



# Federal Register

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**Wednesday,  
November 26, 2008**

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## **Part III**

## **Department of Transportation**

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**Pipeline and Hazardous Materials Safety  
Administration**

**Federal Railroad Administration**

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**49 CFR Parts 172, 174 and 209**

**Hazardous Materials: Enhancing Rail  
Transportation Safety and Security for  
Hazardous Materials Shipments; Railroad  
Safety Enforcement Procedures;  
Enforcement, Appeal and Hearing  
Procedures for Rail Routing Decisions;  
Final Rules**

**DEPARTMENT OF TRANSPORTATION****Pipeline and Hazardous Materials Safety Administration****49 CFR Parts 172 and 174**[Docket No. PHMSA-RSPA-2004-18730]<sup>1</sup>

RIN 2137-AE02

**Hazardous Materials: Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), Department of Transportation (DOT).

**ACTION:** Final rule.

**SUMMARY:** The Pipeline and Hazardous Materials Safety Administration, in coordination with the Federal Railroad Administration (FRA) and the Transportation Security Administration (TSA), is improving safety by revising the current requirements in the Hazardous Materials Regulations applicable to the safe and secure transportation of hazardous materials by rail. We are requiring rail carriers to compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; and make routing decisions based on those assessments. We are also clarifying rail carriers' responsibility to address in their security plans issues related to en route storage and delays in transit. In addition, we are adopting a new requirement for rail carriers to inspect placarded hazardous materials rail cars for signs of tampering or the presence of suspicious items, including improvised explosive devices. We adopted these requirements in an interim final rule published April 16, 2008. This final rule fulfills requirements in Section 1551 of the Implementing Recommendations of the 9/11 Commission Act of 2007. Also, in today's edition of the **Federal Register**, both FRA and TSA are publishing final rules adopting requirements and procedures that promote rail transportation security.

**DATES:** This final rule is effective December 26, 2008.

**FOR FURTHER INFORMATION CONTACT:** William Schoonover, (202) 493-6229,

Office of Safety Assurance and Compliance, Federal Railroad Administration; or Susan Gorsky or Ben Supko, (202) 366-8553, Office of Hazardous Materials Standards, Pipeline and Hazardous Materials Safety Administration.

**SUPPLEMENTARY INFORMATION:****I. Background**

On December 21, 2006, the Pipeline and Hazardous Materials Safety Administration (PHMSA) in coordination with the Federal Railroad Administration (FRA) and the Transportation Security Administration (TSA), published a notice of proposed rulemaking (NPRM) under Docket *PHMSA-RSPA-2004-18730* (71 FR 76834) proposing to revise the current requirements in the HMR applicable to the safe and secure transportation of hazardous materials by rail. Specifically, we proposed to require rail carriers to compile annual data on specified shipments of hazardous materials, use the data to analyze safety and security risks along rail routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments. We also proposed clarifications of the current security plan requirements to address en route storage, delays in transit, delivery notification, and additional security inspection requirements for hazardous materials shipments.

On April 16, 2008, PHMSA, once again coordinating with FRA and TSA, published an interim final rule (IFR) under Docket *PHMSA-RSPA-2004-18730* (73 FR 20751) that amended the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180) to establish requirements that enhance the safe and secure transportation of hazardous materials by rail. The IFR requires rail carriers to compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; and make routing decisions based on those assessments. It also clarifies that each rail carrier must address issues related to en route storage and delays in transit in its security plan. In addition, the IFR establishes a new requirement for rail carriers to inspect placarded hazardous materials rail cars for signs of tampering or suspicious items, including improvised explosive devices (IEDs).

We published the rulemaking as an IFR to account for changes mandated by the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11

Commission Act or Act) (Pub. L. 110-53; 121 Stat. 266). Congress enacted the 9/11 Commission Act, which the President signed into law on August 3, 2007, as the final rule was being developed for the Docket *PHMSA-RSPA-2004-18730* proceeding. The 9/11 Commission Act, among other requirements, directed the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to publish a final rule by May 3, 2008, based on a NPRM published under this docket on December 21, 2006. We elected to publish the rule as an IFR rather than a final rule to provide interested persons with an opportunity to comment on changes made to the NPRM that directly relate to the mandates established by the 9/11 Commission Act.

In accordance with Section 1551(e) of the Act, PHMSA's final rule must require rail carriers of "security-sensitive materials" to "select the safest and most secure route to be used in transporting" those materials, based on the rail carrier's analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has authority to operate. Specifically, the final rule must require such rail carriers to perform the following tasks each calendar year:

(1) Collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the rail carrier and identify the geographic location of the route and the total number of shipments by UN identification number;

(2) Identify practicable alternative routes over which the carrier has authority to operate as compared to the current route for such shipments;

(3) Seek relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route used by a rail carrier to transport security-sensitive materials;

(4) Consider the use of interchange agreements with other rail carriers when determining practicable alternative routes and the potential economic effects of using an alternative route;

(5) Analyze for both the primary route and each practicable alternative route the safety and security risks for the route, railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route; these analyses must be in writing and performed for each calendar year;

(6) Compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment

<sup>1</sup> This rulemaking was formerly designated as HM-232E; however, with the transition to a new government-wide regulations portal, docket number nomenclature has since changed. Some references to the old docket number are still present in this document.

traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes; and

(7) Use the analysis described above to select the practicable route posing the least overall safety and security risk.

In addition, the Act mandates that PHMSA require a covered rail carrier, at least once every three years, to analyze its route selection determinations, including a comprehensive, system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along or in proximity to the route, or other changes affecting the safety and security of the movements of security-sensitive materials that were implemented since the previous analysis was completed. Finally, the Act mandates that PHMSA require covered rail carriers to retain in writing all route review and selection decision documentation and restrict the distribution, disclosure, and availability of this information to appropriate persons.

In this final rule, we are responding to comments submitted on the IFR that relate to our interpretation and application of § 1551 of the 9/11 Commission Act. To review rulemakings, regulatory evaluations, environmental assessments, comments, or public meeting and congressional briefing transcripts for this docket go to <http://www.regulations.gov> under docket number *PHMSA-RSPA-2004-18730*.

## II. Summary of Interim Final Rule

Based on comments received in response to the NPRM and the provisions of the 9/11 Commission Act, the April 16 IFR adopted the following revisions to the HMR:

- Rail carriers transporting certain explosives, poisonous by inhalation (PIH), and radioactive materials must compile information and data on the

commodities transported, including the routes over which these commodities are transported.

- Rail carriers transporting the specified hazardous materials must use the data they compile and relevant information from state, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route to analyze the safety and security risks for each route used and practicable alternative routes to the route used.

- Using these analyses, rail carriers must select the safest and most secure practicable route for the specified hazardous materials.

- In developing security plans required under Subpart I of Part 172 of the HMR, rail carriers must specifically address the security risks associated with shipments delayed in transit or temporarily stored in transit.

- Rail carriers transporting the covered hazardous materials must notify consignees of any significant unplanned delays affecting the delivery of the hazardous material.

- Rail carriers must work with shippers and consignees to minimize the time a rail car containing one of the specified hazardous materials is placed on track awaiting pick-up, delivery, or transfer.

- Rail carriers must conduct security visual inspections at ground level of rail cars containing hazardous materials to check for signs of tampering or the introduction of an IED.

The IFR became effective on June 1, 2008. Beginning January 1, 2009, rail carriers must compile information on the commodities they transport and the routes they use for the six-month period from July 1, 2008 to December 31, 2008. Rail carriers must complete their data collection by March 1, 2009. By September 1, 2009, rail carriers must complete the safety and security analyses of routes currently utilized and available alternatives, and select the safest, most secure routes for

transporting the specified explosive, PIH, and radioactive materials.

Beginning January 1, 2010, and for subsequent years, rail carriers must compile information on the commodities they transport and the routes used for the previous calendar year and complete route assessments and selections by the end of the calendar year.

## III. Comments in Response to the Interim Final Rule

We received ten sets of comments in response to the IFR. The majority of the comments were submitted by companies, but we also received comments from a public interest group; a state government agency; a county government agency; a university; and an industry association. Overall, commenters are supportive of the rulemaking and welcome enhanced routing requirements that promote the safe and secure transportation of hazardous materials by rail. A major concern for rail carriers is the requirement for consultation with state, local, and tribal officials, as appropriate. Carriers suggest that it is impractical for railroads to consult on a continuous basis with all local governments along railroad rights-of-way. Several commenters also suggest that DOT establish a process for evaluating transportation safety and security risks across the entire rail transportation system, including facilitating the analysis and selection of routes involving more than one carrier. Some commenters suggest that the Federal government should mandate specific routing for high-hazard materials rather than provide rail carriers the discretion to make routing decisions.

