Conclusion

None of the facilities addressed in the SIP are in or near existing SO_2 nonattainment areas. EPA has no reason to believe that Illinois' revision to the Illinois SO_2 SIP will cause any area in Illinois to become nonattainment for the SO_2 NAAQS. Based on the above discussion, EPA believes that the variances granted by the IPCB will not interfere with attainment or maintenance of the SO_2 NAAQS in Illinois and would not interfere with any other applicable requirement of the CAA, and thus, is approvable under CAA.

IV. What action is EPA taking?

EPA is proposing to approve the revision to the Illinois SIP submitted by the IEPA on February 6, 2018, because the variances granted by the IPCB for Calpine and Exelon meet all applicable requirements and would not interfere with reasonable further progress or attainment of the SO_2 NAAQS.

V. Incorporation by Reference

In this rule, EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of the IPCB *Opinion and Order of the Board* (PCB 16–106) adopted on September 8, 2016, effective on September 13, 2016; and *Opinion and Order of the Board* (PCB 16–112) adopted on November 17, 2016, effective on December 19, 2016 and subsequently amended on August 17, 2017. EPA has made, and will continue to make, these documents generally available through *www.regulations.gov,* and at the EPA Region 5 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a ''significant regulatory action'' subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Is not expected to be an Executive Order 13771 (82 FR 9339, February 2, 2017) regulatory action because this action is not significant under Executive Order 12866;
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Sulfur oxides.

Dated: June 3, 2019.

Cheryl L. Newton,

Acting Regional Administrator, Region 5.

[FR Doc. 2019–12412 Filed 6–11–19; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Parts 270 and 271

[Docket No. FRA–2011–0060, Notice No. 10 and FRA–2009–0038, Notice No. 7]

RIN 2130–AC73

System Safety Program and Risk Reduction Program

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

ACTION: Notice of proposed rulemaking (NPRM); response to petitions for reconsideration.

SUMMARY: In response to petitions for reconsideration of a final rule, FRA proposes to amend its regulations requiring commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. The proposed amendments would include clarifying that while all persons providing intercity passenger rail (IPR) service or commuter rail passenger transportation share responsibility for ensuring compliance with the SSP final rule, the rule does not restrict a person's ability to provide for an appropriate designation of responsibility. FRA proposes extending the stay of the SSP final rule's requirements to allow FRA time to review and address any comments on this NPRM. FRA also proposes to amend the SSP rule to adjust the rule's compliance dates to account for FRA's prior stay of the rule's effect and to apply the rule's information protections to the Confidential Close Call Reporting System (C^3RS) program included in a railroad's SSP. FRA is expressly providing notice of possible conforming amendments to a Risk Reduction Program (RRP) final rule that would ensure that the RRP and SSP rules have essentially identical consultation and information protection provisions.

DATES: Written comments on this proposed rule must be received on or before August 12, 2019. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

ADDRESSES: Comments related to Docket No. FRA–2011–0060 may be submitted by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and follow the online instructions for submitting comments;

• *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590;

• *Hand Delivery:* The Docket Management Facility is located in Room W12–140, West Building Ground Floor, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590, and open between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or

• *Fax:* 202–493–2251.

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

Docket: For access to the docket to read background documents, petitions for reconsideration, or comments received, go to *http://www.regulations.gov* and follow the online instructions for accessing the docket or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Robert Adduci, Senior System Safety Engineer, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Passenger Rail Division; telephone: 781–447–0017; email: *Robert.Adduci@dot.gov;* Larry Day, Passenger Rail Safety Specialist, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Passenger Rail Division; telephone: 909–782–0613; email: *Larry.Day@dot.gov;* or Elizabeth A. Gross, Attorney Adviser, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel; telephone: 202–493–1342; email: *Elizabeth.Gross@dot.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents for Supplementary Information

I. Background

On August 12, 2016, FRA published a final rule requiring each commuter and intercity passenger railroad to develop and implement an SSP. *See* 81 FR 53850 (Aug. 12, 2016). This final rule was required by section 103 of the Rail Safety Improvement Act of 2008 (RSIA) (Pub. L. 110–432, Div. A, 122 Stat. 4883 (Oct. 16, 2008)), codified at 49 U.S.C. 20156). The Secretary of Transportation delegated the authority to conduct this rulemaking and implement the rule to the Federal Railroad Administrator. *See* 49 CFR 1.89(b).

On October 3, 2016, FRA received four petitions for reconsideration (Petitions) of the final rule: (1) Certain labor organizations (Labor Organizations) [1] filed a joint petition (Labor Petition); (2) certain State and local transportation departments and authorities [2] filed a joint petition (Joint Petition); (3) North Carolina Department of Transportation (NCDOT) filed a separate petition; and (4) Vermont Agency of Transportation (VAOT) filed a separate petition. The Joint, NCDOT, and VAOT petitions are hereinafter referred to as the ''State Petitions.''

Massachusetts Department of Transportation filed a comment in support of the Joint Petition on November 15, 2016. Three other individual comments were filed, but relate to the rule generally, not the petitions.

On February 10, 2017, FRA stayed the SSP final rule's requirements until March 21, 2017, consistent with the new Administration's guidance issued January 20, 2017, intended to provide the Administration an adequate opportunity to review new and pending regulations. *See* 82 FR 10443 (Feb. 13, 2017). FRA's review also included the Petitions. To provide additional time for that review, FRA extended the stay until May 22, 2017; June 5, 2017; December 4, 2017; December 4, 2018; and then September 4, 2019. *See* 83 FR 63106 (Dec. 7, 2018). FRA proposes to further extend the stay to allow FRA time to review any comments on this NPRM and issue a final rule in this proceeding. FRA specifically requests public comment on a possible stay extension. On October 30, 2017, FRA met with the Passenger Safety Working Group and the System Safety Task Group of the Railroad Safety Advisory Committee (RSAC) to discuss the Petitions and comment received in response to the Petitions.[3] *See* FRA–2011–0060–0046. This meeting allowed FRA to receive input from industry and the public and to discuss potential paths forward to respond to the Petitions. During the meeting, FRA made an introductory presentation and invited discussion on the issues raised by the Labor Petition. FRA also presented for discussion draft rule text that would respond to the State

[1] The Labor Organizations in the Labor Petition are the: American Train Dispatchers Association (ADTA); Brotherhood of Locomotive Engineers and Trainmen (BLET); Brotherhood of Maintenance of Way Employes Division (BMWED); Brotherhood of Railroad Signalmen (BRS); Brotherhood Railway Carmen Division; and Transport Workers Union of America.

[2] The State and local transportation departments and authorities in the Joint Petition are the: Capitol Corridor Joint Powers Authority (CCJPA); Indiana Department of Transportation (INDOT); Northern New England Passenger Rail Authority (NNEPRA); and San Joaquin Joint Powers Authority (SJJPA).

[3] Attendees at the October 30, 2017, meeting included representatives from the following organizations: ADS System Safety Consulting, LLC; American Association of State Highway and Transportation Officials; American Public Transportation Association; American Short Line and Regional Railroad Association; ATDA; Association of American Railroads (AAR); BLET; BMWED; BRS; CCJPA; The Fertilizer Institute; Gannett Fleming Transit and Rail Systems; International Brotherhood of Electrical Workers; Metropolitan Transportation Authority; National Railroad Passenger Corporation (Amtrak); National Transportation Safety Board; NCDOT; NNEPRA; San Joaquin Regional Rail Commission/Altamont Corridor Express; Sheet Metal, Air, Rail, and Transportation Workers; and United States Department of Transportation—Transportation Safety Institute.

Petitions by amending the SSP final rule to include a delegation provision that would allow a railroad that contracts all activities related to its passenger service to another person to designate that person as responsible for compliance with the SSP final rule. FRA uploaded this proposed draft rule text to the docket for this rulemaking. *See* FRA–2011–0060–0045. The draft rule text specified that any such designation did not relieve a railroad of legal responsibility for compliance with the SSP final rule. In response to the draft rule text, the State Petitioners indicated they would need an extended caucus to discuss. On March 16, 2018, the Executive Committee of the States for Passenger Rail Coalition (SPRC) [4] provided and FRA uploaded to the rulemaking docket proposed revisions to the draft rule text. *See* FRA–2011–0060–0050. FRA has reviewed and considered these suggested revisions in formulating the proposals in this NPRM.

As discussed in detail below, this NPRM proposes revisions to the SSP final rule that respond to the Petitions. FRA is also proposing to adjust the rule's compliance dates to account for FRA's stay of the rule's effect and to specify that the rule's information protections apply to C[3]RS programs included in a railroad's SSP.

II. Summary of Labor Petition and FRA's Response to Labor Petition

Under § 270.107, a railroad must consult in good faith and use its best efforts to reach agreement with its directly affected employees on the contents of its SSP plan. The Labor Petition requested several amendments to this section regarding the consultation process. In response, FRA is proposing several amendments that would grant in part or deny in part the Labor Petition.

A. Labor Petition—General Chairperson

The Labor Petition requested that FRA make two amendments to § 270.107 related to the points of contact for the consultation process. Paragraph (a)(3) specifies a railroad must hold a preliminary meeting with its directly affected employees to discuss how the consultation will proceed. The Labor Petition requested FRA amend this paragraph to add that the primary point of contact shall be the ''general chairperson'' of any non-profit employee labor organization representing directly affected employees. Paragraph (b)(3) specifies a railroad's consultation statement [5] must include a service list containing the name and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees.[6] When a railroad submits its SSP plan and consultation statement to FRA under § 270.201, it must simultaneously send a copy of these documents to all individuals identified in the service list. The Labor Petition requested FRA amend paragraph (b)(3) to add that the service list must also contain the name and contact information for the general chairperson of any non-profit employee labor organization representing directly affected employees.

