

analysis of improved energy security, monetized benefits of CO<sub>2</sub> reductions, impacts of other pollutants, an assessment of the societal costs and benefits of potential standards, an assessment of potential safety impacts, an assessment of impacts on automobile sales, an assessment of employment impacts, an assessment of the regulatory program's key design elements and flexibility mechanisms, and related issues.

Finally, as discussed in the September NOI, EPA is currently in the process of conducting an assessment of the potential need for additional controls on light-duty vehicles' non-greenhouse gas emissions and gasoline fuel quality. EPA expects to coordinate the timing of any final action on new non-greenhouse gas emissions regulations for light-duty vehicles and gasoline with the final action on greenhouse gas emissions and CAFE regulations discussed in this Supplemental NOI.

In his May 21, 2010 Memorandum, the President highlighted the opportunity for the U.S. to lead the world in developing a new generation of clean cars and trucks, to spur economic growth and to create high-quality jobs. In developing the proposal, the agencies will continue to gather input from stakeholders, including the OEMs and labor unions, on the potential impacts of standards on worker productivity, jobs, the automotive sector, and the opportunities for economic growth.

#### *B. Anticipated Rulemaking Schedule*

The May 21, 2010 Presidential Memorandum called for EPA and NHTSA to include in the September Notice of Intent a "schedule for setting those standards as expeditiously as possible, consistent with providing sufficient leadtime to vehicle manufacturers." As we indicated in the September NOI, the agencies expect to issue a joint Notice of Proposed Rulemaking (NPRM) by September 30, 2011, and a final rule by July 31, 2012.

As required by the National Environmental Policy Act (NEPA), and by NHTSA and Council of Environmental Quality (CEQ) regulations, NHTSA will be developing a Draft Environmental Impact Statement (DEIS), to inform the upcoming NPRM. In the coming months, NHTSA will issue a scoping notice to request comment on the regulatory options that the DEIS should consider. A Final EIS (FEIS) will be issued at least 30 days prior to the release of the final rule.

As with any notice-and-comment rulemaking process, the agencies will provide full opportunity for the public to participate in the rulemaking process,

consistent with EPCA/EISA, the Clean Air Act, Administrative Procedure Act, other applicable law, and Administration policies on openness and transparency in government. Upon publication of the NPRM, the agencies will open a public comment period for receiving written comments and expect to hold at least one joint public hearing to receive oral comments. We will describe all of these opportunities for public involvement in the NPRM which will be published in the **Federal Register**, and we will post this information on each agency's Web site associated with this rulemaking.

Dated: November 30, 2010.

**Ray LaHood,**

*Secretary, Department of Transportation.*

Dated: November 30, 2010.

**Lisa P. Jackson,**

*Administrator, Environmental Protection Agency.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Chapter II

[Docket No. FRA-2009-0038]

RIN 2130-AC11

#### Risk Reduction Program

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

**ACTION:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** The Rail Safety Improvement Act of 2008 requires the development and implementation of railroad safety risk reduction programs. Risk reduction is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing applicable hazards and develops plans to mitigate that risk. Each Risk Reduction Program (RRP) is statutorily required to be supported by a risk analysis and a Risk Reduction Program Plan (RRPP), which must include a Technology Implementation Plan and a Fatigue Management Plan.

This ANPRM solicits public comment on a potential rulemaking that would require each Class I railroad, each railroad with an inadequate safety record, and each passenger railroad to submit an RRPP to FRA for its review and approval. Each of those railroads would ultimately be required to implement its approved RRP.

**DATES:** Written comments must be received by February 7, 2011. Comments received after that date will be considered to the extent possible without incurring additional expenses or delays.

After all public comments are received, FRA may hold a public hearing on a date to be announced in a forthcoming notice. The focus of the meeting would be on issues raised in the submitted comments.

**ADDRESSES:** *Comments:* Comments related to Docket No. FRA-2009-0038 may be submitted by any of the following methods:

- *Online:* Comments should be filed at the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.

- *Fax:* 202-493-2251.

- *Mail:* Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue, SE., W12-140, Washington, DC 20590.

- *Hand Delivery:* Room W12-140 on the Ground level of the West Building, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal holidays.