The comments in the docket for this rulemaking may be reviewed at <http://www.regulations.gov> under docket number *PHMSA-RSPA-2004-18730*. For your convenience, a listing of the docket entries is provided below.

Name/company	Docket No.
Contra Costa County Board of Supervisors .....	PHMSA-RSPA-2004-18730-0203
Friends of the Earth .....	PHMSA-RSPA-2004-18730-0204
The Dow Chemical Company (Dow) .....	PHMSA-RSPA-2004-18730-0205
California Public Utilities Commission (CalPUC) .....	PHMSA-RSPA-2004-18730-0206
The Dow Chemical Company (Dow) .....	PHMSA-RSPA-2004-18730-0207
Theodore S. Glickman .....	PHMSA-RSPA-2004-18730-0208
Norfolk Southern Railway Company (Norfolk Southern) .....	PHMSA-RSPA-2004-18730-0211
The Association of American Railroads (AAR) .....	PHMSA-RSPA-2004-18730-0212
PPG Industries (PPG) .....	PHMSA-RSPA-2004-18730-0213
BNSF Railway Company (BNSF) .....	PHMSA-RSPA-2004-18730-0215

#### IV. Discussion of Comments and Section-by-Section Analysis

In the following paragraphs, we discuss the comments as they apply to the 9/11 Commission Act and explain the impact of the comments on the regulatory text in this final rule.

##### A. General (§ 172.820(a))

In accordance with the IFR, rail carriers must implement enhanced safety and security measures for shipments of the following classes and quantities of hazardous materials:

(1) More than 2,268 kg (5,000 lbs) in a single carload of a Division 1.1, 1.2 or 1.3 explosive;

(2) A bulk quantity of a PIH material, as defined in § 171.8 of the HMR; or,

(3) A highway route-controlled quantity of a Class 7 (radioactive) material, as defined in § 173.403 of the HMR.

Two commenters focus on the need to include additional hazardous materials. CalPUC suggests that, while the rule will improve the safety and security of rail shipments of explosive, PIH, and radioactive materials, it will not adequately protect the public from accidents or terrorist acts against other types of hazardous materials. CalPUC recommends that the route selection requirements apply to flammable gases, flammable liquids, hydrogen peroxide over 60 percent, Class 5 materials (ammonium nitrate), Class 6 materials (poisons), Class 8 materials (corrosives), and certain marine pollutants. Contra Costa County raises similar concerns regarding the inclusion of liquefied petroleum gas tank cars.

As discussed in more detail in the IFR, PHMSA, FRA, and TSA assessed the safety and security vulnerabilities associated with the transportation of different types and classes of hazardous materials. The list of materials to which the proposed enhanced safety and security requirements apply is based on specific railroad transportation scenarios. These scenarios depict how hazardous materials could be deliberately used to cause significant casualties and property damage or accident scenarios resulting in similar catastrophic consequences. DOT and TSA determined that the materials specified in the IFR present the greatest rail transportation safety and security risks—because of the potential consequences of an unintentional release of these materials—and are the most attractive targets for terrorists—because of the potential for these materials to be used as weapons of opportunity or weapons of mass destruction. While DOT and TSA agree

that materials identified by CalPUC and Contra Costa County pose certain safety and security risks in rail transportation, the risks are not as great as those posed by the explosive, PIH, and radioactive materials specified in the IFR, and we are not persuaded that they warrant the additional precautions required by the IFR. We note that the hazardous materials listed by both commenters are currently subject to the security plan requirements in Subpart I of Part 172 of the HMR. Thus, shippers and carriers of these materials must develop and implement security plans based on an assessment of the transportation security risks posed by the materials. Security plans must include measures to address personnel security, unauthorized access, and en route security. DOT, in consultation with TSA, will continue to evaluate the transportation safety and security risks posed by all types of hazardous materials and the effectiveness of our regulations in addressing those risks and will consider revising specific requirements as necessary.

The IFR applied the route analysis and selection requirements to PIH residue shipments in bulk quantities. Several commenters request that we exclude residue shipments from the list of hazardous materials subject to the rail routing provisions, noting that rail security rules proposed by Transportation Security Administration apply only to full tank car loads of PIH materials. In addition, Dow notes that the term “bulk quantity” is not currently defined in the HMR and suggests that if PHMSA decides to regulate residue quantities, we should define the term in the final rule.

As discussed in the IFR, we believe the safety risks posed by the rail transportation of residue quantities of PIH materials should be addressed through enhanced safety requirements, including route assessments. Although target attractiveness from a security standpoint is diminished for residue shipments, significant safety risks persist. We continue to believe that these safety risks are reduced by a requirement for residue quantities of PIH materials remaining in tank cars to travel on the “best” route available—the route that considers factors such as population density, emergency response capabilities, environmentally-sensitive and significant areas, and event venues. Dow is correct that the term “bulk quantity” is not currently defined in the HMR. Our intention in the IFR was to require residue shipments over 119 gallons to be subject to the route analysis and selection criteria. In attempting to develop a definition for

the term “bulk quantity,” however, we realized that applying such a definition to shipments of compressed gases, such as chlorine and anhydrous ammonia, would be very difficult. Moreover, rail carriers do not have the capability to ascertain the precise amount of residue that may remain in a rail tank car; thus, attempting to distinguish residue shipments that would be subject to the routing requirements from residue shipments that would not would be virtually impossible. For these reasons, in this final rule, we are clarifying that the data collection, route analyses, and route selection requirements apply to shipments of PIH materials, including residue shipments, in a bulk packaging. We note that there will be few, if any, rail routes over which only residue quantities of PIH travel. It is likely that the routes used to transport these residue shipments also carry fully loaded packages of PIH or one of the other hazardous materials covered by this rulemaking, and that the routes would therefore be included in a route analysis.

##### B. Commodity Data (§ 172.820(b))

The IFR requires rail carriers to begin compiling commodity data by no later than 90 days after the end of the calendar year for the previous calendar year for the covered hazardous materials, including an identification of the routes utilized and the total number of shipments transported. The data are to be used by the rail carriers to identify the routes over which the specified hazardous materials are transported and the number of shipments utilizing each route. Rail carriers are required to analyze the safety and security risks of the routes identified. This provision of the IFR is consistent with the 9/11 Commission Act mandate that rail carriers collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the rail carrier, and identify the geographic location of the route and the total number of shipments by UN identification number. We did not receive comments addressing this aspect of the IFR. Therefore, in this final rule, we are adopting the commodity flow data collection requirements without change.

AAR requests clarification of the actual date by which the commodity flow data must be compiled in 2009. In addition, AAR seeks clarification of IFR preamble language stating, “For the initial route analysis, we anticipate rail carriers will review the prior two-year period when considering the criteria contained in Appendix D.” (73 FR 20762).

Section 172.820(b) requires commodity data to be compiled no later than 90 days after the end of the calendar year; in 2009 the data must be compiled by March 31. In addition, this section requires the initial data to cover six months, from July 1, 2008 to January 31, 2008. PHMSA's preamble language indicating that we anticipate that carriers will review the data from the prior two years when conducting route analysis was our opinion based on knowledge of the data that rail carriers routinely collect. For their initial analysis, rail carriers are only required to collect data from the six-month period described in this section, additional data may be included, but is not required by the IFR or this final rule. As discussed in more detail below, in this final rule we are providing rail carriers the option to use data for all of 2008 in conducting their initial route analyses. If a rail carrier elects to utilize this option, its route analysis and selection process must be completed by March 31, 2010.

*C. Rail Transportation Route Analysis (§ 172.820(c))*

The IFR requires rail carriers to use the data collected in accordance with § 172.820(b) to analyze the rail routes over which the specified materials are transported. Carriers must analyze the specific safety and security risks for routes identified in the commodity data and the railroad facilities along those routes. Consistent with the 9/11 Commission Act, they are required to seek relevant information from state, local, and tribal officials regarding the security risks to high-consequence targets along or in proximity to the route(s) utilized. If a rail carrier is unable to acquire relevant information from state, local, or tribal officials, then it must document that in its analysis. The route analyses must be in writing and consider, at a minimum, a number of factors specific to each individual route. A non-inclusive list of factors is provided in Appendix D to Subpart I of Part 172.

