November 10, 2014

Joseph C. Szabo
Administrator
Federal Railroad Administration
1200 New Jersey Avenue, SE
Washington, DC 20590

Submitted via www.regulations.gov

Re: Comments on the Notice of Proposed Rulemaking for the Securement of Unattended Equipment (Docket # FRA-2014-0032).

Dear Administrator Szabo,

On behalf of Riverkeeper and its members, we submit the following comments on the Notice of Proposed Rulemaking issued by the Federal Railroad Administration (FRA) September 9, 2014 on Securement of Unattended Equipment (Docket # FRA-2014-0032).[1] The emergency orders, safety alerts, and advisories issued to date by the Department of Transportation (DOT) and its subagencies, the Pipeline and Hazardous Materials Safety Administration (PHMSA) and the FRA, including the proposed regulations at issue here, do not go far enough, fast enough, to protect our communities, our environment, and our economies. For the reasons outlined in detail in these comments, FRA's proposal with respect to procurement fails to satisfy its statutory duty to "consider the assignment and maintenance of safety as the highest priority."[2] We call on FRA to issue regulations that provide for the securement of a wider scope of trains, applicable to all rail lines, yards, and sidings, that have recordkeeping requirements.

Riverkeeper is a member-supported environmental watchdog organization dedicated to defending the Hudson River and its tributaries and to protecting the drinking water supply of nine million New York City and Hudson Valley residents. Through enforcement and litigation, policy and legislation, as well as educational outreach, Riverkeeper works to stop polluters, champion public access to the river, influence land use decisions, and restore habitat, benefiting the natural and human communities of the Hudson River and its watershed.

[1] See 79 F.R. 53356 (September 9, 2014).
[2] 49 U.S.C. § 103(c).

I. INTRODUCTION AND BACKGROUND

Given recent derailments, explosions, and spills which have occurred across the nation and in Canada, our concern about a potentially catastrophic crude oil release from rail cars is fully justified.[3] Recently, the public, as well as responsible federal agencies, have become increasingly aware of the dangers posed by crude-by-rail transportation.

Beginning in 2008, as the U.S. saw expansion of shale oil production in the Bakken fields in North Dakota and Montana, as well as in the Eagle Ford and Permian Basins in Texas, rail transport of crude oil also began to increase.[4] According to a report on crude-by-rail issued by the Congressional Research Service (CRS),

> "In the face of continued uncertainty about the prospects for additional pipeline capacity, and as a quicker, more flexible alternative to new pipeline projects, North American crude oil producers are increasingly turning to rail as a means of transporting crude supplies to U.S. markets."[5]

Indeed, between 2008 and 2012, U.S. refinery receipts of domestic crude oil by rail increased more than sevenfold from 4 million barrels to 30 million barrels.[6] Crude transport by rail was not only supplying refineries; crude oil trains were also servicing transloading hubs where oil could be transferred to barges and vessels. This "flexibility," as the CRS describes it, meant "that U.S. freight railroads are estimated to have carried 434,000 carloads of crude oil in 2013 (roughly equivalent to 300 million barrels), compared to 9,500 carloads in 2008;" a 45-fold increase.[7] The federal government estimates that there could be up to 650,000 carloads of crude oil shipped in 2014, and more in the years beyond.[8]

This dramatic growth in the amount of crude oil transported by rail did not come without drawbacks. According to an August, 2014 report on Oil and Gas Transportation by the Government Accountability Office (GAO), "[t]ransporting oil and gas by any means – through pipelines, rail, truck, or barge – poses **inherent** safety risks."[9] This review included an analysis of PHMSA, FRA, and DOT fatality reports over four years (2007-2011) concluded that, across all modes of transportation, "increased transport of oil and gas by rail, truck, or barge could increase safety risks."[10] According to an analysis of PHMSA data by research firm McClatchy

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[3] For the purposes of these comments, which are in response to proposed rules that generally apply to trains carrying 20 or more railcars of Class 3 flammable hazardous materials (i.e., volatile crude oils and ethanol), use of the phrase "crude oil" should be read to include concerns about ethanol transport, and, unless otherwise specified, concerns about transport of any quantity of such materials.
[4] See 79 F.R., at 45035.
[5] U.S. Rail Transportation of Crude Oil: Background and Issues for Congress Update, Congressional Research Service Report R43390 (May 5, 2014) ("CRS Report Update"), at *i*.
[6] Oil and Gas Transportation, Government Accountability Office Report GAO-14-667 ("GAO Report"), at 15.
[7] CRS Report Update, at *i*.
[8] Id. Note also the GAO estimates that crude oil production in the U.S. will grow 48% between 2012 and 2019, and stay at that level through 2050. GAO Report, at 7.
[9] GAO Report, at 18.
[10] GAO Report, at 19.

