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Docket no. PHMSA-2016-0015 (HM-263)
Electronically submitted via *regulations.gov*

October 27, 2023

RE: Comments of State Attorneys General on PHMSA's Proposed Hazardous
Materials: FAST Act Requirements for Real-Time Train Consist Information;
Docket No. PHMSA-2016-0015 (HM-263)

Dear Acting Administrator:

The Attorneys General of Pennsylvania, New York, Maryland, Delaware, Connecticut, Illinois, District of Columbia, Wisconsin, Maine, Massachusetts, New Jersey, Oregon, and Vermont submit the following Comments in response to the Pipeline and Hazardous Materials Safety Administration's notice of proposed rulemaking, Hazardous Materials: Fast Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41, 541 (June 27, 2023) ("Proposed Rule"). The Proposed Rule would amend the Hazardous Materials Regulations¹ to close informational gaps between railroads and first responders.

For the reasons explained in the attached Comments, we support the Proposed Rule and make the suggestions contained therein for making the rule stronger.

¹ The HMR is codified at 49 C.F.R. Parts 171-180.

If we can provide additional information that would be helpful in considering these comments, or if you wish to discuss any issues raised with us, please do not hesitate to contact the undersigned.

Sincerely,

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Comments of the Attorneys General of Pennsylvania, New York,
Maryland, Delaware, Connecticut, Illinois, District of Columbia,
Wisconsin, Maine, Massachusetts, New Jersey, Oregon, and Vermont

On

The Pipeline and Hazardous Materials Safety Administration's
Proposed Hazardous Materials: FAST Act Requirements for Real-Time
Train Consist Information
88 Fed. Reg. 41,541
PHMSA-2016-0015 (HM-263)

October 27, 2023

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I. Introduction and Summary of the Comments

The Attorneys General of Pennsylvania, New York, Maryland, Delaware, Connecticut, Illinois, District of Columbia, Wisconsin, Maine, Massachusetts, New Jersey, Oregon, and Vermont (“Attorneys General”) submit the following Comments in response to the Pipeline and Hazardous Materials Safety Administration’s (PHMSA) notice of proposed rulemaking, Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41,541 (June 27, 2023) (“Proposed Rule”). The Proposed Rule would amend the Hazardous Materials Regulations (“HMR”)¹ to close informational gaps between railroads and first responders. The Attorneys General support this objective, generally support the Proposed Rule and offer the following suggestions for making the rule stronger.

A. Need for real-time train consist information

The Proposed Rule comes at a critical time. The existing HMR has failed to ensure the timely exchange of hazardous materials information from railroads to first responders. Nor has it made this information easily accessible. Concerns about keeping sensitive information from bad actors has to be balanced with the needs of first responders for the information when they respond to a rail accident or incident.²

Several features of the current HMR contribute to this problem. First, the HMR requires a train crew transporting hazardous materials to have a physical document reflecting the contents and positioning on the train of the hazardous materials.³ An electronic version is not required. Second, the HMR does not require real-time information sharing from railroads to first responders. To the extent there is real-time information, it is dependent on voluntary efforts that do not lead to routine procedures for obtaining such information.⁴ Third, the HMR fails to place affirmative duties on railroads by requiring that they take specific actions to share train consist information with first responders in real time. It

¹ The HMR is codified at 49 C.F.R. Parts 171-180.

² Randall Gockley, President of the Lancaster County Firemen’s Association, explained that he “supports anything that would help the firefighters” but “is wary of sharing information publicly because of the risk of terror attacks.” Ann Rejrat, *Toxic trains: Real-time hazmat info hard to get, even for Lancaster County’s first responders*, LancasterOnline (July 23, 2023 5:15 AM), <https://www.witf.org/2023/07/23/toxic-trains-real-time-hazmat-info-hard-to-get-even-for-lancaster-countys-first-responders/>.

³ 49 C.F.R. § 174.26(a).

⁴ Nor are there standardized ways that first responders obtain train consist information on site. *See* Rejrat, *supra* note 2 (“[T]here is no single, consistent way to find the information at the scene—all of which could slow response time or put [first responders] in danger.”).

instead only requires voluntary actions to make train consists “available” to first responders.⁵

The lack of an affirmative obligation in the HMR to provide first responders with real-time train consist information results in first responders often arriving at the site of a rail accident without knowing what they will encounter. In central Pennsylvania, for example, a local newspaper surveyed twelve counties about their knowledge of the hazardous material passing by rail through their borders. Only three had such lists, and those were partial lists of the hazardous materials most transported by rail in prior years. None had real-time information.⁶

