foreign carrier's primary markets, and the ability and incentives of the foreign carrier to discriminate against unaffiliated U.S. carriers.

In addition, the Notice proposes a specified level of foreign carrier ownership in a U.S. carrier at which the proposed entry standard would apply. The Commission asks whether it is desirable to consider an applicant to be ''affiliated'' with a foreign carrier for purposes of the new rules when the foreign carrier acquires an ownership interest of a certain minimum level or a controlling interest at any level. The Notice requests comment on whether the minimum level of ownership should be set at greater than ten percent, twenty-five percent, or some other level of the capital stock of the applicant.

The Commission also seeks comment on whether the affiliation standard it adopts should replace the current affiliation standard it uses for purposes of classifying an affiliated U.S. carrier as dominant or nondominant on a particular U.S. international route, based on the market power of its foreign carrier affiliate on the foreign end of the route. In addition, the Commission requests comment on whether certain safeguards applied to dominant carriers should be modified to improve their effectiveness. It additionally asks for comment on other proposed nondiscrimination safeguards, including safeguards that would apply to all U.S. international carriers. The Commission also clarifies the definition of a facilities-based carrier and requests comment on its proposal to codify that definition in this proceeding.

Finally, the Notice asks whether the goals of the proceeding would be served by incorporating the proposed effective market access test as an element of the Section 310(b)(4) public interest analysis applicable to foreign entities seeking to acquire an indirect ownership interest of more than 25 percent in U.S. radio licensees. Thus, the Notice asks whether the Commission's evaluation of the public interest should consider whether the primary markets of the foreign entity offer effective market access to U.S. licensees to provide the same type of radio-based services as requested in the United States. The Notice also seeks comment on other public interest factors the Commission should consider.

The Notice seeks public comment on whether these proposals are administratively feasible and whether these approaches or other alternatives will best serve the Commission's goals.

List of Subjects in 47 CFR Part 63

Communications common carriers.

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 95–5127 Filed 3–1–95; 8:45 am]

BILLING CODE 6712–01–M

DEPARTMENT OF ENERGY

48 CFR Parts 933 and 970

Regulation Identifier Number 1991–AB20 Acquisition Regulation; Department of Energy Management and Operating Contracts

AGENCY: Department of Energy.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Energy (DOE) today issues a Notice of Proposed Rulemaking to amend the Department of Energy Acquisition Regulation (DEAR) to modify requirements for management and operating contractor purchasing systems. DEAR subpart 970.71 will be revised to identify certain purchasing system objectives and standards; eliminate the application of the ''Federal norm''; and place greater reliance on commercial practices.

DATES: Written comments on the proposed rulemaking must be received on or before May 1, 1995.

ADDRESSES: Comments on the proposed rulemaking should be addressed to the U.S. Department of Energy, Director, Procurement and Property Review and Evaluation Division (HR–525.1), Attention: James J. Cavanagh, 1000 Independence Avenue SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: James J. Cavanagh, Director, Procurement and Property Review and Evaluation Division (HR–525.1), U.S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585; telephone 202–586–8257.

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I. Background

The Government-wide approach to evaluating contractor purchasing systems, as set forth in Federal Acquisition Regulation (FAR) Subpart 44.301, is to ''evaluate the efficiency and effectiveness with which the contractor spends Government funds and complies with the Government policy when subcontracting.'' Most Federal contracts require purchases to be made in accordance with the applicable laws and the terms and conditions of the contract, with minimal references back to acquisition regulations. The policy for the extent of reviews of these purchasing systems is set forth at FAR 44.303.

Unlike other contractors, however, a DOE management and operating contractor historically has been expected to conform its purchasing practices to the ''Federal norm.'' As provided at the DEAR 970.7103, the Federal norm is an ''evolving concept'', which attempts to balance commercial purchasing practices with Federal procurement principles embodied in law and regulation. The DEAR identifies a number of tenets of Federal policy and practices to which DOE's management and operating contractors must adhere. As a result of the Federal norm, and iterations of related reviews, audits, and protest decisions, management and operating contractor purchasing has, over the years, become increasingly Federal-like, replacing efficient and effective commercial business practices.

In accordance with the objectives of the National Performance Review and the Secretary of Energy's Contract Reform Team Report, the Department intends to revise its expectations for management and operating contractor purchasing systems by eliminating the concept of the ''Federal norm.'' In lieu of the detailed tenets contained in DEAR subpart 970.71, which have resulted in the inefficient layering of non-commercial systems and practices, the Department has identified certain purchasing system objectives and standards which it believes are common to superior purchasing activities, whether they be commercial or public.

In addition, as the Department eliminates the concept of the ''Federal norm,'' the Department intends that any disagreements with management and operating contractor purchasing decision(s) be a matter to be settled between the contractor and potential subcontractor(s). Such disagreements are typically handled in this manner in the commercial sector. The Department expects that its management and operating contractors shall handle any

such disagreements in an open, fair, and reasonable manner, and endorses the use of ombudsmen and alternative disputes resolution procedures for that purpose. Accordingly, by this action, the Department proposes to delete DEAR 970.7107 which provides guidelines for the consideration of subcontractor level protests. This is consistent with the General Accounting Office proposed rule published at 60 FR 5871, January 31, 1995. It is the intention of the Department to incorporate the changes made by this proposed rule into existing management and operating contracts as soon as practicable after the effective date of a final rule.

