



Transportation Type

by Kathryn J. Gainey

Regulatory Update on Transportation of Crude Oil by Rail

In recent years, the amount of crude oil

transported by rail has increased substantially. Several federal agencies have considered ways to enhance safety during transportation.¹ Their efforts have received a significant level of interest from different constituencies. For example, the Pipeline and Hazardous Materials Safety Administration (PHMSA) received more than 100 comments responding to its advance notice of proposed rulemaking regarding tank car design in 2013. Commenters included tank car manufacturers, offerors, rail carriers, members of Congress, the National Transportation Safety Board, environmental groups, municipal and state government entities, and members of the public.

This article provides an overview of two proposals released in July 2014. First, PHMSA, in coordination with the Federal Railroad Administration (FRA), requested comments on proposed rules relating to the rail transportation of crude oil.² PHMSA proposed several rules relating to “high-hazard flammable trains,” which carry 20 or more tank cars of a flammable Class 3 liquid, including crude oil. For these trains, PHMSA proposed rules including timelines for discontinuing use of existing Department of Transportation (DOT) Specification 111 tank cars, speed restrictions, braking systems, and new tank car design. PHMSA further proposed rules that would require information be provided to state emergency response commissions regarding shipments of 1,000,000 gallons or more of crude oil from the Bakken shale formation. Second, PHMSA, in consultation with the FRA, requested comments relating to the threshold of crude oil per train that would trigger the requirement to prepare a comprehensive oil spill response plan.³

Definition of High-Hazard Flammable Train

PHMSA proposed to define a “high-hazard flammable train” as a “single train containing 20 or more tank carloads of Class 3 (flammable liquid) material.”⁴ PHMSA stated that crude oil and ethanol are the “only known Class 3 (flammable liquid) materials transported in trains consisting of 20 tank cars or more.”⁵ The definition of “high-hazard flammable train” thus would not apply to other Class 3

flammable liquids, such as acetone and ethyl methyl ketone.

PHMSA solicited comments regarding its proposed definition. It requested estimates of the costs and benefits of adding other materials to the definition of “high-hazard flammable train,” including materials classified as a flammable gas (Division 2.1) or a combustible liquid.

Notification to State Emergency Response Commissions

PHMSA proposed to require a railroad to notify state emergency response commissions “or other appropriate state-delegated entities” if it transports a train with 1,000,000 gallons or more (i.e., approximately 35 tank cars) of crude oil from the Bakken shale formation in the Williston Basin, located in North Dakota, South Dakota, and Montana in the United States and Saskatchewan and Manitoba in Canada.⁶ This proposal was an effort “to codify and clarify” the requirements in the emergency order issued by DOT in May 2014.⁷ Under PHMSA’s proposal, railroads would be required to provide “(1) a reasonable estimate of the number of affected trains that are expected to travel, per week, through each county within the State; (2) the routes over which the affected trains will be transported...” among other information.⁸ PHMSA also proposed to require railroads to “update notifications ... prior to making any material changes in the estimated volumes or frequencies of trains traveling through a county.”⁹

PHMSA requested comments on questions such as whether the 1,000,000-gallon threshold should be changed, whether the 20-car threshold from the definition of “high-hazard flammable train” should be adopted instead, and whether the estimated burdens would change if the proposal applied to all crude oil, including that originating outside the Bakken formation. PHMSA also solicited comments relating to the confidentiality of information provided by railroads. PHMSA noted that “DOT prefers that this information be kept confidential,” that “railroads may have an appropriate claim that this information constitutes confidential business information,” and that concerns have been raised that the “routing and traffic information ... would be made public under individual state’s open records laws.”¹⁰ PHMSA asked whether it should limit “the

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disclosure of the notification information provided” and whether the information should be designated as sensitive security information.¹¹

Rail Routing Analyses

PHMSA proposed to amend its regulations to require each railroad operating “high-hazard flammable trains” to perform routing analyses.¹² Current regulations require routing analyses for security-sensitive hazardous materials, such as chlorine.¹³ In a routing analysis, rail carriers “must assess available routes using, at a minimum, the 27 factors listed in [the regulation] to determine the safest, most secure routes.”¹⁴ Some railroads have “taken steps to extend the routing requirements ... to certain “high-hazard flammable trains” transporting crude oil.”¹⁵

PHMSA asked how “voluntary compliance” with the routing assessments has “changed the operational practices for crude oil shipments.”¹⁶ It also asked commenters to estimate the costs and benefits of requiring small rail carriers to conduct routing assessments.

