

Date: September 9, 2016

DRAFT

To: Docket Operations
M-30, Ground Floor, Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590-0001

From: Citizens Acting for Rail Safety – Twin Cities

**Re: Hazardous Materials: FAST Act Insurance and Liability Study – Notice of Study
(Docket ID: PHMSA 2016-0074)**

Introduction

Citizens Acting for Rail Safety-Twin Cities (CARS-TC) is a non-partisan, grassroots advocacy group that works with residents, legislators, and agency officials to improve rail safety to benefit the health, safety, and security of people, wildlife and the environment. Formed in response to the exponential growth of oil and ethanol transportation by rail over recent years, CARS-TC strives to bring the citizen voice to bear on issues associated with high hazard freight trains going through the communities of Minneapolis, St. Paul, and other communities along freight rail routes in the Upper Mississippi River Basin within Minnesota.

Thank you for allowing public input on this notice and request for comments. Our understanding is that the comments submitted will serve to further inform the scope of the Insurance and Liability Study (the Study) required by the Section 7310 of the FAST Act of 2015.

The “Summary” section of Docket ID: PHMSA 2016-0074 references “full liability potential” for damages arising from an accident or incident involving a train transporting hazardous materials...” The term “full liability potential” is not defined in the document. To be meaningful the term should include, but not be limited to, the following:

- The costs responding to loss of human life, injuries caused directly or indirectly by a rail disaster, loss of income and costs of continuing care of persons injured.
- Damage and/or loss of use of properties –whether they are commercial, industrial, institutional or private.
- Consequential losses, such as business and/or mission interruption.
- Extra costs incurred by public safety, fire, environmental response and other agencies of government.
- Costs of remediating environmental and natural resource damages – both short term and long term, including analytical and toxicity/persistence testing, and reparations for permanent, non-recoverable issues, such as rare species extinctions.

Level and Structure of Insurance and Liability Coverage

1. Data relating to, the current level, structure, and type of liability insurance coverage (including self-insurance and retentions) available for hazardous materials transportation by rail:

- **Cost and scope of coverage:** Various sources report that with the inception of large increases in rail shipments of crude oil and alcohol-based (i.e., ethanol) fuels, availability of liability coverage for railroads has tightened, and costs have escalated. Some insurance carriers have exited the market, and some policies exclude environmental damages, which are a major exposure in hazardous materials transport by rail.

- **State and Federal requirements:** There are (to our knowledge) no current requirements by the Federal Railroad Administration in respect to liability coverage. The state of Washington has enacted requirements that any major rail company operating in Washington -- today, only BNSF -- report whether they have sufficient financial resources or insurance to cover the costs of an oil train spill of around \$700 million (smaller railroads have smaller requirements). That's better than nothing, which is what most states have. But it's not nearly enough. The federal Pipeline and Hazardous Materials Safety Administration suggested that a disaster inside a major city could cost \$12.6 billion. What could a \$12 billion derailment look like? BNSF runs oil trains within 20 yards of Safeco Field in downtown Seattle during Mariners games when fans are in the stands.¹
- **Changes in the cost or availability of liability insurance:** Sources such as the Risk and Insurance Management Society (RIMS), Public Risk and Insurance Management Assoc. (PRIMA) were consulted in relation to this question; however, absent paid membership in their respective organizations, access to information was denied. We reviewed publicly available publications from large commercial insurance brokers, such as AON and Marsh, and found scant information on this subject, of a substantial nature.

From a May 2, 2015 [TimesUnion](#) article, A 2009 [U.S. DOT](#) study found "the most controversial factors that affect rail rates for the shipment of hazardous materials are insurance and liability considerations." Railroads said available insurance coverage was not enough to protect them from potential bankruptcy after a multibillion-dollar disaster. The DOT report agreed, "While a "nightmare scenario" that would result in ruinous liability is highly improbable, we realize that it is not completely impossible either – given the right circumstances." According to that 2009 report, large railroads typically have about \$750 million to \$1 billion in coverage, costing them between \$18 million and \$25 million a year. Because of the potential cost of a catastrophe, railroads warn they "are forced to "bet the farm" with every movement of dangerous, explosive material like crude oil that after a disaster could "likely force the (railroad) carrier into bankruptcy," the report found.²

Further, Insurance Business Canada on 4/28/16 reported that New York Comptroller Thomas DiNapoli, in researching insurance matters via Security and Exchange Commission database determined that CSX railroad had a \$25 million policy for non-catastrophe property damage, and a \$50 million policy for a natural disaster. The department has estimated there may be 10 oil train accidents of "higher consequence" within the next 20 years at costs exceeding \$1.15 billion in each case and possibly more than \$5.75 billion in a single incident, DiNapoli wrote.³