*Instructions:* All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://www.regulations.gov> including any personal information. *Please see* the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

**FOR FURTHER INFORMATION CONTACT:** Miriam Kloeppel, Staff Director, Risk Reduction Program Division, Office of Safety Analysis, FRA, 1200 New Jersey Avenue, SE., Mail Stop 25, Washington, DC 20590 (*telephone:* 202-493-6224), [miriam.kloeppel@dot.gov](mailto:miriam.kloeppel@dot.gov). Elizabeth A. Gross, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Mail Stop 10, Washington, DC 20590 (*telephone:* 202-493-1342), [elizabeth.gross@dot.gov](mailto:elizabeth.gross@dot.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

In section 103 of the Rail Safety Improvement Act of 2008, Public Law 110-432, 122 Stat. 4854 (Oct. 16, 2008) (codified at 49 U.S.C. 20156) (hereinafter RSIA), Congress directed the Secretary of Transportation to issue a regulation by October 16, 2012, requiring certain railroads to develop a Risk Reduction Program (RRP). While

the statute vests certain responsibilities with the Secretary of the U.S. DOT (Secretary), the Secretary has since delegated those responsibilities to the FRA Administrator. *See* 49 CFR 1.49(o); 74 FR 26981 (June 5, 2009); *see also* 49 U.S.C. 103(g).

Each railroad subject to the regulation would have to develop and implement an RRP approved by FRA. *See* 49 U.S.C. 20156(a)(1). This RRP is required to be supported by an RRPP. *See* 49 U.S.C. 20156(d)(2). FRA would also conduct an annual review to ensure that each railroad has complied with its RRP. *See* 49 U.S.C. 20156(a)(3). The RSIA mandates that the following three categories of railroads be required to develop and implement an FRA-approved RRP:

- (1) Class I railroads;
- (2) Railroad carriers with inadequate safety performance, as determined by the Secretary; and
- (3) Railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads).

*See* 49 U.S.C. 20156(a)(1).

In accordance with the RSIA mandate, this ANPRM announces the initiation of an RRP rulemaking applicable to the above railroads. Railroads not required to implement RRP under the RSIA would be permitted to voluntarily submit plans meeting the requirements of any final RRP regulation for FRA review and approval. *See* 49 U.S.C. 20156(a)(4).

## II. Related Proceeding

With the assistance of the Railroad Safety Advisory Committee (RSAC), FRA is currently developing a System Safety Program (SSP) regulation applicable to passenger railroads. An SSP is anticipated to be a comprehensive process for the application of engineering and management principles, criteria, and techniques to optimize safety. Like risk reduction, an SSP might require a railroad to assess and manage risk, and to develop proactive hazard management methods that would support safety improvement. As currently envisioned, SSP would be specifically tailored to the risks presented by passenger railroads. To the extent possible, FRA intends to incorporate risk reduction requirements into a complementary safety and risk reduction framework.

## III. RSIA RRP Requirements

Under the RSIA, each RRP required to be submitted by a railroad must contain certain components. As a general matter, an RRP is required to

systematically evaluate safety risks on a railroad's system and to manage those risks to reduce the consequences and rates of railroad accidents, incidents, injuries, and fatalities. *See* 49 U.S.C. 20156(a)(1)(A). The RRP will help achieve this goal by mitigating aspects that increase railroad safety risks and enhancing aspects that decrease railroad safety risks. *Id.* Each RRP must contain a risk-based hazard analysis<sup>1</sup> and must be supported by an RRPP describing the processes, procedures and resources that are committed to supporting the RRP.<sup>2</sup> For example, the RRPP must describe the organizational functions and procedures that a railroad will utilize in developing, implementing, and evaluating its RRP. In addition, an RRPP must also incorporate a Technology Implementation Plan and a Fatigue Management Plan.

### A. Risk-Based Hazard Analysis

Each railroad required to implement an RRP would conduct a risk-based hazard analysis that would be submitted along with the railroad's RRPP. *See* 49 U.S.C. 20156(c). FRA would likely expect a risk-based hazard analysis to identify and analyze the following factors that affect railroad safety:

- Operating rules and practices;
- Infrastructure;
- Equipment;
- Employee staffing levels and schedules;
- Management structure;
- Employee training; and
- Other matters that impact railroad safety.

A railroad would not be required to limit its risk-based hazard analysis to the above identified factors, and FRA may require a railroad to consider these and/or additional factors in any proposed or final rule. However, the contents of a railroad's risk mitigation RRPP would be based upon the results of the railroad's completed risk-based hazard analysis. *See* 49 U.S.C. 20156(d)(1).

<sup>1</sup> The RSIA uses the phrase "risk analysis" to describe the type of analysis a railroad is required to perform. For purposes of this ANPRM and any final rule, however, FRA will refer to this analysis as a "risk-based hazard analysis." This terminology clarifies that safety hazard risks are the concern of the rulemaking, as opposed to financial or other types of risk. Additionally, this harmonizes the risk reduction rulemaking with the terminology currently being utilized by the SSP rulemaking.

<sup>2</sup> The RSIA uses the phrases "comprehensive safety risk reduction program" and "risk mitigation plan" to describe the plan that must accompany and support an RRP submitted by a railroad to the FRA for approval. For purposes of this ANPRM, however, FRA will refer to this plan as an RRPP.

