

**THE ATTORNEYS GENERAL OF NEW YORK,
CALIFORNIA, MARYLAND, AND NEW JERSEY**

VIA REGULATIONS.GOV

October 23, 2019

Chief Counsel Paul Roberti
Office of Chief Counsel
U.S. Department of Transportation
Pipeline and Hazardous Materials Safety Administration
1200 New Jersey Avenue SE
Washington, DC 20590

**Re: Comments in Support of Washington State’s Crude Oil Volatility Law
Docket No. PHMSA-2019-0149; PDA-40(R)**

Dear Chief Counsel Roberti:

The States of New York, California, Maryland, and New Jersey respectfully submit these comments in support of initial comments submitted in this docket by Washington State opposing a preemption determination application filed by North Dakota and Montana, and in response to a letter submitted by a group of states led by Oklahoma. PHMSA should deny the petition because Washington’s laws relate to wholly in-state activities for in-state purposes and are not preempted by federal law. Nevertheless, nothing prevents PHMSA from acting expeditiously to set a protective nationwide limit for vapor pressure of crude oil transported by rail in the United States. Our states strongly support the need for protective standards on crude-by-rail, and as PHMSA is aware, several of us have advocated for just such a standard for years. However, in the face of PHMSA’s failure to adopt such a standard, even on an interim basis, it is entirely appropriate for states to take reasonable and necessary measures to protect communities, first responders, businesses and natural resources within our borders.

As the Oklahoma letter points out, almost four years ago, in December 2015, New York filed a rulemaking petition requesting that PHMSA adopt a nationwide limit on the vapor pressure of crude oil transported by rail.¹ The petition chronicles the well-publicized history of high-intensity fires and violent explosions that resulted from accidents and derailments of unit trains shipping crude oil from the Bakken Shale on rail lines across the country. Days later, President Obama signed the Fixing America’s Surface Transportation Act (“FAST Act”), which, among other items, directed Sandia National Labs to study how crude oil vapor pressure contributes to fiery explosions observed in a number of oil train derailments across the country and in Canada.² The FAST Act also directed DOT to report on the availability of insurance for railroad carriers transporting hazardous materials in the event of a catastrophic accident.³ Soon thereafter, PHMSA, in January 2017, published an Advanced Notice of Proposed Rulemaking on

¹ See Petition for Rulemaking, Petition No. P-1669, PHMSA-2015-0253.

² P.L. 114-94, Section 7309.

³ *Id.* at Section 7310.

the vapor pressure issue.⁴ In comments to PHMSA, a group of states, including New York, strongly urged PHMSA to close an existing regulatory loophole by finalizing a vapor pressure rule or by adopting a protective interim vapor pressure standard until the conclusion of Sandia Lab's study.⁵ In those comments, we noted that sufficient information has been available since at least 2014 for PHMSA to establish an interim protective vapor pressure standard.

Unfortunately, PHMSA did not close that loophole. Quite the opposite: efforts at the federal level have either lagged or have affirmatively sought to roll back critical safety protections for high-hazard flammable unit trains that transport crude oil across the country.

First, the Crude Oil Characterization Research Study, presently being conducted by the Sandia National Laboratories pursuant to the FAST Act, is more than two years behind schedule. The Study is presently in Phase II, Task 3 ("Combustion Experiments and Modeling"), which was scheduled to be completed in September 2017. Sandia's progress on Phase II, Task 4 ("Crude Characterization, Tight vs. Conventional"), also scheduled to be completed in September 2017, has still not been reported. There is no clear indication when the Study will conclude, although indications are that Sandia Labs considers the Study concluded with its recent report of August 2019.