In support of those requested amendments, the Labor Petition asserts a general chairperson is the appropriate contact for consultation purposes because he or she is the duly accredited representative of the craft or class of employees represented by the non-profit employee labor organization. *See* Labor Pet. at 3–4. According to the Labor Petition, there are already well-known and well-established procedures and points of contact between labor organizations and railroads, and the SSP consultation is a property-specific matter that a railroad must address directly with a general chairperson. *Id.*

The SSP NPRM proposed a requirement similar to the Labor Petition requests. *See* 77 FR 55383 and 55403 (Nov. 26, 2012). In response, AAR commented, opposing the proposed language and requesting the service list be limited to the international/national president of the labor organization. AAR asserted it would be burdensome to serve the general chairperson for each non-profit employee labor organization on the railroad and that a railroad's inadvertent failure to serve a general chairperson could be considered not using ''best efforts'' in the consultation process and lead to FRA not approving the railroad's plan. AAR also pointed to the Surface Transportation Board's regulations, which require giving notice to the national office of the labor unions of the employees affected when notification of labor unions is required. In response to AAR's concerns, FRA decided not to require notification of a general chairperson in the final rule. *See* 81 FR 53886 (Aug. 12, 2016).

B. FRA's Response—General Chairperson

Upon reconsideration, FRA believes it is consistent with the intent of the consultation requirements to add the general chairperson of a non-profit employee labor organization as the point of contact for directly affected employees represented by that non-profit employee labor organization. Adding the general chairpersons for the non-profit employee labor organizations on a railroad property will ensure the directly affected employees receive SSP information effectively and efficiently because these chairpersons often are the labor representatives that work directly with the represented employees at the railroad. As discussed further in the section-by-section analysis, FRA is therefore proposing amendments to § 270.107 that would clarify a general chairperson is the railroad's primary contact for the consultation process with the directly affected employees represented by a non-profit employee labor organization and must be included in the consultation statement service list. These proposed amendments would grant this part of the Labor Petition.

To alleviate AAR's concern that FRA could consider a railroad's inadvertent failure to serve a general chairperson as not using ''best efforts'' in the consultation process, FRA also proposes including an alternative point of contact. Under FRA's proposal, a non-profit employee labor organization's point of contact could be a person the railroad and non-profit employee labor organization agree on at the beginning of the consultation process. FRA would consider serving any agreed-upon points of contact ''best efforts'' as it applies to proper notification of non-profit employee labor organizations. Unless agreed otherwise, however, the primary point of contact would remain a general chairperson.

C. Labor Petition—Statements From Directly Affected Employees

Under § 270.107(c)(1), if a railroad and its directly affected employees do not reach agreement on the contents of the railroad's SSP plan, directly affected employees may file a statement with FRA explaining their views on the portions of the plan on which agreement was not reached. Under § 270.107(c)(2), directly affected employees have 30 days following the date the railroad

[4] SPRC's website indicates it is an ''alliance of State and Regional Transportation Officials,'' and each State Petitioner appears to be an SPRC member. *See https://www.s4prc.org/state-programs* (last accessed Sept. 20, 2018).

[5] Under § 270.107(b)(1) and (2), a railroad must submit a consultation statement to FRA (along with its SSP plan) describing the railroad's process for consulting with its directly affected employees. If the railroad was unable to reach consensus with its employees on the contents of its SSP plan, the consultation statement must identify any known areas of disagreement and explain why agreement was not reached.

[6] The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independent of a non-profit employee labor organization.

submits its SSP plan and consultation statement to FRA to file their own statement.

The Labor Petition requests FRA amend § 270.107(c)(2) to provide directly affected employees 60 days to file a statement rather than 30 days. *See* Labor Pet. at 4.

D. FRA's Response—Statements From Directly Affected Employees

While the NPRM proposed to provide directly affected employees 60 days to file such a statement, FRA explained in the final rule why it believes the 30 days provided is sufficient. *See* 81 FR 53886 (Aug. 12, 2016). Section 270.107(b)(3) ensures a railroad simultaneously provides FRA and directly affected employees its SSP plan and consultation statement, as the Labor Organizations requested in their comments on the NPRM. *Id.* Moreover, under § 270.201(b), FRA will review an SSP plan within 90 days of receipt. If the directly affected employees had up to 60 days to submit a statement, FRA could be left with only 30 days to consider the directly affected employees' views when reviewing the SSP plan. Thirty days is not enough time to ensure FRA sufficiently addresses the directly affected employees' views.

The Labor Petition does not provide any additional justification to extend this deadline. Therefore, FRA is not proposing to extend the deadline, for the reasons explained above and in the final rule. *See* 81 FR 53886. FRA's position would deny this part of the Labor Petition.

III. Summary of State Petitions

A. Requested Revisions

Generally, the State Petitions request FRA amend the SSP final rule to clarify it does not apply to States [7] that ''sponsor'' [8] IPR service. These amendments would involve three sections of the final rule—§§ 270.3, 270.5, and 270.107(a)(3)—as discussed below.

i. Requested Revisions to Section 270.3, Applicability

Section 270.3 establishes the applicability of the final rule. Paragraph (a) specifies that, except as provided in paragraph (b), part 270 applies to all: (1) Railroads that operate intercity or commuter passenger train service on the general railroad system of transportation (general system); and (2) railroads that provide commuter or other short-haul passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service. Paragraph (b) states the final rule does not apply to: (1) Rapid transit operations in an urban area that are not connected to the general system; (2) tourist, scenic, historic, or excursion operations, whether on or off the general system; (3) operation of private cars, including business/office cars and circus trains; or (4) railroads that operate only on track inside an installation that is not part of the general system (*i.e.,* plant railroads, as defined in § 270.5).

NCDOT and VAOT request FRA amend § 270.3 to add paragraphs (b)(5) through (7) that would exempt: (5) States, State agencies and instrumentalities, and political subdivisions of States that own (but do not operate) railroads; (6) States, State agencies and instrumentalities, and political subdivisions of States that own (but do not operate) railroad equipment; or (7) States, State agencies and instrumentalities, and political subdivisions of States that provide financial support for (but do not operate) intercity passenger rail service. *See* NCDOT Pet. at 2 and VAOT Pet. at 3.

ii. Requested Changes to Section 270.5, Definitions, Railroad

FRA based the § 270.5 definition of ''railroad'' on 49 U.S.C. 20102(2) and (3).[9] The definition encompasses any person providing railroad transportation directly or indirectly, including a rail authority that owns the railroad and provides railroad transportation by contracting out the operation of the railroad to another person, and any form of non-highway ground transportation that runs on rails or electromagnetic guideways, but excludes urban rapid transit not connected to the general system.

The State Petitions request FRA amend this ''railroad'' definition to remove States that contract operation of the railroad to another person, *i.e.,* limiting the definition to ''a person or organization that provides railroad transportation.'' Joint Pet. at 2, NCDOT Pet. at 2, and VAOT Pet. at 4. Alternatively, the Joint Petition asks FRA to provide a formal mechanism for State providers of IPR service to delegate regulatory responsibility under the final rule. *See* Joint Pet. at 2.

iii. Requested Changes to Section 270.107(a)(2), Consultation Requirements, General Duty

In the final rule, FRA clarified that if a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered ''directly affected employees'' for the purposes of part 270. FRA provided this clarification of the meaning of ''directly affected employees'' to make more explicit how the consultation process will be handled when a railroad contracts out significant portions of its operations to other entities. *See* 81 FR 53883 (Aug. 12, 2016).

The Joint Petition requests FRA amend this section to remove the requirement that a railroad consult with contractors performing significant portions of the railroad's operations. *See* Joint Pet. at 2.

B. State Petitions Arguments

The State Petitions set forth multiple arguments for their requested changes to the final rule. To summarize, FRA divides these arguments into four categories: (1) The SSP final rule places a substantial burden on States, which FRA did not consider; (2) FRA exceeded its statutory authority in requiring States to comply with the SSP final rule; (3) the SSP final rule exceeded the scope of the NPRM when clarifying that, if a railroad contracts out significant portions of its operations, employees of a contractor are considered directly affected employees; and (4) FRA must amend the SSP final rule to reconcile it with FRA guidance. While FRA briefly summarizes these arguments below, FRA refers readers interested in greater specificity to the State Petitions in the docket for this rulemaking. *See generally* FRA–2011–0060.

[7] As used in this NPRM, ''State'' refers generally to any State agency or authority, including: A State department of transportation or analogous governmental agency or authority; a regional or local governmental agency or authority whether or not directly funded or overseen by a State (including, *e.g.,* a joint powers authority where counties or localities jointly sponsor a passenger rail service, yet the State itself is not directly involved); or a public benefit corporation chartered by a State, regional, or local government.