Several commenters express concern regarding the IFR requirement to seek relevant information from state, local, and tribal officials regarding the security risks to high-consequence targets along or in proximity to a rail transportation route. Contra Costa County suggests that state and local governments be given the opportunity to consult with the railroads and provide all relevant information, rather than be limited to providing specific data requested by the railroads. According to Contra Costa County, local governments should have access to the person who is managing

the route analysis so they may request a consultation with the railroad or provide information that goes beyond the specific data requested by the railroad. In addition, Contra Costa County suggests that the final rule specify the types of local agencies that will be part of the consultation process.

By contrast, Norfolk Southern indicates that emergency response capability would be best served by receiving communication from a single state agency, preferably the state homeland security agency. Norfolk Southern also expresses concern regarding the overwhelming amount of state and local correspondence railroads are likely to receive as a result of this requirement. Norfolk Southern suggests the creation of individual railroad Web sites that allow state and local governments to provide data and information that rail carriers should consider when they conduct route evaluations. Similarly, AAR suggests that the Department of Homeland Security (DHS) designate high-consequence targets along railroad lines and serve as the main source of information on security risks to high-consequence targets. AAR also suggests that communication between railroads and state and local governments should, for the most part, be led by a single state agency that advises the railroads on security matters concerning the state and its local governments.

As we noted in the IFR, among the factors to be considered by rail carriers in conducting the safety and security analysis are population density along the route; environmentally-sensitive or significant areas; venues along the route (stations, events, places of congregation); emergency response capability along the route; measures and countermeasures already in place to address apparent safety and security risks; proximity to iconic targets; and areas of high consequence along the route. State and local governments may well be able to assist rail carriers in identifying and assessing this type of information. Moreover, state and local government entities may also be able to assist rail carriers in addressing any safety or security vulnerabilities identified along selected routes, in the scheduling of public events, for example, or enhancing emergency response capabilities. For these reasons, we agree with commenters that rail carriers should seek the broadest possible input from state and local governments as they conduct route analyses. We also agree with Contra Costa County that designation of a single point of contact for routing issues at each railroad would help to facilitate

communication and interaction between rail carriers and state and local governments.

At the same time, we recognize the difficulties that rail carriers may encounter in seeking information from every community along a given route and appreciate the need to simplify such interactions to the greatest extent practicable. We believe that rail carriers should have the flexibility to establish mechanisms to accomplish the required consultations that are tailored to each railroad's specific circumstances, routes, and operating environments. Web-based systems for providing and assessing state and local concerns, as suggested by Norfolk Southern, are certainly options that may prove to be very effective. Alternatively, a railroad may wish to work with state governments to establish a state government focal point for consolidating and communicating local government concerns.

Since 2003, many states and larger cities have created State and Local fusion centers, and States have created regional fusion centers to share security and first responder information and intelligence within their jurisdictions as well as with the Federal government. Fusion centers vary from State to State, but most contain similar elements, including members of State law enforcement, public health, social services, public safety, and public works organizations. Increasingly, Federal agencies such as the Department of Homeland Security, Federal Bureau of Investigation, Drug Enforcement Administration, and Bureau of Alcohol Tobacco, Firearms, and Explosives have stationed representatives at State-level fusion centers. Most centers operate as "all hazard" centers, addressing all types of emergencies, and not just those that might be related to homeland security or terrorism. As of March 2008, there were 58 fusion centers around the country.

Railroads have been coordinating with these fusion centers on railroad police and security issues, and the Federal government has officially recognized the importance of these centers in addressing security issues. The 9/11 Commission Act recognized the importance of fusion centers and established a DHS State, Local, and regional fusion center initiative to foster partnerships between centers at all levels of government. Specific language provided at 6 U.S.C. 124(h) establishes: (1) DHS responsibility to support and coordinate with the fusion centers; (2) authority and guidelines for assigning DHS personnel to state fusion centers; (3) uniform guidelines for fusion centers; and (4) funding of \$10 million

per year for each of fiscal years 2008–2012 to carry out the Fusion Center Initiative. Since 2001, the Federal government has provided some \$380 million to help fund fusion centers that meet guidelines jointly established by DHS and the Department of Justice.

In this final rule, in response to comments related to simplifying and facilitating coordination on routing issues between rail carriers and state and local governments, PHMSA is modifying the IFR to require rail carriers to designate a single point of contact (including the name, title, phone number and e-mail address) on routing issues, and to provide this information to: (1) The State and regional fusion centers located in the portion of the country encompassed by their rail systems; and (2) State, Local, and Tribal officials in jurisdictions that may be affected by a rail carrier's routing decisions who directly contact the railroad to discuss these decisions.

States, Local Governments, and Indian tribes may contact the State and regional fusion centers to obtain rail carriers' point of contact information. The Department of Homeland Security's National Operation Center is available 24 hours a day to facilitate public and private entities locating and contacting their State or regional fusion centers; the Center's contact number is (202) 282–8101. States, Local Governments, and Indian tribes will have the flexibility to directly consult with rail carriers on matters affecting the railroads' routing decisions, or channeling this information to the railroads through the fusion centers.

PHMSA and FRA note that we are working with DHS to provide railroads with information regarding high-consequence targets, as specified in the 9/11 Commission Act.

The AAR reiterates its comment that PHMSA should adopt a shipment threshold to trigger the route analysis requirement. Specifically, AAR suggests that if there are no more than 15 shipments along a particular route then the route analysis established by the IFR should not be required. AAR comments utilizing such a threshold eliminates unnecessary analysis of routes used only in emergencies and other unique circumstances.

As we stated in the IFR, we are declining to adopt such a threshold. We understand that there may be times when a route is used that would not normally be used in the everyday course of business, and we would expect the analysis to demonstrate that the routing was out of the ordinary. We believe there is utility in doing such an analysis even on a little-used route. Traffic

densities and circumstances may change, and natural disasters such as floods and hurricanes may occur. There is an advantage in knowing the characteristics, risks and necessary mitigating measures for a route that may have to be used, even in temporary emergency circumstances.

#### *D. Alternative Route Analysis (§ 172.820(d))*

Consistent with 9/11 Commission Act requirements, the IFR requires carriers to analyze and assess the feasibility of all available alternative routes over which they have authority to operate in addition to the routes normally and regularly used for hazardous materials movements. Practicable routes (or routes that are feasible options, both logically and commercially) must be identified and analyzed using, at a minimum, the Rail Risk Analysis Factors of Appendix D to Part 172. Rail carriers must retain a copy (or an electronic image thereof) of all route review and selection decision documentation used when selecting the safest and most secure practicable route available. This documentation should include, but is not limited to, comparative analyses, charts, graphics, or rail system maps.

In accordance with § 1551 of the 9/11 Commission Act, alternative routes must consider the use of interchange agreements. For the purposes of route selection, interchange agreements allow railroads to exchange railcars at specified junction point where rail lines of two or more different railroads meet. Interchange agreements may increase the number of available routes for certain shipments. Routes that utilize interchange agreements may provide a safer, more secure routing option than would otherwise be available.

Overall, rail carriers must account for safety and security risks; comparison of safety and security risks to the primary route, including the risk of catastrophic release; any remediation or mitigation measures taken; and potential economic effects. The goal of the routing analysis requirement is to require that each route used for the transportation of the specified hazardous materials is the one presenting the fewest overall safety and security risks. If the use of an alternative route would significantly increase a carrier's operating costs, as well as the costs to its customers, the carrier should consider and document the cost in its route analysis.

We received several comments on this section of the IFR. One area of concern for commenters is the role that economic factors play in selecting "practicable" alternative routes. Friends of the Earth asserts that these

requirements will spare railroads from any inconvenience or even minor expense in having to re-route cargoes onto available alternative routes and suggests that we have put "practicability" on par with safety and security. CalPUC contends that it is not reasonable to make costs to railroads and shippers the ultimate determinant for routing decisions and suggests that in doing so, we have excluded the overall costs and damages to the nation and its population in general. Contra Costa County asserts that the IFR provides too much opportunity for the railroads to let economic concerns drive the process. According to Contra Costa County, the railroads should be required to analyze all possible routes on safety factors alone to determine the safest route.

We do not agree that the consideration of the "practicability" of specific routes will result in routing decisions that are driven solely by economic considerations. Rail carriers must assess available routes using the 27 factors listed in Appendix D to Part 172 to determine the safest, most secure routes. The factors address both safety and security issues, such as the condition of the track and supporting infrastructure; the presence or absence of signals; past incidents; population density along the route; environmentally-sensitive or significant areas; venues along the route (stations, events, places of congregation); emergency response capability along the route; measures and countermeasures already in place to address apparent safety and security risks; and proximity to iconic targets. However, when carriers consider the "practicability" of a specific route some consideration must be given to economic factors. We note in this regard that the Congress recognized this by including in § 1551(d) of the 9/11 Commission Act a requirement for the alternative route analyses to include the potential economic effects of using an alternative route. In accordance with the IFR, rail carriers must balance economic factors with safety and security factors in making route selections. If using a possible alternative route would significantly increase a carrier's operating costs, as well as the costs to its customers, the carrier should consider and document these facts in its route analysis.