II. Section-by-Section Analysis

1. Section 933.170, Subcontract level protests, is removed.

2. The revision to paragraph (a) of the clause, Contractor Purchasing System, at 970.5204–22 provides guidance for a management and operating contract acquisition system consistent with proposed revisions to section 970.7103.

3. Section 970.7101, General, is revised by removing paragraphs (c) and (d).

4. The revision to section 970.7102(a) removes the parenthetical which contains references which will no longer exist when sections 970.7104 and 970.7108 are removed in their entirety. Section 970.7102(b)(3) is revised to provide that review of individual purchasing actions shall be pursuant to FAR Subpart 44.2. Section 970.7102(b)(4) is revised to provide that periodic appraisals shall be in accordance with established policies in section 970.7103.

5. The revisions to section 970.7103 eliminate the concept of the ''Federal norm,'' and establish contractor purchasing systems objectives, expectations, and standards.

6. Section 970.7104, Conditions of purchasing by management and operating contractors, is removed. The DOE believes it is not necessary to retain this section since many of the requirements comply with provisions of statutes and are already reflected in contract clauses. These requirements will, therefore, continue to be applicable as contractual requirements. Some of the requirements, however, are not specifically prescribed in other parts of the DEAR. The Department will review such requirements prior to finalization of this proposed rule and may redesignate appropriate paragraphs, in the final rule, to other parts of the DEAR, if necessary. If such requirements are identified, the Department will publish a **Federal Register** notice, prior to issuing a final rule, listing the paragraphs being considered for redesignation.

7. Section 970.7106, Procedures for handling mistakes relating to management and operating contractor purchases, is removed.

8. Section 970.7107, Protest of management and operating contractor procurements, is removed.

III. Public Comments

DOE invites interested persons to participate by submitting data, views, or arguments with respect to the DEAR amendments set forth in this rule. Three copies of written comments should be submitted to the address indicated in the ''ADDRESSES'' section of this rule. All comments received will be available for public inspection during normal work hours. All written comments received by the date indicated in the ''DATES'' section of this notice will be carefully assessed and fully considered prior to the effective date of these amendments as a final rule. Any information considered to be confidential must be so identified and submitted in writing, one copy only. DOE reserves the right to determine the confidential status of the information and to treat it according to its determination in accordance with 10 CFR 1004.11.

IV. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' (58 FR 51735, October 4, 1993).

Accordingly, this action was not subject to review under the Executive Order by the Office of Information and Regulatory Affairs.

B. Review Under the National Environmental Policy Act

Pursuant to the Council on Environmental Quality Regulations (40 CFR 1500–1508), the Department has established guidelines for its compliance with the provisions of the National Environmental Policy Act (NEPA) of 1969 (42 U.S.C. 4321 *et seq.*). Pursuant to appendix A of subpart D of 10 CFR part 1021, National Environmental Policy Act Implementing Procedures (Categorical Exclusion A6), the Department of Energy has determined that this proposed rule is categorically excluded from the need to prepare an environmental impact statement or environmental assessment.

C. Review Under the Paperwork Reduction Act

To the extent that new information collection or recordkeeping requirements are imposed by this rulemaking, they are provided for under Office of Management and Budget paperwork clearance package No. 1910–0300. No new information collection is proposed by this rule.

D. Review Under the Regulatory Flexibility Act

This proposed rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. This proposed rule will have no impact on interest rates, tax policies or liabilities, the cost of goods or services, or other direct economic factors. It will also not have any indirect economic consequences, such as changed construction rates. DOE certifies that this rule will not have a significant economic impact on a substantial number of small entities and, therefore, no regulatory flexibility analysis has been prepared.

E. Review Under Executive Order 12612

Executive Order 12612 entitled ''Federalism,'' 52 FR 41685 (October 30, 1987), requires that regulations, rules, legislation, and any other policy actions be reviewed for any substantial direct effects on States, on the relationship between the Federal Government and the States, or in the distribution of power and responsibilities among various levels of Government. If there are sufficient substantial direct effects, then the Executive Order requires preparation of a federalism assessment to be used in all decisions involved in promulgating and implementing a policy action. The Department of Energy has determined that this proposed rule will not have a substantial direct effect on the institutional interests or traditional functions of States.

F. Review Under Executive Order 12778

Section 2 of Executive Order 12778 instructs each agency to adhere to certain requirements in promulgating new regulations and reviewing existing regulations. These requirements, set forth in sections 2(a) and (b)(2), include eliminating drafting errors and needless ambiguity, drafting the regulations to minimize litigation, providing clear and certain legal standards for affected legal conduct, and promoting simplification and burden reduction. Agencies are also instructed to make every reasonable

effort to ensure that the regulation: specifies clearly any preemptive effect, effect on existing Federal law or regulation, and retroactive effect; describes any administrative proceedings to be available prior to judicial review and any provisions for the exhaustion of such administrative proceedings; and defines key terms. DOE certifies that this rule meets the requirements of sections 2(a) and 2(b) of Executive Order 12778.