[8] There is currently no statutory or regulatory definition of the term ''sponsor'' in relation to IPR service. The Joint Petition appears to understand ''sponsor'' as being a State that ''provide[s] financial support'' for IPR routes and ''contract[s] for the operation of IPR.'' *See* Joint Pet. at 2, fn. 2. The NCDOT petition defines ''sponsors'' as ''State or other public entities that own railroads, equipment or that financially sponsor intercity passenger rail service.'' NCDOT Pet. at 3. In its proposed revisions to the strawman text FRA presented during the October 2017 RSAC meeting, SPRC suggested defining ''State sponsor'' as ''a State, regional or local authority, that contracts with a railroad to provide intercity passenger railroad transportation pursuant to Section 209 of the Passenger Rail Investment and Improvement Act of 2008, as amended.'' *See* Comments of the SPRC at 2.

[9] The NPRM and final rule erroneously refer to 49 U.S.C. 20102(1) and (2). *See* 77 FR 55381 and 81 FR 53863.

i. Substantial Burden Arguments

The State Petitions assert FRA did not properly consider the costs and burdens the final rule would impose on States that provide IPR service. Specifically, the State Petitions argue:

- The Regulatory Impact Analysis (RIA) [10] for the SSP final rule referenced only two intercity passenger railroads, Amtrak and the Alaska Railroad Corporation (ARC), indicating the final rule did not appropriately consider States that provide IPR service as railroads and, therefore, did not consider costs for other States that provide IPR service; and
- The SSP final rule imposes substantial burdens on State providers of IPR service without improving safety.

ii. Statutory Authority Arguments

The State Petitions claim Congress did not intend the final rule to apply to States that ''sponsor,'' but do not operate, IPR service, and FRA exceeded its statutory authority in doing so. State Petitioners argue requiring ''State sponsors'' of IPR service to develop and implement an SSP exceeds FRA's authority under the RSIA, and is inconsistent with Congress' intent in enacting section 209 of the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) (Pub. L. 110–432, Div. B (Oct. 16, 2008)). *See* Joint Pet. at 9.[11]

The Joint Petition argues Congress did not separately define ''rail carrier'' for purposes of the SSP mandate in the RSIA and that States ''sponsoring'' IPR service do not fall under the general statutory definition in 49 U.S.C. 20102(3) of a ''railroad carrier'' as a ''person providing railroad transportation.'' *Id.* The Joint Petition asserts FRA impermissibly expanded the definition of ''rail carrier,'' and that there is no evidence Congress intended States to directly assume responsibility for the safety of such routes' operations. *See id.* at 10.

Separately, VAOT contends State ownership of railroad property or financial support for Amtrak services does not make it a ''railroad carrier'' as defined by statute, and, therefore, the SSP mandate in the RSIA does not apply to it. *See* VAOT Pet. at 8–10. VAOT further argues it does not have authority to implement an SSP. *Id.* at 9.

iii. Scope of NPRM

The Joint Petition argues the SSP final rule's extension of the consultation requirement to contractors and contractors' employees was not proposed in the NPRM, was not a logical outgrowth of the proposal, imposes burdens on current operating agreements, and substantially alters the nature of the independent contractor relationship. *See* Joint Pet. at 16–21.

iv. Guidance Argument

Finally, the Joint and NCDOT Petitions assert FRA must amend the final rule to reconcile it with the *Guidance on Safety Oversight and Enforcement Principles for State-Sponsored Intercity Passenger Rail Operations* (*Guidance*), which FRA informally provided to the States on August 11, 2016. *See* Joint Pet. at 12–16 and NCDOT at 6 and 16.

IV. Summary of FRA's Response to the State Petitions

For the reasons discussed below, FRA generally disagrees with the arguments supporting the State Petitions.

A. Substantial Burdens

FRA disagrees with the States and believes that it properly considered the costs and burdens of the final rule on States that provide IPR service.

Regarding the States' argument that the RIA's mention of only Amtrak and ARC IPR service indicates FRA did not appropriately consider costs for State sponsors of IPR service, FRA believes the States mischaracterize the following passage:

> FRA determined there will be only two passenger railroads affected by the SSP rule as small entities. In applying the guidelines of the *Regulatory Flexibility Act (RFA),* FRA includes most Class III railroads impacted by a rule as a small business. In further defining the types of entities qualifying as small businesses, RFA guidelines state that if the entity is a part of/or agent of governments of cities, counties, towns, townships, villages, or special districts serving a population of more than 50,000 they would not be classified as a small business. Essentially all railroads subject to this rule, except the two FRA classified as small businesses (Saratoga & North Creek Railway (SNC) and the Hawkeye Express, operated by the Iowa Northern Railway Company (IANR)), are either a governmental-related transportation agency serving population areas of 50,000 or more and or an intercity service provider (National Railroad Passenger Corporation (Amtrak) and Alaska Railroad)). [. . .] FRA–2011–0020–0028 (emphasis added).

This passage does not define the scope of the RIA's cost analysis, but describes FRA's process of identifying which passenger railroads affected by the SSP rules are small entities under the RFA. The States' argument therefore inappropriately applies FRA's limited RFA discussion to the RIA's broader cost analysis, without otherwise providing evidence that the cost analysis improperly calculated costs.

Further, although FRA's analysis describes Amtrak and ARC as IPR railroads, it does not state that Amtrak and ARC are the only IPR railroads. In fact, the final rule's RFA analysis expressly noted the vast majority of State providers of IPR service would fall under Amtrak's SSP. *See* 81 FR 53892, n. 14. This is because most States contract with Amtrak to provide IPR service, which was true at the time of final rule publication and remains true today.

Regardless, the States' assertion that FRA did not consider the costs for State sponsors of IPR service is incorrect. Because most States contract with Amtrak to provide IPR service, as noted above, the typical IPR service is an Amtrak-scheduled service using equipment Amtrak operates and maintains. In fact, for all State-sponsored IPR service FRA is aware of, Amtrak is the contractor operator. The RIA therefore attributed the costs of implementing the SSP rule for current IPR service to Amtrak (consistent with FRA's past rulemaking practice),[12] on the assumption that Amtrak would implement SSPs on behalf of State sponsors of IPR service as part of Amtrak's integrated national system. *See* 81 FR 53892, n. 14. Further, FRA believes the RIA captured any costs for future State-sponsored IPR service using operators other than Amtrak by estimating there would be one new startup IPR service or commuter railroad in Years 2 and 3 of the analysis and one new startup every other year thereafter. *See* 81 FR 53852. For these reasons, FRA believes the RIA properly accounted for the costs associated with State-sponsored IPR service, even though those costs were attributed to Amtrak rather than specific State sponsors.

Moreover, the plain intent of the regulatory language clearly indicated

[10] *See* FRA–2011–0060–0029.

[11] Section 209 of PRIIA requires that the Amtrak Board of Directors, in consultation with the Secretary of Transportation, the governors of each relevant State, and the Mayor of the District of Columbia, or entities representing those officials, develop and implement a single, nationwide standardized methodology for establishing and allocating the operating and capital costs of providing IPR service among the States and Amtrak for the trains operated on designated high-speed rail corridors (outside the Northeast Corridor), short-distance corridors, or routes of not more than 750 miles, and services operated at the request of a State, a regional or local authority, or another person.

[12] *See* Passenger Equipment Safety Standards, final rule, 64 FR 25560, 25654 (May 12, 1999) (''The [regulatory] evaluation . . . takes into consideration that individual States will contract with Amtrak for the provision of rail service on their behalf. In this regard, for example, a State may utilize Amtrak's inspection forces trained under the rule, and thus not have to train inspection forces on its own.'').

the rule would apply to States providing IPR service. Both the proposed and final SSP rule contain the same applicability section and definition for ''railroad.'' *See* 77 FR 55402–03 (Sept. 7, 2012) and 81 FR 53896–97 (Aug. 12, 2016). Specifically, in both the proposed and final rule, § 270.5 defines ''railroad'' as ''[a] person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person,'' and § 270.3(a)(1) unambiguously states the rule applies to ''[r]ailroads that operate intercity or commuter passenger train service on the general railroad system of transportation . . . .'' These provisions indicate FRA intended the rule to apply to providers of IPR service, including ''State sponsors'' of IPR service. Further, at no point in the rulemaking process did FRA indicate it intended to exempt States providing IPR service from the rule.

Second, the RIA carefully analyzed the potential costs and burdens of the SSP final rule. *See generally* FRA–2011–0060–0029. Ultimately, the RIA concluded the SSP final rule's costs were justified by the safety benefits, and nothing in the State Petitions indicates the RIA improperly estimated costs or benefits. *Id.* at 3.

Further, while the State Petitions allege substantial and undetermined burdens, these burdens were either considered by FRA in the RIA or are not mandated by the SSP final rule. The Joint Petition claims the final rule would impose the following burdens: (1) State providers do not employ qualified railroad personnel with the detailed technical knowledge to develop, implement, and oversee compliance with an SSP and would have to hire such individuals; (2) State providers would face considerable challenges in augmenting existing human resources before the responsibilities imposed by the final rule could be fulfilled; (3) implementing the final rule will likely require State providers to renegotiate their existing operating agreements with Amtrak and other contractors to ensure the exchanges of information the rule requires and to implement required consultation procedures; (4) State providers may have to discontinue IPR service due to the costs imposed by the final rule, and if they discontinue service, FRA may require States to repay grants/loans; and (5) the final rule's definition of ''railroad'' potentially opens the door to attempts to make States that provide IPR service responsible for other statutory obligations, including railway labor and retirement requirements. *See* Joint Pet. at 4–9.[13]

The first two burdens the States allege relate to burdens the rule does not mandate, as the rule does not require States to hire additional technical or human resources personnel. Further, this NPRM proposes amendments that would clarify that the rule does not restrict the ability to designate another entity to fulfill the States' responsibilities under the rule. FRA discusses delegation of SSP responsibility more fully below when discussing the revisions proposed in this NPRM in response to the State Petitions.