Classification, Packaging, and Testing

PHMSA proposed several rules relating to classification, packaging, and testing of mined gases and liquids, including crude oil. The offeror must certify that hazardous material is “properly classified, described, packaged, marked, and labeled,” and the classification is used to select proper equipment (tank, service equipment, interior lining, or coating).¹⁷

PHMSA further proposed to adopt timelines for discontinuing the use of existing DOT 111 tank cars in “high-hazard flammable trains” to transport flammable liquids (Class 3). The proposed timelines depend upon the packing group classification. Under the proposal, DOT 111 tank cars would not be authorized for use in “high-hazard flammable trains” to transport flammable liquids (Class 3) in Packing Group I (which PHMSA described as “pos[ing] the highest danger”) after October 2017, in Packing Group II after October 2018, and in Packing Group III (which PHMSA described as the “lowest” danger) by October 2020.¹⁸ Under PHMSA’s proposal, existing DOT 111 tank cars would be permitted for “crude oil and ethanol that are classed as flammable liquids (all packing groups) and not transported in [“high-hazard flammable trains”]” and for “combustible liquid service.”¹⁹ PHMSA solicited comments regarding the proposed timelines.

PHMSA also proposed a “sampling and testing program for mined gases and liquids, including crude oil.”²⁰ The proposed program would include “[f]requency of sampling and testing to account for appreciable variability of the material” and “[s]ampling at various points along the supply chain to understand the variability of the material during transportation.”²¹ PHMSA requested information relating to its proposals, including whether the proposal “provides sufficient clarity to offerors” and whether “more or less specificity regarding the components of a sampling and testing program [would] aid offerors ... to be in compliance.”²² PHMSA also asked how the agency could “provide flexibility and relax the sampling and testing requirements for offerors who voluntarily use the safest packaging and equipment replacement standards.”²³

Speed Restrictions

PHMSA proposed speed restrictions for “high-hazard flammable trains” depending on the braking system and the design of the tank



car. In the proposed rules, “high-hazard flammable trains” would be “limited to a maximum speed of 50 [miles per hour].”²⁴ PHMSA proposed a speed restriction for “high-hazard flammable trains” of 40 miles per hour “unless all tank cars containing flammable liquids meet or exceed the proposed performance standards for the DOT Specification 117 tank car,” which are discussed below.²⁵ PHMSA’s proposal includes three options regarding the location where the 40-mile-per-hour speed restriction would apply: (1) in all areas, (2) in areas with more than 100,000 people, or (3) in high-threat urban areas.²⁶ Finally, PHMSA proposed a speed restriction of 30 miles per hour for the “high-hazard flammable train” if “a rail carrier cannot comply with the proposed braking requirements,” which are discussed below.²⁷ PHMSA prepared a regulatory impact analysis regarding the economic impact of its proposed speed restrictions, although it stated that the analysis “has several limitations” and did “not estimate any effects from speed reductions on other types of rail traffic throughout the rail network (e.g., passenger trains, intermodal freight, and general merchandise).”²⁸

PHMSA sought information regarding its proposed speed restrictions, such as the effects of the 40-mile per hour speed restriction “on other traffic on the network, including passenger and intermodal traffic,” the costs of delays for “high-hazard flammable trains,” costs of delays “for other types of traffic on the

network,” and the estimated amount of track miles impacted by the second and third options of the proposed 40-mile-per-hour restriction.²⁹ PHMSA also asked for information regarding the extent to which a 40-mile-per-hour speed restriction would “cause rail traffic to be diverted to other lines” and “cause rail traffic, particularly intermodal traffic, to be diverted onto truck or other modes of transit as a result of rail delays.”³⁰ PHMSA solicited estimates of costs and benefits of (1) “limiting the proposed 40-[mile-per-hour] speed restrictions, under each Option, only to DOT 111 tank cars carrying a particular hazardous material (e.g., only crude oil),” and (2) “excluding existing Jacketed CPC-1232 cars from the proposed 40-[mile-per-hour] speed restrictions ... if PHMSA selects a more stringent tank car specification than the Enhanced Jacketed CPC-1232.”³¹