G. Public Hearing Determination

DOE has concluded that this proposed rule does not involve any significant issues of law or fact. Therefore, consistent with 5 U.S.C. 553, DOE has not scheduled a public hearing.

List of Subjects in 48 CFR Parts 933 and 970

Government procurement.

Issued in Washington, D.C. on February 24, 1995.

Richard H. Hopf,

Deputy Assistant Secretary for Procurement and Assistance Management.

For the reasons set forth in the preamble, chapter 9 of title 48 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 933—PROTESTS, DISPUTES, AND APPEALS

1. The authority citation for part 933 continues to read as follows:

Authority: 42 U.S.C. 7254; 40 U.S.C. 486(c)

933.170 [Removed]

2. Section 933.170 is removed.

PART 970—DOE MANAGEMENT AND OPERATING CONTRACTS

3. The authority citation for part 970 continues to read as follows:

Authority: Sec. 161 of the Atomic Energy Act of 1954 (42 U.S.C. 2201), sec. 644 of the Department of Energy Organization Act, Pub. L. 95–91 (42 U.S.C. 7254), sec. 201 of the Federal Civilian Employee and Contractor Travel Expenses Act of 1985 (41 U.S.C. 420) and sec. 1534 of the Department of Defense Authorization Act, 1986, Pub. L. 99–145 (42 U.S.C. 7256a), as amended.

4. At 970.5204–22, revise paragraph (a) of the clause to read as follows:

970.5204–22 Contractor purchasing system.

(a) The contractor shall develop, implement, and maintain formal policies, practices and procedures to be used in the award of subcontracts consistent with DEAR 970.71. The contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to DOE in accordance with DEAR 970.7102. The contractor's purchasing performance will be evaluated against agreed-upon criteria in accordance with the performance criteria and measures clause(s) set forth elsewhere in this contract. DOE reserves the right at any time to require that the contractor submit for approval any or all purchases under this contract. The Contractor shall not purchase any item or service the purchase of which is expressly prohibited by the written direction of DOE and shall use such special and directed sources as may be expressly required by the DOE contracting officer.

* * * * *

970.7101 [Amended]

5. Section 970.7101 is amended by removing paragraphs (c) and (d).

970.7102 [Amended]

6. Section 970.7102 is amended at: paragraph (a) to remove the parenthetical at the end of the paragraph; paragraph (b)(3) by removing the words ''to assure that management and operating contractors implement DOE policies and requirements as defined in this subpart, in accordance with the contractor's accepted system and methods'' and adding in its place the words ''pursuant to FAR 44.2''; and paragraph (b)(4) by removing ''Subpart 944.3 and 970.7108'' and adding in its place ''970.7103.''

970.7103 [Revised]

7. Section 970.7103 is revised to read as follows: 970.7103 Contractor purchasing system.

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulation. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure:

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either:

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition lead-time and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures.

(6) Use of self-assessment and benchmarking techniques to support continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards; and

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid.

970.7104 through 970.7104–47, 970.7106, 970.7107 [Removed]

8. Sections 970.7104 through 970.7104–47 970.7106, and 970.7107 are removed.

[FR Doc. 95–5173 Filed 3–1–95; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[FRA Docket No. RSGC–6; Notice No. 1]

RIN 2130–AA92

Selection and Installation of Grade Crossing Warning Systems; Notice of Proposed Rulemaking

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

ACTION: Notice of Proposed Rulemaking (NPRM).

SUMMARY: FRA proposes to prohibit railroads from unilaterally selecting and installing highway-rail grade crossing warning systems at public highway-rail crossings. FRA further proposes to require that railroads furnish state highway authorities with information necessary for state grade crossing project planning and prioritization purposes.

DATES: (1) Written comments must be received no later than May 16, 1995. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

(2) A public hearing will be held at 9:30 a.m. on May 9, 1995. Any person who wishes to speak at the hearing should notify the FRA Docket Clerk at least five working days before to the hearing, by telephone or by mail.

ADDRESSES: (1) Written comments should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590. Persons desiring to be notified that their written comments have been received by FRA should submit a stamped, self-addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for comments, during regular business hours in Room 8201 of the Nassif Building at the above address.

(2) A public hearing will be held in room 2230 of the Nassif Building, 400 Seventh Street, SW., Washington, DC Persons desiring to speak at the hearing should notify the Docket Clerk by telephone (202–366–0628) or by writing to the Docket Clerk at the address above.

FOR FURTHER INFORMATION CONTACT: Bruce F. George, Chief, Highway-Rail Crossing and Trespasser Programs Division, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202–366–0533), or Mark Tessler, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202–366–0628).

SUPPLEMENTARY INFORMATION: This NPRM clarifies the respective responsibilities of railroads and state and local governments regarding the selection and installation of highway-rail grade crossing warning systems. This proposal is issued to eliminate confusion and uncertainty as to the role of railroads in the selection and installation process. FRA expects the proposed rules to ''substantially subsume'' the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such will preempt state laws covering the same subject matter.

