

reconsideration the Commission granted an extension of time for small entities to comply with all of the provisions of the MDRI. The *Order on Reconsideration* adopted a uniform compliance date for all providers which results in approximately twenty months (almost two full years) from the **Federal Register** publication to implement the requirements. This extension accounts for the resource concerns expressed by Petitioners, while maintaining the important role the MDRI requirements play in facilitating the ability of the American public to call for help, and receive emergency information and/or assistance during natural disasters, and other emergency situations. The Commission also granted a presumption of confidentiality for filed RuDs which eliminates the additional step for small entities of having to submit a request for confidential treatment under § 0.459 of the Commission's rules when filing an RuD with the Commission when requested. As discussed above, in the *Order on Reconsideration* the Commission considered the other alternatives in the Petitioners' request for clarification and/reconsideration and we declined to adopt any of those approaches. The Commission was not persuaded that the increased Commission involvement, expenditure of Commission resources, and the undue delay in implementing the MDRI which would have occurred had we adopted the alternatives requested by Petitioners and commenters was in the public interest, or outweighed the benefits of moving forward with the MDRI requirements as adopted in the *Report and Order*.

III. Ordering Clauses

52. Accordingly, *it is ordered*, pursuant to sections 1, 4(i), 4(j), 4(n), 201(b), 214(d), 218, 251(e)(3), 301, 303(b), 303(g), 303(r), 307, 309(a), 316, 332, 403, 405, 615a-1, and 615c of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i) and (j), 154(n), 201(b), 214(d), 218, 251(e)(3), 301, 303(b), 303(g), 303(r), 307, 309(a), 316, 332, 403, 405, 615a-1, and 615c, and § 1.429 of the Commission's rules, 47 CFR 1.429, that this Order on Reconsideration *is adopted*.

53. *It is further ordered* that Part 4 of the Commission's rules, 47 CFR part 4, *is amended* as set forth in the Appendix, and that such rule amendments *shall be effective* 30 days after publication in the **Federal Register**.

54. *It is further ordered* that the Office of the Managing Director, Performance Program Management, *shall send* a copy of this Order on Reconsideration in a report to be sent to Congress and the

Government Accountability Office pursuant to the Congressional Review Act, 5 U.S.C. 801(a)(1)(A).

List of Subjects in 47 CFR Part 4

Airports, Communications common carriers, Communications equipment, Reporting and recordkeeping requirements, Telecommunications.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 4 as follows:

PART 4—DISRUPTIONS TO COMMUNICATIONS

- 1. The authority citation for part 4 continues to read as follows:

Authority: 47 U.S.C. 34–39, 151, 154, 155, 157, 201, 251, 307, 316, 615a–1, 1302(a), and 1302(b); 5 U.S.C. 301, and Executive Order no. 10530.

- 2. Amend § 4.17 by revising paragraph (e) to read as follows:

§ 4.17 Mandatory Disaster Response Initiative.

* * * * *

(e) Compliance with the provisions of this section is required beginning May 1, 2024, or 30 days following publication of an announcement that OMB review is completed, whichever occurs later. The Commission will revise this section once the compliance date is established.

[FR Doc. 2023–28834 Filed 1–25–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 227

Docket No. FRA–2009–0044, Notice No. 2]

RIN 2130–AC14

Emergency Escape Breathing Apparatus Standards

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

ACTION: Final rule.

SUMMARY: FRA is amending its regulations related to occupational noise exposure in three ways. First, in response to a congressional mandate,

FRA is expanding those regulations to require that railroads provide an appropriate atmosphere-supplying emergency escape breathing apparatus to every train crew member and certain other employees while they are occupying a locomotive cab of a freight train transporting a hazardous material that would pose an inhalation hazard in the event of release during an accident. Second, FRA is changing the name of this part of its regulations from “Occupational Noise Exposure” to “Occupational Safety and Health in the Locomotive Cab” to reflect the additional subject matter of this final rule and to make other conforming amendments. Third, FRA is removing the provision stating the preemptive effect of this part of FRA's regulations because it is unnecessary.

DATES: This final rule is effective March 26, 2024. The incorporation by reference of certain publications listed in this rule is approved by the Director of the Federal Register as of March 26, 2024.

FOR FURTHER INFORMATION CONTACT: Michael Watson, Occupational Safety and Health Manager, Office of Railroad Safety, telephone 202–493–9544, email: michael.watson@dot.gov or Richard Baxley, Attorney-Adviser, Office of the Chief Counsel, telephone: 202–853–5053, email: richard.baxley@dot.gov.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

AAR—Association of American Railroads
 AIHA—American Industrial Hygiene Association
 ANSI—American National Standards Institute
 ASLRRRA—American Short Line and Regional Railroad Association
 BLET—Brotherhood of Locomotive Engineers and Trainmen
 BNSF—BNSF Railway Company
 BRS—Brotherhood of Railroad Signalmen
 BS—British Standards Institution
 CEN—European Committee for Standardization
 CFR—Code of Federal Regulations
 CO₂—carbon dioxide
 DOT—U.S. Department of Transportation
 EEBA—emergency escape breathing apparatus
 EN—European standard
 FRA—Federal Railroad Administration
 FRSA—the former Federal Railroad Safety Act of 1970, repealed and reenacted as positive law primarily at 49 U.S.C. ch. 201
 HMIS—Hazardous Materials Information System
 IDLH—immediate danger to life or health or immediately dangerous to life or health
 IFRA—Initial Regulatory Flexibility Analysis
 ISEA—International Safety Equipment Association
 ISO—International Organization for Standardization

LBIA—the former Locomotive (Boiler) Inspection Act, repealed and reenacted as positive law in 49 U.S.C. 20701–20703
 LPG—liquefied petroleum gas
 NIOSH—National Institute for Occupational Safety and Health
 NPRM—notice of proposed rulemaking
 NS—Norfolk Southern Railway Company
 NTSB—National Transportation Safety Board
 O₂—Oxygen
 OMB—Office of Management and Budget
 OSHA—Occupational Safety and Health Administration
 PHMSA—Pipeline and Hazardous Materials Safety Administration
 PIH material—poison inhalation hazard material
 ppm—parts per million
 PTC—positive train control
 RCO—remote control operator
 RFID—radio frequency identification
 RIA—Regulatory Impact Analysis
 RSIA—Rail Safety Improvement Act of 2008, Public Law 110–432, Division A
 SBA—Small Business Administration
 SCBA—self-contained breathing apparatus
 SCSR—self-contained, self-rescuer
 SNPRM—supplemental notice of proposed rulemaking
 T&E employees—train and engine service employees
 UP—Union Pacific Railroad Company
 UTU—United Transportation Union

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I. Executive Summary

A. Purpose of Regulatory Action

After railroad worker fatalities resulted from the inhalation of chlorine gas following rail accidents in 2004 and 2005, NTSB issued a recommendation that FRA require railroads to provide emergency escape breathing apparatuses (EEBA’s) to their locomotive crewmembers.¹ Subsequently, in October 2008, Congress enacted the RSIA.² Section 413 of the RSIA mandated that FRA issue regulations requiring railroads to provide EEBA’s, and training in their use, for train crews in the locomotive cabs of any freight train transporting a hazardous material in commerce that would present an inhalation hazard in the event of a release. The purpose of this final rule is to respond to that statutory mandate, and it also responds to NTSB Safety Recommendation R–05–17.³

FRA first issued an NPRM responsive to the mandate of section 413 in October 2010.⁴ Based on the cost-benefit analysis in the NPRM, and the comments received in response to the NPRM, FRA issued a guidance document⁵ rather than a final rule. FRA

¹ NTSB Recommendation R–05–17. <https://www.ntsb.gov/investigations/AccidentReports/Reports/RAR0504.pdf>.

² Public Law 110–432, Div. A, 122 Stat. 4848, October 16, 2008 (49 U.S.C. 20166).

³ Collision of Norfolk Southern Freight Train 192 With Standing Norfolk Southern Local Train P22 With Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005, which is posted at <https://www.ntsb.gov/investigations/AccidentReports/Reports/RAR0504.pdf>.

⁴ 75 FR 61386 (Oct. 5, 2010).

⁵ Federal Railroad Administration Guidance for Developing an Atmosphere-Supplying Emergency

intended for railroads to use the guidance document to develop EEBA programs to protect railroad employees involved in transporting hazardous materials posing an inhalation hazard. However, NTSB found that the guidance document did not satisfy its recommendation, and the statutory mandate remained in place. FRA then issued an SNPRM, with some revisions to the NPRM, on March 22, 2023, to open the matter again to public comment. Having considered the public comments on the SNPRM, FRA is promulgating this final rule governing the provision of EEBA’s as required by statute.

B. Summary of Major Provisions

This final rule amends subpart C of 49 CFR part 227 to require any freight railroad to provide a covered employee an appropriate atmosphere-supplying EEBA when occupying a locomotive cab of a train transporting a hazardous material that would pose an inhalation hazard if released during an accident. Employees covered under this final rule include train employees, their supervisor, a deadheading employee, and any other employee designated by the railroad who is in the cab of a locomotive. This this final rule addresses the inhalation hazards associated with the hazardous materials that PHMSA identifies as “materials poisonous by inhalation,” which are commonly referred to as “PIH materials” and are defined by PHMSA’s Hazardous Materials Regulations as: (1) a gas meeting the defining criteria in 49 CFR 173.115(c) (*i.e.*, Division 2.3—Gas poisonous by inhalation) and assigned to Hazard Zone A, B, C, or D in accordance with 49 CFR 173.116(a); (2) a liquid, other than a mist, meeting the defining criteria regarding inhalation toxicity in 49 CFR 173.132(a)(1)(iii) and assigned to Hazard Zone A or B in accordance with 49 CFR 173.133(a); or (3) any material identified as an inhalation hazard by a special provision in column 7 of the table in 49 CFR 172.101.⁶

This final rule requires railroads that transport a PIH material on the general railroad system of transportation to establish and carry out programs for: selection, procurement, and provision of EEBA’s; inspection, maintenance, and replacement of EEBA’s; and instruction of employees in the use of EEBA’s. Railroads are required to identify individual employees or positions to be

Escape Breathing Apparatus Program (Dec. 2016). <https://railroads.dot.gov/library/federal-railroad-administration-guidance-developing-atmosphere-supplying-emergency-escape>.

⁶ 49 CFR 171.8.

placed in their general EEBA programs so that a sufficient number of EEBA's are available and to ensure that the identified employees or incumbents of the identified positions know how to use the devices. This final rule requires railroads to provide for storage of EEBA's in locomotive cabs to enable employees to access the apparatus quickly in the event of a release of a hazardous material that poses an inhalation hazard.

Because the new regulation is being placed in 49 CFR part 227, noncompliance with these regulations may trigger enforcement action and penalties as described in 49 CFR 227.9. FRA is also making conforming changes, minor corrections, and updates to some of the existing provisions of part 227. Further, FRA is removing the provision at 49 CFR 227.7 on the preemptive effect of part 227 as it is unnecessary because it is duplicative of statutory law at 49 U.S.C. 20106 and case law. *See Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 613; 47 S.Ct. 207, 210 (1926).

C. Costs and Benefits

FRA analyzed the economic impact of this final rule. FRA estimated the costs to be incurred by railroads and the qualitative benefits of fewer injuries to crewmembers from PIH material releasing after an accident/incident.

This final rule requires that a railroad provide an EEBA for each covered

employee in a locomotive cab on a freight train transporting any PIH material. These EEBA's will provide neck and face coverage with respiratory protection for the covered employees. Railroads must also ensure that the equipment is maintained and in proper working condition. Finally, railroads are required to train covered employees on the use of the EEBA's. The main objective of this final rule is to protect covered employees from the risk of exposure to PIH materials while the employees are in the locomotive cab or escaping from a hazardous materials release posing an inhalation hazard.

Details on the estimated costs of this final rule can be found in the Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (FRA-2009-0044). The RIA presents estimates of the costs likely to occur over the first 10 years of the final rule. The analysis includes estimates of costs associated with the purchase of EEBA's and installation, employee training, and recordkeeping.

FRA has estimated costs for three options that are permissible under the final rule. These include:

- *Option 1: Employee Assignment*—EEBA's are assigned to all covered employees and considered part of their equipment.
- *Option 2: Locomotive Assignment*—EEBA's are assigned to and kept in locomotives.
- *Option 3: Equipment Pooling*—EEBA's are pooled at rail yards and kept in storage

lockers where employees would check-in and check-out the EEBA when PIH is being hauled.

For all three options, FRA developed estimates using a closed-circuit EEBA.⁷ For the "Employee Assignment" option, FRA estimates that the costs associated with issuing each T&E employee (with an estimated 60,000 T&E employees) with an EEBA as their own personal equipment. The "Locomotive Assignment" option would require installing EEBA devices in all locomotives in a railroad's fleet, regardless of whether a locomotive is part of a train that is transporting PIH material. There are approximately 24,000 locomotives owned by Class I railroads, and FRA estimates that at least three apparatuses would have to be installed in each locomotive, one apparatus each for the conductor, the engineer, and an additional covered employee. In the "Equipment Pooling" option, FRA considered only having EEBA's provided in trainsets that were transporting PIH. EEBA's would be brought on board after a determination is made on a case-by-case basis.

FRA estimates the 10-year costs of the final rule to be between \$27.1 million to \$91.9 million, discounted at 7 percent. The following table shows the total costs of this final rule, over the 10-year analysis period.

Total 10-Year Costs (2021 Dollars)⁸

Category	10-Year cost (\$)	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Option 1: Employee Assignment	92,327,892	79,247,309	86,066,845	11,283,034	10,089,660
Option 2: Locomotive Assignment	107,153,842	91,909,968	99,855,523	13,085,912	11,706,114
Option 3: Equipment Pooling	33,546,542	27,116,550	30,415,557	3,860,787	3,565,631

The benefits associated with this final rule are qualitative in nature and relate to the prevention of causalities and injuries. This rule is expected to improve railroad safety by ensuring that all covered employees in locomotives on freight trains transporting PIH material can safely vacate the exposed area if a PIH material release were to occur. The primary benefits include heightened safety for covered employees and, as a result, earlier awareness/ notification to the public of any catastrophic release of a PIH material. Implementation of this rule should mitigate the injuries to covered

employees from PIH material releasing after an accident/incident.