Further, the States' claim that they may have to discontinue IPR service due to the rule's costs is unsubstantiated. FRA notes that States providing IPR service have always had to comply with FRA safety regulations to ensure the safety of their passengers, and the States have done so successfully. For example, the application of the rule is essentially the same as FRA's Passenger Train Emergency Preparedness and Passenger Equipment Safety Standards rules,[14] both issued almost two decades ago and implicating the same concerns the States now raise. Because States have been complying with their responsibilities under these and other statutorily-based rules, their assertion that the SSP rule somehow will prevent their ability to provide IPR service is not persuasive.[15]

Regarding the States' claim that implementing the final rule will incur costs associated with renegotiating contracts, FRA notes that the rule itself does not require contract renegotiation. Rather, to the extent any such costs would be incurred, they would result from the States' own decisions on how to provide IPR service, and not a requirement of the rule.

Finally, FRA disagrees with the States that being subject to the SSP rule will open them up to application of other statutes. To the extent another agency might argue that labor, tax, or other statutes apply to the States based on the application of this rule, the challenge would be to that agency's statute, not the SSP rule. Further, FRA was mandated by the RSIA to issue an SSP rule that specifically applies to providers of IPR service.[16] There is no basis for disregarding a statutory mandate because another agency might use it to apply an unrelated statute. This rule would also not apply any additional hook for applying other laws to States providing IPR than is already present through States' compliance with FRA's Passenger Train Emergency Preparedness and Passenger Equipment Safety Standards rules.

B. Statutory Authority

FRA disagrees with the State Petitions that applying the SSP final rule to ''State sponsors'' of IPR service goes beyond FRA's statutory authority. First, by the plain language of the RSIA mandate, the law applies to ''each railroad carrier that is a Class I railroad, a railroad carrier that has inadequate safety performance (as determined by the Secretary), or a railroad carrier that provides intercity rail passenger or commuter rail passenger transportation . . . .'' 49 U.S.C. 20156(a)(1). A ''railroad carrier'' is also statutorily defined as ''a person providing railroad transportation.'' 49 U.S.C. 20102(3). FRA believes ''State sponsors'' of IPR service meet the definition of a person providing railroad transportation. Although there is no official definition for the term ''State sponsors,'' FRA generally understands that ''State sponsors'' provide financial support for IPR service, contract for that service, and, in some cases, provide safety oversight. *See* Joint Pet. at 2, fn. 2; and NCDOT Pet. at 13.[17] FRA believes each of these activities for IPR service that States ''sponsor'' constitutes providing railroad transportation. Congress did not exclude ''State sponsors'' in the definition of a person providing railroad transportation, and nothing in the RSIA legislative history indicates Congress intended to exempt States that ''sponsor'' or otherwise provide IPR service from the SSP rule. There is therefore no statutory basis for deviating from either the plain language of the RSIA or the definition of ''railroad carrier,'' both of which encompass States that ''sponsor'' or otherwise provide IPR service.

Second, passenger rail operations have always been subject to FRA's safety jurisdiction. *See* 49 CFR part 209, app. A. FRA has exercised jurisdiction over all passenger operations for decades under the Federal Railroad Safety Act of 1970, and the 1982, 1988, and 2008 amendments to that act. *See*

[13] NCDOT's and VAOT's petitions assert similar arguments regarding the rule's costs and burdens and FRA's alleged failure to consider them.

[14] *See* 63 FR 24630 (May 4, 1998) and 64 FR 25560 (May 12, 1999).

[15] The vast majority of states that provide IPR service comply with FRA's Passenger Train Emergency Preparedness regulations by having Amtrak prepare and implement the required emergency preparedness plans on their behalf. FRA does not require the States to duplicate the efforts of the entities that prepare and implement SSP plans on their behalf.

[16] *See* 49 U.S.C. 20156(a)(1)(A).

[17] *See supra* footnote 8.

Federal Railroad Safety Act of 1970 (Pub. L. 91–458, 84 Stat. 971, enacted Oct. 16, 1970); Federal Railroad Safety Authorization Act of 1982 (Pub. L. 97–468, 96 Stat. 2579, enacted Jan. 14, 1983); Rail Safety Improvement Act of 1988 (Pub. L. 100–342, 102 Stat. 624, enacted June 22, 1988); and Rail Safety Improvement Act of 2008 (Pub. L. 110–432, 122 Stat. 4883, Div. A, enacted Oct. 16, 2008). FRA has previously explained in a rulemaking proceeding that public authorities may act in a private capacity to provide rail service and that, in doing so, public authorities have the same powers and obligations for purposes of rail safety as similarly-situated private actors. *See* 75 FR 1180, 1211–12 (Jan. 8, 2010).

The SSP final rule neither expands FRA's jurisdiction nor requires States to incur additional costs to contract for such services. Historically, this has not been an issue because FRA has typically looked to Amtrak with respect to enforcement and application of Federal rail safety requirements for IPR service. However, Congress' enactment of PRIIA section 209 has led to several important changes to the nature of the relationship between Amtrak and State departments of transportation (or other public authorities) that provide funding for, and oversight of, IPR service. Beginning in fiscal year 2014, section 209 of PRIIA required all applicable States to provide funding to Amtrak for passenger rail services along certain corridors using a consistent nationwide methodology.[18] As a result, some States have become more active in funding, managing, organizing, performing, or contracting their passenger rail services. With respect to some operations, this has increased the State's role in making substantive operational and safety-related decisions, including selecting contractors to perform such services. However, the fact that States choose to contract out certain services based on section 209 of PRIIA does not absolve the States from safety responsibility or remove them from FRA safety jurisdiction.

As noted above, FRA has a long history of applying its safety regulations to State providers of passenger rail service. *See generally* 49 CFR parts 213, 238 and 239. It is not uncommon for multiple entities to be involved in providing passenger rail service, with each entity having varying safety responsibilities.[19] However, as explained in the NPRM and final rule, and earlier notably in the Passenger Equipment Safety Standards rulemaking,[20] each entity involved in providing passenger rail service—including ''State sponsors''—is responsible for complying with Federal rail safety requirements.[21] *See also* 77 FR 55380–82 (Sept. 7, 2012) and 81 FR 53861, 53864 (Aug. 12, 2016). Overall, FRA believes compliance with the SSP final rule does not differ from compliance with FRA's other regulations that may apply to IPR service providers, *e.g.,* 49 CFR parts 213, 238 and 239.

C. Scope of NPRM

FRA also believes that clarifying the consultation process requirements in the final rule falls within the scope of the NPRM. Section 270.107(a)(2) clarifies that if a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations will be considered directly affected employees for the purposes of the SSP final rule. This language is consistent with the NPRM, and the final rule simply further explained the requirements proposed in the NPRM. The rule text and preamble of the NPRM made it clear that entities providing railroad transportation, such as States that provide IPR service, would be treated as railroads and are required to comply with the rule. The NPRM also proposed that railroads would be required to consult with directly affected employees on the contents of the SSP plan, a requirement directly from the RSIA. *See* 77 FR 55403 and 49 U.S.C. 20156(g). Therefore, the NPRM put States on notice that: (1) They will be treated like railroads under the SSP rule for providing railroad transportation, even if they contract out operations; and (2) railroads will be required to consult with directly affected employees. Consistent with the NPRM, the final rule went on to clarify who will be considered directly affected employees for railroads that contract out significant portions of their operations. Section 270.107(a)(2) did not add any new requirements, and States were given sufficient notice that FRA intended to apply the consultation requirements to them.

D. Guidance

Finally, the *Guidance* document FRA informally provided to the States is not an extension or an explanation of the SSP final rule. Rather, the *Guidance* addressed how FRA regulations generally apply to States that provide IPR service, merely used the SSP final rule as an example, and is unrelated to the SSP rulemaking.

V. FRA's Proposed Amendments in Response to the State Petitions

Although FRA generally disagrees with the State Petitions for the reasons discussed above, FRA nevertheless proposes to amend the final rule in response to the petitions. The proposed amendments would clarify that while all persons providing IPR or commuter rail passenger transportation share responsibility for ensuring compliance with the SSP final rule, the rule does not restrict a person's ability to provide for an appropriate designation of responsibility. The proposed amendments would also explain that any such designation must be included in the SSP plan, although a person may also notify FRA of a designation by submitting a notice of such designation before submitting the SSP plan. Further, the proposed amendments would establish requirements for describing the designation in an SSP plan. The section-by-section analysis discusses these proposed amendments in detail below. FRA believes the proposed amendments would clarify the States' ability to have another entity fulfill the States' responsibilities under the SSP final rule. If another entity performs SSP functions on a State's behalf, FRA would not expect a State to duplicate that work and effort.

The proposed amendments also specify that a person designating responsibility would remain responsible for ensuring compliance with the SSP final rule. As explained in the SSP final rule, it would be inconsistent with FRA's statutory jurisdiction over passenger rail service to allow a party to completely assign or otherwise contract away its entire responsibility for compliance under the law. *See* 81 FR 53861 (Aug. 12, 2016). A State providing IPR service can have other parties fulfill safety responsibilities on its behalf, but it cannot entirely disclaim

[18] *See supra* footnote 11.

[19] For example, an entity, such as a State agency or authority, may organize and finance the rail service; a primary contractor may oversee the day-to-day operation of the rail service; one subcontractor may operate the trains along the route; another subcontractor may maintain the train equipment; and another entity may own the track.