### B. Technology Implementation Plan and Positive Train Control Systems

An RRPP must include a Technology Implementation Plan (TIP) that describes the railroad's plan for the "development, implementation, maintenance, and use of current, new, or novel technologies on its system over a 10-year period to reduce safety risks identified under the railroad safety risk reduction program." 49 U.S.C. 20156(e)(1). At a minimum, a TIP must contain (1) a technology analysis addressing the safety impact, feasibility, and costs and benefits of implementing technologies, and (2) a 10-year implementation schedule prioritizing the development and implementation of new technology. *See* 49 U.S.C. 20156(e)(2) and (e)(3).

The RSIA also contains several provisions regarding a railroad's TIP and the implementation of positive train control (PTC) systems. These provisions, however, apply only to the extent that a railroad is not already required to implement a PTC system under section 104 of the RSIA. Under section 104, certain railroads—including all Class I and passenger railroads—are required to implement PTC systems by December 31, 2015. *See* 49 U.S.C. 20156(e)(4) and 20157(a). Therefore, the RSIA's provisions (other than those in section 104) regarding PTC systems would apply only to railroads determined to have an inadequate safety record. Possible methodologies FRA could use to determine whether a railroad has an inadequate safety record are discussed later in this ANPRM.

While there is no general requirement in the RSIA that all railroads with an inadequate safety record must address PTC systems in their TIPs, the RSIA does contain the following provisions regarding PTC systems:

- If a railroad's TIP contains an implementation schedule for a PTC system, the railroad must comply with that schedule. *See* 49 U.S.C. 20156(e)(4)(A).
- If a railroad is required to submit a TIP that addresses PTC systems, that railroad must implement such a PTC system pursuant to its TIP by December 31, 2018. *See* 49 U.S.C. 20156(e)(4)(B).

The above provisions mean that a railroad voluntarily submitting a TIP addressing the implementation of a PTC system would not have to comply with the December 31, 2018 implementation deadline. Rather, such a railroad would only be required to comply with the implementation schedule contained in its own TIP. The December 31, 2018 deadline would apply only to a railroad with an inadequate safety record that

FRA specifically requires to implement PTC.

### C. Fatigue Management Plan

Each RRPP must include a Fatigue Management Plan (FMP) that will be designed to reduce the likelihood of accidents, incidents, injuries, and fatalities caused by the fatigue of safety-related railroad employees. *See* 49 U.S.C. 20156(f)(1). A railroad will have to update its FMP every two years. *Id.* An FMP should accomplish this by prescribing appropriate fatigue countermeasures, taking into account the various operating circumstances on the different parts of a railroad system. *See* 49 U.S.C. 20156(f)(2). A railroad would also have to consider whether its FMP should include elements addressing the following:

- Employee education and training on the physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue, based on the most current scientific and medical research and literature.
- Opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders.
- Effects on employee fatigue of an employee's short-term or sustained response to emergency situations, such as derailments and natural disasters, or engagement in other intensive working conditions.
- Scheduling practices for employees, including innovative scheduling practices, on-duty call practices, work and rest cycles, increased consecutive days off for employees, changes in shift patterns, appropriate scheduling practices for varying types of work, and other aspects of employee scheduling that would reduce employee fatigue and cumulative sleep loss.
- Methods to minimize accidents and incidents that occur as a result of working at times when scientific and medical research have shown increased fatigue disrupts employees' circadian rhythm.
- Alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty.
- Opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad carrier.
- The increase of the number of consecutive hours of off-duty rest, during which an employee receives no communication from the employing railroad carrier or its managers, supervisors, officers, or agents.

- Avoidance of abrupt changes in rest cycles for employees.
- Additional elements that the Secretary considers appropriate. *See* 49 U.S.C. 20156(f)(3)(A)–(J).

### D. Consensus Requirements

Each railroad submitting an RRP must consult on the contents of the plan in good faith with all of its directly affected railroad employees and any non-profit employee labor organization representing directly affected employees. *See* 49 U.S.C. 20156(g)(1). If the railroad cannot reach a consensus on the proposed contents with the employees or the labor organization, the employees or the labor organization may file a statement with FRA explaining their views on the RRP on which consensus was not reached. *See* 49 U.S.C. 20156(g)(2). FRA is required to consider such views during the review and approval of the RRP. *Id.*

### E. Protection of Confidential Information

#### 1. FOIA Protection

Under section 109 of the RSIA, 49 U.S.C. 20118(a), certain information submitted to FRA pursuant to an RRP or risk reduction pilot project is prohibited from disclosure under the Freedom of Information Act, 5 U.S.C. 552, ("FOIA"), except as necessary for the Secretary or another Federal agency to enforce or carry out any provision of Federal law. This prohibition applies to any part of any record that FRA receives, inspects, or copies pursuant to an RRP or pilot project, including (but not limited to) a railroad's analysis of its safety risks and its statement of identified mitigation measures. *Id.* This prohibition, however, is subject to the exception that FRA may disclose information otherwise available to the public if FRA determines that disclosure would be consistent with the confidentiality needed for an RRP or pilot program. *See* 49 U.S.C. 20118(b).