II. Statutory Authority

Section 413 of the RSIA mandates that the Secretary of Transportation (Secretary) adopt regulations requiring railroads to provide EEBA's for the train crews in the locomotive cabs of any freight train transporting a hazardous material in commerce that would present an inhalation hazard in the event of a release. Specifically, the statute instructs the Secretary to prescribe regulations requiring railroads to: (1) ensure that EEBA's affording suitable "head and neck coverage with

respiratory protection" are provided "for all crewmembers" in a locomotive cab on a freight train transporting "hazardous materials that would pose an inhalation hazard in the event of a release;" (2) provide a place for convenient storage of EEBA's in the locomotive that will allow "crewmembers to access such apparatus quickly;" (3) maintain EEBA's "in proper working condition;" and (4) provide crewmembers with appropriate instruction in the use of EEBA's. The Secretary has delegated the responsibility to carry out his responsibilities under this section of the RSIA to the Administrator of FRA. 49

⁷ A closed-circuit EEBA is a device designed for use as respiratory protection during entry into hazardous atmospheres that can be immediately dangerous to life and health and are described as

an apparatus of the type in which the exhaled breath is rebreathed by the wearer after the CO₂ has been effectively removed and oxygen concentration restored to suitable levels.

⁸ Numbers in this table and subsequent tables may not sum due to rounding.

CFR 1.89(b). Additionally, FRA is issuing this final rule under the authority of 49 U.S.C. 20103 and 20701–20703, as delegated to the Administrator of FRA pursuant to 49 CFR 1.89(a).

III. Background

A. Accident History and NTSB Recommendation R–05–17

As noted in the 2010 NPRM, historical data suggests limited train crew injuries and fatalities related to the catastrophic release of a PIH material; in the last decade (2013 to 2022), there were no PIH-related fatalities of, or injuries to, T&E personnel.

While rail accidents involving the release of PIH materials are rare; as demonstrated by the June 2004 rail accident in Macdona, Texas, and the January 2005 accident in Graniteville, South Carolina, such accidents can be deadly to both the crew members involved and others in the vicinity. Both the Macdona and Graniteville accidents involved the release of a PIH material (chlorine) and both accidents resulted in the deaths of crewmembers.

The collision near Macdona occurred on June 28, 2004. According to the NTSB's report,⁹ a westbound freight train traveling on the same main line track as an eastbound freight train struck the midpoint of the 123-car eastbound train as it was leaving the main line to enter a parallel siding. The collision derailed the 4 locomotive units and the first 19 cars of the westbound train as well as 17 cars of the eastbound train. As a result of the derailment and pileup of railcars, the 16th car of the westbound train, a pressure car loaded with liquefied chlorine, was punctured. Chlorine escaping from this car immediately vaporized into a cloud of chlorine gas that engulfed the accident area to a radius of more than 700 feet. Three people, including the conductor of the westbound train and two local residents, died as a result of chlorine gas inhalation.

The Graniteville accident occurred on January 6, 2005, when a freight train encountered a switch that had been improperly lined. The improperly lined switch diverted the train from the main line onto an industry track. Once on the industry track, the train struck an unoccupied, parked train. The collision resulted in the derailment of two locomotives and 16 freight cars on the diverted train, as well as the locomotive

and one of the two cars of the parked train. There were three tank cars containing chlorine among the derailed cars on the diverted train. One of the cars containing chlorine was breached causing a release of chlorine gas, which resulted in the train engineer and eight other people dying from chlorine gas inhalation.¹⁰

Following the Macdona and Graniteville accidents, the NTSB issued Safety Recommendation R–05–17 to FRA recommending that FRA determine the most effective methods of providing emergency escape breathing apparatus for all crewmembers on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of unintentional release, and then require railroads to provide those breathing apparatus to their crewmembers along with appropriate training.

B. FRA Sponsored Study

In response to NTSB Safety Recommendation R–05–17, FRA commissioned a study of EEBA's in cooperation with the railroad industry and railroad labor organizations. As part of the study, FRA compiled factual information, performed technical, risk, and economic analyses, and made recommendations on “the use of [EEBA's] by train crews who may have exposure to hazardous materials [that] would pose an inhalation hazard in the event of unintentional release.” The study, published in 2009, provided information and recommendations on the use of EEBA's by train crews who may be exposed to hazardous materials that pose inhalation hazards. The study concluded that railroads should consider using EEBA's on trains transporting hazardous materials that pose an inhalation hazard.¹¹ Part of the preamble to this final rule draws from the study; however, after further consideration of the issues involved and consultation with representatives of the railroad industry and railroad labor organizations (as discussed under “Section VII. Information and Recommendations Provided by the Railroad Industry and Railroad Labor Organizations after the Study”), FRA has come to different conclusions on a number of matters, including the

minimum breathing time that EEBA's should provide, the analysis of different methods of distribution of the devices, and the costs and benefits of various EEBA alternatives.

C. FRA's 2016 Guidance for Developing an EEBA Program

In December 2016, FRA published, in the absence of a final rule, Guidance for Developing an EEBA Program.¹² This provided guidance to railroads for developing and implementing an individualized EEBA program to protect their crewmembers. The guidance highlights factors to consider when selecting an appropriate EEBA and explains various components to evaluate when developing an EEBA program. However, the statutory mandate remains in place, and NTSB found that the Guidance did not satisfy its recommendation. In addition, FRA is unaware of the Guidance leading to any railroad developing an EEBA program or making EEBA's generally available to their crewmembers.

IV. Selection of the Appropriate EEBA by Railroads

As explained in the 2010 NPRM, EEBA's are “respirators” and generally there are two different types of respirators: air-purifying and atmosphere-supplying. Air-purifying respirators remove specific air contaminants by passing ambient air through an air-purifying element, such as an air-purifying filter, cartridge, or canister. Atmosphere-supplying respirators supply breathing air from a source independent from the ambient atmosphere. Types of atmosphere-supplying respirators include airline supplied-air respirators and SCBA units. Based on the factors presented below, FRA is requiring an atmosphere-supplying respirator that provides adequate head and neck protection as well as giving sufficient time for its user to escape an IDLH atmosphere.¹³

In the 2010 NPRM, FRA noted that it was aware of three main organizations that had promulgated standards governing the use and maintenance of respirators—NIOSH, OSHA, and the ISO.¹⁴ Since issuance of the 2010 NPRM, FRA has become aware of a

¹² Federal Railroad Administration Guidance for Developing an Atmosphere-Supplying Emergency Escape Breathing Apparatus Program (Dec. 2016). <https://railroads.dot.gov/elibrary/federal-railroad-administration-guidance-developing-atmosphere-supplying-emergency-escape>.

¹³ NIOSH defines an IDLH as “an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual's ability to escape from a dangerous atmosphere.” See 29 CFR 1910.134(b).

¹⁴ 75 FR 61386, 61390 (Oct. 5, 2010).

⁹ “Collision of Union Pacific Railroad Train MHOTU–23 With BNSF Railway Company Train MEAP–TUL–126–D With Subsequent Derailment and Hazardous Materials Release, Macdona, Texas, June 28, 2004,” Railroad Accident Report NTSB/RAR–06/03, Washington, DC.

¹⁰ “Collision of Norfolk Southern Freight Train 192 With Standing Norfolk Southern Local Train P22 With Subsequent Hazardous Materials Release at Graniteville, South Carolina, January 6, 2005,” Railroad Accident Report NTSB RAR–05/04, Washington, DC.

¹¹ See “Emergency Escape Breathing Apparatus,” FRA Office of Research and Development, Final Report, May 2009, which is posted at https://railroads.dot.gov/sites/fra.dot.gov/files/fra_net/1419/ord0911.pdf.

fourth organization, CEN, that has also developed two relevant standards.

As explained in the 2010 NPRM, NIOSH, located within the Centers for Disease Control and Prevention of the U.S. Department of Health and Human Services, worked with government and industry partners to develop certification standards for respirators. The NIOSH regulations, codified at 42 CFR part 84, establish the requirements for NIOSH certification of respirator equipment. NIOSH has also developed information on safe levels of exposure to toxic materials and harmful physical agents and issued recommendations for respirator use.

ISO has also established standards for respirator maintenance and use. ISO is a network of national standards institutes in 162 countries, including the United States, through the American National Standards Institute. ISO develops international standards to assist in ensuring the safe performance of a wide range of EEBAs. While ISO is not a government organization, it works to establish performance standards that have scientific and technological bases while ensuring that products, falling within its purview, are safe and reliable for consumers. The organization has promulgated ISO 23269–1:2008, “Ships and marine technology—Breathing apparatus for ships—Part 1: Emergency escape breathing devices (EEBD) for shipboard use, First Edition (2008–02–01).” While ISO 23269–1:2008 is directed towards EEBAs on ships and marine technology, the standard can be reasonably transferred to the railroad environment. ISO 23269–1:2008 establishes performance specifications for EEBAs that are intended to provide air or oxygen to a user to facilitate escape from accommodation and machinery spaces, similar to a locomotive cab, with a hazardous atmosphere.¹⁵

CEN serves a similar purpose as ISO in that it develops consensus standards for European countries. In creating these standards, CEN relies on the input of technical experts, business and consumer groups, and other societal interest organizations. Additionally, there is a measure of interconnectedness between the ISO and CEN, as CEN has entered into a cooperative agreement with ISO to avoid duplicative standards.

¹⁵ However, as explained below, FRA believes that the minimum breathing capacity allowed by ISO 23269–1:2008, which is 10 minutes, is insufficient for the anticipated use in a railroad environment. As a result, the proposed rule requires a minimum breathing capacity of 15 minutes, which would be equally applicable to EEBAs certified under the requirements of NIOSH. See 42 CFR part 84, or ISO 23269–1:2008.

In the area of escape respirators, CEN has developed two standards that railroads could use to identify an appropriate EEBA to provide to an employee. The first standard establishes requirements for approving closed-circuit escape respirators, *see* BS EN 13794:2002, “Respiratory Protective Devices—Self-Contained, Closed-Circuit Breathing Apparatus for Escape—Requirements, Testing, Marking (November 2002),” while the second standard establishes requirements for approving open-circuit escape respirators, *see* BS EN 1146:2005, “Respiratory Protective Devices—Self-Contained, Open-Circuit Compressed Air Breathing Apparatus Incorporating a Hood for Escape—Requirements, Testing, Marking (February 2006).” While BS EN 13794:2002 and BS EN 1146:2005 are standards created for the European market, FRA finds that compliance with either standard would be adequate to establish the reliability of a device, subject to the provisions of this regulation, specifically, 49 CFR 227.203, which is discussed in detail below. *See* VIII. Public Comment on the NPRM, with FRA’s Response and IX. Section-by-Section Analysis.

Additionally, OSHA, located within the U.S. Department of Labor, is responsible for developing and enforcing general workplace safety and health regulations related to respiratory protection. In furtherance of this responsibility, OSHA has promulgated extensive regulations governing the maintenance, care, and use of respirators of all types, including emergency escape devices. *See* 29 CFR 1910.134.

In drafting this final rule, FRA considered the comments submitted in response to the SNPRM and the requirements of both Federal agencies (NIOSH and OSHA) as well as the ISO and EN standards to assist in determining the possible types of EEBAs that may be used by railroad employees covered under this rule. To determine which type or types of EEBAs are appropriate, FRA has looked to the comprehensive selection process for respirators developed by NIOSH.¹⁶ For purposes of EEBAs deployed in the railroad environment, the two major NIOSH factors to consider in selecting a respirator are to determine whether the respirator is intended for: (1) use in an oxygen-deficient atmosphere (*i.e.*, less than 19.5 percent O₂); and (2) use in, entry into, or escape from, unknown or

¹⁶ <https://www.cdc.gov/niosh/docs/2005-100/default.html>.

IDLH atmospheres (*e.g.*, an emergency situation).

FRA’s investigation into the Graniteville accident found that the concentration of the toxic chlorine cloud over the accident site area was estimated to be approximately 2,000 parts per million (ppm).¹⁷ OSHA classifies chlorine as having an IDLH level of 10 ppm. FRA roughly estimated the distance between the final resting spot of the breached chlorine tank car in relation to the train crew, as well as the wind speed and size of breach, to determine that the chlorine plume reached the crew within two minutes. The coroner’s report on the eight fatalities to persons who were not railroad employees in the Graniteville accident indicated that the primary cause of death was asphyxia, or lack of oxygen. The coroner listed the engineer’s primary cause of death as lactic acidosis. Exposure to chlorine gas was attributed as the secondary cause of all deaths in the accident. Under the circumstances presented, it appears that both NIOSH selection criteria were met. There may have been an oxygen-deficient atmosphere, and there certainly was toxic-gas concentration exceeding IDLH levels.

The Graniteville accident demonstrated that railroad hazardous material incidents (meaning collisions, derailments, or other train accidents) involving the catastrophic loss of certain PIH materials have the potential to release IDLH concentrations and/or displace oxygen very quickly without the crew’s knowledge. In such circumstances, the crew may need to respond to an incident by donning their EEBAs even before assessing the damage caused by an accident. Considering the variables associated with the transportation of hazardous materials via rail and the potential hazards that exist, FRA is, based on the NIOSH selection criteria, proposing to require that railroads provide an escape-type respirator to covered employees.

The single function of escape-type EEBAs is to allow sufficient time for an individual working in a normally safe environment to escape from suddenly occurring respiratory hazards. Given this function, the selection of the device does not rely on assigned protection factors designated by OSHA.¹⁸ Instead,

¹⁷ *See* R.L. Buckley, Detailed Numerical Simulation of the Graniteville Train Collision, Savannah River National Laboratory, Report WSRC-MS-2005–00635 October 2005.

¹⁸ “Assigned protection factor” means the level of safety that a respirator or a class of respirators is expected to provide to employees. Assigned protection factors were developed by OSHA to

these escape-type respirators are selected based on a consideration of the time needed to escape in the event of IDLH or oxygen-deficient conditions.

Pursuant to statutory requirements, and as proposed in the 2010 NPRM and 2023 SNPRM, this final rule would require providing a device with head and neck coverage. Escape-type SCBA devices are commonly used with full-face pieces or hoods. Such devices are usually rated from 3- to 60-minute units depending on the supply of air. The following two types of atmosphere-supplying SCBA would satisfy the protection requirements of this regulation:

- *Open-Circuit SCBA.* These are typically classified as positive pressure, open-circuit systems whereby the user receives (inhales) clean air with 21 percent O₂ from a compressed air cylinder worn with a harness on the back. The user's exhaled breath contains significant amounts (15 percent) of unused oxygen that is vented to atmosphere. Because much of the user's exhaled breath vents to atmosphere, the size of open-circuit systems is larger than that of closed-circuit systems. Open-circuit SCBA systems may employ full face masks or hoods and typically require an airtight seal against the head, face, or aural/nasal area.

- *Rebreathers.* These can be positive-pressure or negative-pressure systems. Classified as closed-circuit O₂ systems, rebreathers perform as their name implies. The user rebreathes his or her breath. A chemical scrubber removes the CO₂ from the user's breath and makes up metabolized O₂ from a small bottle of compressed 100-percent O₂. Because the user is rebreathing his or her exhaled air containing 15 percent oxygen, a rebreather is four times more efficient than an open-circuit system. As a result, such systems are capable of either lasting much longer than open-circuit systems (if size were comparable) or providing the same breathing duration as an open-circuit system but in a smaller package. Rebreathers may be employed with full-face masks or hoods. Negative pressure rebreathers do not require a tight seal.

