

**§§ 76.1605 and 76.1606 [Removed]**

- 13. Remove §§ 76.1605 and 76.1606.

**§§ 76.1612 and 76.1613 [Removed]**

- 14. Remove §§ 76.1612 and 76.1613.

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

[Docket No. FRA-2009-0007, Notice No. 4]

RIN 2130-AC35

**Track Safety Standards; Concrete Crossties**

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

**ACTION:** Final rule; response to petitions for reconsideration.

**SUMMARY:** This document responds to petitions for reconsideration of FRA's final rule published on April 1, 2011, mandating specific requirements for effective concrete crossties, for rail fastening systems connected to concrete crossties, and for automated inspections of track constructed with concrete crossties. This document amends and clarifies the final rule.

**DATES:** The final rule is effective November 8, 2011.

**FOR FURTHER INFORMATION CONTACT:** Kenneth Rusk, Staff Director, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: (202) 493-6236); or Veronica Chittim, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20950 (telephone: (202) 493-0273).

**SUPPLEMENTARY INFORMATION:****Background**

On August 26, 2010, FRA issued a Notice of Proposed Rulemaking (NPRM) as a first step to the agency's promulgation of concrete crosstie regulations per the Congressional mandate contained in Section 403(d), of the Rail Safety Improvement Act of 2008 (Pub. L. 110-432, Division A) (RSIA). See 75 FR 52,490. On April 1, 2011, following consideration of written comments received in response to the NPRM, FRA published a final rule mandating specific requirements for effective concrete crossties, for rail fastening systems connected to concrete crossties, and for automated inspections of track constructed with concrete

crossties. See 76 FR 18,073. FRA received two petitions for reconsideration in response to the final rule.

On May 5, 2011, the International Brotherhood of Teamsters, Brotherhood of Maintenance of Way Employees Division (BMWED) filed a petition for reconsideration (BMWED Petition) of the final rule and on May 27, 2011, the Association of American Railroads (AAR) filed a petition for reconsideration (AAR Petition) of the final rule. In order to provide sufficient time to fully consider both Petitions, FRA delayed the effective date of the final rule until October 1, 2011. See 76 FR 34,890 (June 15, 2011).

The specific issues raised by these petitioners and FRA's responses to their petitions, are discussed in detail below in the "Section-by-Section Analysis" portion of the preamble. The Section-by-Section analysis also contains a detailed discussion of each provision of the final rule which FRA has amended or clarified. The amendments contained in this document generally clarify requirements currently contained in the final rule or allow for greater flexibility in complying with the rule, and are within the scope of the issues and options discussed, considered, or raised in the NPRM.

**Section-by-Section Analysis***Amendments to 49 CFR Part 213*

## Section 213.109 Crossties

## AAR Petition: Visibility of Prestressing Material

The final rule provides that concrete crossties shall not be "broken through or deteriorated to the extent that prestressing material is visible." 49 CFR 213.109(d)(1). AAR requests that FRA amend 49 CFR 213.109(d)(1) to state, "broken through or deteriorated to the extent outer prestressing strands are no longer in tension." AAR Petition at 3-4. In proposing such language, AAR asserts that FRA is inconsistent with the specifications in 49 CFR 213.335(d)(1) for Class 6 track. See AAR Petition at 3. AAR argues that "FRA's concern is whether the prestressing material is in tension," as demonstrated by the discussion in the final rule. AAR Petition at 3.

FRA declines to adopt AAR's recommendation to modify the language of 49 CFR 213.109(d)(1). The intent of 49 CFR 213.109(d)(1) is to ensure that concrete crossties with reinforcing strands that have lost their bond to the concrete are considered defective. This intent is clearly described in the preamble to the final rule. See 76 FR

18,077-18,079 (Apr. 1, 2011). While a concrete crosstie that is "broken through or deteriorated to the extent outer prestressing strands are no longer in tension" would be defective, the standard that AAR proposes is difficult to quantify in the field, as an inspector would have difficulty knowing if the prestressing strands are no longer in tension. AAR's proposal would add a qualifier to the standard, making the regulation more subjective and more difficult to enforce.

AAR suggests using the same standard for § 213.109(d)(1) as specified in § 213.335(d), for Class 6 track. Section 213.335(d) provides that the crosstie cannot be "so deteriorated that the prestress strands are ineffective or withdrawn into the tie at one end and the tie exhibits structural cracks in the rail seat or in the gage of track." FRA believes that the standard adopted for lower speeds of track in § 213.109(d)(1) improves upon § 213.335(d) for lower classes of track by more clearly defining what it means to be "ineffective" and explaining how to find "structural cracks." FRA notes that while further study would be needed to determine whether this clarifying language would also be appropriate in higher classes of track, any potential amendment to § 213.335(d) would be outside the scope of this proceeding, as modifications to the language in § 213.335(d) was neither raised in the NPRM, nor discussed in the final rule. However, FRA would be willing to address the language in § 213.335(d) in future updates to part 213.