In any event, Sandia's August 2019 report, "Pool Fire and Fireball Experiments," is a limited experiment that neither inspires confidence in the project's planning, sampling and analytical methods, nor in the ultimate conclusions. Sandia's testing was limited to three crude oils and only a single sampling from the vast and diverse Bakken Shale formation. That single "tight" Bakken crude displayed dramatically low vapor pressure measurements (9.0 to 10.8 psi) compared to Bakken crude oils implicated in derailment fires and explosions and, more generally, to crude oil in the Bakken Shale. For example, samples from the explosions in Lynchburg, Virginia in April 2014, displayed a vapor pressure of 14.3 psi, while the Bakken crude oil implicated in the February 2015 Mount Carbon, West Virginia, derailment, fire and explosions displayed a vapor pressure of 13.9 psi. Indeed, PHMSA's July 2014 analysis of 99 Bakken crude samples reported in "Operation Safe Delivery Update" displayed an average vapor pressure of 12.3 psi. Moreover, Sandia's testing protocol apparently allowed the Bakken crude to "weather" before combustion testing, thereby lowering its vapor pressure, or otherwise used an oil that is neither representative of Bakken crudes implicated in oil train fires and explosions nor of Bakken crude in general.

Second, the present administration has pursued a number of de-regulatory actions that increase the likelihood and dangerous consequences of oil train accidents and derailments. In May 2019, the Federal Railroad Administration and the U.S. Department of Transportation withdrew a proposed rule⁴ that would mandate a minimum of two-person train crews for oil trains.⁶ The proposed rule came in response to two catastrophic derailments of trains carrying crude oil - one in Lac-Mégantic, Quebec, that resulted in 47 deaths and 2000 evacuations, and a

⁴ 82 Fed. Reg. 5499 (Jan. 18, 2017).

⁵ See Comments by the Attorney Generals of New York, California, Illinois, Maine, Maryland and Washington, Docket No. PHMSA-2016-0077 (May 19, 2017).

⁶ Train Crew Staffing, 84 Fed. Reg. 24735 (May 29, 2019).

second in Casselton, North Dakota, that resulted in 1500 evacuations - both involving mile-long unit trains operated by a single crewperson.⁷ Among other things, multiple-crew staffing under the proposed rule was intended to reduce the likelihood of accidents by alleviating the cognitive demands on single-member crews, reducing fatigue, and ameliorating the complexities of operating new train technologies.⁸

Additionally, in 2018, PHMSA and FRA eliminated a critical safeguard that would have required trains that transport crude oil to be outfitted with electronically controlled pneumatic (ECP) braking systems.⁹ The proposed rulemaking requiring ECP brakes found that, by limiting the speed of trains, ECP brakes would reduce the risk of derailments and the puncturing of train cars.¹⁰ PHMSA and FRA removed the braking requirement under the premise - since called into question - that the costs of implementing ECP brakes would outweigh potential safety benefits.

These rollbacks come at a time when CPC-1232 tank cars, the same train cars involved in past accidents, are still used on our nation's railways to transport crude oil. Current law does not require phase-out or retrofit of these tank cars until 2025, and may be extended into 2027.¹¹

Third, PHMSA's own November 2017 Rail Liability Study, transmitted to Congress as required by the FAST Act, identifies important market failures in the railroad sector that prevent or disincentivize actions to improve the safety of transporting crude oil by rail.¹² Despite encountering limitations in available information, one of PHMSA's key findings was that the regulated market for hazardous materials ("hazmat") rail transportation does not efficiently incentivize parties - such as shippers of crude oil - to reduce their contribution to that risk. As PHMSA is aware, Class I railroads as "common carriers" are mandated to carry hazmat commodities such as crude oil on their rail networks so long as those commodities are packaged in conformance with the Hazardous Materials Regulations ("HMR"). As the HMR contains no vapor pressure standards for crude oil (only North Dakota has regulations in effect), common carriers are in no position to require shippers to reduce crude oil vapor pressure. In addition, Class I railroads are limited in their ability to shift legal liability on to shippers of hazmat commodities such as crude oil and can only charge "reasonable rates" according to statutory criteria and cost modeling as determined by the Surface Transportation Board, which bases those costs largely independent of commodity type.