[20] Passenger Equipment Safety Standards, final rule; response to petitions for reconsideration, 65 FR 41284, 41291 (July 3, 2000) (addressing responsibility for compliance of the sponsoring governmental authority and other entities that may be involved in a single passenger train service).

[21] The SSP final rule addressed a specific scenario involving a passenger railroad contracting out portions of its operations and explained that the passenger railroad would be required to comply with the final rule. *See* 81 FR 53857.

responsibility.[22] Allowing a State provider of IPR service to completely divest itself of responsibility for ensuring the passenger operation's compliance with Federal rail safety requirements is not consistent with FRA's exercise of its rail safety jurisdiction because FRA has consistently indicated that responsibility for compliance does not rest solely with whichever service providers the States contract with.[23] However, if a State provider of IPR service appropriately designates another person as responsible for compliance with the SSP rule, FRA would consider the designated entity as the person with primary responsibility for SSP compliance. FRA's policy would therefore be to primarily look to the designated entity when reviewing and approving a submitted SSP plan, auditing the implementation of that plan, and deciding whether to take action to enforce the SSP rule requirements.

VI. Other Proposed Revisions

In addition to the proposed revisions discussed above, FRA is also proposing the following revisions to the SSP final rule.

Discovery and Admission as Evidence of Certain Information

The final rule protects certain information a railroad compiles or collects after August 14, 2017, solely for SSP purposes from discovery, admission into evidence, or use for any other purpose in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. *See* 49 CFR 270.105(a). The final rule also specified certain categories of information that are not protected, including information a railroad compiled or collected on or before August 14, 2017, and that the railroad continues to compile and collect, even if the railroad uses that information to plan, implement, or evaluate its SSP. *See* 49 CFR 270.105(b)(2). The NPRM and final rule contain significant discussion of the protections and exceptions. *See* 77 FR 55373, 55378–79, 55390–92, and 55406 (Sept. 7, 2012); 81 FR 53851, 53855–56, 53858–60, 53878–82, and 53900 (Aug. 12, 2016).

FRA is proposing to amend the SSP final rule's information protections to specify that they apply to a C[3]RS program included as part of a railroad's SSP, even if the railroad joined C[3]RS on or before August 14, 2017. C[3]RS is a partnership currently between FRA and the National Aeronautics and Space Administration (NASA), in conjunction with participating railroads and labor organizations, that allows participating railroads and their employees to voluntarily and confidentially report close calls.[24] Employees of participating railroads can submit C[3]RS reports to NASA, which protects the identity of both the reporting employee and the railroad by generalizing or removing all identifying information.

As discussed in the NPRM and final rule, C[3]RS embodies many of the concepts and principles found in an SSP, including: Proactive identification of hazards and risks; analysis of those hazards and risks; and implementation of appropriate action to eliminate or mitigate the hazards and risks. *See* 77 FR 55376 (Sept. 7, 2012) and 81 FR 53854 (Aug. 12, 2016). For example, railroads participating in C[3]RS establish peer review teams (PRT) that receive de-identified close call reports. After evaluating a close call report or reports, a PRT may develop and recommend corrective actions responding to the hazards and risks identified by the report.

While FRA does not require any railroad to implement a C[3]RS program, FRA encourages railroads to include a C[3]RS program as part of their SSPs. *See* 81 FR 53854 (Aug. 12, 2016). For a railroad that establishes a C[3]RS program as part of its SSP after August 14, 2017, the final rule already protects the railroad's C[3]RS information.[25] For clarity and to preserve continued participation by railroads that established C[3]RS programs on or before August 14, 2017, FRA is specifically proposing to add paragraph (a)(3) to § 270.105 to provide that for Federal or State court proceedings initiated after 365 days from publication of the final rule,[26] the information protected includes C[3]RS information a railroad includes in its SSP, even if the railroad compiled or collected the C[3]RS information on or before August 14, 2017. FRA is also proposing to add a definition for C[3]RS in § 270.5.

FRA's proposed amendment would ensure the protections apply equally to every railroad that includes C[3]RS information (including PRT analyses) as part of its SSP, regardless of when the railroad joined C[3]RS. Because C[3]RS is a Federal safety program designed to increase the safety of railroad operations, and by its design it generates risk and hazard identification information, FRA believes it is important to provide clarity ensuring that early C[3]RS adopters receive the same SSP information protections as railroads that waited to join C[3]RS until after August 14, 2017. Further, FRA believes this clarity will promote safety because early C[3]RS adopters will be more willing to perform robust analyses of C[3]RS reports if they are confident that the SSP information protections will apply to those analyses. The proposal also avoids a situation where early C[3]RS adopters may even decide to drop out of the program because they fear they will not receive the same SSP information protections as newer participants. FRA believes the proposed amendment is also consistent with the spirit of the RSIA, which provides that FRA ''may conduct behavior-based safety and other research, including pilot programs, *before promulgating regulations under this section* and thereafter.'' 49 U.S.C. 20156(a)(2) (emphasis added).

As a practical matter, FRA's proposed approach is also appropriate because the C[3]RS de-identification process could make it difficult to determine the applicability of the current SSP information protections, which generally apply based on when a railroad began to compile or collect certain information. For example, C[3]RS reports are de-identified to protect the reporter's confidentiality, and this de-identification process involves removing references to the reporting employee and the involved railroad and generalizing or eliminating dates and times.[27] Protecting C[3]RS information included in an SSP, regardless of when a railroad joined the program, would avoid creating a situation where a participating railroad could not

[22] *See e.g.,* 49 CFR 213.5(d) (FRA may hold the owner of track responsible for compliance with FRA's Track Safety Standards even if the track owner has assigned track maintenance responsibility to another entity).

[23] For example, the duty for compliance with passenger equipment standards in part 238 lies with railroads, including those that ''operate intercity or commuter passenger train service,'' 49 CFR 238.3(a), and that duty remains with the railroad even though contractors must also comply. *See* 49 CFR 238.9(c). Railroads subject to the passenger train emergency preparedness regulation in part 239, including intercity and commuter passenger railroads, also have a non-delegable duty to comply with the standards in that part. *See* 49 CFR 239.3(a), 239.9.

[24] *See generally https://c3rs.arc.nasa.gov/information/summary.html.*

[25] The C[3]RS information protected would include not only the reports submitted by employees, but also a PRT's identification and analysis of any hazards and risks associated with those reports.

[26] FRA's authority for issuing a rule protecting SSP information is found in 49 U.S.C. 20119(b). The proposed protections for C[3]RS information would apply only to court proceedings initiated 365 days after publication of a final rule because sec. 20119(b) provides that ''[a]ny such rule prescribed pursuant to this subsection shall not become effective until 1 year after its adoption.''

[27] *See https://c3rs.arc.nasa.gov/information/confidentiality.html.*

establish applicability of the SSP information protections because, due to the de-identification process that is essential to the program, the date the information was compiled or collected was unknown.

Further, FRA notes that C³RS does not provide railroads a mechanism for gathering unlimited safety information. A railroad would not, therefore, be able to expand the scope of C³RS unilaterally to strategically gain information protections for a larger universe of safety information. For example, C³RS information a railroad can compile or collect is limited by the nature of the program, which only provides for voluntary reporting of close call events by railroad employees. Implementing memoranda of understanding among FRA, railroads, and labor organizations also limit the scope of close call events that can be reported to the program. For example, events involving a train accident or injury are generally ineligible to be reported as close calls.[28]

FRA requests public comment on this proposal and any potential alternatives. FRA is specifically requesting comment on a potential alternative under which FRA would only protect C³RS information a railroad compiles or collects as part of an SSP after 365 days following publication of a final rule, even if the railroad established the C³RS program on or before that date. Like with the proposal discussed above, this alternative would reflect that C³RS embodies many of the concepts and principles in SSP and would provide C³RS-participating railroads similar information protection, regardless of when the railroads joined the program. The notable difference under this potential alternative is that C³RS information a railroad compiled or collected on or before 365 days following publication of a final rule would not receive protection. FRA also notes that this alternative may be difficult to administer because the process of de-identifying C³RS information could make it difficult to determine when a railroad compiled or collected the information.

Compliance Dates

FRA has stayed the SSP final rule requirements until September 4, 2019. *See* 83 FR 63106 (Dec. 7, 2018). As discussed above, FRA proposes to extend the stay beyond September 4, 2019, to allow FRA time to issue a final rule in this proceeding. FRA seeks public comment on a possible stay extension. FRA proposes to adjust the various compliance dates in the SSP final rule to account for the stay—specifically, the compliance dates in §§ 270.107(a)(3)(i) and 270.201(a)(1) and appendix B to part 270. These adjustments are discussed further in the section-by-section analysis.

VII. Conforming Amendments to an RRP Final Rule

The SSP rule implements the RSIA mandate for railroad safety risk reduction programs for passenger railroads, while a separate RRP rulemaking is addressing the mandate for certain freight railroads. *See* 49 U.S.C. 20156(a)(1). Throughout both the SSP and RRP rulemaking proceedings, FRA has consistently stated both an SSP and RRP final rule would contain consultation and information protection provisions that were essentially identical. *See* 81 FR 53855 (Aug. 12, 2016) and 80 FR 10955 (Feb. 27, 2015). While this NPRM proposes amendments to the consultation and information protection provisions of the SSP final rule, there is currently no RRP final rule FRA can propose similarly amending.[29] If FRA publishes an RRP final rule before a final rule in this rulemaking proceeding, FRA may use a final rule in this proceeding to make conforming changes to the consultation and information protection provisions of an RRP final rule. FRA therefore welcomes and encourages comments from railroads, labor organizations, and other parties interested in an RRP final rule on the amendments this NPRM proposes to the SSP rule's provisions on consultation and information protection.