AAR further states that FRA's position to reject the proposed phrase "completely broken through" for § 213.109 is unconvincing. See AAR Petition at 3. Contrary to this concern, FRA's intent was to simply provide consistency in the language used for wooden crossties and does not find it necessary to introduce ambiguity by adopting differing language without sufficient justification.

Although AAR is concerned with the situations where prestressing material is visible and yet not defective, FRA clearly explained in the preamble to the final rule in response to AAR's comment that FRA is not concerned with prestressing material being visible due to a wheel impact or due to the manufacturing process. See 76 FR 18,077-18,079 (Apr. 1, 2011). FRA thoroughly explained its intent in the preamble that by saying the material is "visible" it does not mean "a concrete tie being simply chipped due to wheel impact as opposed to actual deterioration." 76 FR 18,077 (Apr. 1, 2011). FRA also clarified that it is "not

concerned with reinforcing material that may be left visible on the end of a tie during the manufacturing process.” 76 FR 18,077 (Apr. 1, 2011). While this explanatory language is not in the rule text itself, it is clear that FRA intended to clarify in the preamble those prestress concrete crosstie conditions that are of concern to the agency. See Nov. 18, 2008, Concrete Crossties Task Force (CCTF) meeting document (TSCCTF08–1118–06 CONSENSUS WG & TF CLEAN Document For Concrete Crossties, “NOTE: FRA wants to describe prestress tie conditions, to be covered in the compliance manual or preamble”). As FRA adequately addressed AAR’s comment to the NPRM in the preamble to the final rule, FRA declines to adopt AAR’s proposed change to § 213.109(d)(1).

#### AAR Petition: The Use of Crossties With One Fastener on a Rail

AAR argues that § 213.109(d)(6) should be amended to state: “[c]onfigured with less than two fasteners on the same rail except (i) as provided in § 213.127(c) and (ii) where the fastenings on two adjacent ties on class 1 and class 2 track provide the equivalent of the fastenings on one tie, in which case the two adjacent ties shall be counted as one tie.” AAR Petition at 5.

This issue was raised by AAR in previous comments and addressed by FRA in the final rule. AAR has provided nothing new to sway the agency’s views on the issue. Thus, FRA is again declining to adopt the proposal. See 76 FR 18,077 (Apr. 1, 2011). In response to the issue, FRA has already stated the following:

FRA responds that, as with nonconcrete ties, one of the safety requirements of an effective concrete tie is that it be able to hold fasteners. Consequently, FRA is declining to accept AAR’s recommended change to the regulatory text due to this safety concern.

76 FR 18,077 (Apr. 1, 2011). In the Section-by-Section analysis of the final rule, FRA further stated the following with respect to AAR’s proposal:

FRA contends that, as with non-concrete ties, one of the safety requirements of an effective concrete tie is that it be able to hold fasteners. Thus, FRA is declining to accept this suggested change to the regulatory text due to this safety concern.

76 FR 18,079 (Apr. 1, 2011).

As noted above, FRA believes that it responded to this issue adequately in the preamble to the final rule and that this issue is duplicative and need not be addressed. See 49 CFR 211.29(c). However, FRA would like to take this opportunity to further explain its

reasoning. Although AAR argues that the rule text that disqualifies concrete crossties under the conditions described will impose a significant cost on the industry, FRA notes that it has not changed its enforcement policy in the final rule and those concrete crossties that are unable to hold fasteners would have been defective even prior to the issuance of the final rule. The final rule did not modify the existing requirement that any type of crosstie with a missing fastener is considered defective in part 213. The Track Safety Standards require that to be an effective crosstie, it must be able to hold fasteners that can restrain the rail. The crosstie, rail, and fasteners work together as a system to provide effective restraint.<sup>1</sup> FRA concedes that the BNSF Railway (BNSF), the only railroad known to FRA that utilizes defective crossties in this manner, will need to spend substantial funds to remediate any trackage that consists of these defective crossties. However, this cost is not a new cost as a result of the final rule, but merely the cost of compliance with part 213 as it existed prior to the final rule. Finally, amending the rule text is not an appropriate avenue to address one railroad’s isolated and limited practice on approximately fifty miles of non-mainline track.<sup>2</sup> A more appropriate avenue would be for BNSF to seek a waiver from the FRA Railroad Safety

<sup>1</sup> See 76 FR 18,073, 18,079 (Apr. 1, 2011):

The rail and fastener assembly work as a system, capable of providing electrical insulation, and adequate resistance to lateral displacement, undesired gage widening, rail canting, rail rollover, and abrasive or excessive compressive stresses. \* \* \* Part of the complexity of crosstie assessment is the fastener component. Both crossties and fasteners act as a system to deliver the expected performance effect. A non-compliant crosstie and defective fastener assembly improperly maintains the rail position and support on the crosstie and contributes to excessive lateral gage widening (rail cant-rail rollover), and longitudinal rail movement because of loss of toeload.