- **Issues unique to industry, commodity, and/or entity size:** Sources reviewed online indicated that coverage cost may inhibit purchase, especially with respect to smaller sized railroads. Further Carrier Management reported on October 9, 2014 that American International Group launched a \$1 billion catastrophe policy that would be triggered after a client had incurred \$1.5 billion in covered property damage and bodily injury liability. The news release did not specify if environmental damages were eligible for coverage.⁴

2. Appropriateness of current levels of insurance and liability coverage for hazardous materials transportation by rail:

- **Appropriate level of insurance and liability coverage:** To have meaning, the phrase "appropriate level" needs to encompass two perspectives -
 - levels to cover the situation as is, and
 - levels that anticipate development, implementation and proof of effectiveness of specific, enhanced incident prevention and control measures – including emergency response cost.

Further, “appropriate” implies -

- sufficiently large commitments in terms of financial impact, to motivate (on the part of railroads and shippers) a rigorous, consistent and sustainable approach to improved incident prevention and control, such as Safety Management Systems⁵, linked to full implementation of specific risk reduction technologies such as Positive Train Control, enhanced protection of rail tank cars carrying hazardous materials (beyond the current recommendations/requirements of the FRA, which have been proven to be inadequate), and more accurate classification of fuels, in terms of flammability, volatility, etc.;
 - protective of taxpayers’ financial interests;
 - linked to reductions in the number of unit trains containing crude oil and ethanol, and their routing around major population centers;
 - implementation of more robust anti-terrorism measures; and
 - development of scientifically – based studies of maximum foreseeable loss, associated with catastrophic events involving hazardous material incidents.
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- **Policy or market changes that could perspective on what is adequate level of insurance and liability coverage:** If, as the US did with respect to the nuclear power industry – with the Price Anderson Act – created a fund to respond to catastrophic incidents, with linkages to improved incident prevention measures, this time applied to the rail industry, the nation would be better prepared to both prevent disasters, and respond to them, responsibly.⁶
 - **Anticipated changes in the future:** The prospect for change will be conditioned by the likelihood of a cooperative (vs. antagonistic) approach with respect to the US Congress’ ability to work together to accomplish worthy goals. At this time, unfortunately the prospect seems remote.

3. Drivers of the current coverage limits for hazardous materials transportation liability insurance: The drivers include risk tolerance of insurance carriers and reinsurers, uncertainty as to upper bounds of losses, and gaps in information on the frequency of both large losses and those which (absent good luck) have the potential to be catastrophic. Inadequacies in FRA data reporting and analysis tools contribute to the environment of secrecy that surrounds rail liability issues.

- **Policy or market changes that could enable the availability of higher coverage limits?** See #2 above.
- **Future changes:** If improvements in hazard prevention and control are not expedited, additional disasters will result in horror shows that will cause public rage and “break the bank” liabilities to (finally) force lawmakers and regulators to do the work that they have (to date) failed, miserably, to do.

4. As hazardous materials transportation dangerous goods transported by rail is a cross-border enterprise, how, if at all, do foreign requirements related to insurance and liability coverage impact the level, structure and type of insurance and liability coverage held domestically: Under the Safe and Accountable Rail Act, Canada has enacted legislation that protects taxpayers to some extent from covering the costs of a major rail disaster. Minimum levels of liability insurance are required, based on the type and volume of dangerous goods transported.⁷

Insurance and Liability Alternatives

5. Data relating to, any previous or current initiatives for sharing the cost of insurance and/or legal liability for hazardous material by rail incidents between shipper and carrier:

Our perception is that the railroads' position has been the definition of opaque, to date, on this subject. Further, relationships between railroads, shippers and intervening freight brokers muddy the water with respect to which entities are ultimately responsible for disaster related costs.

6. Data relating to, any other legislative, policy, or voluntary approaches from other industries that may be applicable to liability and insurance related to hazardous materials transportation by rail (e.g., potential economic, safety, and environmental considerations related to these alternative approaches):

Compliance with IEC 61508⁸ by railroads is an issue that needs to be further explored and strengthened.

