
PETITION TO THE SECRETARY OF TRANSPORTATION TO ISSUE AN EMERGENCY ORDER REQUIRING COMPREHENSIVE OIL SPILL RESPONSE PLANS FOR HIGH HAZARD FLAMMABLE TRAINS

Submitted by the Center for Biological Diversity, Friends of
the Gorge and Adirondack Mountain Club
September 30, 2014



Introduction

This petition, submitted pursuant to the Administrative Procedures Act, 5 U.S.C. § 553(e), asks the Secretary of Transportation¹ to issue an emergency order requiring that all high hazard flammable trains (“HHFTs”)² have a comprehensive oil spill response plan (“OSRP”) consistent with 49 CFR 130.31(b). The United States is experiencing an unprecedented boom in the transport of oil across the country by rail. The growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to people and the environment. These significant risks have been highlighted by the recent instances of trains carrying crude oil that derailed, resulting in spilled oil, fires, evacuations, and harm to people and the environment. Trains carrying crude oil are currently not required to have a comprehensive OSRP. *See* 49 CFR

¹ This petition is being submitted to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, and Chief Safety Officer (*Attn:* Office of Chief Counsel, PHC), Pipeline and Hazardous Materials Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., East Building, Washington, DC 20590 by first class mail in accordance with 40 CFR § 109.19(f).

² Pursuant to the Pipeline and Hazardous Materials Administration’s recent Notice of Proposed Rulemaking, the proposed definition for an HHFT to be included in 49 CFR 171.8 is: 20 or more carloads in a single train of a Class 3 flammable liquid. *See* Docket No. PHMSA-2012-0082 NPRM 2137-AE91.

130.31.³ Due to the imminent hazard that these trains pose, we petition for an emergency order requiring a comprehensive OSRP for HHFTs is necessary to protect public health and the environment.⁴

The dangers and hazards associated with HHFTs have been discussed at length in the United States Department of Transportation's ("DOT") Emergency Order dated May 7, 2014,⁵ and the Pipeline and Hazardous Materials Administration's ("PHMSA") recent Notice of Proposed Rulemaking, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains.⁶ In that rulemaking proceeding, PHMSA has admitted that "[t]he growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment," and that due to "the projected continued growth of domestic crude oil production, and the growing number of train accidents involving crude oil, PHMSA concludes that the potential for future severe train accidents involving crude oil in HHFTs has increased substantially."

Despite the increased risks from oil trains, currently companies shipping oil by rail must only provide a basic OSRP, which merely requires them to identify the potential manner of response to spills, the private personnel and equipment available for a response, and the appropriate agencies to contact in case of a spill. 49 CFR 130.31(a). A comprehensive plan would provide far greater assurances of a proper and timely cleanup, by requiring consistency with the National Contingency Plan and Area Contingency Plans, and would require that oil shippers not just identify personnel and equipment availability, but secure their availability by contract to ensure that there is sufficient means to respond to a worst-case discharge. 49 CFR 130.31(b). A comprehensive OSRP would also describe the training equipment, testing, periodic unannounced drills, and response actions of personnel, to be carried out under the plan to ensure safety and to mitigate or prevent discharge or the substantial threat of such a discharge. *Id.*

These requirements are essential to ensure that there is a timely and proper response to spills, which is necessary as it is apparent that spill response planning is currently not adequate. In

³ Comprehensive OSRPs are required for trains carrying a package containing more than 42,000 gallons of oil; however, the tank cars currently used to transport oil are 35,000 gallon capacity. As PHMSA has noted "the number of railroads required to have a comprehensive OSRP is much lower, or possibly non-existent, because a very limited number of rail tank cars in use would be able to transport a volume of 42,000 gallons in a single package." Advanced notice of proposed rulemaking "Hazardous Materials: Oil Spill Response Plans for High-Hazard Flammable Trains" (Docket No. PHMSA-2014-0105 (HM-251B)).

