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

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

Carl T. Johnson,

Administrator.

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DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 209

[FRA–2007–28573]

RIN 2130–AB87

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

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

ACTION: Final rule.

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

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

FOR FURTHER INFORMATION CONTACT: Roberta Stewart, Office of Chief Counsel, Federal Railroad Administration, 202–493–6027.

SUPPLEMENTARY INFORMATION:

I. Background

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

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

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

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

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

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

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

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

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

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

II. Summary of the FRA NPRM

The procedures proposed by FRA in the NPRM are summarized below.

Proposed Section 209.501 provided that if the Associate Administrator determines that a railroad carrier's route selection documentation and underlying analysis are deficient and fail to establish that the route chosen by the carrier is the route with the least overall safety and security risk, the Associate Administrator would issue a written notice of review (''Notice'') to the railroad carrier. The Notice will specifically address each deficiency found in the railroad carrier's route analysis, and may also include suggested mitigation measures that may be taken to remedy the deficiencies, including selection and use of an alternative commercially practicable route. After issuing the Notice, the Associate Administrator will conference with the railroad carrier for a 30-day period (or longer, if necessary, as determined by the Associate Administrator) to resolve the deficiencies. The Associate Administrator will keep a record of all written correspondence with the railroad carrier, as well as written summaries of each meeting and telephone conversation with the carrier pertaining to the Notice.

If, after the close of the 30-day period, the Associate Administrator concludes that the identified deficiencies have not been satisfactorily resolved, the Associate Administrator will:

(1) Consult with TSA and PHMSA regarding the safety and security of the route proposed by the railroad carrier and any alternative route(s) over which the carrier is authorized to operate that are being considered by the Associate Administrator. A written summary of the recommendations from TSA and PHMSA will be prepared;

(2) Obtain the comments of the STB regarding whether the alternative rail route(s) under consideration by the Associate Administrator would be commercially practicable; and

(3) After fully considering the input of TSA, PHMSA and STB, render a decision.

In proposed section 209.501(d), there were two possible outcomes of a decision by the Associate Administrator. First, the Associate Administrator may find that the route analysis and documentation provided by the railroad carrier are sufficient to support the route selected by the carrier or that commercial practicability issues preclude the use of an alternative route. In either of those circumstances, the Associate Administrator would conclude the route review without further action, and notify the railroad carrier of the decision in writing.

Alternately, the Associate Administrator may conclude that the railroad carrier's route analysis does not support the railroad carrier's original selected route, that safety and security considerations establish a significant preference for an alternative route, and that the alternative route is commercially practicable. The Associate Administrator would then issue a second written notice (2nd Notice) to the railroad carrier that specifically identifies deficiencies in the route analysis, including a clear description of the risks that have not been satisfactorily mitigated; explains why the available data and reasonable inferences support an alternative route; and directs the railroad carrier to temporarily use the alternative route determined by the Associate Administrator to be the route with the overall least safety and security risk. The railroad carrier would be required to start using the alternative route selected by the Associate Administrator within 20 days after the issuance date of the 2nd Notice. The railroad carrier would be required to use the alternative route until such time as the carrier has adequately mitigated the risks identified by the Associate Administrator on the original route selected by the carrier, the decision is stayed by the Associate Administrator pending the outcome of a court challenge to the decision, or the decision is overturned by a United States court of appeals.

When the Associate Administrator issues a 2nd Notice directing the use of an alternative route pursuant to section 209.501(d)(2), the Associate Administrator shall make available to the railroad carrier the administrative record relied upon in issuing the 2nd Notice, including the recommendations of TSA, PHMSA and the STB to FRA.

Within 20 days after the issuance date of the 2nd Notice, the railroad carrier may: (1) Comply with the Associate Administrator's directive to use an alternative route while addressing deficiencies in its route analysis identified by the Associate Administrator; or (2) file a petition for judicial review of the Associate Administrator's 2nd Notice. Judicial review would be available in an appropriate United States court of appeals as provided in 49 U.S.C. 5127. The filing of a petition for judicial review will not stay or modify the force and effect of final agency action unless otherwise ordered by the Associate Administrator or the court of appeals.

