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DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1926

[Docket ID: OSHA-2015-0012]

RIN: 1218-AD07

Cranes and Derricks in Construction: Railroad Roadway Work

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rulemaking.

SUMMARY: The Occupational Safety and Health Administration published its final rule for cranes and derricks in construction on August 9, 2010. The final rule set out new requirements to enhance worker safety around cranes and derricks. On October 7, 2010, the Association of American Railroads ("AAR") filed a petition for review in the United States Court of Appeals for the District of Columbia challenging certain requirements affecting railroad roadway work. Subsequently OSHA and AAR reached a settlement agreement under which OSHA agreed to undertake rulemaking to propose expanding several exemptions and to issue clarifications affecting work on or along railroad tracks. These exemptions and clarifications, which would not apply to bridge work, would exempt entirely one type of railroad equipment from OSHA's crane standard; would exempt railroad equipment operators from the certification requirements in the standard; and would include several provisions relating to safety devices, work-area controls, out-of-level work, dragging loads sideways, equipment modifications, and manufacturer requirements. OSHA believes this proposal, if promulgated, would maintain safety and health protections for workers while reducing employers' compliance burdens.

DATES: Submit comments to this proposed rule, public hearing requests, and other information no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Each submission must bear a postmark or provide other evidence of the date of submission.

ADDRESSES: Submit comments, hearing requests, and other materials, identified with this docket, Docket No. OSHA-2015-0012, using any of the following methods:

Electronically: Submit comments and attachments, as well as hearing requests and other information, electronically via the Federal e-Rulemaking Portal at *http://www.regulations.gov*. Follow the online instructions for making electronic submissions.

Facsimile: Commenters may fax submissions that are no longer than 10 pages in length, including any attachments, to the OSHA Docket Office at (202) 693-1648. These submissions must include Docket No. OSHA-2015-0012 [RIN: 1218-AD07]. OSHA does not require hard copies of the faxed comments. Commenters must submit documents longer than 10 pages (e.g. supplemental attachments, comments, research studies, or journal articles) to the OSHA Docket Office, Technical Data Center, U.S. Department of Labor, Room N-2625, 200 Constitution Avenue, NW, Washington, DC 20210. These attachments must clearly identify the commenter's name, and the date, subject (Cranes and Derricks in Construction: Railroad Roadway Work), and docket number (i.e., OSHA-2015-0012) of the submission so the Agency can attach them to the appropriate submission. *See also* Regular mail, express delivery, hand delivery, and messenger (courier service) below.

Regular mail, express mail, hand (courier) delivery, or messenger service. Submit a copy of comments and any additional material (e.g., studies, journal articles) to the OSHA Docket Office, Docket No. OSHA-2015-0012, Technical Data Center, U.S. Department of

Labor, Room N-3653, 200 Constitution Avenue, NW, Washington, DC 20210; telephone: (202) 693-2350 (TDY number: (877) 889-5627). Note that security procedures may result in significant delays in receiving comments and other written materials by regular mail. Contact the OSHA Docket Office for information about security procedures concerning delivery of materials by express mail, hand delivery, or messenger (courier) service. The hours of operation for the OSHA Docket Office are 10:00 a.m. to 3:00 p.m. ET.

Information Collection Requirements. OSHA welcomes comments on the information collection requirements contained in this rule on the same basis as for any other aspect of the rule. Interested parties may also submit comments about the information collection requirements directly to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for DOL-OSHA (RIN 1218-AD07), Office of Management and Budget, Room 10235, 725 17th Street, NW, Washington, DC 20503, Fax: 202-395-6881, email: OIRA_submission@omb.eop.gov. *See* Paperwork Reduction Act section of this preamble for particular areas of interest.

Instructions: All submissions must include the Agency's name (OSHA), the title of the rulemaking (Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work), and Docket No. OSHA-2015-0012. OSHA places submissions, comments, and other materials, including any provided personal information, in the public record of this docket without revision. Submitted materials will be available online at *http://www.regulations.gov*. Therefore, OSHA cautions commenters about submitting materials that contain personal information (either about themselves or others) such as Social Security numbers, birth dates, and medical data.

OSHA requests comments on all issues related to this proposed rule, including whether these revisions will have any economic, paperwork, or other regulatory impacts on the regulated community.

Docket: To read or download submissions or other materials in the public record for this docket (including material referenced in the preamble), go to *http://www.regulations.gov* or contact the OSHA Docket Office by telephone or the address listed above. While the Agency lists all documents for this docket in the *http://www.regulations.gov* index, some information (e.g. copyrighted material) is not publicly available through the website for reading or downloading. All submissions, including copyrighted material, are available for inspection at the OSHA Docket Office at the above address. Contact the OSHA Docket Office for assistance locating submissions.

FOR FURTHER INFORMATION CONTACT:

Press inquiries: Mr. Frank Meilinger, OSHA Office of Communications, telephone: (202) 693-1999; email: *Meilinger.Francis2@dol.gov*.

General and Technical inquiries: Mr. Garvin Branch, Directorate of Construction, telephone: (202) 693-2020; email: *Branch.Garvin@dol.gov*.

Copies of this Federal Register document and news releases: Electronic copies of these documents are available at OSHA's Web page at *http://www.osha.gov*.

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

The Occupational Safety and Health Administration (OSHA) and the Association of American Railroads negotiated a settlement to resolve litigation following OSHA's issuance of its Cranes and Derricks in Construction standard in 2010. This rulemaking satisfies part of OSHA's obligations under that settlement. OSHA proposes to exempt entirely certain railroad "roadway maintenance machines" from the requirements of that standard, and to create limited exemptions for other equipment used by railroads for track-related construction activities other than bridge construction. New section § 1926.1442 would clarify that operators of the relevant equipment need not comply with the operator certification requirements in OSHA's standard. OSHA believes that these limited exemptions will maintain safety protections for workers.

OSHA has estimated the cost and cost savings for this proposed rule. At a 3 percent discount rate over 10 years, there are net annual cost savings of $15.7 million per year, and at a discount rate of 7 percent there are net annual cost savings of $17.0 million per year. When the Department uses a perpetual time horizon to allow for cost comparisons under EO 13771 (82 FR 9339, February 3, 2017), the annualized cost savings of the proposed rule is $17.0 million with 7 percent discounting. This proposed rule is accordingly expected to be an EO 13771 deregulatory action. Details on OSHA's cost/cost savings estimates for this proposed rule can be found in the rule's economic analysis.

II. Background

OSHA published its final rule for cranes and derricks in construction on August 9, 2010 (29 CFR 1926 Subpart CC, 75 FR 47906). The crane standard resulted from years of work by a negotiated rulemaking committee that drew from industry best practices to draft regulatory requirements to prevent crane tipovers, electrocution from crane contact with power lines, workers being struck by the equipment or loads, crane collapse because of improper assembly, and other hazards associated with the operation of cranes in construction work. The crane standard added many new provisions, such as requirements to ensure safe ground conditions underneath the equipment, mandatory safety devices, distance requirements from power lines, inspection procedures, workplace area controls to prevent workers from entering hazardous areas, and new operator certification requirements.

On October 7, 2010, the Association of American Railroads and a number of individual railroads (hereafter collective referred to as "AAR") filed a petition challenging the rule. That petition remains before the United States Court of Appeals for the District of Columbia Circuit (Case No. 10-1386), but after AAR provided more background and additional information about existing practices in the railroad industry, the parties reached a settlement in which OSHA agreed to issue an interpretation of its standard as it relates to ground conditions for railroads[1] and to propose the revisions to the regulatory text of the crane standard included in this proposal (see Docket ID: OSHA-2015-0012-0002). The settlement followed extensive discussions with AAR and officials from the Federal Railroad Administration and the principal labor organization representing affected employees, the Brotherhood of Maintenance of Way Employees. OSHA also reviewed the settlement with the Brotherhood of Railroad Signalmen. In deciding to enter into the settlement, OSHA acknowledged the lack of a record of significant injuries or fatalities

[1] See Nov. 14, 2014 letter to AAR Counsel Jill Hyman Kaplan, Esq., available at *www.osha.gov*.

resulting from the use of cranes or derricks for railroad track construction and maintenance and the consensus between labor and management groups that the proposed exemptions and alternatives would continue practices generally accepted as safe in the railroad industry. The settlement was narrowly tailored to address the aspects of the railroad industry that differ significantly from the more typical construction work covered by the standard.

The proposed revisions include two groups of exemptions: one for certain equipment with low-hanging attachments used to perform track work, and a second for certain requirements applicable to all railroad machines used in track construction and covered by OSHA's standard. The settlement contains draft regulatory language, which forms the basis of this proposal, but OSHA did not commit to a specific final regulatory action as part of the settlement and seeks public comment on this proposal. AAR has agreed to move to dismiss its petition within seven days of OSHA's publication of a final rule addressing these issues.

III. Summary and Explanation of the Proposed Standard

OSHA has long classified work performed to place or repair significant sections of railroad track, ties, and roadbed as construction activity subject to OSHA's construction standards in 29 CFR Part 1926.[2] The railroad industry relies on a number of different pieces of equipment to deliver and position the ballast rock that supports the railroad ties, the ties that support the rail, and the rail itself. Most of this equipment falls within the scope of OSHA's Cranes and Derricks Standard in subpart CC because it is "power operated equipment" and includes some form of hoisting device that allows the equipment to be used to "hoist and lower and horizontally move a suspended load" (see 29 CFR 1926.1400(a)). Railroads also use the

[2] See, e.g., *Sec'y of Labor v. Consolidated Rail Corp.* (May 28, 1981), 9 OSHC Cas. (BNA) 1892, 1981 OSHD (CCH) P 25421, 1981 WL 18909; see also Memorandum for Regional Administrators, Construction vs. Maintenance, From James W. Stanley (August 11, 1994), available at *www.osha.gov*.

equipment to install railway signal posts and to keep the tracks and the areas immediately alongside the track free from debris and other impediments to trains.

The railroad industry classifies this equipment collectively as "roadway maintenance machines," which are defined in Federal Railway Administration (FRA) regulations as devices "powered by any means of energy other than hand power … being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway,[3] signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary" (49 CFR 214.7). AAR provided examples of common forms of this equipment, with photos, in a memorandum to OSHA (see Docket ID: OSHA-2015-0012-0006).

A. Exemption for Flash-Butt Welding Trucks and Equipment with Similar Attachments

Flash-butt welding trucks are roadway maintenance machines with low-hanging workhead attachments. These machines are equipped with an attachment designed to suspend and move a welding workhead low and close to the rails in order to weld precisely two sections of rail together. Other machines that would fall within this proposed exemption are similarly designed to suspend and move specific operation workheads low to the rails. This class of machines does not have any other hoisting device. AAR provided examples of these machines (see Docket ID: OSHA-2015-0012-0008).