In addition, FRA may also prohibit disclosure of risk analyses or risk mitigation analyses obtained under other provisions, regulations, or orders promulgated under 49 U.S.C. chapter 201, if FRA determines that the prohibition of public disclosure is necessary to promote railroad safety. *See* 49 U.S.C. 20118(c).

#### 2. Protection From Discovery

The RSIA also directs FRA to conduct a study evaluating whether it is in the public interest to withhold certain risk reduction information from discovery or admission into evidence in Federal or State court proceedings against a railroad that involve personal injury or

wrongful death. *See* 49 U.S.C. 20119(a). In conducting this study, FRA must take into account both public safety and the legal rights of persons injured in railroad accidents, and must solicit input from railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public. *Id.* The risk reduction information that is the subject of the study would include any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad RRP that is required under 49 U.S.C. chapter 201, including a railroad's analysis of safety risks and its statement of mitigation measures with which it will address those risks. *Id.* FRA may then issue a rule addressing the results of this study, so long as the rule is in the public interest (including public safety and the legal rights of persons injured in railroad accidents). *See* 49 U.S.C. 20119(b). Any such rule may not go into effect until one year after its adoption. *Id.*

FRA anticipates that it will complete this study within one to two years. The public will have an opportunity to comment on the information collection requirements of this study through FRA's obligation under the Paperwork Reduction Act.

### IV. FRA's Risk Reduction Initiative

Although FRA's traditional rule-based system has been effective at establishing minimum safety standards, additional safety improvements could be achieved through the establishment of risk reduction programs. FRA's risk reduction initiative utilizes an approach based on (1) voluntary risk reduction programs in the railroad industry, and (2) changes to FRA's internal safety culture to maximize the agency's ability to improve railroad safety. FRA envisions that the RRP and SSP regulations discussed in this ANPRM will enhance this broad approach. Risk reduction is a problem-solving process used to identify and mitigate railroad safety risks. Its objective is to develop innovative methods, processes, and technologies that can be used to identify and mitigate railroad safety risk factors proactively instead of reactively, so that risks are effectively counteracted before an accident, injury, or fatality occurs.

Overall, a risk reduction approach could help railroads, FRA, and labor organizations learn how unsafe events may occur and identify underlying conditions that contribute to unsafe events. This knowledge will then provide a means to effectively prevent those unsafe events. When fully implemented, FRA intends that its

broad risk reduction initiative will help identify systemic factors that can address multiple railroad safety problems. Risk reduction will also help to identify, track, and evaluate corrective actions taken by railroads, and could help reveal previously hidden safety information for analysis and problem solving.

#### A. Voluntary Risk Reduction Programs

Before the passage of RSIA, FRA worked with railroads and labor organizations to develop voluntary proactive safety programs designed to improve railroad safety and build strong safety cultures. Various programs, such as the Confidential Close Call Reporting Systems (C<sup>3</sup>RS) (OMB No. 2130-0574), Crew Resource Management model training programs, and Clear Signal for Action (CSA) behavior-based safety programs (as well as many others), contained elements that made them (or other programs like them) appropriate for consideration as voluntary programs under the risk reduction umbrella. These elements include commitments from all stakeholders; voluntary, confidential, and non-punitive participation; systematic and objective data gathering, analysis, and reporting; problem-solving and corrective actions; and long-term sustaining mechanisms. FRA's risk reduction initiative will continue to encourage the development and implementation of voluntary programs focusing on proactive risk mitigation.

#### B. FRA's Internal Risk Reduction Program

As a regulator, FRA recognizes that the presence of a strong internal safety culture increases its ability to improve railroad safety. A strong internal safety culture enables the agency to overcome institutional "stovepipe" barriers that inhibit the free flow of information within the agency and can help the entire agency focus effectively on railroad safety issues. To help the agency identify new processes or methods for improving railroad safety, FRA is developing its own internal risk reduction program. This program will provide support and guidance to several FRA teams working on internal pilot studies that would address specific railroad safety issues.