First responders (such as firefighters) commonly use open-circuit positive pressure SCBA systems for entering the scene of an emergency event. However, such devices may not be best situated to the railroad environment. In addition to being heavy and cumbersome from incorporating a large, compressed air

cylinder mounted to a harness, they also commonly incorporate use of a full-face piece. Depending on the program developed by each railroad, the incorporation of a full-face piece may be a logistically and economically difficult undertaking. To be effective, a full-face piece requires an airtight seal around the user's face, which means that each user must be personally fitted for the device. It also means the user must be cleanly shaven or otherwise free of excessive facial hair. The enforcement of such a requirement would be difficult at best.

FRA believes that hoods provide a useful alternative to full-face masks while protecting the face and neck. Hoods are universal fitting devices and can be used with open and closed-circuit SCBAs. Because they are universal fitting, hoods do not require personally fitting the user, and hoods operate efficiently regardless of most eyewear, facial features, or hair. Significantly, hoods also allow the wearer to communicate while using the SCBA.

Experience has shown that a plume of hazardous material can travel quickly. As a result, it is vitally important that the train crew has adequate breathing time available to allow each member to move a significant distance from the site while being protected from the ambient atmosphere. Because such incidents will often result from a collision, as was the case in Macdona and Graniteville, consideration should be given to those situations where additional time may be used to assist or extricate fellow crewmembers that may be hurt or trapped. For example, if it takes 10 minutes to assist a fellow crewmember and each is wearing a 15-minute open-circuit respirator, each crewmember is left with five minutes to escape from any plume that may be present. Moreover, often individuals will have a tendency to breathe rapidly and deeply in stressful situations, which will shorten the breathing time available in a respirator. In selecting an EEBA with sufficient breathing time, each railroad should take into consideration these factors and others that contribute to the "Murphy's Law" effects of accidents such as an incident occurring at night or in tight terrain. As a result, FRA is proposing to require that EEBA's being provided to covered employees have at least a 15-minute minimum breathing capacity. Further, FRA encourages railroads to consider EEBA's with a longer breathing capacity, to provide an extra margin for escape under stressful circumstances.

V. Provision of EEBA's to Covered Employees

FRA has decided not to mandate a specific method by which railroads must provide EEBA's to covered employees. See discussion of covered employees at IX. Section-by-Section Analysis of §§ 227.201 and 227.211, below. FRA recognizes that there are differing methods for effectively distributing suitable EEBA's among a railroad's covered employees, its locomotive fleet, or both. Each of these options has advantages and disadvantages. Given these factors, FRA believes that the regulation most efficiently serves the RSIA mandate by allowing each railroad to choose the method of distribution that works for it as long as: (1) covered employees are provided with a suitable device while they are in the locomotive cab of a freight train transporting a PIH material; and (2) transportation of a covered hazardous material is not unduly delayed, thereby posing additional risk, particularly where the covered train (or a locomotive intended to be used to haul a covered train) is interchanged from one railroad to another. See VII. Information and Recommendations Provided by the Railroad Industry and Railroad Labor Organizations after the Study, for relevant remarks. In the following paragraphs, FRA discusses five options available to railroads for providing EEBA's to covered employees.

Under this final rule, EEBA's may be treated as part of an employee's permanently issued items, similar to eye protection, radios, and lanterns. This method of distribution would allow railroads to permanently issue an EEBA to each potentially covered employee (e.g., for a freight railroad that regularly hauls one or more PIH materials, possibly all of its train employees). The device would be in the user's control at all times, and each individual would be responsible for having the device in his or her possession. The carrier would still be responsible for ensuring the state of the equipment through an inspection program; however, the company would be relieved of most of the responsibilities for EEBA management. Theoretically, this option would tend to result in better cared for equipment and lower replacement costs. Moreover, personal assignment allows for customization of the EEBA. However, permanently issuing EEBA's to employees results in substantial costs. Over a 10-year period, total costs would be approximately \$92 million. Other negative aspects of treating EEBA's as a permanently issued item include difficulty in monitoring the condition of

designate to employers the proper type of device that is required in selecting a respirator. According to OSHA, assigned protection factors are not applicable to respirators used solely for escape.

the EEBA and ensuring that the required EEBA is with the user at all times. Additionally, permanently issuing the EEBA would add to an already lengthy list of items expected to be carried by train employees.

Alternatively, EEBA's may also be permanently assigned to an individual as a dedicated personal item issued at the start of each shift and recovered at the end of each shift as part of the clock-in/clock-out process. This method allows for individual customization and allows the EEBA to be with the user at all times the user is on duty, while supporting centralized inspection and maintenance. However, the railroad may experience greater costs due to the increased size of its EEBA inventory since all train employees who have the potential to work in the locomotive cab of a freight train transporting a PIH material would require stocked EEBA's. This alternative may also create difficulties in the provision of EEBA's if the train employees who must have access to the EEBA's have more than one on-duty location.

A third option is to treat EEBA's as "pool" items. The EEBA's would not be assigned to a specific individual. They would be issued at the start of each shift and recovered at the end of each shift as part of the clock-in/clock-out process. This option supports centralized inspection and maintenance while minimizing number of EEBA's required, which could reduce costs substantially. FRA estimates that trains transporting PIH materials amount to approximately 0.2 percent of all train traffic, as cars carrying PIH materials are concentrated in relatively few trains. If railroads chose this option, they could stock enough EEBA's to cover 10 percent of the entire locomotive fleet for approximately \$33.5 million over a 10-year period. Equipping enough EEBA's to cover 10 percent of the entire locomotive fleet should allow for every locomotive that will be part of train transporting a PIH material to be equipped with the necessary devices for each covered employee provided that the railroads exercise adequate resource management with respect to EEBA's. This would ensure that the EEBA would be with the user throughout his or her entire shift. However, railroads likely would have to allocate or build space at one or more locations (depending on the size of the railroad) to warehouse EEBA's that are not being used by covered employees. Moreover, an employee must be assigned to monitor the handing out and returning of devices. This system also may have hidden costs, such as losing the potential benefits of

a sense of employee "ownership" if EEBA's are treated as common property.

A fourth option is to have EEBA's permanently mounted in each locomotive cab in the railroad's fleet. This method would ensure that trains transported by the railroad that include a PIH material are always adequately equipped, while supporting centralized inspection and maintenance. The negative aspects of permanently mounting the EEBA selected by the railroad in the cabs of the railroad's locomotive fleet include the increased size of the railroad's EEBA inventory if non-covered consists would transport the EEBA's and since EEBA's must be provided for worst-case crewing (including possible supernumerary personnel such as deadheading employees), increased management burden for tracking/recovery, increased management burden for item inspection and maintenance, and unavailability of customized EEBA's. Additionally, FRA has estimated that the total 10-year cost of outfitting all locomotives to be approximately \$106.8 million. These estimates could be reduced if railroads opted to dedicate a portion of their locomotive fleet to service for trains transporting PIH materials, subject to balancing any impact on operating efficiencies.

As discussed in section VII. Information and Recommendations Provided by the Railroad Industry and Railroad Labor Organizations after the Study, AAR has proposed that Class I railroads interchanging locomotives with each other will provide the same type of EEBA while also using the same method of equipping the locomotive, which would expedite interchange between two Class I railroads. However, the option of permanently mounting a specific type of EEBA within each locomotive owned by a Class I railroad could create delays at interchange if the locomotives from nonparticipating railroads also are offered in interchange to Class I railroads to haul covered trains. The delay could occur if the nonparticipating railroad delivers a locomotive in interchange that either lacks an EEBA of any kind or that has an EEBA that does not conform to the type specified under the Class I railroad's general EEBA program under § 227.211.

A fifth option is for EEBA's to be temporarily mounted in the locomotive cab as the train containing a shipment of PIH material is made up. Using this option would help to minimize the number of EEBA's required, while ensuring that each consist containing a PIH material is appropriately equipped. It would also allow the railroad to cater

efficiently to differing crew sizes. Drawbacks with this method include increased management burden for the initial issue of EEBA's to the consist, increased management burden for tracking/recovery, increased management burden for item inspection and maintenance, and unavailability of customized EEBA's.

FRA recognizes that these are only a few of the numerous options for the provision of EEBA's, each involving its own considerations. Any of these options (or combination of these options), including options that have not been discussed above, is acceptable under this final rule, as long as a suitable EEBA is provided by the railroad to each covered employee while they are in a locomotive cab of a covered train and the transportation of covered hazardous materials via rail is not unduly delayed.

VI. Information and Recommendations Provided by the Railroad Industry and Railroad Labor Organizations After the Study

As previously mentioned, representatives of both the railroad industry and railroad labor organizations cooperated with the FRA-sponsored study on the feasibility of providing EEBA's to train crews, the report of which was published in May 2009. AAR, UTU,¹⁹ and BLET also exchanged information and ideas with FRA on issues related to this rulemaking, as summarized below.

In July 2009, prior to the publication of the 2010 NPRM, representatives of AAR briefed FRA with information on AAR's exploration of alternative ways by which the rulemaking mandate under section 413 of the RSIA might be carried out. AAR has also offered recommendations to FRA on issues related to this rulemaking, including the type of EEBA and the mode of providing it that AAR thought would satisfy the statutory mandate. Subsequently, in a letter to FRA dated January 13, 2010, AAR encouraged FRA to incorporate by reference a draft specification establishing guidelines for: (1) vendors of EEBA's that would be used by Class I railroads; (2) mounting EEBA's on locomotives; and (3) requiring training support.

FRA considered incorporating by reference a finalized version of AAR's specification; however, FRA has ultimately decided not to do so. Many comments raised questions about the details of the specification, and FRA

¹⁹ UTU is now part of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART).

believes this final rule provides a clearer standard for efficiently complying with the RSIA mandate. Of course, AAR is free to rely on a final specification to normalize EEBA among Class I railroads, as long as the specification complies with the requirements in subpart C.

Additionally, in the course of drafting the 2010 NPRM, FRA representatives met with UTU and BLET representatives on March 31, 2010, who briefed FRA on issues related to the provision of EEBA. AAR was also in attendance at this meeting. UTU felt that EEBA should be “placed on all occupied locomotives which operate over a corridor where freight trains carry hazardous materials that pose an inhalation hazard in the event of a release.” Under UTU’s recommendation, each occupied locomotive would be required to have working EEBA—even if the occupied locomotive is not part of a train carrying PIH materials—as long as the locomotive is operating over a rail line that carries such materials.

During the March 31, 2010, meeting, UTU indicated that it opposed issuing EEBA as personal items. UTU felt that adding an additional item to each train employee’s required personal equipment would unnecessarily burden crewmembers. UTU was concerned with not only the added weight, but also the extra responsibility for care and maintenance that would fall to train employees in the event that EEBA are provided as personal equipment. It contended that railroads are in a better position than the employees to maintain the devices.

Finally, UTU stressed that there must be sufficient training of train employees in the use of EEBA. Such training would ensure that train employees would know how to use EEBA if presented with a situation in the field where their use was required. UTU expressed a strong desire for regular, hands-on training with devices selected by the railroads to achieve these ends.

VII. Public Comment on the SNPRM, With FRA’s Response

A. Introduction

FRA received 7 sets of comments on the SNPRM from 8 different entities (AAR and ASLRRRA jointly submitted comments), covering a broad spectrum of interests which resulted in revisions to this final rule. These commenters included the railroad industry, a labor organization, the NTSB, and concerned individuals. In revising this final rule, FRA has considered each issue raised by the commenters, and it addresses those issues in this section.

B. Comments on the Preamble, With FRA’s Response

AAR and ASLRRRA argue that FRA has not adequately accounted for the costs of installation and recordkeeping associated with the managing of an EEBA program. They argue that FRA has not properly accounted for tasks such as developing and implementing testing and inspection protocols for devices, conducting scrap planning, tracking pilferage or damage, anticipating future EEBA purchases, assessing employee turnover, identifying EEBA reallocation needs, tracking wear and tear on mounting systems, and developing and implementing training for EEBA usage and management. However, FRA included these very considerations in the cost estimates presented in the SNPRM. FRA’s estimates were not broken down into such granular detail, but those same administrative and management considerations were included. AAR and ASLRRRA specifically point to the EEBA pooling option (the lowest cost option) as having the highest of these associated administrative costs. In response, FRA reexamined its initial administrative and management costs estimates, particularly as they relate to the EEBA pooling option, to ensure they are being properly accounted for and concluded the original cost estimates were correct.

AAR and ASLRRRA note that the hazmat exposure resulting from the 2014 Texas incident addressed in the SNPRM () was to battery acid, which is not a PIH or an asphyxiant. FRA has examined this incident and concluded that AAR and ASLRRRA are correct; this was not a hazmat release where an injury due to contact with the hazmat would have been prevented by an EEBA as contemplated in this rulemaking. FRA has also reexamined the other incident (2012, New Jersey) referred to in the SNPRM and arrived at the same conclusion. Accordingly, FRA has removed both incidents from its calculation of this rulemaking’s benefits. AAR and ASLRRRA also state that FRA does not address effective usage rates for EEBA when determining the costs and benefits. However, usage rates have no impact on the costs and since FRA has removed the two above incidents the effective usage rate has no impact on the estimated benefits either.

AAR and ASLRRRA argue that “[r]ailroads are safer now than they were when the RSIA was passed” stating that since 2008 there has been a “23 percent decrease in the mainline accident rate” and that “hazmat accident rates have declined by 55 percent” in the same period. They

contend that “operational changes related to the implementation of Positive Train Control, speed restrictions that are required for trains transporting poisonous-inhalation-hazard (PIH) materials, and improvements to tank cars have substantially reduced the likelihood of a PIH material release.” They also note that in “the SNPRM, FRA adjusts its 10-year benefit estimate downward from \$13.5 million to \$63,720” and that this “amounts to an annualized societal benefit estimate of only \$6,138.” They argue that FRA should not advance this EEBA regulation and instead put its resources toward continuing to minimize the number and consequence of rail accidents involving hazardous materials. In response to these comments, FRA notes that the RSIA mandates that the Secretary adopt regulations requiring railroads to provide EEBA for train crews occupying locomotive cabs of any freight train transporting a hazardous material in commerce that would present an inhalation hazard in the event of a release. Given this statutory mandate, FRA is issuing a rule that not only considers the costs, but also provides a mechanism to enhance safety for railroad employees transporting hazardous materials presenting an inhalation hazard if a release occurs. Moreover, FRA has recently undertaken a number of rulemaking initiatives in a variety of disciplines, including re-engineering tank cars (in cooperation with PHMSA), PTC, and amendments to operating rules, all designed to improve the safety of railroad operations, and thus reduce the rate of incidents, including those involving hazardous materials. As with all complex systems, however, there are occasions when failures do occur. This final rule provides an additional element of protection for covered employees should an accident with a PIH release occur in the future. AAR and ASLRRRA also suggest that FRA has no reasonable basis for issuing a final rule if, in FRA’s analysis, the costs exceed the benefits. However, a lack of quantifiable (*i.e.*, monetized) benefits, or quantifiable costs exceeding quantifiable benefits, is not dispositive for an agency’s rulemaking analysis. Indeed, OMB Circular A–4 directs agencies to describe benefits qualitatively when it is not possible to quantify or monetize all of a rule’s important benefits. Agencies should also take other factors, such as statutory mandates, into account when comparing the anticipated costs and benefits of a rulemaking. Here, Congress, through the RSIA, established

a statutory mandate to promulgate regulations that require railroads to provide EEBA's for all crewmembers in locomotive cabs on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of release and that alone provides a reasonable basis for issuing this final rule.