DC, more crude oil was spilled by rail in 2013 (over 1.15 million gallons) than was spilled during all the years between 1975 and 2012 combined (800,000 gallons).

Specifically for railroads, PHMSA builds on this baseline of inherent risk, noting that because of the particular dangers of rail transport, these risks are multiplied:

> "transporting crude oil can be dangerous if the crude oil is released into the environment because of its flammability. This risk of ignition is compounded in the context of rail transportation of crude oil. It is commonly shipped in [unit trains] that may consist of over 100 loaded tank cars, and there appear to be uniquely hazardous characteristics of crude oil."[11]

The type of crude oil has also compounded these risks – oils derived from shale formations often have "variable composition and may sometimes contain higher than usual levels of dissolved natural gases."[12] The Association of American Railroads, the group representing the railroad industry, has concluded that "this can lead to flammable gases building up in a tank car during transport ... [and] that the presence of natural gas makes fires more likely when crude oil tank cars are involved in an accident."[13] Given the dramatic growth in the transported quantity of this especially flammable, volatile type of crude oil, it is unsurprising that internal PHMSA data shows that, specifically for crude oil, "incidents in the United States increased from 8 incidents in 2008 to 119 incidents in 2013."[14]

That this increase has caused a corresponding increase in the number of mainline train accidents involving crude oil ("from zero in 2010 to five in 2013 and [through August,] five in 2014") led PHMSA to conclude that the potential for "future severe train accidents involving crude oil in [unit trains] has increased substantially."[15] In the words of PHMSA, "prompt action must be taken."[16]

After an explosion in Lac-Mégantic, Quebec, where 47 people lost their lives when a crude oil train derailed and exploded, the industry, the National Transportation Safety Board (NTSB), and the agencies in charge of regulating crude-by-rail began to act.

In January, 2014, the DOT issued a "'Call to Action' to actively engage all the stakeholders in the crude oil industry," in improving rail safety.[17] The outcome of this collaboration was that "the rail and crude oil industries agreed to voluntarily consider or implement potential improvements" from speed reductions in certain areas and investments in

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[11] 79 F.R., at 45041.
[12] GAO Report, at 38.
[13] GAO Report, at 38.
[14] GAO Report, at 34. While most of these incidents are categorized by the GAO as small, "significant accidents involving crude oil have increased in recent years, with one incident occurring between 2008 and 2012 compared to eight incidents since 2012." GAO Report, at 34.
[15] 79 F.R., at 45019.
[16] 79 F.R., at 45039.
[17] 79 F.R., at 45033.

response training to the use of distributive power braking systems.[18] In August, 2014, PHMSA issued a Notice of Proposed Rulemaking on rank car design and crude-by-rail operations, along with an Advanced Notice of Proposed Rulemaking on rail spill response planning. See the attached comments on these actions, proposals, and the dangers associated with crude-by-rail.

Overall, the transport of crude oil (and other hazardous materials) by rail is inherently dangerous. As such, the regulations which address the safe securement of trains hauling such materials must be as protective as possible. By law, FRA has a mandate to "consider the assignment and maintenance of safety as the highest priority."[19] Here, however, FRA's proposed rule does not go far enough in so protecting the public or the environment. The securement regulations proposed by FRA fail to bring about meaningful, immediate, and comprehensive progress in ensuring the safety of the public, our communities, and the environment.

II. PROPOSED SECUREMENT REGULATIONS ARE INSUFFICIENT

a. The DOT Emergency Order on Securement

On August 7, 2013, the DOT issued an Emergency Order establishing securement requirements for unattended trains, including crude-by-rail trains.[20] This Emergency Order focused solely on securement (rather than internal railroad program reviews, operations, or infrastructure), and is presently binding.