III. Discussion of Comments Received; Section-by-Section Analysis

Only three comments were submitted in response to its NPRM. These came from the Association of American Railroads (AAR), a trade association representing Class I railroads; Dow Chemical Company (Dow), a private company; and the Mayo Clinic (Mayo Clinic). Commenters were generally supportive of having procedures to appeal routing decisions made by railroads. Concern was voiced by all commenters regarding the standard that the routing decisions would be held to. Commenters also expressed interest in having parties other than the affected railroad carriers be able to provide input to and challenge routing decisions made by railroads or FRA. In the following paragraphs, we discuss the comments as they relate to each section of the regulatory text in this final rule.

A. Review of Route Analysis (§ 209.501(a))

In the NPRM, we proposed that the Associate Administrator shall issue a written notice of review (''Notice'') to the railroad carrier where it is determined that the railroad carrier's route selection, analysis and documentation are deficient and fail to establish that the route chosen by the carrier is the safest and most secure route. The Notice shall specifically address each deficiency that the Associate Administrator found in the railroad carrier's route analysis. The Associate Administrator may also include in the Notice suggested mitigation measures that the railroad carrier may take to remedy the deficiencies found, such as the selection of an alternative commercially feasible route.

The AAR commented that FRA's proposed requirement in § 209.501(a) that railroads select the ''safest and most secure route'' imposes a new substantive obligation on railroads that contradicts the PHMSA IFR. The PHMSA IFR requires railroads to ''select the practicable route posing the least overall safety and security risk.'' 73 FR 20772 (April 16, 2008). AAR suggests amending proposed 49 CFR 209.501(a) by inserting ''poses the least overall safety and security risk'' in the place of ''is the safest most secure route.''

We agree that the language in this final rule should be consistent with the PHMSA IFR and final rule, and we have changed the phrasing throughout the regulatory text accordingly.

In its comments, Dow suggests revision of proposed § 209.501(a) to require that the railroad carrier identify

affected shippers of covered materials for the purposes of § 209.501(b) and (c). Dow states that that this change is necessary because shippers of covered hazardous materials will be significantly affected by an FRA determination that a railroad's route selection is deficient; therefore, shippers of covered hazardous materials should be involved in the FRA's process for determining the acceptability of a railroad's routing decision.

FRA is not adopting Dow's proposed revision because we do not believe a separate requirement for shipper information is necessary in this subsection. The railroad carriers' route analyses conducted under the requirements of the PHMSA Final Rule will include detailed information regarding the origins, destinations, number of shipments, and routes of the specific security sensitive materials. FRA will already have access to and be able to evaluate this detailed data and take it into account regarding any findings or decisions on a railroad's route. In addition, FRA will consult with the STB before any routing change is mandated, which is an additional protection to ensure that interstate commerce and the timely movement of goods is not unduly impacted.

The Mayo Clinic suggested amending proposed § 209.501(a) to require that FRA provide notice in writing to affected jurisdictions whenever a written notice of review is issued to a railroad carrier. It stated that jurisdictions that would be potentially harmed in the event of a catastrophic release or explosion of hazardous materials should have an opportunity to challenge a railroad carrier's routing decision.

Congress did not afford jurisdictions traversed by a railroad with an opportunity to challenge a railroad carrier's routing decision, and FRA does not think it wise to do so in this final rule. Local jurisdictions had no ability prior to the Act to challenge railroad routing decisions and the Act did not create such an ability. The Act provides for routing decisions to be made on the basis of safety and security by those with expertise to do so and the national perspective needed to ensure that the general railroad system of transportation works well and performs its essential role in the Nation's economy. Experience teaches that local communities are often eager to divert trains carrying hazardous materials away from themselves. A cacophony of ''not-in-my-backyard'' challenges from the hundreds of local communities along a typical railroad route would impair the ability of the FRA or any other body to make timely, annual routing decisions as required by the Act. Moreover, FRA believes that the specific requirements and factors that must be included in a railroad carrier's route analysis, as well as the requirement for input from State, local and tribal officials imposed by PHMSA Final Rule are adequate to protect the interests of jurisdictions along each rail route. A railroad carrier also faces extremely high liability and remediation costs if a hazardous materials accident or incident occurs on one of its routes, which acts as a powerful incentive for the railroad to indeed conduct its operations in the manner posing the least overall safety and security risk. For example, the January 2005 Graniteville, South Carolina, rail accident killed nine people and injured 554 more. In addition, the accident necessitated the evacuation of more than 5,400 people. Total costs associated with the Graniteville accident are currently almost $126 million. Should a rail accident involving the release of TIH materials result in tort judgments that exceed a railroad's insurance coverage, payment of the judgments could jeopardize the ability of the railroad to continue operations.