Without real-time information, an emergency response is inherently reactive and slower. The recent derailment at East Palestine, Ohio highlights many of the current flaws in the HMR that exist without real-time information. Eleven of the rail cars that derailed contained hazardous material.⁷ Several caught fire immediately. Firefighters from the East Palestine Fire Department arrived on scene without knowing anything regarding the hazardous materials. No one from the fire department had access to AskRail, an application developed by the railroads and related organizations to provide train consist data. The train crew, along with the train consist documentation, were not at the site of the derailment. Consistent with procedure,⁸ the crew had uncoupled the head-end locomotives and moved about a mile from the derailment.⁹

Meanwhile, first responders doused the fires. The placards identifying the contents of burning rail cars had charred off. First responders did not learn until about forty-five minutes after arrival at the scene that the rail cars contained vinyl chloride, a hazardous material, and that it was not safe to continue dousing the

⁵ *Id.* at § 172.600(c). The Attorneys General recognize that the HMR provides for this proactive information sharing with first responders for trains meeting the definition of a High Hazard Flammable Train. *See* 49 C.F.R. § 174.310.

⁶ Shelby Bradford & Katie Knol, *We sought railroad hazmat records from 12 central PA. counties; only 3 provided detailed lists*, LancasterOnline (July 23, 2023 5:15 AM), <https://www.witf.org/2023/07/23/we-sought-railroad-hazmat-records-from-12-central-pa-counties-only-3-provided-detailed-lists/>.

⁷ NAT. TRANSP. SAFETY BD., Preliminary Report RRD23MR005 (Feb. 23, 2023) Norfolk Southern Railway Train Derailment with Subsequent Hazardous Material Release and Fires (Feb. 3, 2023), *available at* <https://www.nts.gov/investigations/Documents/RRD23MR005%20East%20Palestine%20OH%20Prelim.pdf> (“NTSB Preliminary Report”), at 1.

⁸ *See* Interview of Scott Deutsch, NTSB Docket No. DCA23HR001, at 15 (Feb. 8, 2023). Scott Deutsch, Northern Regional Manager of Norfolk Southern, explained how first responders get train consists in these situations: “[w]ith the fire, though, one of [the crew’s] procedures, they normally disconnect from the train and go to the next crossing or get to what they call a safe area and then a first responder would have to go down there till—to use it.” *Id.* (emphasis added).

⁹ NTSB Preliminary Report, *supra* note 7, at 3.

fire.¹⁰ First responders' inability to access a physical document (i.e., the train consist) which was in the hands of the separated train crew bottlenecked the entire emergency response effort.

Closing the informational gaps that exist between railroads carrying hazardous materials and first responders is a big step towards resolving this problem. It is especially important considering the volume of hazardous material passing by rail. More than 2 million carloads of hazardous material pass through the nationwide rail network annually. That's about 6% of all rail traffic in 2014, according to the Association of American Railroads.¹¹

A spokeswoman for the Transportation Trade Department, AFL-CIO, claims that while federal data shows that the total number of hazardous materials incidents has declined, the rate of such incidents has increased. The total number itself should decrease because companies are running fewer but longer trains.¹² These criticisms are common, particularly among labor groups that caution against certain railroad operating practices.¹³

Either way, if hazardous materials are transported by rail, it is likely there will be other major incidents resulting from derailments. The Attorneys General welcome the changes to the HMR in the Proposed Rule because the Rule should make future emergencies involving hazardous materials safer for all involved.

B. Summary of Proposed Rule and Comments

The Attorneys General generally support the Proposed Rule because it addresses the informational gaps existing between railroads and first responders. It also addresses the shortcomings in the existing HMR that have failed to timely

¹⁰ *Hearing on East Palestine, Ohio, train disaster focuses on emergency response*, NPR (June 22, 2023 4:27 PM), <https://www.npr.org/2023/06/22/1183842739/hearing-on-east-palestine-ohio-train-disaster-focuses-on-emergency-response>.

¹¹ Dan Gunderson, *Mystery trains: Crews, communities in the dark on chemical cargo*, MPR News (Sep. 23, 2014 9:00 PM), <https://www.mprnews.org/story/2014/09/23/trains-haul-undocumented-hazardouschemicals#:~:text=Nationwide%2C%20railroads%20moved%20about%202.2,line%20every%20year%20without%20incident>. In some states, the percentage of hazardous material by rail is much higher. Carl Belke, president of the Keystone State Railroad Association, an industry trade group, testified during a Senate Transportation Committee hearing on February 27, 2023, that “[a]s much as 40% of the freight transported by rail each year in Pennsylvania is considered a hazardous material.” Matthew Rink, *What we know and don't know about the hazards on PA's rails*, GoErie (Mar. 9, 2023 5:01 AM), <https://www.goerie.com/story/news/state/2023/03/09/pa-trains-whats-known-unknown-about-the-hazardous-materials-they-carry/69916442007/>.