The individual commenter also states that a new cost-benefit analysis should be conducted. However, FRA already conducted a new cost-benefit analysis in the SNPRM and again analyzed the costs and benefits in this final rule. The same individual commenter also questions whether the addition of EEBA's to locomotive cabs will increase the risk of fire. FRA has examined this issue and found that EEBA's do not themselves present a fire risk and that their inclusion in a locomotive cab will not increase its flammability.

AAR and ASLRRRA also commented on the deadlines for compliance which are 12, 12, and 18 months respectively for Class I, II, and III railroads. AAR and ASLRRRA argue that the timeline of the 2010 NPRM (24, 30, and 36 months respectively) is more appropriate. However, given the length of time since the publication of the 2008 RSIA mandate, 2010 NPRM, FRA's issuance of guidance in 2016, and the 2023 SNPRM, railroads have been on notice about the need to provide EEBA's and the lengthy timelines from the 2010 NPRM are no longer necessary.

AAR and ASLRRRA's comments address concerns about the financial impact of the RSIA mandate on small entities in the railroad industry, which they contend lack pricing power to pass on the costs of this rule to their customers and have small capital budgets necessitating that other work, such as track maintenance, will have to be deferred to pay for it. AAR and ASLRRRA contend that while the initial costs for Class III railroads may indeed be modest, the ongoing costs for inspection, maintenance, replacement, and enforcement penalties will result in permanent ongoing expenditures that will be particularly impactful on small railroads as they are likely to: (1) focus on the purchase of EEBA's based on crew terminals and number of customers, (2) face higher costs than estimated and have limited options to benefit for bulk orders; and (3) face disproportionately high training costs. AAR and ASLRRRA estimate that the total compliance present costs²⁰ (at 7%) to be borne by Class II and III railroads at over \$6.6 million, or over \$945,000 on

an annualized basis. For just Class III railroads, ASLRRRA projects total present costs (at 7%) to amount to almost \$4.9 million, with the individual annualized cost to each of the 110 impacted railroads estimated to be \$6,333 per year, or more than four times the cost estimated in the SNPRM. As such, AAR and ASLRRRA ask that FRA exercise its discretion, in this particular instance, to provide a "de minimis" exception for railroad operations, similar to what FRA provided for PTC requirements, to exempt Class II and III railroads from the requirement to provide EEBA's.

While FRA understands ASLRRRA's concerns, the agency is constrained by section 413 of the RSIA. Unlike with PTC, Congress did not carve out an exemption for Class II and Class III railroads from the statutory requirement. See section 104 of the RSIA. Instead, Congress used broad language that covers any railroad carrier transporting hazardous materials that would pose an inhalation hazard in the event of release. In light of this language, FRA cannot institute an exception for Class II and III railroads without congressional action.

Notwithstanding these constraints, FRA has enacted measures to limit the costs for railroads. In particular, FRA has provided flexibility to allow railroads to pursue the most cost-effective way to provide EEBA's in accordance with the statutory requirements and this final rule. Additionally, small railroads could consider pooling resources wherever possible for requirements such as periodic training. Indeed, many small railroads are jointly owned by the same holding companies making resource pooling even easier. In light of the concerns raised above, FRA has reexamined its estimated costs for small railroads to ensure that their unique conditions are being properly accounted for and concluded they have been.

C. Section-Specific Public Comments, With FRA's Response

FRA received comments on changes to §§ 227.201(a)(1), 227.203(c), 227.207, 227.209, and 227.215 of the SNPRM.

1. Comments on § 227.201(a)(1), With FRA's Response

BRS and an individual commenter suggested that EEBA's should also be provided to employees working outside the locomotive cab such as signalmen and yard employees. In particular, BRS suggests that signalmen would benefit from EEBA's as they are among the first responders to rail accidents and would benefit from respiratory protection systems in the event of a hazardous material release.

The RSIA established a statutory mandate to promulgate regulations that require railroads to provide EEBA's "for all crewmembers in locomotive cabs on freight trains carrying hazardous materials that would pose an inhalation hazard in the event of release." If Congress had wanted the Secretary to promulgate more expansive regulations covering areas outside the locomotive cab, then it would have chosen different language requiring that FRA cover personnel in areas other than locomotive cabs, including signalmen and employees in rail yards. Since Congress did not do so, FRA does not propose to include requiring the provision of EEBA's at strategically placed locations in rail yards. Furthermore, the purpose of EEBA's is to allow railroad employees located in the cab to better escape an accident, they are not intended for use by responders. However, the rule in no way prohibits railroads from voluntarily distributing EEBA's to their employees not covered by this regulation.

AAR and ASLRRRA argue that FRA has exercised discretion beyond the statutory mandate of the RSIA by requiring that persons, other than solely crewmembers, be provided EEBA's when located in the locomotive cab of an in-service freight train transporting a PIH material. FRA agrees that the RSIA's mandate is for an EEBA to be provided "for all crewmembers." However, the RSIA does not limit which railroad employees in the cab of a locomotive must be provided with an EEBA and does not define crewmembers. FRA considered worst-case crewing scenarios that included possible supernumerary personnel such as supervisors and deadheading employees who might be in the locomotive cab during a PIH release and concluded that requiring the railroads provide such employees with EEBA's to be consistent with RSIA's mandate and in the general interest of employee safety.

2. Comments on § 227.203(c), With FRA's Response

AAR and ASLRRRA note that § 227.203(b) of the SNPRM proposed to require railroads to use an EEBA certified by NIOSH or meeting criteria set by specified industry organizations. Therefore, AAR and ASLRRRA argue no further showing of the adequacy of the EEBA should be necessary and that § 227.203(c) should be deleted. FRA disagrees because § 227.203(c) provides considerations beyond the minimum criteria required under the NIOSH, ISO, or EN standard. For example, FRA has concluded that the minimum breathing capacity allowed by ISO 23269-1:2008,

²⁰ AAR and ASLRRRA developed this estimate using an equipment pooling approach.

which is 10 minutes, is insufficient for the anticipated use in a railroad environment. As a result, this final rule requires a minimum breathing capacity of 15 minutes. FRA concluded, by the same logic, that the considerations for head and neck protection and accommodations for eyeglasses and a range of facial features contained in § 227.203(c) are necessary even if they go beyond the NIOSH, ISO, or EN standards. FRA is therefore keeping the requirements in § 227.203(c).

3. Comments on § 227.207, With FRA's Response

AAR and ASLRRRA comment that FRA goes beyond the rulemaking discretion afforded it in the RSIA in requiring pre-trip inspections of EEBA's in § 227.207(a)(1) and that such inspections would be overly burdensome. AAR suggests that FRA should rely instead on the periodic inspections required in § 227.207(a)(2).

The RSIA requires that EEBA's be maintained in proper working condition. FRA considers pre-trip inspections the most effective method of ensuring compliance with this statutory mandate because the final rule requires that an EEBA for each employee will be in the locomotive cab prior to departure. For example, FRA can envision scenarios where at least two crews could be relying on locomotive-mounted EEBA's and, absent a pre-trip inspection, the second crew would have no means to verify that the devices were present and ready for service. Such verification is essential to ensuring equipment is properly maintained. Therefore, FRA believes that the pre-trip inspection requirement is fully consistent with FRA's authority under the RSIA.

FRA also disagrees that the pre-trip inspection is an overly burdensome requirement. FRA expects that the pre-trip inspection will be a quick check to ensure that the appropriate accompaniment of EEBA's is provided and that those devices are charged to provide a minimum 15-minute breathing capacity, as well as any of other necessary checks that the manufacturer recommends. The nature of this pre-trip inspection may be as simple as visually inspecting and verifying that the case has not been tampered with and that all gauges and other indicators are in an acceptable range.

AAR and ASLRRRA also oppose the recordkeeping requirements in § 227.207 for the same reasons they oppose § 227.207(a)(1) above. FRA's response is also the same; the RSIA mandates that EEBA's be maintained in

proper working condition. Meeting this mandate requires some level of recordkeeping to ensure compliance. While FRA views pre-trip inspection records as necessary to ensure compliance with the RSIA mandate, it should be noted that the record of pre-trip inspections, depending on the device selected, may be as simple as the check-off/initialed card used on fire extinguishers. FRA also understands that some of the Class I carriers are considering using RFID tags to track and record the inspection of individual EEBA units. The use of this technology could possibly minimize the inspection and recordkeeping burden.

4. Comments on § 227.209, With FRA's Response

AAR and ASLRRRA comment that "there is simply no requirement in the statutory text and no functional safety rationale for FRA to require all railroad employees to be able to demonstrate knowledge of EEBA selection criteria, as proposed in § 227.209(2)(b)(6)." FRA believes that a demonstration of knowledge of EEBA selection criteria would ensure that employees know the purpose and limitations of the selected EEBA's (minimum breathing time, that it covers the full face, etc.). However, this information is duplicative of the other training requirements in § 227.209(2)(b) and so FRA agrees with its removal.

5. Comments on § 227.215, With FRA's Response

AAR and ASLRRRA comment that FRA goes beyond the rulemaking discretion afforded it in the RSIA in requiring that records be kept as required in § 227.215. The RSIA mandates that EEBA's be provided to all crewmembers in the locomotive cab of a freight train transporting a hazardous material that would pose an inhalation hazard in the event of release and that all such equipment be maintained in proper working condition. Meeting this mandate necessarily requires some level of recordkeeping to ensure compliance and § 227.215 simply lays out the reasonable requirements for keeping and making the records available.

VIII. Section-by-Section Analysis

PART 227—OCCUPATIONAL SAFETY AND HEALTH IN THE LOCOMOTIVE CAB

FRA is changing the name of the part from "OCCUPATIONAL NOISE EXPOSURE" to "OCCUPATIONAL SAFETY AND HEALTH IN THE LOCOMOTIVE CAB" in order to reflect the broader subject matter of the part. Previously, part 227 contained regulations related only to dangers from

occupational noise exposure. Part 227 is the best place to put the regulations related to EEBA's because the occupational noise regulations and the EEBA regulations both concern dangers to the occupational safety and health of locomotive cab occupants. However, the inclusion of the EEBA regulations requires broadening the name of the part to accurately capture the new subject matter that is now covered in that part.

Subpart A—General

Section 227.1 Purpose and Scope

FRA amends this section to reflect the expanded purpose and scope of this part.

Section 227.3 Applicability

FRA amends this section so that paragraphs (a) and (b) apply to subpart B only and that the title mentioned, "Associate Administrator for Safety," is updated to reflect the current title, "Associate Administrator for Railroad Safety/Chief Safety Officer." New paragraphs (c) and (d) define the types of railroad operations to be covered by subpart C. In particular, subpart C applies to a railroad transporting an in-service freight train that carries a PIH material on track that is part of the general railroad system of transportation. See 49 CFR part 209, appendix A.²¹ It should be noted that, with some exceptions, common carriers by railroad have a "common carrier" obligation to accept for rail transportation a PIH material if it is properly prepared for transportation. If a railroad accepts and transports a tank car containing a load or residue²² of a PIH material in an in-service freight train, even if the railroad has never done so before, the railroad would become subject to this rule. FRA realizes the applicability of this rule to a company's first time transporting a PIH material in a freight train could delay the transportation of such material if the company did not voluntarily take the steps required by the rule (e.g., preparation of a general EEBA program, procurement and distribution of EEBA's,

²¹ As noted in the SNPRM, FRA has removed references to "asphyxiants" that were included in the NPRM. The SNPRM explained the reasons for not including simple asphyxiants (i.e., non-PIH asphyxiants) as covered materials but invited public comment on whether they should be included. 88 FR 17302 at 17312–17313 (Mar. 22, 2023). FRA received only one comment on this issue, which was supportive of removing asphyxiants from this rule.

²² *Residue* means the hazardous material remaining in a packaging, including a tank car, after its contents have been unloaded to the maximum extent practicable and before the packaging is either refilled or cleaned of hazardous material and purged to remove any hazardous vapors.

and instruction of employees in the program) in advance. Further, a delay related to compliance with this final rule could conflict with the railroad's duty to expedite the transportation of hazardous material, pursuant to the Hazardous Materials Regulations at 49 CFR 174.14.

Section 227.5 Definitions

The rulemaking amends this section to add definitions for key terms used in subpart C. The terms defined are set forth alphabetically. FRA intends these definitions to clarify the meaning of the terms for purposes of this part. Many of these definitions have been taken from the regulations issued by OSHA and NIOSH and are widely used by safety and health professionals, such as the definition of "immediately dangerous to life or health (IDLH)." A definition of "PIH material" is included in this final rule to ensure that the universe of materials covered by this regulation is adequately described.

Section 227.15 Information Collection

FRA amends this section to note the provisions of this part, including subpart C, that have been reviewed and approved by OMB for compliance with the Paperwork Reduction Act of 1995. See 44 U.S.C. 3501 *et seq.*

Subpart B—Occupational Noise Exposure for Railroad Operating Employees

FRA is making minor corrections to this subpart. The term "Class 1" is removed wherever it appears and replaced with the corrected term "Class I." The incorrect term appeared in, for example, § 227.103(a)(1).

Subpart C—Emergency Escape Breathing Apparatus Standards

Section 227.201 Criteria for Requiring Availability of EEBA in the Locomotive Cab

Section 227.201(a)(1) requires that an EEBA be provided by a railroad to each of its train employees, direct supervisors of train employees, deadheading employees, and any other employees designated at the railroad's discretion and identified in writing whose duties require regular work in the locomotive cabs of in-service freight trains transporting a PIH material. The EEBA provided must have been selected in accordance with the criteria in § 227.203. Moreover, the EEBA provided shall have been inspected and determined to be in proper working condition under § 227.207.

