30 days; or (3) replace the broken bar(s), replace the broken bolts, install one additional bolt per rail end, and adjust the anchors; or (4) replace the broken bar(s), replace the broken bolts, and anchor every tie 195 feet in both directions from the CWR joint; or (5) replace the broken bar(s), replace the broken bolt(s), add rail with provisions for later adjustment pursuant to (d)(2) of this section, and reapply anchors. Per

<sup>4</sup> See 49 CFR 213.121(e), stating that, in the case of CWR, each rail shall be bolted with at least two bolts at each joint. This is a total of four bolts required at each joint.

BMWED's comment, FRA is adding the option of "bars" to (c)(3) and (c)(4) and making other modifications to the wording of this requirement.

FRA noted during Working Group discussions that this section lacked an explicit reference to how a rail joint in CWR shall be bolted. As this requirement appears in § 213.121(e), FRA decided that it would be prudent to also state this requirement in § 213.119 so as to include all requirements for CWR in one section. This requirement serves as a reminder to track owners that they cannot create their own joint bolt requirements in their CWR plans that are less restrictive than those specified in the regulation.

As previously mentioned, the Working Group was not able to reach consensus on paragraph (c). However, virtually identical text was included and discussed in the generic CWR plan generated by the rail carrier representatives, as discussed above. The rail carrier representatives were not in favor of including this paragraph, contending that its inclusion would constitute "regulatory creep." These representatives did not believe it was necessary to incorporate the text into the rule if FRA knew that they had already proposed to add the text to their individual CWR plans. AAR argued this same point in its comment on the NPRM. BMWED, on the other hand, agreed with the proposed text. FRA strongly feels that inclusion of the paragraph is necessary. With the history of high-profile derailments on CWR due to joint bar failure, as discussed in the October 11, 2006 final rule (71 FR 59677), FRA stresses the importance for CWR track owners to follow the installation and maintenance procedures in this paragraph. FRA also notes that the maintenance procedures were analyzed and discussed at length by the Working Group and found to represent sound industry guidance to avoid a derailment on CWR track due to poor joint installation or maintenance.

*Paragraph (d).* FRA is redesignating previous paragraph (c) as paragraph (d). No substantive change to this paragraph's requirements is intended.

*Paragraph (e).* FRA is redesignating previous paragraph (d) as paragraph (e). No substantive change to this paragraph's requirements is intended.

*Paragraph (f).* FRA is redesignating previous paragraph (e) as paragraph (f). FRA is also revising paragraph (f)'s format to more clearly identify its requirements and add a new paragraph (f)(2) which requires the track owner to have procedures in the CWR plan that govern train speed when the difference between the average rail temperature

and the rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location. "Rail temperature" is defined as "the temperature of the rail, measured with a rail thermometer," and, as discussed in redesignated paragraph (l), below, FRA is adding a definition for "rail neutral temperature" (RNT) as "the temperature at which the rail is neither in compression nor in tension." When maintaining the integrity of CWR track, the track owner needs to be concerned not only with the actual rail temperature, but also with the rail neutral temperature. FRA notes that the track owner also has the responsibility to quantify the rail neutral temperature of all CWR track.

There have been a significant number of derailments caused by buckled track. Because of this safety concern, FRA is requiring track owners to reduce train speed over areas where there is an increased possibility of track buckling. By reducing the train speed, FRA anticipates that track owners will be able to reduce the probability of a catastrophic derailment caused by track buckling.

*Paragraph (g).* FRA is redesignating previous paragraph (f) as paragraph (g). FRA is also revising the requirements of this paragraph by specifying that track owners must have in their CWR plans procedures which prescribe when physical track inspections are to be performed to detect not only buckling-prone conditions, but also pull-apart prone conditions.

This paragraph previously focused only on when physical track inspections were required to identify buckling-prone conditions in CWR track. The requirements for these inspections to detect buckling-prone conditions have not been changed. In paragraph (g)(1)(i), track owners are still be required to have procedures in their CWR plans that address inspecting track to identify buckling-prone conditions in CWR, which include: (A) Locations where tight or kinky rail conditions are likely to occur, and (B) locations where track work of the nature described in redesignated paragraph (f)(1) of this section have recently been performed. As discussed above, redesignated paragraph (f)(1) describes maintenance work, track rehabilitation, track construction, or any other event which disturbs the roadbed or ballast section and reduces the lateral or longitudinal resistance of the track. The track owner also continues to specify when the inspections will be conducted as well as the appropriate remedial actions to be taken when buckling-prone conditions

are found, as provided in paragraph (g)(2), discussed further below.

Pull-apart prone conditions are addressed with the addition of paragraph (g)(1)(ii), which requires the track owner to include procedures in its CWR plan that prescribe when physical track inspections are to be performed to identify pull-apart prone conditions in CWR track. The procedures must include locations where pull-apart or stripped-joint rail conditions are likely to occur. As provided in paragraph (g)(2), the track owner must also specify when the inspections will be conducted and the appropriate remedial actions to be taken when pull-apart prone conditions are found. Paragraph (g)(2) is based on the previous text of paragraph (f)(2), which addressed buckling-prone conditions, expanding it to address pull-apart prone conditions as well.

The Working Group discussed that changes in temperature can greatly affect the integrity of CWR. Typically, significant increases in rail temperature can cause buckling-prone conditions, and significant decreases in rail temperature can cause pull-apart prone conditions. FRA has chosen not to quantify the specific temperatures that would cause a buckling-prone condition or a pull-apart prone condition. The Working Group discussed that, given the varied geographical composition of each railroad entity, specifying these temperatures would be best left to the track engineering program of each track owner. Therefore, FRA has declined to specify at what temperatures a physical track inspection under paragraph (g)(1) would be required, choosing instead to require that the track owner identify the conditions and situations when a physical track inspection would need to occur due to a buckling-prone or pull-apart prone condition.