Each rail route may be hundreds of miles long and could pass dozens of jurisdictions, making it potentially burdensome and time-consuming for FRA to provide notice in writing to each individual affected jurisdiction. One of the purposes of this rulemaking was to design an appeal process that would not unduly hinder rail traffic and interstate commerce, thereby ensuring that rail traffic is not congested or delayed by a pending FRA decision, and ensuring that critical commodities continue to reach the communities that need them in a timely, safe, and secure manner. That purpose would be thwarted by soliciting the views of each jurisdiction along a route, waiting for those views to be delivered, and then taking the time needed to consider and respond to all of those views.

B. Conference to Resolve Deficiencies (§ 209.501(b))

The NPRM proposed that the Associate Administrator conference with the railroad carrier for a thirty (30)-day period after issuing the Notice to resolve the deficiencies identified in the Notice. The Associate Administrator would be required to keep a record of all written correspondence with the railroad carrier and a summary of each meeting and telephone conversation as it pertains to the Notice. Additionally, the Associate Administrator may extend the 30-day conference period.

Dow requests that proposed § 209.501(b) be revised to allow shippers of covered hazardous materials to participate in the conference between the railroad carrier and the Associate Administrator. It states that shippers of covered hazardous materials will be significantly affected by an FRA determination that a railroad's route selection is deficient.

Again, FRA believes that the detailed commodity information required to be included in a railroad carrier's route analysis and supporting data will sufficiently protect shippers' interests. As stated above, this appeals process is not intended to hinder rail transportation, or to delay the timely, safe, and secure delivery of the covered commodities to their final destinations.

In the normal course of business, shippers may express some preference for the specific routing of their shipments, but the routing decisions are usually left to the full discretion of the railroad carriers, who are in a better position to analyze the efficiencies of their systems, and to select route posing the least safety and security risks. We note that the PHMSA Final Rule does not include an opportunity for shippers to provide input into the data gathering, route analysis and route choice performed by the railroad carriers. In comments submitted to the PHMSA NPRM docket, Dow and the Institute of Makers of Explosives suggested that consistent with fundamental concepts of due process, PHMSA should provide an immediate procedure to appeal an FRA determination to require the use of an alternative route. To address that concern, FRA issued its NPRM proposing these appeal procedures concurrently with the PHMSA IFR on April 16, 2008.

The 9/11 Commission Act does not require PHMSA to provide for hazardous materials shippers to participate in the route analysis process, and PHMSA's IFR and final rule do not include any requirement for railroad carriers to consult with shippers or for shippers to submit any input or data to railroad carriers for their route analyses. In § 1551(h) of the Act, in contrast, Congress did require that railroad carriers must ''seek relevant information from State, local, and tribal officials, as appropriate, regarding security risks to high-consequence targets along or in proximity to a route.'' Thus, Congress was quite specific in the Act about what information railroad carriers should consider when gathering data and analyzing rail routes, and explicitly included this consultation requirement with State, local and tribal officials.

As discussed below, the Associate Administrator will consult with the STB concerning the commercial practicability of alternative routes before reaching any final routing decision. FRA believes that this regulatory provision—together with the detailed data and analysis by the railroad carriers, and the carriers' own economic interests in ensuring the efficient, safe and secure transportation of all freight, including hazardous materials—will adequately safeguard the interests of hazardous materials shippers.