<sup>2</sup> AAR’s Petition included BNSF’s submission of its May 2011 findings, based on reports from a geometry car that had operated over BNSF’s Seadrift subdivision on December 14, 2010. According to AAR, BNSF’s practice of using crossties in this manner will not hinder, but may actually improve safety. FRA notes that BNSF’s findings were based on the operation of trains at ten miles per hour, over an eight mile segment of track designed for twenty-five miles per hour. This data alone is insufficient to demonstrate that this practice would prevent rollover at higher speeds and varying conditions or apply more broadly than as shown on this particular trackage. FRA also notes that AAR states that “there are eight miles of track with approximately 80 percent of the ties consisting of ties with one defective fastener (approximately 20 percent of the ties are new).” AAR Petition at 5. If this description is correct, this track generally meets the Class 1 criteria of 5 non-defective ties per 39 feet of track.

Board, pursuant to the procedures contained in 49 CFR part 211.<sup>3</sup>

#### AAR Petition: Spacing of Concrete Crossties at Rail Joints

AAR requests amending § 213.109(e)(1) to add “(50 inches in the case of concrete ties)” after “48 inches” and § 213.109(e)(3) to add “(25 inches in the case of concrete ties)” after “24 inches.” AAR Petition at 6.

The spacing requirements for crossties at rail joints contained at § 213.109(e), were not modified by the final rule. The specifications for crossties’ spacing are based on providing sufficient support to a rail joint and are not dependent on the type of crosstie material used, whether the crossties are made of wood or concrete. For Class 1 and Class 2 track, the regulation provides that each rail joint shall be supported by at least one crosstie whose centerline is within 24 inches of each rail joint location. 49 CFR 213.109(e)(1). For Classes 3, 4, and 5, each rail joint shall be supported by either at least one non-defective crosstie within 18 inches of the joint, or have two crossties, one on each side of the rail joint, whose centerlines are within 24 inches of the rail joint. 49 CFR 213.109(e)(2), (3). The Track Safety Standards already allow for flexibility in the spacing of crossties.<sup>4</sup> Although it may be true that the industry spaces concrete crossties further apart than wooden crossties, all crossties, wood or concrete, must provide effective support for the rail joint.

AAR’s suggestion does not appear to have been previously raised in the

<sup>3</sup> FRA may waive its regulatory requirements when a waiver is in the public interest and consistent with railroad safety. In doing so, FRA often imposes conditions designed to ensure safety. If a railroad believes that there are some FRA requirements applicable to it that should be waived, it may petition for a waiver under the procedures set forth in 49 CFR part 211. Any such petition should specify why the railroad believes it cannot comply with the regulation and what alternative measures it will take to ensure safety. See 49 CFR 211.9. If FRA’s Railroad Safety Board determines that a railroad can provide, through alternative procedures, the same level of safety that the FRA regulations provide, then the Safety Board may grant the waiver. FRA’s Railroad Safety Board’s decision to restrict the exercise of FRA’s regulatory authority in no way constrains the exercise of its statutory emergency order authority under 49 U.S.C. 20104. That authority was designed to address imminent hazards not dealt with by existing regulations and/or so dangerous as to require immediate, *ex parte* action on the government’s part.

<sup>4</sup> For example, the railroads have a range of crosstie spacing options, between 19.5 inches and 30 inches, depending on the size of the crosstie, the size of the rail, and the class of track. The industry-recommended practice is to avoid placing a concrete crosstie directly underneath the adjoining ends of two rails, making a rail joint, as the compressive forces downward on the concrete crosstie would deteriorate the concrete crosstie quickly.

RSAC process or in any of the comments to the NPRM. Nor has AAR provided FRA with any data to support its contention that concrete crossties should be treated differently from wood crossties in this manner. Moreover, AAR has not provided any basis for why FRA must consider these additional facts, or explained why these facts were not presented to the Administrator within the allotted time. *See* 49 CFR 211.29(b). Thus, FRA is denying AAR's request. Furthermore, for the reasons noted above, FRA believes that the issue being raised by AAR is outside the scope of this proceeding and that it is inappropriate for FRA to address the issue at this late stage of the rulemaking proceeding.