¹² *Id.*

¹³ *See, e.g., Improving Rail Safety in Response to the East Palestine Derailment: Hearing Before the S. Comm. On Comm, Sci. and Transp., (2023)* (statement of Clyde Whitaker, Ohio St. Leg. Dir. SMART – Transp. Div.) (“While the total number of derailments may be down, it is because they are operating fewer trains. If you look at the rate of train incidents on a per train mile basis, you see a completely different story.”).

place accurate train consist information concerning hazardous materials into the hands of first responders. The Proposed Rule addresses these gaps by doing the following:

First, the Proposed Rule applies to all railroads transporting hazardous materials in commerce. Applying the Proposed Rule to all railroads, regardless of class designation, improves the existing HMR because it currently only requires railroads to keep a physical train consist on their trains that shows the location and contents of hazardous materials rail cars. The Proposed Rule would enhance safety in the future by requiring all railroads to share safety-critical information with first responders in electronic form, in real-time, and at all times—while continuing to require railroads to keep a matching physical version on trains carrying hazardous materials.

Second, the Proposed Rule deletes the term “train consist” and replaces it with “train consist information,” a more expansive term that keeps physical copies in the definition but also adds electronic records. Including the two formats gives necessary flexibility and builds redundancy. The Proposed Rule also adds a new reference in “train consist information” to 49 C.F.R. § 174.26 and incorporates its heightened information requirements as the threshold to meet the new definition. This needed change adds a required railroad designated emergency point of contact and adds information concerning a hazardous material’s point of origin and destination. Both additions promote timeliness and backstop the goal of quickly sharing accurate information with first responders.

Third, the Proposed Rule makes clear that railroads must give physical train consist information to their crews before trains may move. That physical copy must then be stored in a conspicuous location while the crew is aboard the locomotive. At all times during transportation, train consist information must be immediately accessible to the crew. These are clear requirements with clear duties. These changes promote quick access to hazardous materials information and make it more likely that first responders will receive it quickly from crewmembers.

Fourth, the Proposed Rule requires the crew to update the physical train consist information at intermediate stops before continuing onward. The electronic version must also reflect the updates. Railroads have options for how to accomplish this task, but the result is the same—all forms of train consist information must be updated at intermediate stops before a train can proceed. Updating the train consist information at each stop will promote accuracy of information as will having two matching versions (physical and electronic).

Fifth, the Proposed Rule adopts a dual approach to close the information gaps. It starts by requiring railroads to provide first responders along their train routes with access to electronic train consist information (including the type and

location of hazardous materials). This change advances the goal of timely information sharing with first responders by establishing the electronic communications infrastructure *before* an emergency. To improve this requirement, the Attorneys General urge PHMSA to: (1) define first responders who must have access to electronic train consist information at all times to ensure proper dissemination of information; (2) require railroads to coordinate with the appropriate state agencies to account for state-specific needs; (3) consider development of a central role-based data repository as described further below; (4) require railroads to periodically test their electronic communication tools and report the results on a standardized form to PHMSA; and (5) require railroads to develop contingency plans for when electronic train consist information is inaccessible.

Sixth, the Proposed Rule closes the information gaps with the other component of a dual approach: the emergency response notification requirement. Going forward, after an accident or incident involving a train carrying hazardous materials, the Proposed Rule requires railroads to promptly forward electronic train consist information to first responders within a 10-mile radius. The Proposed Rule leaves it open for the railroads to decide how to accomplish the “prompt” notification and how to gather, maintain, and update the contact information of all first responders along and within 10-miles of their train routes. As will be discussed more fully below, the Attorneys General urge PHMSA to standardize this process to ensure that railroads have accurate contact lists of first responders and sufficient notification processes. The Attorneys General also recommend defining “prompt” by setting a time for notification. Otherwise, the Attorneys General support the emergency response notification requirement as first responders will have access to train consist information under the advance access requirement, then receive it through a “prompt” notification under the emergency notification requirement.

Seventh, the Proposed Rule requires railroads to implement security and confidentiality protections that ensure only authorized persons can view electronic train consist information. This is necessary considering the threats that exist in today’s world.