#### C. Risk Reduction Pilot Programs

The RSIA authorized FRA to conduct research and pilot programs related to risk reduction. See 49 U.S.C. 20156(a)(2). FRA intends to use the information and experience gathered through these pilot programs to develop the RRP regulation. *Id.*

On May 29, 2009, FRA published a Broad Agency Announcement (BAA) soliciting proposals for risk reduction pilot programs. See Department of Transportation (Federal Railroad Administration), "Limited Competition of the Federal Railroad Administration Risk Reduction Program/Broad Agency Announcement," Special Notice, Solicitation Number: DTFR53-09-M-0000, available at: <https://www.fbo.gov/index?s=opportunity&mode=form&id=0ea229f12915fda77cfc84b4dbc6ef9a&tab=core&cvview=0>. FRA limited competition under the BAA to Class I railroads, many of which were already developing proactive safety programs. This allowed FRA to increase the speed of generating pilot projects results to help develop the RRP regulation required by RSIA. The BAA requested proposals from the Class I railroads for pilot projects that targeted operations, equipment, or systems that posed the greatest risk to operational and personal safety. FRA evaluated the proposals and announced in September 2009 that Risk Reduction Pilot Program Grant Awards had been awarded to the National Railroad Passenger Corporation (Amtrak); BNSF Railway Company; Canadian Pacific Railway; CSX Transportation, Inc.; Norfolk Southern Corporation; and Union Pacific Railroad Company.

FRA is currently monitoring these pilot programs and gathering information and results that will assist in the development of the subject RRP regulation. FRA anticipates that many of these pilot projects will have a life span beyond the publication of the final risk reduction regulation, and many of them may ultimately become part of a railroad's FRA-approved RRP.

#### V. Advance Notice of Proposed Rulemaking

In accordance with the RSIA mandate, this ANPRM announces the initiation of an RRP rulemaking. This ANPRM requests written comments in response to the questions presented. FRA also welcomes any additional information that may be helpful in considering a risk reduction framework for railroad carriers. FRA is not proposing any specific regulatory language in this ANPRM. After a review of all the comments submitted in response to this ANPRM, FRA will likely issue a notice of proposed rulemaking (NPRM) proposing specific risk reduction program regulations. Interested persons will have the opportunity to comment on a proposed regulation prior to the adoption of any final regulation regarding risk reduction.

#### A. Identifying Railroads With an Inadequate Safety Record

FRA is particularly interested in soliciting input regarding how to determine whether a railroad has an "inadequate safety record" under 49 U.S.C. 20156(a)(1) and thus would be required to develop and implement an RRP. The RSIA does not provide guidance on how this determination should be made. FRA is currently considering an approach in which a variety of safety factors would be analyzed and weighed when making the determination. Such possible factors could include:

- The railroad's safety performance within the last five (5) years, as measured by the number of occurrences per million train-miles of the following:
    - Fatal accidents/incidents reportable under 49 CFR part 225 (not including accidents/incidents occurring at highway-rail grade crossings, unless caused by a railroad's failure to comply with a railroad operating rule or a Federal statute or regulation).
    - The number, severity, and types (e.g., head-on collisions between pieces of on-track equipment) of accidents/incidents reportable under 49 CFR part 225.
    - Non-accident hazardous materials releases.
    - FRA safety violations/deficiencies.
  - How the railroad's measured safety performance compares with other railroads of similar size and operations.
    - Any serious accident/incident involving hazardous materials and whether any such accident/incident led to an evacuation, environmental damage, or a personal injury/fatality.
    - Any recommendations made by an FRA Regional Administrator (with detailed supporting reasons provided) identifying a railroad with an inadequate safety record.
  - The proportion of the railroad's territory that is excepted track under 49 CFR 213.4. Railroads may designate a segment of track as excepted track subject to certain conditions. *Id.* For example, on excepted track a railroad may not operate trains in excess of ten miles an hour, operate occupied passenger trains, or operate freight trains containing more than five cars containing hazardous materials. See § 213.4(e)(1)-(e)(3). Excepted track is then subject to less stringent track safety standards. See 49 CFR 213.5.
- FRA does not anticipate that all these factors would necessarily be weighted equally. Additionally, a determination relating to the adequacy of a railroad's safety record could be based upon any number of factors, depending upon the

severity of the safety concern involved. FRA would likely consider such factors as fatalities, accidents/incidents, non-accident hazmat releases, and FRA safety violations/deficiencies, using statistical models that compare the railroad's performance to the industry average or an FRA threshold established on a periodic basis (e.g., yearly). Rates above a certain threshold would then likely cause FRA to determine that a railroad has an inadequate safety record. In order for FRA to determine that a railroad no longer has an inadequate safety record, the railroad may then need to be below all applicable thresholds for a set period of time (e.g., three years).

Additional factors to be considered may include the increased risk level due to operating conditions specific to an individual railroad. In other words, factors presenting a greater than usual risk or hazard would weigh in favor of determining that a railroad has an inadequate safety record. Such factors might include the following:

- Share of a railroad's revenue from the shipment of hazardous materials;
- Share of a railroad's revenue from the shipment of hazardous materials in a major metropolitan area;
- Whether the railroad shares trackage rights with a railroad engaged in passenger operations; and
- Whether a passenger operation crosses the railroad's right-of-way at grade, otherwise known as a diamond crossing.