VIII. Section-by-Section Analysis

In response to petitions for reconsideration, FRA is proposing various amendments to part 270—System Safety Program. FRA is also proposing to clarify that the SSP rule's information protections apply to C³RS programs included in an SSP and to extend certain compliance dates to account for the stay of the rule.

Section 270.5—Definitions

FRA is proposing to amend the definitions section of part 270 to add a definition for ''Confidential Close Call Reporting System (C³RS),'' which would mean an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report unsafe events that are either currently not required to be reported or are underreported. The proposed definition closely parallels the description of C³RS on FRA's website. *See https://www.fra.dot.gov/c3rs.*

Section 270.7—Penalties and Responsibility for Compliance

Currently, this section contains provisions relating to compliance with part 270 and penalties for violations of part 270. For reasons discussed in Section V of the preamble, FRA is proposing to add a new paragraph (c)(1) to this section to clarify that even though all persons providing IPR or commuter (or other short-haul) rail passenger transportation share responsibility for ensuring compliance with the SSP final rule, the rule does not restrict the ability of such persons to designate to another person responsibility for compliance with this part. The new paragraph would also clarify that a designator (designating entity) would not be relieved of responsibility for compliance. As discussed above in Section V of this preamble, FRA's policy would be to consider a designated entity as the person with primary responsibility for compliance with the SSP final rule. Section V further explains that it would be inconsistent with FRA's statutory jurisdiction over passenger rail service to allow the designator to completely assign or otherwise contract away its entire responsibility for compliance under the law.

As proposed in paragraph (c)(2)(i), a person may designate another person as responsible for compliance with part 270 by including a designation of responsibility in the SSP plan. This designation must be included in the SSP plan's statement describing the railroad's management and organizational structure and include the information specified by proposed § 270.103(e)(6), the details of which are discussed below in the section-by-section analysis for that section. Any rescission or modification of a designation would have to be made in accordance with the requirements for amending SSP plans in § 270.201(c).

FRA notes that the use of ''may'' in proposed paragraph (c)(2) was intentional, as this section does not require a person to designate another person as responsible for compliance—any person can comply with the SSP requirements on its own behalf. However, if a person intends to designate another person as responsible for compliance, the SSP plan must

[28] *See e.g.,* Confidential Close Call Reporting System Implementing Memorandum of Understanding (C³RS/IMOU) for Amtrak, Article 6.1 (Criteria for Close Call Report Acceptance), May 11, 2010, available at *https://www.fra.dot.gov/eLib/details/L16140.*

[29] FRA published an RRP NPRM on February 27, 2015, and is currently developing an RRP final rule. *See* 80 FR 10950.

describe the railroad management and organizational structure, including management responsibilities within the SSP and the distribution of safety responsibilities within the railroad organization, in addition to the requirements of §§ 270.7(c)(2) and 270.103(e)(6).

Nonetheless, FRA further notes that in approving SSP plans, FRA would consider how a designation of responsibility for SSP compliance would be consistent with the holistic, system-wide nature of safety management systems. FRA believes that the systemic nature of SSP requires a single entity to have overall responsibility for the entire SSP, to ensure that the SSP is properly implemented throughout the railroad's entire system by the potentially various entities responsible for separate aspects of the system's safety. FRA therefore expects that a designation would identify only a single entity with overall responsibility for SSP compliance, as opposed to designating SSP responsibility piecemeal to multiple entities.

Including a designation provision in an SSP plan would not, however, relieve a person of responsibility for ensuring that host railroads and other persons that provide or utilize significant safety-related services appropriately support and participate in an SSP, as required under § 270.103(e)(5). Designating a single person as responsible for SSP compliance would not mean that no other entity participates in the SSP. Rather, it means that the designated person has the primary responsibility for ensuring overall SSP compliance, which can include ensuring the participation of other persons as appropriate.

FRA acknowledges that some railroads may wish to make a designation of responsibility for SSP compliance clear before submitting an SSP plan to FRA, particularly if the designation would involve responsibility for consulting with directly affected employees on the contents of an SSP plan. Proposed paragraph (c)(2)(ii) therefore states that a person may notify FRA of a designation of responsibility before submitting an SSP plan by submitting a designation notice to the Associate Administrator for Railroad Safety and Chief Safety Officer. The notice must include all information required under § 270.103(e)(6), although this information must still be included in the SSP plan. If a person does submit a designation notice under this proposed provision, FRA would encourage the person to share the notice with directly affected employees before and during the consultation process. FRA is not proposing a deadline for this notification, but is specifically requesting public comment on whether such a deadline would be necessary.

Section 270.103—System Safety Program Plan

Currently, this section requires a railroad to adopt and fully implement an SSP through a written SSP plan containing the information required in this section. Paragraph (e) specifically states an SSP plan must include a statement describing the railroad's management and organizational structure, and paragraphs (e)(1) through (5) specify information this statement must contain.

FRA is proposing to amend this section to add a new paragraph (e)(6), which would contain the requirements for a designation included in an SSP plan and any designation submitted under proposed § 270.7(c)(2). Under paragraph (e)(6), a designation would have to include the name and contact information for the designator (designating entity) and the designated entity; a statement signed by an authorized representative of the designated entity acknowledging responsibility for compliance with part 270; a statement affirming a copy of the designation has been provided to the primary contact for each non-profit employee labor organization representing directly affected employees for consultation purposes under § 270.107(a)(2); and a description of how the directly affected employees not represented by a non-profit employee labor organization would be notified of the designation for consultation purposes under § 270.107(a).

FRA is also proposing minor formatting amendments to paragraphs (e)(4) and (5) to account for the additional proposed paragraph (e)(6).

Section 270.105—Discovery and Admission as Evidence of Certain Information

Currently, this section sets forth the discoverability and admissibility protections for certain SSP information. The SSP final rule preamble discussed these protections in depth. *See* 81 FR 53878–53882 (Aug. 12, 2016). For reasons discussed in Section VI of the preamble, FRA proposes to add paragraph (a)(3) to this section to clarify that for court proceedings initiated after 365 days following publication of the final rule, the protections established by this section apply to C^{3}RS information a railroad includes in its SSP, even if a railroad compiled or collected the C^{3}RS information on or before August 14, 2017, for non-SSP purposes. FRA is also proposing to add language to the introductory text of paragraph (a) to indicate the information protections apply except as provided in paragraph (a)(3).

FRA is also proposing minor formatting amendments to paragraphs (a)(1) and (2) to account for the additional proposed paragraph (a)(3).

Section 270.107—Consultation Requirements

Currently, this section implements the RSIA's mandate that a railroad required to establish an SSP must consult with its directly affected employees on the contents of its SSP plan. *See* 49 U.S.C. 20156(g)(1). The SSP final rule preamble discussed the requirements of this section in depth. *See* 81 FR 53882–53887 (Aug. 12, 2016). As discussed in Section II.B of the preamble, FRA is proposing several amendments to this section to include language proposed in the Labor Petitions, as modified and clarified by FRA. To account for the stay of the SSP final rule, FRA is also proposing to extend the compliance date for holding the preliminary meeting with directly affected employees.

Paragraph (a)—General Duty

Currently, paragraph (a)(2) of this section states that a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization. If a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations are considered directly affected employees for part 270 purposes.

For reasons discussed in Section II.B of the preamble, FRA proposes to amend paragraph (a)(2) to add that the primary point of contact for directly affected employees represented by a non-profit employee labor organization shall be the general chairperson for that non-profit employee labor organization or a primary point of contact the non-profit employee labor organization and the railroad agree upon at the beginning of the consultation process. Unless agreed otherwise, the primary point of contact for consultation purposes will be a labor organization's general chairperson. While the Labor Petition requested FRA amend paragraph (a)(3) to establish the general chairperson of a non-profit employee labor organization as a railroad's primary point of contact,

FRA believes such a provision belongs more appropriately in paragraph (a)(2), which contains requirements addressing the consultation process generally. Paragraph (a)(3), in contrast, only addresses the preliminary meeting portion of the consultation process. By proposing to amend paragraph (a)(2) instead of paragraph (a)(3), FRA's intent is to clarify that a general chairperson is the primary contact for the entire consultation process, not just the preliminary meeting. FRA specifically requests public comment on whether proposing to amend paragraph (a)(2) instead of paragraph (a)(3) adequately addresses the Labor Petition's concerns.

Currently, paragraph (a)(3) requires a railroad to have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed and states the railroad must hold this meeting no later than April 10, 2017. To account for the stay of the SSP final rule, as discussed in Section VI of the preamble above, FRA is proposing to amend paragraph (a)(3)(i) to extend the deadline for the preliminary meeting from April 10, 2017, to 120 days after the date a final rule arising from this NPRM is published.

Paragraph (b)(3)—Railroad Consultation

Currently, paragraph (b)(3) requires a railroad consultation statement to include a service list containing the name and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees.[30] When a railroad submits its SSP plan and consultation statement, it must simultaneously send a copy of both to all individuals identified in the service list.

FRA proposes to amend paragraph (b)(3) to add that the service list must also include the name and contact information for either each general chairperson of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees or the agreed-upon point of contact that the non-profit employee labor organization and the railroad agree upon at the beginning of the consultation process.