Because these machines are not capable of raising and suspending the workhead more than a few feet above the ground or roadbed, and the weight and structure of the workhead does not appear to present any danger of equipment tipover at any point during the workhead's full

[3] The "roadway" referenced in this definition does not refer to a road over which cars or trucks would travel; within the railroad industry it refers to the area encompassing the tracks, track support, and nearby items that could foul the track (see, e.g., the definition of "roadway worker" in 49 CFR 214.7).

range of motion, OSHA preliminarily accepts AAR's assertion that equipment in this class does not present the types of safety hazards that OSHA intended to address in its crane standard. Therefore, given that it does not appear to compromise worker safety, OSHA proposes to revise § 1926.1400(c) to expressly exempt flash-butt welding trucks and "other railroad roadway work machines equipped only with hoisting devices used to suspend and move their workhead assemblies low and close to the rails." OSHA requests comment on this proposed exemption.

B. New Section 29 CFR 1926.1442 to Address Railroad Equipment

Existing section 1926.1442, which addresses severability, is currently the last section of the crane standard. OSHA proposes to re-designate the severability provision as § 1926.1443 to enable the addition of a new § 1926.1442 dedicated to the railroad roadway maintenance machines addressed in this proposed rulemaking.

OSHA's crane standard, 1926 Subpart CC, is organized so that generalized requirements affecting cranes and derricks in construction come first in the subpart. The bulk of the standard is composed of these generalized requirements, such as those governing ground conditions; various assembly/disassembly requirements; safety devices and operational aids; crane/derrick operations; work area control; keeping clear of the load; and operator qualification and certification. Additional sections focus on specific types of equipment, such as tower cranes and overhead and gantry cranes, and small equipment with a rated hoisting/lifting capacity of 2,000 pounds or less. There are also railroad-specific exceptions and requirements in various sections.[4]

Rather than insert various railroad roadway machine exceptions throughout Subpart CC, the proposal consolidates them into a single section (§ 1926.1442) for the convenience of

[4] Existing railroad provisions in the crane standard include exemptions from ground condition and inspection requirements as set forth in §§ 1926.1400(h), 1926.1402(f), and 1926.1412(d)(1)(x) and (d)(1)(xiii); restrictions on locomotive crane movements in § 1926.1417(z); and an exception from the signal transmission requirements in 1420(b)(2).

affected parties and to maintain the organizational integrity of Subpart CC. As proposed, aside from the § 1926.1400(c)(18) exclusion for flash-butt welding trucks and similar equipment, § 1926.1442 would contain all the new proposed provisions addressed through the settlement, all of which are provisions with which OSHA preliminarily agrees.

C. Scope of New § 1926.1442

OSHA's proposed limited exemptions for railroads in § 1926.1442 would apply to work on the construction of railroad tracks and supporting structures (the railroad ties supporting the tracks, the ballast and road bed that support the track and ties, and the poles and other structures on which railroad signal devices and signage are mounted). AAR explained that these construction activities are typically performed using equipment created specifically for railway work or specially modified for that purpose (Docket ID: OSHA-2015-0012-0007). AAR also explained that this specialized equipment is not typically used for construction of buildings, retaining walls, fences, or platforms controlled by railroads, or for other more traditional types of construction work related to railroads. Rather, those traditional construction activities are often contracted out to construction firms and typically involve standard construction equipment. OSHA is not proposing any new or special treatment for equipment used to conduct these traditional construction activities that are not related to track work. OSHA is not aware of any need for additional exceptions, and OSHA is not aware of any significant differences in the hazards of using railroad equipment for these purposes than for similar projects in other industries.

Proposed § 1926.1442 accomplishes the limitation in two ways. First, this new §1926.1442(a) states that it only applies to equipment meeting the 49 CFR 214.7 definition of "Roadway Maintenance Machine," which includes a functional component focused on track

work (machines "being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems"). Thus, a crane owned by a railroad would not meet the definition of a roadway maintenance machine when engaged in constructing a building or railway platform, but the same crane could later meet the definition if used to install railway track.

Second, proposed § 1926.1442(a) explicitly excludes roadway maintenance machines engaged in bridge work from the limited exemptions in that section. The use of cranes and derricks on bridges exposes workers to the same hazards as in other construction work, and Subpart CC addresses those hazards without exceptions. Proposed § 1926.1442(a) makes clear that employers engaged in bridge work would still be required to comply with all of the applicable Subpart CC requirements for cranes or derricks used during that work even when using roadway maintenance machines. Worker safety remains paramount. Bridge construction work encompasses work on bridges supporting track over features such as gullies, highways, rivers, and walkways, along with work on bridges built over the track to support things such as structures, automobile roadways, and pedestrian and livestock walkways.

Subpart CC would continue to apply to all railroad construction activities, including construction using roadway maintenance machines, unless one of the proposed exceptions found at § 1926.1442(b)[5] applies (or one of the existing exceptions in other sections applies).

For the remainder of this document, references to the proposed exceptions for roadway maintenance machines or exempt equipment are intended to refer only to roadway maintenance machines not used for bridge work.

[5] Proposed § 1926.1442(b) refers to the seven subparagraphs that lay out proposed exceptions. In the version of the draft regulatory text attached to the settlement, paragraph (b) incorrectly referred to six subparagraphs. With AAR's agreement, OSHA has referenced the correct number (seven) in the proposed rule.

D. § 1926.1442(b)(1). This proposed section would provide exemptions in accordance with Section 4(b)(1) of the OSH Act, which exempts from the Act the working conditions of certain Federal and non-Federal employees with respect to which other Federal agencies exercise statutory authority to prescribe and enforce occupational safety and health standards.

Following OSHA's promulgation of the crane standard in Subpart CC, the FRA promulgated its own training requirements for operators of roadway maintenance machines equipped with cranes. This FRA rule included a clear statement in the preamble that after the effective date of its new rule, "FRA regulations would apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427" (79 FR 66460, 66475 (Nov. 7, 2014)). This FRA action has the effect of prohibiting OSHA, under section 4(b)(1) of the OSH Act, from enforcing its operator certification requirements with respect to operators of roadway maintenance machines (including roadway maintenance machines used for bridge construction).

The Agency is therefore including in §1926.1442(b)(1) an explicit exemption from proposed § 1926.1427 for these operators, to provide clear notice to employers in the railroad industry who might not otherwise be aware of the effect of the FRA's rule on OSHA's standard. Although OSHA's additional operator training requirements in § 1926.1430 were not explicitly mentioned in the FRA's rule, OSHA has included the §1926.1430 operator training requirements in the proposed § 1926.1442(b)(1) exemption for roadway maintenance machine operators based on the FRA's statement of intent to exercise jurisdiction over all aspects of operator training.

OSHA will also consider an exemption for roadway maintenance machine operators from operator assessment requirements that it is separately considering. OSHA initiated a rulemaking

on that issue following the settlement discussions and the FRA final rule; the rulemaking would revise § 1926.1427 to require employers to evaluate their operators to ensure competency to operate specific cranes (see RIN 1218-AC96 in DOL's Fall 2017 Semiannual Regulatory Agenda). Although the FRA's final rule predated that rulemaking, OSHA preliminarily reads FRA's statement about replacing "OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427" as intended to preempt all OSHA requirements that would apply to the training, certification, and assessment of operators of roadway maintenance machines. Thus, if OSHA does revise § 1926.1427 to add new operator assessment requirements, OSHA could take action through this rulemaking or the other operator assessment rulemaking to clarify that the new requirement would not apply to roadway maintenance machine operators. OSHA seeks comment on this issue, and more generally on whether OSHA should include additional preamble discussion or changes to regulatory text to address issues arising from section 4(b)(1) of the OSH Act.

E. § 1926.1442(b)(2). This provision would provide an exemption from existing Subpart CC requirements for using rail stops and rail clamps on all Subpart CC-covered equipment. Those requirements address hazards posed by locomotive cranes, which can swing loads at varying radii around the machine and force the machine to tip or move. AAR has explained, however, that rail stops are not typically used on railroad tracks and that many roadway maintenance machines are designed to move continuously over the tracks, so stops would interfere with the normal function of the equipment. Clamps are used occasionally, but manufacturers typically require their use when the clamps are needed for safety purposes. OSHA has not located any record of injuries that have resulted from the absence of stops or clamps on railroad equipment used during track construction and accordingly, because it appears

that worker safety would not be compromised, proposes a partial exemption from the rail clamp or stop requirement.

The proposed § 1926.1442(b)(2)(i) and (ii) would exempt employers using roadway maintenance machines while performing OSHA regulated construction activities from the requirement for rail stops while performing construction activities and would mandate the use of rail clamps only when required by the manufacturer, in accordance with existing railroad practices. If a machine's manufacturer requires using rail clamps, then the employer would have two options: (1) ensure that the clamps are used; or (2) operate without clamps only if a registered professional engineer (RPE) determines that the clamps are not necessary. OSHA includes the proposed RPE requirement to address concerns raised by AAR that, because railroad equipment often represents only a small percentage of a crane manufacturer's market and is often specially modified for railroad use, the manufacturers are often not responsive to requests for approval of modifications or exceptions from general requirements developed for non-railroad use. An option for RPE approval thus could provide an alternative measure of safety while accommodating that aspect of railroad roadway operations. RPE approval is required, or allowed as an alternative, in a number of provisions of OSHA's crane standard (see, e.g., §§ 1926.1404(j) and (m)(1)(i); 1417(b)(3); 1434(a)(2)(i); 1435(f)(3)(ii)).

OSHA also requests comment on whether the language of the proposed exception is clear and welcomes suggestions for clarifying it. For example, would it be clearer if OSHA replaced the "except/unless" construct with a more lengthy provision like the following: "(i) The requirement for rail clamps in § 1926.1415(a)(6) does not apply when clamps are not required by the manufacturer. When a manufacturer requires rail clamps, the employer is not required to use them if a registered professional engineer determines that rail clamps are unnecessary"?