⁴ The petitioners: The Center for Biological Diversity is a national, nonprofit conservation organization with more than 775,000 members and online activists dedicated to the protection of endangered species and wild places. Friends of the Columbia Gorge is a conservation organization with 5,200 members dedicated to protecting the scenic beauty and natural heritage of the Columbia River Gorge.

The Adirondack Mountain Club is a conservation organization with 28,000 members dedicated to the conservation, preservation, and responsible recreational use of the New York State Forest Preserve and other parks, wild lands, and waters.

⁵ Docket No. DOT-OST-2014-0067. The Emergency Order states that "[t]he 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."

⁶ Docket No. PHMSA-2012-0082 NPRM 2137-AE91

Oregon, for example, Governor Kitzhaber has called for a top-to-bottom review of Oregon oil train safety and oil spill responsiveness, citing the lack of information that emergency responders have about the oil being hauled through Oregon communities.⁷ That lack of information makes it difficult for oil spill responders to properly respond to an accident. ODOT hasn't added any railroad inspectors since the late 1990s, despite the increase in crude oil shipments. Therefore, not only is the potential for a spill rapidly increasing, but there is a very real threat that oil spill responders will not have the information or equipment they need to mount a proper response, resulting in harm to people and the environment.

The lack of comprehensive OSRPs for HHFTs poses an imminent hazard to people and the environment, and has put the burden of dealing with oil spills on states and local responders, and ultimately on tax payers. Those that profit from the shipment of oil by rail should be the ones to ensure that sufficient personnel and equipment are available in the event of a worst-case discharge, and the requirements for comprehensive OSRPs will help alleviate some of the burden that states are facing due to the rapid increase in rail transport of oil. However, the comprehensive OSRP requirements will only help to protect the public and the environment from the next inevitable oil spill if they are implemented immediately. DOT and PHMSA have the authority to take immediate action. There is no time or reason to wait and an emergency order is warranted to respond to the imminent hazard that HHFTs pose.

Increased Oil-by-Rail Transport and Spills

The amount of crude oil being transported by rail throughout North America has increased dramatically in recent years. In 2008, only 9,500 rail cars of oil were transported on America's Class I railways. The volume of crude oil carried by rail increased 423 percent between 2011 and 2012, and volumes continued to increase in 2013, as the number of rail carloads of crude oil surpassed 400,000.⁸

The increased transport of oil by rail has resulted in several catastrophic and deadly rail accidents throughout North America involving oil and petroleum products. Fiery derailments have recently occurred in North Dakota, New Brunswick, Alabama and Quebec, the latter causing the death of 47 people, the evacuation of approximately 2,000 people from the surrounding area, and the incineration of a popular tourist town. Most recently, on April 30, 2014, an eastbound CSX train consisting of 105 tank cars loaded with Bakken crude oil from North Dakota derailed in downtown Lynchburg, Virginia. Seventeen of the train's cars derailed, and one of the tank cars was breached. A petroleum crude oil fire ensued, shooting flames and black smoke into the air. Three of the derailed tank cars containing petroleum crude oil came to rest in the adjacent James River, spilling up to 30,000 gallons of petroleum crude oil into the river.

These and other accidents have resulted in hundreds of thousands of gallons of crude oil being spilled into our nation's waterways. In 2013 there were 117 crude-by-rail spills in the U.S., a

⁷ http://www.oregonlive.com/environment/index.ssf/2014/02/gov_john_kitzhaber_orders_top-.html

⁸ See PHMSA Proposed Rulemaking, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains at 7, Docket No. PHMSA-2012-0082 (HM-251).

near tenfold rise since 2008.⁹ These resulted in more than 1.1 million gallons of crude oil spilled in the U.S., more in one year than the total amount spilled from 1975-2012.¹⁰ This is in part due to the use of unsafe DOT 111 tank cars, which the National Transportation safety Board has stated can almost always be expected to breach in the event of a train accident.¹¹ While PHMSA has proposed a rule regarding these tank cars, even if it is promulgated the legacy DOT 111s will remain in service over a 5 year phase-out period, during which time they will continue to pose an imminent hazard.