Lastly, despite the ways in which the Proposed Rule closes the information gaps between railroads and first responders, the Attorneys General strongly recommend PHMSA consider creating a role-based data repository for electronic train consist information. A role-based data repository could enhance the Proposed Rule because, as currently written, railroads must make electronic train consist information available to first responders along their routes and then promptly push that information to the first responders within ten miles of a rail accident or incident. Implicitly, railroads must identify the relevant first responders and maintain accurate contact information for them in order to send a push notification after an emergency. The Proposed Rule does not identify how PHMSA will monitor

the sufficiency of those contact lists before an emergency occurs. The Proposed Rule also does not explain how PHMSA will monitor the sufficiency of the electronic train consist information that railroads store in their chosen electronic communication tools. A role-based data repository could improve the efficacy of the Proposed Rule by serving as a well-known central location for electronic train consist information. PHMSA could potentially host the role-based data repository and set guidelines for uploading standardized data, and importantly implement stronger controls for cybersecurity. At a minimum, the Attorneys General recommend including a requirement for periodic testing, regardless of whether PHMSA adopts the recommendation for a data repository, to ensure that all relevant first responders have access and will receive notifications promptly after an emergency.

II. SUMMARY OF INTERESTS OF ATTORNEYS GENERAL

As stated above, after the Norfolk Southern train careened off the tracks and caught fire in East Palestine Ohio, it took roughly 45 minutes for firefighters to learn which chemicals were involved.¹⁴ This was precious time lost.

The Attorneys General have an interest in keeping residents in our jurisdictions safe, and our natural resources unharmed. One way of doing that is by providing support for our first responders so they can make better, more informed decisions more quickly. The Proposed Rule furthers this objective by giving our first responders accurate information about the potentially dangerous situations they will have to confront when responding to an incident involving a railroad carrying hazardous materials. When first responders have accurate, timely information concerning hazardous materials on the trains passing through their jurisdictions, necessary planning can occur. When an incident or accident does happen, it is more likely that they will be ready. Coordination can start more quickly. Mitigation timeframes will likely be accelerated. Disaster will be less likely to spread. Our communities and natural resources will be less likely to suffer the effects of delayed responses.

III. REVIEW OF THE PROPOSED RULE AND COMMENTS

A. Authority for the Proposed Rule

We support PHMSA's use of its authority to issue the Proposed Rule. PHMSA derives its authority for the Proposed Rule, in part, from the Secretary of Transportation's delegation of his authority under two statutes.

¹⁴ *Hearing on East Palestine, supra* note 10.

In § 7302 of the Fixing America’s Surface Transportation Act (“FAST Act”),¹⁵ as amended by the Investment Infrastructure and Jobs Act,¹⁶ Congress directed the Transportation Secretary to require Class I railroads transporting hazardous materials to generate accurate, real-time train consist information.¹⁷ Those railroads must provide that information to authorized first responders. That information must include: “(1) The identity, quantity, and location of hazardous materials on a train; (2) The point of origin and destination of the train; (3) Any emergency response information or resources required by the Secretary; and (4) An emergency response point of contact designated by the Class I railroad.”¹⁸

In § 5103(b) of the Hazardous Materials Transportation Act (“HMTA”), Congress broadly authorized the Transportation Secretary to promulgate regulations for the safe transportation of hazardous materials in commerce, including in all classes of trains.¹⁹

The Secretary delegated his authority under the two statutes above to the PHMSA Administrator.²⁰ Under the delegated authority under the FAST Act and HMTA, PHMSA has issued the Proposed Rule. Consistent with the authority vested in the Secretary under those two Acts (and then delegated to PHMSA) and their important risk-reduction purposes, PHMSA published the Proposed Rule based on the common-sense explanation that hazardous materials carry the same risks regardless of what Class of train is carrying them—i.e., Class I, Class II, or Class III.²¹ It is also consistent with the National Transportation Safety Board (“NTSB”)’s safety recommendation R-07-04 from 2007 that called on PHMSA to require all railroads (not just Class I railroads) to “immediately provide to emergency responders accurate, real-time information regarding the identity and location of all hazardous materials on a train.”²² In August 23, 2023 comments to PHMSA on the Proposed Rule, the NTSB makes clear that it “does not agree with limiting the proposed rule to only Class I railroads.”²³

¹⁵ Pub. L. 114-94.

¹⁶ Pub. L. 117-58

¹⁷ Codified at 49 U.S.C. 20103 note.

¹⁸ *Id.*

¹⁹ 49 U.S.C. § 4103(b).

²⁰ 49 CFR 1.97(b).

²¹ Proposed Rule, at 41,544 (“rail transportation of hazardous material is not limited to Class I railroads, and thus the prospect of an accident or emergency is also not limited to those railroads.”).

²² NTSB, NTSB/RAR-07/01, “Collision of Two CN Freight Trains near Anding, Mississippi on July 10, 2005” at 48 (Mar. 2007) (NTSB Report),

<https://www.nts.gov/investigations/accidentreports/reports/RAR0701.pdf>.