There are additional problems with including other parties, such as shippers, in the conference between the Associate Administrator and a railroad. The railroads' commodity data and route analyses will contain information that qualifies as Sensitive Security Information (SSI) under 49 CFR parts 15 and 1520; much of that information is also likely to be commercially sensitive or confidential. Sharing or release of such information by the Federal government is necessarily limited by a number of regulations and statutes in order to protect national security interests and prevent financial harm to private companies. Because the railroad carriers' commodity data, route analyses, and the conference record will contain sensitive information with a distribution limited by statute and regulation, it cannot be made available for review or comment to outside parties. To allow the detailed railroad routing information to be released to parties beyond authorized government officials and the railroad itself would defeat the purpose of the 9/11 Commission Act and the PHMSA Final Rule: To make railroad transportation of security sensitive hazardous materials safer and more secure.

In its comments to the PHMSA IFR Dow also suggested the use of conferences under 49 U.S.C. 333 (Section 333 conference) to bring together the government, shippers, and carriers. In 2005, FRA convened a Section 333 conference to discuss ways to minimize security and safety risks associated with the transportation of TIH materials. The conference has permitted railroads to share information on how TIH traffic is routed, and the reason for that routing. As indicated in the PHMSA Final Rule, FRA will continue to make the conference available to the railroads to jointly evaluate the safety and security risks associated with rail movements of high-risk hazardous materials across the entire rail system, and to evaluate risk-reducing arrangements on a national scale, including rerouting of these materials. FRA will also consider further hazardous material shipper participation in future Section 333 conferences.

C. Consultation With and Comment From Other Agencies (§ 209.501(c))

The NPRM proposed that, when issues identified in the Notice and conference period are not adequately resolved, the Associate Administrator is to: (1) Consult with the Transportation Security Administration (TSA) and PHMSA concerning the safety and security of the railroad carrier's proposed route and any alternative routes over which the railroad carrier is authorized to operate; (2) obtain comments from the Surface Transportation Board (STB) regarding whether the alternative routes being considered would be commercially practicable; and (3) fully consider the input of TSA, PHMSA, and STB in rendering a decision pursuant to proposed § 209.501(d), which shall be administratively final.

Dow suggested a revision of proposed § 209.501(c) to require that FRA take into consideration the input of shippers of covered hazardous materials prior to making its decision under proposed § 209.501(d). As stated above, FRA believes the detailed information that will be in the railroad carriers' analyses and input from the STB will be sufficient to protect shippers' interests, and that no separate provision for securing shippers' input is necessary.

D. Decision (§ 209.501(d)(1))

In the NPRM, we proposed that the Associate Administrator conclude the review and notify the railroad carrier in writing where it is found that the route analysis and documentation provided by the railroad carrier are sufficient to support the route that the carrier has selected or that valid issues of commercial practicability preclude the use of alternative routes.

The Mayo Clinic suggests two amendments to this subsection: (1) Allow affected jurisdictions, particularly those where high-consequence targets are located, to petition the FRA to review its decision to allow a railroad carrier to use a route based on the railroad's determination that it has chosen the safest and most secure route or that no commercially practicable alternative exists, and (2) make clear that the Associate Administrator's written decision is a final agency action and that a denial of a petition by an affected jurisdiction also would be treated as a final agency action for the purposes of judicial review.

For the reasons stated above regarding the Mayo Clinic's comments on section 209.501(a), FRA declines to adopt these suggested changes. The Associate Administrator's written decision is not intended to be the exhaustion of FRA's administrative process, and is not final agency action. As discussed in the NPRM, final agency action will occur only when the FRA Associate Administrator issues a 2nd Notice, per subsections 209.501(e) and (g).

E. Actions Following 2nd Notice and Re-Routing Directive (§ 209.501(e))

The NPRM proposed that a railroad carrier may file a petition for judicial review pursuant to paragraph (f) of this section where the Associate Administrator issues a 2nd Notice directing the use of an alternate route.

Dow points out that there appears to be a typographical error in proposed § 209.501(e)(2). FRA agrees that ''paragraph (g)'' should be inserted to replace the reference to ''paragraph (f)'' and has made the change to the regulatory text.