Braking Systems

PHMSA proposed to “require each “high-hazard flammable trains” to be equipped with an enhanced brake signal propagation system.”³² PHMSA offered four proposals involving end-of-train devices, distributed power systems, or electronic-controlled pneumatic brakes. As noted above, PHMSA proposed an exception for a rail carrier that “does not comply with the proposed braking requirements” where it may operate “high-hazard flammable trains” at a speed of 30 miles per hour or less.³³

PHMSA requested comments on several aspects of its braking systems proposals, including the cost of installing electronic-controlled pneumatic brakes on new tank cars, retrofitted tank cars, and locomotives. PHMSA also solicited information regarding the “annual capacity of tank car and locomotive manufacturing and retrofit facilities to install or implement [electronic-controlled pneumatic], [distributed-power] and [end-of-train] systems.”³⁴

New Tank Car Design

PHMSA proposed to require tank cars “constructed after Oct. 1, 2015, that are used to transport Class 3 flammable liquids in “high-hazard flammable trains” to meet the specification requirements for the DOT Specification 117 tank car or the proposed performance specifications” known as DOT Specification 117P.³⁵

PHMSA stated that the DOT Specification 117 tank car “would change the specification requirements for rail tank cars authorized to transport crude oil and ethanol,” and the design “would be phased in over time depending on the packing group of the flammable liquid.”³⁶

PHMSA proposed three options for design specifications of DOT 117 tank cars. Option 1 is the tank car designed by PHMSA and FRA, which includes rollover protection and electronic-controlled pneumatic brakes.³⁷ PHMSA described Option 2 as the “[Association of American Railroads] 2014 Recommended Car,” which has the “same safety features as the Option 1 car, including the same increase in shell thickness, jacket requirement, thermal protection requirement, and head shield requirement, but it lacks rollover protection and the [electronic-controlled pneumatic] brake requirement.”³⁸ PHMSA identified Option 3 as the “Enhanced Jacketed CPC-1232,” which “would modify the CPC-1232 standard by requiring improvements to the bottom outlet handle and pressure relief valve.”³⁹ The Option 3 tank car would have a thinner shell than the Option 1 or Option 2 tank cars, and it would not include rollover protection or electronic-controlled pneumatic brakes. Each option has a “proposed performance standard” that must be approved by FRA and is “intended to encourage innovation in tank car designs, including materials of construction and tank car protection features, while providing an equivalent level of safety as the DOT Specification 117.”⁴⁰

PHMSA solicited comments regarding its proposals for new tank cars, including whether its proposals would reduce car capacity or impact braking systems, track integrity, or loading.⁴¹ PHMSA also sought estimates of the “benefits and costs of allowing CPC-1232 cars ordered before Oct. 1, 2015, to be placed into service for their useful life.”⁴²

Retrofitting Existing Tank Cars

PHMSA proposed that “DOT Specification 111 tank cars may be retrofitted to DOT Specification 117, retired, repurposed, or operated under speed restrictions.”⁴³ PHMSA stated that “the requirements for newly constructed tank cars and retrofits are the same,” except that PHMSA’s proposal does not require existing tank cars

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to be retrofitted with top-fitting protections.⁴⁴ As noted above, under PHMSA's proposal, existing DOT 111 cars used in "high-hazard flammable trains" will be phased out between 2017 through 2020 according to packing group, although they "can continue to be used to transport other commodities, including flammable liquids, provided they are not in a "high-hazard flammable trains".⁴⁵

PHMSA sought information regarding the "impacts associated with each tank car option as a standard for existing tank cars," including "which portions of the fleet commenters expect would be retrofitted, repurposed, or retired under each option, and the anticipated costs and benefits."⁴⁶ PHMSA asked whether "CPC-1232 cars [should] be exempted from some or all of the retrofitting requirements" or "have a different implementation timeframe than legacy DOT 111 cars."⁴⁷ PHMSA solicited comments regarding whether the options would require "structural changes to existing tank cars," would cause "engineering challenges," or would impact braking systems, track integrity, and loading.⁴⁸