Background

Highway-rail grade crossings present inherent risks to users, including motorists, pedestrians, railroad passengers and railroad employees. Of the more than 168,000 public highway-rail grade crossings in the nation, only 28,100 are fully equipped with automatic lights, gates and bells; fewer than 1,000 of the 108,000 private crossings are so equipped. The vast majority of public crossings (and private crossings) are equipped with only passive warning devices such as crossbucks. Engineering improvements at individual crossings, education of the public, and enforcement of highway traffic laws have reduced accidents and casualties at highway-rail crossings. Since 1978, accidents and fatalities have decreased dramatically despite increased highway usage, stable rail traffic levels, and increased train speeds. However, the present loss of life, injuries and property damage are still unacceptable. Highway-rail collisions are the number one cause of death in the entire railroad industry, far surpassing employee or passenger fatalities. Additionally, the proportion of severe accidents (i.e., those likely to result in fatalities) is rising. Nearly 4,900 collisions occurred between highway users and on-track railroad equipment in 1993. More than 600 people were killed and over 1,800 were seriously injured in these collisions.

In 1973 Congress first established the Rail-Highway Crossing Program (section 130 program) to improve highway-rail crossing safety. Continuous federal funding since then has made more than $3 billion available in improvement funds, representing more than 90% of project costs under this program. Because highway-rail grade crossing safety is primarily achieved through highway traffic control, DOT'S Federal Highway Administration (FHWA) has oversight responsibility for the program. See 49 CFR 1.48.

State Safety Prioritization Process

FHWA regulations provide uniform federal standards for all highway traffic control systems, including those at highway-rail crossings. The federal government, rather than dictating the specific type of warning system to be installed at each of the nation's 168,000 public grade crossings, has established the outline of the required planning and selection process. FHWA has adopted regulations governing the process by which states are to establish priorities for implementing highway safety improvement projects, including projects for elimination of hazards of highway-rail grade crossings.

FHWA's regulations detail the uniform planning process involved in selecting the crossings to be improved (23 CFR Part 924.) The planning component of a state's highway safety improvement program is required to incorporate a process for collecting and maintaining a record of accident, traffic, and highway data including characteristics of both highway and rail traffic. The planning component must also contain a process for analyzing data to identify hazardous highway locations based on accident experience or accident potential as well as containing a process for conducting engineering studies of hazardous locations. Of vital importance in ensuring that limited funds are spent in a manner that will achieve the greatest safety return, a state's safety improvement program is required to have a process for establishing priorities for implementing highway safety improvement projects. That process must consider the potential reduction in the number and/or severity of accidents; the cost of the projects and resources available; the relative hazard of public highway-rail crossings based on a hazard index formula; on-site inspections of crossings; potential danger to large numbers of people at crossings used on a regular basis by passenger trains, buses, pedestrians, bicyclists or by trains and motor vehicles carrying hazardous materials; and other criteria as appropriate in each state. 23 CFR 924.9.

As a review of the planning and prioritization components shows, the process outlined above could only be carried out by an entity capable of gathering and analyzing all the needed data. A railroad has only data available

to it which is railroad specific: rail traffic volume, authorized speed, number of tracks, type of train control system, and projected changes in these areas. Even accident data available to a railroad are of uncertain benefit since they are limited to the experiences of that one railroad rather than compared and collated with similar data from other railroads in the state or even other railroads whose tracks are crossed by the same highway.

The federal government has recognized that individual entities such as railroads do not have the requisite analytical tools and information gathering ability to make the appropriate decisions regarding the most appropriate focusing of limited safety improvement funds. State agencies have the necessary analytical tools and information. It is therefore appropriate that they have the responsibility for the actual selection of specific crossings and the determination of the type of warning devices to be installed.

The Secretary, through FHWA, has also issued standards governing the form and placement of all grade crossing warning systems irrespective of whether federal funds are used in their installation. 23 CFR 646.214. FHWA's Manual on Uniform Traffic Control Devices (MUTCD), incorporated by reference into the Code of Federal Regulations (23 CFR 655.601), establishes ''traffic control device standards for all streets and highways open to public travel regardless of type or class or the governmental agency having jurisdiction.'' MUTCD 1A–2. The MUTCD establishes uniform standards relating to design and placement of traffic control signs, pavement markings and automatic warning devices. These standards apply nationwide—even when the improvements have not been paid for with federal funds.

DOT Safety Initiatives

This proposed rule is but one component of a continuing DOT campaign to improve grade crossing safety. DOT's Grade Crossing Action Plan includes several initiatives that will aid in improving safety at grade crossings. This plan details six major Departmental initiatives encompassing 55 separate actions addressing highway-rail grade crossing safety and trespass prevention. These initiatives include: enhanced enforcement of traffic laws at crossings; enhanced rail corridor crossing reviews and improvements; expanded public education and Operation Lifesaver activities; increased safety at private crossings; improved data and research efforts; and prevention of rail trespassing.