Several commenters address the use of interchange agreements between rail carriers when determining practicable alternative routes. Friends of the Earth asserts that the key flaw in the IFR is that it does not force a railroad to "interchange" its most dangerous cargo

over to another railroad to go around a target city. Theodore Glickman suggests that because we require railroads to consider only routes over which they have authority to operate, we are missing an opportunity for identifying routes that reduce time in transit and pose fewer safety and security risks. PPG states that carriers should be required to work together to select the safest, most secure routes. Dow and AAR both suggest that we consider mechanisms, including 49 U.S.C. 333, that would assist a rail carrier in analyzing the safety and security risks of an alternative route over which it has no authority to operate. AAR notes that the § 333 conference discussed in the IFR appears to be the best way to conduct discussions of rerouting through interchanges.

The requirement in the IFR for railroads to consider interchange agreements as they identify and assess alternative routes is consistent with the 9/11 Commission Act. The Act does not mandate the use of interchange agreements. However, we agree with Dow and AAR that safety and security would be further enhanced if rail carriers could together evaluate the safety and security of routes across the entire rail transportation system. We also agree that utilizing existing statutory authority under 49 U.S.C. 333, which provides relief for potential antitrust concerns, provides a mechanism to facilitate a systems approach to evaluating and mitigating safety and security risks. Section 333 authorizes the FRA Administrator, as delegate of the Secretary of Transportation, to convene conferences at the request of one or more railroads to address coordination of operations and facilities of rail carriers in order to achieve a more efficient, economical, and viable rail system. Persons attending a § 333 conference are immune from antitrust liability for any discussions at the conference, and can also receive immunity for any resulting agreements that receive FRA approval. As discussed in the IFR, in 2005, FRA convened a conference under this authority to discuss ways to minimize security and safety risks associated with the transportation of PIH materials. FRA plans to consider ways to expand this conference to provide a forum for rail carriers to evaluate the safety and security of the covered hazardous materials across the entire rail system, and specifically to evaluate risk-reducing arrangements on a national scale. FRA will also consider including shippers as part of the conference.

We continue to believe that the route analyses and selection requirements in

the IFR will reduce safety and security risks associated with the rail transportation of explosive, PIH, and radioactive materials. We are not convinced that mandating the use of interchange agreements as part of this process is the most effective way to reduce risk across the entire rail transportation system. Rather, we believe that the next step should be the joint shipper-carrier consultations described above. Therefore, we are adopting the alternative route analysis requirements as established by the IFR.

#### *E. Route Selection (§ 172.820(e))*

Consistent with requirements in the 9/11 Commission Act, the IFR requires a carrier to use the analysis, including any remediation measures implemented on a route, to select the route posing the least overall safety and security risk. In selecting a route, the carrier must analyze the safety and security risk for both the primary route and each practicable alternative route including railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route. The analyses must be in writing and performed for each calendar year. Carriers must compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes. The route selection documentation and underlying data will qualify as sensitive security information (SSI), will be handled in accordance with the SSI regulations at 49 CFR Parts 15 and 1520, and may be distributed only to "covered persons" with a "need to know." State and local government officials generally are considered to be "covered persons" with a "need to know" for purposes of sharing data and information applicable to a railroad's route analysis.

One commenter, Contra Costa County, suggests that the analysis and route selection performed by the rail carriers should be made available to local law enforcement, fire, and public health/hazardous materials officials. It also suggests that a distribution chain be established so these agencies can review the route analysis methodology and results of the railroads.

Similar comments were addressed during the IFR stage of this rulemaking proceeding. Specifically, in its comments on the December 2006 NPRM, the City of Cleveland, Ohio, suggested that we revise the proposal in the NPRM to require rail carriers to share the commodity data with local

governments responsible for the geographic areas through which hazardous materials are transported. In the preamble to the IFR, we agreed that state and local governments should have access to such information, provided access to the information is limited to those with a "need to know" for transportation safety and security purposes, and further provided that such information may not be publicly disclosed pursuant to any state, local, or tribal law. (73 FR 20759). Again, as part of a vulnerability assessment, the commodity data that will be collected by the railroads will qualify as SSI and will be handled in accordance with those regulations. Because of the security sensitivity of the data and route selection information, it is not appropriate for it to be broadly disclosed to government or private entities. State and local governments may contact FRA to voice concerns and request an inspection of a route plan, security vulnerability, or, more generally, a rail carrier.

Some of the comments raise issues discussed in the IFR, including the availability of rail routing tools and accounting for persons that are more susceptible to exposure from the listed hazardous materials. Contra Costa County asks that rail routing tools be made available to local parties upon request, along with an explanation of how the tool functions and suggests that local governments have an opportunity to appeal the railroad's finding, through a process identified in the final rule for resolving disputes.

Tools used by railroads to complete the route analyses and selection process mandated by this rule will include sensitive information that should not be broadly disseminated. However, we agree that sharing information with state or local government officials about how a rail carrier performed its route analysis and made its route selections could be beneficial to both the carrier and the affected government jurisdictions. Such information will qualify as SSI and must be handled in accordance with SSI regulations, but nothing in this final rule is intended to prohibit sharing of this information upon request to "covered persons" with a "need to know."

We do not believe it is necessary to provide a separate process for local governments to appeal railroad route selections to FRA. FRA has a process in place under which state and local governments may contact FRA to voice concerns about route selections and request an inspection of a route plan, security vulnerability, or, more generally, a rail carrier.

In its comments, AAR suggests that we clarify the meaning of the statement “subpopulations particularly susceptible to such risk and/or more highly exposed” as used in the preamble of the IFR in regard to the population included in the rail carrier’s route selection analysis. (73 FR 20763). When assessing the safety and security risks along a specific route, carriers must consider possible impacts to the total population in proximity to that route. In addition, carriers should consider possible impacts on subpopulations—such as children or the elderly—if there are locations or facilities such as schools, hospitals, or assisted living facilities along the route or if such subpopulations are a disproportionate part of the population as a whole.

Some commenters, including BNSF, suggested that PHMSA should dictate to the carriers the routes to be used for transportation of the covered hazardous materials. BNSF has also suggested that once FRA has completed its review of a rail carrier’s route selection, the route selected by the carrier should be classified as an approved route. The 9/11 Commission Act does not direct the Federal Government to mandate specific rail routes for security-sensitive materials; rather § 1551 of the Act specifically directs the Secretary of Transportation to, through this final rule, require *rail carriers* to select the safest and most secure routes for the movement of these materials. We continue to believe that rail carriers are in the best position to select the safest and most secure routes, taking into consideration mitigation measures that they may wish to implement to address safety and security vulnerabilities they identify.

As explained in the IFR, we are not requiring rail carriers to submit their route analyses and route selections to DOT for approval. Federal review and approval of these analyses would be resource-intensive and time-consuming and could result in shipment delays if a rail carrier had to await approval from DOT prior to transporting hazardous materials along the routes it identified as posing the fewest safety and security risks. Moreover, the 9/11 Commission Act does not provide for an approval process for route selections made by rail carriers. That being said, we intend to aggressively oversee railroads’ route analyses and route selection determinations and will use all available tools to enforce compliance with the rule. As the agency with primary responsibility for railroad safety enforcement, FRA will incorporate review and inspection of route analyses

and selections into its inspection programs. FRA inspectors may offer suggestions for modifying or improving the analysis or make changes to a route if the route selection documentation or underlying analysis is found to be deficient. If an inspector’s recommendations are not implemented, FRA may compel a rail carrier to make changes and/or assess a civil penalty. Further, if the carrier’s chosen route is found not to be the safest and most secure practicable route available, FRA may require the use of an alternative route.

After consideration of comments received, in this final rule, we are adopting the requirements applicable to route selection as established by the IFR.

#### *F. Completion of Route Analysis (§ 172.820(f))*

The IFR requires rail carriers to conduct their initial rail transportation route analysis, alternative route analysis, and route selection by September 1, 2009, based on routing data for the six month period from July 1, 2008 to December 31, 2008. In subsequent years, the rail transportation route analysis, alternative route analysis, and route selection, including a comprehensive review of all operational changes, infrastructure modifications, traffic adjustments, or other changes implemented, must be conducted no later than the end of the calendar year following the year to which the analyses apply.

