

**FEDERAL COMMUNICATIONS
COMMISSION**
47 CFR Part 73
[DA 11-74; MB Docket No. 11-4; RM-11616]
Television Broadcasting Services; El Paso, TX
AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission has before it a petition for rulemaking filed by Comcorp of El Paso License Corp. the licensee of station KTSM-TV, channel 9, El Paso, Texas, requesting the substitution of channel 16 for channel 9 at El Paso.

DATES: Comments must be filed on or before February 28, 2011, and reply comments on or before March 14, 2011.

ADDRESSES: Federal Communications Commission, Office of the Secretary, 445 12th Street, SW., Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve counsel for petitioner as follows: Scott S. Patrick, Esq., Dow Lohnes PLLC, 1200 New Hampshire Avenue, NW., Suite 800, Washington, DC 20036-6802.

FOR FURTHER INFORMATION CONTACT: Adrienne Y. Denysyk, adrienne.denysyk@fcc.gov, Media Bureau, (202) 418-1600.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MB Docket No. 11-4, adopted January 11, 2011, and released January 19, 2011. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-478-3160 or via e-mail <http://www.BCPIWEB.com>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document does not contain proposed information collection

requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding. Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts (other than *ex parte* presentations exempt under 47 CFR 1.1204(a)) are prohibited in Commission proceedings, such as this one, which involve channel allotments. *See* 47 CFR 1.1208 for rules governing restricted proceedings.

For information regarding proper filing procedures for comments, *see* 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Television, Television broadcasting.

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR Part 73 as follows:

PART 73—RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334, 336.

§ 73.622(i) [Amended]

2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Texas, is amended by adding channel 16 and removing channel 9 at El Paso.

Federal Communications Commission.

Barbara A. Kreisman,

Chief, Video Division, Media Bureau.

[FR Doc. 2011-1935 Filed 1-27-11; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF TRANSPORTATION
**Pipeline and Hazardous Materials
Safety Administration**
49 CFR Part 177
**Federal Motor Carrier Safety
Administration**
49 CFR Part 392

[Docket Numbers PHMSA-2010-0319 (HM-255) & FMCSA-2006-25660]

RIN 2137-AE69 & 2126-AB04 &

**Highway-Rail Grade Crossing; Safe
Clearance**

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), and Federal Motor Carrier Safety Administration (FMCSA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM); request for comments.

SUMMARY: FMCSA and PHMSA propose to amend the Federal Motor Carrier Safety Regulations (FMCSRs) and Hazardous Materials Regulations (HMRs), respectively, to prohibit a motor vehicle driver from entering onto a highway-rail grade crossing unless there is sufficient space to drive completely through the grade crossing without stopping. This action is in response to section 112 of the Hazardous Materials Transportation Authorization Act of 1994. The intent of this rulemaking is to reduce highway-rail grade crossing crashes.

DATES: Send your comments on or before March 29, 2011.

ADDRESSES: You may submit comments identified by Federal Docket Management System Numbers PHMSA-2010-0319 (HM-255) and FMCSA-2006-25660 by any of the following methods:

- **Web Site:** <http://www.regulations.gov>. Follow the instructions for submitting comments on the Federal electronic docket site.
- **Fax:** 1-202-493-2251.
- **Mail:** Docket Management Facility, U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001.
- **Hand Delivery:** Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the Agency names and docket number or Regulatory Identification Number (RIN) for this rulemaking. For

detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Participation heading below. Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading below.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to the ground floor, room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m. e.t., Monday through Friday, except Federal holidays.

Privacy Act: Anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (65 FR 19476) or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

Public participation: The <http://www.regulations.gov> Web site is generally available 24 hours each day, 365 days each year. You can get electronic submission and retrieval help and guidelines under the "help" section of the <http://www.regulations.gov> Web site and also at the DOT's <http://docketsinfo.dot.gov> Web site. If you want us to notify you that we received your comments, please include a self-addressed, stamped envelope or postcard or print the acknowledgement page that appears after submitting comments online.

Comments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable. FMCSA and PHMSA, however, may issue a final rule at any time after the close of the comment period.

FOR FURTHER INFORMATION CONTACT: At FMCSA: Mr. Thomas Yager, Driver and Carrier Operations; or MCPSD@dot.gov. Telephone (202) 366-4325. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays. At PHMSA: Mr. Ben Supko, Office of Hazardous Materials Standards, (202) 366-8553, Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590 0001.

SUPPLEMENTARY INFORMATION:

Background

Section 112 of the Hazardous Materials Transportation Authorization Act of 1994 (HMTAA) [Pub. L. 103-311, title I, 108 Stat. 1673, 1676, August 26, 1994] requires FMCSA and PHMSA to amend the FMCSRs and the HMRs, respectively, to prohibit drivers of motor vehicles from driving onto a highway-rail grade crossing unless there is sufficient space to drive completely through the grade crossing without stopping. (Throughout the remainder of this document, FMCSA and PHMSA use the term "grade crossing" to refer to public, open, at-grade highway-rail grade crossings, unless otherwise noted.) The report by the Senate Committee on Commerce, Science, and Transportation (December 9, 1993) states that the intent of section 112 was to " * * * improve safety at highway-railroad crossings in response to fatalities that have occurred from accidents involving commercial motor vehicle operators who failed to use proper caution while crossing." The report also states that "[t]he Committee believes that imposing a Federal statutory obligation on drivers of all commercial motor vehicles to consider whether they can cross safely and completely * * * will help to reduce the number of tragedies associated with grade crossing accidents" (Senate Report No. 103-217, at 11 (1994), reprinted in 1994 U.S.C.C.A.N. 1763, 1773). The consequences of a motor vehicle failing to clear the tracks at a grade crossing are potentially serious, particularly if a vehicle or train is transporting hazardous materials or passengers. Over time, increased motor vehicle traffic and congestion at some grade crossings, as well as increased train movements, may amplify this risk.

The Manual on Uniform Traffic Control Devices (MUTCD 2009 edition), published by the Federal Highway Administration (FHWA) and incorporated by reference in 23 CFR part 655, subpart F, describes in chapter 8A the length of roadway necessary for a particular vehicle to clear the tracks safely as the "clear storage distance."¹ Chapter 8 guidance material also refers to "storage space." "Storage space" means the space available for stationary vehicles between a traffic control device (traffic signal, stop sign, or yield sign) and the railroad crossing behind them.