As this document is an ANPRM, the above ideas are not intended to constitute FRA's final position regarding the definition of "inadequate safety record." Rather, they are intended to elicit discussion and comment from interested parties. FRA anticipates that any approach proposed in a future NPRM could differ significantly from the above. Nevertheless, FRA believes that the approach presented above provides a good starting point for discussion. As discussed further below in the Request for Information section, FRA is interested in receiving any comments, questions, or concerns about the above approach, as well as any suggestions for alternate methods of determining when a railroad has an "inadequate safety record."

### B. RRP Requirements and Implementation

As discussed above, the RSIA requires a railroad's RRP to include certain minimum core components: A risk-based hazard analysis and an RRPP (which must include a TIP and an FMP). FRA anticipates that a risk reduction proposed rule would provide further

specification regarding what a risk-based hazard analysis and an RRPP might contain. For example, FRA could propose the following requirements for public comment:

- A railroad's risk-based hazard analysis may be required to:
  - Utilize certain demonstrated methodologies;
  - Be of a certain scope;
  - Contain a comprehensive description of the railroad's system;
  - Address the risks posed both by and to contractors who work for the railroad; and
  - Address the risks posed by joint operations between railroads.
- A railroad may be required to update its risk-based hazard analysis on a periodic basis. Additionally, certain events or occurrences may trigger a mandatory update of a railroad's risk-based hazard analysis.
- A railroad's RRPP may be required to include defined roles and responsibilities for contractors working for the railroad, as well as employees.
- A railroad's RRPP may be required to provide for periodic risk reduction training to specific railroad employees and contractors.
- A railroad's RRPP may be required to specify how the railroad will periodically review the design and implementation of its RRP utilizing valid mathematical tests or methods that conform to the standards of the American Evaluation Association.
- A railroad may be required to maintain certain risk reduction documentation and records and to make that information available upon request to the FRA for auditing purposes.
- A railroad may be required to develop and submit a risk-based hazard analysis and an RRPP for approval six months after the publication of the final rule, and to fully implement the RRP six months after the hazard analysis and the RRPP have been approved by the FRA.

### C. Request for Information

In general, FRA seeks comments on the broad areas outlined within this ANRPM, and approaches FRA can take to integrate existing FRA requirements into a comprehensive risk reduction program that meets the requirements set forth in RSIA. FRA seeks comments on how a risk reduction program could be implemented to meet the requirements of the law in a manner that maximizes benefits without imposing excessive, unjustified, or unnecessary costs.

FRA also seeks input from the public on the following specific questions. Comments will be used by FRA to make decisions regarding the content and direction of any future public meetings

on the risk reduction rulemaking and the contents of the NPRM. Each commenting party should refer to the number of the specific question(s) to which it is responding. FRA also requests additional comments and information not addressed by these questions that would promote an understanding of the implications of imposing an RRP regulatory requirement. FRA does not expect that every commenter will be able to answer every question. Please respond to those questions you feel able to answer or that address your particular issue. FRA encourages responses from all interested entities, not only railroads. Each comment filed by a party, other than railroads or their representatives, should explain its interest in risk reduction and how its comments may assist in the development of an RRP rulemaking.

### Risk Reduction Program

1. If you are not in the railroad industry, please tell us about your organization and your interest in risk reduction.

2. What should be the scope of applicability for the final risk reduction rule? Should certain types of railroads (such as tourist railroads) be exempted from the regulation?

3. The RSIA requires a railroad with an "inadequate safety record" to develop and implement an FRA-approved RRP. This ANPRM proposes a list of factors that FRA could consider when determining whether a railroad has an "inadequate safety record."

a. Is FRA asking the right questions to determine the adequacy of a safety record? Please comment on the various factors FRA has identified. What other questions should FRA be asking?

b. What additional factors not discussed above should FRA consider?

4. An RRP must be designed to improve safety by reducing the number and rates of accidents, incidents, injuries, and fatalities. An RRP will accomplish this by using a safety improvement process that identifies accident precursors and mitigates hazards on an ongoing basis.

a. What should an effective RRP include to accomplish this mandate?

b. How should a railroad go about adequately demonstrating that its RRP is effective for addressing safety concerns identified in the risk-based hazard analysis?

c. How can a railroad utilize risk reduction to improve its corporate safety culture?

5. Each railroad required to develop and implement an FRA-approved RRP must include defined roles and responsibilities for contractors. FRA

will likely hold a railroad responsible for ensuring that a contractor fulfills these roles and responsibilities.

a. What are the different ways an RRP can incorporate contractors performing work for a railroad?

b. How would you determine which contractors should be included in a railroad's RRP? Should a railroad's RRP be required to incorporate only contractors who perform safety-sensitive service for the railroad? Who should be excluded? Explain.

c. Should a railroad or FRA (or both) be responsible for ensuring that contractors working for a railroad are fulfilling their RRP roles and responsibilities?