*Paragraph (h).* FRA is redesignating previous paragraph (g) as paragraph (h). FRA is not substantively changing the requirements of this paragraph. FRA is only making conforming amendments to cross-references in this paragraph to reflect the redesignation of the paragraphs in the section.

*Paragraph (i).* FRA is redesignating previous paragraph (h) as paragraph (i). FRA is also revising this paragraph by requiring the track owner to have in effect a comprehensive training program for the application of its written CWR procedures with provisions for annual re-training for individuals designated under § 213.7(c) to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. Additionally, FRA is requiring that the track owner make the training program

available for review by FRA upon request.

This paragraph previously required that the track owner's training program have provisions for "periodic" re-training of qualified individuals. The Working Group discussed this requirement and advised that the term "periodic" was undesirably vague. A brief, informal survey at one of the Working Group meetings revealed that some rail carriers re-trained individuals every year, while others re-trained individuals every two or three years. FRA identified that a leading cause of carrier non-compliance with § 213.119 is a lack of training among individuals qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. The AR Task Force's study showed that a significant number of accidents/incidents could be attributed to the failure to comply with the track owner's CWR policy. In order to address this serious safety concern, FRA determined that it was necessary to state more specifically when qualified individuals must be re-trained.

Within the Working Group, FRA representatives proposed to revise this paragraph by specifying the months or days that should pass between the re-training of qualified individuals. Rail carrier representatives stated that this would not give them the flexibility to train individuals at pre-determined training classes and would add to operational costs. In order to address the concerns of the rail carrier representatives, FRA agreed that it would be sufficient to require annual re-training of individuals. FRA notes that, for purposes of this paragraph, "annual" means "calendar year," as opposed to a 365-day period.

As FRA is amending § 213.7 to include paragraph (c) that explicitly addresses how a track owner designates an individual as qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track, FRA decided that it was necessary to include a reference to § 213.7(c) in this revision to § 213.119(i).

In paragraph (i), FRA is also requiring that the track owner make the training program available for review by FRA upon request. Due to the unique and individual nature of training programs, FRA determined that it would not be cost-effective for the agency to examine the training program of each track owner in addition to its CWR plan any time a change is made to the plan. However, particularly in the event of non-compliance with the CWR regulations, FRA believes that it should

have the option of examining how qualified individuals are trained to apply the track owner's written CWR procedures.

During the Working Group's meetings, Class I railroad representatives agreed to voluntarily make an initial submission of their CWR training programs to FRA. FRA also agreed that, in its Track Safety Standards Compliance Manual, track inspectors will be instructed not to request the training program of a specific track owner unless under the specific direction of FRA management. Rather, FRA's headquarters staff will undertake the responsibility of obtaining and disseminating this information, as needed, to both FRA inspectors and inspectors from States participating in rail safety enforcement activities under 49 CFR part 212.

*Paragraph (j).* FRA is redesignating previous paragraph (i) as paragraph (j). FRA is not substantively changing the requirements of this paragraph, however, FRA is only making a conforming change to the cross-reference to another paragraph in this section, due to the redesignation of the paragraphs in this section, and to correct the cross-reference so that it references "this section"—not "this part."

*Paragraph (k).* FRA is adding a new paragraph (k) that requires the track owner to make readily available, at every job site where personnel are assigned to install, inspect or maintain CWR, a copy of the track owner's CWR procedures and all revisions, appendices, updates, and referenced materials related thereto prior to their effective date. Additionally, such CWR procedures are required to be issued and maintained in one comprehensive CWR standards and procedures manual.

Since the implementation of the CWR regulations, FRA has noted that a number of rail carriers maintain two different sets of CWR procedures; rail carriers have been discovered to maintain the set of CWR procedures submitted to FRA pursuant to this § 213.119, as well as maintain a separate set of CWR procedures to be used by personnel in the field. While FRA takes no issue with a rail carrier instructing its personnel to maintain more restrictive CWR procedures in the field than what is on file with FRA, FRA stresses that rail carriers are required to train their personnel on the plan on file with FRA. While FRA continues to enforce the CWR plan on file with its Office of Railroad Safety, having the procedures required to be at every job site where personnel are assigned to install, inspect or maintain CWR will ensure that personnel in the field

understand which set of procedures FRA will hold them responsible for compliance with pursuant to the Federal regulations. Although FRA agrees with NTSB's comment that it is confusing to have two standards, FRA points out that the Track Safety Standards are minimum standards, and that the track owner is free to voluntarily follow more restrictive standards as a best practice.

*Paragraph (l).* FRA is redesignating former paragraph (j) as paragraph (l). This paragraph contains definitions to be used in connection with this section. FRA is revising two existing definitions, removing a definition, adding five new definitions, and making non-substantive changes to correct the capitalization of the definitions. Specifically, FRA is changing the definition of "continuous welded rail (CWR)" to mean "rail that has been welded together into lengths exceeding 400 feet. Rail installed as CWR remains CWR, regardless of whether a joint or plug is installed into the rail at a later time." As a consequence of this change, FRA is also changing the definition of "CWR joint" to mean "any joint directly connected to CWR." ("CWR joint" had been defined as "(a) any joint directly connected to CWR, and (b) any joint(s) in a segment of rail between CWR strings that are less than 195 feet apart, except joints located on jointed sections on bridges.")