I. Legal Basis for the Rulemaking

This rulemaking is based on the authority of the Motor Carrier Act of 1935 (MCA or 1935 Act) and the

HMTAA. The 1935 Act provides that "The Secretary of Transportation may prescribe requirements for (1) qualifications and maximum hours of service of employees of, and safety of operation and equipment of, a motor carrier; and, (2) qualifications and maximum hours of service of employees of, and standards of equipment of, a motor private carrier, when needed to promote safety of operation" [49 U.S.C. 31502(b)]. Pursuant to 49 U.S.C. 31501(2), the definitions used in 49 U.S.C. 13102 apply to the 1935 Act. "Motor carrier," therefore, means "a person providing motor vehicle transportation for compensation" [49 U.S.C. 13102(14)]; and "motor private carrier" means "a person, other than a motor carrier, transporting property by motor vehicle when—(A) the transportation is as provided in section 13501 of this title [i.e., in interstate commerce]; (B) the person is the owner, lessee, or bailee of the property being transported; and (C) the property is being transported for sale, lease, rent, or bailment or to further a commercial enterprise" [49 U.S.C. 13102(15)].

The grade crossing regulations set forth in 49 CFR 392.12 of this NPRM pertain directly to the " * * * safety of operation" of the motor carriers over which FMCSA has jurisdiction. The adoption and enforcement of such rules was specifically authorized by the MCA. This proposed rule is based, in part, on that authority.

Before prescribing any regulations, FMCSA must also consider their "costs and benefits" [49 U.S.C. 31136(c)(2)(A) and 31502(d)]. Those factors are also discussed in this proposed rule.

This NPRM is also based on the authority of the Federal hazardous materials transportation law (Federal hazmat law; 49 U.S.C. 5101 *et seq.*), under which, the Secretary of Transportation is charged with protecting the nation against the risks to life, property, and the environment that are inherent in the commercial transportation of hazardous materials. Section 5103(b)(1)(B) provides that PHMSA's Hazardous Materials Regulations (HMR; 49 CFR Parts 171 through 180) "shall govern safety aspects, including security, of the transportation of hazardous material the Secretary considers appropriate." As such, PHMSA has the authority to adopt requirements pertaining to hazardous materials transportation that are applicable to both intrastate and interstate commerce. The amendments to 49 CFR 177.804 proposed here are based directly on PHMSA's authority.

The primary impetus for this rulemaking is section 112 of the

¹ See <http://mutcd.fhwa.dot.gov>.

HMTAA, which directed the Secretary of Transportation to adopt a rule to prohibit the driver of a commercial motor vehicle (CMV) from driving onto a grade crossing “without having sufficient space to drive completely through the crossing without stopping.” Section 112 reads as follows:

Sec. 112 Grade Crossing Safety.

The Secretary of Transportation shall, within 6 months after the date of enactment of this Act, amend regulations—

(1) under chapter 51 of title 49, United States Code (relating to transportation of hazardous materials), to prohibit the driver of a motor vehicle transporting hazardous materials in commerce, and

(2) under chapter 315 of such title (relating to motor carrier safety) to prohibit the driver of any commercial motor vehicle, from driving the motor vehicle onto a highway-rail grade crossing without having sufficient space to drive completely through the crossing without stopping. [108 Stat. 1676]

Section 112(1), of HMTAA mandates a change to prohibit the driver of a commercial motor vehicle that is transporting hazardous materials from driving the motor vehicle onto a highway-rail grade crossing without having sufficient space to drive completely through the crossing without stopping. Because the safety benefits associated with this section are equally applicable to drivers operating in intrastate commerce as they are to interstate commerce, this Section falls under chapter 51 of title 49 U.S.C. and corresponding changes would be incorporated into § 177.804 of the HMR. However, to promote consistency between PHMSA and FMCSA, the definition of “hazardous materials,” provided by the Federal Motor Carrier Safety Regulations (FMCSRs; 49 CFR Parts 350–399), is used to define the scope of this Section.

FMCSA defines “hazardous materials” in § 383.5 of the 49 CFR as follows:

Hazardous materials means any material that has been designated as hazardous under 49 U.S.C. 5103 and is required to be placarded under subpart F of 49 CFR part 172 or any quantity of a material listed as a select agent or toxin in 42 CFR part 73.

Based on this definition and PHMSA’s authority, the scope of the proposed changes to 49 CFR 177.804 encompass all drivers who transport a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73. This includes drivers of motor vehicles of any size that are used to transport the materials covered by the FMCSA definition. Additionally, it includes drivers engaged in intrastate or interstate commerce.

Although section 112(2) refers to the driver of a “commercial motor vehicle” under chapter 315 of title 49, the relevant portion of that chapter—49 U.S.C. 31502(a)–(b)—does not use the term “commercial motor vehicle,” referring instead to “motor carriers” and “motor private carriers” as defined in 49 U.S.C. 13102 (the definitions of “motor carrier” and “motor private carrier” are discussed above). A “motor vehicle” is defined in section 13102(16) as “a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used on a highway in transportation, or a combination determined by the Secretary, but does not include a vehicle, locomotive, or car operated only on a rail, or a trolley bus operated by electric power from a fixed overhead wire, and providing local passenger transportation similar to street-railway service.” These are the definitions that determine the scope of 49 CFR 392.12, the FMCSA portion of this NPRM.

It should be noted that, unlike “CMV,” the defined term that describes the motor vehicles over which FMCSA has jurisdiction in many other provisions of the FMCSRs, a “motor vehicle,” as defined in section 13102(16), does not have a minimum weight threshold. This proposed rule, therefore, applies to the operation in interstate commerce of any motor vehicle used by a for-hire “motor carrier” or a “motor private carrier” in furtherance of a commercial enterprise, even if its gross vehicle weight (GVW) or gross vehicle weight rating (GVWR) is less than the 10,001-pound threshold for a CMV. In addition, § 392.12 would not apply to a private carrier of passengers because the definition of a “motor private carrier” in section 13102(15) covers only the transportation of “property,” not passengers.