In its comments, AAR suggests that the September 1, 2009, deadline for completing an initial route analysis and route selection may be difficult for rail carriers to meet. AAR explains that the first set of analyses will be resource-intensive and time-consuming and that subsequent analyses will be less so because they can build off previous analyses. AAR suggests that its member railroads would be willing to analyze data for a full year in 2009 (data for all of 2008) in return for elimination of the special September 1 deadline for route analyses in 2009.

We recognize that the IFR established an aggressive timeline for completion of an initial route analysis and route selection process. The IFR provides over 16 months (from April 16, 2008 to September 1, 2009) for completion of this process. We believe that the safety and security risks addressed in the IFR warrant an aggressive approach. However, we recognize that in some cases the last six months of 2008 data may not accurately reflect the seasonality of the rail movement of certain PIH materials (such as

anhydrous ammonia) on some carriers, and that an analysis of data for all of 2008 may help facilitate the review in the subsequent year. In this final rule, therefore, we are providing the following options for completing the initial route analysis, alternative route analysis, and route selection: (1) A rail carrier may complete the process by September 1, 2009, as established in the IFR, using data for the six month period from July 1, 2008 to December 31, 2008; or (2) a rail carrier may complete the process by March 31, 2010, using data for all of 2008, so long as the rail carrier notifies FRA in writing by September 1, 2009, that it has chosen this second option.

Several commenters also addressed our decision to require rail carriers to conduct an annual comprehensive review of the route analysis and selection process rather than once every three years. Section 1551(g) of the 9/11 Commission Act requires rail carriers to perform a comprehensive review of its route selection determinations at least once every three years. The analysis is to include a system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along or in proximity to the route, and any other changes affecting the safety and security of the movement of security-sensitive materials that were implemented since the previous analysis was completed.

Dow requests that we amend the IFR to require the comprehensive review to be completed once every three years. Dow suggests that PHMSA lacks support in the current administrative record to impose an unduly burdensome annual comprehensive review requirement. On the other hand, CalPUC provided comments in strong support of the requirement to perform comprehensive reviews on an annual basis.

As we indicated in the IFR, we believe there is value in conducting an annual review of the route analysis even in the absence of changes to the way a carrier operates. Conditions along the selected routes may change, for example, or there may be changes affecting other factors utilized in the analyses, such as incidents on the selected route, the capabilities of local emergency response agencies, or venues located in proximity to the selected route. Again, performance of the initial data gathering and analysis will be the most burdensome. We expect that the subsequent yearly analyses will build on the initial analysis and will be easier to do. Therefore, we are adopting the annual comprehensive review



requirement as established by the IFR in this final rule.

*G. Storage, Delays in Transit, and Notification (§ 172.820(g))*

The IFR clarifies that rail carriers must address delays in transit and *en route* storage in their security plans. Thus, rail carrier security plans must include: (1) A procedure for consulting with offerors and consignees to minimize the time a material is stored incidental to movement; (2) measures to limit access to the materials during storage and delays in transit; (3) measures to mitigate risk to population centers during storage incidental to transportation; (4) measures to be taken in the event of an escalating threat level during storage incidental to transportation; and (5) a procedure that is acceptable by both the rail carrier and consignee for notifying the consignee in the event of transportation delays.

The IFR included language to the effect that all affected parties should agree upon measures to be implemented by the rail carriers to minimize the time that PIH, explosive, and radioactive materials are stored in transit. In its comments, AAR suggests that this provision of the IFR unnecessarily restricts rail carriers' flexibility. According to AAR, customers often lack incentive to reduce storage on railroad property because of their own lack of storage capacity. AAR notes that railroads welcome opportunities to discuss with their customers ways of minimizing the extent to which cars may be delayed on railroad property due to the inability of their customers to receive cars. Norfolk Southern agrees with AAR's comments and adds that if the parties cannot agree, then the railroad carrier must have the final say concerning storage occurring on the railroad's own property.

The intent of the requirement in § 172.820(g)(1) is to establish a procedure that provides an opportunity for offerors and consignees to work with rail carriers to minimize incidental storage of shipments. It was not our intention to limit a carrier's flexibility concerning the storage of rail cars on railroad property. We are aware that rail carriers have worked closely with TSA to voluntarily implement measures to reduce the number of hours PIH cars are held in high-threat urban areas. Therefore, in this final rule, we are removing the sentence in § 172.820(g)(1) that suggests that all parties should agree on measures to be implemented to minimize the time that rail cars are stored in transit.

AAR also requests clarification of the phrase "formally consult," as it applies

to the rail carriers working with offerors and consignees to minimize storage incidental to transportation. The requirement for a "formal" procedure should not be read to imply that rail carriers must develop an agenda for the meeting or maintain documentation to keep a record of the consultation. By requiring that the process be formal, we are simply indicating that rail carriers must make offerors and consignees fully aware of the process and how it will work. The procedure should involve offerors and consignees when storage decisions are made that directly affect their operations. The consultation requirement may be met as part of the normal course of communication between the railroad and its customers.

*H. Recordkeeping (§ 172.820(h))*

Consistent with requirements in the 9/11 Commission Act, in the IFR, we require each rail carrier to maintain an accessible copy of the information and analyses associated with the collection of commodity data and route assessment and selection processes. We further require the distribution of such information to be limited to "covered persons" with a "need to know" in accordance with SSI regulations in 49 CFR Parts 15 and 1520. There were no comments in response to this paragraph; therefore, we are adopting it as established by the IFR.

*I. Compliance and Enforcement (§ 172.820(i))*

In the IFR, we require carriers to revise their analyses or make changes to a route if the route selection documentation or underlying analyses is found to be deficient. In addition, if the carrier's chosen route is found not to be the safest and most secure practicable route available, the FRA Associate Administrator for Safety, in consultation with TSA, may require the use of an alternative route until such time as identified deficiencies are satisfactorily addressed. FRA and TSA will consult with the Surface Transportation Board regarding whether the contemplated alternative route(s) would be economically practicable.

One commenter specifically addressed the requirements in this section. AAR asks if field inspectors will have the capability to perform route analyses. It suggests that the level of detail involved in the route analysis would make it difficult for inspectors to have the capability to perform route analyses during an inspection. AAR recommends that Federal agencies should designate the employees requiring access to route analyses and provide the railroads with a list of those

employees to facilitate coordination between the railroads and Federal agencies.

FRA will continue to coordinate closely with the railroads in its inspection and enforcement activities, including review of security plans and route analyses. We note concerning the AAR comments that FRA's enforcement role is to review the railroads' analyses, not to perform them. FRA employees will be capable of reviewing a rail carrier's route analyses and route selections to ensure compliance with the requirements of this final rule. Further, FRA and its employees will comply with the existing SSI regulations with regard to the handling of the route analyses and the underlying commodity data. Only FRA employees who are "covered persons" with a "need to know" under the SSI regulations at 49 CFR Parts 15 and 1520 will access the routing analyses and data. 9 CFR Part 1 outlines enforcement authority for the modal administrations within DOT. In the hazardous materials arena, modal administrations share broad authority over all modes regardless of agency. In accordance with a DOT-wide memorandum of understanding that delineates normal areas of activity for each modal administration, FRA expects to utilize inspectors from various disciplines as well as other modal partners when evaluating rail carrier compliance with these regulations.

In addition, FRA plans to work closely with TSA to develop a coordinated enforcement strategy to include both FRA and TSA inspection personnel. We note in this regard that while TSA has broad responsibility and authority under the Aviation and Transportation Security Act for security in all modes of transportation, TSA does not have the authority to enforce safety or security requirements established in the HMR. If in the course of an inspection of a railroad carrier or a rail hazardous material shipper, TSA identifies evidence of non-compliance with a DOT security regulation, TSA will provide the information to FRA and PHMSA for appropriate action. TSA will not directly enforce DOT security rules and will not initiate safety inspections. In accordance with the PHMSA-TSA and FRA-TSA annexes to the DOT-DHS MOU, all the involved agencies will cooperate to ensure coordinated, consistent, and effective activities related to rail security issues.

Another commenter, PPG, fully supports the intent of this rulemaking and believes it will aid in the safe and secure transportation of hazardous materials. However, PPG questions whether a risk assessment is necessary

before a rail carrier can accept a shipment for a new route. The concern is that the rail carrier will have the right to refuse to accept a shipment until a risk assessment can be done. According to its comments, PPG does not believe this is the intent of the rule but wants some assurance that the rail carriers cannot refuse a shipment based on this rulemaking.