This regulatory and market failure has the effect of preventing railroads from requiring shippers to reduce oil vapor pressure and simultaneously disincentivizing oil shippers from voluntarily reducing vapor pressure because the liability regime imposes responsibility for accidents and their consequences on the railroads. Indeed, crude oil shippers have resisted

⁷ 81 Fed. Reg. 13918, 13921-24 (Mar. 15, 2016).

⁸ *Id.* at 13925.

⁹ Hazardous Materials: Removal of Electronically Controlled Pneumatic Brake System Requirements for High Hazard Flammable Unit Trains, 83 Fed. Reg. 48393 (Sept. 25, 2018).

¹⁰ Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26643, 26649-50 (May 8, 2015).

¹¹ FAST Act, Section 7304(a) and (b)(1).

¹² U.S. Department of Transportation, Pipelines and Hazardous Materials Safety Administration: *Hazardous Materials by Rail Liability Study - Report to Congress*, pp. 46-52 (November 29, 2017).

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attempts by railroads to require crude oil packaging that would increase safety and reduce the railroads' liability exposure.¹³

These shortcomings in federal law have the practical effect of North Dakota standing in as the nation's *de facto* regulator of much of crude-by-rail activity, to the extent it acts as a regulator at all. North Dakota's permissive vapor pressure standard for crude oil has widely been observed to be inadequate and not sufficiently protective. Moreover, North Dakota has recently scaled back vapor pressure testing of Bakken crude oil to only about half the year.

Protecting the health and safety of our citizens, first responders, and environment are of paramount concern to our states. As PHMSA has given no indication that it will address the volatility of crude oil from the Bakken Shale, it is appropriate for states to fill this regulatory void by adopting their own protective standards consistent with the Supremacy Clause of the U.S. Constitution. The laws adopted by Washington State, which apply only to in-state facilities, are wholly appropriate where the federal government has opted not to act despite its ability to do so. Consequently, PHMSA should decline to find that Washington State's laws are preempted.

We appreciate PHMSA's consideration of these comments and certify that copies of this comment letter have been sent to Mr. Stenehjem and Mr. Fox at the addresses specified in the Federal Register.

Respectfully submitted,

FOR THE STATE OF NEW YORK

LETITIA JAMES
ATTORNEY GENERAL

By: /s/ Mihir A. Desai

MIHIR A. DESAI
Assistant Attorney General

JOHN D. DAVIS
Environmental Scientist

JEREMY MAGLIARO
Policy Analyst

28 Liberty Street, 19th Floor
New York, NY 10005
(212) 416-8478
Mihir.Desai@ag.ny.gov
John.Davis@ag.ny.gov
Jeremy.Magliaro@ag.ny.gov

¹³ For example, a suit brought by the American Fuel & Petrochemical Manufacturers alleges that a surcharge imposed by BNSF Railway for transport of Bakken crude oil violated BNSF's common carrier obligation. *See Am. Fuel & Petrochemical Mfrs.*, 15-cv-682 (S.D. Tex. March 13, 2015).

Chief Counsel Roberti
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FOR THE STATE OF CALIFORNIA

XAVIER BECERRA
ATTORNEY GENERAL

DAVID A. ZONANA
Supervising Deputy Attorney General

SCOTT LICHTIG
Deputy Attorney General

California Dept. of Justice
1515 Clay Street, Ste. 2000
Oakland, CA 94612
(510) 879-1248
David.Zonana@doj.ca.gov
Scott.Lichtig@doj.ca.gov

FOR THE STATE OF NEW JERSEY

GURBIR S. GREWAL
ATTORNEY GENERAL

DIANNA E. SHINN
Deputy Attorney General

Division of Law
25 Market Street
Trenton, NJ 08625
(609) 376-2789
Dianna.Shinn@law.njoag.gov

FOR THE STATE OF MARYLAND

BRIAN E. FROSH
ATTORNEY GENERAL

STEVEN J. GOLDSTEIN
Special Assistant Attorney General

200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6414
sgoldstein@oag.state.md.us