#### Section 213.234 Automated Inspection of Track Constructed With Concrete Crossties

##### AAR Petition: Whether Automated Inspection Equipment Cannot Measure Rail Seat Deterioration as Required

AAR argues that "today's automated inspection equipment cannot measure rail seat deterioration at all, let alone within  $\frac{1}{8}$  of an inch." AAR Petition at 5. Further, AAR states that "automated equipment is not capable of meeting the standard set forth in subsection 213.234(d)." AAR suggests deleting § 213.234(d), (e), and (h). *See* AAR Petition at 5.

Throughout the RSAC process, the parties agreed that automated inspections were a good approach to locating areas of rail seat deterioration. Indeed, the NPRM states that "[o]ther than automated inspection, there are currently no other tools capable of aiding in the detection of rail seat deterioration." 75 FR 52,497 (Aug. 26, 2010). FRA is surprised that AAR asserts at this stage in the rulemaking process that the technology to perform these types of automated inspections does not exist.

Although AAR is technically correct that automated equipment cannot currently *measure* rail seat deterioration directly, today's automated equipment can *indicate* locations of rail seat deterioration. Rail seat deterioration is indicated as a result of interpolations and calculations from rail cant measurements. The rail cant measurements provide an indication to the designated § 213.7 person that the location should be field-verified. The railroad industry did not want to be limited to a requirement to locate rail seat deterioration through automated inspection using the rail cant method alone. In response to this concern, FRA removed the provision initially

proposed in the NPRM requiring automated inspections of rail cant. Instead, FRA chose to use "a performance-based standard" for automated inspections that would indicate rail seat deterioration to the accuracy specified by § 213.234, or  $\frac{1}{8}$  of an inch, without mandating which technology should be used. *See* 76 FR 18,076–18,077, 18,080–18,081 (Apr. 1, 2011).

The design and practicality of all automated and autonomous geometry measurement systems is a supplement to visual inspection efforts toward identifying locations of greatest derailment risk. It has been FRA's objective and policy that on-the-ground visual verification must be done by inspectors to validate not only rail seat deterioration, but all track structure and geometry conditions discovered by automated means. A credible gage measurement restraint system (GRMS) is the preferred choice, however, only FRA's DOTX 218 is properly equipped to vertically and laterally load the rails into the crosstie seat area. FRA's other cars load vertically, but not necessarily completely load the rails laterally to "seat" the rail on the crosstie pad in all instances. FRA's rail profiling system (rail cant method) provides a highly accurate indication (advisory) of possible rail seat deterioration. FRA's safety strategy is to promptly identify rail seat deterioration locations with DOTX 217, 219, and 220 cars' onboard rail profiling systems, then re-inspect those areas indicating rail seat deterioration conditions. FRA's automated inspection vehicle uses rail cant to indicate areas of rail seat deterioration, to an accuracy level of within at least one degree of rail cant, which is equivalent to  $\frac{1}{8}$  of an inch of rail seat deterioration.

Additionally, there were presentations made at the CCTF meetings as part of the RSAC process, describing technologies that can detect or indicate rail seat abrasion. These included systems used by Georgetown Rail Equipment Company, Holland Company LP, and ENSCO, Inc.<sup>5</sup> Georgetown Rail Equipment Company represents that their "scanning" system

<sup>5</sup> *See, e.g.*, "Rail Seat Abrasion Detection, November 2008 Update, RSAC Meeting Nov. 19–20, 2008, by Richard Reiff, TTCL, AAR & BNSF Cooperative Project (comparing detection systems for rail seat abrasion, utilizing rail cant data or its equivalent). For example, the presentation compares the BNSF TGC85 car, the Holland TrackStar, the FRA T-20 car, the FRA T-18, and Georgetown Rail/Aurora systems. Also note the availability of rail profile systems offered by companies such as Plasser American, KLD Labs Inc., MERMEC Inc., ENSCO, Inc., Holland Company LP, and Georgetown Rail Equipment Company.

utilizes laser imagery to "see" height differences of ties, scanning both the inside and outside of the crosstie.<sup>6</sup> FRA believes that BNSF may use this "scanning" system currently on parts of its concrete crossties trackage. AAR's Petition included geometry car reports for a track geometry car that operated over BNSF's Seadrift subdivision on December 14, 2010, measuring rail cant. *See* AAR Petition at 5, 25, 32. While FRA's system of calculating rail cant cannot technically "measure" rail seat deterioration, it does provide indications of rail seat deterioration. FRA realizes that the rule text is technically incorrect to require that an automated inspection measurement system "measure" rail seat deterioration to within  $\frac{1}{8}$  of an inch. FRA wishes to clarify that it is requiring the automated measurement system to "locate" rail seat deterioration. It is up to the railroad whether it will use rail cant to indicate locations of rail seat deterioration, to utilize the scanning capability that has been proven effective at detecting dangerous areas of rail seat deterioration, or to use any other demonstrated effective and accurate technology.