We do not intend for the provisions of this rule to impede the everyday commerce of hazardous materials, or to change the common carrier obligation of the railroads to handle security-sensitive materials that shippers tender to them for shipment. In the event that a railroad accepts a new shipment with a new route, we would expect the railroad to document this new data in its annual data compilation, and to note any new routes, risk factors, and mitigation measures in its analysis. Since new routes are often discussed long before the initial shipment, if the carrier has knowledge of the expected shipments when it conducts its initial or subsequent reviews it should include this information as part of the decision-making process.

#### *J. Federal Preemption (§ 172.822)*

We addressed the preemptive effect of the IFR by clarifying that state and local regulation of rail routes for shipments of hazardous materials is preempted under both the Federal Hazardous Materials Transportation Law (Federal Hazmat Law; 49 U.S.C. 5125) and the Federal Rail Safety Act (49 U.S.C. 20106). All comments that were addressed supported the proposed language; therefore, we are adopting it as established by the IFR.

#### *K. Rail Risk Analysis Factors (Appendix D to Part 172)*

The IFR adopts minimum criteria in Appendix D to Part 172 to be used by rail carriers when performing the safety and security risk analyses required by § 172.820. We listed 27 factors in this appendix for carriers to consider in the analyses. The IFR adopted the 27 factors as proposed in the NPRM, with modifications for consistency with requirements of the 9/11 Commission Act. Specifically, the IFR added high consequence targets, as defined in § 1551(h)(2), to the list of factors that must be considered.

The comments submitted in response to this section reiterate comments made to the NPRM. BNSF expresses concern that the IFR does not provide any direction as to how the 27 factors are to be prioritized and requests that PHMSA provide guidance on the comparative weight or prioritization that it assigns to

each factor. Theodore Glickman suggests that the 27 factors far exceed the number that should be included and recommends that emphasis should be placed on the identification of the most important factors and developing the database required to evaluate those factors. In its comments, Norfolk Southern expresses support for the factors and agrees with the agency's decision not to arbitrarily weight or rank the factors and recognize that weighting of the individual factors listed in Appendix D may vary upon the circumstances and/or the region in which the rail carrier operates.

As we stated in the IFR, the weighting of the factors is an extremely important aspect of an overall safety and security risk assessment methodology. However, we do not believe that prioritizing or limiting the number of factors will allow rail carriers the flexibility necessary to account for unique track conditions and localized concerns. We expect carriers to make conscientious efforts to develop logical and defensible systems using these factors. Tools to assist rail carriers to use the factors to assess the safety and security vulnerabilities of specific routes, including how to weight the factors in performing the analysis, are available from a variety of sources. In addition, DOT and DHS are finalizing a route analysis tool under a grant from the Federal Emergency Management Agency (FEMA). This web-based, interactive tool will assist rail carriers to identify route characteristics using the 27 factors and to weigh safety and security impacts, thereby providing a standardized, consistent approach to the process of selecting safe and secure rail routes for high-risk hazardous materials. In addition, the tool provides a methodology for assessment of consequences for a specific commodity released at a specific point on a rail line; assessing natural hazard risks for a specific rail asset; and for corridor analysis entailing a review of all route or asset analysis results for a given rail corridor (i.e., geographic area). We expect this analysis tool to be available in 2008.

We addressed similar comments regarding the rail risk analysis factors in the IFR. After thoroughly reviewing the comments submitted in response to the IFR, we are confident that the list of rail risk analysis factors is sufficient. The flexibility provided is necessary to allow rail carriers to fully assess the potential routes. Therefore, this final rule adopts Appendix D to Part 172 as established by the IFR.

#### *L. Pre-Trip Security Inspections (§ 174.9)*

The IFR increases the scope of the currently required rail car safety inspection to include a security inspection of all rail cars carrying placarded loads of hazardous materials. The primary focus of the enhanced inspection is to recognize an IED, which is a device fabricated in an improvised manner incorporating explosives or destructive, lethal, noxious, pyrotechnic, or incendiary chemicals in its design, and generally including a power supply, a switch or timer, and a detonator or initiator. The IFR requires the rail carriers' pre-trip inspections of placarded rail cars to include an inspection for signs of tampering with the rail car, including its seals and closures, and an inspection for any item that does not belong, is suspicious, or may be an IED. When an indication of tampering or a foreign object is found, the rail carrier must take appropriate actions before accepting the rail car for further movement; the carrier will verify that the rail car is secure and its contents have not been compromised. Instructional materials have been developed by TSA that may be used by rail carriers to train their employees on detection of tampering and identification of IEDs. The comments submitted in response to the IFR do not address the pre-trip security inspections. Therefore, we are adopting § 174.9 as established by the IFR.

### **VII. Regulatory Analyses and Notices**

#### *A. Statutory/Legal Authority for This Rulemaking*

This final rule is published under authority of the Federal Hazmat Law. Section 5103(b) of Federal Hazmat Law authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. In addition, this final rule is published under authority of the 9/11 Commission Act. Section 1551 of the 9/11 Commission Act directs the Secretary of Transportation, in consultation with the Secretary of Homeland Security, to publish a final rule by May 3, 2008, based on the NPRM published under this docket on December 21, 2006. In accordance with § 1551(e) of the Act, PHMSA's final rule must require rail carriers of "security-sensitive materials" to "select the safest and most secure route to be used in transporting" those materials, based on the rail carrier's analysis of the safety and security risks on primary and alternate transportation routes over

which the carrier has authority to operate.

*B. Executive Order 12866 and DOT Regulatory Policies and Procedures*

This final rule is a significant regulatory action under § 3(f) Executive Order 12866 and, therefore, was reviewed by the Office of Management and Budget (OMB). The final rule is a significant rule under the Regulatory Policies and Procedures order issued by the DOT (44 FR 11034). We completed a regulatory evaluation and placed it in the docket for this rulemaking.

Generally, costs associated with the provisions of this final rule include the cost for collecting and retaining data and performing the mandated route safety and security analysis. We estimate total 20-year costs to gather the data and conduct the analyses established by this final rule to be about \$20 million (discounted at 7%).

In addition, rail carriers and shippers may incur costs associated with rerouting shipments or mitigating safety and security vulnerabilities identified as a result of their route analyses. Because the final rule builds on the current route evaluation and routing practices already in place for most, if not all, railroads that haul the types of hazardous materials covered, we do not expect rail carriers to incur significant costs associated with rerouting. The railroads already conduct route analyses and rerouting—in line with what this rule would require—in accordance with the AAR comments and AAR Circular OT-55-I. Moreover, the smaller carriers (regionals and short lines) are unlikely to have access to many alternative routes, and where an alternative does exist, it is not likely to be safer and more secure than the route they are currently using. If there is an alternative route the carrier determines to be safer and more secure than the one it is currently using, the carrier could well switch routes, even in the absence of a regulatory requirement, because it reduces the overall risk to its operations. Such reduction in risk offers a significant economic advantage in the long run.

Identifying and mitigating security vulnerabilities along rail routes are currently being done by the railroads. We believe that readily available “high-tech” and “low-tech” measures are being quickly implemented. The development, procurement, and widespread installation of the more technology-driven alternatives could take several years. However, PHMSA’s previous security rule requires the railroads to have a security plan that includes en route security. This existing regulatory requirement, coupled with

industry efforts to address security vulnerabilities, has caused railroads to enhance their security posture. As with routing decisions, such reduction in risk offers a significant economic advantage in the long run. Therefore, we expect that the cost of mitigation attributed solely to this final rule will not be significant. We note in this regard that safety and security measures are intertwined and often complementary; therefore, separating security costs from safety costs is not feasible.

We do not expect this final rule to result in a diversion from railroads to trucks. For the movements subject to this rule, transportation and distribution patterns, with associated infrastructure, tend to be well-established. For example, the vast majority of PIH offerors ship by rail; indeed, many do not have the infrastructure (loading racks, product transfer facilities) necessary to utilize trucks for such transportation. Moreover, the current fleet of cargo tank motor vehicles is insufficient to handle a significant shift of PIH cargoes from rail to highway—for example, there are only 85 cargo tank motor vehicles used for the transportation of chlorine. Because it takes about four tank trucks to haul the amount of product that can be moved in a rail tank car, the industry would have to build many more trucks to accommodate a shift in transportation from rail to highway, necessitating a significant expansion in current tank truck manufacturing capacity. In addition, because it takes four trucks to transport the same amount of product as a single rail tank car, it generally is only cost-effective to utilize trucks for relatively limited distances. A farm cooperative or agricultural products distributor, for example, typically receives large quantities of anhydrous ammonia by rail car and offloads the material into storage tanks for subsequent truck movement to local customers.