Section 270.201—Filing and Approval

This section contains the requirements for filing an SSP plan and FRA's approval process. As discussed in Section VI of the preamble, FRA proposes to amend paragraph (a)(1) to account for the stay of the requirements of the SSP final rule. Because FRA is proposing to extend the date of the preliminary meeting under § 270.107(a)(3), it would also be necessary to extend the time for a railroad to submit its SSP plan to FRA. FRA is proposing to provide railroads one year after the publication of a final rule to submit their SSP plans to FRA for review and approval. FRA specifically requests public comment on whether railroads will need an entire year following the publication of a final rule to submit SSP plans to FRA, or whether a shorter deadline, such as six months, would provide sufficient time.

Appendix B to Part 270—Federal Railroad Administration Guidance on the SSP Consultation Process

Appendix B contains guidance on how a railroad could comply with the consultation requirements of § 270.107. FRA proposes to amend appendix B to reflect the proposed amended compliance dates in §§ 270.107(a)(3)(i) and 270.201(a)(1).

IX. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM is a non-significant rulemaking and evaluated in accordance with existing policies and procedures under Executive Order 12866 and DOT Order 2100.6. *See* 58 FR 51735, Sep. 30, 1993 and *https://www.transportation.gov/regulations/2018-dot-rulemaking-order*. The scope of this analysis is limited to the revisions that FRA is proposing to make in this rulemaking. FRA concluded that because this NPRM generally includes only voluntary actions or alternative action by designated entities that would be voluntary, this NPRM does not impart additional burdens on regulated entities.

Pursuant to petitions for reconsideration FRA received in response to the SSP final rule, this NPRM proposes five sets of amendments to the SSP rule. The following paragraphs describe the costs and benefits that would follow from implementation of the proposals in this NPRM.

First, to address the State Petitions' concerns discussed in Section III of this NPRM, the NPRM would amend the SSP rule to clarify that a person subject to the SSP rule may designate another entity as being responsible for SSP compliance under §§ 270.7(c) and 270.103(e)(6). As any such designation would be voluntary, such clarification would add no additional burden nor provide any additional safety benefit. In addition, the proposed revisions to §§ 270.7(c) and 270.103(e)(6) would clarify the responsibilities of the designated entity and the designator. Because both the designated entity and the designator would be responsible for compliance under § 270.7(c), issuing the NPRM would not affect safety benefits. FRA requests comment from the public on the costs and benefits described in this paragraph.

Second, to address the Labor Petition's concerns discussed in Section II of this NPRM, FRA proposes to amend the SSP rule to add the general chairperson of a non-profit employee labor organization as the point of contact for directly affected employees represented by that non-profit employee labor organization.

Third, FRA received a comment from AAR voicing concern that an inadvertent failure to serve a general chairperson may result in FRA deeming a railroad as not using ''best efforts'' in the consultation process. In response to such concern, FRA is proposing to allow a railroad and a non-profit employee labor organization to establish an alternative point of contact within the non-profit employee labor organization. This point of contact could be a person the railroad and non-profit employee labor organization agree on at the beginning of the consultation process. FRA anticipates any burden associated with requiring the inclusion of a general chairperson in the service list would be significantly alleviated, if not eliminated altogether, by the provision allowing railroads and non-profit employee labor organizations to agree on an alternative point of contact. FRA specifically requests comment from the public on this conclusion.

Further, as discussed in Section VI of this NPRM, FRA is proposing to amend the SSP final rule's information protections to address the C^{3}RS program. Because this proposed amendment merely addresses the scope of the protections provided by the SSP final rule, there are no burdens associated with it.

Finally, FRA is also proposing to adjust the various compliance dates in the SSP final rule to account for the stay of the final rule's requirements. Because the adjustments are necessary only to conform the final rule's deadlines with the stay, they have already been accounted for in the regulatory impact analysis that accompanied the final rule extending the stay. *See* 82 FR 56745 (Nov. 30, 2017).

[30] Paragraph (b)(3) also requires the service list to contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization.

This proposed rule is not expected to be an Executive Order 13771 regulatory action because this proposed rule is not significant under Executive Order 12866.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.,* and Executive Order 13272, 67 FR 53461 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. The five sets of proposed revisions within this NPRM would not impart any additional burden on regulated entities. Three of the proposed sets of revisions would add clarity to the final rule, and the proposed revision requiring submission of the designation notice to FRA is voluntary and would only apply if a designation is made. Another proposed revision would allow each railroad and labor union to decide jointly on an alternative contact person, thereby eliminating or significantly mitigating any burden associated with the proposed revision requiring inclusion of a general chairperson in the service list.

''Small entity'' is defined in 5 U.S.C. 601 as including 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 ''linehaul railroad'' that has fewer than 1,500 employees, a ''short line railroad'' with fewer than 1,500 employees, or a ''commuter rail system'' with annual receipts of less than $15.0 million dollars. *See* ''Size Eligibility Provisions and Standards,'' 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as ''small entities'' governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Federal agencies may adopt their own size standards for small entities, in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes ''small entities'' or ''small businesses'' as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003), codified at appendix C to 49 CFR part 209. The $20-million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking.

For purposes of this analysis, this proposed rule will apply to 30 commuter or other short-haul passenger railroads and two intercity passenger railroads, Amtrak and the ARC. Neither is considered a small entity. Amtrak serves populations well in excess of 50,000, and the ARC is owned by the State of Alaska, which has a population well in excess of 50,000.

Based on the definition of ''small entity,'' only one commuter or other short-haul railroad is considered a small entity: The Hawkeye Express (operated by the Iowa Northern Railway Company). Although the proposed regulation may impact a substantial number of small entities, by virtue of its impact on the only identified small identity, it would merely provide additional clarifying information without introducing any additional burden. The proposed regulation would therefore not have a significant impact on a substantial number of small entities.

A substantial number of small entities may be impacted by this regulation; however, any impact would be minimal and positive. FRA requests comments as to the impact that the rule would have on both small passenger railroads as well as all passenger railroads in general.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated and the estimated time to fulfill each requirement is as follows:

CFR section/subject	Respondent universe (railroads)	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent
270.103—System Safety Program Plan (SSPP)—Comprehensive written SSPP meeting all of this section's requirements.	32	32 plans	40 hours	1,280	$140,800
—Copies of railroad (RR) designations to non-profit employee labor organizations.	32	27 copies	2 minutes	1	73
—Designation notifications to employees not represented by non-profit employee labor organizations.	32	27 notices	5 minutes	2	146
—System safety training by RR of employees/contractors/others.	32	450 trained individuals.	2 hours	900	65,700
—Records of system safety training for employees/contractors/others.	32	450 records ..	2 minutes	15	1,095
—Furnishing of RR results of risk-based hazard analyses upon request of FRA/participating part 212 States.	32	10 analyses results.	20 hours	200	14,600
—Furnishing of descriptions of RR's specific risk mitigation methods that address hazards upon request of FRA/participating part 212 States.	32	10 mitigation methods descriptions.	10 hours	100	7,300
—Furnishing of results of railroad's technology analysis upon request of FRA/participating part 212 States.	32	32 results of technology analysis.	40 hours	1,280	93,440

CFR section/subject	Respondent universe (railroads)	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent
270.107(a)—Consultation requirements—RR consultation with its directly affected employees on SSPP.	32	32 consults (w/labor union reps.).	40 hours	1,280	93,440
—RR notification to directly affected employees of preliminary meeting at least 60 days before being held.	32	32 notices	8 hours	256	18,688
—(b) RR consultation statements that includes service list with name & contact information for labor organization chairpersons & non-union employees who participated in process.	32	30 statements + 2 statements.	80 hours + 2 hours	2,404	175,492
—Copies of consultations statements by RR to service list individuals.	32	32 copies	1 minute	1	73
270.201—SSPPs found deficient by FRA and requiring amendment.	32	4 amended plans.	40 hours	160	11,680
—Review of amended SSPPs found deficient and requiring further amendment.	32	1 further amended plan.	40 hours	40	2,920
—Reopened review of initial SSPP approval for cause stated.	32	2 amended plans.	40 hours	80	5,840
270.203—Retention of SSPPs—Retained copies of SSPPs.	32	37 copies	10 minutes	6	438
270.303—Annual internal SSPP assessments/reports conducted by RRs.	32	32 evaluations/reports.	40 hours	1,280	93,440
—Certification of results of RR internal assessment by chief safety official.	32	32 certification statements.	8 hours	256	28,160
270.305—External safety audit—RR submission of improvement plans in response to results of FRA audit.	32	6 plans	40 hours	240	26,400
—Improvement plans found deficient by FRA and requiring amendment.	32	2 amended plans.	24 hours	48	3,504
—RR status report to FRA of implementation of improvements set forth in the improvement plan.	32	2 reports	4 hours	8	584
Appendix B—Additional documents provided to FRA upon request.	32	2 documents	30 minutes	1	73
—Notifications/good faith consultation with non-represented employees by RRs.	2	2 notices/consults.	8 hours	16	1,168
—Meeting with non-represented employees within 180 days of final rule effective date about consultation process.	2	2 meetings	8 hours	16	1,168
Appendix C—Written requests by RRs to file required submissions electronically.	32	20 written requests.	30 minutes	10	730
Totals	32	1,310 replies/responses.	N/A	9,880	768,952

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

Under 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized.