F. Review and Decision by Associate Administrator on Revised Route Analysis Submitted in Response to 2nd Notice (§ 209.501(f))

In the NPRM, FRA proposed that upon submission of a revised route analysis containing an adequate showing by the railroad carrier that its original selected route poses the least overall safety and security risk, the Associate Administrator will notify the carrier in writing that the original selected route may be used. No comments were received in response to this paragraph; therefore, we are adopting it as proposed in the NPRM.

G. Appellate Review (§ 209.501(g))

The NPRM proposed that a railroad carrier that is aggrieved by final agency action may petition the appropriate United States court of appeals as provided by 49 U.S.C. 5127. Under the proposed rule, the filing of a petition for review would not stay or modify the force and effect of the final agency action unless the Associate Administrator or the Court orders otherwise.

Dow comments that the proposed rule improperly restricts the rights of shippers to judicial review, as provided in 49 U.S.C. 5127, by failing to extend the right of appellate review to a shipper adversely affected or aggrieved by an FRA decision on route selection. Dow seeks an amendment to proposed § 209.501(g) to extend appellate review rights to shippers adversely affected or

aggrieved by an FRA decision on route selection.

FRA is declining to adopt Dow's suggested change in the final rule. We and PHMSA have reviewed the statute and it is our position that section 49 U.S.C. 5127 does not afford a party not directly regulated by this final rule with a private right of action in an appellate court to challenge a decision by FRA requiring rerouting.

Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The statutory intent is determinative in deciding whether a statute creates not just a private right but also a private remedy, and a statute does not give rise to a civil cause of action unless the language of the statute is explicit or it can be determined by clear implication. *See Alexander* v. *Sandoval,* 532 U.S. 275 (2001); *Virginia Bankshares, Inc.* v. *Sandberg,* 501 U.S. 1083 (1991); *Merrel Dow Pharmaceuticals Inc.* v. *Thompson,* 478 U.S. 804 (1986); *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 578 (1979); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11 (1979). In determining whether a private right of action exists under a federal statute, the central inquiry is whether Congress intended to create, either expressly or by implication, a private cause of action. *Cort* v. *Ash,* 422 U.S. 66 (1975). Where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under a particular statute or under an implied right of action. *Gonzaga University* v. *Doe,* 536 U.S. 273 (2002) (referring to 42 U.S.C. 1983). Such a private right of action is not afforded by 49 U.S.C. 5127 to entities not part of the underlying regulatory scheme and enforcement action.

The text of section 5127(a) states: ''Filing and venue. Except as provided in section 20114(c), a person adversely affected or aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in the United States court of appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60 days after the Secretary's action becomes final.''

The legislative history for section 5127 indicates that it was intended only to provide an appropriate and consistent judicial forum for the appeal of final actions taken by the Secretary of Transportation under Chapter 51. Prior to the passage of section 5127 in the Safe, Efficient, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, 119 Stat. 1907 (Aug. 10, 2005), several different statutes designated the proper court for judicial review of final agency actions under Chapter 51, depending on the mode of transportation to which the final agency action applied. In some cases, a petition for judicial review was required to be filed in a Federal district court, and in other cases, only a U.S. court of appeals had jurisdiction. To provide a consistent procedure and eliminate confusion, section 5127 specifically established the appropriate judicial forum for review of final agency actions in the areas of compliance, enforcement, civil penalties, rulemaking, and preemption.[1] Therefore, it appears that Congress only intended 49 U.S.C. 5127 to confer exclusive jurisdiction of final agency actions under the authority of Chapter 51 to the U.S. courts of appeals.

There is no other provision suggesting that Congress intended to provide a right of action to third parties not involved in an enforcement proceeding under Chapter 51. On the contrary, in the context of the entire statute and the congressionally developed enforcement scheme, those aggrieved, and provided an opportunity to judicial review, are limited to those who participated in the underlying enforcement proceeding. The requirements of the PHMSA Final Rule only apply to railroad carriers of certain hazardous materials, not shippers and not communities traversed by the railroads. Accordingly, this final rule, which establishes appeal procedures for the PHMSA Final Rule also only applies to railroad carriers as the regulated entities. Entities not covered by the PHMSA Final Rule and not included in the administrative proceeding, including a railroad carrier's customers (e.g., shippers) and communities traversed by the railroad, would therefore not be entitled to judicial review under § 5127.