II. History

On July 30, 1998, FHWA published an NPRM to implement section 112(2) (63 FR 40691). The NPRM proposed to amend the FMCSRs by adding a new section, 49 CFR 392.12, to read as follows: “A driver of a commercial motor vehicle shall not drive onto a highway-rail grade crossing without having sufficient space to drive completely through the crossing without stopping.”

The Motor Carrier Safety Improvement Act of 1999 (Pub. L. 106–159, 113 Stat. 1748, December 9, 1999) created FMCSA as a new operating administration of DOT, effective January 1, 2000. FMCSA assumed the motor carrier safety functions previously exercised by FHWA’s Office of Motor Carriers.

Withdrawal of 1998 NPRM

On April 28, 2006, FMCSA withdrew the 1998 NPRM [71 FR 25128]. FMCSA stated:

After reviewing the comments to the NPRM and the transcript of the [November 9, 1999] public meeting, FMCSA has concluded that this rulemaking has created a great deal of misunderstanding and should be terminated.

FHWA asked the States for information on the number and location of highway-railroad grade crossings with inadequate storage—and on alternative crossings—as the first step in estimating the costs and benefits of the rule required by Section 112. In view of the expected complexity of that analysis, the Agency needed as much information as possible. Many State agencies, however, seem to have assumed that they were required to provide the information; that the final rule would then require them to reconstruct, rewire, reroute or otherwise correct every inadequate crossing; and that the Agency was indifferent to the costs of such an undertaking. In fact, the time, difficulty and cost involved in collecting reliable data on highway-railroad grade crossings became a primary focus of the comments.

Section 112 requires a rule applicable to drivers, not to States. If the regulatory requirement prevented some motor carriers from using a particular crossing because the storage distance is too short for their normal vehicles, several options are available (such as switching to shorter trucks or using alternate crossings) before any reconstruction efforts suggested by the State commenters need to be considered. And even then, significant civil engineering projects are likely to have a low priority. Consultations among government entities, truckers, and the shippers they serve might produce quick and simple solutions.

Therefore, FMCSA terminates this rulemaking and will open a new one less burdened by previous misunderstandings. An NPRM to address the requirements of Section 112 will be published when additional analysis of grade crossing problems, which is now under way, has been completed.

Survey of State Models

FMCSA reviewed State statutes on grade crossings. As expected, all States have laws regarding operation of vehicles near or over grade crossings. Most of these provisions are variations on the requirements in 49 CFR 392.10 and 392.11 (e.g., stopping between 15 and 50 feet from the tracks, looking and listening for a train, crossing without shifting gears, etc.). On the other hand, only 24 States have storage-space laws similar or identical to the requirements of section 112 of the HMTAA. The recently enacted provisions usually match section 112 very closely. The older laws, adopted in the 1970s and 1980s, prohibit entering an intersection or grade crossing—even on a green

light—unless traffic conditions permit the vehicle to drive all the way through without blocking traffic on the cross street or rail line. Although it is not clear how the States interpret such provisions, the reference to blocking traffic on the cross street or rail line might mean that—unlike section 112—these laws would not prohibit a driver from starting across an empty grade crossing with no train in sight if a brief stop at a traffic sign or signal on the other side would leave the rear of the vehicle on the tracks.

Grade Crossing Safety Outreach Activities

Since publication of the 1998 NPRM, various regulatory actions, outreach initiatives, and research activities have helped to improve grade crossing safety. FMCSA, the Federal Railroad Administration (FRA), and the Federal Transit Administration (FTA) intensified their outreach and educational activities to prevent grade crossing crashes.² In 1999, DOT convened a public meeting to promote information sharing on grade crossing crashes involving CMVs. In addition, FMCSA worked with FRA, FTA, and FHWA to update the Department's "1994 Grade Crossing Action Plan." In June 2004, the Secretary issued the "Action Plan for Highway-Rail Grade Crossing Safety and Trespass Prevention," which focused Departmental and private sector resources to enhance grade crossing safety by distributing educational literature to heighten awareness about grade crossings and the "hump" (or vertical alignment profile) challenges they present, particularly to vehicles with long wheelbases or low-hanging equipment. This educational focus also extended to the development of improved highway route guidance to identify and help drivers avoid problematic grade crossings. In 2006, FMCSA, in collaboration with FRA, issued laminated visor cards for drivers, outlining safety tips for crossing railroad tracks. DOT and its agencies will continue to develop further outreach and education efforts.

2006 Public Meeting and Comments

On September 20, 2006, following notice in the **Federal Register**, FMCSA, in conjunction with FHWA, FRA, and PHMSA, held a public meeting in

Washington, DC, to provide all interested parties an opportunity to express their views on this rulemaking. Only two members of the public attended, including a representative from the Association of American Railroads (AAR). There was a detailed discussion of the subject matter with that representative. A copy of the transcript from that meeting is available in docket FMCSA–2006–25660.

The Owner Operator Independent Drivers Association, Inc. (OOIDA) submitted the only comments during the public comment period for the meeting. OOIDA recommended three things. First, OOIDA suggested that FMCSA should provide pavement markings and signage at or near grade crossings to indicate the storage space available to CMV drivers. FMCSA and PHMSA do not have the statutory authority to mark, sign, or require others to mark roads and provide signs at or near grade crossings. FHWA, however, has funding available annually under 23 U.S.C. 104(b)(5) ("highway safety improvement program") as a set aside under 23 U.S.C. 148(a)(3) ("highway safety improvement project") and 23 CFR part 924, Highway Safety Improvement Program, for a variety of highway safety improvement projects (HSIPs). Eligible HSIPs include: (1) Construction of projects for the elimination of hazards at a public railroad crossing that is eligible for funding under 23 U.S.C. 130; (2) improvement of highway signage and pavement markings; and (3) installation of a traffic control or other warning device at a location with high crash potential. FMCSA and PHMSA will bring OOIDA's suggestion to the attention of FHWA. We note that competition for limited HSIP resources means that States and other public authorities must decide whether and when particular grade crossings might get pavement markings and signage and that not all grade-crossing improvements are likely to be funded.

Second, OOIDA suggested that FMCSA undertake additional comparative analyses to determine the number of grade crossings with inadequate storage space in industrial areas. OOIDA suggested that some such grade crossings are rarely used by trains and that regulatory prohibitions in these cases may be far more expensive than any possible benefits. Defining an "industrial area" has proven to be difficult and somewhat subjective. FMCSA and PHMSA do not agree that such comparative analyses are necessary. The regulation proposed today may occasionally—though not frequently—cause disproportionate

expense, as OOIDA says; but this is a statutory mandate.