FRA also recognizes that detecting rail cant alone will not necessarily demonstrate *all* possible locations of rail seat deterioration. For example, FRA's geometry car will not find areas of rail seat deterioration that are due to compression forces from loads onto the crosstie. However, FRA's geometry car will locate rail seat deterioration due to rail cant in curved track, which are the hardest areas to detect manually. The automated inspection provision contained in § 213.234 was never intended to require railroads to detect all areas of rail seat deterioration, but rather to supplement manual visual inspections.

Automated inspection technology is able to detect rail seat deterioration to an accuracy of  $\frac{1}{8}$  of an inch, as demonstrated above. Furthermore, the Final Regulatory Impact Analysis explained in detail how FRA estimated the costs of possible upgrades to railroads' existing technology or equipment to detect rail seat deterioration. *See* document number 6 in the public docket of this proceeding, at 38. FRA believes that all Class 1 railroads, Class 2 railroads, intercity passenger railroads, and commuter railroads servicing a community greater than 50,000 people currently conduct automated geometry inspections of their

<sup>6</sup> The scanning system measures the crosstie voids against the nominal height of the crosstie design, usually within a tolerance of  $\frac{1}{16}$  of an inch.

track at frequencies roughly twice as great as those required in the final rule. Moreover, most major railroads with concrete crossties already perform automatic inspections to detect rail seat deterioration (either through the rail cant method or through the "scanning" method), and most of these railroads already have equipment that can measure within  $\frac{1}{8}$  of an inch of accuracy.<sup>7</sup> Thus, FRA denies AAR's request to delete the automated inspection requirements contained in § 213.234, but FRA clarifies that by requiring measurement of rail seat deterioration, FRA actually meant that the technology had to "indicate" rail seat deterioration. Consequently, FRA amends § 213.234(d) and (g) accordingly.

**BMWED Petition: Whether FRA Should Explicitly Require All Persons Fully Qualified Under § 213.7, and Whose Territories Are Subject to § 213.234 Automated Inspections, Be Provided With a Copy of the Exception Report, or That a Copy of Such Report Be Made Readily Available to Such Persons**

BMWED urges that FRA amend the final rule to require "exception report data to be provided to, or made readily available to, persons fully qualified under § 213.7, including track inspectors responsible for performing § 213.233 visual track inspection in between automated inspection cycles." BMWED Petition at 5. To support its argument, BMWED cites to other provisions in the CFR that mandate focused dissemination and availability of reports. See BMWED Petition at 5–6.

FRA accepts BMWED's proposed amendment to the final rule. The final rule states that "[t]he automated inspection measurement system shall produce an exception report containing a systematic listing of all exceptions to § 213.109(d)(4), identified so that an appropriate person(s) designated as fully qualified under § 213.7 can field-verify each exception." 49 CFR 213.234(e). The final rule requires that "[e]ach exception must be located and field-verified no later than 48 hours after the automated inspection" and

"[a]ll field-verified exceptions are subject to all the requirements [of part 213]." 49 CFR 213.234(e). FRA notes that § 213.234(e) implicitly requires that persons fully qualified under § 213.7 and whose territories are subject to automated inspection under § 213.234 be provided with, or have ready access to a copy of the exception report, because without such information being disseminated, § 213.234(e) cannot be satisfied. In short, qualified persons under § 213.7 cannot logically field-verify exceptions found in the exception report without access to the exception report. Furthermore, it is in the best interest of the railroad to provide all track inspectors in the relevant territory with access to the exception report so that problem areas can be monitored and corrected.<sup>8</sup>

It was FRA's intent in the final rule that the railroad would voluntarily provide all persons fully qualified under § 213.7 with a copy of the exception report, so that both a supervisor under § 213.7(a) and a track inspector under § 213.7(b) would have access to the report. It is expected that the designated § 213.7 person(s) would then act responsibly upon the information subject to the requirements in part 213, once verified, so that appropriate remedial action would be taken in a timely manner.

This issue was raised in the joint comments to the NPRM of the American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), Brotherhood of Railroad Signalmen (BRS), and the United Transportation Union (UTU) (Labor) and addressed by FRA in the final rule. Labor representatives recommended that FRA mandate that a physical copy of the exception report be given to the person that the track owner has designated as being responsible for frequency inspections pursuant to § 213.233. In response, FRA declined to adopt Labor's recommendation, stating that it "refuses to interfere with a track owner's assignment process." 76 FR 18,081 (Apr. 1, 2011). FRA clarified that it "agrees that it would be a best practice for the track owner to ensure that the person responsible for performing the frequency inspections required by § 213.233 be provided a copy of the exception report, as all field-verified exceptions are subject to all of

FRA's Track Safety Standards." 76 FR 18,081 (Apr. 1, 2011).