Additionally, Dow's comments suggest amending proposed § 209.501(g) to stay any FRA-required route alteration during the pendency of an appeal in order to minimize operational and economic disruptions until the appellate process is complete. With respect to this second suggested amendment to section 209.501(g), FRA will decline to make that change. We reiterate that we have designed these procedures specifically to avoid undue disruption and delay to rail transportation. But in the case of a serious or immediate security threat to rail transportation or a commodity in transportation, FRA and other Federal agencies must retain the ability to reroute or stop rail transportation to mitigate any accident, incident, release or terrorist act that would cause harm to the public and the transportation system.

H. Time (§ 209.501(h))

This section proposed a method for computing time for all deadlines and time periods in the proposed rule. No comments were received on this section, and it will be adopted as proposed in the NPRM.

I. Penalties (Appendix B to Part 209)

In the NPRM, FRA proposed civil penalty assessments and guidelines for violations of PHMSA's rail security and routing regulations. These penalty guidelines would be added to FRA's existing penalty guidelines for hazardous materials violations. No comments were received on the proposed penalty guidelines, and they will be adopted as proposed in the NPRM.

J. Miscellaneous Comments

AAR comments that FRA's proposed rule does not address the protection of security-sensitive information, particularly route analysis information. AAR requests that FRA restrict access to route analysis information to those FRA employees who need the information for enforcement purposes, and that FRA designate those employees who need access to rail routing information for enforcement purposes to facilitate the transmission of said information.

The AAR submitted substantially the same comment in response to the PHMSA IFR, and we will respond to it in the same way here. FRA will continue to coordinate closely with the railroads in its inspection and enforcement activities regarding security plans. To date, FRA is not aware of issues surrounding access to or inspection of railroad security plans. FRA's enforcement role is to review the railroads' analyses, not to perform them. FRA and its employees will comply with the existing SSI regulations with regard to the handling of the route analyses and the underlying commodity data. Only FRA employees who are ''covered persons'' with a ''need-to-know'' under the SSI regulations at 49 CFR parts 15 and 1520 will be accessing the routing analyses and data.

The Mayo Clinic comments on FRA's statement in the Background Information section of the NPRM, which provides that the FRA expects to mandate temporary changes to routes only in the most exigent circumstances.

[1] *See, e.g.,* H.R. Rep. 109–12 § 7024 (Mar. 7, 2005).

It contends that there is no basis in the Implementing Recommendations of the 9/11 Commission Act to substitute the exigent circumstances standard for the ''safest and most secure'' and ''least overall safety and security risks'' statutory standards.

FRA's response is that this was simply an explanatory statement in the preamble which does not propose to substitute a standard or regulation for any standards established by the 9/11 Commission Act or the regulatory text in the PHMSA Final Rule or this final rule. As previously noted, railroads have every incentive to choose routes posing the least overall safety and security risks for moving security-sensitive materials and FRA anticipates that it will rarely have to overturn a railroad carrier's routing decision.

IV. Rulemaking Analyses and Notices

A. Statutory/Legal Authority for This Rulemaking

This NPRM is published under authority of the Federal hazmat law (49 U.S.C. 5101 et seq.). Section 5103(b) of Federal hazardous materials law authorizes the Secretary to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce. The HMR are issued by PHMSA. 49 CFR 1.53(b). FRA inspects railroads and rail shippers for compliance with the hazardous materials transportation law and regulations. 49 CFR 1.49(s).

B. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is not considered a significant regulatory action under section 3(f) of Executive Order 12866 and, therefore, was not reviewed by the Office of Management and Budget. This final rule is not significant under the Regulatory Policies and Procedures of DOT (44 FR 11034). The economic impact of this final rule is minimal to the extent that preparation of a regulatory evaluation is not warranted.

C. Executive Order 13132

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132 (''Federalism''). This final rule would not have any direct effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the national government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government.