Section 227.201(a)(2) prohibits utilizing a locomotive to transport a PIH material in an in-service freight train

unless each of the employees identified in paragraph (a)(1) has access to an EEBA that was selected in accordance with § 227.203 and that has been inspected and is in proper working order pursuant to § 227.207. Paragraph (a)(2) makes clear that it is not enough for a railroad to merely issue an EEBA to its employees, *e.g.*, as a uniform item; the employee must have access to the EEBA in the cab of the covered train. For instance, it is not a defense to a violation of § 227.201(a)(2) that the railroad provided the EEBA to the employee and instructed the employee to have it while in the cab, but the employee lost or forgot it.

Section 227.201 also includes exceptions to its general requirements in paragraph (b). FRA excludes trains that contain PIH materials exclusively in intermodal containers from the requirements in this section. Further, employees who are involved in activities, such as moving a locomotive coupled to a car or group of cars containing a PIH material within a locomotive maintenance facility, or who make incidental movements for the purpose of inspection or maintenance, are also exempted from coverage.

Paragraph (c) establishes that, notwithstanding the exceptions identified in § 227.201, any employee who is found to have willfully tampered with or vandalized an EEBA will be subject to subpart C for enforcement purposes. As a result, an employee to whom the railroad is not required to provide an EEBA may become subject to this subpart by vandalizing or willfully tampering with an EEBA.

Section 227.203 Criteria for Selecting EEBA

This section provides the requirements for selecting an EEBA. See general discussion at V. Selection of the Appropriate EEBA by Railroads, above. The requirements for selecting EEBA are based on the nature and extent of the potential hazard to be faced. Due to the varying modes of toxicity and physical state of commodities carried by railroads, the selection of EEBA types is limited to those that supply a breathable atmosphere to the wearer, rather than types that simply filter out the toxic material. Filtering EEBA cannot provide protection from gases that can displace oxygen in the atmosphere. Filtering EEBA approved for protection against specific materials usually are not approved for others of different chemical characteristics and generally have an upper concentration limit on their protective capabilities.

Paragraph (a) of § 227.203 requires a railroad to select an atmosphere-

supplying EEBA that protects against all PIH materials (including residues of such commodities) that are being transported by an in-service freight train. To ensure that the EEBA has met a standard set of testing criteria, paragraph (b) requires the selection of a NIOSH-certified (42 CFR part 84) or ISO-compliant (ISO 23269–1:2008) EEBA, with 15-minute minimum breathing capacity. In addition, FRA has included language in paragraph (b) to permit selection of devices that comply with BS EN 13794:2002 or BS EN 1146:2005.

To ensure that the EEBA provides adequate oxygen to allow train employees to extricate themselves from an IDLH atmosphere, FRA requires in paragraph (c)(1) that the EEBA must contain a minimum breathing capacity of 15 minutes under § 227.207(a)(1).

In paragraph (c)(2), FRA addresses head and neck protection. The EEBA selected by a railroad must facilitate escape from a hazardous atmosphere by providing a means of protecting a user's nose and throat from inhalation hazards while also protecting the user's eyes from irritation.

Section 227.205 Storage Facilities for EEBA

This section addresses the mandate in the RSIA that the rule require railroads to "provide convenient storage in each freight train locomotive to enable crewmembers to access such apparatus quickly." FRA has adapted the storage requirements promulgated by OSHA at 29 CFR 1910.134(h)(2) to this final rule.

Section 227.207 Railroad's Program for Inspection, Maintenance, and Replacement of EEBA; Requirements for Procedures

This section requires each railroad to establish and carry out procedures intended to ensure that EEBA required to be present in the locomotive cabs are fully functional. This section is adapted from OSHA's inspection documentation requirements. See 29 CFR 1910.134(h)(3)(iv). Since the EEBA selected may have differing requirements for inspection, maintenance, and replacement, this section is, for the most part, written as a general standard. However, minimum repair and adjustment requirements also have been adapted from OSHA's regulations. See 29 CFR 1910.134(h)(4).

In paragraph (b), FRA requires that railroads create and maintain pre-trip and periodic inspection records and retain these records for a period of 92 days and one year, respectively. Paragraph (d) requires railroads to create and maintain an accurate record of all

turn-ins, maintenance, repair, and replacement of EEBA's required by paragraph (c) of this section, including EEBA's that are used; and retain these records for three years.

Section 227.209 Railroad's Program of Instruction on EEBA's

This section identifies the elements of the instructional program that the railroad must establish and carry out for train employees and other employees who are part of the railroad's general EEBA program under § 227.211 and will be provided with EEBA's. The elements outlined in this section are partly adapted from OSHA's regulations. See 29 CFR 1910.134(k). The program required by this section should be considered the minimum, and the railroads are encouraged to provide additional relevant information depending on the types of EEBA's selected.

Paragraph (b) requires that any railroad transporting a PIH material provide sufficient training to its covered employees. Such employees must be able to demonstrate knowledge of why an EEBA is necessary; how improper fit, usage, or maintenance can compromise the protective effect of an EEBA; the limitations and capabilities of the type of EEBA provided by the railroad, including the timeframe for effective use; how to deal with emergency situations involving the use of EEBA's or if an EEBA malfunctions; how to inspect, put on, remove, and use an EEBA, including the inspection of seals; procedures for maintenance and storage of EEBA's; employee responsibilities under subpart C; employee rights concerning access to records; and identification of hazardous materials that are classified as PIH materials. FRA is particularly concerned that the employees know the limitations of the EEBA's provided so that the employees can avoid circumstances that would lead to reliance on the EEBA's for conditions or time frames beyond the EEBA's capabilities.

This program may be integrated with the railroad's program of instruction on the railroad's operating rules required by 49 CFR 217.11 or its program of instruction for hazmat employees under 49 CFR 172.704. Under 49 CFR 172.704(a)(3)(ii), for example, hazmat employees (which includes crews of freight trains transporting hazardous material), must receive "safety training" on means "to protect the employee from the hazards associated with hazardous materials to which they may be exposed in the workplace, including special measures the hazmat employer has

implemented to protect employees from exposure."

Paragraph (c) establishes the timing of the initial and refresher training. Initial instruction must occur no later than 30 days prior to the date of compliance with subpart C for the subject railroad. New employees must receive initial instruction either by 30 days before the applicable date of compliance with subpart C or prior to being assigned to jobs where EEBA's are required to be provided on a locomotive, whichever is later. The initial instruction must be supplemented with periodic instruction at least once every three years.

Section 227.209(d) requires railroads to create and maintain an accurate record of employees instructed in compliance with § 227.209; and retain these records for at least three years.

Section 227.211 Requirement To Implement a General EEBA Program; Criteria for Placing Employees in the General EEBA Program

In this section, FRA requires railroads subject to subpart C to adopt and comply with a general EEBA program to ensure that the selection and distribution of the EEBA's is done in a technically appropriate, sustainable manner and supported by a comprehensive set of policies and procedures, as discussed in detail at section IV. FRA-Sponsored Study and section V. Selection of the Appropriate EEBA by Railroads, above. Many of the procedures will likely be used as a basis for aspects of the required instructional program.

Paragraph (b)(1) requires that each railroad's general program identify the railroad's EEBA manager by title and requires that the EEBA manager is qualified to oversee the program.

Section 227.211(b)(4) requires the following individuals to be placed in the railroad's general EEBA program: (1) employees of railroads subject to this subpart who perform service subject to the provisions of the hours-of-service law governing "train employees," see 49 U.S.C. 21103, in the locomotive cabs of freight trains that transport a PIH material; (2) the direct supervisors of these train employees; and (3) any employees who deadhead in the locomotive cabs of such trains. The term "train employee" refers to employees who are engaged in functions traditionally associated with train, engine, and yard service; for example, engineers, conductors, brakemen, switchmen, and firemen. See 49 U.S.C. 21101(5); 49 CFR part 228, appendix A; and 74 FR 30665, June 26, 2009.

A railroad may also identify other employees and designate them in

writing to be included in its general EEBA program. In making this assessment, the railroad should consider an employee's work over the period of a year. In doing so, the railroads must consider how they use their workforces, *i.e.*, review the work that their employees perform, determine which employees will occupy the cab of the locomotive of an in-service freight train and therefore experience the risk of the release of an inhalation-material from the consist, and then place those employees in the general EEBA program.

Given the nature of the railroad industry, FRA is aware that some of these employees may not always work in the cab. Due to longstanding labor practices in the railroad industry concerning seniority privileges and concerning the ability of railroad employees to bid for different work assignments, these railroad employees are likely to change jobs frequently and to work for extended periods of time on assignments that involve duties outside the cab. For example, an employee might start the year in a job that involves mostly outside-the-cab work, spend three months working primarily inside the cab, and then return to outside-the-cab work for the rest of the year. In this type of situation, these regulations govern the exposure of this employee throughout the year despite the fact that the employee only spent three months inside the cab. This employee is covered by this part because he or she spent time, no matter how little, in a locomotive cab where the use of an EEBA may be required. As a result, the railroad must ensure that the employee is properly instructed in how to inspect and use an EEBA and provide an EEBA for those time periods in which the employee is serving as a train employee, as a direct supervisor of a train employee, or in a capacity that the railroad has determined, in its discretion and designated in writing, should be provided an EEBA while any of these individuals is working in the cab of the locomotive of an in-service freight train transporting a PIH material.

Note that placement of an employee in the railroad's general EEBA program means different things depending on the nature of the program that the railroad chooses to adopt. For example, if the railroad's program states that the railroad will equip its fleet of locomotives with sets of EEBA's sufficient to accommodate the train crew and possible deadheading train employees, the railroad would have to provide the EEBA to the employee in that way, in the locomotive cab. On the other hand, if the railroad's program

states that the railroad will provide the EEBA to the employee as part of his or her personal equipment, the railroad would have to provide the EEBA in that manner. If the employee, for whatever reason, did not have the EEBA with him or her while in the locomotive cab, the railroad would be prohibited from using the locomotive by § 227.201(a)(2), which bars using a locomotive to transport a covered train if a covered employee occupying the cab of the locomotive does not have access to a working EEBA. One constant is that all railroads, subject to this part, are required to instruct employees placed in their general EEBA program in how to use EEBA's; the provision on instruction at § 227.209 requires that all employees, identified in § 227.211, be provided instruction on EEBA's.

Finally, § 227.211(c) requires railroads to maintain records concerning the persons and positions designated to be placed in its EEBA program and retain these records for the duration of the designation and for one year after the designation has ended.

Section 227.213 Employee's Responsibilities

Since employees who must be provided EEBA's are not always directly supervised by managers who can ensure the identified tasks are done at the appropriate time and frequency, this section establishes certain responsibilities on the part of employees. Some of these tasks may involve making records of such tasks as pre-trip inspections that must be done to ensure the EEBA's are ready for use. Additionally, FRA prohibits employees from willfully tampering with or vandalizing an EEBA in an attempt to disable or damage the device. See 49 CFR part 209, appendix A, for definition and discussion of "willfully."

Section 227.215 Recordkeeping in General

Section 227.215 sets out the general recordkeeping provisions for subpart C. Section 227.215(a) addresses the availability of required records. Section 227.215(a) provides that records required under this part, except for records of pre-trip inspections, be kept at system and division headquarters. It requires that a railroad make all records available for inspection and copying or photocopying by representatives of FRA upon request. The railroad must also make an employee's records available for inspection and copying or photocopying by that employee or such person's representative upon written authorization by such employee.

Section 227.215(b) permits required records to be kept in electronic form. These requirements are almost identical to the electronic recordkeeping requirements found in FRA's existing Track Safety Standards, 49 CFR 213.241(e). Section 227.215(b) allows each railroad to design its own electronic system as long as the system meets the specified criteria in § 227.215(b)(1) through (5), which are intended to safeguard the integrity and authenticity of each record.

Section 227.217 Compliance Dates

The specific dates by which certain groups of railroads are required to comply are set forth in this section. FRA recognizes that it will take time to procure EEBA's, instruct employees on their use, and outfit locomotives with the appropriate equipment to carry the devices. FRA staggers the compliance dates based on the size of the railroad, with larger railroads having to comply earlier. Under the final rule, FRA requires Class I railroads to be compliant within 12 months of the effective date of the final rule, with required compliance following for Class II railroads at 12 months and Class III and other railroads at 18 months.

Section 227.219 Incorporation by Reference

Because subpart C incorporates by reference ISO 23269–1:2008, BS EN 13794:2002, and BS EN 1146:2005, FRA is adding this section to comply with the requirements of 5 U.S.C. 552(a) and 1 CFR part 51. ISO 23269–1:2008 provides specifications for emergency escape breathing devices intended to supply air or oxygen needed to escape from accommodation and machinery spaces with a hazardous atmosphere. BS EN 13794:2002 provides specifications including requirements, testing, and marking for self-contained closed-circuit breathing apparatus intended for an escape from a hazardous atmosphere. BS EN 1146:2005 provides specifications including requirements, testing, and marking for self-contained open-circuit compressed air breathing apparatus incorporating a hood and intended for an escape from a hazardous atmosphere. They are reasonably available to all interested parties online at <https://webstore.ansi.org/> and <https://shop.bsigroup.com>, respectively. Further, FRA will maintain copies of the standards available for review at the Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

IX. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This final rule is not a significant regulatory action within the meaning of Executive Order 12866, as amended by Executive Order 14094, "Modernizing Regulatory Review,"²³ and DOT Order 2100.6A ("Rulemaking and Guidance Procedures"). Details on the estimated costs of this final rule can be found in the RIA, which FRA has prepared and placed in the docket (FRA–2009–0044).

FRA is issuing a final rule that enables covered employees to wear protective breathing apparatus in the event of a catastrophic release of PIH materials. This final rule requires that an EEBA be provided for each covered employee transporting PIH materials. These EEBA's will provide neck and face coverage with respiratory protection for these crewmembers. Railroads must also ensure that the equipment is maintained and in proper working condition. Finally, the final rule requires that railroads train crewmembers how to use the EEBA's.

The RIA presents estimates of the costs likely to occur over the first 10 years of the final rule. The analysis includes estimates of costs associated with the purchase of EEBA's and installation, employee training, and recordkeeping.

FRA has estimated costs for three options that are permissible under the rule. These include:

- *Option 1: Employee Assignment*—EEBA's are assigned to all relevant employees and considered part of their equipment.
- *Option 2: Locomotive Assignment*—EEBA's are assigned to and kept in locomotives.
- *Option 3: Equipment Pooling*—EEBA's are pooled at rail yards and kept in storage lockers where employees would check-in and check-out the EEBA's when PIH is being hauled.