A cornerstone of this grade crossing safety campaign is the closure and consolidation of little used and redundant crossings. It is generally acknowledged that there are too many highway-rail grade crossings in this country—there are not sufficient resources from any source or sources to provide full warning systems or grade separations at all of the nation's crossings. Too many crossings are equipped only with crossbuck warning signs. Elimination of poorly designed, less travelled, and redundant crossings will clearly enhance the safety of the travelling public. FRA has thus been advocating consolidation and closure for a number of years. FRA's role of advocate reflects the fact that state and local governments have the authority to close and consolidate crossings just as they have the authority to create crossings in connection with public road construction.

This rulemaking is one in a series of rules addressing the responsibilities of the various parties in this critical rail safety area. On September 27, 1994, FRA issued maintenance, inspection, and testing rules (59 FR 50086, September 30, 1994). Those rules for the first time impose specific responsibilities on railroads to maintain, inspect and test active highway-rail grade crossing warning systems. Additionally, FRA imposed on railroads the responsibility to take specified actions when grade crossing warning systems malfunction. The rules impose costs on railroads in addition to the more than $130 million they spend on crossing maintenance every year. The allocation of responsibility to railroads regarding grade crossing maintenance, inspection, and testing and response to malfunctions reflects reality—railroads are the appropriate party to perform these activities. They have the technical expertise and forces to perform the work. Safety is enhanced by such allocation of responsibility.

Similarly, responsibilities have been allocated between railroads and state and local agencies by the Congress in the Swift Rail Development Act of 1994 (Pub. L. 103–440). Section 302 of that act directs the Secretary of Transportation to issue regulations requiring that a locomotive horn be sounded while each train is approaching and entering each public grade crossing unless certain supplementary safety measures are provided by the ''appropriate traffic control authority or law enforcement authority responsible for safety at the highway-rail grade crossing.'' Congress has implicitly recognized that railroads have responsibility in areas over which they have control, such as sounding of horns, while state and local traffic control authorities have responsibility pertaining to those areas within their expertise and under their control, namely, highway traffic control.

The NPRM

This NPRM would also define responsibilities in the grade crossing area. It defines the responsibility of railroads to provide information and assistance in those areas in which their expertise is paramount—railroad operations. Railroads would be required to provide appropriate state agencies information related to their operations and to participate with state or local diagnostic teams to help the state or local governmental body determine which crossings' warning systems should be upgraded and to what extent.

This allocation of responsibility to railroads is based on the recognition that state and local governmental bodies are the entities with the expertise and information to look at the entire picture (of which railroad traffic and plans are but one component): whether crossings should be consolidated or closed; funding availability; funding constraints; local desires; area residential, commercial and industrial development plans; and highway traffic engineering demands and constraints. Consistent with that expertise and information base, state and local governmental bodies are the appropriate bodies to determine which, how, and when highway rail grade crossing warning systems should be upgraded. Because of the very high cost to install an automatic traffic control warning system at a grade crossing—more than $100,000 at a double track crossing—it is imperative that the limited safety funds, from whatever sources, available for crossing improvements be spent in a rational, uniform, and coordinated manner. The present system whereby states, pursuant to FHWA regulations, investigate, plan, and prioritize crossing improvements provides the needed uniformity and coordination to ensure that the crossings most in need of safety improvements are those that receive them. Grade crossing safety is best enhanced by such a program that provides for a systematic upgrading of traffic control devices at crossings that are truly needed pursuant to a prioritized schedule established by state authorities under uniform federal criteria. Such a program allows state highway officials the ability to respond to the concerns of the public in making grade crossing improvement decisions,

and allows available resources to be allocated to the grade crossing improvement projects yielding the highest safety returns. Simply stated, this will save more lives than if an equal amount of money were spent on upgrading crossings that statistically are not as dangerous.

In other, less frequent situations, a state agency, local governmental body, or state or local legislative body may, outside of the Federal-aid program, fund the upgrading of a warning system at a specific crossing or order a railroad to install or upgrade a warning system at its own expense. These proposed rules are not meant to prevent those governmental authorities from being involved in such activities. Although the selection decision in these situations may not be based on the selection and installation criteria established by FHWA and adopted by the state department of transportation or highway department, presumably the governmental body's selection decision is based on sound public policy and overall safety considerations derived from information available to the state.

Some state laws, generally predating the advent of the Federal Rail-Highway Crossing Program, impose a tort law duty upon railroads to maintain safe crossings. In some cases this duty has been interpreted to include a duty to select and install warning systems at hazardous crossings. While this system may have been appropriate in the past, when there was no systematic and uniform improvement program in existence, today the result is one of misallocation of scarce resources. This ad hoc system of grade crossing improvements, driven by tort law and individual jury awards, runs counter to the goal of a uniform national program based on planning and prioritization. Those ofttimes arbitrary local requirements can result in the installation of grade crossing warning systems, not where research and data indicates they will do the most good, but where a judge or jury determined, after the fact, that such a system should have been installed.

Jury verdicts based on common law standards are necessarily ad hoc, case-by-case judgements that are retrospective in nature. The duties now imposed upon railroads ad hoc in this manner are inconsistent with the command of Congress that ''[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable.'' (49 U.S.C. 20106) These verdicts do not provide an appropriate mechanism for determining whether the crossing is needed in the first place, and if needed, what warning devices are appropriate. Neither do these verdicts provide an appropriate method for determining the order in which crossings would be equipped or upgraded to yield the greatest safety benefits. Moreover, these judgments divert resources from saving lives through investments in grade crossing warning devices to compensating those killed or injured in accidents or their survivors. This is sound public policy only when the railroad has breached a duty to them that it is appropriate for the railroad to have.