²³ N.T.S.B Comments dated August 23, 2023 to Hazardous Materials: Fast Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41,451 (June 27, 2023) (Proposed Rule), p. 5, available at <https://www.regulations.gov/documents/PHMSA-2016-0015-0023>.

Thus, the Proposed Rule rests on solid statutory authority and reflects a reasonable exercise of PHMSA’s expertise on these technical, safety-based issues.

B. Review of the Proposed Rule and Comments

The Proposed Rule, if adopted, would amend the HMR at §§ 171.8 and 174.26, and would add a new section at § 174.28.²⁴ The Attorneys General support the proposed amendments to each of these sections as addressed below.

i. The Attorneys General support applying the Proposed Rule to all railroads carrying hazardous material

PHMSA proposes to apply the Proposed Rule to Class II and Class III railroads as well as Class I.²⁵ The Attorneys General support this decision, which is grounded in PHMSA’s statutory authority pursuant to HMTA.²⁶ Hazardous materials pose risks during transport and those risks, regardless of the class designation of the railroad hauling them, are oftentimes similar: a release can harm communities, endanger emergency response personnel, and impact the environment. In other words, hazardous materials are dangerous because of what they are and not because of the class of the rail carrier transporting them.²⁷

Those common risks pose the same need for accurate, real-time train consist information in the hands of first responders. The Attorneys General support PHMSA’s decision, under the authority provided to the Transportation Department in the FAST Act and HMTA and delegated to PHMSA discussed in Section III, A, *supra*, to issue regulations for the safe transportation of hazardous material in commerce, to require that Class I, Class II and Class III railroads comply with the Proposed Rule.²⁸

²⁴ It also would delete the definition of “train consist” from 49 C.F.R. § 180.503 because “train consist” is not used in that part.

²⁵ Proposed Rule, at 41,542 (“PHMSA proposes extending the proposed requirements to all railroads in light of the risks to public safety and the environment from delay in responding to releases from even smaller, Class II and III railroads on which hazardous materials are transported.”).

²⁶ 49 U.S.C. § 5103.

²⁷ “The Surface Transportation Board categorizes rail carriers into Class I, Class II, and Class III based on carrier’s annual revenues. The threshold for Class I is a carrier earning revenue greater than approximately \$900 million/year (2022); the threshold for Class II rail carriers is approximately \$40 million/year; and the threshold for Class III rail carriers is any value less than the threshold for Class II railroads.” Proposal, at 41544 n. 5.

²⁸ The Attorneys General highlight that most of the required data to meet the definition of train consist information is already captured by all railroads transporting hazardous materials. Thus, this proposed requirement is not expected to overly stress smaller railroads.

ii. The Attorneys General support amending “train consist” to “train consist information”

To provide for real-time communication, the Proposed Rule starts with a definition change at § 171.8. It proposes to delete “train consist” and replace it with “train consist information.”

The Attorneys General support the proposed change because “train consist” is too narrow to accomplish the goal of the Proposed Rule. Train consist “means a written record of the contents of each rail car in a train.”²⁹ The new definition would expand it to include “a hard (printed) copy or electronic record of the position and contents of each hazardous material rail car,” and it would also add that the record must include “the information required by § 174.26 of this subchapter.”³⁰

Attorneys General support defining “train consist information” to encompass both a physical copy and an electronic version. Including both physical and electronic forms, either on or off the train, in the definition is consistent with the objective of achieving appropriate redundancy and ease of access to the information.

The Proposed Rule would also amend § 174.26 and the information it requires. If adopted, § 174.26 would require railroads carrying hazardous materials to generate the following data to meet the definition of train consist information:

- (a) a railroad-designated emergency point of contact (name, title, phone number and email address) in a conspicuous location [on the hard (printed) copy]; and
- (b) the position in the train and contents of each hazardous material train rail car by reporting mark and number, to include the:
 - (1) Point of origin and destination of hazardous materials subject to shipping paper requirements on the train;
 - (2) Shipping paper information required by §§ 172.201 to 172.203 of this subchapter; and
 - (3) Emergency response information required by § 172.602(a) of this subchapter.³¹

In essence, to meet the proposed definition of train consist information, the Proposed Rule adds the emergency point of contact information in subsection (a) and the origin and destination requirement in subsection (b)(1). These changes

²⁹ 49 C.F.R. § 171.8.

³⁰ Proposed Rule, at 41,560.