D. Regulatory Flexibility Act and Executive Order 13272

FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. This final rule would apply to carriers of hazardous materials by rail. Some of these entities are classified as small entities; however, there is no economic impact on any person that complies with Federal hazardous materials law and the regulations and orders issued under that law.

E. Paperwork Reduction Act

There are no new information requirements in this final rule.

F. Unfunded Mandates Reform Act of 1995

This final rule does not impose unfunded mandates under the Unfunded Mandates Act of 1995. It does not result in annual costs of $141,100,000 or more, in the aggregate, to any of the following: State, local, or Indian tribal governments, or the private sector, and is the least burdensome alternative to achieve the objective of the rule.

G. Environmental Assessment

There are no significant environmental impacts associated with this final rule.

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). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking, that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211, and determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

I. Regulation Identifier Number (RIN)

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in spring and fall of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 209

Administrative practice and procedure, Hazardous materials transportation, Penalties, Railroad safety, Railroad safety enforcement procedures, Reporting and recordkeeping requirements.

■ Therefore, in consideration of the foregoing, chapter II, subtitle B of title 49 of the Code of Federal Regulations is amended as follows:

PART 209—[AMENDED]

■ 1. The authority citation for part 209 continues to read as follows:

Authority: 49 U.S.C. 5123, 5124, 20103, 20107, 20111, 20112, 20114; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Amend § 209.3 by adding the following new definitions:

§ 209.3 Definitions.

* * * * *

Associate Administrator means the Associate Administrator for Safety, Federal Railroad Administration, or that person's delegate as designated in writing.

* * * * *

Railroad carrier means a person providing railroad transportation.

* * * * *

■ 3. Add new Subpart F, consisting of § 209.501, to read as follows:

Subpart F—Enforcement, Appeal and Hearing Procedures for Rail Routing Decisions Pursuant to 49 CFR § 172.820

§ 209.501 Review of rail transportation safety and security route analysis.

(a) *Review of route analysis.* If the Associate Administrator for Safety determines that a railroad carrier's route selection, analysis and documentation pursuant to § 172.820 of chapter I of this title is deficient and fails to establish that the route chosen by the carrier poses the least overall safety and security risk, the Associate Administrator shall issue a written notice of review (''Notice'') to the

railroad carrier. The Notice shall specifically address each deficiency found in the railroad carrier's route analysis. The Notice may also include suggested mitigation measures that the railroad carrier may take to remedy the deficiencies found, including selection of an alternative commercially feasible routing.

(b) *Conference to resolve deficiencies.* After issuing the Notice, the Associate Administrator conferences with the railroad carrier for a thirty (30)-day period, or such longer period as provided by the Associate Administrator, to resolve the deficiencies identified in the Notice. The Associate Administrator keeps a record of all written correspondence with the railroad carrier and a summary of each meeting and telephone conversation with the railroad carrier that pertains to the Notice.

(c) *Consultation with and comment from other agencies.* If, after the close of the conference period, the Associate Administrator concludes that the issues identified have not been satisfactorily resolved, the Associate Administrator:

(1) Consults with the Transportation Security Administration (''TSA'') and the Pipeline and Hazardous Materials Safety Administration (PHMSA) regarding the safety and security of the route proposed by the railroad carrier and any alternative route(s) over which the carrier is authorized to operate that are being considered by the Associate Administrator and prepares a written summary of the recommendations from TSA and PHMSA;

(2) Obtains the comments of the Surface Transportation Board (''STB'') regarding whether the alternative route(s) being considered by the Associate Administrator would be commercially practicable; and

(3) Fully considers the input of TSA, PHMSA and the STB and renders a decision pursuant to paragraph (d) of this section which shall be administratively final.

(d) *Decision.* (1) If the Associate Administrator finds that the route analysis and documentation provided by the railroad carrier are sufficient to support the route selected by the carrier or that valid issues of commercial practicability preclude an alternative route, the Associate Administrator concludes the review without further action and so notifies the railroad carrier in writing.