In this proposed rule, FRA is defining in a nationally uniform manner the safety duties railroads have in connection with the selection and installation of warning devices at grade crossings. Tort judgments in general certainly exert a salutary deterrent influence on behaviors that rational actors can avoid, but here that deterrent is distorted and diminished by the combination of (i) the lack of adequate funds, public or private, to improve all grade crossings to the desired level of safety, (ii) the focus of tort cases on whether a railroad has satisfied its common law duties at the grade crossing in question without regard to its behavior concerning grade crossings in general, and (iii) large judgments for accidents at grade crossings of low relative hazard. As things now stand, a railroad that is responsibly investing its available funds for the improvement of grade crossings in the order and in the manner specified by the transportation authorities in the states it serves may be subjected to large tort judgments resulting from the relatively random occurrence of accidents at grade crossings of low hazard relative to those improved. The proposed regulations are meant to ensure that the present system is not compromised by state requirements that railroads select and install grade crossing improvements outside of the coordinated and prioritized federal/state system already established.

The Supreme Court, in a recent decision, *CSX Transportation, Inc.* v. *Easterwood,* (113 S. Ct. 1732, (1993)) held that legal duties imposed on railroads by a State's common law of negligence fall within the scope of the preemption provision of 49 U.S.C. 20106, (formerly § 205 of the Federal Railroad Safety Act (45 U.S.C. § 434)). However, the Court held that preemption of such state laws will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

FRA expects the proposed rules will ''substantially subsume'' the subject matter of railroads' selection and installation of highway rail grade crossing warning systems and as such will preempt state laws covering the same subject matter, regardless of whether Federal funding of improvements is involved at a particular crossing.

In *Easterwood*, the Court held that ''for projects in which federal funds participate in the installation of warning devices, the Secretary has determined the devices to be installed and the means by which railroads are to participate in their selection. The Secretary's regulations therefore cover the subject matter of state law which, like the tort law on which respondent relies, seeks to impose an independent duty on a railroad to identify and/or repair dangerous crossings.'' 123 L. Ed. 2d at 401.

The Department believes that the distinction in safety duties drawn in *Easterwood* depending upon whether or not improvements to a particular grade crossing were federally funded results in poor public policy that is likely to misallocate scarce funds for grade crossing improvements because railroads are given a powerful financial incentive either (i) to invest funds in improving crossings on some basis other than the relative hazard rankings established by state highway authorities or (ii), especially in the case of small railroads, to diminish investment in grade crossing improvements because they cannot tell where an adverse verdict may strike next and their net financial results may be better served by using the funds to pay judgments they are unable to avoid. Railroad and highway safety alike are best served by focusing the economic and legal incentives of everyone involved in the process to invest grade crossing improvement funds where the most lives will be saved and the most injuries prevented. The proposed rule is intended to achieve that result.

If, as the Department has recommended in its Highway-Rail Grade Crossing Action Plan, state transportation authorities also begin evaluating the hazards of grade crossings on entire rail corridors, the proposed rule would accommodate improvements focused in that manner. That is simply another way for state transportation authorities to systematically evaluate the relative safety of highway rail grade crossings and to decide which improvements will yield the best safety results.

Moreover, highway rail grade crossing warning systems are devices to control motor vehicle traffic on highways. Government bodies responsible for

highways and motor vehicle safety are the appropriate decision makers to decide which devices should be installed on public highways and the order in which intersections should be improved.

Railroads should be responsible for providing information to help state highway authorities make those decisions and for helping to implement those decisions after they are made. In fulfilling the requirements of FHWA's Highway Safety Improvement Program (49 CFR Part 924), state agencies have a need for railroad information that might have an impact on the type of improvement appropriate to a particular crossing or that might affect the relative priority to be given in upgrading one crossing versus another. Such data include present and projected rail traffic (both hazardous and non-hazardous materials), track configuration, signalling, and authorized train speed as well as other conditions affecting the crossing. Railroads have historically provided assistance to state agencies planning for grade crossing improvements. The proposal would codify railroads' present practice of providing information and assistance needed by those state agencies.

The proposal will not affect railroads' present obligations to maintain grade crossing warning systems. Indeed, as noted above, FRA's recently issued amendments to Grade Crossing Signal System Safety regulations codify specific maintenance, inspection, and testing requirements for grade crossing warning systems.

While this proposed rule prevents a railroad from unilaterally selecting and installing warning systems, it does not prevent a state agency from ordering a railroad to pay for all or part of grade crossing warning system on a non-Federal aid project. While FRA is philosophically opposed to the concept of a railroad being forced to pay for an upgrade to what is essentially a highway traffic control device for which it receives no net benefit (see 23 CFR 210(b)), FRA is not prepared at this time to issue regulations preempting the many state laws in this area.

Section-by-Section Analysis

§ 234.301 Railroad cooperation.