The Working Group discussed that the current definition of CWR, which does not include a reference to a joint or plug, does not fully address the reality of CWR in the industry. When the previous definition of CWR was read with the previous definition of CWR joint, one could wrongly conclude that, by adding a joint or plug into a section of CWR track, the track would no longer be defined as CWR track. Indeed, it was agreed upon by the members of the Working Group that CWR track generally maintains its CWR properties whether or not a joint or plug is added to the track at a later date. Therefore, the Working Group recommended that the definition be revised to specify that rail installed as CWR remains as CWR, regardless of whether a joint or plug is installed into the rail at a later date.

Due to the decision to revise the definition of CWR, the Working Group determined that the definition of CWR joint should also be revised. As the new definition of CWR would explain that CWR track remains as CWR, regardless of whether a joint or plug is installed into the rail at a later date, the definition of CWR joint would no longer need to specify that a CWR joint is a joint in a segment of rail between CWR strings that are less than 195 feet apart. Since

rail installed as CWR remains as CWR with the new definition, FRA is revising the definition of CWR joint to simply be "any joint connected to CWR."

FRA is removing the definition "action items," because the term is not expressly used in this section. Previously, "actions items" were defined as "the rail joint conditions that track owners identify in their CWR plans pursuant to paragraph (g)(3) which require the application of a corrective correction." Paragraph (g)(3) itself provides that, in formulating procedures which prescribe the scheduling and conduct of inspections to detect cracks and other indications of potential failures in CWR joints, the track owner specify the conditions of actual or potential joint failure for which personnel must inspect. Current paragraph (g)(3) further provides that these conditions include, at a minimum, the following items: (i) Loose, bent, or missing joint bolts; (ii) rail end batter or mismatch that contributes to instability of the joint; and (iii) evidence of excessive longitudinal rail movement in or near the joint, including, but not limited to, wide rail gap, defective joint bolts, disturbed ballast, surface deviations, gap between tie plates and rail, or displaced rail anchors. The term "action items" is not used in this paragraph, however. FRA is redesignating paragraph (g)(3) as paragraph (h)(3), for formatting purposes only due to the addition of new paragraphs in this section. FRA does not intend to make any change to the substance of this paragraph, and removing the definition of "action items" is not intended to have any effect on what items are considered defects under the provisions of the rule.

At the same time, FRA is adding the new definition of "rail neutral temperature" to mean "the temperature at which the rail is neither in compression nor tension." This definition is necessary because FRA is adding new paragraph (f)(2), which utilizes the term "rail neutral temperature." In paragraph (f)(2), FRA requires track owners to have procedures that govern train speed when the difference between the average rail temperature and the rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location. When maintaining the integrity of CWR track, the track owner has to be concerned with not only the actual rail temperature of the rail, but the rail neutral temperature as well. FRA decided that it was necessary to include in the regulation a definition of rail neutral temperature to clarify what temperature

the track owner should be concerned with when preventing rail buckling. While FRA has provided a definition of "rail neutral temperature," it is the responsibility of the track owner to quantify the rail neutral temperature at specific locations.

FRA has also chosen to add a definition for "annual re-training." In paragraph (i) of § 213.119, FRA requires that the track owner shall have in effect a comprehensive training program for the application of these written CWR procedures, with provisions for annual re-training, for those individuals designated under § 213.7(c) as qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. FRA notes that, for purposes of this paragraph, "annual" means "calendar year," as opposed to a 365-day period.

Finally, FRA has also chosen to add a couple of definitions to clarify terms that are used throughout § 213.119. Specifically, FRA has added a definition for a "buckling-prone condition," a "pull-apart or stripped joint," and a "pull-apart prone condition." A "buckling-prone condition," is when the actual rail temperature is above the actual rail neutral temperature, which will vary, given the geographical composition of the track. A "pull-apart or stripped joint" are interchangeable terms used to describe a condition where no bolts are mounted through the holes of a joint bar on the rail end, rendering the joint bar ineffective due to excessive expansive or contractive forces. A "pull-apart prone condition" is when the actual rail temperature is below the rail neutral temperature at or near a joint where longitudinal tensile forces may affect the fastenings at the joint.

#### *Appendix B to Part 213—Schedule of Civil Penalties*

Appendix B to part 213 contains a schedule of civil penalties for use in connection with this part. FRA is revising the schedule of civil penalties in issuing the final rule to reflect the addition of § 213.118 and revisions made to § 213.119.

### **VII. Regulatory Impact**

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

This final rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. See 44 FR 11034; February 26, 1979. As part of the regulatory

impact analysis, FRA has assessed quantitatively the costs and benefits expected from the implementation of this final rule. FRA has determined that none of the provisions would have a major impact. If FRA's main assumptions are correct, the sum of the net benefit of all provisions would be \$390,000 per year. The cost per year is estimated at \$300,000 for the first year, and \$150,000 per year for subsequent years. The total net benefit would then be \$90,000 for the first year and \$240,000 per year for subsequent years. The analysis has a range of assumptions to check sensitivity. Under the least favorable assumptions the rule would develop net societal costs, but those are apparently extreme assumptions. Under the most favorable assumptions the net benefits would be up to \$1,140,000 per year. In no event would the net benefits or costs constitute more than a very small portion of the total railroad expenditures on CWR rail maintenance.