F. § 1926.1442(b)(2)(iii). This section would clarify that the requirements of § 1926.1424(a)(2) do not apply to certain employers. These requirements cover work-area controls to prevent employee injuries from the movement of the crane, such as the rotation of the crane structure as it moves a load laterally. Most of the methods of work area control involve cordoning off a work area to ensure that employees do not enter hazardous areas during crane operations. In the railroad industry, however, equipment is often continuously moving down a railroad track, so physically fixed controls would be difficult to implement. The FRA also requires employers to file a written safety program that addresses work-area safety for FRA approval (see 49 CFR 214.307(b)). Thus, although existing § 1926.1424(a)(2) allows employers to use signage in combination with special training where it is infeasible to erect a cordon, it is not clear how that alternative would comport with existing FRA requirements or what safety benefit it would add. The FRA already has a mechanism by which it can ensure that employers put in place protections to prevent the types of hazards that OSHA intended to prevent through its work-area control requirements. OSHA believes that, with respect to employers required to submit on-track safety programs with the FRA, the FRA's program preempts the work-area-control requirements in OSHA's crane standard based on the preemption provisions of 4(b)(1) of the OSH Act. Thus, proposed § 1926.1442(b)(2)(iii) states that § 1926.l424(a)(2) does not apply to any railroad employers that are required to implement an FRA-approved on-track safety program. OSHA notes that although the proposed regulatory text only explicitly addresses such employers when they actually implement such a plan, OSHA expects that it would be preempted from enforcing its 1926.l424(a)(2) requirements even if the employer failed to file or implement a program with the FRA because the FRA has exercised its jurisdiction with respect to those

employers. OSHA is considering adding language in the final rule to clarify that such employers would also be exempt.

OSHA's is also proposing to exempt from its § l926.1424(a)(2) requirements employers who are not required to implement an FRA-approved on-track safety program but who are nevertheless implementing such a protective program, because the FRA program would provide safety protections for employees. Employers who are not required to implement a FRA-approved program and are not implementing one would be required to comply with OSHA's § 19126.l424(a)(2) requirements.

G. § 1926.1442(b)(3). This proposed section would exempt roadway maintenance machines from existing restrictions on out-of-level work. These restrictions, including the requirements to comply with manufacturer out-of-level procedures in § 1926.1402(b), the inspection requirements in § 1926.1412(d)(l)(xi), and the requirement that machines have out-of-level indicators in § 1926.1415(a)(l), address the risk of equipment tipover and loss of control of the load.

OSHA has preliminarily determined that the prohibition on out-of-level work is not practical for railroad roadway track work. In addition to thousands of miles of straight and level track, much curved track is banked and many other miles of track are inclined, as are the structures or road bed supporting the track. In 2010, OSHA responded to the unique railroad conditions with an exception to the out-of-level work prohibition for railroad equipment, but limited the exception to include only equipment traveling on the tracks (see § 1926.1402(f)). Following the rulemaking, AAR explained that many roadway maintenance machines, like a swing loader crane, often travel next to the track (as opposed to on it) but frequently must work out-of-level because the ballast and road bed are sloped. These cranes typically lift loads, which

are well below the crane capacity, only a few feet off the ground and thus do not present the same type of risks as more traditional uses of cranes in construction. Both the relevant labor organizations and FRA representatives acknowledged that out-of-level operation is longstanding and necessary practice in the industry. AAR explained that industry practices already account for load-chart adjustments and other standard practices to address out-of-level work, and OSHA is proposing alternative measures to ensure that the work can be performed safely.

OSHA accordingly proposes in § 1926.1442(b)(3)(i) and (ii) to allow out-of-level operation when two conditions are met. First, either the manufacturer must approve or modify the equipment to allow out-of-level work, or a registered professional engineer qualified with respect to the particular equipment must approve the out-of-level work for the equipment. Second, the employer must abide by the limitations and other requirements specified by the manufacturer or the engineer, or comply with a load chart modified by a qualified person for the approved out-of-level work. While OSHA expects the qualified person generally to follow the requirements established by the manufacturer or registered professional engineer, given the many unique areas of railroad work, in some cases a manufacturer or engineer might not have accounted for a particular activity that would require an additional adjustment to the load chart. OSHA included the option of allowing a qualified person to make additional adjustments to the load chart so that the employer would not need to stop work and locate an RPE every time an additional adjustment to the load chart is necessary. OSHA requests comment on whether OSHA should provide additional guidance about the types of adjustments that a qualified person may make and the extent to which the manufacturer or RPE must spell out its approval for out-of-level work.

OSHA has drafted this exemption to include a parenthetical naming the particular sections as follows: "The restrictions on out-of-level work (including the requirements in §§ 1926.1402(b), 1926.1412(d)(l)(xi), and 1926.1415(a)(l)), and the requirements for crane-level indicators and inspections of those indicators do not apply when [lists circumstances]." But OSHA is considering relocating all or part of the parenthetical to follow "those indicators" given that § 1926.1415(a)(1) addresses requirements for crane-level indicators and inspections of those indicators, but does not otherwise address restrictions on out-of-level work. Under this option, the sentence would read "The restrictions on out-of-level work, and the requirements for crane-level indicators and inspections of those indicators (including the requirements in §§ 1926.1402(b), 1926.1412(d)(l)(xi), and 1926.1415(a)(l)), would not apply when . . . ." OSHA requests comment on which approach would be clearer.

In addition to the exemption described above, this proposed section includes a "grandfathering" provision to exempt roadway maintenance machines from all out-of-level prohibitions if the machines were purchased before OSHA's crane standard took effect on November 8, 2010. AAR explained that older machines represent the vast majority of equipment currently used in the railroad industry and has expressed concern about the cost of obtaining manufacturer or RPE approval for out-of-level work for that number of pieces of equipment. Based on the lack of reported safety incidents involving these machines, OSHA has preliminarily determined to include an exemption for them. As a result of this exemption for older equipment, railroad employers would be able to focus their resources on obtaining manufacturer approval as part of the process of purchasing new equipment and focusing RPE expertise on equipment that has not already been as time-tested.

OSHA is also proposing a "grandfathering" provision for the requirements in §1926.1415(a)(1) that all covered equipment have a built-in level or a level available on the equipment and that employers inspect such level indicator to confirm that it is functioning properly (§1926. 1412(d)(1)(xiv)). AAR informed OSHA that most roadway maintenance machines were manufactured prior to OSHA's promulgation of the crane standard in 2010, and are not currently equipped with level indicators. AAR objected to the cost of retrofitting them with such leveling equipment if such equipment would be allowed to operate out-of-level because they were grandfathered out of the out-of-level requirements. OSHA included the requirement for a level to ensure that the equipment operator would be able to comply with the restrictions on out-of-level work, so OSHA preliminarily agrees that there would be little purpose to requiring a level on the equipment if the out-of-level restrictions do not apply. Therefore, in addition to the exception for out-of-level work, OSHA is also proposing a "grandfather" provision that would relieve railroad employers of the requirement to include or inspect crane-level indicators on roadway maintenance machines purchased before the effective date of OSHA's construction crane standard (November 8, 2010). OSHA expects that equipment purchased after that date will already be equipped with a level to comply with OSHA's crane standard.

OSHA requests comments on its proposed grandfathering exemptions from out-of-level prohibitions and associated level indicator and indicator inspection requirements. It also requests comments on whether used equipment originally purchased before November 8, 2010, but resold at a later date should be entitled to these grandfathering exceptions. OSHA also requests comment on whether the "grandfathering" provisions should be conditioned on other factors, such as a certain number of years of safe use or evidence of regular maintenance on the machine.

The Agency further requests any data on these subjects that could better inform its decision making.

H. § 1926.1442(b)(4) *Dragging a load sideways.* The proposed § 1926.1442(b)(4) exemption provides relief from the prohibition in §1926.1417(q) against using cranes or derricks to drag a load sideways. AAR informed OSHA that an existing practice during many track construction projects for roadway maintenance machines is to drag rail or ties sideways. AAR explained that the practice of dragging long pieces of rail sideways off of the ties or to position them on top of the ties is routine and critical to the process, does not have a ready alternative, does not involve lifts more than a few feet off of the ground, and the movement of the load is predictable because the procedure is repeated over and over with the same materials. OSHA has not located any record of injuries resulting from the longstanding practice of using railroad equipment during track construction and accordingly proposes an exemption from the new prohibition on dragging a load sideways.

I. § 1926.1442(b)(5) *Boom-hoist limiting device.* This proposed section would clarify existing § 1926.1416(d)(1), which requires equipment manufactured after December 16, 1969, to have a boom-hoist limiting device. Traditionally, boom hoists wind wire rope around a revolving drum. They continue to wind until stopped by the operator, a limiting device, or by damaging the machine. The process is somewhat analogous to a fisherman winding line on a rod and reel: if too much winding occurs, the lure is pulled into the rod tip; more winding bends and breaks the rod or detaches the lure. The limiting device prevents similar results on boom hoist equipped cranes and derricks by automatically stopping the winding. On hydraulic cylinder/piston equipped booms, the §1926.1416(d)(1) requirement for a limiting device is redundant because the stroke or piston travel is an inherent limit in each cylinder/piston. OSHA

proposes §1926.1442(b)(5) to clarify that roadway maintenance machines using a hydraulic piston for raising and lowering the boom do not need a separate boom-hoist limiting device. The addition of this provision should not adversely affect worker safety.

J. § 1926.1442(b)(6) *Manufacturer guidance for modifications covered by § 1926.1434.* The proposed rule would modify the application of § 1926.1434, which requires employers to obtain and follow equipment manufacturer's guidance for equipment modifications except in certain circumstances, for the railroad roadway context. Many roadway maintenance machines are modified for railroad use. AAR stated that some manufacturers of these machines no longer exist and others are often reluctant to approve modifications for a variety of reasons, including liability concerns arising from their lack of expertise in railroad operations. AAR argued that employers in the railroad industry are best suited to oversee the safety of railroad equipment modification based on their long history of safe operation with modified equipment. OSHA agrees that given the unique nature of the railroad industry and the equipment used for track work, it would be appropriate to simplify how a railroad employer may use modified equipment without involving the manufacturer, but continuing to include safety assurances. Modifications covered by this exception would include: alterations to the physical structure of the equipment and modifications to the use of the equipment, such as adding metal wheels for operation on railroad tracks, increasing charted capacity by shortening and strengthening the lattice boom, or increasing reach by lengthening the boom and reducing charted capacity.

According to proposed § 1926.1442(b)(6), an employer may use modified railroad roadway maintenance equipment regardless of manufacturer guidance when three conditions are met. First, an RPE qualified with respect to the equipment must approve the procedure, modifications, addition, or repair; specify the equipment configurations described in the

approval; and modify applicable procedures, load charts, manuals, instructions, plates, tags, and decals. Second, the employer must operate the equipment within the specifications and limitations set by the engineer. Third, taking into account the modifications and procedures, the equipment's safety factor must remain at or above 1.7 for the structural integrity of the boom, or 1.25 for stability, unless the original safety factors were lower. The "safety factor" of the equipment is a common term used to assess the strength and stability of cranes, and OSHA derived these safety factors based on its engineering judgment. OSHA believes that these safety factors can be readily determined by an engineer based on documentation and analyses.