For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202–493–6292 or Ms. Kimberly Toone, Records Management Officer, Office of Railroad Safety, Federal Railroad Administration, at 202–493–6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE, 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Mr. Brogan at *Robert.Brogan@dot.gov* or Ms. Toone at *Kim.Toone@dot.gov*.

OMB must make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection

requirements resulting from this rulemaking action prior to the effective date of the final rule, and will announce the OMB control number, when assigned, by separate notice in the **Federal Register**.

D. Environmental Impact

FRA has evaluated this proposed rule in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545 (May 26, 1999)) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this proposed rule is not a major Federal action, requiring the preparation of an environmental impact statement or environmental assessment, because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. *See* 64 FR 28547 (May 26, 1999).

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this proposed rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

E. Federalism Implications

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.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule generally clarifies or makes technical amendments to the requirements contained in part 270, System Safety Program. FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

F. 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 proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

G. 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 proposed rule in accordance with Executive Order 13211 and determined that this regulatory action is not a ''significant energy action'' within the meaning of the Executive Order.

Executive Order 13783, ''Promoting Energy Independence and Economic Growth,'' requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. *See* 82 FR 16093 (Mar. 31, 2017). FRA determined this proposed rule would not burden the development or use of domestically produced energy resources.

H. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to *www.regulations.gov,* as described in the system of records notice, DOT/ALL–14 FDMS, accessible through *www.dot.gov/privacy.* To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 270

Penalties, Railroad safety, Reporting and recordkeeping requirements, System safety.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 270 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 270—[AMENDED]

■ 1. The authority citation for part 270 continues to read as follows:

Authority: 49 U.S.C. 20103, 20106–20107, 20118–20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

■ 2. In § 270.5, add a definition in alphabetical order for *Confidential Close Call Reporting System (C³RS)* to read as follows:

§ 270.5 Definitions.

* * * * *

Confidential Close Call Reporting System (C³RS) means an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report currently unreported or underreported unsafe events.

* * * * *

■ 3. In § 270.7, add paragraph (c) to read as follows:

§ 270.7 Penalties and responsibility for compliance.

* * * * *

(c)(1) All persons providing intercity rail passenger or commuter (or other short-haul) rail passenger service share responsibility for ensuring compliance with this part. Nothing in this paragraph (c), however, shall restrict the ability to provide for an appropriate designation of responsibility for compliance with this part. A designator, however, shall not be relieved of responsibility for compliance with this part.

(2)(i) Any person subject to this part may designate another person as responsible for compliance with this part by including a designation of responsibility in the SSP plan. This designation must be included in the SSP plan's statement describing the railroad's management and organizational structure and include the information specified by § 270.103(e)(6).

(ii) A person subject to this part may notify FRA of a designation of responsibility before submitting an SSP plan by first submitting a designation of responsibility notice to the Associate Administrator for Railroad Safety and Chief Safety Officer. The notice must include all information required under § 270.103(e)(6), and this information must also be included in the SSP plan.

■ 4. In § 270.103, revise paragraph (e)(4) and the last sentence of paragraph (e)(5) and add paragraph (e)(6) to read as follows:

§ 270.103 System safety program plan.

* * * * *

(e) * * *

(4) Clear identification of the lines of authority used by the railroad to manage safety issues;

(5) * * * As part of this description, the railroad shall describe how each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified by the railroad pursuant to paragraph (d)(2) of this section supports and participates in the railroad's system safety program, as appropriate; and

(6) If a person subject to this part designates another person as responsible for compliance with this part under § 270.7(c)(2), the following information must be included in the designator's SSP plan and any notice of designation submitted under § 270.7(c)(2):

(i) The name and contact information of the designator;

(ii) The name and contact information of the designated entity and a statement signed by an authorized representative of the designated entity acknowledging responsibility for compliance with this part;

(iii) A statement affirming that a copy of the designation has been provided to the primary point of contact for each non-profit employee labor organization representing directly affected employees for consultation purposes under § 270.107(a)(2); and

(iv) A description of how directly affected employees not represented by a non-profit employee labor organization were notified of the designation for consultation purposes under § 270.107(a).

* * * * *

■ 5. In § 270.105, revise paragraphs (a) introductory text and (a)(1) and the last sentence of paragraph (a)(2) and add paragraph (a)(3) to read as follows:

§ 270.105 Discovery and admission as evidence of certain information.

(a) *Protected information.* Except as provided in paragraph (a)(3) of this section, any information compiled or collected after August 14, 2017, solely for the purpose of planning, implementing, or evaluating a system safety program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. For purposes of this section—

(1) ''Information'' includes plans, reports, documents, surveys, schedules, lists, or data, and specifically includes a railroad's analysis of its safety risks under § 270.103(q)(1) and a railroad's statement of mitigation measures under § 270.103(q)(2);

(2) * * * This section does not protect information that is required to be compiled or collected pursuant to any other provision of law of regulation; and

(3) A railroad may include a Confidential Close Call Reporting System (C^3RS) program in a system safety program established under this part. For Federal or State court proceedings described by this paragraph (a) that are initiated after (date 365 days after date of publication of the final rule), the information protected by this paragraph (a) includes C^3RS information a railroad includes in its system safety program, even if the railroad compiled or collected the C^3RS information on or before August 14, 2017, for purposes other than planning, implementing, or evaluating a system safety program under this part.

* * * * *

■ 6. In § 270.107, add a sentence after the first sentence of paragraph (a)(2) and revise paragraph (a)(3)(i) and the first sentence of paragraph (b)(3) to read as follows:

§ 270.107 Consultation requirements.

(a) * * *

(2) * * * For directly affected employees represented by a non-profit employee labor organization, the railroad's primary point of contact shall be either the general chairperson of that non-profit employee labor organization or a non-profit employee labor organization primary point of contact the railroad and the non-profit employee labor organization agree on at the beginning of the consultation process. * * *

(3) * * *

(i) Hold the preliminary meeting no later than (date 120 days after date of publication of the final rule); and

* * * * *

(b) * * *

(3) A service list containing the name and contact information for either each international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees, or each non-profit employee labor organization primary point of contact the railroad and the non-profit employee labor organization agree on at the beginning of the consultation process. * * *

* * * * *

■ 7. In § 270.201, revise paragraph (a)(1) to read as follows:

§ 270.201 Filing and approval.

(a) *Filing.* (1) Each railroad to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue SE, Washington, DC 20590, no later than (date 365 days after date of publication of the final rule), or not less than 90 days before commencing passenger operations, whichever is later.

* * * * *

■ 8. In appendix B to part 270:

■ a. Revise the section titled ''Employees Represented by a Non-Profit Employee Labor Organization''; and

■ b. Revise the section titled ''Employees Who Are Not Represented by a Non-Profit Employee Labor Organization.''

The revisions read as follows:

Appendix B to Part 270—Federal Railroad Administration Guidance on the System Safety Program Consultation Process

* * * * *

Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 270.107(a)(2), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of a SSP plan will be considered to have consulted with the directly affected employees represented by that organization.

A railroad may utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of a SSP plan.

- Pursuant to § 270.107(a)(3)(i), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) no later than (date 120 days after date of publication of the final rule) to begin the process of consulting on the contents of the railroad's SSP plan. A railroad must provide notice at least 60 days before the scheduled meeting.
- During the time between the initial meeting and the applicability date of § 270.105 the parties may meet to discuss administrative details of the consultation process as necessary.
- Within 60 days after the applicability date of § 270.105 a railroad should have a meeting with the directed affected employees to discuss substantive issues with the SSP.
- Pursuant to § 270.201(a)(1), a railroad would file its SSP plan with FRA no later than (date 365 days after date of publication of the final rule), or not less than 90 days before commencement of new passenger service, whichever is later.
- As provided by § 270.107(c), if agreement on the contents of a SSP plan could not be reached, a labor organization (representing a class or craft of the railroad's directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a railroad's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a railroad with non-represented employees should make a concerted effort to ensure that its non-represented employees are aware that they are able to participate in the development of the railroad's SSP plan. FRA therefore is providing the following guidance regarding how a railroad may utilize good faith and best efforts when consulting with non-represented employees on the contents of its SSP plan.

- By (date 45 days after date of publication of the final rule), a railroad should notify non-represented employees that—

(1) The railroad is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its SSP plan;

(2) The railroad is required to meet with its directly affected employees by (date 120 days after date of publication of the final rule) to address the consultation process;

(3) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and

(4) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed SSP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

- This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

(1) Electronically, such as by email or an announcement on the railroad's website;

(2) By posting the notification in a location easily accessible and visible to non-represented employees; or

(3) By providing all non-represented employees a hard copy of the notification. A railroad could use any or all of these methods of communication, so long as the notification complies with the railroad's obligation to utilize best efforts in the consultation process.

- Following the initial notification and initial meeting to discuss the consultation process (and before the railroad submits its SSP plan to FRA), a railroad should provide non-represented employees a draft proposal of its SSP plan. This draft proposal should solicit additional input from non-represented employees, and the railroad should provide non-represented employees 60 days to submit comments to the railroad on the draft.
- Following this 60-day comment period and any changes to the draft SSP plan made as a result, the railroad should submit the proposed SSP plan to FRA, as required by this part.
- As provided by § 270.107(c), if agreement on the contents of a SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

Issued in Washington, DC.

Ronald L. Batory

Administrator, Federal Railroad Administration.

[FR Doc. 2019–12125 Filed 6–11–19; 8:45 am]

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