#### *B. Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980 (the Act) (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities. The U.S. Small Business Administration (SBA) stipulates in its "Size Standards" that the largest a railroad business firm that is "for-profit" may be, and still be classified as a "small entity," is 1,500 employees for "Line-Haul Operating Railroads," and 500 employees for "Switching and Terminal Establishments." "Small entity" is defined in the Act as a small business 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 after consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final policy that formally establishes "small entities" as railroads which meet the line haulage revenue requirements of a Class III railroad. The revenue requirements are currently \$20 million or less in annual operating revenue. The \$20 million limit (which is adjusted by applying the railroad revenue deflator adjustment) is based on the Surface Transportation Board's (STB) threshold for a Class III railroad carrier. FRA uses the same revenue dollar limit to determine whether a railroad or shipper or contractor is a small entity.

Approximately 200 small railroads have CWR and may be affected by this final rule. Relatively few Class III railroads have CWR. For the minority of Class III railroads that have CWR, the portion of each such railroad made up

of CWR is more likely to be small. To the extent these railroads have CWR, Class III railroads are subject to most of the provisions in this final rule. Small railroads were consulted during the RSAC Working Group deliberations and their interests have been taken into

consideration in this final rule. FRA believes that there will be no significant impact on a substantial number of small entities.

*C. 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 sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
213.4—Excepted track				
—Designation of track as excepted	200 railroads	20 orders	15 minutes	5 hours.
—Notification to FRA about removal of excepted track	200 railroads	15 notification	10 minutes	3 hours.
213.5—Responsibility of track owners	728 railroads	10 notification	8 hours	80 hours.
213.7—Designation of qualified persons to supervise certain renewals and inspect track				
—Designations	728 railroads	1,500 names	10 minutes	250 hours.
—Employees trained in CWR procedures (New)	31 railroads	80,000 tr. empl.	90 minutes	120,000 hours.
—Written authorizations and recorded exams (New)	31 railroads	80,000 auth. + 80,000 exams.	10 min. + 60 min	93,333 hours.
—Designations (partially qualified) under paragraph (c) of this section.	31 railroads	250 names	10 minutes	42 hours.
213.17—Waivers	728 railroads	6 petitions	24 hours	144 hours.
213.57—Curves, elevation and speed limitations				
—Request to FRA for approval	728 railroads	2 requests	40 hours	80 hours.
—Notification to FRA with written consent of other affected track owners.	728 railroads	2 notifications	45 minutes	2 hours.
—Test plans for higher curving speeds	1 railroad	2 test plans	16 hours	32 hours.
213.110—Gage restraint measurement systems (GRMS)				
—Implementing GRMS—notices & reports	728 railroads	5 notifications + 1 tech rpt.	45 min./4 hours	8 hours.
—GRMS vehicle output reports	728 railroads	50 reports	5 minutes	4 hours.
—GRMS vehicle exception reports	728 railroads	50 reports	5 minutes	4 hours.
—GRMS/PTLF—procedures for data integrity	728 railroads	4 proc. docs.	2 hours	8 hours.
—GRMS training programs/sessions	728 railroads	2 prog. + 5 sessions.	16 hours	112 hours.
—GRMS inspection records	728 railroads	50 records	2 hours	100 hours.
213.118 Continuous welded rail (CWR); plan review and approval				
—Plans w/written procedures for CWR (Amended)	728 railroads	728 plans	4 hours	2,912 hours.
—Notification to FRA and RR employees of CWR plan effective date (New).	728 RRs/80,000 employees.	728 + 80,000 notifications.	15 min.; 2 min.	2,849 hours.
—Written submissions after plan disapproval (New)	728 railroads	20 submissions	2 hours	40 hours.
—Final FRA disapproval and plan amendment (New)	728 railroads	20 am. plans	1 hour	20 hours.
213.119—Continuous welded rail (CWR); plan contents				
—Fracture Report for each broken CWR joint bar	239 RRs/ASLRRA	12,000 reports	10 minutes	2,000 hours.
—Petition for technical conference on Fracture Reports.	1 RR association	1 petition	15 minutes	.25 hour.
—Training programs re CWR procedures. (Amended)	239 RRs/ASLRRA	240 am. tr. programs.	1 hour	240 hours.
—Annual CWR training of employees (New)	31 railroads	80,000 tr. empl.	30 minutes	40,000 hours.
—Record keeping	239 railroads	2,000 records	10 minutes	333 hours.
—Record keeping for CWR rail joints	239 railroads	360,000 rcds.	2 minutes	12,000 hours.
—Periodic records for CWR rail joints	239 railroads	480,000 rcds.	1 minute	8,000 hours.
—Copy of track owner's CWR procedures (New)	728 railroads	239 manuals	10 minutes	40 hours.
213.233—Track inspections—Notations	728 railroads	12,500 notations	1 minute	208 hours.
213.241—Inspection records	728 railroads	1,542,089 rcds.	Varies	1,672,941 hours.
213.303—Responsibility for compliance	2 railroads	1 notification	8 hours	8 hours.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

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 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**.

#### *D. Environmental Impact*

FRA has evaluated this final rule in accordance with its "Procedures for Considering Environmental Impacts" (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this action 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 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.

#### *E. 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. 10, 1999).

As discussed earlier in the preamble, this final rule creates requirements for the qualification of persons designated to inspect CWR track, or supervise the installation, adjustment, or maintenance of CWR track. This final rule also clarifies the procedures associated with the submission of CWR plans to FRA by track owners and specifies that these plans should add focus on inspecting CWR for pull-apart prone conditions, and on CWR joint installation and maintenance procedures. This final rule also makes other changes to the requirements governing CWR.