Changing these established transportation patterns would require substantial investment in new capacity and infrastructure, vastly exceeding the costs of complying with the final rule. Under these circumstances, we do not expect any shift in transportation mode as a result of implementation of this final rule. We note in this regard that no commenters raised this issue in their discussions of the potential impacts of the proposals in the NPRM. Overall transportation costs should not substantially increase because of this final rule.

Estimating the security benefits of the new requirements is challenging. Accident causation probabilities can be

estimated based on accident histories in a way that the probability of a criminal or terrorist act cannot. The threat of an attack is virtually impossible to assess from a quantitative standpoint. It is undeniable that hazardous materials in transportation are a possible target of terrorism or sabotage. The probability that hazardous materials will be targeted is, at best, a guess. Similarly, the projected outcome of a terrorist attack cannot be precisely estimated. It is assumed choices will be made to maximize consequences and damages. Scenarios can be envisioned in which hazardous materials could be used to inflict hundreds or even thousands of fatalities. To date, there have been no known or specific threats against freight railroads, rail cars, or tank cars, which makes all of these elements even more difficult to quantify. Security plans lower risk through the identification and mitigation of vulnerabilities. Therefore, rail carriers and the public benefit from the development and implementation of security plans. However, forecasting the benefits likely to result from plan implementation requires the exercise of judgment and necessarily includes subjective elements.

The major benefits expected to result from this final rule relate to enhanced safety and security of rail shipments of hazardous materials. The requirements of the final rule are intended to reduce the safety and security risks associated with the transportation of the specified hazardous materials. Accidents that result in the release of hazardous materials can be very costly. Given the level of such costs, it is not unreasonable to assume that the benefits associated with assessing safety and security risks and identifying opportunities to reduce those risks will also be significant.

*C. Executive Order 13132*

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Orders 13132 (“Federalism”) and 13175 (“Consultation and Coordination With Indian Tribal Governments”). This final rule would not have any direct effect on the states, their political subdivisions, or Indian tribes; it would not impose any compliance costs; and it would not affect the relationships between the national government and the states, political subdivisions, or Indian tribes, or the distribution of power and responsibilities among the various levels of government.

Section VII.K of the IFR (73 FR 20766) includes a discussion of PHMSA’s conclusion that the decision in the

March 25, 2003, final rule in HM-232 to leave to rail carriers the specifics of routing rail shipments of hazardous materials preempts all states, their political subdivisions, and Indian tribes from prescribing or restricting routes for rail shipments of hazardous materials, under Federal Hazmat Law (49 U.S.C. 5125) and the Federal Rail Safety Act (49 U.S.C. 20106). In that section, we also discuss the comments on the proposed language in the NPRM concerning the preemptive effect of HM-232 and this final rule and explain the reasons for adopting revised language in 49 CFR 172.822.

#### *D. Executive Order 13175*

We analyzed this final rule in accordance with the principles and criteria prescribed in Executive Order 13175 ("Consultation and Coordination With Indian Tribal Governments"). Because this final rule does not significantly or uniquely affect tribes, and does not impose substantial and direct compliance costs on Indian tribal governments, the funding and consultation requirements of Executive Order 13175 do not apply; thus, a tribal summary impact statement is not required.

#### *E. Regulatory Flexibility Act, Executive Order 13272, and DOT Procedures and Policies*

In consideration of the potential impacts of rules on small entities, we developed this final rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant impact on a substantial number of small entities.

The Small Business Administration (SBA) permits agencies to alter the SBA definitions for small businesses upon consultation with SBA and in conjunction with public comment. Pursuant to this authority, FRA published a final rule (68 FR 24891; May 9, 2003) defining a "small entity" as a railroad meeting the line haulage revenue requirements of a Class III railroad. Currently, the revenue requirements are \$20 million or less in annual operating revenue. This is the definition used by PHMSA to determine the potential impact of this final rule on small entities.

Not all small railroads will be required to comply with the provisions of this final rule. Most of the 510 small railroads transport no hazardous materials. PHMSA and FRA estimate there are about 100 small railroads—or 20% of all small railroads—that could potentially be affected by this final rule. Cost impacts for small railroads will result primarily from the costs for data collection and analysis. PHMSA estimates the cost to each small railroad to be \$2,776.70 per year over 20 years, discounted at 7%. Based on small railroads' annual operating revenues, these costs are not significant. Small railroads' annual operating revenues range from \$3 million to \$20 million. Thus, the costs imposed by the final rule amount to between 0.01% and 0.09% of a small railroad's annual operating revenue.

This final rule will not have a noticeable impact on the competitive position of the affected small railroads or on the small entity segment of the railroad industry as a whole. The small entity segment of the railroad industry faces little in the way of intramodal competition. Small railroads generally serve as "feeders" to the larger railroads, collecting carloads in smaller numbers and at lower densities than would be economical for the larger railroads. They transport those cars over relatively short distances and then turn them over to the larger systems, which transport them relatively long distances to their ultimate destination or for handoff back to a smaller railroad for final delivery. Although their relative interests do not always coincide, the relationship between the large and small entity segments of the railroad industry is more supportive and co-dependent than competitive.

It is also rare for small railroads to compete with each other. As mentioned above, small railroads generally serve smaller, lower density markets and customers. They tend to operate in markets where there is not enough traffic to attract or sustain rail competition, large or small. Given the significant capital investment required (to acquire right-of-way, build track, purchase fleet, etc.), new entry in the railroad industry is especially rare. Thus, even to the extent the final rule may have an economic impact, it should have no impact on the intramodal competitive position of small railroads.

We did not receive any comments in opposition to our conclusion that this rulemaking will not have a significant impact on a substantial number of small entities. Based on the lack of opposing comments, the foregoing discussion, and more detailed analysis in the

regulatory evaluation for this final rule, PHMSA certifies that the provisions of this final rule, if adopted, will not have a significant impact on a substantial number of small entities.

#### *F. Paperwork Reduction Act*

This final rule may result in an increase in annual burden and costs under OMB Control Number 2137-0612. PHMSA currently has an approved information collection under OMB Control No. 2137-0612, "Hazardous Materials Security Plans", expiring June 30, 2011.

Under the Paperwork Reduction Act of 1995, no person is required to respond to an information collection unless it has been approved by OMB and displays a valid OMB control number. 5 CFR 1320.8(d) requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information and recordkeeping requests.

This identifies a revised information collection request that PHMSA submitted to OMB for approval based on the requirements in this rule. PHMSA has developed burden estimates to reflect changes in this proposed rule. We estimate that the total information collection and recordkeeping burden for the current requirements and as specified in this rule would be as follows:

OMB No. 2137-0612, "Hazardous Materials Security Plans"

#### *First Year Annual Burden*

*Total Annual Number of Respondents:* 139.

*Total Annual Responses:* 139.

*Total Annual Burden Hours:* 51,469.

*Total Annual Burden cost:* \$3,130,859.27.

#### *Subsequent Year Burden*

*Total Annual Number of Respondents:* 139.

*Total Annual Responses:* 139.

*Total Annual Burden Hours:* 13,677.

*Total Annual Burden Cost:* \$831,971.91.

Direct your requests for a copy of the information collection to Deborah Boothe or T. Glenn Foster, U.S. Department of Transportation, Pipeline & Hazardous Materials Safety Administration (PHMSA), East Building, Office of Hazardous Materials Standards (PHH-11), 1200 New Jersey Avenue, SE., Washington, DC 20590; telephone (202) 366-8553.

#### *G. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal

Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN number contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

#### *H. Unfunded Mandates Reform Act*

This final rule does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. It does not result in costs of \$120.7 million or more to either state, local, or tribal governments, in the aggregate, or to the private sector, and is the least burdensome alternative to achieve the objective of the rule.

#### *I. Environmental Assessment*

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires that Federal agencies analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order Federal agencies to conduct an environmental review considering: (1) The need for the proposed action; (2) alternatives to the proposed action; (3) probable environmental impacts of the proposed action and alternatives; and (4) the agencies and persons consulted during the consideration process. 40 CFR 1508.9(b).

In accordance with the CEQ regulations, we completed an environmental assessment for this final rule that considers the potential environmental impacts of three alternatives—(1) do nothing; (2) impose enhanced safety and security requirements for a broad list of hazardous materials transported by rail; or (3) impose enhanced safety and security requirements for specified rail shipments of highly hazardous materials. The environmental assessment is available for review in the public docket for this rulemaking.

The provisions of this final rule build on current regulatory requirements to enhance the transportation safety and security of shipments of hazardous materials transported by rail, thereby reducing the risks of an accidental or intentional release of hazardous materials and consequent environmental damage. The net environmental impact, therefore, will be moderately positive. There are no significant environmental impacts associated with this final rule.