³¹ *Id.*

promote the likelihood that first responders, in the event of a rail accident or incident, will receive accurate and timely hazardous materials information. An emergency point of contact standardizes who to call when emergencies arise. And the origin and destination requirement will aid first responders in obtaining additional information about the hazardous materials being transported on a train.

iii. The Attorneys General support imposing clear duties on railroads under the HMR to provide train crews with hard copy (printed) train consist information *before* movement and to stow it in a conspicuous location

The Proposed Rule would amend § 174.26(a). The current rule states: “The train crew must have a document that reflects the current position in the train of each rail car containing a hazardous material.”³² The Proposed Rule would change that proviso to: “*Prior to the movement of a train*, a railroad must provide the train crew with train consist information as defined in § 171.8 of this subchapter in hard copy (printed) form” that includes the information discussed above in Section III., B., ii, *supra*.³³

The Attorneys General support the addition of “prior to the movement” to clarify that the railroad must provide the physical train consist information to its crew before a train carrying hazardous materials may move. Once movement of a train occurs, the Proposed Rule makes clear in new § 174.26(c) that “train consist information must always be immediately available for use by the train crew while the train is in transportation.”³⁴ Railroads could presumably accomplish this in several ways, including electronically. Even if not done electronically, the Proposed Rule adds: “the train consist information shall be stowed in a conspicuous location” when the train crew is aboard the train locomotive.”³⁵

Because the changes contemplated by the Proposed Rule clarify and make it more likely that train consist information will be usable when needed, the Attorneys General support these changes.

³² 49 C.F.R. § 174.26(a).

³³ Proposed Rule, at 41,560.

³⁴ *Id.*

³⁵ *Id.*

iv. The Attorneys General support requiring updated train consist information—both in hard (printed) copy and electronic record—before a train may move from an intermediate stop

The Proposed Rule would amend § 174.26(a) and (b). Section 174.26(a) currently requires “[t]he train crew to update the [train consist] to indicate changes in the placement of a rail car within the train.”³⁶ The Proposed Rule would move this requirement to § 174.26(b) and make it more effective.

The amended § 174.26(b) would require the train crew to “update the train consist information to reflect any changes in the train consist information occurring at intermediate stops prior to continued movement of the train.”³⁷ It would also require that any updates to the train consist information “also be reflected in the electronic train consist information required pursuant to § 174.28 prior to continued movement of the train.”³⁸

The Attorneys General support this proposed change because it cures several deficiencies with the existing rule. First, § 174.26(a) is currently not clear as to whether it requires the crew to update the train consist at each intermediate stop and before moving from such locations. Second, to the extent a railroad has an electronic record of a train’s train consist, it is not required to reflect the updates to the physical version, either before moving from an intermediate stop or after.

The Attorneys General further support this proposed change because it would greatly increase the likelihood that first responders, in the event of an emergency, receive accurate hazardous materials information. Requiring train crews to update train consist information at intermediate stops before continuing onward should improve the quality of those records. And having both a hard copy and electronic record of the updated train consist information, at each intermediate stop, will direct railroads to focus on the importance of accurate train consist information.

³⁶ 49 C.F.R. § 174.26(a).

³⁷ Proposed Rule, at 41,560.

³⁸ *Id.*

- v. **The Attorneys General support requiring proactive sharing of electronic train consist information with authorized personnel before an emergency so that it is immediately available when needed**

The Proposed Rule adds § 174.28(a).³⁹ It would, if adopted, impose three important duties on railroads that transport hazardous materials—all of which, importantly, require action before an emergency. The Attorneys General support each proposed change, discussed in turn below, but caution that PHMSA may need to consider alternatives or provide greater clarification to accomplish the objectives of the Proposed Rule.

First, proposed § 174.28(a) would require a railroad that transports hazardous materials to maintain, at all times, in electronic form and off the train, accurate train consist information. The Attorneys General support this proposed change because it introduces a requirement for railroads to keep train consist information in a format that is capable of real-time communication. And as a precursor to real-time information sharing, it is also a step in removing the information bottlenecks that exist when the physical train consist is not available.

Second, proposed § 174.28(a) would require that railroads make electronic train consist information immediately accessible to their designated emergency point of contact, with the purpose of enabling them to communicate that information to first responders seeking assistance in responding to an incident or emergency.⁴⁰ The Attorneys General support this proposed change as it streamlines information sharing between railroads and first responders. It also standardizes a primary point of contact for the railroad for first responders to seek information during an emergency.

Third, proposed § 174.28(a) would require railroads to use electronic communication tools to make electronic train consist information available to first responders along their routes at all times. The Attorneys General support this proposed change as it is proactive, and it will lead to closing the information gaps between railroads and first responders by establishing the electronic communications infrastructure before an emergency situation arises.

