

**FRA's Position on Conducting Safety Inspections
During COVID-19 Public Health Emergency
August 2020**

During the coronavirus disease 2019 (COVID-19) public health emergency, Federal Railroad Administration (FRA) safety inspectors continue to conduct inspections of regulated entities, including railroads and hazardous material shippers. However, while carrying out these duties in support of FRA's safety mission, FRA safety inspectors have recently been subject to recurring questions and concerns from regulated entities about their potential exposure to COVID-19. FRA is therefore providing the following statement on its safety inspectors' right to such entry and access during the COVID-19 public health emergency. This document does not create any new legal requirements, but merely explains existing requirements under Federal law and how they apply to FRA's ongoing safety inspections during COVID-19.

FRA Is Committed to Personal Safety During the COVID-19 Public Health Emergency

FRA continues to exercise its broad authority to enter the property and facilities of regulated entities for purposes of conducting compliance inspections and investigations, while recognizing the unique challenges presented by the COVID-19 public health emergency. FRA is committed to the safety of its employees, the employees of its regulated entities, passengers, and the public during this time. Accordingly, FRA requires its employees to follow applicable guidance from the Centers for Disease Control and Prevention (CDC) and other Federal public health agencies. For example, FRA safety inspectors are required to adhere to social distancing; use appropriate personal protective equipment; and consistent with CDC guidance and appropriate medical advice, stay home if they feel sick, show COVID-19 symptoms, suspect they may have been exposed to COVID-19, or tested positive for COVID-19. Additionally, the U.S. Department of Transportation has a robust internal reporting procedure in the event any employee, including an FRA inspector, is diagnosed with COVID-19 or comes into contact with someone confirmed positive for COVID-19. If an FRA inspector is diagnosed with COVID-19, FRA will work to support the contact tracing efforts of the relevant public health agency in the state(s) where the inspector works.

FRA Will Follow Regulated Entities' COVID-19 Policies When and As Consistent with Federal Law

In light of the unique challenges posed by COVID-19, FRA inspectors will also, to the extent possible without interfering with FRA's inspection and oversight responsibilities, adhere to specific regulated entities' policies designed to mitigate the spread of COVID-19. FRA is mindful of regulated entities' own policies for the safety and welfare of their employees, and understands the entities' need for COVID-19 policies to help stop the spread of the virus.

However, Federal law does not permit regulated entities to impose additional requirements on the exercise of FRA's safety inspection authority, such as requiring FRA safety inspectors to fill out questionnaires, waivers, or documents of any kind, whether written or oral, as a condition of entry or access. Congress has vested the Secretary of Transportation (and her officers and agents, such as FRA safety inspectors) with full authority to regulate and enforce safety requirements for the railroad industry, and this authority includes a right of entry to regulated entities' premises to conduct

inspections to determine compliance with Federal railroad safety laws and regulations, subject only to the condition that inspections occur at reasonable times, in a reasonable manner, and with a display of proper credentials (upon request).¹ Only FRA management has the authority to direct the activities of its inspectors in carrying out their Federal inspection and oversight responsibilities.

Regulated Entities Must Reasonably Cooperate With FRA

Federal law also requires reasonable cooperation by the regulated entities being inspected.² FRA understands that regulated entities may have implemented certain protective measures due to the COVID-19 public health emergency. As noted above, FRA will endeavor to adhere to those policies to the extent they do not interfere with its Federal safety responsibilities, but regulated entities are still required to cooperate with FRA safety inspectors and provide FRA's inspectors entry and access to the entities' records and property.

Although much of FRA's inspection and investigatory activities can be done consistent with social distancing, some activities necessitate closer human interaction (e.g., an FRA inspection in a railroad track inspection vehicle (hi-rail) involving an FRA employee being in close proximity to a railroad employee). Given the current need for social distancing, if a railroad has implemented a policy governing the occupation of closed cabs of rail vehicles (e.g., hi-rails or other vehicles), FRA inspectors will follow that policy. However, if that policy prevents FRA from conducting an inspection that it would otherwise normally perform (e.g., prohibits an FRA inspector from occupying a hi-rail vehicle with railroad personnel to perform a track inspection), the involved railroad must cooperate with FRA to identify and allow FRA to implement an alternative means for conducting the inspection that is reasonable and efficient. To continue with the track inspection example, a railroad with a policy preventing an accompanied hi-rail track inspection could be required to provide FRA sufficient track time to conduct a walking inspection.

Contacting FRA Safety Management

If a regulated entity (such as a railroad or a shipper of hazardous materials) denies or places unreasonable conditions on entry or access to its property or facilities, or refuses to cooperate with an FRA safety inspector, the FRA safety inspector will contact the relevant FRA Safety Management Team, or other FRA leadership, who will work to facilitate a resolution of the issue and will also be available to answer questions. If necessary, the involved inspection personnel and/or FRA leadership will work with FRA's Office of the Chief Counsel to ensure the right of entry and access to conduct inspections and to ensure continued safety oversight of the railroad industry.

¹ See 49 U.S.C. §§ 20107(b), 5121(a) & (c).

² See *United States v. Missouri Pac. R.R. Co.*, 553 F.2d 1156, 1158–59 (8th Cir. 1977).