Finally, OOIDA suggested FMCSA and PHMSA consider educational outreach through State driver licensing agencies to inform automobile drivers of the risks of passing CMVs to occupy space left at the head of the queue by prudent truck drivers at grade crossings. OOIDA reported that its members increasingly witness this practice, which forces CMV drivers to wait through several cycles of the traffic signals before being able to cross. According to OOIDA members, some States and localities have programmed traffic lights with cycles so short that CMVs are often prevented from crossing, especially when impatient automobile drivers rush to occupy any open space ahead of a CMV. This sometimes results in automobile drivers becoming trapped on the tracks when the crossing alarm sounds. OOIDA suggests creating informational signage to inform automobile drivers of the risks involved in such me-first tactics. FMCSA will encourage Motor Carrier Safety Assistance Program lead agencies to distribute grade crossing safety materials to their driver licensing colleagues in State government and to suggest the addition of such material to State driver training manuals that do not already cover the subject.

III. The Proposed Rule

Section 392.12

Today's NPRM would adopt the statutory language of section 112 as 49 CFR 392.12. While the proposed regulatory text is essentially the same as that published in the 1998 NPRM, FMCSA believes the context in which the proposal is presented will make the potential impact of the rulemaking clearer.

Though the proposed rule would not explicitly prohibit motor vehicles from using certain grade crossings, it might have that effect where the clear storage distance between the train tracks and the next traffic control device is less than the length of the vehicle. To proceed through such a grade crossing, a motor vehicle driver would either have to ignore the traffic control device or comply with the traffic control device but violate the proposed rule by driving onto the grade crossing without having sufficient space to drive completely through the crossing without stopping.

Section 177.804

To ensure that the statutory language of section 112 applies to both interstate and intrastate motor carriers, PHMSA would revise 49 CFR 177.804. PHMSA

² The FRA uses the terms "accident" and "incident" in its definitions and databases used to collect data on grade crossings. The variations do not rise to a level of significance; however, FMCSA uses the term "crash" in its publications, except when the terms "accident" or "incident" appear in names or quotes.

proposes to add a new paragraph (b) to require drivers of commercial motor vehicles transporting a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR Part 73 to comply with the FMCSA safe clearance requirements for highway-rail crossings. As such, motor carriers and drivers who engage in the transportation of covered materials must comply with the safe clearance requirements in § 392.12 of the FMCSRs.

Additional Assistance

FMCSA and PHMSA acknowledge OOIDA's concerns that this rulemaking could result in CMV drivers encountering situations in which compliance with the proposed rule might be difficult to achieve. Therefore, the two Agencies will work with State enforcement agencies, the motor carrier and railroad industries, and safety advocacy groups to provide information to assist carriers in identifying options for traveling safely through problematic grade crossings, including developing educational and technical assistance and frequently asked questions. FMCSA and PHMSA will also consider issuing

regulatory guidance in response to inquiries to provide additional assistance to the motor carrier industry and State enforcement personnel in implementing the rule.

IV. Scope of the Safety Problem

Generally, the grade crossings where the physical storage distance is less than 100 feet would present the greatest challenge to motor vehicle drivers. A typical 3-axle "day cab" (a tractor without a sleeper berth) with a 2-axle, 53-foot semitrailer is 65 feet long. A typical 3-axle truck tractor (with a sleeper berth) pulling a 2-axle, 53-foot semitrailer would be about 65 to 72 feet long. Typical cars on American highways range from 13 to 18 feet³ in length. With one short car and one long car ahead of it in a queue at a grade crossing with 100 feet of storage space, a 65-foot truck might find it impossible to clear the railroad track.

Number of Grade Crossings

The number of such grade crossings was determined by analyzing several FRA and geographic mapping databases. Table I summarizes the findings on grade crossings in the continental United States where the clear storage

space is limited. FMCSA and PHMSA estimate that the total number of public, at-grade, open highway-rail grade crossings of all types is 145,702. Of these, 84,835 grade crossings have an estimated available clear storage distance of more than 1,500 feet.

There are about 60,867 grade crossings where the estimated available clear storage distance is 1,500 feet or less. FMCSA and PHMSA estimate that approximately 19,824 of these grade crossings have a clear storage distance of less than 100 feet. FMCSA and PHMSA estimate there are 41,043 grade crossings (60,867 minus 19,824 equals 41,043) where the estimated available storage distance is greater than 100 feet but 1,500 feet or less. In addition, there are 1,384 other grade crossings estimated to have a relatively higher risk of storage-distance issues due to a combination of factors such as the volume of motor vehicle and CMV traffic, the number of train movements, and the number of lanes of roadway. Therefore, the total number of grade crossings of primary interest for this proposed rule is 21,208 (19,824 plus 1,384 equals 21,208), representing approximately 14.5 percent of grade crossings in the United States.

TABLE I—GRADE CROSSINGS IN THE CONTINENTAL U.S.

| Distance to nearest intersection | Number of grade crossings |
|--|---------------------------|
| All Grade Crossings | 145,702 |
| Greater Than 1,500 feet | 84,835 |
| Less Than or Equal To 1,500 feet | 60,867 |
| Less Than 100 feet | 19,824 |
| 100–500 feet | 26,959 |
| 501–1,000 feet | 8,843 |
| 1,001–1,500 feet | 5,241 |

Number of Grade Crossing Crashes

FMCSA and PHMSA used FRA's Railroad Accident/Incident Reporting System, Highway-Rail Grade Crossing

Accident/Incident File to analyze the extent to which storage distance has historically been recorded as a factor in grade crossing crashes. FMCSA and

PHMSA analyzed crashes involving CMVs during the period 1998 through 2005. Table II summarizes the estimated number of grade crossing crashes.