6. An RRP must take into account the risks and hazards associated with joint operations between railroads.

a. How should FRA define joint operations in the context of an RRP regulation?

b. What are the different ways an RRP can incorporate risks and hazards associated with joint operations?

7. Should all railroads be required to submit risk-based hazard analyses and RRPPs of identical scope and depth that meet uniform rigorous standards? If not, how can FRA craft a scalable regulation that applies fairly to both large and small railroads? Are there ways to make risk reduction programs scalable and flexible, dependent upon the size and flexibility of the railroad?

8. Risk reduction is an ongoing, dynamic approach to identifying and mitigating risks. How can a railroad use an RRPP to promote safety improvement and to maintain an acceptable level of safety?

9. What risk reduction activities are already in place at railroads, and, how could those activities be incorporated into a future proposed rule?

10. Are there ways to achieve greater benefits at a lower cost through alternative methods of implementation?

#### Risk-Based Hazard Analysis

11. The RSIA requires each railroad to develop and implement an RRP that systematically "evaluates railroad safety risks on its system." How can a risk-based hazard analysis accomplish this mandate?

a. What methodologies should FRA require that a railroad use when conducting its risk-based hazard analysis?

b. What should be excluded from the scope of a risk-based hazard analysis? What should be included in that scope?

c. How should a risk-based hazard analysis determine what is and what is not an acceptable level of risk?

d. What are various methods for determining whether a railroad has

effectively applied a risk-based hazard analysis to its entire system?

12. FRA will likely require a risk-based hazard analysis to address the risks presented both by and to contractors working for the railroad. What elements would need to be present to ensure risks relevant to contractors are addressed?

a. Is there a particular set of contractors that FRA should focus on, or, conversely, contractors that have little impact on overall risk?

13. When approving a railroad's RRPP, FRA will likely consider the railroad's approach to updating its risk-based hazard analysis.

a. At a minimum, how often should a railroad update a risk-based hazard analysis? Why have you recommended this time span?

b. In what ways is a risk-based hazard analysis an on-going process supporting safety improvements?

c. What type of events or occurrences might trigger an update of a railroad's risk-based hazard analysis?

#### Risk Reduction Program Plan

14. The RSIA requires a railroad to include a TIP and an FMP in its RRPP. FRA may require an RRPP to have additional elements, such as a comprehensive description of the railroad's system. What other basic elements should an RRPP be required to contain?

15. Based on the information provided in this ANPRM, what would the potential burden on railroads be for developing and maintaining an RRPP, TIP, and FMP? Are particular elements more burdensome than others? Are there ways for FRA to reduce the burden on railroads (including, but not limited to, reduction of burden on small entities)?

16. All conclusions reached or positions taken by a railroad should have supporting data that a reviewer can understand and follow in order to reach the same conclusions. What additional supporting documentation, data, or other information should a railroad be required to include in the RRPP package it submits for FRA approval?

17. Are there risk management standards or guidelines that FRA should apply when approving a railroad's RRPP?

18. Are there standards, analyses, or other considerations that FRA should apply when deciding whether a railroad with an inadequate safety record must submit a TIP providing for the implementation of a PTC system?

19. The RSIA requires a railroad to consider whether its FMP should address certain elements. Are there

additional elements that FRA should require a railroad's FMP to consider? What are the likely costs of implementing specific elements of an FMP, and, what are the expected benefits of implementing these elements?

#### Training

20. A railroad will likely be required to develop a risk reduction training program (submitted as part of the railroad's RRPP) that introduces the concept of safety risk reduction and the elements of the railroad's RRP. What specific material should be included in or excluded from a railroad's training?

21. Which employees or classes of employees should a railroad be required to train on various RRP policies and procedures? Who should be excluded from this training? Explain.

22. How often should risk reduction training be required? Why?

#### Recordkeeping and Program Audits

23. FRA may require railroads to maintain RRP records related to input and output data, safety outcomes, evaluation protocols, manuals, training programs, policies, procedures, standard operating procedures, *etc.* Would retaining these records be appropriate? Are there other records FRA should propose that railroads maintain? What would be the practical utility of collecting and maintaining this information? What would the potential burden of these activities be? Are there ways for FRA to reduce burden related to recordkeeping and auditing requirements?

24. In addition to a records review, FRA's annual review will probably include field inspections, interviews, surveys, and other evaluative data collection efforts. FRA may also inspect data indicating whether the program has been effective in reducing risk. Are these effective evaluation measures? What other tools could FRA incorporate into its annual review effort?

25. As provided by the RSIA, FRA will review a railroad's RRP annually. Should FRA's annual review:

a. Address a railroad's entire RRP?

b. Focus primarily on certain RRP components, with a maximum of two years between audits for any single program component?

c. Target certain issues identified by accident/incident, inspection, or complaint data?