Executive Order 13132 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, the agency consults with 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 would 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 the various levels of government. In addition, FRA has determined that this final rule would not impose any direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this final rule has preemptive effect. 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 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 local safety or security exception to Section 20106. The intent of Section 20106 is to promote national uniformity in railroad safety and security standards. 49 U.S.C. 20106(a)(1). Thus, subject to a limited exception for essential local safety or security hazards, this final rule establishes a uniform Federal safety standard that must be met, and State requirements covering the same subject matter would be displaced, whether those State requirements are in the form of a State law, including common law, regulation, or order.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the preemption of State laws covering the subject matter of this final rule,

which occurs by operation of law under Section 20106 whenever FRA issues a rule or order. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

#### *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 that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) [currently \$141,300,000] in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and Tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$141,300,000 or more 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 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 final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of

energy. Consequently, FRA has determined that this final rule is not a "significant energy action" within the meaning of the Executive Order.

#### H. Privacy Act Statement

Anyone is able to search the electronic form of all comments received into any of DOT'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 published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477-78), or you may visit <http://DocketsInfo.dot.gov>.

#### List of Subjects in 49 CFR Part 213

Penalties, Railroad safety, Reporting and recordkeeping requirements.

#### The Rule

■ For the reasons discussed in the preamble, FRA amends part 213 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

#### PART 213—[AMENDED]

■ 1. The authority citation for part 213 continues to read as follows:

**Authority:** 49 U.S.C. 20102-20114 and 20142; 28 U.S.C. 2461, note; and 49 CFR 1.49(m).

■ 2. Section 213.7 is amended by redesignating paragraphs (c) and (d) as paragraphs (d) and (e), respectively; adding new paragraph (c); and revising newly redesignated paragraphs (d) and (e) to read as follows:

#### § 213.7 Designation of qualified persons to supervise certain renewals and inspect track.

\* \* \* \* \*

(c) Individuals designated under paragraphs (a) or (b) of this section that inspect continuous welded rail (CWR) track or supervise the installation, adjustment, and maintenance of CWR track in accordance with the written procedures of the track owner shall have:

(1) Current qualifications under either paragraph (a) or (b) of this section;

(2) Successfully completed a comprehensive training course specifically developed for the application of written CWR procedures issued by the track owner;

(3) Demonstrated to the track owner that the individual:

(i) Knows and understands the requirements of those written CWR procedures;

(ii) Can detect deviations from those requirements; and

(iii) Can prescribe appropriate remedial action to correct or safely compensate for those deviations; and

(4) Written authorization from the track owner to prescribe remedial actions to correct or safely compensate for deviations from the requirements in those procedures and successfully completed a recorded examination on those procedures as part of the qualification process.

(d) Persons not fully qualified to supervise certain renewals and inspect track as required in paragraphs (a) through (c) of this section, but with at least one year of maintenance-of-way or signal experience, may pass trains over broken rails and pull apart provided that—

(1) The track owner determines the person to be qualified and, as part of doing so, trains, examines, and re-examines the person periodically within two years after each prior examination on the following topics as they relate to the safe passage of trains over broken rails or pull apart: rail defect identification, crosstie condition, track surface and alinement, gage restraint, rail end mismatch, joint bars, and maximum distance between rail ends over which trains may be allowed to pass. The sole purpose of the examination is to ascertain the person's ability to effectively apply these requirements and the examination may not be used to disqualify the person from other duties. A minimum of four hours training is required for initial training;

(2) The person deems it safe and train speeds are limited to a maximum of 10 m.p.h. over the broken rail or pull apart;

(3) The person shall watch all movements over the broken rail or pull apart and be prepared to stop the train if necessary; and

(4) Person(s) fully qualified under § 213.7 are notified and dispatched to the location promptly for the purpose of authorizing movements and effecting temporary or permanent repairs.

(e) With respect to designations under paragraphs (a) through (d) of this section, each track owner shall maintain written records of—

(1) Each designation in effect;

(2) The basis for each designation; and

(3) Track inspections made by each designated qualified person as required by § 213.241. These records shall be kept available for inspection or copying by the Federal Railroad Administration during regular business hours.

■ 3. Section 213.118 is added to read as follows:

#### § 213.118 Continuous welded rail (CWR); plan review and approval.

(a) Each track owner with track constructed of CWR shall have in effect and comply with a plan that contains written procedures which address: the installation, adjustment, maintenance, and inspection of CWR; inspection of CWR joints; and a training program for the application of those procedures.

(b) The track owner shall file its CWR plan with the FRA Associate Administrator for Railroad Safety/Chief Safety Officer (Associate Administrator). Within 30 days of receipt of the submission, FRA will review the plan for compliance with this subpart. FRA will approve, disapprove or conditionally approve the submitted plan, and will provide written notice of its determination.

(c) The track owner's existing plan shall remain in effect until the track owner's new plan is approved or conditionally approved and is effective pursuant to paragraph (d) of this section.

(d) The track owner shall, upon receipt of FRA's approval or conditional approval, establish the plan's effective date. The track owner shall advise in writing FRA and all affected employees of the effective date.

(e) FRA, for cause stated, may, subsequent to plan approval or conditional approval, require revisions to the plan to bring the plan into conformity with this subpart. Notice of a revision requirement shall be made in writing and specify the basis of FRA's requirement. The track owner may, within 30 days of the revision requirement, respond and provide written submissions in support of the original plan. FRA renders a final decision in writing. Not more than 30 days following any final decision requiring revisions to a CWR plan, the track owner shall amend the plan in accordance with FRA's decision and resubmit the conforming plan. The conforming plan becomes effective upon its submission to FRA.

■ 4. Section 213.119 is revised to read as follows:

#### § 213.119 Continuous welded rail (CWR); plan contents.

The track owner shall comply with the contents of the CWR plan approved or conditionally approved under § 213.118. The plan shall contain the following elements—

(a) Procedures for the installation and adjustment of CWR which include—

(1) Designation of a desired rail installation temperature range for the geographic area in which the CWR is located; and

(2) De-stressing procedures/methods which address proper attainment of the desired rail installation temperature range when adjusting CWR.