Oil Spill Response Plans

PHMSA also released an advance notice of proposed rulemaking where PHMSA considered oil spill response plans for "high-hazard flammable trains." PHMSA is responding to a recommendation by the National Transportation Safety Board that the agency should amend the current spill response planning thresholds.⁴⁹ Current regulations require a basic oil spill response plan for "oil shipments in a packaging having a capacity of 3,500 gallons or more" and a comprehensive oil spill response plan for "oil shipments in a package containing more than 42,000 gallons (1,000 barrels)."⁵⁰ PHMSA is "re-examining whether it is more appropriate to consider the train in its entirety when setting the threshold for comprehensive [oil spill response plans]."⁵¹

PHMSA requested comments to "inform a potential future [notice of proposed rulemaking] that would adjust threshold quantities to trigger comprehensive [oil spill response plan] requirements for "high-hazard flammable trains".⁵² PHMSA sought comments regarding four thresholds of crude oil per train to require preparation of a comprehensive oil spill response plan: (1) 1,000,000 gallons or more; (2) 20 carloads or more; (3) 42,000 gallons (i.e., two carloads); or (4) "[a]nother threshold."⁵³ PHMSA solicited comments regarding whether "elements ... should be added, removed, or modified from the comprehensive [oil spill plan response] requirements."⁵⁴ PHMSA also posed other questions, including whether it should "require that the basic and/or the comprehensive [oil spill response plans] be provided to the State Emergency Response Commissions ... and/or made available to the public."⁵⁵

Conclusion

Comments on PHMSA's proposed rules and its advance notice of proposed rulemaking are due 60 days after the notices are published in the Federal Register. Several additional rulemakings are on the horizon. Aside from PHMSA's upcoming proposed rules regarding oil spill response plans, the administration also stated that it will conduct a future rulemaking regarding other comments received in 2013, "particularly regarding modernization of Part 174 of the [hazardous materials regulations]."⁵⁶ FRA also plans to propose rules regarding securement and attendance.⁵⁷ ☉

Endnotes

¹See, e.g., *Emergency Order Establishing Additional Requirements for Attendance and Securement of Certain Freight Trains and Vehicles on Mainline Track or Mainline Siding Outside of a Yard or Terminal*, FRA Emergency Order No. 28, Notice No. 1, 78 Fed. Reg. 48218 (Aug. 7, 2013); Advance Notice of Proposed Rulemaking, *Hazardous Materials: Rail Petitions and Recommendations to Improve the Safety of Railroad Tank Car Transportation (RRR)*, Docket No. PHMSA-2012-0082, 78 Fed. Reg. 54849 (Sept. 6, 2013); Notice of Safety Advisory, *Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil By Rail*, Docket No. PHMSA-2014-0049, 79 Fed. Reg. 27370 (May 13, 2014).

²Notice of Proposed Rulemaking, *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for "High-Hazard Flammable Trains,"* Docket No. PHMSA-2012-0082 (released on July 23, 2014) (hereinafter 2014 NPRM).

³Advance Notice of Proposed Rulemaking, *Hazardous Materials: Oil Spill Response Plans for "High-Hazard Flammable Trains,"* Docket No. PHMSA-2014-0105 (released on July 23, 2014) (hereinafter 2014 ANPRM).

⁴2014 NPRM at 73.

⁵*Id.*

⁶*Id.* at 192 (quoting proposed rule 49 C.F.R. § 174.310).

⁷*Id.* at 76. DOT issued this emergency order pursuant to the "Secretary's authority to abate imminent hazards at 49 U.S.C. § 5121(d)." 2014 NPRM at 76. See Notice of Issuance and Availability of Emergency Order, *Emergency Order Providing for Local Notification of High-Volume Rail Transport of Bakken Crude Oil*, Docket No. DOT-OST-2014-0067, 79 Fed. Reg. 27363 (May 13, 2014). DOT's Emergency Restriction/Prohibition Order is available at www.dot.gov/briefing-room/emergency-order (last accessed July 25, 2014).

⁸2014 NPRM at 192 (quoting proposed rule 49 C.F.R. § 174.310).

⁹*Id.*

¹⁰*Id.* at 79.