TABLE II—CRASHES AT GRADE CROSSINGS WITH LIMITED STORAGE SPACE 1998 TO 2005

| Definition | Number of crashes (1998 to 2005) |
|---|----------------------------------|
| All Crashes at All Highway-Rail Grade Crossings Involving All Types of Vehicles | 26,027 |
| All Crashes at Any One of the 21,208 FMCSA-Identified Grade Crossings of Interest to the Proposal's Regulatory Impact Assessment— | 4,168 |
| —With a Train Striking a Truck or Bus— | 890 |
| —Stopped or Trapped on the Crossing— | 289 |
| —Definitely or Probably Storage Related | 32 |

³ FMCSA and PHMSA reviewed various auto manufacturers' Web sites for the specific length

measurements for small sports cars and large luxury executive sedans to arrive at the 13 to 18 feet range.

TABLE II—CRASHES AT GRADE CROSSINGS WITH LIMITED STORAGE SPACE 1998 TO 2005—Continued

| Definition | Number of crashes (1998 to 2005) |
|----------------------------------|----------------------------------|
| —Possibly Storage Related* | 122 |

* In order to ensure adequate consideration of the potential that the crash was storage related, this number was developed using the same proportion as those with sufficient narrative information, i.e., assuming 42.1 percent of crashes with indeterminate narratives are classified as storage-distance related. (See Regulatory Impact Assessment in dockets PHMSA-2010-0319 (HM-255) or FMCSA-2006-25660 for further information.)

V. Costs and Benefits of Rule Implementation

Data are not available to estimate with any degree of certainty the costs and benefits of implementing this rule. However, the Agencies are required by statute to implement a rule prohibiting drivers from going across grade crossings unless there is sufficient space to clear the crossings completely without stopping. States with existing statutes or regulations similar to the proposed Federal rule have somewhat lower crash rates at grade crossings identified as having significant risk of storage-related issues. While factors other than the States' storage-space rules may be responsible for some of the differences in crash rates, the Agencies believe the differential is large enough to suggest that such rules have safety benefits. The States' voluntary adoption of storage-space rules also suggests that the costs of implementing the requirements have not proven to be an issue with the States or with the motor carrier industry. Based on the safety impacts seen in the States that have adopted requirements similar to those considered in this rulemaking, FMCSA and PHMSA believe the rule would provide a cost-beneficial enhancement to safety.

As mentioned above in the Legal Basis section of the preamble, CMVs have a minimum weight threshold of 10,001 pounds. However, the "motor vehicles" to which the proposed rule would apply have no such threshold; any motor vehicle, no matter how small, used by a "motor carrier" or "motor private carrier" in interstate commerce in furtherance of a commercial enterprise would be subject to the proposed rule. Yet these lighter vehicles—mainly pickup trucks and work vans—are unlikely to be affected by this proposal because virtually every grade crossing has enough storage space to accommodate one of them; and they are simply too short and maneuverable to be trapped on grade crossings with storage space for several vehicles. Even if traffic suddenly bunched up, leaving one of these vehicles stopped on the tracks, it could drive onto the shoulder or otherwise maneuver out of harm's

way. Because FMCSA has concluded that the proposed rule would impose no costs on vehicles too small to qualify as CMVs, they are ignored in the following analysis of costs and benefits.

Also mentioned in the Legal Basis section of this NPRM is that PHMSA's authority includes intrastate carriers. PHMSA estimated the number of carriers that may be affected by assessing hazmat registration data from the 2010-2011 registration year. The data is collected on DOT form F 5800.2 in accordance with § 107.608(a) of the 49 CFR. Generally, the registration requirements apply to any person who offers for transportation or transports a quantity of hazardous materials requiring placarding under Part 172 of the 49 CFR. Additional data collected on form F 5800.2 verify that the person is indeed a carrier, the mode of transportation used, and the US DOT Number. Based on PHMSA's analysis of form F 5800.2—18,841 persons have registered as motor carriers of hazardous materials. Of those 18,841 persons 17,599 included a US DOT Number. Therefore, based on PHMSA's registration data, the difference between persons registered as motor carriers and persons that have obtained a US DOT Number is 1,242 (18,841 - 17,599 = 1,242). PHMSA considers these persons to be intrastate motor carriers. PHMSA compared these numbers with the FMCSA Motor Carrier Management Information System (MCMIS). Based on MCMIS data, PHMSA verified that the 1,242 carriers identified through registration data have not been issued a US DOT Number by FMCSA.

To ensure that all intrastate carriers are identified, PHMSA multiplied the number of intrastate carriers identified through registration data by a 20% underreporting factor. As a result, the total population of intrastate carriers affected by this rulemaking is 1,490 intrastate motor carriers (1,242 × 1.20 = 1,490). For the purposes of this NPRM the cost and benefit impact is applied to each intrastate and interstate motor carrier equally. In the cost and benefit discussions that follow the Agencies consider the costs and benefits applicable to the total population of

intrastate and interstate carriers affected by this proposed rule. The Agencies consider that, because the proposed rule does not mandate specific changes in carrier operations, driver training, or grade crossing infrastructure enhancements, its cost impacts should not be significant. Because a substantial number of States already have in place storage-space rules, motor vehicle drivers operating in or through those States should have the experience and knowledge needed to ensure compliance. FMCSA and PHMSA do not believe the rule is so complex that it would require special training of drivers operating in the other States. The Agencies request public comment on this issue.

For motor vehicles, the storage-distance related annual crash rate per 1,000 grade crossings is 0.72.⁴ FMCSA and PHMSA found that the difference in this rate between States that have laws/regulations similar to the proposed Federal rule and those that do not is 0.285 crashes per 1,000 grade crossings per year. Thus, FMCSA and PHMSA would expect 2.62 fewer crashes per year, if all States adopted the proposed Federal rule,⁵ and 0.2 fewer train derailments.⁶

The total annual savings from crashes avoided (in 2009 dollars) is estimated to be approximately \$975,000. This consists of \$381,000 in reduced fatalities, \$159,000 in reduced injuries, \$1,600 in reduced hazardous material spills, \$31,000 in reduced highway property damage, and \$402,000 in reduced costs for train derailments. Total implementation costs per year are estimated to be \$279,000. Thus, the expected annual savings from implementation of this proposed rule would be about \$696,000.

Table III displays the 10-year average annual and discounted net costs and

⁴ 122 crashes/8 years/21,208 grade crossings with limited storage space × 1,000 = 0.72.

⁵ 0.000285 fewer incidents per grade crossing × 9,204 storage space impacted grade crossings in states without a similar rule equals 2.62 fewer crashes per year.