As a basis for the Order, the DOT noted that between January 2010 and August 2013 there were nearly 4,950 instances of noncompliance with *existing* securement regulations applying to unattended trains.[21] "Moreover," continued the DOT, "FRA has seen a number of serious accidents during rail transportation of flammable liquids since 2009, and there has been significant growth in these types of rail shipments since 2011."[22] According to data provided in the Emergency Order, between 2009 and 2013, **35.7%** of all accidents were the result of human-factor causes; of those, for calendar year 2011 through April 2013, about **8.5%** were the result of improper securement.[23]

Clearly, the DOT is concerned that this history of noncompliance, coupled with increasingly dangerous cargoes and rail traffic, will lead to more disasters in the future. "With increased shipments of hazardous materials," noted the DOT, "securement non-compliance, particularly on mainline track and mainline sidings outside of a yard or terminal, has become a serious, immediate safety concern."[24]

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[18] 79 F.R., at 45033.
[19] 49 U.S.C. § 103(c).
[20] 78 F.R. 48218 (August 7, 2013).
[21] Id., at 48218.
[22] Id., at 48218.
[23] Id., at 48221.
[24] Id., at 48222.

In order to "eliminate an immediate hazard of death, personal injury, or significant harm to the environment,"[25] the DOT mandated the following in its Emergency Order:

- A prohibition on leaving trains unattended on mainline tracks or sidings, only until such time as the railroads "develops, adopts, complies with and makes available to FRA upon request, a plan that identifies specific locations and circumstances when such trains or vehicles may be left unattended."[26]
- A requirement that, if a train is left unattended, the controlling locomotive cab is locked (or some of the controls removed) and the employees responsible for that train notify their railroad dispatcher as to the details of their train's load and location, and the conditions (of the train, track, and weather) the train was left in.
- A requirement that all railroads inform all affected employees of these new requirements.

While these new requirements carry with them a penalty for noncompliance of up to $105,000, the DOT notes in the Emergency Order that with "limited resources, FRA can inspect only a small percentage of trains and vehicles for regulatory compliance."[27]

Immediately upon issuance of this Emergency Order, the FRA received a request for a waiver of compliance. As noted in the Notice for these Securement regulations:

> "Following a request from AAR and ASLRRA, FRA granted partial relief from Emergency Order 28's dispatcher communication requirement in certain limited situations. FRA's relief letter provides that a railroad employee may leave equipment unattended on a mainline or siding without contacting the train dispatcher when the employee is actively engaged in switching duties as long as the employee ensures that there is an emergency application of the air brakes, hand brakes are set in accordance with 49 CFR 232.103(n), and the employee has demonstrated knowledge of FRA and railroad securement requirements."[28]

The August 2013 Emergency Order carried with it another large loophole: if the railroad believes there is a reason to leave a train unattended, it may, so long as it informs its own dispatcher where the trains are left unattended and confirms (internally) that the train is safely secured as per the railroad's own internal securement regulations. This Emergency Order, an easily-avoided set of requirements likely not anything more restrictive than current best practices, was grossly inadequate and by no means addressed the safety risks posed by the "significant growth" in crude-by-rail or the lessons learned after Lac-Mégantic.

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[25] Id., at 48218.
[26] See 78 F.R. 48223. Note that, for this Order and for many later DOT, F.R.A, and PHMSA actions– including the proposed rulemaking at issue today – these new requirements are only required for trains carrying "(1) Five or more tank car loads of any one or any combination of materials poisonous by inhalation as defined in 49 C.F.R. 171.8, and including anhydrous ammonia (UN 1005) and ammonia solutions (UN 3318); or (2) 20 rail car loads or intermodal portable tank loads of any one or any combination of materials listed in (1) above, or, any Division 2.1 flammable gas, Class 3 flammable liquid or combustible liquid, Class 1.1 or 1.2explosive, or hazardous substance listed in 49 C.F.R. 173.31(f)(2)." 78 F.R. 48218.
[27] Id.
[28] 79 F.R. 53359.

b. Proposed regulations unacceptably weaken the already insufficient Emergency Order

In a third Emergency Order issued in May, 2014, only a few months after its Order on securement, the DOT's tone noticeably shifted: "the number and type of petroleum crude oil railroad accidents … that have occurred during the last year is **startling**, and the quantity of petroleum crude oil spilled as a result of those accidents is **voluminous** in comparison to past precedents."[29] Yet in spite of the fact that the risks associated with crude-by-rail are clear – and becoming clearer, accident after accident, FRA's securement regulations do not go far enough in protecting people or the environment.