(2) If the Associate Administrator concludes that the railroad carrier's route analysis does not support the railroad carrier's original selected route, that safety and security considerations establish a significant preference for an alternative route, and that the alternative route is commercially practicable, the Associate Administrator issues a second written notice (2nd Notice) to the railroad carrier that:

(i) Specifically identifies deficiencies found in the railroad carrier's route analysis, including a clear description of the risks on the selected route that have not been satisfactorily mitigated;

(ii) Explains why the available data and reasonable inferences indicate that a commercially practicable alternative route poses fewer overall safety and security risks than the route selected by the railroad carrier; and

(iii) Directs the railroad carrier, beginning within twenty (20) days of the issuance date of the 2nd Notice on the railroad carrier, to temporarily use the alternative route that the Associate Administrator determines poses the least overall safety and security risk until such time as the railroad carrier has adequately mitigated the risks identified by the Associate Administrator on the original route selected by the carrier.

(e) *Actions following 2nd Notice and re-routing directive.* When issuing a 2nd Notice that directs the use of an alternative route, the Associate Administrator shall make available to the railroad carrier the administrative record relied upon by the Associate Administrator in issuing the 2nd Notice, including the recommendations of TSA, PHMSA and STB to FRA made pursuant to paragraphs (c)(1) and (2) of this section. Within twenty (20) days of the issuance date of the Associate Administrator's 2nd Notice, the railroad carrier may:

(1) Comply with the Associate Administrator's directive to use an alternative route while the carrier works to address the deficiencies in its route analysis identified by the Associate Administrator; or

(2) File a petition for judicial review of the Associate Administrator's 2nd Notice, pursuant to paragraph (g) of this section.

(f) *Review and decision by Associate Administrator on revised route analysis submitted in response to 2nd Notice.* Upon submission of a revised route analysis containing an adequate showing by the railroad carrier that its original selected route poses the least overall safety and security risk, the Associate Administrator notifies the carrier in writing that the carrier may use its original selected route.

(g) *Appellate review.* If a railroad carrier is aggrieved by final agency action, it may petition for review of the final decision in the appropriate United States court of appeals as provided in 49 U.S.C. 5127. The filing of the petition for review does not stay or modify the force and effect of the final agency action unless the Associate Administrator or the Court orders otherwise.

(h) *Time.* In computing any period of time prescribed by this part, the day of any act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or Federal holiday, in which event the period runs until the end of the next day which is not one of the aforementioned days.

■ 4. In appendix B to part 209, amend the civil penalty guideline table by adding the following entries:

Appendix B to Part 209—Federal Railroad Administration Guidelines for Initial Hazardous Materials Assessments

* * * * *

49 CFR section	Description	Guideline amount
*	* * * * * *	*
	PART 172—SHIPPING PAPERS	
*	* * * * * *	*
172.820(a)–(e)	General failure to perform safety and security route analysis *Factors to consider are the size of the railroad carrier, and the quantities of hazmat transported.*	5,000 to 10,000
172.820(a)–(e)	Partial failure to complete route analysis; failure to complete a component of the route analysis —Compilation of security-sensitive commodity data. —Identification of practicable alternative routes. —Consultation with State, local, and tribal officials, as appropriate regarding security risks to high-consequence targets along or in proximity to a route used by the carrier to transport security-sensitive materials. —Safety and security route analysis of route used. —Safety and security alternative route analysis.	5,000
172.820(f)	Failure to complete route analyses within the prescribed time frame	2,000
172.820(g)	Failure to include one of the following components in safety and security plan —Procedure for consultation with offerors and consignees to minimize storage of security-sensitive materials incidental to movement. —Measures to limit unauthorized access to the materials during storage or delays in transit. —Measures to mitigate risk to population centers associated with in-transit storage of the materials. —Measures to be taken in the event of escalating threat levels for the materials stored in transit. (*Unit of violation is the component. For a total failure to have a security plan, cite § 172.800 and use the penalties provided for that section.*).	2,000
172.820(h)	Failure to maintain records and make available to DOT and DHS authorized officials	2,000
172.820(i)	Failure to use route designated by FRA Associate Administrator for Safety	10,000
*	* * * * * *	*

Issued in Washington, DC, on November 18, 2008.

Joseph H. Boardman,

Administrator.

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