(b) Rail anchoring or fastening requirements that will provide sufficient restraint to limit longitudinal rail and crosstie movement to the extent practical, and specifically addressing CWR rail anchoring or fastening patterns on bridges, bridge approaches, and at other locations where possible longitudinal rail and crosstie movement associated with normally expected train-induced forces, is restricted.

(c) CWR joint installation and maintenance procedures which require that—

(1) Each rail shall be bolted with at least two bolts at each CWR joint;

(2) In the case of a bolted joint installed during CWR installation after August 25, 2009, the track owner shall either, within 60 days—

(i) Weld the joint;

(ii) Install a joint with six bolts; or

(iii) Anchor every tie 195 feet in both directions from the joint; and

(3) In the case of a bolted joint in CWR experiencing service failure or a failed bar with a rail gap present, the track owner shall either—

(i) Weld the joint;

(ii) Replace the broken bar(s), replace the broken bolts, adjust the anchors and, within 30 days, weld the joint;

(iii) Replace the broken bar(s), replace the broken bolts, install one additional bolt per rail end, and adjust anchors;

(iv) Replace the broken bar(s), replace the broken bolts, and anchor every tie 195 feet in both directions from the CWR joint; or

(v) Replace the broken bar(s), replace the broken bolts, add rail with provisions for later adjustment pursuant to paragraph (d)(2) of this section, and reapply the anchors.

(d) Procedures which specifically address maintaining a desired rail installation temperature range when cutting CWR, including rail repairs, in-track welding, and in conjunction with adjustments made in the area of tight track, a track buckle, or a pull-apart. Rail repair practices shall take into consideration existing rail temperature so that—

(1) When rail is removed, the length installed shall be determined by taking into consideration the existing rail

temperature and the desired rail installation temperature range; and

(2) Under no circumstances should rail be added when the rail temperature is below that designated by paragraph (a)(1) of this section, without provisions for later adjustment.

(e) Procedures which address the monitoring of CWR in curved track for inward shifts of alignment toward the center of the curve as a result of disturbed track.

(f) Procedures which govern train speed on CWR track when—

(1) Maintenance work, track rehabilitation, track construction, or any other event occurs which disturbs the roadbed or ballast section and reduces the lateral or longitudinal resistance of the track; and

(2) The difference between the average rail temperature and the average rail neutral temperature is in a range that causes buckling-prone conditions to be present at a specific location; and

(3) In formulating the procedures under paragraphs (f)(1) and (f)(2) of this section, the track owner shall—

(i) Determine the speed required, and the duration and subsequent removal of any speed restriction based on the restoration of the ballast, along with sufficient ballast re-consolidation to stabilize the track to a level that can accommodate expected train-induced forces. Ballast re-consolidation can be achieved through either the passage of train tonnage or mechanical stabilization procedures, or both; and

(ii) Take into consideration the type of crossties used.

(g) Procedures which prescribe when physical track inspections are to be performed.

(1) At a minimum, these procedures shall address inspecting track to identify—

(i) Buckling-prone conditions in CWR track, including—

(A) Locations where tight or kinky rail conditions are likely to occur; and

(B) Locations where track work of the nature described in paragraph (f)(1)(i) of this section has recently been performed; and

(ii) Pull-apart prone conditions in CWR track, including locations where pull-apart or stripped-joint rail conditions are likely to occur; and

(2) In formulating the procedures under paragraph (g)(1) of this section, the track owner shall—

(i) Specify when the inspections will be conducted; and

(ii) Specify the appropriate remedial actions to be taken when either buckling-prone or pull-apart prone conditions are found.

(h) Procedures which prescribe the scheduling and conduct of inspections to detect cracks and other indications of potential failures in CWR joints. In formulating the procedures under this paragraph, the track owner shall—

(1) Address the inspection of joints and the track structure at joints, including, at a minimum, periodic on-foot inspections;

(2) Identify joint bars with visible or otherwise detectable cracks and conduct remedial action pursuant to § 213.121;

(3) Specify the conditions of actual or potential joint failure for which personnel must inspect, including, at a minimum, the following items:

(i) Loose, bent, or missing joint bolts;

(ii) Rail end batter or mismatch that contributes to instability of the joint; and

(iii) Evidence of excessive longitudinal rail movement in or near the joint, including, but not limited to; wide rail gap, defective joint bolts, disturbed ballast, surface deviations, gap between tie plates and rail, or displaced rail anchors;

(4) Specify the procedures for the inspection of CWR joints that are imbedded in highway-rail crossings or in other structures that prevent a complete inspection of the joint, including procedures for the removal from the joint of loose material or other temporary material;

(5) Specify the appropriate corrective actions to be taken when personnel find conditions of actual or potential joint failure, including on-foot follow-up inspections to monitor conditions of potential joint failure in any period prior to completion of repairs;

(6) Specify the timing of periodic inspections, which shall be based on the configuration and condition of the joint:

(i) Except as provided in paragraphs (h)(6)(ii) through (h)(6)(iv) of this section, track owners must specify that all CWR joints are inspected, at a minimum, in accordance with the intervals identified in the following table:



MINIMUM NUMBER OF INSPECTIONS PER CALENDAR YEAR<sup>1</sup>

	Freight trains operating over track with an annual tonnage of:			Passenger trains operating over track with an annual tonnage of:	
	Less than 40 mgt	40 to 60 mgt	Greater than 60 mgt	Less than 20 mgt	Greater than or equal to 20 mgt
Class 5 & above .....	2	3 <sup>2</sup>	4 <sup>2</sup>	3 <sup>2</sup>	3 <sup>2</sup>
Class 4 .....	2	3 <sup>2</sup>	4 <sup>2</sup>	2	3 <sup>2</sup>
Class 3 .....	1	2	2	2	2
Class 2 .....	0	0	0	1	1
Class 1 .....	0	0	0	0	0
Excepted Track .....	0	0	0	n/a	n/a

4 = Four times per calendar year, with one inspection in each of the following periods: January to March, April to June, July to September, and October to December; and with consecutive inspections separated by at least 60 calendar days.