For all three options, estimates were developed using a closed-circuit EEBA. For the "Employee Assignment" option, FRA estimates that the costs associated with issuing each T&E employee (\$60,000) with an EEBA as their own personal equipment. The "Locomotive Assignment" option would require installing EEBA's in all locomotives in the covered railroad's fleet, regardless of whether a locomotive is part of a train that is transporting PIH material. There are approximately 24,000 locomotives owned by Class I railroads, and three apparatuses would have to be installed in each locomotive, one apparatus each

²³ 88 FR 21879 (April 6, 2023) located at <https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review>.

for the conductor, the engineer, and a supervisor. In the “Equipment Pooling” option, FRA considered only having EEBAs provided in trainsets that were transporting PIH. EEBAs would be

brought on board after a determination is made on a case-by-case basis.

The analysis includes estimates of costs associated with the purchase of EEBAs and installation, employee training, and recordkeeping.

FRA estimates the 10-year costs of the final rule to be between \$27.1 million and \$91.9 million, discounted at 7 percent. The following table shows the total costs of this final rule, over the 10-year analysis period.

TOTAL 10-YEAR COSTS
[2021 Dollars]²⁴

Category	10-year cost (\$)	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Option 1: Employee Assignment	92,327,892	79,247,309	86,066,845	11,283,034	10,089,660
Option 2: Locomotive Assignment	107,153,842	91,909,968	99,855,523	13,085,912	11,706,114
Option 3: Equipment Pooling	33,546,542	27,116,550	30,415,557	3,860,787	3,565,631

The benefits associated with this final rule are qualitative in nature and relate to the prevention of causalities and injuries. This rule is expected to improve railroad safety by ensuring that all covered employees can safely vacate the exposed area if a PIH material release were to occur. The primary benefits include heightened safety for crewmembers and, as a result, earlier awareness/notification to the public of PIH releases. Implementation of this rule should mitigate the injuries of covered employees from PIH material releasing after an accident/incident. Although the monetary costs associated with implementation of this rule would exceed the correspondingly measured benefits, under the RSIA, FRA must require railroads to: (1) ensure that EEBAs affording suitable “head and neck coverage with respiratory protection” are provided “for all crewmembers” in a locomotive cab on a freight train “carrying hazardous materials that would pose an inhalation hazard in the event of release;” (2) provide a place for convenient storage of EEBAs in the locomotive that will allow “crewmembers to access such apparatus quickly;” (3) maintain EEBAs “in proper working condition;” and (4) provide crewmembers with appropriate instruction in the use of EEBAs. Additionally, OMB Circular A-4 directs agencies to describe benefits qualitatively when it is not possible to quantify or monetize all of a rule’s important benefits. Section 6 of the RIA discusses non-quantifiable benefits. FRA will not require a particular method of deployment of EEBAs, but rather leave that to the railroads’ discretion. In addition, railroads will be allowed to select the type of apparatus to use in their program (closed-circuit or open-circuit). This allows railroads to

deploy EEBAs in the manner best suited to their operations.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. FRA prepared this FRFA to evaluate the impact of the final rule on small entities and describe the effort to minimize the adverse impact. The estimated costs on small entities is not significant as it represents less than one percent of average annual revenue of affected entities. Even if FRA uses the estimated costs per small entity provided by ASLRRRA, as discussed in section 5 below, the impact would still not be significant. Accordingly, the FRA Administrator hereby certifies that this rule will not have a significant economic impact on a substantial number of small entities.

1. Statement of the Need for, and Objectives of, the Rule

This final rule requires railroads to provide an appropriate atmosphere-supplying EEBA, in proper working order, to train crewmembers, direct supervisors of train crewmembers, and certain other employees while these employees are occupying cabs of freight train locomotives transporting hazardous material that would pose an inhalation hazard in the event of release during an accident. This includes material poisonous by inhalation (poisonous-inhalation-hazard or PIH materials), gases poisonous by inhalation, and certain other materials classified as poisonous by inhalation. EEBAs are intended to protect covered employees from the risk of exposure to such hazardous materials while the

employees escape from the locomotive cab during a catastrophic event.

The rule requires railroads that transport PIH materials on the general railroad system to establish and carry out a series of programs for: inspection and maintenance of the devices; instruction of employees in the use of the devices; and selection, procurement, and provision of the devices. Railroads are required to identify individual employees or positions to be placed in their EEBA programs so that enough EEBAs are available and that those employees know how to use the devices. Finally, the rule requires that convenient storage be provided for EEBAs in the locomotive to enable employees to access such apparatuses quickly in the event of a release of a hazardous material that poses an inhalation hazard.

2. Significant Issues Raised by Public Comments

FRA received several comments related to the anticipated costs of this rule. AAR and ASLRRRA’s comments address concerns about the financial impact of the RSIA mandate on small entities in the railroad industry, which they contend lack pricing power to pass on the costs of this rule to their customers and have small capital budgets necessitating that other work, such as track maintenance, will have to be deferred to pay for it. AAR and ASLRRRA stated that while the initial costs for Class III railroads may indeed be modest the ongoing costs for inspection, maintenance, replacement, and enforcement penalties will result in permanent ongoing expenditures that will be particularly impactful on small railroads. The comment states that small railroads will likely focus on the purchase of EEBAs based on crew terminals and number of customers, face

²⁴ Numbers in this table and subsequent tables may not sum due to rounding.

higher costs than estimated, have limited options to benefit for bulk orders, and will face disproportionately high training costs. AAR and ASLRRRA estimate that the total 10-year compliance costs to be borne by Class II and III railroads at over \$6.6 million (PV, 7 percent), or over \$945,000 on an annualized basis. For just Class III railroads, ASLRRRA projects total costs to amount to almost \$4.9 million (PV, 7 percent), with the individual annualized cost to each of the 110 impacted railroads estimated to be \$6,333 per year, or more than four times the cost estimated in the SNPRM. As such, AAR and ASLRRRA ask that FRA exercise its discretion, in this particular instance, to provide a “de minimis” exception for railroad operations, similar to what FRA provided for PTC requirements, to exempt Class II and III railroads from the requirement to provide EEBA’s.

FRA understands ALSRRA’s concerns, but the agency is constrained by section 413 of the RSIA. Unlike with PTC, Congress did not carve out an exemption for Class II and Class III railroads from the statutory requirement. See section 104 of the RSIA. Instead, Congress used broad language that covers any railroad carrier transporting hazardous materials that would pose an inhalation hazard in the event of release. In light of this language, FRA is constrained from instituting an exception for Class II and III railroads without congressional action. Notwithstanding these constraints, FRA has included measures to limit the costs for railroads. In particular, FRA will allow railroads to pursue the most cost-effective way to provide EEBA’s in accordance with the statutory and regulatory requirements. Additionally, small railroads could consider pooling resources wherever possible for requirements such as periodic training. Indeed, many small railroads are jointly owned by the same holding companies making resource pooling even easier. In light of the

concerns raised above, FRA has reexamined its estimated costs for small railroads based on comments received to the NPRM. In the regulatory impact analysis for the final rule, FRA has increased the cost estimate for Class III railroads to purchase EEBA’s since each railroad may not purchase enough to secure a bulk discount on pricing. Therefore, FRA estimates that each EEBA for Class III railroads will be approximately \$1,000, instead of \$850 as was estimated in the RIA for the proposed rule.

3. Response to Comments Filed by the Chief Counsel for Advocacy of the Small Business Administration

FRA did not receive a comment from the Small Business Administration.

4. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for-profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 1,500 employees, a “commuter rail system” with annual receipts of less than \$47.0 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than \$34.0 million.²⁵

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment.

Under that authority, FRA has published a statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR part 1201, General Instruction 1–1, which is \$20 million or less in inflation-adjusted annual revenues,²⁶ and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less.²⁷ FRA is using this definition for the final rule.

When shaping the final rule, FRA considered the impact that the final rule will have on small entities. The final rule will be applicable to all railroads with locomotives that transport PIH materials. FRA estimates there are 733 Class III railroads that operate on the general system. These railroads are of varying size, with some belonging to larger holding companies. FRA is aware of 110 Class III railroads that transport PIH materials. The remaining Class III railroads do not transport PIH, and thus will not be impacted by this final rule.

5. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

Class III Railroads will have all the same requirements as larger railroads, reduced for the estimated number of locomotives and employees on Class III railroads. Small railroads may not be able to benefit from bulk discount rates on EEBA’s, so FRA has adjusted that cost to not include the 15% discount for Class III railroads. All other cost components will be the same as larger railroads.

The following table shows the annualized cost for Class III railroads over the 10-year analysis period. The total estimated 10-year costs for Class III railroads will be \$1.1 million (PV, 7 percent) and the annualized cost for all Class III railroads will be \$151,467 (PV, 7 percent).

TOTAL 10-YEAR AND ANNUALIZED COSTS, CLASS III RAILROADS

Category	Present value (7%)	Annualized (7%)
EEBA and Installation	731,620	104,166
Training	232,950	33,167
Records	99,272	14,134
Total	1,063,841	151,467

²⁵ U.S. Small Business Administration, “Table of Small Business Size Standards Matched to North American Industry Classification System Codes, March 27, 2023. https://www.sba.gov/sites/sbagov/files/2023-06/Table%20of%20Size%20Standards_

Effective%20March%2017%2C%202023%20%282%29.pdf.

²⁶ The Class III railroad revenue threshold is \$46.3 million or less, for 2022. <https://>

www.ecfr.gov/current/title-49/subtitle-B/chapter-X/subchapter-C/part-1201.

²⁷ See 68 FR 24891 (May 9, 2003) (codified at appendix C to 49 CFR part 209).

The industry trade organization representing small railroads, ASLRRRA, reports the average freight revenue per

Class III railroad is \$4.75 million. The following table summarizes the average

annual costs and revenue for Class III railroads.

AVERAGE CLASS III RAILROADS' COSTS AND REVENUE

Total cost for class III railroads, annualized 7%	Number of class III railroads with PIH	Average annual cost per class III railroad (\$)	Average class III annual revenue (\$)	Average annual cost as a percent of revenue
a	b	c = a ÷ b	d	e = c ÷ d
151,467	110	1,377	4,750,000	0.03%

The average annual cost for a Class III railroad impacted by this rule will be \$1,377. This represents a small percentage (0.03%) of the average annual revenue for a Class III railroad. The estimates above show that the burden on Class III railroads will not be a significant economic burden.

6. A Description of the Steps the Agency Has Taken To Minimize the Economic Impact on Small Entities

When developing the final rule, FRA considered the impact that the final rule will have on small entities. FRA has included measures to limit the costs for railroads. In particular, FRA will allow railroads to pursue the most cost-effective way to provide EEBAs in accordance with the statutory and regulatory requirements. Small railroads could consider pooling resources wherever possible for requirements such as periodic training. Additionally, under the final rule, FRA allows additional time for Class III and other railroads to implement the rule. Class III railroads are allotted 18 months for implementation rather than 12 months.

C. Federalism

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not

required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the final rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, nor on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically a provision of the former FRSA, repealed and recodified at 49 U.S.C 20106, and the former LBIA, repealed and recodified at 49 U.S.C. 20701–20703. See Public Law 103–272 (July 5, 1994). A provision of the former FRSA provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation,

or order qualifies under the "local safety or security hazard" exception to section 20106. Moreover, the former LBIA has been interpreted by the Supreme Court as preempting the entire field of locomotive safety. See *Napier v. Atlantic Coast R.R.*, 272 U.S. 605, 611; 47 S.Ct. 207, 209 (1926).

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under a provision of the former FRSA and under the former LBIA. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to OMB²⁸ under the Paperwork Reduction Act of 1995.²⁹ The information collection requirements and the estimated time to fulfill each requirement are as follows:

²⁸ FRA will be using the OMB control number (OMB No. 2130–0620) that was issued when the

previous NPRM was published in 2010 for this information collection request.

²⁹ 44 U.S.C. 3501 *et seq.*

CFR section	Respondent universe	Total annual responses (A)	Average time per response (B)	Total annual burden (hours) (C) = A * B	Total cost equivalent (hours) (D) = C * wage ³⁰
227.201(a)—Criteria for requiring availability of EEBA's in the locomotive cab—Employees designated by the railroad in writing.	128 railroads	600 designations	3 minutes	30.00	\$2,337.30
227.203(c)—Criteria for selecting EEBA's—Railroads to document the adequacy of the EEBA and provide such documentation for inspection to FRA upon request.	128 railroads	43 written justifications	2 hours	86.00	6,700.26
227.205(c)—Storage facilities for EEBA's—Railroads to keep a copy of the instructions at their system headquarters for FRA inspection.	128 railroads	43 instruction copies	1 minute72	56.10
227.207(a)—Railroad's program for inspection, maintenance, and replacement of EEBA's; requirements for procedures—Written program for inspection, maintenance, and replacement of EEBA's.	The paperwork burden for this requirement is covered under § 227.211.				
—(b) Inspection procedures and records—Tag or label that is attached to the storage facility for the EEBA or kept with the EEBA or in inspection reports stored as paper or electronic files.	128 railroads	10,000 inspection records	30 seconds	83.33	6,492.24
—(d) Records of returns, maintenance, repair, and replacement—Recordkeeping and retention.	128 railroads	180 records	30 seconds	1.50	116.87
227.209(a)—Railroad's program of instruction on EEBA's—Written program of instruction on EEBA's.	The paperwork burden for this requirement is covered under § 227.211.				
—(d) Records of instruction—Railroad to maintain a record of employees provided instruction in compliance with this section and retain these records for three years ³¹ .	128 railroads	20,000 initial training records	3 minutes	1,000.00	62,670.00
—(d) Records of intervals for periodic instruction	128 railroads	2,000 refresher or new hire training records.	3 minutes	100.00	6,267.00
227.211(a), (b) and (d)—Requirement to implement a general EEBA program; criteria for placing employees in the general EEBA program—Comprehensive written program.	128 railroads	45.67 written programs (2.33 Class I railroads' programs + 42.33 Class II and III railroads' programs + 1 generic program developed by ASLRRRA).	80 hours + 2 hours + 80 hours.	351.33	30,167.83
—(c) Records of positions or individuals or both in the railroad's general EEBA—Designated employees by the railroad to be placed in its general EEBA program pursuant to § 227.211(b)(4).	The paperwork burden for this requirement is covered under §§ 227.201 and 227.209.				
227.213(a)(3)—Employee's responsibilities—Notification to railroad of EEBA failures and of use incidents in a timely manner.	128 railroads	1 notification	1 minute02	1.25
227.215(b)—Recordkeeping in general—Electronic records to meet FRA requirements.	18 railroads	6 modified systems	1 hour	6.00	467.46
—(b)(5) Paper copies of electronic records and amendments to those records are made available for inspection and copying or photocopying by representatives of FRA.	128 railroads	43 copies	15 minutes	10.75	837.53
Total ³²	128 railroads	32,962 responses	N/A	1,670	116,114

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

³⁰The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes a 75-percent overhead charge.

³¹The associated burden related to employees' training are calculated under the economic cost of the regulation.

³²Totals may not add up due to rounding.

F. Compliance With the Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule

that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in such an expenditure, and thus preparation of such a statement is not required.