⁶ 14 derailments/122 grade crossing incidents × 2.62 incidents prevented equals 0.2 fewer train derailments.

benefits of the statute that we are implementing in this proposal.

TABLE III—TOTAL ESTIMATED 10-YEAR COSTS AND BENEFITS FOR IMPLEMENTING THE STATUTE MANDATING THE PROPOSED GRADE CROSSING STORAGE-SPACE RULE

[In thousands, 2009 dollars]

| | Annual impact | 10-Year total | 10-Year (Discounted at 3 percent)* | 10-Year (Discounted at 7 percent)* |
|--------------------|---------------|---------------|------------------------------------|------------------------------------|
| Benefits | \$975.0 | \$9,750 | \$8,566 | \$6,352 |
| Costs** | \$381.0 | \$3,810 | \$2,172 | \$1,818 |
| Net Benefits | \$696.0 | \$6,960 | \$5,419 | \$4,535 |

* Present values of 10-year costs are discounted at 3 percent and 7 percent as specified in OMB Circular A-4, Regulatory Analysis, September 2003. Note that the first year costs and benefits are not discounted.

** Excludes any potential costs from rerouting due to uncertainty of costs. See Sensitivity Analysis section below.

Sensitivity Analysis

It is important to note that the proposed rule could increase vehicle miles traveled (VMT) due to re-routing. Because of major data limitations, FMCSA and PHMSA performed a sensitivity analysis to explore this possibility but are unable to identify what that increase—if any—would be. The Congressionally mandated rule would be cost beneficial if the additional VMT does not exceed 0.63 percent of the maximum possible increase calculated in the sensitivity analysis.⁷ The Agencies request comments from motor carriers on the extent to which this rulemaking would cause them to reroute their motor vehicles.

This proposed storage-distance rule will discourage drivers of motor vehicles, particularly tractor-trailer combinations, from using grade crossings at which the storage distance is less than the overall length of the vehicle. FMCSA and PHMSA believe most drivers will make similar trips dozens or hundreds of times a year and experience the need to re-route only the first time. This assumes that the drivers and companies learn from their mistakes and avoid re-routing. Driver and dispatcher awareness training and improved in-cab geographic information system displays may allow companies and motor vehicle drivers to plan routes more efficiently before or shortly after leaving the point of origin, enabling them to avoid problem grade crossings entirely, instead of re-routing appreciably at the last minute.

If significant numbers of companies or drivers do not plan their trips efficiently, and drivers unexpectedly encounter grade crossings with storage distances of less than their overall lengths (FMCSA and PHMSA assumed

that a distance of approximately 100 feet could be problematical⁸), there would be additional costs to motor vehicle operators and the public due to the rerouting required. These route changes would likely result in additional VMT, with consequent increases in operating costs and adverse safety impacts.

The sensitivity analysis for this proposed rule first determined an estimated range of extra VMT that might result if all large motor vehicles were re-routed away from all grade crossings with insufficient storage space. This assumes that the drivers and companies never change their behavior and always go to the grade crossing before re-routing, for all trips taken along that route. FMCSA and PHMSA classify this outcome as the high-end limit of VMT increases. The actual number of re-routed trips would be only a small fraction of the possible number because companies and drivers learn from their mistakes and avoid re-routing. The low-end limit on VMT increases would occur if only minimal routing changes are made. FMCSA and PHMSA also provide an estimate that is intermediate between these two extremes. As indicated above, the proposed rule would be cost beneficial if additional VMT does not exceed 0.63 percent.

The second step in the sensitivity analysis is to calculate the additional costs resulting from each of the proposed cases. These include increases in large truck operating costs, and societal costs associated with crashes that could be expected to occur as mileage increases.

Based on the current analysis, there are an estimated 19,824 grade crossings in the U.S. where the physical storage distance is estimated to be less than 100 feet. For each of these grade crossings, the average annual daily traffic (AADT)

volume of all motor vehicles passing through the grade crossing and the percent of vehicle traffic through the crossing estimated to consist of “trucks” were obtained from the FRA’s Grade Crossing Inventory System (GCIS). The AADT figure for all vehicle types was transformed into an annual average equivalent figure and multiplied by the GCIS “percent trucks” data field to produce an estimate of the total number of all CMV movements (of all types of CMVs) through each grade crossing during the course of 1 year. Because only a portion of these truck movements involve tractor-trailer combinations of sufficient length, nationwide VMT distribution data by vehicle size and type was used to refine the estimate (derived both from the 2002 Vehicle Inventory and Use Survey (VIUS),⁹ and the 2005 Highway Statistics¹⁰).

The estimated total number of all truck movements at each grade crossing is calculated from the total vehicle AADT data and the GCIS “percent truck” figure. This figure is then reduced further by 17 percent, to reflect the reduction in the relative share (from VIUS and the 2005 *Highway Statistics*) of combination vehicles on non-access-controlled roadways (where grade crossings would be found).

The additional miles that each motor vehicle might actually travel is likely to vary widely at each grade crossing of interest based on local conditions and the specific origin and destination of each trip. An estimate of potential average additional miles traveled per motor vehicle was developed for each grade crossing based on individual inspection of approximately 10 randomly selected grade crossings each

⁹ U.S. Department of Commerce, Economics and Statistics Administration, “2002 Economic Census: Vehicle Inventory and Use Survey,” December 2004.

¹⁰ U.S. Department of Transportation, Federal Highway Administration, Office of Highway Policy Information, “Highway Statistics,” 2005.

⁷ \$696,000 in annual savings ÷ 110,000,000 for maximum additional VMT equals 0.63 percent.

⁸ This distance is larger than most motor coach and tractor-trailer lengths, but less than that of some multiple-trailer and over-dimensional vehicles.

in urban, suburban, and rural areas throughout the U.S. The actual miles traveled estimates for the 10 grade crossings in each type of area were then averaged and applied to all grade crossings (classifying their locations as rural, suburban, or urban) based on an analysis using geographic information systems (GIS) software. An estimate of the extra VMT that might be generated by each motor vehicle trying to avoid suspect grade crossings was determined to be about on average 0.75 miles. FMCSA and PHMSA believe numerous grade crossings close together in metropolitan areas may result in such a small average extra VMT estimate.