FRA intended to convey with its response to Labor's comment that it would not direct the manner in which a track owner communicates and assigns corrective action to a noncompliant condition among their personnel. The final rule requires that an exception report be created, but does not explicitly require that the report be given to a particular person, as long as a fully-qualified person under § 213.7 properly field-verifies any exceptions pursuant to the rule. Persons designated under § 213.7 must receive or have access to the exception report in order to comply with the provisions of the final rule. In other words, a designated qualified inspector is required by the final rule to receive any noncompliant rail seat deterioration reports, whether the reports are made accessible to or are physically handed to the person designated under § 213.7, for field-verification and repairs purposes.

While FRA addressed Labor's comments in the preamble to the final rule, BMWED's Petition modified Labor's recommendation by asking that FRA require that individuals performing frequency inspections be provided with a copy of the automated inspection report or that a copy of the automated inspection report be made readily available. With this alteration, FRA believes that BMWED's request becomes less burdensome on the railroads. Railroads have an incentive to make such automated inspection reports available to track inspectors performing frequency-based inspections because this practice could ensure compliance with the regulations and could prevent worsening track conditions with costlier repairs or potential accidents. If inspectors have been provided with all of the relevant information, inspectors can better monitor problematic areas. Further, as this is a good business practice, most Class 1 railroads already make these reports available to the relevant inspectors. Given that the benefits of making reports available to all inspectors in the territory outweigh the slight cost of requiring a railroad to make the report available, which many do already, FRA is amending the final rule to explicitly require that railroads make such reports available to all relevant § 213.7 persons. The marginal increase in cost of making the report available compared with the added benefit of allowing inspectors to note defects earlier justify adding this requirement.

To clarify FRA's original intent and to promote good industry practice, FRA amends § 213.234(e) to require that

<sup>7</sup> For example, CSX contracts Holland Company LP's GRMS system to automatically inspect their concrete crossties, which can measure rail cant up to  $\frac{1}{2}$  of a degree (equivalent to  $\frac{1}{16}$  of an inch). Additionally, some regional railroads contact FRA to perform and receive the benefit of an automated inspection, which can calculate up to  $\frac{1}{2}$  of a degree. The rail profile systems offered by companies such as Plasser American, KLD Labs Inc., MERMEC Inc., ENSCO, Inc., Holland Company LP, Georgetown Rail Equipment Company report a rail cant accuracy of approximately  $\frac{1}{16}$  of an inch at the rail base/crosstie interface. FRA believes that all Class 1 railroads equip their geometry cars with these systems to measure undesirable rail cant.

<sup>8</sup> It is FRA's understanding that most Class 1 railroads (e.g., Union Pacific Railroad Company, Burlington Northern Santa Fe Railway) already provide access to automated inspection reports to 49 CFR 213.7 inspectors in a given territory.

exception reports be provided to or are made available to all persons qualified under § 213.7 and whose territories are subject to the requirements of § 213.234.

**BMWED Petition: Whether FRA Should Adjust the Exception Testing Threshold From 1/2 of an Inch to 3/8 of an Inch To Compensate for the 1/8 of an Inch Calibration Variance Allowed in § 213.234(d)(1)**

BMWED asserts that “§ 213.234(d)(1) has the affect [sic] of adding up to an additional 1/8 of an inch to the proposed maximum depth of 1/2 inch rail seat deterioration prescribed under § 213.109(d)(4).” BMWED Petition at 2. Thus, BMWED requests that FRA “compensate for the 1/8 inch calibration variance” by requiring “the automated exception report [to] record all ‘exceptions’ of 3/8 of an inch or greater, and that all such exceptions be subject to field verification under the provisions of § 213.234(e).” BMWED Petition at 2–3. BMWED contends that because of the 1/8 of an inch variance allowed by § 213.234(d)(1), exceptions may reach up to 5/8 of an inch before automated means would detect them. See BMWED Petition at 5.

FRA accepts BMWED’s recommendation that railroads must flag locations identified as 3/8 of an inch or greater on the automated exception report, but FRA declines to require field-verification of those areas noted on the report that are less than 1/2 of an inch. This additional notation will serve as an alert to the inspectors of potential problem areas to observe. Generally, railroads already note locations on automated reports in advance of the 1/2 of an inch violation level. For example, BNSF already flags locations at 3/8 of an inch with an alert. Adding an “alert” to an automated exception report would be a simple and low-cost modification. For example, Rail Profile Measurement System (RPMS) instrumentation on FRA geometry cars are set to flag an advisory exception when the angle exceeds four degrees of negative or outward rail cant. See 76 FR 18,081 (Apr. 1, 2011). However, requiring field-verification of locations flagged below 1/2 of an inch would be inappropriate, as it would impose too high of a cost without a corresponding benefit to safety.