G. Environmental Assessment

FRA has evaluated this final rule in accordance with the National Environmental Policy Act (NEPA), the Council of Environmental Quality's NEPA implementing regulations, and FRA's NEPA implementing regulations. FRA has determined that this proposed rule is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS. Specifically, FRA has determined that this final rule is categorically excluded from detailed environmental review.

This rulemaking would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review. FRA has concluded that no such unusual circumstances exist with respect to this final rule and it meets the requirements for categorical exclusion.

Pursuant to section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties. FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by section 4(f). Further, FRA reviewed this final rulemaking and found it consistent with Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad."

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action" (66 FR 28355, May 22, 2001). FRA evaluated this final rule in accordance with Executive Order 13211 and determined that this final rule is not a "significant energy action" within the meaning of Executive Order 13211.

I. Analysis Under 1 CFR Part 51

As required by 1 CFR 51.5, FRA has summarized the standards it is incorporating by reference in the section-by-section analysis in this preamble. These standards summarized herein, are reasonably available to all interested parties for inspection. Copies

can be obtained from the International Organization for Standardization, Chemin de Blandonnet 8, CP 401, 1214 Vernier, Geneva, Switzerland, telephone +41-22-749-08-88 or <https://www.iso.org/standard/50245.html> and from the British Standards Institution, 12110 Sunset Hills Road, Suite 200, Reston, VA 20190-5902, telephone: 800-862-4977 or <https://shop.bsigroup.com>. They are also available for inspection at the Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; phone: (202) 493-6052; email: FRALegal@dot.gov.

J. Environmental Justice

Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," requires DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. DOT Order 5610.2C ("U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations") instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order 5610.2C in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations.³³ FRA has evaluated this final rule under Executive Orders 12898 and 14096 and DOT Order 5610.2C and has determined it will not cause disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

K. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this final rule in accordance with the principles and criteria contained in Executive Order 13175, "Consultation and Coordination

³³ Executive Order 14096, "Revitalizing Our Nation's Commitment to Environmental Justice," issued on April 26, 2023, supplements Executive Order 12898, but is not currently referenced in DOT Order 5610.2C.

with Indian Tribal Governments," dated November 6, 2000. The final rule would not have a substantial direct effect on one or more Indian tribes, would not impose substantial direct compliance costs on Indian tribal governments, and would not preempt tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 227

Hazardous materials transportation, Incorporation by reference, Locomotive noise control, Occupational safety and health, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends part 227 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 227—OCCUPATIONAL SAFETY AND HEALTH IN THE LOCOMOTIVE CAB

■ 1. The authority citation for part 227 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20103 note, 20166, 20701–20703, 21301, 21302, 21304; 28 U.S.C. 2461 note; and 49 CFR 1.89.

■ 2. Revise the heading for part 227 to read as set forth above.

■ 3. Revise § 227.1 to read as follows:

§ 227.1 Purpose and scope.

(a) *General.* The purpose of this part is to protect the occupational safety and health of certain employees who are exposed to occupational dangers while in the cab of the locomotive. This part prescribes minimum Federal safety and health standards for certain locomotive cab occupants. This part does not restrict a railroad or railroad contractor from adopting and enforcing additional or more stringent requirements.

(b) *Subpart B of this part.* The purpose of subpart B is to protect the occupational safety and health of employees whose predominant noise exposure occurs in the locomotive cab. Subpart B prescribes minimum Federal safety and health noise standards for locomotive cab occupants.

(c) *Subpart C of this part.* The purpose of subpart C is to protect the occupational safety and health of train employees and certain other employees in the cab of the locomotive of a freight train that is transporting a poison inhalation hazard (PIH) material that, if released due to a railroad accident/incident, would pose an inhalation hazard to the occupants. In particular,

subpart C is intended to protect these employees from the risk of exposure to the material while they are located in, or during escape from, the locomotive cab.

■ 4. Amend § 227.3 by revising paragraphs (a), (b) introductory text, and (b)(5) and adding paragraphs (c) and (d) to read as follows:

§ 227.3 Application.

(a) Except as provided in paragraph (b) of this section, subpart B of this part applies to all railroads and contractors to railroads.

(b) Subpart B of this part does not apply to—

* * * * *

(5) Foreign railroad operations that meet the following conditions: Employees of the foreign railroad have a primary reporting point outside of the U.S. but are operating trains or conducting switching operations in the U.S.; and the government of that foreign railroad has implemented requirements for hearing conservation for railroad employees; the foreign railroad undertakes to comply with those requirements while operating within the U.S.; and FRA’s Associate Administrator for Railroad Safety/Chief Safety Officer determines that the foreign requirements are consistent with the purpose and scope of subpart B of this part. A “foreign railroad” refers to a railroad that is incorporated in a place outside the U.S. and is operated out of a foreign country but operates for some distance in the U.S.

(c) Except as provided in paragraph (d) of this section, subpart C of this part applies to any railroad that operates a freight train that transports a PIH material, including a residue of such a PIH material, on standard gage track that is part of the general railroad system of transportation.

(d) Subpart C of this part does not apply to a railroad that operates only on track inside an installation that is not part of the general railroad system of transportation.

■ 5. Amend § 227.5 by adding, in alphabetical order, definitions for “Accident/incident”, “Associate Administrator for Railroad Safety/Chief Safety Officer”, “Atmosphere immediately dangerous to life or health (IDLH)”, “Atmosphere-supplying device”, “Deadheading”, “Division headquarters”, “Emergency escape breathing apparatus or EEBA”, “Freight car”, “Freight train”, “Hazardous material”, “Hazmat employee”, “In service or in-service”, “Intermodal container”, “ISO”, “NIOSH”, “PIH material”, “Residue”, “State”,

“Switching service”, “System headquarters”, “Train employee”, and “United States” to read as follows:

§ 227.5 Definitions.

* * * * *

Accident/incident has the meaning that is assigned to that term by § 225.5 of this chapter.

* * * * *

Associate Administrator for Railroad Safety/Chief Safety Officer means the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

Atmosphere immediately dangerous to life or health (IDLH) means an atmosphere that poses an immediate threat to life, would cause irreversible adverse health effects, or would impair an individual’s ability to escape from a dangerous atmosphere.

Atmosphere-supplying device means a respirator that supplies the respirator user with breathing air from a source that is independent of the ambient atmosphere. Such devices include supplied-air respirators and self-contained breathing apparatus units.

* * * * *

Deadheading means the physical relocation of a train employee from one point to another as a result of a railroad-issued oral or written directive.

* * * * *

Division headquarters means the location designated by the railroad where a high-level operating manager (e.g. a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office.

Emergency escape breathing apparatus or EEBA means an atmosphere-supplying respirator device that is designed for use only during escape from a hazardous atmosphere.

* * * * *

Freight car means a vehicle designed to transport freight, or railroad personnel, by rail and includes, but is not limited to, a—

- (1) Box car;
- (2) Refrigerator car;
- (3) Ventilator car;
- (4) Stock car;
- (5) Gondola car;
- (6) Hopper car;
- (7) Flat car;
- (8) Special car;
- (9) Caboose;
- (10) Tank car; and
- (11) Yard car.

Freight train means one or more locomotives coupled with one or more freight cars, except during switching service.

Hazardous material has the meaning assigned to that term by § 171.8 of this title.

Hazmat employee has the meaning assigned to that term by § 171.8 of this title.

* * * * *

In service or *in-service* when used in connection with a freight train, means each freight train subject to this part unless the train—

(1) Is in a repair shop or on a repair track;

(2) Is on a storage track and its cars are empty; or

(3) Has been delivered in interchange but has not been accepted by the receiving carrier.

Intermodal container means a freight container designed and constructed to permit it to be used interchangeably in two or more modes of transportation.

ISO means the International Organization for Standardization, a network of national standards institutes in 162 countries, including the United States through the American National Standards Institute, that develops international standards to assist in ensuring the safe performance of a wide range of devices, including EEBA’s.

* * * * *

NIOSH means the National Institute for Occupational Safety and Health, a Federal agency responsible for conducting research and making recommendations for the prevention of work-related injury and illness, which is part of the Centers for Disease Control and Prevention in the U.S. Department of Health and Human Services and which certifies industrial-type respirators in accordance with the NIOSH respiratory regulations (42 CFR part 84).

* * * * *

PIH material means any of the hazardous materials that are a gas, liquid, or other material defined as a “material poisonous by inhalation” by § 171.8 of this title.

* * * * *

Residue has the meaning assigned to the term by § 171.8 of this title.

* * * * *

State means a State of the United States of America or the District of Columbia.

Switching service means the classification of freight cars according to commodity or destination; assembling of cars for train movements; changing the position of cars for purposes of loading, unloading, or weighing; placing of locomotives and cars for repair or storage; or moving of rail equipment in connection with work service that does not constitute a freight train movement.

System headquarters means the location designated by the railroad as the general office for the railroad system.

* * * * *

Train employee means an individual who is engaged in or connected with the movement of a train, including a hostler, as defined in 49 U.S.C. 21101.

United States means all of the States and the District of Columbia.

§ 227.7 [Removed and Reserved]

■ 6. Remove and reserve § 227.7.

■ 7. Amend § 227.15 by revising paragraph (b) to read as follows:

§ 227.15 Information collection.

* * * * *

(b) The information collection requirements are found in the following sections: §§ 227.13, 227.103, 227.107, 227.109, 227.111, 227.117, 227.119, 227.121, 227.201, 227.203, 227.205, 227.207, 227.209, 227.211, 227.213, and 227.215.

■ 8. Amend § 227.103 by revising paragraphs (a)(1) and (2) to read as follows:

§ 227.103 Noise monitoring program.

(a) * * *

(1) Class I, passenger, and commuter railroads no later than February 26, 2008.

(2) Railroads with 400,000 or more annual employee hours that are not Class I, passenger, or commuter railroads no later than August 26, 2008.

* * * * *

■ 9. Amend § 227.109 by revising paragraph (e)(2)(i) to read as follows:

§ 227.109 Audiometric testing program.

* * * * *

(e) * * *

(2) * * *

(i) For all employees without a baseline audiogram as of February 26, 2007, Class I, passenger, and commuter railroads, and railroads with 400,000 or more annual employee hours shall establish a valid baseline audiogram by February 26, 2009; and railroads with less than 400,000 annual employee hours shall establish a valid baseline audiogram by February 26, 2010.

* * * * *

■ 10. Amend § 227.119 by revising paragraph (b)(2) to read as follows:

§ 227.119 Training program.

* * * * *

(b) * * *

(2) For employees hired on or before February 26, 2007, by Class I, passenger, and commuter railroads, and railroads with 400,000 or more annual employee

hours, by no later than February 26, 2009;

* * * * *

■ 11. Add subpart C, consisting of §§ 227.201 through 227.219, to read as follows:

Subpart C—Emergency Escape Breathing Apparatus Standards

Sec.

227.201 Criteria for requiring availability of EEBA in the locomotive cab.

227.203 Criteria for selecting EEBA.

227.205 Storage facilities for EEBA.

227.207 Railroad's program for inspection, maintenance, and replacement of EEBA; requirements for procedures.

227.209 Railroad's program of instruction on EEBA.

227.211 Requirement to implement a general EEBA program; criteria for placing employees in the general EEBA program.

227.213 Employee's responsibilities.

227.215 Recordkeeping in general.

227.217 Compliance dates.

227.219 Incorporation by reference.

Subpart C—Emergency Escape Breathing Apparatus Standards

§ 227.201 Criteria for requiring availability of EEBA in the locomotive cab.

(a) *In general.* (1)(i) Except as specified in paragraph (b) of this section, a railroad is required to provide an EEBA to each of the following of its employees while the employee is located in the cab of a locomotive of an in-service freight train transporting a PIH material, including a residue of a PIH material:

(A) Any train employee;

(B) Any direct supervisor of the train employee;

(C) Any employee who is deadheading; and

(D) Any other employee designated by the railroad in writing and at the discretion of the railroad.

(ii) Each EEBA provided to an employee identified in paragraph (a)(1)(i) of this section must meet the EEBA-selection criteria of § 227.203 and must have been inspected and be in working order pursuant to the requirements of § 227.207 at the time that the EEBA is provided to the employee.

(2) Except as specified in paragraph (b) of this section, a railroad shall not use a locomotive to transport a PIH material, including a residue of a PIH material, in an in-service freight train unless each of the employees identified in paragraph (a)(1)(i) of this section while occupying a locomotive cab of the train has access to an EEBA that satisfies the EEBA selection criteria in § 227.203 and that has been inspected and is in

working order pursuant to the requirements in § 227.207.

(b) *Exceptions.* (1) A railroad is not required to provide an EEBA, or make accessible an EEBA, to an employee while in the locomotive cab of an in-service freight train transporting a PIH material if all of the PIH materials in the train, including a residue of a PIH material, are being transported in one or more intermodal containers.

(2) This subpart does not apply to any of the following:

(i) Employees who are moving a locomotive or group of locomotives coupled to a car or group of cars transporting a PIH material, including a residue of a PIH material, only within the confines of a locomotive repair or servicing area.

(ii) Employees who are moving a locomotive or group of locomotives coupled to a car or group of cars transporting a PIH material, including a residue of a PIH material for distances of less than 100 feet for inspection or maintenance purposes.

(c) *Employee misconduct.*

Notwithstanding any exceptions identified in this subpart, any employee who willfully tampers with or vandalizes an EEBA shall be subject to this subpart for purposes of enforcement relating to § 227.213.

§ 227.203 Criteria for selecting EEBA.

In selecting the appropriate EEBA to provide to an employee, the railroad shall do the following:

(a) Select an atmosphere-supplying EEBA that protects against all PIH materials (including their residue) that are being transported by the freight train while in service.

(b) Ensure that the type of respirator selected meets the requirements of paragraph (c)(1) of this section regarding minimum breathing capacity and is—

(1) Certified for an escape only purpose by NIOSH pursuant to 42 CFR part 84; or

(2) Declared by the manufacturer, based on verifiable testing by the manufacturer or an independent third party, to meet the criteria established by one of the following:

(i) ISO 23269–1:2008 (incorporated by reference, see § 227.219);

(ii) BS EN 13794:2002 (incorporated by reference, see § 227.219); or

(iii) BS EN 1146:2005 (incorporated by reference, see § 227.219).

(c) Document, and provide such documentation for inspection by FRA upon request, the rationale for the final selection of an EEBA by addressing each of the following concerns:

(1) *Breathing time.* Each EEBA must be fully charged and contain a

minimum breathing capacity of 15 minutes at the time of the pre-trip inspection required under § 227.207(a)(1).

(2) *Head and neck protection.* The EEBA selected must provide a means of protecting the individual's head and neck from the irritating effects of PIH materials to facilitate escape.