3 = Three times per calendar year, with one inspection in each of the following periods: January to April, May to August, and September to December; and with consecutive inspections separated by at least 90 calendar days.

2 = Twice per calendar year, with one inspection in each of the following periods: January to June and July to December; and with consecutive inspections separated by at least 120 calendar days.

1 = Once per calendar year, with consecutive inspections separated by at least 180 calendar days.

<sup>1</sup> Where a track owner operates both freight and passenger trains over a given segment of track, and there are two different possible inspection interval requirements, the more frequent inspection interval applies.

<sup>2</sup> When extreme weather conditions prevent a track owner from conducting an inspection of a particular territory within the required interval, the track owner may extend the interval by up to 30 calendar days from the last day that the extreme weather condition prevented the required inspection.

(ii) Consistent with any limitations applied by the track owner, a passenger train conducting an unscheduled detour operation may proceed over track not normally used for passenger operations at a speed not to exceed the maximum authorized speed otherwise allowed, even though CWR joints have not been inspected in accordance with the frequency identified in paragraph (h)(6)(i) of this section, provided that:

(A) All CWR joints have been inspected consistent with requirements for freight service; and

(B) The unscheduled detour operation lasts no more than 14 consecutive calendar days. In order to continue operations beyond the 14-day period, the track owner must inspect the CWR joints in accordance with the requirements of paragraph (h)(6)(i) of this section.

(iii) Tourist, scenic, historic, or excursion operations, if limited to the maximum authorized speed for passenger trains over the next lower class of track, need not be considered in determining the frequency of inspections under paragraph (h)(6)(i) of this section.

(iv) All CWR joints that are located in switches, turnouts, track crossings, lift rail assemblies or other transition devices on moveable bridges must be inspected on foot at least monthly, consistent with the requirements in § 213.235; and all records of those inspections must be kept in accordance with the requirements in § 213.241. A track owner may include in its § 213.235 inspections, in lieu of the joint

inspections required by paragraph (h)(6)(i) of this section, CWR joints that are located in track structure that is adjacent to switches and turnouts, provided that the track owner precisely defines the parameters of that arrangement in the CWR plans.

(7) Specify the recordkeeping requirements related to joint bars in CWR, including the following:

(i) The track owner shall keep a record of each periodic and follow-up inspection required to be performed by the track owner's CWR plan, except for those inspections conducted pursuant to § 213.235 for which track owners must maintain records pursuant to § 213.241. The record shall be prepared on the day the inspection is made and signed by the person making the inspection. The record shall include, at a minimum, the following items: the boundaries of the territory inspected; the nature and location of any deviations at the joint from the requirements of this part or of the track owner's CWR plan, with the location identified with sufficient precision that personnel could return to the joint and identify it without ambiguity; the date of the inspection; the remedial action, corrective action, or both, that has been taken or will be taken; and the name or identification number of the person who made the inspection.

(ii) The track owner shall generate a Fracture Report for every cracked or broken CWR joint bar that the track owner discovers during the course of an inspection conducted pursuant to §§ 213.119(g), 213.233, or 213.235 on

track that is required under § 213.119(h)(6)(i) to be inspected.

(A) The Fracture Report shall be prepared on the day the cracked or broken joint bar is discovered. The Report shall include, at a minimum: the railroad name; the location of the joint bar as identified by milepost and subdivision; the class of track; annual million gross tons for the previous calendar year; the date of discovery of the crack or break; the rail section; the type of bar (standard, insulated, or compromise); the number of holes in the joint bar; a general description of the location of the crack or break in bar; the visible length of the crack in inches; the gap measurement between rail ends; the amount and length of rail end batter or ramp on each rail end; the amount of tread mismatch; the vertical movement of joint; and in curves or spirals, the amount of gage mismatch and the lateral movement of the joint.

(B) The track owner shall submit the information contained in the Fracture Reports to the FRA Associate Administrator twice annually, by July 31 for the preceding six-month period from January 1 through June 30 and by January 31 for the preceding six-month period from July 1 through December 31.

(C) After February 1, 2010, any track owner may petition FRA to conduct a technical conference to review the Fracture Report data submitted through December of 2009 and assess whether there is a continued need for the collection of Fracture Report data. The track owner shall submit a written

request to the Associate Administrator, requesting the technical conference and explaining the reasons for proposing to discontinue the collection of the data.

(8) In lieu of the requirements for the inspection of rail joints contained in paragraphs (h)(1) through (h)(7) of this section, a track owner may seek approval from FRA to use alternate procedures.

(i) The track owner shall submit the proposed alternate procedures and a supporting statement of justification to the Associate Administrator.

(ii) If the Associate Administrator finds that the proposed alternate procedures provide an equivalent or higher level of safety than the requirements in paragraphs (h)(1) through (h)(7) of this section, the Associate Administrator will approve the alternate procedures by notifying the track owner in writing. The Associate Administrator will specify in the written notification the date on which the procedures will become effective, and after that date, the track owner shall comply with the procedures. If the Associate Administrator determines that the alternate procedures do not provide an equivalent level of safety, the Associate Administrator will disapprove the alternate procedures in writing, and the track owner shall continue to comply with the requirements in paragraphs (h)(1) through (h)(7) of this section.