The language of this exception was based on the existing provision in § 1926.1431(a)(2) allowing employers to modify equipment when a manufacturer refuses to review the request. In some cases, equipment manufacturers specify safety factors less than 1.7 and 1.25. In those cases, the employer could rely on the manufacturer's specifications. But if the original safety factor of the equipment is not available or was originally set at or higher than 1.7 or 1.25, the proposed exception would allow equipment modifications resulting in a safety factor no lower than 1.7 for the structural boom and 1.25 for stability, subject to the other provisions of the exception (RPE approval). OSHA requests comments on this proposed exception, including the safety factors and the proposal to allow compliance with lower manufacturer-specified values.

OSHA also requests comment on whether the structure of proposed paragraph (b)(6)(i) would be improved by moving the last clause of subparagraph (A), "and specifies the equipment configurations to which that approval applies;" to a separate subparagraph (B) to make it clearer that this is a separate requirement (proposed subparagraph (B) would be re-designated as subparagraph (C)).

K. § 1926.1442(b)(7) *Other manufacturer guidance*. This proposed exception would apply to several other sections of Subpart CC that require employers to follow manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications. The restrictions are found in §§ 1926.1404(j), (m), or (q); 1926.1417(a), (r), (u), or (aa); 1926.1433(d)(l)(i); and in 1926.1441. The proposed exemptions in § 1926.1442(b)(7) would allow employers to use roadway maintenance machines without regard for the manufacturer's listed restrictions if the following conditions are met: (1) an RPE familiar with the equipment provides a written determination of the appropriate limitations for equipment use; and (2) the employer does not exceed those limitations. Like the exemption in proposed §1926.1442(b)(6) above, this proposed exemption responds to practices in the railroad industry of modifying equipment from manager specifications for the unique needs of railway maintenance. This exemption is intended to preserve existing use practices in the railroad industry while relying on the expertise of an RPE familiar with the equipment to ensure the safety of the equipment for departures from manufacturer guidance. The exemption also provides employers a means to operate safely in cases where obtaining manufacturer's approval is impossible, such as when the manufacturer no longer exists.

OSHA requests comments on all of the proposed exemptions and their explanations provided in this document.

L. Requirement for RPE determinations to be in writing

The agency notes that there is some inconsistency between different proposed exemptions as to whether required determinations by RPEs or others must be in writing. For example, proposed §1926.1442(b)(2)(i) conditions part of the exemption on an RPE determination that rail clamps are not necessary, but does not explicitly require that

determination to be in writing. Likewise, proposed §1926.1442(b)(3)(i) requires RPE approval of out-of-level work but does not specify that the approval be in writing. However, proposed §1926.1442(b)(7)(i) would require written approval from an RPE for modifications not approved by a manufacturer. OSHA requests comment on whether it should require all of the determinations and approvals to be in writing to ensure accurate communication and facilitate enforcement.

IV. Preliminary Economic Analysis and Regulatory Flexibility Act Analysis

Executive Orders 12866 and 13563 require OSHA estimate the benefits, costs, and net benefits of regulations. Executive Orders 12866 and 13563, the Regulatory Flexibility Act (5 U.S.C. 601-612), and the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1532(a)) also require OSHA to estimate the costs, assess the benefits, and analyze the impacts of certain rules that the Agency promulgates. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The cost savings for employers for this proposed rule are the difference between the 2010 rule and the residual costs, which is a savings of $15.7 million per year at a discount rate of 3 percent.[6] This proposal is not economically significant within the meaning of Executive Order 12866, nor is it a major rule under the Unfunded Mandates Reform Act or Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq*.). In addition, this rule complies with Executive Order 13563.

[6] At a discount rate of 7 percent the cost savings are $17.0 million per year. Estimates in this economic analysis are derived from OSHA's economic analysis of the 2010 rule, other public sources, and a survey performed by AAR of its members and provided to OSHA under the settlement agreement for use in this analysis (AAR, 2015). Due to rounding as shown in the text versus the underlying exact spreadsheet calculations, some text calculations may vary from the exact presented totals. All dollar amounts in the text are brought forward to 2017 dollars.

When it issued the final crane standard in 2010, OSHA prepared a final economic analysis (FEA) to ensure compliance with the OSH Act and Executive Order 12866 (58 FR 51735) (Sept. 30, 1993). OSHA also published a Final Regulatory Flexibility Analysis as required by the Regulatory Flexibility Act (5 U.S.C. 601-612). On September 26, 2014, the Agency included additional economic analysis when it published a final rule extending the employer duty to ensure operator competency and the deadline for all crane operators to become certified (79 FR 57785.) Because OSHA did not have sufficient data at the time, OSHA did not include in either rulemaking a complete assessment of the economic impact on the railroad industry.

This preliminary economic analysis (PEA) not only addresses the economic impact of the proposed revisions to the crane standard, but also completes the analysis of the impact of the entire crane standard on the railroad industry. This analysis relies primarily on the same methodology applied to other industries in the 2010 economic analysis of the crane standard. In conducting that analysis, the Agency relies mainly on the best available economic data provided by AAR to the Agency as part of its settlement agreement. The Agency provided a list of questions to AAR, which then surveyed Class I freight railroad members and returned the results, along with other general responsive information, to OSHA. Those responses (referenced as AAR 2015) as well as some estimates from the economic analysis supporting the September 26, 2014, operator certification deadline extension final rule form the basis of this PEA.

The proposed exemptions would relieve the railroad industry of several cost burdens related to the crane standard. OSHA estimates that the 2010 rule would have cost the railroad industry $24.2 million annually. The residual costs the industry would still face after factoring in the exemptions in this proposed rule would be $8.5 million per year. Finally, the cost savings for

employers for this proposed rule are the difference between the 2010 rule and the residual costs, which is a savings of $15.7 million per year. These estimates are at a discount rate of 3 percent. At a discount rate of 7 percent the economic analysis of the 2010 rule would have costs of $25.6 million annually. The residual costs the industry would still face with the regulatory changes in this proposed rule would be $8.6 million per year. Finally, the cost savings for employers for this proposed rule are the difference between the 2010 rule and the residual costs, which is a savings of $17.0 million per year. When the Department uses a perpetual time horizon to allow for cost comparisons under EO 13771, the annualized cost-savings of this proposed rule is the same: $17.0 million with 7 percent discounting.

a. Scope of the exemption

The railroad industry is typically divided into three "classes" of railroads according to a revenue-based classification scheme developed by the Surface Transportation Board (STB).[7] Class I railroads are the largest railroads with the greatest amount of revenue and primarily comprise seven large freight railroads and the Amtrak passenger train service. They operate the vast majority of track across the country. Class II and III railroads are smaller freight railroad companies, various commuter lines, and other specialty lines that operate much smaller sections of track or operate on track owned by the larger railroads.

OSHA has imperfect information about the three classes of railroads. The AAR survey only covered the Class I freight railroads. AAR was also able to provide some additional information it obtained from Amtrak, but due to the patchy nature of national statistics for the railroad industry, OSHA has not been able to obtain corresponding data for Class II and Class III railroads.

[7] See 49 CFR 1201, General Instructions 1-1. Class I railroads are those with annual carrier operating revenues of more than $250 million, Class II railroads are those with operating revenues between $20 million and $250 million, and Class III railroads have annual revenues less than $20 million.

Therefore, for this NPRM, the Agency has used indirect estimates to scale up partial data to create estimates for the industry as a whole. The U.S. Department of Transportation states that Class I freight railroads operated 94,400 miles (68%) of the 139,400 total miles in the U.S. system.[8] Amtrak stated that it maintains 852 miles of track (Amtrak, 2017). In combination with Class I freight track, the total Class I track estimate is therefore 95,252 (94,400 miles operated by Class I freight + 852 miles operated by Amtrak) out of the total U.S. track of 139,400. AAR also stated that its members operate 6,935 machines that might fall within the scope of OSHA's crane standard (AAR, 2015), and Amtrak stated that it operates 303 machines that might fall within that standard (Amtrak, 2017). Assuming that non Class-I railroads use machines in the same way as Class I, OSHA is able to estimate the total number of potentially covered equipment by scaling up the total number of Class I machines by the ratio of total track to Class I track, or 1.46 (139,400 / (94,400 +852)).[9] With the total number of Class I machines at 7,238 (6,935 freight + 303 Amtrak), the final estimate of all railroad industry machines is 10,593 (7,238 x 1.46). To the extent that Class I railroads perform track work for other segments of the railroad industry, this markup will be an overestimate. The Agency solicits comment and any further data on this issue.

Based on information provided by FRA staff from its Office of Safety Analysis, OSHA estimates that there are a total of 775 railroads (OSHA discussion with FRA staff, September 9, 2014). AAR reported that in 2012 the total number of freight railroads, including the 7 Class I freight railroads, was 574 (AAR, 2014). The remainder of the railroads are passenger and commuter railroads, intra-plant railroads (that do not operate on the national freight system),

[8] "The United States had almost 140,000 railroad route-miles in 2014, including about 94,400 miles owned and operated by the seven Class I freight railroads. Amtrak, local, and regional railroads operated the remaining 45,000 miles." (DOT/BTS, 2016, p. 16 (internal citation omitted)).

[9] From this point forward, this PEA refers to the ratio of total track to Class I track (1.46) as "the standard markup".

freight car manufacturers, freight car repair facilities or companies that provide specialized rail services, and switching and terminal railroads. The Agency assumes 2012 data continue to approximate industry conditions today.

To estimate the cost savings from the NPRM exemptions, the number of machines must be broken out into subcategories. First there is a small group of Class I machines that would fit into the proposed full exemption for flash-butt welding trucks and similar equipment under proposed 1400(c)(18). AAR reported that its members had 22 machines that would fall within the proposed exemption, (AAR, 2015),[10] while Amtrak indicated that none of its equipment would (Amtrak, 2017). Using the same ratio to account for this exempt equipment in Class II and III railroads, OSHA estimates that there is a total of 32 pieces of such exempt equipment across the entire railroad industry (1.46 x 22). Thus, OSHA estimates that 7,216 (7,238 - 22) Class I machines, and an industry total of 10,561 (10,593 – 32) machines, would fall under at least some provisions of the crane rule and would not, even upon finalization of this proposed rule, be completely exempt from the crane standard.