Due to these accidents and the use of legacy DOT 111 tank cars, DOT has found that the “growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment,” and has issued emergency orders regarding the dissemination of information on oil train shipments¹² and proposed new rules for HHFTs; however, these actions do not ensure that sufficient personnel and equipment will be available for a worst-case scenario oil spill from a train derailment. The imminent hazard posed by the recent increase in oil-by-rail traffic necessitates emergency action to ensure that people and the environment will be protected.

Legal Basis for Emergency Order

The Hazardous Materials Transportation Act (“HMTA”) directs the Secretary of Transportation to “prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.” 49 U.S.C. § 5103(b) (1)(B). HMTA specifically authorizes the Secretary to issue emergency orders:

If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, and out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

49 U.S.C. § 5121(d). An imminent hazard is defined as “the existence of a condition relating to hazardous material that presents a substantial likelihood that death, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment.” 49 U.S.C. § 5102(5).

⁹ Pipeline and Hazardous Materials Safety Administration (PHMSA) data (available at <https://hazmatonline.phmsa.dot.gov/IncidentReportsSearch/search.aspx>)

¹⁰ Curtis Tate, *More Oil Spilled From Trains in 2013 than in Previous 4 Decades, Federal Data Show*, McClatchy DC, Jan. 20, 2014 (available at <http://www.mcclatchydc.com/2014/01/20/215143/more-oil-spilled-from-trains-in.html>).

¹¹ PHMSA Proposed Rulemaking, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains at 30, Docket No. PHMSA-2012-0082 (HM-251).

¹² Docket No. DOT-OST-2014-0067.

PHMSA has set forth in great detail in its proposed rulemaking for enhanced tank car standards, Docket No. PHMSA-2012-0082 (HM-251), the hazards associated with HHFTs. The proposed rulemaking specifically states that “the growing reliance on trains to transport large volumes of flammable liquids poses a significant risk to life, property, and the environment.” The lack of comprehensive OSRPs for HHFTs significantly increases these risks, due to the lack of assurances that sufficient personnel and equipment will be available to respond to a spill. This provides a basis for the issuance of an emergency order prohibiting the use of HHFTs that do not have a comprehensive OSRP.

The Need for Comprehensive Oil Spill Response Plans

The difference between the basic OSRP and comprehensive OSRP requirements are meaningful to the consideration of the need for an emergency order. PHMSA notes in its advanced notice of proposed rulemaking “Hazardous Materials: Oil Spill Response Plans for High-Hazard Flammable Trains,” that there are significant differences between basic and comprehensive OSRPs, including consistency with the National and Area Contingency Plans, and the need for contracts to ensure that personnel and equipment will be available for a worst-case discharge event. The information and commitments that are required in a comprehensive plan are essential to ensuring the safety of the public and the environment, and the continued use of HHFTs without the assurances of a comprehensive OSRP poses an imminent hazard to the public.

The basic OSRP requirements simply do not provide sufficient assurances that resources and personnel will be available to respond to a spill, and therefore requiring a comprehensive OSRP is warranted. If PHMSA does not immediately alter 49 CFR 130.31 through an emergency order, there will continue to be no assurance of consistency with the National and Area Contingency Plans, and no assurance that adequate personnel and equipment are available to respond to an oil spill. To put this in some context, the Northwest Area Contingency Plan, which covers the Columbia River and Puget sound with several oil refineries and transloading facilities, states that “[s]hould a catastrophic oil spill occur, it is likely that there will not be adequate response resources in the Northwest Area to manage and clean up the spill.” NWACP at 1000-28. If a comprehensive OSRP is required of HHFTs, then there would be a requirement that contracts be in place to ensure adequate equipment to respond to a worst-case scenario spill, resolving this inadequacy. There would also be assurances that proper training for spill response actions takes place. Therefore, whether or not a comprehensive OSRP is required could have far reaching impacts on public health and the environment in the event of a spill.