FMCSA and PHMSA included for analysis only the subset of grade crossings with storage distance estimated to be 100 feet or less that are located in the 27 jurisdictions (26 States and the District of Columbia) that do not

currently have storage-space laws similar or identical to the requirements of this NPRM. The Agencies only include grade crossings where storage distance is estimated to be 100 feet or less since, for purposes of re-routing, these are the only crossings a driver could easily identify. There are 8,749 such grade crossings in these 27 jurisdictions.

The final estimate of the number of annual movements of large trucks through each of these 8,749 affected grade crossings was then multiplied by the estimates of additional miles traveled per trip to derive a final maximum estimate of 110,902,390 additional VMT annually (affecting about 146,307,200 motor vehicle trips annually) in the 27 jurisdictions where no equivalent State law currently exists.¹¹

The costs of these additional miles traveled by large trucks include added motor carrier operating costs (driver salary, fuel, depreciation, etc.), and safety-related costs associated with increased risks of crashes. Estimates of the per-mile operating costs for large trucks were derived from a September 2004 study of motor carrier industry financial and operating performance profiles.¹² The average total operating cost for large motor vehicles carrying all commodity types was estimated to be \$1.93 per vehicle-mile in 2001. Inflating to 2009 dollars, this is equivalent to \$2.34 per vehicle-mile.

Estimates of safety-related costs were derived from average fatality, injury, and property-damage-only incidence rates developed by FMCSA for large truck transportation,¹³ and cost-per-incident estimates. These results are summarized in Table IV below.

TABLE IV—ESTIMATED ANNUAL MOTOR VEHICLE OPERATING AND SAFETY COSTS RESULTING FROM ADDED VMT TO BYPASS STORAGE-SPACE IMPACTED GRADE CROSSINGS
[\$2009, thousands]

| Cost category | Highest possible estimate of additional VMT | Mid-range estimate; 10 percent of maximum additional VMT | Lower-end estimate; 1 percent of maximum additional VMT |
|-------------------------------------|---|--|---|
| Extra VMT | 110,900 | 11,100 | 1,100 |
| CMV Operations Crash Related: | \$261,500 | \$ 26,100 | \$ 2,600 |
| Fatalities | \$ 15,600 | \$ 1,550 | \$ 200 |
| Injuries | \$ 8,200 | \$ 800 | < \$ 100 |
| Property Damage | \$ 500 | < \$ 100 | < \$ 100 |
| Hazardous Material Spills | < \$ 100 | < \$ 100 | < \$ 100 |
| Total Costs | \$286,000 | \$28,700 | \$3,100 |

These additional operations and safety costs are several hundred times greater than the estimated net benefits in Table III, which ignores potential re-routing costs. The high-end estimated crash-related costs, by themselves, are about 42 times greater than the total annual net benefits of this proposal. Motor carriers, however, are incentivized to minimize VMT in order to save time and money; FMCSA and PHMSA believe that operators will be able to find alternate routes that add little distance to their trips. We believe the lower-end estimate of additional VMT in Table IV is likely to be the most realistic.

FMCSA and PHMSA seek additional information from the public to further assess the costs and benefits of this proposal. FMCSA has found no indications of problems caused by

rerouting in those States with laws similar to this NPRM. FMCSA and PHMSA seek comments from States with laws similar to this proposal on how many extra miles, on average, their grade crossing prohibitions force trucks and buses to travel to avoid crossings with insufficient storage space.

Regulatory Analyses

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

FMCSA and PHMSA have determined that this action is a non-significant regulatory action within the meaning of Executive Order 12866. FMCSA and PHMSA expect the proposed rule would have minimal costs and generate minimal public interest. Previous efforts to implement section 112 of the

HMTAA have elicited little public response. Of the 45 comments submitted to the July 30, 1998, NPRM, 35 were from State agencies expressing concern that the rulemaking would impose certain economic burdens on the States. As explained previously in this NPRM, however, those concerns were based on a misunderstanding of the applicability of the proposed rule. Comments were received from three transportation industry associations (the American Trucking Associations (ATA), AAR, the National School Transportation Association (NSTA)) and three transit authorities, with only four comments from other entities.

The Agencies note that when FMCSA held a public meeting on the implementation of section 112 in September 2006, there were only two participants—one from the AAR, none

¹¹ 8,749 affected grade crossings times ~12,676 per trip additional miles estimated equals 110,902,390 additional VMT annually.

¹² Thomas M. Corsi, *et al.*, "Motor Carrier Industry Profile Study: Financial and Operating Performance Profiles by Industry Segment, 2001–2002," Office of

Information Management, Federal Motor Carrier Safety Administration, September 2004.

¹³ FMCSA, "Large Truck Crash Facts," February 2007.

from the motor carrier industry or the States. The interest initially expressed by States in response to the 1998 NPRM seems to have diminished since the NPRM was withdrawn in 2006, presumably because FMCSA's discussion of the comments to the docket resolved their concerns. The motor carriers and drivers to which this rule would apply, as well as the associations that represent their interests, have shown little interest in this proceeding; FMCSA and PHMSA therefore believe the rulemaking is non-significant in the context of Executive Order 12866.

The Agency has prepared a regulatory analysis of the costs and benefits of this proposal. The estimated costs and benefits are small, and the rule may be cost beneficial. That is not certain, however, given the additional VMT that may be generated but that cannot be reliably estimated. A copy of the analysis document is included in docket FMCSA-2006-25660.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601-612), FMCSA and PHMSA have considered the effects of this proposed regulatory action on small entities and determined that this proposed rule would not have a significant economic impact on a substantial number of small entities, as defined by the U.S. Small Business Administration's Office of Size Standards.

FMCSA has determined that the requirements in this rulemaking apply to a substantial number of small entities (i.e., small owner/operator motor carriers and other small businesses employing CMV drivers). The NPRM, however, does not mandate specific changes in carrier operations or driver training. Any rerouting and other logistics costs that might be borne by small carriers would occur only to the extent that their private benefits were judged to be greater than their costs. Carriers are presumed to pursue the most efficient transportation routes in order to minimize time, fuel usage, tire wear-and-tear and dead heading. Obtaining the most efficient route is a function of many factors, one of which is the avoidance of deficient storage-space railroad tracks. To the extent that existing carriers have not already attained and incorporated efficient route plans, they may sustain a revenue reduction, but it is one that is expected to be minimal and temporary.