Second, OSHA estimates that there are 186 Class I machines exclusively engaged in bridge work, and a further 269 Class I machines, including 2 Amtrak machines, used to do both track and bridge work, all of which would be covered to some extent by the OSHA construction crane standard (the proposed exemptions do not apply to bridgework). Because some costs will need to be taken into account if any bridge work at all is performed by a machine, the Agency took the conservative approach of lumping together those doing some bridge work with those

[10] For the purposes of this analysis, OSHA has treated all flash-butt welding trucks and similar equipment as covered by the standard absent the proposed exemption.

doing bridge work exclusively.[11] OSHA only estimates cost savings for machines used exclusively for non-bridge work. Thus, the number of Class I machines that will still need to comply with all of the provisions in the crane standard (other than the operator training and certification provisions) is 455 (186 + 269), with an industry total of 666 machines (455 x 1.46) outside the proposed limited exceptions and covered by the crane standard.

b. Non-Operator Base Costs of 2010 Crane Standard for Railroads

Railroads are subject to all requirements of the 2010 crane standard (unless previously exempted in the 2010 rule or, upon finalization, specifically exempted through this rulemaking). An economic analysis of the costs imposed by that standard on the industry was not presented in the 2010 final rule and is, therefore, presented here. Table B-9 of the final rule (75 FR 48104) shows that railroads are in the "Own but Do Not Rent" sector of the industry profile. The Agency estimates the costs of the 2010 rule by using the costs for the "Own but Do Not Rent" sector as a proxy for railroad costs, scaling these aggregate costs by the size of the railroad industry as presented above. The Agency recognizes this proxy may be imperfect and solicits comment and additional information regarding these estimates.

Costs other than certification will be incurred by railroad employers using equipment covered by OSHA's crane standard. Most 2010 rule provisions other than operator certification and training are not operator specific, so the Agency estimates the cost of the existing requirements by identifying the per-crane non-operator cost of the 2010 final rule and applying that cost (inflated to 2017 dollars) to the number of affected machines in the Railroad sector. Then OSHA identifies the costs that would be avoided if the proposed exemptions are adopted.

[11] The AAR survey asked what percentage of time these dual use machines and operators were doing track work and the response was 90-95%. Hence for certain costs this allocation of assuming all their work is on bridges will underestimate cost savings.

The "Own but Do Not Rent" sector in Table B-9 (75 FR 48104) has total operator certification costs of $30,606,452 and overall total costs of $62,651,984, leaving $32,045,531 in non-certification costs ($62,651,984 - $30,606,452).[12] The "Own but Do Not Rent" sector was listed as having 50,807 cranes and other covered equipment (Table B-11, 75 FR 48107). Thus, excluding operator certification costs, OSHA's 2010 cost estimates for the "Own but Do Not Rent" sector amounted to $631 per machine ($32,045,531 / 50,807). Using the 1.12 GDP deflator factor this cost brought forward to 2017 dollars is $707 (BEA, 2017).

Based on this per-machine cost of the 2010 rule and the estimate of 10,593 total pieces of railroad equipment covered by the 2010 rule, the total annual base non-operator cost of the 2010 rule to the entire railroad industry would be $7,486,362 (10,593 x $706.75; 2017 dollars). The proposed exception for flash-butt welding trucks and similar equipment would remove 32 machines and lower the cost in 2017 dollars to $7,463,607 (10,561 x $706.75), which is a savings of $22,755.

These are the base non-operator costs only. There are two pieces of equipment specific to cranes on rails that would have a special impact on railroads absent the proposed exemptions: rail clamps and rail stops. These were not included in the base costs and are addressed next.

c. Rail Clamps and Rail Stops

Rail clamps are one type of equipment that would no longer be required under the proposed exemption. AAR told OSHA that the railroad industry does not typically use rail clamps for most operations and indicated that 5,663 additional rail clamps beyond what the Class I railroad industry currently has in stock would need to be purchased to comply with the existing

[12] In the 2010 rulemaking, OSHA did not include any additional costs for operator training, other than certification exam preparation, because operator training was already required under the previous standard. Thus, this analysis relies exclusively on operator certification costs as the costs avoided by the exemption for railroads from OSHA's operator training and certification requirements.

rule (AAR, 2015). Further communication from AAR stated that Amtrak would need 157 additional clamps (Amtrak, 2017). These rail claims would impose new up-front, maintenance, and replacement costs on the industry.

OSHA estimates a total cost for rail clamps of $51,104,943, plus an additional $4,897,557 for maintenance. OSHA derives these costs first by applying the standard markup of 1.46 to estimate non-Class I railroad use clamps as 8,517 (1.46 x (5,663 + 157)). OSHA then estimates the up-front cost for each unit. AAR's survey reported as follows: "The majority of the railroads indicated that the unit cost for a rail clamp is $5,000-$6,000. However, one of the railroads contacted a manufacturer and obtained a unit cost of $10,000." (AAR, 2015 p. 5). OSHA's costs are estimated to reflect the average costs for most firms, so the Agency selects the higher-end of the typical cost of $6,000 from the AAR survey. Therefore, the total cost for rail clamps would be $51,104,943 (8,517 x $6,000). Annualized over 10 years at a discount rate of 3%, the annualized cost is $5,991,058. Annual maintenance costs per clamp are estimated at $575 [13] for a total annual maintenance cost of $4,897,557 (8,517 x $575).

OSHA also estimates annual replacement costs of $3,741,650 associated with the clamp requirement for the railroad industry. From the (AAR 2015) survey, the number of replacement clamps needed over 10 years for Class I freight is 4,223. OSHA did not receive an estimate for the number of replacement clamps that Amtrak or the Class II and III railroads would use, so the Agency has developed an estimate for additional replacement clamps based on the ratio of Class I freight railroad track to all other track. The resulting markup factor for purely Class I freight track as compared to the entire U.S. railroad industry track is 1.48 (139,400 miles of total U.S. track / 94,400 miles of Class I freight track). Applying this freight markup to the total number of

[13] This is the midpoint of the range in the AAR survey of $450 to $700 ($575 = ($450 +$700) /2).

replacement clamps produces an estimate of 6,236 for the entire industry (4,223 x 1.48). If 10% of these clamps are replaced each year, then with the unit cost equal to the purchase price of $6,000, annual replacement costs will total $3,741,650 (6,236 x 10% x $6,000).[14] Summed together, the annual cost savings for rail clamps for the railroad industry are $14,630,265 ($5,991,058 initial cost + $4,897,557 maintenance + $3,741,650 replacement clamps).

Rail stops are the second type of equipment that would no longer be required under the proposed exemption. For rail stops, OSHA estimates total up-front costs of $5,110,494 and maintenance costs of $511,049. AAR indicated that 11,326 additional rail stops beyond what the Class I freight railroads currently have in stock would need to be purchased (AAR, 2015). Amtrak indicated it would need an additional 314 stops (Amtrak, 2017). The standard (track-based) markup derived earlier in this PEA and applied to the sum of Class I rail stops and Amtrak rail stops produces an estimated 17,035 additional rail stops for the entire industry (1.46 x (11,326 + 314)). The unit cost of a rail stop is $300 each (AAR, 2015); therefore, the total cost of rail stops is $5,110,494 (17,035 x $300). Annualized over 10 years at a discount rate of 3%, the annual cost is $599,106. Annual maintenance costs per stop are $30 (AAR, 2015); therefore, total maintenance cost is $511,049 (17,035 x $30).

OSHA also estimates annual replacement costs of $462,324 associated with the rail stop requirement for the railroad industry. The number of replacement stops for the Class I freight railroads needed over 10 years is 10,436 (AAR, 2015). OSHA did not receive information regarding the number of replacement stops required for Amtrak or the Class II and III railroads. OSHA again focuses on the ratio of all U.S. railroad track to Class I freight railroad track, which is 1.48. The number of replacement stops needed for the whole industry is 15,410 (1.48 x

[14] If the total pool of working clamps is kept constant, as we assume, then the maintenance costs for the replacement clamps are already accounted for in the annual maintenance costs for the original pool.

10,436). If 10% of the replacement stops will be introduced each year then 1,541 replacement railroad stops will be required each year (15,410 x .10). The estimate of the annual unit cost for these replacement stops is the unit cost for buying a new rail stop of $300.[15] Hence the total annual cost for replacement rail stops is $462,324 (1,541 x $300). Summed together, annual cost savings of railroad stops are $1,572,479 ($599,106 + $511,049 + $462,324).

Adding the total costs savings of both railroad stops and clamps in 2016 dollars gives $16,202,744 ($14,630,265 + $1,572,479). In year 2017 dollars, the cost savings for both railroad stops and clamps is $16,704,394.

The Agency has adjusted these cost-savings estimates to account for the costs that the railroad industry will incur for rail clamps and stops related to bridgework because the proposed exemption does not cover rail clamps and stops used in bridge construction activity. To adjust for these costs, the Agency proxies rail clamp use on bridges by AAR's survey responses for such use by machines. Based on the estimates identified earlier, there are a total of 666 machines engaged in bridgework out of 10,561 total machines (assuming that flash-butt machines as not engaged in any bridge work). Hence the estimate of the share of rail clamps that will be exempted is 94% (10,561 - 666) / 10,561). The total cost for bridge work for clamps and stops is $1,053,284 ($16,704,394 x (1 - .94)). That cost will remain for the industry even if the proposed exemptions are ultimately finalized, but the remaining rail clamp and rail stop costs would be avoided. The cost savings due to the proposed exemption for clamps/stops is $15,651,110 ($16,704,394 x .94) in 2017 dollars.

d. Work Area Controls

[15] As in the preceding footnote, maintenance costs for these replacement stops will already be accounted for in the maintenance costs for the original pool under the assumption of a constant total pool.