As the Advanced notice of proposed rulemaking Hazardous Materials: Oil Spill Response Plans for High-Hazard Flammable Trains notes, “the purpose of an OSRP is to ensure that personnel are trained and available and equipment is in place to respond to an oil spill, and that procedures are established before a spill occurs, so that required notifications and appropriate response actions will follow quickly when there is a spill.” The requirements of a basic OSRP do not fulfill this purpose, since they do not require transporters of oil to ensure that personnel are trained and equipment will be available to respond to a spill. Given the unprecedented recent increase in rail transport of oil throughout North America, and new knowledge concerning the risks of transporting oil by rail, there is a far greater risk for impacts to people and the environment from an oil spill and related response actions than was the case just a few years ago.

This new information serves to heighten the immediate need for comprehensive OSRPs for HHFTs.

Emergency Action is Needed to Ensure That Public Health and the Environment are Protected While DOT Considers New Rules

While PHMSA has issued an advanced notice of proposed rulemaking regarding the threshold for requiring a comprehensive OSRP for HHFTs, this is insufficient to ensure that personnel and equipment will be available to respond to oil spills that are inevitable in the near future, as a new rule is considered. As PHMSA notes in Docket No. PHMSA-2012-0082, due to “the projected continued growth of domestic crude oil production, and the growing number of train accidents involving crude oil, PHMSA concludes that the potential for future severe train accidents involving crude oil in HHFTs has increased substantially. Such an increase raises the likelihood of higher-consequence train accidents.” The hazards posed by HHFTs have been described in detail by PHMSA itself in its proposed rulemaking in Docket No. PHMSA-2012-0082 (HM-251). The ongoing rulemaking process, however, will take too long to address the lack of comprehensive OSRPs for HHFTs, and an emergency order is warranted to avert the immediate and imminent hazard posed by these trains.

Furthermore, the emergency order that this petition requests would only require a comprehensive OSRP for those trains that were categorized as High Hazard Flammable Trains (20 or more carloads in a single train of a Class 3 flammable liquid) - a moniker that PHMSA itself uses to describe them, and which highlights their hazardous nature. The Center believes that the threshold for requiring comprehensive OSRPs should be 35,000 gallons per train consist, as is set forth in our comments in Docket No. PHMSA-2014-0105 (HM-251B). This would be the most appropriate threshold, because it would be one that is most protective of public health and the environment. However, while PHMSA considers the appropriate threshold through rulemaking, at the very least an emergency order immediately requiring comprehensive OSRPs for those trains that PHMSA has described as highly hazardous is necessary to ensure that the public is protected.

The rulemaking process is too slow to ensure that sufficient protections are in place given the rapid increase in oil-by-rail traffic and associated fiery derailments. Even if a proposed rule is published this fall, it will take many months and possibly a year or more before a final rule will be promulgated. Meanwhile, the increase in oil-by-rail shipments is putting people and the environment at risk of a spill without sufficient means for response. An emergency order is therefore necessary to ensure that all High Hazard Flammable Trains have comprehensive OSRPs in place immediately - before another spill occurs.

Conclusion

For all of the reasons set forth above, as well as the information provided by DOT/PHMSA in the emergency orders and proposed rulemakings regarding the hazards of oil-by-rail transport, an emergency order requiring HHFTs to have a comprehensive OSRP is necessary to protect the public health and the environment, and we urge the Secretary to issue such an order immediately.

Respectfully submitted,

/s/ Jared M. Margolis_____

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On behalf of:

Friends of the Gorge
Adirondack Mountain Club

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of September, 2014, I caused to be served the foregoing PETITION TO THE SECRETARY OF TRANSPORTATION TO ISSUE AN EMERGENCY ORDER REQUIRING COMPREHENSIVE OIL SPILL RESPONSE PLANS FOR HIGH HAZARD FLAMMABLE TRAINS on the following parties at the following addresses:

U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor, Room W12-140
1200 New Jersey Avenue, SE.
Washington, DC 20590

Chief Safety Officer
(*Attn:* Office of Chief Counsel, PHC)
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue, SE., East Building
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By U.S. Postal Service, certified or registered mail, return receipt requested.

/s/ Jared M. Margolis

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