#### *J. Privacy Act*

Anyone is able to search the electronic form of any written

communications and comments received into any of our dockets by the name of the individual submitting the document, or the name of the individual signing the document if submitted on behalf of an association, business, labor union, etc. You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000, (65 FR 19477) or you may visit <http://www.regulations.gov>.

#### **List of Subjects**

##### *49 CFR Part 172*

Hazardous materials transportation, Hazardous waste, Labeling, Packaging and containers, Reporting and recordkeeping requirements.

##### *49 CFR Part 174*

Hazardous materials transportation, Rail carriers, Reporting and recordkeeping requirements.

■ In consideration of the foregoing, the interim final rule published on April 16, 2008 (73 FR 20752), amending title 49 Chapter I, Subchapter C, Parts 172 and 174, is confirmed as final with the following changes:

#### **PART 172—HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, AND TRAINING REQUIREMENTS**

■ 1. The authority citation for part 172 continues to read as follows:

**Authority:** 49 U.S.C. 5101–5128, 44701; 49 CFR 1.53.

■ 2. In § 172.820:

■ A. Revise paragraph (a)(2),  
■ B. Redesignate paragraphs (g), (h), and (i) as paragraphs (h), (i), and (j), respectively,

■ C. Add new paragraph (g), and  
■ D. Revise paragraphs (f) and newly designated paragraph (h)(1), to read as follows:

##### **§ 172.820 Additional planning requirements for transportation by rail.**

(a) \* \* \*

(2) A quantity of a material poisonous by inhalation in a single bulk packaging;  
or

\* \* \* \* \*

(f) *Completion of route analyses.* (1) Rail carriers have the following options for completing the initial route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section:

(i) A rail carrier may complete the initial process by September 1, 2009, using data for the six month period from July 1, 2008 to December 31, 2008; or

(ii) A rail carrier may complete the initial process by March 31, 2010, using data for all of 2008, provided the rail carrier notifies the FRA Associate Administrator of Safety in writing by September 1, 2009 that it has chosen this second option.

(2) Beginning in 2010, the rail transportation route analysis, alternative route analysis, and route selection process required under paragraphs (c), (d), and (e) of this section must be completed no later than the end of the calendar year following the year to which the analyses apply.

(3) The initial analysis and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive review of the entire system. Subsequent analyses and route selection determinations required under paragraphs (c), (d), and (e) of this section must include a comprehensive, system-wide review of all operational changes, infrastructure modifications, traffic adjustments, changes in the nature of high-consequence targets located along, or in proximity to, the route, and any other changes affecting the safety or security of the movements of the materials specified in paragraph (a) of this section that were implemented during the calendar year.

(4) A rail carrier need not perform a rail transportation route analysis, alternative route analysis, or route selection process for any hazardous material other than the materials specified in paragraph (a) of this section.

(g) *Rail carrier point of contact on routing issues.* Each rail carrier must identify a point of contact (including the name, title, phone number and e-mail address) on routing issues involving the movement of materials covered by this section in its security plan and provide this information to:

(1) State and/or regional Fusion Centers that have been established to coordinate with state, local and tribal officials on security issues and which are located within the area encompassed by the rail carrier's rail system; and

(2) State, local, and tribal officials in jurisdictions that may be affected by a rail carrier's routing decisions and who directly contact the railroad to discuss routing decisions.

(h) *Storage, delays in transit, and notification.* \* \* \*

(1) A procedure under which the rail carrier must consult with offerors and consignees in order to develop measures for minimizing, to the extent practicable, the duration of any storage

of the material incidental to movement (see § 171.8 of this subchapter).

\* \* \* \* \*

Issued in Washington, DC, on November 18, 2008, under the authority delegated in 49 CFR Part 1.

Carl T. Johnson,  
Administrator.

[FR Doc. E8-27826 Filed 11-25-08; 8:45 am]

BILLING CODE 4910-60-P

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 209

[FRA-2007-28573]

RIN 2130-AB87

#### Railroad Safety Enforcement Procedures; Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions

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

**ACTION:** Final rule.

**Summary:** In this final rule, FRA is establishing procedures to enable railroad carriers to challenge rail routing decisions made by FRA's Associate Administrator for Safety (Associate Administrator) that carry out the requirements adopted in a separate rulemaking of the Pipeline and Hazardous Materials Safety Administration (PHMSA). In PHMSA's final rule published today, railroad carriers are required to take the following actions to enhance the safety and security of certain shipments of explosive, toxic by inhalation (TIH), and radioactive materials: Compile annual data on shipments of these materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options, including interchanging the traffic with other railroad carriers; seek information from State, local and tribal officials regarding security risks to high-consequence targets along or in proximity to the routes; consider mitigation measures to reduce safety and security risks, and select the practicable routes that pose the least overall safety and security risk. Under PHMSA's final rule, FRA's Associate Administrator may require a railroad carrier to use an alternative route to the route selected by the railroad carrier if the Associate Administrator determines that the carrier's route selection documentation and underlying analysis are deficient

and fail to establish that the route chosen by the carrier poses the least overall safety and security risk based on the information available.

**DATES:** This final rule is effective November 26, 2008.

#### FOR FURTHER INFORMATION CONTACT:

Roberta Stewart, Office of Chief Counsel, Federal Railroad Administration, 202-493-6027.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

In coordination with FRA and the Transportation Security Administration (TSA), PHMSA has amended the Hazardous Materials Regulations (HMR; 49 CFR parts 171-180) to adopt requirements to enhance the safe and secure transportation of hazardous materials by rail. See PHMSA's interim final rule (73 FR 20751 [Apr. 16, 2008]) and final rule. Railroad carriers are required to: Compile annual data on certain shipments of explosive, toxic by inhalation, and radioactive materials; use the data to analyze safety and security risks along rail routes where those materials are transported; assess alternative routing options; seek information from State, local and tribal officials regarding security risks to high-consequence targets along or in proximity to the routes; consider mitigation measures to reduce safety and security risks, and select the practicable routes that pose the least overall safety and security risk. In addition, each railroad carrier must address issues related to en route storage and delays in transit in its security plan and railroad inspect placarded hazardous materials rail cars for signs of tampering or suspicious items, including improvised explosive devices.

PHMSA initially adopted these requirements in its April 16, 2008 IFR to carry out the mandate in Section 1551 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (9/11 Commission Act or Act) (Pub. L. 110-53; 121 Stat. 469). The 9/11 Commission Act required publication of a final rule by May 3, 2008, based on PHMSA's December 21, 2006 notice of proposed rulemaking (NPRM) and the requirements of the Act. The Act provides in § 1551(e) that DOT shall "ensure that the final rule requires each railroad carrier transporting security-sensitive materials in commerce to \* \* \* select the safest and most secure route to be used in transporting" those materials, based on the railroad carrier's analysis of the safety and security risks on primary and alternate transportation routes over which the carrier has

authority to operate. Specifically, the Act requires that railroad carriers perform the following tasks each calendar year:

(1) Collect and compile security-sensitive commodity data, by route, line segment, or series of line segments, as aggregated by the railroad carrier and identify the geographic location of the route and the total number of shipments by UN identification number;

(2) Identify practicable alternative routes over which the carrier has authority to operate as compared to the current route for such shipments;

(3) Consider the use of interchange agreements with other railroad carriers when determining practicable alternative routes and the potential economic effects of using an alternative route;

(4) Seek relevant information from State, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route used by a railroad carrier to transport security-sensitive materials;

(5) Analyze for both the primary route and each practicable alternative route the safety and security risks for the route, railroad facilities, railroad storage facilities, and high-consequence targets along or in proximity to the route; these analyses must be in writing and performed for each calendar year;

(6) Compare the safety and security risks on the primary and alternative routes, including the risk of a catastrophic release from a shipment traveling along these routes, and identify any remediation or mitigation measures implemented on the primary and alternative transportation routes; and

(7) Use the analysis described above to select the practicable route posing the least overall safety and security risk.

In its December 21, 2006 NPRM, April 16, 2008 IFR, and the final rule published today, PHMSA has indicated that FRA would provide a procedure for administrative due process so that a railroad carrier may seek redress of a decision by the Associate Administrator that the carrier's routing analysis is deficient and directing a carrier to use an alternate route while the deficiencies are corrected. Accordingly, FRA published an NPRM on April 16, 2008 (73 FR 20774), proposing to adopt procedures governing the review of rail routing decisions, including appeal of the Associate Administrator's decisions and solicited public comments on these procedures. This final rule completes FRA's adoption of those procedural provisions.