According to the notice of proposed rulemaking, FRA's securement regulations, broadly, would have three main requirements:[30]

1. Ensuring that each locomotive left unattended outside of a yard have a door lock;
2. For trains with "twenty (20) or more loaded cars or loaded intermodal portable tanks of any one or any combination of PIH materials (including anhydrous ammonia and ammonia solutions), or any flammable gas, flammable or combustible liquid, explosives, or a hazardous substance listed at [49 C.F.R.] § 173.31(f)(2)," locks must be "applied on the controlling locomotive cab door,"
3. Such trains "may only be left unattended on a main track or siding if justified in a plan adopted by the railroad, accompanied by an appropriate job briefing, and proper securement is made and verified."[31]

The first proposed requirement, that locomotives have locks, is laudable, even if it strains belief that some train locomotives on the rails today do not have locks. For the remaining two sections of the proposed regulation, however, the FRA misses an opportunity to truly protect the public and the environment because of four main ways in which the proposal's intentions are undermined:

i. Unattended Train Plans

As noted, a "hazardous materials" train (hereinafter, HMT) as described above, can indeed be left unattended if a justification is provided to the FRA. This loophole was, as noted above, also part of the DOT Emergency Order. In practice, not only is the presence of this loophole concerning, the fact that FRA believes "that it is not necessary to provide approval for each plan" because that level of oversight "could take considerable resources," is clear evidence that safety, here, is not being considered the highest priority. FRA's reservation of a right to request to look at these justifications (should it so choose) does nothing to overcome this abrogation of responsibility.[32] FRA should not allow railroads to develop their own plans for leaving HMTs unattended without reviewing those plans.

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[29] See 79 F.R. 27363 (emphasis added).
[30] 79 F.R. 53365.
[31] Id.
[32] 79 F.R. 53365

ii. Hazardous Material Exemptions

According to the FRA, the regulations would exempt residue cars from consideration, and would not apply to hazardous materials which are not "flammable gas, flammable or combustible liquid, explosives, or a hazardous substance listed at [49 C.F.R.] § 173.31(f)(2)."[33] We are concerned that the FRA did not thoroughly analyze the potential human health and environmental impacts associated with residue cars (which, as is discussed in the attached PHMSA proposal comments, are still inherently dangerous), or cars carrying crude oils such as heavy, sinking tar sands oils. The latter are expected to become more regularly shipped in the least-safe DOT-111 and CPC-1232 railcars (up to 23,000 railcars) when and if the PHMSA proposed upgrades for volatile Class 3 Flammable materials take effect. Indeed, such oils are being transported now. Even if they pose less of an explosive threat than other more volatile crude oils, spills of such oils could result in their impacts to our economy and our environment that can be just as significant. Both residue cars and cars carrying hazardous materials of any type must be covered by in this rule.

iii. Paperwork Exemptions

Throughout the proposed regulations, railroads are exempted from maintaining any records of securement practices – a decision which makes it easy for an employee to not comply with safety protocols, and makes it difficult for FRA to meaningfully enforce its rules. For example, the regulations would require that the "an employee responsible for securing equipment defined by paragraph (n)(6) verify securement with another qualified person."[34] The FRA verification requirement, however, "does not contain a requirement that the railroad maintain a record of the verification of proper securement."[35] In this case, FRA's assumption, with respect to enforcement and compliance, is based on its belief that:

> "the type of verification requirement in proposed paragraph (n)(8)(i) will serve to ensure that any employee who is responsible for securing equipment containing hazardous materials will follow appropriate procedures because the employee will need to fully consider the securement procedures to relay what was done to the qualified employee."[36]

FRA is unwilling to specify requirements for this verification step, which we consider to be a very significant element of securement. Not only does it refuse to "limit[] the type of employee who may be qualified" to confirm that a train is secure ("FRA envisions that a dispatcher, roadmaster, yardmaster, road foreman of engines, or another crew member would be able to serve in the verification capacity"), it also fails to specify the type of verification, or even the details that must be provided.[37] This recordkeeping omission was made, according to the FRA for the following, circular, reason:

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[33] 79 F.R. 53365.
[34] 79 F.R. 53366.
[35] Id.
[36] Id.
[37] Id.