OSHA estimates no economic impact from the proposed exemption from compliance with the crane standard's work-area controls requirements. FRA already requires a number of work area controls to prevent injury to those working on or around railroad equipment and OSHA believes that even if the proposed exemption from work-area controls is not finalized, the railroads could comply with OSHA's requirements without incurring significant new costs. Therefore, OSHA is neither identifying a new cost for this requirement nor treating the proposed exemption as resulting in any cost saving.

e. Out-of-Level Work

The 2010 crane rule economic analysis did not estimate any cost increase due to this provision. Thus, there would be no resulting savings from this exemption.

f. Dragging a Load Sideways

The 2010 crane rule economic analysis estimated no increased cost due to this provision, and OSHA has likewise included no cost saving from the exemption from it. It is possible that the exemption does result in significant cost savings: AAR indicated that railroad equipment regularly needs to drag long portions of rail sideways during the process of installing or replacing the rail, ties, or underlying road bed. Therefore AAR asserted that the prohibition on dragging a load sideways would force railroad employers to substantially change current practices for track installation and replacement. If such changes were feasible, they would likely incur significant cost. However, because OSHA did not previously estimate any increased costs for this provision, OSHA has not included any cost saving as part of this rulemaking.

g. Boom-Hoist Limiting Device

The 2010 crane rule economic analysis estimated that such boom hoist limiting devices would generally already be in place, where needed. Hence OSHA did not include any new costs for this requirement in 2010, so there would be no resulting savings from this exemption.

h. Manufacturer Guidance for Modifications Covered by § 1926.1434

The 2010 crane rule economic analysis estimated that there would be no new costs due to this provision because it was similar enough to the previous Subpart N crane standard. Hence this exemption would produce no cost savings.

i. Operator Certification and Assessment

Because the FRA specifically preempted OSHA's operator training and certification requirements when it issued its own operator training rules for railroads, the costs of this standard for operator training and certification do not apply to railroads and thus the proposed rule would not result in any cost savings. As discussed in the preamble of this proposed rule, OSHA is also considering a separate rulemaking that would specify additional operator assessment responsibilities for each employer. OSHA expects that FRA's training rule would also preclude the OSHA's assessment requirements, if promulgated, from impacting railroad employers. At this juncture, OSHA does not anticipate any cost to railroad employers as a result of OSHA's requirements for employer assessment of operators, whether or not OSHA modifies the assessment requirements.

j. Total Cost and Savings from Proposal

Finally, adding together the rail clamp/stop costs and the base non-operator costs, the total cost of the 2010 rule is $24,190,756 ($16,704,394 + 7,486,362). Factoring in the proposed exemptions, the total costs that will still be incurred by the industry are $8,516,891 ($1,053,284 clamps and stops + $7,463,607 base non-operator costs). Cost savings of the proposal are

$15,673,865 ($24,190,756 - $8,516,891). These calculations are at a discount rate of 3%, using 2017 dollars. At a discount rate of 7%, the costs would be as follows: total costs of $25,648,173, total ongoing costs of $8,608,788, and cost savings of $17,039,385.

k. Economic Impacts

This section investigates the economic impacts of this proposal, whether the proposed rule is economically feasible for the industry as a whole, and whether the Agency can certify that the proposed rule will not have a significant economic impact on a substantial number of small entities. OSHA applies two threshold tests to look at economic feasibility for firms overall, regardless of size: whether the rule's costs as a percentage of revenues for a sector as a whole are below 1 percent, and whether those costs as a percentage of profits are below 10 percent. For small entities there are also two threshold tests: whether the costs for small entities are 1 percentage of their revenues or below, and whether those costs are 5 percent or less of the small entities' profits. None of these threshold tests are hard ceilings or determinative; they are guidelines the Agency uses to examine whether there are any potential economic feasibility issues that require additional study. As for the overall totals estimated above, the Agency must use indirect estimates since no public firm-by-firm information exists.

The Agency relies on SBA size standards to classify a company as "small." The SBA size standard for a small entity in the railroad industry is employment of 1,500 or less (SBA, 2016). The seven Class I freight railroads employ a total of 162,819 employees, or an average of 23,260 employees per firm (162,819 / 7). The Agency estimates that all 7 freight railroads will be above the 1,500-employee SBA size standard. Amtrak has more than 20,000 employees, and will also be well above the small entity threshold (https://www.amtrak.com/about-amtrak/amtrak-facts/amtrak-national-facts.html). While there is likely to be a skew among non-

Class I railroads and some of these freight railroads may actually exceed the threshold for small businesses, for the purposes of this analysis the Agency treats all 767 non-Class I firms (775 railroads – 8 Class I railroads) as below the SBA size standard of 1,500 employees.

According to AAR, the Class I freight railroads in 2012 had revenue[16] of $67.6 billion out of the total of $71.6 billion for the entire freight industry, so the share of Class I freight revenues is 94 percent (67.6 / 71.6), while $4 billion (71.6 - 67.6) are the revenues for small freight railroads (AAR, 2014).

OSHA applied AAR's report of 2012 operating income (profits) for Class I to estimate the average profits of the non-Class I railroads. Class I freight railroads' net income was $11.9 billion (AAR, 2014), and assuming that the Class I net income share was the same as its operating revenue share, OSHA derives a total freight industry net income of $12.6 billion ($11.9 / .94) in 2012, and hence small freight railroad total net income of $704 million ($12.6 - $11.9) in 2012. OSHA did not receive income estimates regarding non-freight railroads, so applying the standard freight-only markup to those totals to account for passenger rail, OSHA estimates $18.6 billion ($12.6 x 1.48) and $1.0 billion ($704 x 1.48), respectively, for total railroad (including passenger rail) and small railroad net income (including passenger rail). Using the GDP deflator to convert these amounts to 2017 dollars results in $19.9 billion and $1.1 billion, respectively.

Finally, OSHA allocates costs to the small railroads. The share of employment, rather than revenue, was judged to be the better proxy to estimate the costs of small railroads. From the information provided earlier, Class I freight employment is 90% of total freight railroad

[16] These are freight revenues rather than total revenue. (AAR 2014) only reports freight, rather than total, revenue for non-Class I railroads. In 2013, Class I freight revenue was 70.5 billion while total revenue was 72.9 billion, or 97% (70.5 / 72.9). Using only freight revenue will give a slight under-estimate of total revenues, and a slight over-estimate of the final ratio wanted: (costs/revenue). Because these ratios turn out to be very small, we do not include any correction for using freight rather than total revenues.

employment and the total railroad industry freight costs are $24.1 million, so total small railroad industry costs are $2.4 million ($24.1 million x (1 - .90)). The revenues, profits, and costs are set out in Table 1.

Table 1 Total and Small Railroad Industry Estimated Financial Statistics

Description	2017 dollars
Revenue	
Total Revenue	$113 billion
Small Entity Revenue	$6.3 billion
Profit	
Total Profit	$19.9 billion
Small Entity Profit	$1.1 billion
Cost	
Total Cost (existing)	$24.2 million
Total Cost (with proposed exemption)	$8.5 million
Small Entity Cost (existing)	$2.5 million
Small Entity Cost (with proposed exemption)	$ 155,068

The ratio of the proposed rule's costs to revenue for total railroads is .02% ($24.2m/ $113 billion) and for small railroads is .04% ($2.5m / $6.3 billion). The ratio of the proposed rule's

costs to profits for total railroads is .12% ($24.2m / $19.9 billion) and for small railroads it is .22% ($2.5m / $1.1 billion). Both easily pass OSHA's standard threshold impacts tests of costs being below 1% of revenue and 10% of profits (5% of profits for small entities.) The proposed exemptions would drastically lower those costs, so the thresholds would be even easier to meet. These estimates are scaling several Class I numbers so the results are sensitive to whether these (scaled) numbers are representative of the rest of the industry. The Agency requests comment and further information on these issues.

l. Overhead Cost Adjustment

The Agency notes that it did not include an overhead labor cost in the PEA for this rule. It is important to note that there is not one broadly accepted overhead rate and that the use of overhead to estimate the marginal costs of labor raises a number of issues that should be addressed before applying overhead costs to analyze the costs of any specific regulation. There are several approaches to examine the cost elements that fit the definition of *overhead* and there are a range of overhead estimates currently used within the federal government. For example, the Environmental Protection Agency has used 17 percent,[17] and government contractors have been reported to use an average of 77 percent.[18,19] Some overhead costs, such as advertising and marketing, vary with output rather than with labor costs. Other overhead costs vary with the number of new employees. Rent or payroll processing costs may change little with the addition of 1 employee in a 500-employee firm, but those costs may change substantially with the

[17] U.S. Environmental Protection Agency, "Wage Rates for Economic Analyses of the Toxics Release Inventory Program," June 10, 2002.

[18] Grant Thornton LLP, *2015 Government Contractor Survey*. (https://www.grantthornton.com/~/media/content-page-files/public-sector/pdfs/surveys/2015/Gov-Contractor-Survey.ashx)

[19] For a further example of overhead cost estimates, please see the Employee Benefits Security Administration's guidance at https://www.dol.gov/sites/default/files/ebsa/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-august-2016.pdf

addition of 100 employees. If an employer is able to rearrange current employees' duties to implement a rule, then the marginal share of overhead costs such as rent, insurance, and major office equipment (e.g., computers, printers, copiers) would be very difficult to measure with accuracy (e.g., computer use costs associated with 2 hours for rule familiarization by an existing employee).

If OSHA had included an overhead rate when estimating the marginal cost of labor, without further analyzing an appropriate quantitative adjustment, and had adopted an overhead rate of 17 percent on base wages, as was done in a sensitivity analysis in the FEA in support of OSHA's 2016 final rule on Occupational Exposure to Respirable Crystalline Silica, such rate would have only affected the non-operator certification costs estimated from the 2010 rule. Because labor costs were only part of those costs, including this overhead adjustment would have increased the average cost per machine from $631 to $684, a 9 percent increase. Using this larger per machine cost in the rest of the analysis would increase the final cost savings of this proposal from $15.674 million to $15.676 million at a discount rate of 3 percent, an increase of .01 percent. It would also have increased cost savings from $17.039 million to $17.041 million at a discount rate of 7 percent, an increase of .01 percent.

m. Economic and Technological Feasibility

All requirements of the proposed rule have now been in place since the promulgation of the crane standard in 2010, and the only feasibility issues for the railroad industry raised with OSHA were addressed through its settlement with AAR. For example, AAR raised concerns that it would not be feasible for railroads to avoid dragging rails sideways because this activity is an essential component of railroad construction. OSHA is now proposing to exempt railroads from this prohibition in the 2010 crane standard on dragging loads sideways. The Agency does not

have sufficient information to estimate the costs to the railroad industry of this prohibition. It also does not have enough data to estimate the cost savings that could result from the proposed exemption but they could be significant. OSHA requests information to help it better estimate the cost-saving implications of this proposed exemption. Beyond the issues raised by AAR and addressed in the settlement, the Agency is not aware of any special infeasibility issues that are unique to the railroad industry and the 2010 technological feasibility analysis is equally applicable to the railroad industry.

OSHA found that the 2010 final crane standard is feasible for all affected industries because the "[c]osts of 0.2 percent of revenues and 4% of profits will not threaten the existence of the construction industry, affected general industry sectors, or the use of cranes in affected industry sectors," and no change in the competitive structure of those industries was expected (75 FR 48112). The above analysis shows that the cost of the 2010 rule on railroads is 0.02 percent of revenues and 0.13 percent of profits, and the proposed rule, which would exempt railroads from many of the requirements of the 2010 rule would be still less costly. This supports OSHA's finding that the 2010 final rule is economically feasible for all affected industries (including railroads) and a finding that the OSHA proposal is also economically feasible. The Agency preliminarily concludes that the proposed rule is both economically and technologically feasible for the railroad industry.

n. Certification of No Significant Impact on a Substantial Number of Small Entities

In determining that the 2010 final rule would not have a significant impact on a substantial number of small entities, OSHA found that in no case would a small entity have to increase prices more than 0.18 percent or, if costs could not be passed on, absorb costs comprising more than 5.0 percent of profits (75 FR 47913, 48115). As discussed above, as applied to small

railroads, the 2010 rule would be just 0.04 percent of revenues and 0.24 percent of costs, which supports OSHA's 2010 determination as applied to railroads. Because the proposed rule would exempt railroads from several of the requirements of the 2010 rule, the proposed rule would reduce the cost impact on small entities. Thus, the Agency certifies that the proposed rule will have not have a significant impact on a substantial number of small entities.