Paragraph (a) of this section requires that railroads cooperate with the appropriate state agency in furnishing information to enable the state to develop plans and project priorities for the elimination of hazards of highway-rail grade crossings. Railroad plans to increase traffic on a line or to upgrade track or signalling to enable increases in train speed, are important factors which states must take into consideration in determining their prioritization and plans. Similarly, state planners need information regarding railroad plans or projections regarding decreasing traffic volume. Railroads have generally provided such information on a voluntary and routine basis. This provision codifies the responsibility of a railroad to provide current and projected information which is uniquely available to the railroad. Without railroad information a state is unable to make the appropriate decisions to determine which crossings should be upgraded and with which type of warning systems. Many railroads already provide information such as current train counts, speeds, type and number of tracks and type of installed warning system to FRA or the state for inclusion in the DOT/Association of American Railroads National Highway-Rail Grade Crossing Inventory (Inventory) on file with FRA. Duplicate submissions to a state are not necessary under this rule inasmuch as Inventory data is routinely available to States.

Presently, information submissions by States and railroads to the Inventory are made on a voluntary basis. Comments are specifically invited regarding the advisability of making Inventory information submission mandatory.

This section also provides that a railroad need not submit proprietary data of a confidential nature to a state unless that information will be protected from disclosure. Such provision will ensure that railroads will not be penalized commercially by such regulatory compliance.

Paragraph (b) of this section requires that railroads provide appropriate engineering and other technical assistance to the state agency in designing and installing the warning system determined by the state to be appropriate to the particular crossing. In many instances a railroad is the only party with the requisite technical expertise to assist the state in developing the engineering design for the crossing. This section recognizes that fact and therefore establishes a duty to assist in this area.

§ 234.303 Selection and installation of warning systems at public crossings.

Paragraph (a) of this section prohibits a railroad from unilaterally selecting or determining the type of grade crossing warning system to be installed at a public highway-rail grade crossing. Such a decision is more appropriately made by the state or local government. In some situations today, a railroad voluntarily contributes to the cost of installing a crossing warning system. In some cases, a railroad has voluntarily contributed all or part of a locality's required local share in order to enable a particular crossing to be improved with federal funds. The proposed rule is not meant to alter this practice of voluntary railroad involvement. Similarly, this rule is not meant to affect those situations in which a railroad improves a crossing at its own expense in order to secure the closure of another crossing. These railroad practices, unlike funding of projects outside of the state planning process, are supportive and consistent with the prioritization and planning process. Therefore, nothing in the proposal prevents a railroad from voluntarily contributing to the installation costs of warning devices installed pursuant to the state planning process.

Paragraph (b) addresses installation of the warning system after the specific grade crossing and type of warning system has been selected. This paragraph provides that a railroad shall only install or upgrade a grade crossing warning system at a public highway-rail grade crossing pursuant to an order by, or agreement with, a state agency or other public body having authority to issue such order or enter into such agreements. The proposal provides that whenever such state agency or other public body determines that a particular grade crossing warning system should be installed at a particular highway-rail grade crossing, the railroad shall comply with any legally sufficient order, or in the case of federally funded grade crossing projects, enter into and perform an agreement for the installation or upgrade of that grade crossing warning system with the state agency or other public body having jurisdiction. The rule does not require a railroad to provide the non-federal share of costs involved in federally-funded grade crossing improvement projects.

This section recognizes that since the warning system is, in many instances, tied into the railroad's track circuits and the railroad will maintain the system, the railroad is generally the most appropriate party to physically install the system. Under the present Federal-aid system, railroads are reimbursed for procurement and installation costs of the warning system. This paragraph recognizes the benefits of this process and only prohibits railroads from unilaterally installing grade crossing warning systems without state or local approval.

This section is not meant to prohibit a railroad's voluntarily contribution to the costs of installation of a highway-rail grade crossing warning system.

Railroads have voluntarily contributed all or a portion of the non-Federal matching share required under Federal law for construction of grade crossing warning systems. FRA does not intend to prevent or discourage such contributions.

While FRA believes that railroads have many powerful incentives to continue their longstanding policy of voluntarily providing matching funds for federally funded grade crossing projects, comment is sought concerning whether this proposal will affect the level of railroad participation in such projects.

Paragraph (c) addresses railroad projects in which warning system improvements are only incidental to the railroad project. Some railroad projects, such as new track, upgraded track, or the installation of signal systems, may involve upgrading warning system circuits or the replacement of obsolete equipment with newer, more technologically advanced equipment. This rule is not intended to prohibit railroad's present practice of incidental upgrades.

Regulatory Impact

E.O. 12866 and DOT Regulatory Policies and Procedures

This proposed rule has been evaluated in accordance with existing policies and procedures, and is considered to be significant under DOT policies and procedures (44 FR 11034, February 26, 1979). This regulatory document was subject to review under E.O. 12866. FRA has prepared and placed in the rulemaking docket a regulatory evaluation addressing the economic impact of this rule. A copy of the regulatory evaluation may be inspected and copied in Room 8201, 400 Seventh Street, S.W., Washington, D.C., 20590.