³⁹ Proposed Rule, at 41,560.

⁴⁰ *Id.* at 41,550.

The Attorneys General have several concerns, however, with the proposed language and implementation of this requirement. The proposed language should be clearer. Currently, the proposal says:

Each railroad must also *provide*, using electronic communication (*e.g.*, a software application or electronic data interchange), that electronic train consist information to *authorized Federal, state, and local first responders, emergency response officials, and law enforcement personnel along the train route that could be or are involved in the response to, or investigation of, an accident, incident, or public health or safety emergency* involving the rail transportation of hazardous materials such that the information is immediately available for use at the time it is needed.

The Attorneys General recommend the term “provide” in the first clause be replaced with “make available” to clearly reflect PHMSA’s intent to make electronic train consist information accessible to first responders as explained throughout the Proposed Rule.⁴¹ Otherwise, it could be interpreted as requiring railroads to send electronic train consist information to the required groups before each train trip involving hazardous materials. Similarly, to eliminate ambiguity, PHMSA should define the intended groups to which railroads must provide with access to electronic train consist information. The proposed definition could be interpreted to only include groups that are verified by local public-safety answering points (“PSAP”) or other state and local agencies.⁴²

The Attorneys General recognize that PHMSA must closely monitor and enforce railroads’ implementation and compliance with these rules. As currently written, the Proposed Rule relies on railroads to keep up-to-date contact lists of first responders along their routes.⁴³ The Attorneys General are concerned that in the

⁴¹ *See, e.g., id. at 41552* (“paragraph (a) . . . would require all railroads to ensure that authorized first responders, emergency response officials, and law enforcement personnel along routes in which they transport hazardous material have access to up-to-date, electronic real-time train consist information at any time—including *before* an accident or incident occurs.”)

⁴² The Attorneys General caution that PHMSA must ensure that all relevant first responders have access to, and ultimately receive, electronic train consist information, without overburdening local public-safety answering points. *See* Comment from National Emergency Number Association (NENA) and National Association of State 9-1-1 Administrators (NENA) to Hazardous Materials: Fast Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41, 541 (June 27, 2023) (Proposed Rule).

⁴³ *See* Proposed Rule, at 41552. “PHMSA will be less concerned with the particular tools (*e.g.*, instant message to mobile devices, email, fax notification functionalities within the AskRail® system), employed by railroads than on whether railroads have ensured that (1) their personnel have, in

event of a rail accident or incident involving the transportation of hazardous materials, non-compliance with the Proposed Rule would only be apparent after the emergency, and after first responders had been slowed by a railroad's non-compliance. To help avoid this, the Attorneys General suggest that PHMSA require railroads to coordinate with appropriate state agencies and local municipalities to obtain accurate first responders contact lists and to account for the needs of each area. Some parts of Maine, for example, are mostly unpopulated and do not have first responders along the train routes or within a 10-mile radius of the tracks. To ensure that the objectives of the Proposed Rule will be achieved, PHMSA should develop a mechanism to track compliance, perhaps through a form that railroads must periodically file with PHMSA that records a railroad's outreach efforts to authorities in an area, including whether local PSAPs were contacted; the identity and contact information of the first responders on their lists; the electronic communication tools in place; education or training programs provided to local first responders; the results of any tests conducted by the railroad to determine whether the electronic communication tool works; and a description of contingency plans for when electronic train consist information is inaccessible.

Another possible solution is the development of a role-based data repository that serves state and local governments. Under this approach, railroads would have to upload electronic train consist information to one central place. It would require guidelines for the standardization of data, role definitions, and expectations for timely uploads. This data repository could be hosted by PHMSA or FRA. Such a system would also make it easier to implement security and confidentiality protections that ensure only authorized persons can view electronic train consist information. Such a repository would also allow first responders to access the database as needed and immediately.

The Attorneys General also believe such a data repository would be an important backstop to the § 174.28(b) requirement that railroads have “ensured (1) their personnel have, in advance of rail transportation of hazardous material, a comprehensive, verified list of persons and pertinent contact information for authorized local first response personnel along a route”—a list that would be contacted after an accident or incident.⁴⁴ A long train route may pass through the jurisdiction of dozens of first responders organizations, and the personnel of those organizations will not remain static. The possibility exists that some railroads will

advance of rail transportation of hazardous material, a comprehensive, verified list of persons and pertinent contact information for authorized local first response personnel along a route.” *Id.*

⁴⁴ *Id.*

not update such lists immediately every time there is a relevant personnel change in a first responder organization. If there is a central data repository, all first responder organizations will have access to it—even organizations with new contact personnel whom a railroad has failed, likely inadvertently, to place in its updated list of persons to contact.