References

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V. Legal Considerations

The purpose of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) is "to assure so far as possible every working man and woman in the nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. 651(b). To achieve this goal, Congress authorized the Secretary of Labor to promulgate and enforce occupational safety and health standards. 29 U.S.C. 654(b), 655(b). A safety or health standard "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment or places of employment." 29 U.S.C. 652(8). A standard is reasonably necessary or appropriate within the meaning of Section 652(8) when a significant risk of material harm exists in the workplace and the standard would substantially reduce or eliminate that workplace risk. See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607 (1980). In the 2010 crane rulemaking, OSHA made such a determination with respect to the use of all cranes and derricks in construction, including cranes used in the railroad industry (75 FR 47913, 47920-21). This

proposed rule includes a number of exemptions and does not impose any new requirements on employers. Therefore it does not require an additional significant-risk finding (see *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988)).

In addition to materially reducing a significant risk, a safety standard must be technologically feasible. See *UAW v. OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994). A standard is technologically feasible when the protective measures it requires already exist, when available technology can bring the protective measures into existence, or when that technology is reasonably likely to develop (see *Am. Textile Mfrs. Inst. v. OSHA*, 452 U.S. 490, 513 (1981); *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 980 (D.C. Cir. 1991)). In the 2010 Final Economic Analysis for the crane standard, OSHA found the standard to be technologically feasible (75 FR 48079). Also, this proposed rule is technologically feasible because it would not require employers to implement any additional protective measures. Instead, it would offer employers new compliance alternatives and exemptions.

VI. Office of Management and Budget Review Under the Paperwork Reduction Act

A. Overview

The purposes of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq., include enhancing the quality and utility of information the Federal government requires and minimizing the paperwork and reporting burden on affected entities. The PRA requires certain actions before an agency can adopt or revise a collection of information (also referred to as a "paperwork" requirement), including publishing a summary of the collection of information and a brief description of the need for, and proposed use of, the information. The PRA defines "collection of information" as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format"

(44 U.S.C. 3502(3)(A)). Under the PRA, a Federal agency may not conduct or sponsor a collection of information unless it is approved by the Office of Management and Budget (OMB) and displays a currently valid OMB control number, and the public is not required to respond to a collection of information unless it displays a currently valid OMB control number (44 U.S.C. 3507). Also, notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number (44 U.S.C. 3512).

B. Solicitation of Comments

The "Cranes and Derricks in Construction: Railroad Roadway Work" proposal would establish new information-collection requirements. The proposal would also modify a number of information-collection requirements in the existing Cranes and Derricks in Construction Standard (29 CFR part 1926, Subpart CC) Information Collection (IC) approved by OMB.

Some of these revisions, if adopted, would result in changes to the existing burden-hour and/or cost estimates associated with the currently OMB-approved information-collection requirements contained in the Cranes and Derricks in Construction Standard Information Collection. The proposed rule would also revise existing standard provisions that are not information-collection requirements. Those revisions are not addressed in this preamble section.

Concurrent with publication of this proposed rule, OSHA prepared and submitted a revised Cranes and Derricks in Construction Standard (29 CFR part 1926, Subpart CC) Information Collection Request (ICR) reflecting the NPRM's new information collection-requirements to OMB for review under control number 1218-0261. When and if the final rule is published, OSHA will submit a revised ICR for the final Cranes and Derricks in Construction Standard that will include railroad roadway work to OMB for approval. Pursuant to the PRA,

the public may comment directly to OMB on the information-collection (paperwork) requirements during a 30-day period following the submission of the document to OMB. This comment period is in addition to the opportunity for the public to provide comments directly to the agency.

The Agency and OMB solicit comments on the Cranes and Derricks Standard information-collection requirements as they would be established or revised by this rule. In particular, comments are sought that:

- Evaluate whether the proposed information-collection requirements are necessary for the proper performance of the Agency's functions, including whether the information will have practical utility;
- Evaluate the accuracy of OSHA's estimate of the time and cost burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

A copy of the ICR for this proposal with applicable supporting documentation, including a description of the likely respondents, estimated frequency of response, and estimated total burden, may be obtained free of charge from the RegInfo.gov website at: http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201710-1218-003 (this link will only become active on the day following publication of this document).

C. Proposed Revisions to the Information Collection Requirements

As required by 5 CFR 1320.5(a)(1)(iv) and 1320.8(d)(1), OSHA is providing the following summary information about the information-collection requirements identified in the proposal.

1. Title: Cranes and Derricks in Construction (29 CFR part 1926 Subpart CC)

2. Description of the ICR. The proposal creates new information-collection requirements associated with the existing "Cranes and Derricks in Construction Standard" Information Collection. These information-collection requirements are discussed below and in more specific detail in Section III: Summary and Explanation of the Proposed Amendments to Subpart CC.

Sections 1926.1442(b)(2)(i) and (b)(2)(iii) – Rail clamps and work-area controls exemptions.

Section 1926.1442(b)(2)(i) exempts the railroad equipment from the requirement in § 1926.1415(a)(6) for rail clamps when the manufacturer does not require them. When the manufacturer does require the clamps, the proposal allows the employer to seek an exemption by obtaining an RPE's determination that rail clamps are not necessary.

Section 1926.1442(b)(2)(iii) provides that the work-area controls specified by § 1926.1424(a)(2) do not apply when employers have implemented an on-track safety program that addresses work-area safety for the equipment, and the FRA approved the on-track safety program in accordance with 49 CFR 214.307(b). The FRA already has a mechanism by which it can ensure that employers put in place sufficient protections to prevent the types of hazards that OSHA intended to prevent through its work-area control requirements. OSHA expects that all

covered railroad equipment will comply with the FRA requirements and therefore be exempt from OSHA's work-area requirements.

Sections 1926.1442(b)(3)(i) and (ii) – Out-of-level work restriction exemptions.

OSHA's crane standard generally prohibits out-of-level operation of cranes unless approved by the manufacturer. When the manufacturer has not already authorized out-of-level work, proposed § 1926.1442(b)(3) would allow out-of-level operation for all railroad equipment purchased before November 8, 2010, and for all other equipment under two conditions that would contain information collection requirements in some scenarios: (i) the manufacturer must approve or modify the equipment to allow out-of-level work, or an RPE qualified with respect to the particular equipment must approve the out-of-level work for the equipment; and (ii) the employer must abide by the limitations and other requirements specified by the manufacturer or the engineer, or by a load chart modified by a qualified person for the approved out-of-level work. Given the many unique areas of railroad work, in some cases a manufacturer or engineer might not have accounted for a particular activity that would require an additional adjustment to the load chart. OSHA included the option of allowing a qualified person to make additional adjustments to the load chart so that the employer would not need to stop work and locate an RPE every time an additional adjustment is necessary.

Section 1926.1442(b)(6)(i)(A) and (b)(6)(i)(B) – Manufacturer guidance for modifications covered by § 1926.1434 exemptions.

Current section 1926.1434 requires employers to obtain and follow equipment manufacturer's guidance for equipment modifications except in certain circumstances. OSHA is proposing an exception that would simplify how a railroad employer may use modified equipment without involving the manufacturer but continuing to include safety assurances.

Under proposed § 1926.1442(b)(6), an employer would be able to use modified railroad roadway maintenance equipment regardless of manufacturer guidance when several conditions are met. Specifically, under proposed § 1926.1442(b)(6)(i)(A) and § 1926.1442(b)(6)(i)(B), an RPE qualified with respect to the equipment must approve the procedure, modifications, addition, or repair; specify the equipment configurations described in the approval; and modify applicable procedures, load charts, manuals, instructions, plates, tags, and decals.

Section 1926.1442(b)(7) – Other manufacturer guidance exemption.

The proposed exemption in § 1926.1442(b)(7) would apply to several other sections of Subpart CC that require employers to follow manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications. Those restrictions are found in §§ 1926.1404(j), (m), or (q); 1926.1417(a), (r), (u), or (aa); 1926.1433(d)(l)(i); and in 1926.1441. Under the proposed exemption, employers would be allowed to use roadway maintenance machines without regard for the manufacturer's listed restrictions if certain conditions are met. A number of these conditions contain information collection requirements. Proposed § 1926.1442(b)(7)(1) provides that an RPE familiar with the equipment must provide a written determination of the appropriate limitations for equipment use. Like the exemption in proposed § 1926.1442(b)(6) above, this exemption is intended to preserve existing use practices in the railroad industry while relying on the expertise of an RPE familiar with the equipment to ensure the safety of the equipment for departures from manufacturer guidance. The exemption also provides employers a means to operate safely in cases where obtaining manufacturer's approval is impossible, such as when the manufacturer no longer exists.

3. Number of respondents: 210,626 (including 775 railroad establishments).

4. Frequency of responses: Various.

5. Number of responses: 3,045,098.

6. Average time per response: Various.

7. Estimated total burden hours: 436,701.

8. Estimated cost (capital-operation and maintenance): $ 2,622.994.

D. Submitting Comments

In addition to submitting comments directly to the Agency, members of the public who wish to comment on the Agency's information-collection requirements in this proposal may send written comments to the Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the DOL-OSHA (RIN-1218-AD07), Office of Management and Budget, Room 10235, Washington, DC 20503. You may also submit comments to OMB by email at: OIRA_submission@omb.eop.gov. Please reference control number 1218-0261 in order to help ensure proper consideration. The Agency encourages commenters also to submit their comments related to the Agency's clarification of the information collection requirements to the rulemaking docket (Docket Number OSHA-2015-0012), along with their comments on other parts of the proposed rule. For instructions on submitting these comments to the rulemaking docket, see the sections of this Federal Register document titled **DATES** and **ADDRESSES**.

A copy of the ICR for this proposal, with applicable supporting documentation: including a description of the likely respondents, estimated frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov website at: http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201710-1218-003 (this link will only become active on the day following publication of this document). Copies of these documents may also be obtained by contacting Mr. Vernon Preston, Directorate of Construction, OSHA,

Room N-3427, U.S. Department of Labor, 200 Constitution Avenue NW, Washington DC 20210; telephone: (202) 693-2020; email: Preston.Vernon@dol.gov.

VII. Federalism

OSHA reviewed this proposed rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, August 10, 1999), which requires that Federal agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when clear constitutional authority exists and the problem is national in scope. Generally, Executive Order 13132 allows preemption of State law only with the expressed consent of Congress. Agencies must limit any such preemption to the extent possible.