In its regulatory analysis FRA posited that the costs and benefits of this proposed rule are not measurable at present, but that the benefits will equal or exceed the costs, because the function of the rule is to virtually eliminate grade crossing selections and installations which do not require an analysis which considers costs and benefits.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities. In reviewing the economic impact of the proposed rule, FRA has concluded that it will have a minimal economic impact on small entities. There is no direct or indirect economic impact on small units of government, businesses, or other organizations. Therefore, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act.

Paperwork Reduction Act

The proposed rule contains information collection requirements. FRA is submitting these information collection requirements to the Office of Management and Budget for approval under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). The proposed section that contains information collection requirements is § 234.301. Persons desiring to comment on this topic should submit their views in writing to FRA (Ms. Gloria Swanson, RRS–21, Federal Railroad Administration, 400 Seventh Street, S.W., Washington, D.C. 20590) and to the Office of Management and Budget (Desk Officer, Regulatory Policy Branch (OMB No. 2130–AA92), Office and Management and Budget, New Executive Office Building, 726 Jackson Place, N.W., Washington, D.C. 20530. Copies of any such comments should also be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, S.W., Washington, D.C. 20590.

Environmental Impact

FRA has evaluated these proposed regulations in accordance with its procedure for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act and related directives. This notice meets the criteria that establish this as a non-major action for environmental purposes.

Federalism Implications

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rule has sufficient federalism implications to warrant the preparation of a Federalism Assessment. A copy of the Federalism Assessment has been placed in the public docket and is available for inspection.

List of Subjects in 49 CFR Part 234

Railroad safety, Highway-rail grade crossings.

The Proposed Rule

In consideration of the foregoing, FRA proposes to amend Part 234, Title 49, Code of Federal Regulations as follows:

PART 234—[AMENDED]

1. The authority citation for Part 234 continues to read as follows:

Authority: 49 U.S.C. 20103, 20106, 20107, 20111, 20112, 20134, 21301, 21304, and 21311 (formerly Secs. 202, 208, and 209 of the Federal Railroad Safety Act of 1970, as amended (45 U.S.C. 431, 434, 437, and 438, as amended)); 49 U.S.C. 20901 and 20102 (formerly the Accident Reports Act (45 U.S.C. 38 and 42); and 49 CFR 1.49 (f), (g), and (m).

2. Add a new ''Subpart E—Selection and Installation of Grade Crossing Warning Systems,'' to read as follows:

Subpart E—Selection and Installation of Grade Crossing Warning Systems

Sec.
234.301 Railroad cooperation.
234.303 Selection and installation of grade crossing warning systems.

§ 234.301 Railroad Cooperation.

(a) Railroads shall cooperate with the appropriate state agency in furnishing information to enable the state agency to develop plans and project priorities for the elimination of hazards of highway-rail grade crossings including, but not limited to grade crossing elimination, reconstruction of existing grade separations, and grade crossing improvements. At the request of the appropriate state agency, a railroad shall provide information not already provided to the FRA or the state for inclusion in the DOT/Association of American Railroads National Highway-Rail Grade Crossing Inventory regarding railroad operations involving specific highway-rail grade crossings, including, but not limited to: present and projected rail freight traffic (including transportation of hazardous materials); present and projected passenger traffic; present and projected track configuration and signalling; present and projected maximum authorized train speed; and other conditions which may affect the planning for, and prioritization of, crossing improvements. Nothing herein requires that a railroad provide to a state proprietary data of a confidential nature unless such information shall be protected from disclosure.

(b) Railroads shall provide appropriate engineering and other technical assistance to the state agency in designing and installing the warning system determined by the state to be appropriate to the particular crossing.

§ 234.303 Selection and installation of grade crossing warning systems.

(a) A railroad shall not unilaterally select or determine the type of grade crossing warning system to be installed at a public highway-rail grade crossing.

(b) Subject to paragraph (c), a railroad shall only install or upgrade a grade crossing warning system at a public highway-rail grade crossing pursuant to an order by, or agreement with, a state agency or other public body having authority to issue such order or enter into such agreements. Whenever such state agency or other public body determines that a particular grade crossing warning system should be installed at a particular highway-rail grade crossing, the railroad shall comply with any legally sufficient order, or in the case of federally funded grade crossing projects, enter into and perform an agreement for the installation or upgrade of that grade crossing warning system with the state agency or other public body having jurisdiction. Nothing herein shall require a railroad to provide the non-federal share of costs involved in federally-funded grade crossing improvement projects.

(c) A railroad is permitted to upgrade, at its own expense, components of a public highway-rail grade crossing warning system when such upgrade is incidental to a railroad improvement project relating to track, structures or train control systems.

3. Amend Appendix A by inserting in numerical order new entries to read as follows:

APPENDIX A TO PART 234.—SCHEDULE OF CIVIL PENALTIES

Section	Violation	Willful violation
* * *	*	*
234.301 Railroad co-operation	$5,000	$7,500

APPENDIX A TO PART 234.—SCHEDULE OF CIVIL PENALTIES—Continued

Section	Violation	Willful violation
§ 234.303 Selection and installation of grade crossing warning systems	5,000	7,500
* * *	*	*

Issued in Washington, D.C. on February 24, 1995.

Jolene M. Molitoris,

Administrator.

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