26. How should a railroad provide FRA access to proprietary or sensitive data?

27. FRA will likely require covered railroads to periodically evaluate their RRP to ensure that it is effectively

reducing risk. Covered railroads will be specifically required to evaluate components of the program that were not audited by FRA that year. These evaluations will likely be required to utilize valid mathematical tests or methods that conform to the standards of the American Evaluation Association.

a. How often should a railroad be required to evaluate the effectiveness of its RRP?

b. What other standards could a railroad use to evaluate the effectiveness of its RRP?

28. Should FRA allow a railroad to hire a contractor to evaluate its RRP? If so, what qualifications or certifications should this contractor have?

29. What documentation/certification must a railroad maintain so that FRA can verify that the railroad has properly evaluated the effectiveness of its RRP?

#### Cost/Benefits

30. What are the initial and recurrent costs of establishing and maintaining RRP processes (e.g., internal auditing and evaluation, data collection, employee training, computer software, personnel hiring and training)?

31. How could railroads maximize benefits associated with a risk reduction program without unjustified or unnecessary costs?

32. What new knowledge, skills, and abilities would your organization need, if any, to operate successfully within a risk reduction framework?

33. What are practical ways a small business could apply the elements of an RRP?

34. What business benefits are created by a risk reduction program?

35. Are there special costs or loss of benefits of scale for small businesses? If so, how can they be minimized?

#### General/Background

36. FRA may require a railroad to develop and submit an RRPP for approval six months after publication of the final rule. Is this timeline appropriate? If not, why? What additional problems does the six month deadline create?

37. FRA may require a railroad to establish a full initial implementation of an RRP six months after the RRPP has been approved by FRA.

a. Is this timeline appropriate? If not, explain why it is not appropriate.

b. Should FRA permit a railroad to implement its RRP in phases? What should those phases be? Explain.

38. Has your organization implemented an official safety risk reduction program (or other programs that could qualify as risk reduction)? Please describe your implementation experience.

a. How has this program impacted organizational safety and compliance with existing Federal statutes and regulations?

b. How have the resources required to implement and maintain the program affected your organization?

c. If you do not represent a railroad, how do you think your risk reduction activities would apply in a railroad context?

d. How has this program improved your organization's corporate safety culture?

39. Has your railroad undertaken a risk reduction pilot project? If so, please tell us how successful that pilot project has been and how any data or information obtained through the project could assist in the development of an RRP regulation.

40. What areas of FRA's current regulations do you believe already incorporate risk reduction principles? How would you suggest the FRA avoid any duplicative requirements in any risk reduction rulemaking effort?

#### Public Meetings

41. After the ANPRM comment period has closed, FRA may hold one or more public hearings on the announced risk reduction rulemaking. Decisions regarding public meetings will be made based upon the content of the comments. As such, all interested entities should, to the best of their ability, respond fully in writing to the questions presented in this ANPRM.

a. How many public meetings, if any, should FRA hold?

b. Where should any public meeting(s) be held? Are there certain meeting locations that would increase participation?

Issued in Washington, DC, on December 2, 2010.

**Karen J. Hedlund,**

*Chief Counsel, Federal Railroad Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 100526227-0256-01]

RIN 0648-AY71

### Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Surfclam (Surfclam) and Ocean Quahog Fishery

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** NMFS withdraws the proposed rule published on June 30, 2010, which proposed to open a portion of the Georges Bank (GB) Closed Area to the harvest of surfclams and ocean quahogs. The previously published proposed rule will not be issued as a final rule and will not become effective or enforceable. The current GB Closed Area remains in effect.

**DATES:** The withdrawal of the proposed rule to open a portion of the GB Closed Area to the harvest of surfclams and ocean quahogs (75 FR 37745, June 30, 2010) is effective December 8, 2010.

**FOR FURTHER INFORMATION CONTACT:** Anna Macan, Fishery Management Specialist, phone (978) 281-9165, fax (978) 281-9135.

#### SUPPLEMENTARY INFORMATION:

##### Background

NMFS is withdrawing a proposed rule to open a portion of the GB Closed Area to the harvest of surfclams and ocean quahogs that was published on June 30, 2010 (75 FR 37745), with public comments accepted through July 30, 2010. The background and full details on the development of the June 30, 2011 proposed rule are contained in the preamble of the proposed rule and are only summarized here.

The GB Closed Area, located in the Exclusive Economic Zone east of 69°00' W. long. and south of 42°20' N. lat., has been closed to the harvest of surfclams and ocean quahogs since 1990 due to red tide blooms that cause paralytic shellfish poisoning (PSP). The closure was implemented based on advice from the U.S. Food and Drug Administration (FDA), after samples tested positive for toxins (saxotoxins) that cause PSP. PSP toxins are produced by the alga, *Alexandrium fundyense*, which can