As discussed in more detail in the following section addressing State Plan States, under Section 18 of the OSH Act, Congress expressly provides that States may adopt, with Federal approval, a plan for the development and enforcement of occupational safety and health standards; States that obtain Federal approval for such a plan are referred to as "State Plan States." (29 U.S.C. 667). Occupational safety and health standards developed by State Plan States must be at least as effective in providing safe and healthful employment and places of employment as the Federal standards.

This proposed rule complies with Executive Order 13132. In States without OSHA-approved State Plans, any standard developed from this proposed rule would limit State policy options in the same manner as every standard promulgated by OSHA. In States with OSHA-approved State Plans, this rulemaking would not significantly limit State policy options.

VIII. State-Plan States

When Federal OSHA promulgates a new standard or a more stringent amendment to an existing standard, the 28 States and U.S. Territories with their own OSHA-approved occupational safety and health plans (State-Plan States) must amend their standards to reflect the new standard or amendment, or show OSHA why such action is unnecessary (e.g., because an existing State standard covering this area is already "at least as effective" as the new Federal standard or amendment. (29 CFR 1953.5(a)). The State standard must be at least as effective as the final Federal rule and the State must complete the standard within six months after the publication date of the final Federal rule. When OSHA promulgates a new standard or amendment that does not impose additional or more stringent requirements than the existing standard, State-Plan States are not required to amend their standards. The provisions in this proposal are exemptions from existing OSHA requirements and will reduce compliance burdens on employers, and as such OSHA does not view any of the proposed provisions as more stringent than the existing standard. Therefore, States and Territories with approved State Plans may adopt comparable amendments to their standards but are not required to do so. OSHA seeks comment on this assessment of its proposal.

The 28 States and territories with OSHA-approved State Plans are: Alaska, Arizona, California, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming. Connecticut, Illinois, New Jersey, New York, Maine, and the Virgin Islands have OSHA-approved State Plans that apply to State and local government employees only.

IX. Unfunded Mandates Reform Act of 1995

OSHA reviewed this proposed rule in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA; 2 U.S.C. 1501 et seq.) and Executive Order 12875 (56 FR 58093). As discussed in section IV ("Preliminary Economic Analysis and Regulatory Flexibility Act Certification") of this proposed rule, the Agency determined that this proposed rule does not add new costs because the proposed changes are exemptions. However, because OSHA did not identify the cost to the railroad industry of the *Cranes and Derricks in Construction* standard, OSHA is identifying that cost now as part of this rulemaking. As OSHA explained in 2010, the total costs of the crane standard exceeded the threshold of $100 million per year and required additional analysis under the UMRA, which OSHA performed in 2010 (see 75 FR 48130). The $8.5 million in residual costs attributed to the railroad industry does not significantly impact the Agency's previous analysis, and the PEA for this rulemaking includes an additional analysis of the economic impact of the crane standard on the railroad industry.

As noted under section VIII ("State Plans") of this proposed rule, the Agency's standards do not impose any duties on State and local governments except in States that elect voluntarily to adopt a State Plan approved by the Agency. OSHA is not aware of any tribal governments that operate railroads using equipment that would be subject to this rulemaking, and the proposed changes create exceptions to the rule, not new duties. Consequently, this proposed rule does not meet the definition of a "Federal intergovernmental mandate" (see Section 421(5) of the UMRA (2 U.S.C. 658(5)). Therefore, for the purposes of the UMRA, the Agency certifies that this proposed rule does not mandate that State, local, or tribal governments adopt new, unfunded regulatory obligations, or increase expenditures by the private sector of more than $100 million in any year.

X. Consultation and Coordination with Indian Tribal Governments

OSHA reviewed this proposed rule in accordance with Executive Order 13175 (65 FR 67249 (Nov. 9, 2000)) and determined that it does not have "tribal implications" as defined in that order. The final rule, if promulgated as proposed, would not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.

XI. Review by the Advisory Committee for Construction Safety and Health

OSHA must consult with the ACCSH whenever the Agency proposes a rulemaking that involves the occupational safety and health of construction employees (29 CFR 1911.10, 1912.3). Accordingly, before the meeting date below, OSHA gave the ACCSH members a copy of the proposed revisions in this rulemaking as well as a brief summary and explanation of them. On December 1, 2016, ACCSH unanimously recommended that OSHA publish the proposal (see *https://www.osha.gov/doc/accsh/meetingminutes/accsh_20161201.pdf*).

XII. Public Participation

A. Submission of Comments and Access to the Docket

OSHA invites comments on the proposed revisions described, and the specific issues raised, in this proposed rule. These comments should include supporting information and data. OSHA will carefully review and evaluate these comments, information, and data, as well as any other information in the rulemaking record, to determine how to proceed.

When submitting comments, parties must follow the procedures specified in the previous sections titled **DATES** and **ADDRESSES**. The comments must provide the name of the commenter and docket number. The comments also should identify clearly the provision of the proposal each comment is addressing, the position taken with respect to the proposed provision

or issue, and the basis for that position. Comments, along with supporting data and references, submitted on or before the end of the specified comment period will become part of the proceedings record, and will be available for public inspection and copying at *http://www.regulations.gov*.

B. Requests for an Informal Public Hearing

In accordance with section 6(b)(3) of the OSH Act and 29 CFR 1911.11, members of the public may request an informal public hearing by following the instructions under the section of this Federal Register document titled **ADDRESSES**. Hearing requests must include the name and address of the party requesting the hearing, and submitted (e.g., postmarked, transmitted, sent) on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. All submissions must bear a postmark or provide other evidence of the submission date.

List of Subjects in 29 CFR Part 1926

Construction industry, Occupational safety and health, Railroad safety, Safety.

Authority and Signature

Loren Sweatt, Deputy Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, authorized the preparation of this document pursuant to Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657), 29 CFR part 1911, and Secretary's Order 1-2012 (77 FR 3912).

Signed at Washington, DC, on July 12, 2018.

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Loren Sweatt,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

Proposed Amendments to Standards

For the reasons stated in the preamble above, OSHA proposes to amend 29 CFR part 1926 to read as follows:

PART 1926—SAFETY AND HEALTH REGULATIONS FOR CONSTRUCTION

Subpart CC—Cranes and Derricks in Construction

1. The authority citation for Subpart CC of 29 CFR part 1926 continues to read as follows:

AUTHORITY: 40 U.S.C. 3701et seq.; 29 U.S.C. 653, 655, 657; and Secretary of Labor's Orders 5-2007 (72 FR 31159) or 1–2012 (77 FR 3912), as applicable; and 29 CFR part 1911.

2. Amend § 1926.1400 by adding paragraph (c)(18) to read as follows:

§ 1926.1400 Scope.

*** * * * ***

(c) * * *

(18) Flash-butt welding trucks or other roadway maintenance machines which are not equipped with any hoisting device other than that used to suspend and move a welding device or workhead assembly. For purposes of this exclusion, the terms *flash-butt welding truck* and *roadway maintenance machine* refer to railroad equipment that meets the definition of "Roadway Maintenance Machine" in 49 CFR 214.7 and is used only for railroad track work.

* * * * *

3. Redesignate **§ 1926.1442** as new **§ 1926.1443**.

4. Add a new **§ 1926.1442** to read as follows:

§ 1926.1442 Railroad roadway maintenance machines.

(a) For bridge construction work, employers using equipment covered by this Subpart CC of this part that meets the definition of "Roadway Maintenance Machine," as defined in 49 CFR 214.7, must comply with all of the requirements in this Subpart CC of this part.

(b) For construction work other than bridge construction, employers using equipment covered by Subpart CC of this part that meets the definition of "Roadway Maintenance Machine" must comply with the requirements in Subpart CC of this part, except as provided in paragraphs (b)(1) through (7) of this section:

(1) *Operator certification and training*. The requirements in §§ 1926.1427 (Operator qualification and certification) and 1926.1430 (Training) do not apply.

(2) *Rail clamps, rail stops, and work-area controls.* (i) The requirement for rail clamps in § 1926.1415(a)(6) does not apply; except § 1926.1415(a)(6) applies when a manufacturer requires rail clamps, unless a registered professional engineer determines that rail clamps are not necessary;

(ii) The requirement for rail stops in § 1926.1415(a)(6) does not apply; and

(iii) The work-area controls specified by § 1926.1424(a)(2) do not apply when employers have implemented an on-track safety program that addresses work-area safety for the equipment and the Federal Railroad Administration approved the on-track safety program in accordance with 49 CFR 214.307(b).

(3) *Out-of-level work.* The restrictions on out-of-level work (including the requirements in §§ 1926.1402(b), 1926.1412(d)(l)(xi), and 1926.1415(a)(l)), and the requirements for crane-level indicators and inspections of those indicators, do not apply when the employer uses equipment purchased before November 8, 2010, or when:

(i) The manufacturer approves or modifies the equipment for out-of-level operation, or a registered professional engineer who is a qualified person with respect to the equipment involved approves such out-of-level work; and

(ii) The employer uses the equipment within limitations specified by the manufacturer or the registered professional engineer, or a qualified person modifies the load chart for such approved out-of-level work and the employer uses the equipment in accordance with that load chart.

(4) *Dragging a load sideways.* The prohibition in § 1926.1417(q) on dragging a load sideways does not apply.

(5) *Boom-hoist limiting device.* The requirement in § 1926.1416(d)(1) for a boom-hoist limiting device does not apply to Roadway Maintenance Machines when the cranes use hydraulic cylinders to raise the booms.

(6) *Manufacturer guidance for modifications covered by § 1926.1434.* The requirements to follow the manufacturer's guidance set forth in § 1926.1434 do not apply when employers meet all of the following conditions:

(i) A registered professional engineer who is a qualified person with respect to the equipment:

(A) Approves the procedure, modification, addition, or repair, and specifies the equipment configurations to which that approval applies; and

(B) Modifies load charts, procedures, instruction manuals, and instruction plates, tags, and decals, as appropriate.

(ii) The employer uses the equipment in accordance with all of the engineer's specifications and modifications.

(iii) The original safety factor of the equipment is not reduced below 1.7 for the structural boom, and 1.25 for stability, unless the original safety factor is lower.

(7) *Other manufacturer guidance*. The requirements to follow the manufacturer's guidance, instructions, procedures, prohibitions, limitations, or specifications, set forth in §§1926.1404(j), (m), or (q); 1926.1417(a), (r), (u), or (aa); 1926.1433(d)(l)(i); or 1926.1441 do not apply when:

(i) A registered professional engineer familiar with the type of equipment involved determines the appropriate limitations on the equipment in writing; and

(ii) The employer does not exceed those limitations.

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