FRA estimates that there would be approximately eight times as many locations found at 3/8 of an inch than those found at 1/2 of an inch. This increase would result in eight times as many field-verifications, and would consequently represent a significant increase in the economic burden. Measurement errors are usually equally distributed as positive and negative,

meaning that having a target of 3/8 of an inch would trigger exceptions that actually measure 1/4 of an inch as often as 1/2 of an inch. FRA notes that this would cause unneeded inspections for such false-positives at a high cost. However, there are potential cost savings, as the additional field-verification may result in the repair of an issue that would have been more costly to repair later or could have contributed to an accident. BMWED’s Petition recommends that FRA adopt something higher than a minimum safety standard. If FRA takes violations before the railroad is noncompliant, it would be contrary to FRA’s enforcement policy and would be interfering with the railroad’s managerial discretion.

While railroads astutely demand higher than minimum standards, FRA only requires the minimum for safety purposes. A location indicating rail seat deterioration of 3/8 of an inch would likely fall within a railroad’s maintenance standard to watch or to field-verify, but such field-verification will not be mandated by FRA. FRA agrees with BMWED that it would be a good practice and thus mandates that automated inspection equipment must note all locations indicating rail seat deterioration of 3/8 of an inch and greater on the report, yellow-flagging, or identifying “alerts” for, those areas identified between 3/8 and 1/2 of an inch, and red-flagging, or identifying “alarms” for, those areas identified at 1/2 of an inch and above. However, subjecting all areas 3/8 of an inch and above to field-verification would add significant cost burdens without a demonstrated safety benefit.

In light of the preceding discussion, a new paragraph is added to § 213.234(e) to require exception reports to note an “alert” for locations identified between 3/8 of an inch and 1/2 of an inch.

**AAR Petition: Effective Date of the Rule To Accommodate Railroad Training Cycles**

AAR asserts that “[r]ailroads traditionally concentrate training classes for their existing employees in the first half of the year, with training materials prepared during the second half of the previous year.” AAR Petition at 7. By postponing the applicability date of the formal training provision in § 213.234(h) to July 1, 2012, these requirements would comport with the railroads’ standard training schedule.

In consideration of these typical railroad training cycles, FRA will extend the applicability date of § 213.234 to July 1, 2012. Accordingly, FRA amends 49 CFR 213.234(a).

## Regulatory Impact and Notices

### A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

Prior to issuing the April 1, 2011 final rule, FRA prepared and placed in the docket a regulatory analysis addressing the economic impact of the final rule. The rule was evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11,034; February 26, 1979. For a more detailed discussion, see 76 FR 18,082. This response to the petitions for reconsideration of the final rule is likewise considered to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. This regulatory action generally clarifies or makes technical amendments to the requirements contained in the final rule or allows for greater flexibility in complying with the rule.

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

The Regulatory Flexibility Act of 1980 (the Act) (5 U.S.C. 601 *et seq.*) and Executive Order 13272 require a review of proposed and final rules to assess their impact on small entities. Prior to issuing the April 1, 2011 final rule, FRA prepared and placed in the docket a regulatory flexibility analysis which assessed the small entity impact by the rule. FRA certified in the final rule that it expects there will be no significant economic impact on a substantial number of small entities. For a more detailed discussion, see 76 FR 18,082. This response to the petitions for reconsideration of the final rule generally clarifies the requirements contained in the rule or allows for greater flexibility in complying with the rule. Consequently, FRA certifies that this regulatory action is not expected to have a significant economic impact on a substantial number of small entities.

### C. Paperwork Reduction Act

The information collection requirements in this final rule and FRA’s response to petitions for reconsideration are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The section that contains the one new and current information collection requirements is noted below, and the estimated burden time to fulfill each requirement is as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
213.234—Automated Inspection of Track Constructed with Concrete Crossties:				
—Exception Reports .....	18 Railroads .....	150 reports .....	8 hours .....	1,200
—Field Verified Exception Reports .....	18 Railroads .....	150 field verifications ...	2 hours .....	300
—Provision/Availability of Exception Reports to Designated Persons (New).	18 Railroads .....	150 electronic reports ..	12 minutes .....	30
—Records of Inspection Data and Exception Records.	18 Railroads .....	150 records .....	30 minutes .....	75
—Procedures for Maintaining Data Integrity Collected by Measurement System.	18 Railroads .....	18 procedures .....	4 hours .....	72
—Training of Employees in Handling Seat Deterioration.	18 Railroads .....	2,000 trained employees.	8 hours .....	16,000

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the information collection submission sent to OMB, please contact Mr. Robert Brogan at 202-493-6292 or Ms. Kimberly Toone at 202-493-6132 or via e-mail at the following addresses: *Robert.Brogan@dot.gov*; *Kimberly.Toone@dot.gov*.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20503, attn: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address: *oira\_submissions@omb.eop.gov*, mail to: *victor.angelo@fra.dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in response to the petitions of reconsideration of 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 action in accordance with its “Procedures for Considering Environmental Impacts”

(FRA’s Procedures) (64 FR 28,545, 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 28,547, 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 regulation is not a major Federal action significantly affecting the quality of the human environment.