Also, there would probably be only minimal additional costs for driver training as the training would probably occur as a modification of emphasis in

existing training curricula and would not likely add extra time to the training requirement.

We estimated that a preponderance of this rule's implementation costs, expected to be composed of government administrative, enforcement, or training activities, will affect transportation personnel in the 27 jurisdictions that do not have an existing law or regulation similar to the proposed Federal rule.

Accordingly, the Administrators of FMCSA and PHMSA hereby certify that this proposal would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

There is only one circumstance under which this rulemaking would impose an unfunded Federal mandate, as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532, *et seq.*), resulting in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$140.3 million or more in any 1 year. If drivers and motor carriers resolutely fail to learn from previous experience (by repeatedly approaching railroad highway grade crossings with storage space inadequate to accommodate their vehicles and then turning away to find alternative crossings), the additional VMT generated by these errors might have a cost exceeding the threshold for this statute. FMCSA and PHMSA, however, believe that drivers and carriers would make such mistakes only a few times, and thereafter select streets and roads with appropriate grade crossings that do not require re-routing. PHMSA and FMCSA, therefore, believe that this rule would not impose an unfunded Federal mandate.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 12630 (Taking of Private Property)

This proposed rulemaking would not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Executive Order 13132 (Federalism)

This proposed action has been analyzed in accordance with the principles and criteria contained in

Executive Order 13132. FMCSA and PHMSA have preliminarily determined that this rulemaking would not have a substantial direct effect on States, nor would it limit the policy-making discretion of the States. Nothing in this document would preempt any State law or regulation.

Executive Order 12372 (Intergovernmental Review)

The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires that FMCSA and PHMSA consider the impact of paperwork and other information collection burdens imposed on the public. FMCSA and PHMSA have determined that there are no current new information collection requirements associated with this proposed rule.

National Environmental Policy Act

The Agencies analyzed this proposed rule for the purpose of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and determined under FMCSA's environmental procedures Order 5610.1, issued March 1, 2004 (69 FR 9680), that there is no adverse impact to Air Quality because the Proposed Action would result in a decrease in highway and rail vehicle emissions as a result of fewer crashes. There are possible, moderately positive impacts to public health and safety, specifically at grade crossings, based on a decrease in the likelihood of fatalities and injuries as a result of CMV crashes due to insufficient storage distance at grade crossings. There are no identified overall negative environmental or socioeconomic impacts associated with the proposed rule.

The beneficial impacts of the proposed rule include the positive effect on hazardous materials transportation, reduced locomotive idling time otherwise incurred as follow-on trains are delayed by derailments at grade crossings, and public health and safety, specifically at grade crossings. There are also net positive socioeconomic benefits, to motor and rail carriers in particular, in addition to positive indirect impacts to aspects of the physical and human environment.

FMCSA and PHMSA have also analyzed this rule under the Clean Air Act, as amended (CAA), section 176(c) (42 U.S.C. 7401 *et seq.*), and

implementing regulations promulgated by the Environmental Protection Agency. Approval of this action is exempt from the CAA's general conformity requirement since it involves rulemaking and policy development and issuance.

A copy of the joint FMCSA and PHMSA Environmental Assessment (EA) is included in docket FMCSA-2006-25660. FMCSA and PHMSA request the public to comment on this environmental assessment.

Executive Order 12898 (Environmental Justice)

FMCSA and PHMSA evaluated the environmental effects of this proposed rule in accordance with Executive Order 12898 and determined that there are neither environmental justice issues associated with its provisions nor any collective environmental impact resulting from its promulgation. Environmental justice issues would be raised if there were "disproportionate" and "high and adverse impact" on minority or low-income populations. None of the alternatives analyzed in FMCSA's EA, discussed under NEPA, would result in high and adverse environmental impacts.

Executive Order 13211 (Energy Effects)

FMCSA and PHMSA analyzed this proposed action under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use. FMCSA and PHMSA determined preliminarily that it would not be a "significant energy action" under that Executive Order

because it would not be economically significant and would not be likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects

49 CFR Part 177

Hazardous materials transportation, Motor carriers, Radioactive materials, Reporting and recordkeeping requirements.

49 CFR Part 392

Highway safety, Motor carriers.

In consideration of the foregoing, PHMSA and FMCSA propose to amend title 49, Code of Federal Regulations, chapter I, part 177, and chapter III, part 392, as set forth below:

PART 177—CARRIAGE BY PUBLIC HIGHWAY

1. The authority citation for part 177 is revised to read as follows:

Authority: 49 U.S.C. 5101-5127; sec. 112 of Pub. L. 103-311, 108 Stat. 1673, 1676 (1994); 49 CFR 1.53.

2. Amend § 177.804 by redesignating the existing text as paragraph (a), amending newly designated paragraph (a) by adding a paragraph heading, and by adding a new paragraph (b) to read as follows:

§ 177.804 Compliance with Federal Motor Carrier Safety Regulations.

* * * * *

(a) General. * * *

(b) *Highway-rail crossings.* Drivers of commercial motor vehicles transporting

a quantity of hazardous materials, as defined in 49 CFR 383.5, requiring placarding under part 172 of the 49 CFR or any quantity of a material listed as a select agent or toxin in 42 CFR part 73 must comply with the safe clearance requirements for highway-rail crossings in § 392.12 of the FMCSRs.

PART 392—DRIVING OF COMMERCIAL MOTOR VEHICLES

3. The authority citation for part 392 is revised to read as follows:

Authority: 49 U.S.C. 13902, 31136, 31151, 31502; Section 112 of Pub. L. 103-311, 108 Stat. 1673, 1676 (1994); and 49 CFR 1.73.

4. Section 392.12 is added to read as follows:

§ 392.12 Highway-rail crossings; safe clearance.

No driver of a commercial motor vehicle shall drive onto a highway-rail grade crossing without having sufficient space to drive completely through the crossing without stopping.

Issued in Washington, DC on January 20, 2011 under authority delegated in 49 CFR part 1.

By the Federal Motor Carrier Safety Administration.

Anne S. Ferro,
Administrator.

By the Pipeline and Hazardous Materials Safety Administration.

Cynthia L. Quarterman,
Administrator.

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