¹¹*Id.* at 81. The procedures regarding protection of Sensitive Security Information (known as SSI) are codified at 49 C.F.R. Part 15.

¹²2014 NPRM at 82.

¹³*Id.* at 83.

¹⁴*Id.* The factors are listed in Appendix D to 49 C.F.R. Part 1172.

¹⁵2014 NPRM at 82.

¹⁶*Id.* at 83.

¹⁷*Id.* at 86.

¹⁸*Id.* at 85.

¹⁹*Id.* at 137-138.

²⁰*Id.* at 88.

²¹*Id.*

²²*Id.* at 92.

²³*Id.* at 93.

²⁴*Id.* at 192 (quoting proposed 49 C.F.R. § 174.310(a)(3)).

²⁵*Id.* at 98-99.

²⁶*Id.* at 99.

²⁷*Id.* at 98.

²⁸*Id.* at 100.

²⁹*Id.* at 99-100.

³⁰*Id.* at 101.

Conclusion

Judge Wallace's accomplishments would not only surprise his high school counselor, they are impressive by any measure. He has shared his judicial philosophy and insights on the judicial process in hundreds of opinions and more than 40 scholarly articles, introduced substantial new innovations in judicial administration, launched the American Inns of Court, raised a wonderful family, devoted countless hours to his faith, and traveled internationally for more than 40 years to improve courts around the world.

Now in his eighties, Judge Wallace shows few signs of slowing. He continues to exude an inspirational energy, optimism, and international outlook and to work as hard as many men and women half his age. Judge Wallace's legal hero, Abraham Lincoln, seems to have set the tone: "The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today. ... Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done."¹⁰ The unbounded energy and tireless work of Judge J. Clifford Wallace provide a fitting example of Lincoln's ideal lawyer. ☺

Endnotes

¹Lucinda Eddy, *War Comes to San Diego*, THE JOURNAL OF

SAN DIEGO HISTORY (Spring 1993), available at www.sandiegohistory.org/journal/93spring/warcomes.htm (last accessed May 24, 2014).

²Amelia Hansen, *Federal Judge J. Clifford Wallace Travels the World Promoting the Rule of Law*, California Lawyer Magazine (Aug. 2009), available at www.callawyer.com/common/CLprint.cfm?eid=903327&evid=1 (last accessed May 25, 2014).

³Hon. J. Clifford Wallace, *Birth of the American Inns of Court*, 25 BERKELEY J. INT'L L. 109, 109-110 (2007).

⁴See home.innsofcourt.org/about-us/get-to-know-the-american-inns-of-court.aspx (last accessed May 25, 2014).

⁵See *supra* note 2.

⁶11 F.2d 296 (9th Cir. 1979).

⁷*Christian Science Bd. of Directors of First Church of Christ Scientists v. Evans*, 520 A.2d 1347, 1354 (N.J. 1987).

⁸Hon. J. Clifford Wallace, *The Law of Federal Courts*, 62 TEX. L. REV. 191, 195 (1983).

⁹*Ibid.*

¹⁰The Collected Works of Abraham Lincoln edited by Roy P. Basler, Volume II, *Notes for a Law Lecture* (July 1, 1850), p. 81 (spelling updated).

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³¹*Id.*

³²*Id.* at 107.

³³*Id.*

³⁴*Id.* at 108.

³⁵*Id.* at 110.

³⁶*Id.* at 111.

³⁷*Id.* at 112.

³⁸*Id.* at 113.

³⁹*Id.* at 114.

⁴⁰*Id.* at 132.

⁴¹*Id.* at 130-131.

⁴²*Id.* at 131.

⁴³*Id.* at 142.

⁴⁴*Id.* at 132, 138.

⁴⁵*Id.* at 142-143.

⁴⁶*Id.* at 133.

⁴⁷*Id.* at 143.

⁴⁸*Id.* at 144.

⁴⁹2014 ANPRM at 8.

⁵⁰*Id.* at 4.

⁵¹*Id.* at 8.

⁵²*Id.* at 9.

⁵³*Id.*

⁵⁴*Id.* at 9-10.

⁵⁵*Id.* at 11.

⁵⁶2014 NPRM at 50.

⁵⁷*Id.* at 148.

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