At a minimum, the Attorneys General suggest PHMSA require railroads to conduct periodic testing to make sure that first responders have access to electronic train consist information and to develop contingency plans for when electronic train consist information is inaccessible. Periodic testing should ensure that the appropriate groups have access to electronic train consist information using the railroad’s chosen electronic communication tool. A failure revealed by testing could also inform how railroads should develop contingency plans. If these proposed changes—which are consistent with the Proposed Rule—were added to the other requirements in the Proposed Rule, it would provide greater confidence that first responders along train routes will have access to train consist information at all times.

vi. The Attorneys General support requiring prompt sharing of electronic train consist information with authorized personnel after an emergency arises

The Proposed Rule would add an emergency notification requirement at §174.28(b). It would provide:

When a train carrying hazardous material is involved in either an accident, or in an incident involving the release or suspected release of a hazardous material from a rail car in the train, the railroad *must promptly notify State-authorized local first responders within at least a 10-mile radius* of the accident or incident by forwarding train consist information in electronic form to those personnel.⁴⁵

By requiring prompt notification to all State-authorized local first responders within a 10-mile radius, this proposed change would ensure that first responders receive electronic train consist information quickly after an accident or incident. It also enshrines into the HMR a dual approach that importantly complements the advance access to electronic train consist information required by § 174.28(a). The two, in tandem, would ensure that electronic communication infrastructure is not

⁴⁵ *Id.* at 41560 (emphasis added).

only in place before an emergency, but also that electronic train consist information gets “pushed” to first responders once an emergency arises.

The Attorneys General support this proposed change because it addresses some of the information-sharing deficiencies that exist in the HMR. The dual approach should address these gaps by providing first responders with access to hazardous materials information before an emergency and then sending them the information after an emergency arises. The Attorneys General caution, as discussed above, that the “push” notification will only accomplish the objectives of the Proposed Rule if the contact information of first responders is accurate and stored in the relevant electronic communication tool. That makes it all the more important that PHMSA can identify and monitor compliance before a “push” notification is needed.

Likewise, the Attorneys General suggest enhancing the “push” notification requirement by defining “prompt.” The definition should set an actual time for pushing a notification to first responders. This suggestion is the same as NTSB’s suggestion in NTSB’s August 23, 2023 comments to PHMSA on the Proposed Rule, and the Attorneys General share the view of NTSB that it is unacceptable, for any railroad, to provide train consist information within minutes after a rail accident to their contractors while taking almost an hour to provide that information to first responders.⁴⁶ Defining “prompt” will help avoid such problems.

Otherwise, the Attorneys General support this proposed change because it will help remove the informational gaps that exist. In particular, the “push” notification should provide first responders with electronic train consist information quickly after an emergency arises. And having that information earlier would allow first responders to more effectively coordinate before arriving on scene. It would also make it less likely that first responders encounter informational bottlenecks after arriving on scene. That should result in enhancing safety for all involved and swifter emergency response and recovery times.

vii. The Attorneys General support requiring certain security and confidentiality protections so that only authorized personnel may access electronic train consist information

The Proposed Rule would, if adopted, add § 174.28(c). The proposal would require railroads to “implement security and confidentiality protections in

⁴⁶ N.T.S.B. Comments dated August 23, 2023 to Hazardous Materials: Fast Act Requirements for Real-Time Train Consist Information, 88 Fed. Reg. 41, 541 (June 27, 2023) (Proposed Rule), pp. 3-4, *available at* <https://www.regulations.gov/document/PHMSA-2016-0015-0023>.

generating, updating, providing, and forwarding train consist information in electronic form pursuant to this section to ensure they provide access only to authorized persons.”⁴⁷

The Attorneys General support this provision. The Attorneys General find it encouraging that the AskRail app, the *de facto* leader of real-time train communication, has a demanding onboarding process that ensures only authorized and vetted first responders have access to its information.

IV. CONCLUSION AND RECOMMENDATIONS

The Attorneys General applaud PHMSA for proposing these important changes to the existing rule, which are critical to the protection of our state residents, first responders and railroad workers. In summary, the Attorneys General support the Proposed Rule and suggest that PHMSA consider the following:

- 1) Develop a role-based data repository for electronic train consist information;
- 2) Account for state and local needs by requiring coordination between railroads and state agencies and municipalities;
- 3) Require periodic testing to ensure that all relevant first responders have access to electronic train consist information.
- 4) Require contingency plans; and,
- 5) Ensure compliance with these requirements through enforcement.

⁴⁷ Proposed Rule, at 41,560.