(3) *Accommodation for eyeglasses and a range of facial features.* The EEBA selected must provide a means of protecting each employee who is required to be provided with the EEBA, including those who wear glasses, and allow for the reasonable accommodation of each such employee's facial features, including facial hair.

§ 227.205 Storage facilities for EEBA's.

(a) A railroad may not use a locomotive if it is part of an in-service freight train transporting a PIH material, including a residue of a PIH material, and the locomotive cab is occupied by an employee identified in § 227.201(a)(1)(i)(A) through (D) (subject employee), unless the locomotive cab has appropriate storage facilities to hold the number of EEBA's required to be provided.

(b) The storage facility for each required EEBA must—

(1) Prevent deformation of the face piece and exhalation valve, where applicable;

(2) Protect the EEBA from incidental damage, contamination, dust, sunlight, extreme temperatures, excessive moisture, and damaging chemicals;

(3) Provide each subject employee located in the locomotive cab with ready access to the EEBA during an emergency; and

(4) Provide a means for each subject employee to locate the EEBA under adverse conditions such as darkness or disorientation.

(c) A railroad must comply with the applicable manufacturer's instructions for storage of each required EEBA and must keep a copy of the instructions at its system headquarters for FRA inspection.

§ 227.207 Railroad's program for inspection, maintenance, and replacement of EEBA's; requirements for procedures.

(a) *General.* Each railroad shall establish and comply with a written program for inspection, maintenance, and replacement of EEBA's that are required under this subpart. The program for inspection, maintenance, and replacement of EEBA's shall be maintained at the railroad's system headquarters and shall be amended, as necessary, to reflect any significant changes. This program shall include the following procedures:

(1) Procedures for performing and recording a pre-trip inspection of each EEBA that is required to be provided on a locomotive being used to transport a PIH material and procedures for cleaning, replacing, or repairing each required EEBA, if necessary, prior to its being provided under § 227.201(a);

(2) Procedures for performing and recording periodic inspections and maintenance of each required EEBA in a manner and on a schedule in accordance with the manufacturer's recommendations; and

(3) Procedures for turning in and obtaining a replacement for a defective, failed, or used EEBA and for recording those transactions.

(b) *Inspection procedures and records.* (1) A railroad's procedures for pre-trip and periodic inspections of EEBA's shall require that the following information about each pre-trip and periodic inspection be accurately recorded on a tag or label that is attached to the storage facility for the EEBA or kept with the EEBA or in inspection reports stored as paper or electronic files:

(i) The name of the railroad performing the inspection;

(ii) The date that the inspection was performed;

(iii) The name and signature of the individual who made the inspection;

(iv) The findings of the inspection;

(v) The required remedial action; and

(vi) A serial number or other means of identifying the inspected EEBA.

(2) A railroad shall maintain an accurate record of each pre-trip and periodic inspection required by this section. Pre-trip inspection records shall be retained for a period of 92 days. Periodic inspection records shall be retained for a period of one year.

(c) *Procedures applicable if EEBA fails an inspection or is used.* An EEBA that fails an inspection required by this section, is otherwise found to be defective, or is used, shall be removed from service and be discarded or repaired, adjusted, or cleaned in accordance with the following procedures:

(1) Repair, adjustment, and cleaning of EEBA's shall be done only by persons who are appropriately trained to perform such work and who shall use only the EEBA manufacturer's approved parts designed to maintain the EEBA in compliance with one of the following standards:

(i) NIOSH at 42 CFR part 84;

(ii) ISO 23269-1:2008 (incorporated by reference, see § 227.219);

(iii) BS EN 1146:2005 (incorporated by reference, see § 227.219); or

(iv) BS EN 13794:2002 (incorporated by reference, see § 227.219).

(2) Repairs shall be made according to the manufacturer's recommendations and specifications for the type and extent of repairs to be performed.

(3) Where applicable, reducing and admission valves, regulators, and alarms shall be adjusted or repaired only by the manufacturer or a technician trained by the manufacturer.

(4) An EEBA may not be returned to service unless it meets the requirements in § 227.203.

(d) *Records of returns, maintenance, repair, and replacement.* A railroad shall—

(1) Maintain an accurate record of return, maintenance, repair, or replacement for each EEBA required by this subpart; and

(2) Retain each of these records for three years.

§ 227.209 Railroad's program of instruction on EEBA's.

(a) *General.* (1) A railroad shall adopt and comply with its written program of instruction on EEBA's for all of its employees in its general EEBA program under § 227.211 (subject employees). The program of instruction shall be maintained at the railroad's system headquarters and shall be amended, as necessary, to reflect any significant changes.

(2) This program may be integrated with the railroad's program of instruction on operating rules under § 217.11 of this chapter or its program of instruction for hazmat employees under § 172.704 of this title. If the program is not integrated with either of these programs, it must be written in a separate document that is available for inspection by FRA.

(b) *Subject matter.* The railroad's program of instruction shall require that the subject employees demonstrate knowledge of at least the following:

(1) Why the EEBA is necessary and how improper fit, usage, or maintenance can compromise the protective effect of the EEBA.

(2) The capabilities and limitations of the EEBA, particularly the limited time for use.

(3) How to use the EEBA effectively in emergency situations, including situations in which the EEBA malfunctions.

(4) How to inspect, put on, remove, and use the EEBA, and how to check the seals of the EEBA.

(5) Procedures for maintenance and storage of the EEBA that must be followed.

(6) The requirements of this subpart related to the responsibilities of employees and the rights of employees to have access to records.

(7) The hazardous materials classified as PIH materials.

(c) *Dates of initial instruction and intervals for periodic instruction.* (1) The instruction for current subject employees shall be provided on an initial basis no later than 30 days prior to the date of compliance identified in § 227.217. Initial instruction of new subject employees shall occur either 30 days prior to the date of compliance identified in § 227.217 or before assignment to jobs where the deployment of EEBA's on a locomotive is required, whichever is later.

(2) Initial instruction shall be supplemented with periodic instruction at least once every three years.

(d) *Records of instruction.* A railroad shall maintain a record of employees provided instruction in compliance with this section and retain these records for three years.

§ 227.211 Requirement to implement a general EEBA program; criteria for placing employees in the general EEBA program.

(a) *In general.* A railroad shall adopt and comply with a comprehensive, written, general program to implement this subpart that shall be maintained at the railroad's system headquarters. Each railroad shall amend its general EEBA program, as necessary, to reflect any significant changes.

(b) *Elements of the general EEBA program and criteria for placing employees in program.* A railroad's general EEBA program shall—

(1) Identify the individual who implements and manages the railroad's general EEBA program by title. The individual must have suitable training and sufficient knowledge, experience, skill, and authority to enable him or her to manage properly a program for provision of EEBA's. If the individual is not directly employed by the railroad, the written program must identify the business relationship of the railroad to the individual fulfilling this role.

(2) Describe the administrative and technical process for selection of EEBA's appropriate to the hazards that may be reasonably expected.

(3) Describe the process used to procure and provide EEBA's in a manner to ensure the continuous and ready availability of an EEBA to each of the railroad's employees identified in § 227.201(a)(1)(i)(A) through (D) (while actually occupying the locomotive cab of a freight train in service transporting a PIH material). This description shall include—

(i) A description of the method used for provision of EEBA's, including whether the EEBA's are individually assigned to employees, installed on

locomotives as required equipment, or provided by other means. If EEBA's are installed on locomotives as required equipment, the means of securement shall be designated.

(ii) The decision criteria used by the railroad to identify trains in which provision of EEBA's is not required.

(iii) A description of what procedures will govern the railroad at interchange to ensure that the locomotive cab in each in-service freight train transporting a PIH material has an EEBA accessible to each of the employees identified in § 227.201(a)(1)(i)(A) through (D) while in the cab of the locomotive, including what procedures are in place to ensure that the EEBA's provided satisfy the EEBA-selection criteria in § 227.203, satisfy the EEBA-storage criteria in § 227.205, and have been inspected and are in working order pursuant to the requirements in § 227.207.

(4) Ensure that each of the following employees, except those excluded by § 227.201(b), whose duties require regular work in the locomotive cabs of in-service freight trains transporting a PIH material, including a residue of a PIH material, has the required EEBA available when they occupy the cab of such a train and know how to use the EEBA:

(i) Employees who perform service subject to 49 U.S.C. 21103 (train employees) on such trains;

(ii) Direct supervisors of train employees on such trains;

(iii) Deadheading employees on such trains; and

(iv) Any other employees designated by the railroad in writing and at the discretion of the railroad.

(c) *Records of positions or individuals or both in the railroad's general EEBA program.* A railroad shall maintain a record of all positions or individuals, or both, who are designated by the railroad to be placed in its general EEBA program pursuant to paragraph (b)(4) of this section. The railroad shall retain these records for the duration of the designation and for one year thereafter.

(d) *Consolidated programs.* A group of two or more commonly controlled railroads subject to this subpart may request in writing that the Associate Administrator for Railroad Safety/Chief Safety Officer (Associate Administrator) treat them as a single railroad for purposes of adopting and complying with the general EEBA program required by this section. The request must list the parent corporation that controls the group of railroads and demonstrate that the railroads operate in the United States as a single, integrated rail system. The Associate Administrator will notify

the railroads of his or her decision in writing.

§ 227.213 Employee's responsibilities.

(a) An employee to whom the railroad provides an EEBA shall—

(1) Participate in training under § 227.209;

(2) Follow railroad procedures to ensure that the railroad's EEBA's—

(i) Are maintained in a secure and accessible manner;

(ii) Are inspected as required by this subpart and the railroad's program of inspection; and

(iii) If found to be unserviceable upon inspection, are turned in to the appropriate railroad facility for repair, periodic maintenance, or replacement; and

(3) Notify the railroad of EEBA failures and of use incidents in a timely manner.

(b) No employee shall willfully tamper with or vandalize an EEBA that is provided pursuant to § 227.201(a) in an attempt to disable or damage the EEBA.

§ 227.215 Recordkeeping in general.

(a) *Availability of records.* (1) A railroad shall make all records required by this subpart available for inspection and copying or photocopying to representatives of FRA, upon request.

(2) Except for records of pre-trip inspections of EEBA's under § 227.207, records required to be retained under this subpart must be kept at the system headquarters and at each division headquarters where the tests and inspections are conducted.

(b) *Electronic records.* All records required by this subpart may be kept in electronic form by the railroad. A railroad may maintain and transfer records through electronic transmission, storage, and retrieval provided that all of the following conditions are met:

(1) The electronic system is designed so that the integrity of each record is maintained through appropriate levels of security such as recognition of an electronic signature, or other means, which uniquely identify the initiating person as the author of that record. No two persons have the same electronic identity.

(2) The electronic system ensures that each record cannot be modified in any way, or replaced, once the record is transmitted and stored.

(3) Any amendment to a record is electronically stored apart from the record that it amends. Each amendment to a record is uniquely identified as to the individual making the amendment.

(4) The electronic system provides for the maintenance of records as originally

submitted without corruption or loss of data.

(5) Paper copies of electronic records and amendments to those records that may be necessary to document compliance with this subpart are made available for inspection and copying or photocopying by representatives of FRA.

§ 227.217 Compliance dates.

(a) Class I railroads subject to this subpart are required to comply with this subpart beginning no later than 12 months from March 26, 2024.

(b) Class II railroads subject to this subpart are required to comply with this subpart beginning no later than 12 months from March 26, 2024.

(c) Class III railroads subject to this subpart and any other railroads subject to this subpart are required to comply with this subpart beginning no later than 18 months from March 26, 2024.

§ 227.219 Incorporation by reference.

Certain material is incorporated by reference into this subpart with the approval of the Director of the Federal Register under 5 U.S.C. 552(a) and 1 CFR part 51. This incorporation by reference (IBR) material is available for inspection at the FRA and the National Archives and Records Administration (NARA). Contact FRA at: Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590; phone: (202) 493-6052; email: FRALegal@dot.gov. For information on the availability of this material at NARA, visit www.archives.gov/federal-register/cfr/ibr-locations or email fr.inspection@nara.gov. The material may be obtained from the following sources:

(a) The British Standards Institution, 12110 Sunset Hills Road, Suite 200, Reston, VA 20190-5902, phone: 800-862-4977; website: shop.bsigroup.com.

(1) BS EN 1146:2005, Respiratory protective devices—Self-contained, open-circuit compressed air breathing apparatus incorporating a hood for escape—requirements, testing, marking; February 2, 2006; into §§ 227.203(b) and 227.207(c).

(2) BS EN 13794:2002, Respiratory protective devices—Self-contained, closed-circuit breathing apparatus for escape—requirements, testing, marking, November 26, 2002; into §§ 227.203(b) and 227.207(c).

(b) International Organization for Standardization, Chemin de Blandonnet 8, CP 401, 1214 Vernier, Geneva, Switzerland; phone +41-22-749-08-88; website: www.iso.org.

(1) ISO 23269-1:2008(E), Ships and marine technology—Breathing

apparatus for ships—Part 1: Emergency escape breathing devices (EEBD) for shipboard use, First Edition, February 1, 2008; into §§ 227.203(b) and 227.207(c).

(2) [Reserved]

Issued in Washington, DC.

Amitabha Bose,

Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 230306-0065; RTID 0648-XD669]

Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Catcher Vessels Less Than 60 Feet (18.3 Meters) Length Overall Using Hook-and-Line or Pot Gear in the Bering Sea and Aleutian Islands Management Area

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is prohibiting directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 meters (m)) length overall (LOA) using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area (BSAI). This action is necessary to prevent exceeding the 2024 Pacific cod total allowable catch (TAC) allocated to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI.

DATES: Effective 1200 hours, Alaska local time (A.l.t.), January 25, 2024, through 2400 hours, A.l.t., December 31, 2024.

FOR FURTHER INFORMATION CONTACT: Adam Zaleski, 907-586-7228.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the BSAI exclusive economic zone according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2024 Pacific cod TAC allocated to catcher vessels less than 60 feet (18.3 m)

LOA using hook-and-line or pot gear in the BSAI is 3,867 metric tons as established by the final 2023 and 2024 harvest specifications for groundfish in the BSAI (88 FR 14926, March 10, 2023), inseason adjustment (88 FR 88836, December 26, 2023) and reallocation (89 FR 2176, January 12, 2024).

In accordance with § 679.20(d)(1)(iii), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2024 Pacific cod TAC allocated as a directed fishing allowance to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI will soon be reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI.

While this closure is effective the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

Classification

NMFS issues this action pursuant to section 305(d) of the Magnuson-Stevens Act. This action is required by 50 CFR part 679, which was issued pursuant to section 304(b), and is exempt from review under Executive Order 12866.

Pursuant to 5 U.S.C. 553(b)(B), there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest, as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod by catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of January 23, 2024.

The Assistant Administrator for Fisheries, NOAA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: January 23, 2024.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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