(iii) While a determination is pending with the Associate Administrator on a request submitted pursuant to paragraph (h)(8) of this section, the track owner shall continue to comply with the requirements contained in paragraphs (h)(1) through (h)(7) of this section.

(i) The track owner shall have in effect a comprehensive training program for the application of these written CWR procedures, with provisions for annual re-training, for those individuals designated under § 213.7(c) as qualified to supervise the installation, adjustment, and maintenance of CWR track and to perform inspections of CWR track. The track owner shall make the training program available for review by FRA upon request.

(j) The track owner shall prescribe and comply with recordkeeping requirements necessary to provide an adequate history of track constructed with CWR. At a minimum, these records must include:

(1) Rail temperature, location, and date of CWR installations. Each record shall be retained for at least one year;

(2) A record of any CWR installation or maintenance work that does not conform to the written procedures. Such record shall include the location of the

rail and be maintained until the CWR is brought into conformance with such procedures; and

(3) Information on inspection of rail joints as specified in paragraph (h)(7) of this section.

(k) The track owner shall make readily available, at every job site where personnel are assigned to install, inspect or maintain CWR, a copy of the track owner's CWR procedures and all revisions, appendices, updates, and referenced materials related thereto prior to their effective date. Such CWR procedures shall be issued and maintained in one CWR standards and procedures manual.

(l) As used in this section—

*Adjusting/de-stressing* means the procedure by which a rail's temperature is re-adjusted to the desired value. It typically consists of cutting the rail and removing rail anchoring devices, which provides for the necessary expansion and contraction, and then re-assembling the track.

*Annual re-training* means training every calendar year.

*Buckling incident* means the formation of a lateral misalignment sufficient in magnitude to constitute a deviation from the Class 1 requirements specified in § 213.55. These normally occur when rail temperatures are relatively high and are caused by high longitudinal compressive forces.

*Buckling-prone condition* means a condition when the actual rail temperature is above the actual rail neutral temperature. This varies given the geographical composition of the track.

*Continuous welded rail (CWR)* means rail that has been welded together into lengths exceeding 400 feet. Rail installed as CWR remains CWR, regardless of whether a joint or plug is installed into the rail at a later time.

*Corrective actions* mean those actions which track owners specify in their CWR plans to address conditions of actual or potential joint failure, including, as applicable, repair, restrictions on operations, and additional on-foot inspections.

*CWR joint* means any joint directly connected to CWR.

*Desired rail installation temperature range* means the rail temperature range, within a specific geographical area, at which forces in CWR should not cause a buckling incident in extreme heat, or a pull apart during extreme cold weather.

*Disturbed track* means the disturbance of the roadbed or ballast section, as a result of track maintenance or any other event, which reduces the

lateral or longitudinal resistance of the track, or both.

*Mechanical stabilization* means a type of procedure used to restore track resistance to disturbed track following certain maintenance operations. This procedure may incorporate dynamic track stabilizers or ballast consolidators, which are units of work equipment that are used as a substitute for the stabilization action provided by the passage of tonnage trains.

*Pull apart or stripped joint* means a condition when no bolts are mounted through a joint on the rail end, rendering the joint bar ineffective due to excessive expansive or contractive forces.

*Pull-apart prone condition* means a condition when the actual rail temperature is below the rail neutral temperature at or near a joint where longitudinal tensile forces may affect the fastenings at the joint.

*Rail anchors* mean those devices which are attached to the rail and bear against the side of the crosstie to control longitudinal rail movement. Certain types of rail fasteners also act as rail anchors and control longitudinal rail movement by exerting a downward clamping force on the upper surface of the rail base.

*Rail neutral temperature* is the temperature at which the rail is neither in compression nor tension.

*Rail temperature* means the temperature of the rail, measured with a rail thermometer.

*Remedial actions* mean those actions which track owners are required to take as a result of requirements of this part to address a non-compliant condition.

*Tight/kinky rail* means CWR which exhibits minute alignment irregularities which indicate that the rail is in a considerable amount of compression.

*Tourist, scenic, historic, or excursion operations* mean railroad operations that carry passengers with the conveyance of the passengers to a particular destination not being the principal purpose.

*Track lateral resistance* means the resistance provided by the rail/crosstie structure against lateral displacement.

*Track longitudinal resistance* means the resistance provided by the rail anchors/rail fasteners and the ballast section to the rail/crosstie structure against longitudinal displacement.

*Train-induced forces* means the vertical, longitudinal, and lateral dynamic forces which are generated during train movement and which can contribute to the buckling potential of the rail.

*Unscheduled detour operation* means a short-term, unscheduled operation where a track owner has no more than

14 calendar days' notice that the operation is going to occur.

■ 5. Appendix B to part 213 is amended by adding an entry for § 213.118 and revising the entry for § 213.119 to read as follows:

**Appendix B to Part 213—Schedule of Civil Penalties**

Section	Violation	Willful violation <sup>1</sup>
* * * * *		*
213.118 ..... Continuous welded rail plan (a) through (e) .....	5,000	7,500
213.119 ..... Continuous welded rail plan contents (a) through (k) .....	5,000	7,500
* * * * *		*

<sup>1</sup>A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$100,000 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

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Issued in Washington, DC on August 17, 2009.  
**Joseph C. Szabo,**  
*Administrator, Federal Railroad Administration.*  
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