> "FRA has found that requiring recordation of securement information is superfluous because the verification requirement ensures that two individuals consulting with each other make certain that the appropriate securement method is used. The intent of the recordation requirement was to ensure the communications are taking place. FRA has found over the last year that communications occur in the course of the verification process. **Therefore, it does not believe requiring railroads to make a record of each securement event is necessary to ensure proper securement**."[38]

First, FRA failed to provide any evidence supporting its contention that "over the last year … communications occur" between the securing employee and the overseeing employee. Second, FRA's conclusion that records cannot keep a train from rolling away misses the point of maintaining records – they allow for oversight and enforcement.

iv. Yards, Adjacency, and Sidings

None of the proposed requirements for securing trains, as the rule was noticed by the FRA, would apply to trains left unattended on main tracks or sidings which run through, or are directly adjacent to, a yard, or trains left unattended at yards.[39] The reason given for these exclusions is:

> "As a result of the tasks performed there, yards tend to have appropriate geographic characteristics, sufficient railroad activity, and a population of railroad personnel in close proximity that make them safer places for leaving equipment unattended. In FRA's view, mainline tracks that run through yards share those characteristics with the yard tracks surrounding it and is often used as a *de facto* "yard" track to assist with classifying cars and with making-up and inspecting trains. As such, FRA did not see a need … for railroads to identify mainline tracks within a yard in the railroad's securement plan before a railroad would be allowed to leave equipment unattended on the mainline track that is surrounded by a yard. … [T]racks adjacent to the yard share many of the same characteristics as mainline tracks that run through a yard. Therefore, FRA has proposed in this rulemaking to treat mainline track that is adjacent to the yard in the same manner that it is currently treating mainline track that runs through a yard."[40]

In other words, FRA is assuming that because rail yards and sidings generally have more activity than lone, far-flung mainline track, trains are inherently more secure in and around yards to the point that they do not need to be included in these securement regulations. This conclusion is not supported by any presented facts, and ignores the risks of unsecured trains rolling out of yards, or sidings, or mainlines near yards, potentially toward imminent and significant disaster.[41]

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[38] Id. (emphasis added).
[39] 79 F.R. 53365. Note, this is another departure from the DOT Emergency Order on securement, which did apply to trains left unattended on mainline tracks running through or adjacent to yards.
[40] Id., at 53365-53366.
[41] Indeed, FRA notes that the risk of a train rolling to disaster is ever-present, no matter how "flat" or secure a rail line appears to be – "FRA further proposes to remove the phrase "on a grade," as such a requirement is arguably superfluous and confusing. Perfectly level track is rare, and there is still a risk of unattended movement caused by

In Albany County, NY, the Selkirk rail yard (operated by CSX) has far more oil and hazardous material spills than any other part of the rail lines in the Hudson Valley Region, and is located adjacent to a large chemical facility and a power plant. Were an unsecured crude oil train to roll out of that facility, it could impact the Hudson River, the adjacent facilities, or numerous communities, regardless of the relative activity level of the rail yard as compared to the mainline track.

The decision to exempt such areas from securement requirements is not supported by the record, and arbitrarily relies on nonspecific "railroad" activity and the assumption that rail yard workers would be able to respond to a runaway train in time to avoid disaster. Any final rule on securement must apply to all unattended trains, regardless of where they are left.

Overall, the FRA's proposals have too many loopholes and shortcomings that the agency attempts to justify with scant or nonexistent evidence. The agency must require more robust reporting, for all trains, in all places, and must commit to ensuring compliance.

c. Improvements to the safety culture of railroads and oversight by FRA ignored

In an August, 2014 summary of the Lac-Mégantic derailment (which was caused, in part, by improper securement), Canada's Transportation Safety Board (TSB-Canada) specifically noted how a weak safety culture of "care" on the part of certain railroads, coupled with lax oversight by railroad regulators, contributed to the Lac-Mégantic disaster.