*E. Federalism Implications*

Executive Order 13132, “Federalism” (64 FR 43,255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government

officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

As stated in the preamble to the final rule, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Sec. 20106. *See* 76 FR 18,083. This response to the petitions for reconsideration of the final rule generally clarifies the requirements contained in the rule or allows for greater flexibility in complying with the rule.

*F. Unfunded Mandates Reform Act of 1995*

Pursuant to Sec. 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).” Sec. 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 \$140,800,000] 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 response to the petitions for reconsideration of the

final rule will not result in the expenditure, in the aggregate, of \$140,800,000 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 28,355 (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 response to petitions for reconsideration of the final rule in accordance with Executive Order 13211, and has determined that this regulatory action is not a "significant energy action" within the meaning of the Executive Order.

#### H. Administrative Procedure Act

Under the Administrative Procedure Act, an independent Notice of Proposed Rulemaking (NPRM) is not required when an agency, for good cause, finds "that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(3)(B). FRA believes that it is making only technical changes, clarifications, and minor amendments in response to petitions for reconsideration of FRA's final rule. For this reason, and because FRA believes that it has provided sufficient opportunities for notice and comment through the NPRM, the final rule, and the petitions for reconsideration which were all contained in the public docket, publishing an independent NPRM is unnecessary.

#### I. 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 Final Rule

In consideration of the foregoing, FRA amends part 213 of chapter II, subtitle B of title 49, 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; Sec. 403, Div. A, Public Law 110–432, 122 Stat. 4885; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 213.234 is amended by revising the first sentence of paragraph (a), and revising paragraphs (d), (e), and (g), to read as follows:

#### § 213.234 Automated inspection of track constructed with concrete crossties.

(a) *General.* Except for track described in paragraph (c) of this section, the provisions in this section are applicable on and after July 1, 2012. \* \* \*

(d) *Performance standard for automated inspection measurement system.* The automated inspection measurement system must be capable of indicating and processing rail seat deterioration requirements that specify the following:

(1) An accuracy, to within 1/8 of an inch;

(2) A distance-based sampling interval, which shall not exceed five feet; and

(3) Calibration procedures and parameters assigned to the system, which assure that indicated and recorded values accurately represent rail seat deterioration.

(e) *Exception reports to be produced by system; duty to field-verify exceptions.* The automated inspection measurement system shall produce an exception report containing a systematic listing of all exceptions to § 213.109(d)(4), identified so that an appropriate person(s) designated as fully qualified under § 213.7 can field-verify each exception.

(1) Exception reports must be provided to or be made available to all persons designated as fully qualified under § 213.7 and whose territories are subject to the requirements of § 213.234.

(2) Each exception must be located and field-verified no later than 48 hours after the automated inspection.

(3) All field-verified exceptions are subject to all the requirements of this part.

(4) Exception reports must note areas identified between 3/8 of an inch and 1/2 of an inch as an "alert."

\* \* \* \* \*

(g) *Procedures for integrity of data.* The track owner shall institute the necessary procedures for maintaining the integrity of the data collected by the measurement system. At a minimum, the track owner shall do the following:

(1) Maintain and make available to FRA documented calibration procedures of the measurement system that, at a minimum, specify an instrument verification procedure that ensures correlation between measurements made on the ground and those recorded by the instrumentation; and

(2) Maintain each instrument used for determining compliance with this section such that it accurately provides an indication of the depth of rail seat deterioration in accordance with paragraph (d)(1) of this section.

\* \* \* \* \*

Issued in Washington, DC, on September 6, 2011.

**Joseph C. Szabo,**  
Administrator.

[FR Doc. 2011–23133 Filed 9–8–11; 8:45 am]

BILLING CODE 4910–06–P

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

#### 49 CFR Part 571

[Docket No. NHTSA–2011–0139]

RIN 2127–AJ44

#### Federal Motor Vehicle Safety Standards, Child Restraint Systems

**AGENCY:** National Highway Traffic Safety Administration (NHTSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** This final rule, the first of two under the designation RIN 2127–AJ44, amends a provision in Federal Motor Vehicle Safety Standard No. 213, "Child restraint systems," that permits NHTSA to allow manufacturers of child restraint systems (CRSs) manufactured before August 1, 2010, to choose to have NHTSA test the CRSs with either the Hybrid II 6-year old child (H2–6C) dummy or the Hybrid III 6-year-old child (HIII–6C) dummy. This final rule amends the provision to permit manufacturers of currently-manufactured CRSs the choice of