In Quebec in August, 2013, this was the case with the now-bankrupt Montreal, Maine & Atlantic (MMA) Railway and with Canadian rail oversight of that line:

> "An organization with a strong safety culture is generally proactive when it comes to addressing safety issues. MMA was generally reactive. There were also significant gaps between the company's operating instructions and how work was done day to day. This and other signs in MMA's operations were **indicative of a weak safety culture—one that contributed to the continuation of unsafe conditions and unsafe practices, and significantly compromised the company's ability to manage risk**. [MMA's] employee training, testing, and supervision were not sufficient, particularly when it came to the operation of hand brakes and the securement of trains. Although MMA had some safety processes in place and had developed a safety management system in 2002, the company did not begin to implement this safety management system until 2010—and by 2013, it was still not functioning effectively."[42]

The securement regulations proposed here rely in whole or in part on the follow-through and the cooperation of the rail industry – in other words on the existence of a "strong safety culture," as TSB-Canada put it. DOT's August 2013 securement Emergency Order, for example,

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numerous factors, such as a mistake in the location or length of the level track, the effect of extreme weather, or an impact from other equipment." Id., at 53365.

[42] Lac-Mégantic Runaway Train and Derailment Investigation – Summary, Transportation Safety Board of Canada (2014), at 7. Available at http://www.tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054-r-es.pdf.

prohibits unattended trains *unless* the railroad can show it has a good reason and a process in place to make sure unattended trains are safe and secure. These internally-developed plans (subject to no increased oversight or review by federal agencies) are exactly what were left unimplemented by MMA in the Lac-Mégantic disaster, owing to, as TSB-Canada noted, the "weak safety culture" of the company and its inability to manage risk effectively. In short, even if a railroad has a safety management plan, weak oversight or lax safety program adherence (e.g., human error), can result in disaster.

Moreover, no level of safety or security planning by the industry can be considered sufficient without thorough oversight by regulators like the FRA and PHMSA. As part of the TSB-Canada review of the Lac-Mégantic disaster, fault was first and foremost placed at on the railroad, but the agency also highlighted the lack of oversight from Transport Canada, the Canadian equivalent of the DOT. According to TSB-Canada's 2014 review of government oversight culture that existed at the time of the derailment,

> "although MMA had developed a safety management system in 2002, Transport Canada's regional office in Quebec *did not audit it until 2010—even though this is Transport Canada's responsibility, and despite clear indications (via inspections) that the company's safety management system was not effective*."[43]

Indeed, the vital connection between the industry's own actions and government oversight was the impetus behind TSB-Canada's August, 2014 investigation summary. As a consequence, the agency announced a new recommendation, R14-05, requiring that Transport Canada "take a more hands on role when it comes to railways' safety management systems—making sure not just that they exist, but that they are working and that they are effective."[44]

FRA claims that new requirements of the rules proposed here would indeed "enhance safety culture and oversight." However, our concern is that the new requirements lack the enforceability needed to actually change the *status quo*. As presented, the FRA's proposed changes do not go far enough to ensure that safety becomes the top priority in securement:

- FRA proposes "requiring that securement be part of all relevant job briefings," but has no ability to ascertain whether briefed employees understand, or are implementing, securement policies.
- FRA proposes requiring that there be more "dialog between railroad employees [which would] provide enhanced oversight within the organization," but has no way to ensure that such dialogs occur, or whether they actually improve compliance rates.[45]

Finally, neither of these cultural changes, as discussed above, will necessarily be reported to the FRA or the public in a manner that promotes transparent oversight and robust enforcement. Coupled with the ability of railroads to apply for waivers of any of these practices and to develop

[43] Id. (emphasis added).
[44] Id., at 9.
[45] 79 FR 53359.

securement program specifics in-house, these proposed regulations could result in no real changes to the current, inadequate practices that the proposed rule attempts to address.

Industry actions (largely, if not entirely) developed internally, coupled with lax or nonexistent federal oversight, has proved to be a sure path to crude-by-rail disaster. As DOT has often noted over the past year, including in the notice for the proposed regulations, with their "limited resources, FRA can inspect only a small percentage of trains and vehicles for regulatory compliance."[46] Here, as with classification, FRA's proposed securement standards rely too much on the industry, and should be amended to require more reporting, documentation, inspections, and higher penalties for noncompliance.

III. FRA CANNOT MOVE FORWARD WITH ITS RULEMAKING WITHOUT COMPLETING AN ENVIRONMENTAL IMPACT STATEMENT UNDER NEPA

When describing the fundamental objective of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-47, the Supreme Court proclaimed, "NEPA promotes its sweeping commitment to prevent or eliminate damage to the environment and biosphere by focusing Government and public attention on the environmental effects of proposed agency action" so that the "agency will not act on incomplete information only to regret its decision after it is too late to correct."[47] To fulfill its purpose, NEPA requires federal agencies "to the fullest extent possible" to prepare an environmental impact statement (EIS) for "every . . . major Federal actio[n] significantly affecting the quality of the human environment."[48]

When a federal agency is unsure whether an action will cause a significant environmental impacts, the Council on Environmental Quality (CEQ) regulations implementing NEPA require the agency to develop an environmental assessment (EA) that includes (1) the need for the proposed action, (2) alternatives to the proposed action as required by 42 U.S.C. § 4332(2)(E), (3) the environmental impacts of the proposed action and alternatives, and (4) a list of the agencies and persons consulted.[49]

Where substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, an EIS must be completed.[50] The CEQ regulations require the agency with primary responsibility for preparing the EIS to consider ten factors measuring the significance of environmental impacts.[51] Among other factors, the agency must consider the beneficial and adverse impacts of the project, the effect on public health and safety, the unique characteristics of the geographic area, the degree to which possible effects are highly controversial, uncertain or involve unique or unknown risks, cumulatively significant impacts, and whether the proposed action will violate any laws or standards of environmental protection. The lead agency must also "[r]igorously explore and objectively evaluate all

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[46] 78 F.R. 48218.
[47] *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).
[48] 42 U.S.C. § 4332(2)(C).
[49] 40 C.F.R. § 1508.9(b).
[50] *Cal. Wilderness Coalition v. Dep't of Energy*, 631, F.3d 1072, 1997 (9th Cir. 2011).
[51] 40 C.F.R. § 1508.27.

reasonable alternatives, and for alternatives which were eliminated from study, briefly discuss the reasons for their having been eliminated."[52] The alternatives analysis "is the heart" of the Environmental Impact Statement.[53]

FRA's environmental assessment (EA) for its rulemaking on securement is deficient because FRA's procedures categorically excludes safety regulations such as these from detailed environmental review, excludes reasonably foreseeable significant environmental impacts, and entirely excludes consideration of feasible alternatives.[54] The potential environmental impacts, and the differences between impacts among alternative securement regulation scenarios, must be considered in a full EIS. Instead, the FRA provides this meager environmental discussion:

> "FRA has determined that this rule is not a major FRA 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 [which] reads as follows: "(c) Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. … (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation." 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 regulation that might trigger the need for a more detailed environmental review**. As a result, FRA finds that this rule is not a major Federal action significantly affecting the quality of the human environment."[55]

As discussed above, the proper securement of trains, especially those transporting hazardous materials like crude oil, was significant enough (and imminent enough) to warrant a DOT Emergency Order. In that Order, the DOT noted that ""With increased shipments of hazardous materials," noted the DOT, "securement non-compliance, particularly on mainline track and mainline sidings outside of a yard or terminal, **has become a serious, immediate safety concern**."[56]

Furthermore, FRA echoes this concern (based on the derailment disaster in Lac Mégantic) in the Notice of Proposed Rulemaking, noting that "[a]fter reviewing the facts related to this derailment, FRA concluded that additional action was necessary to eliminate an immediate hazard of death, personal injury, or **significant harm to the environment, particularly in instances where certain hazardous materials are involved**."[57] After the Order was issued, again, the DOT admitted that these risks kept growing, "the number and type of

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[52] Id.
[53] 40 C.F.R. § 1502.14.
[54] See, 79 F.R. 53382.
[55] Id. (emphasis added).
[56] Id., at 48222.
[57] 79 F.R. 53357 (emphasis added).

petroleum crude oil railroad accidents … that have occurred during the last year is **startling**, and the quantity of petroleum crude oil spilled as a result of those accidents is **voluminous** in comparison to past precedents."[58]

The unique, growing, and significant risks associated with hazardous material transport by rail, and the proposed securement of those trains, have the potential to impact the environment. These risks and potential impacts, acknowledged by DOT itself, require NEPA review.

IV. CONCLUSIONS

Overall, the proposed FRA regulations contain too many exemptions to be adequately protective. In order to satisfy its statutory duty to "consider the assignment and maintenance of safety as the highest priority,"[59] FRA must require securement for all trains, with all hazardous cargoes, in all places, and more thoroughly close the gaps in compliance and enforcement of such regulations.

Sincerely,

Sean Dixon
Staff Attorney
Riverkeeper, Inc.

[58] See 79 F.R. 27363 (emphasis added).
[59] 49 U.S.C. § 103(c).