7. Impose fees to fund secondary liability coverage and/or create liability capitations: In response to the Exxon Valdez oil disaster, the US Congress passed OPA 1990, which created an Oil Spill Liability Trust Fund that is designed to respond to similar disasters in the future.⁹ An approach like this, or the one used by the Federal Deposit Insurance Corporation, could both reduce risk by requiring additional incident prevention, as well as fund disaster recovery efforts.¹⁰

Other Information

8. Please refer to the following data sources to inform the Insurance and Liability Study:

- “Rail Transportation of Toxic Inhalation Hazards Policy Response to the Safety and Security Externality” by Lewis M. Branscomb, Mark Fagan, Philip Auerswald, Ryan N. Ellis, and Raphael Barcham HARVARD Kennedy School (2010)
<https://www.hks.harvard.edu/mrcbg/rpp/Working%20papers/Rail%20Transportation%20of%20TIH.pdf>
- “A New Era of Crude Oil Transports: Risks and Impacts in the Great Lakes Basin” by Susan Christopherson and Kushan Dave
CaRDI Reports, Cornell University (November 2014)
<https://cardi.cals.cornell.edu/sites/cardiacals.cornell.edu/files/shared/documents/CardiReports/A-New-Era-of-Crude-Oil-Transport.pdf>
- “Crude Oil Transport: Risks and Impacts”
Great Lakes Commission des Grand Lacs (February 20, 2015)
<http://glc.org/files/projects/oil/GLC-Oil-Report-IssueBrief3-20150220.pdf>
- “Derailment risks and liability issues expand as oil shipments boom – High-profile accidents raise safety, liability issues for shippers, railroads”
by Judy Greenwald
Business Insurance (March 2, 2014)
http://www.businessinsurance.com/article/20140302/NEWS06/303029991/derailment-risks-and-liability-issues-expand-as-oil-shipments-boom?X-IgnoreUserAgent=1#full_story

9. Other considerations related to liability and the rail transport of hazardous materials to be considered but not addressed in the proposed scope of the Study:

- The internalization of profits and externalization of liabilities connected with the transportation of bulk shipments of crude oil, ethanol and other hazardous materials must be addressed, as a matter of justice, and as a tool that will incentivize additional loss prevention and control actions.
- Environmental justice aspects ought to be addressed (i.e., poorer, more ethnically diverse segments of the population are often represented in areas near rail yards and rail lines that carry hazardous materials).

FOOTNOTES:

¹ <http://stand.ngpvanhost.com/blog/oil-train-insurance-washington-state-and-billion-dollar-disaster>

² <http://www.timesunion.com/tuplus-business/article/Who-pays-if-a-crude-oil-train-crashes-No-6238612.php>

³ <http://www.insurancejournal.com/news/east/2016/04/27/406877.htm>

⁴ <http://www.carriermanagement.com/news/2014/10/09/130169.htm>

⁵ <http://www.nts.gov/safety/mwl/Pages/mwl-3.aspx>

⁶ https://en.wikipedia.org/wiki/Price%E2%80%93Anderson_Nuclear_Industries_Indemnity_Act

⁷ <https://www.tc.gc.ca/eng/mediaroom/infosheets-railway-safety-7683.html> and <http://business.financialpost.com/news/transportation/shipping-oil-by-rail-in-canada-is-about-to-get-more-expensive>

⁸ <http://www.iec.ch/functionalsafety/explained/>

⁹ <https://www.epa.gov/laws-regulations/summary-oil-pollution-act>

¹⁰ <https://www.fdic.gov/deposit/>

Hazardous Materials: FAST Act Insurance and Liability Study PHMSA Notice and Request for Comments

Request for Comments: As part of this study, PHMSA is conducting a review of existing data and literature with regard to current insurance liability levels and structure for rail carriers transporting hazardous materials. This review examines publically available insurance and liability data, including information released by the rail carriers, information released by industry trade associations, data and reports regarding the insurance industry, previous academic, government, or industry studies, and other public sources.

Given the large scope of this study, PHMSA is seeking public comment. Specifically, in an effort to provide an opportunity for stakeholder input on the study and potential sources of data and literature, PHMSA is issuing this notice requesting comment on insurance and liability coverage for rail carriers transporting hazardous materials. PHMSA is requesting input that would inform the study, as well as any available insurance and liability literature and data that may be relevant to this topic.

In addition, PHMSA is seeking input and data related to the following specific questions.

Level and Structure of Insurance and Liability Coverage

1. Please comment on, or provide data relating to, the current level, structure, and type of liability insurance coverage (including self-insurance and retentions) available for hazardous materials transportation by rail.

Specifically, please address the following:

- Cost and scope of coverage
 - State and Federal Requirements
 - Changes in the cost or availability of liability insurance
 - Issues unique to your industry, commodity, and/or entity size
2. Are the current levels of liability insurance coverage for hazardous materials transportation by rail appropriate?
- If not, what would be considered an appropriate level?
 - Are there policy or market changes that could alter your perspective on what is adequate?
 - How do you anticipate this changing in the future?
3. What are the drivers of the current coverage limits for hazardous materials transportation liability insurance?
- Are there policy or market changes that could enable the availability of higher coverage limits?
 - How do you anticipate this changing in the future?
4. As hazardous materials transportation by rail is a cross-border enterprise, how, if at all, do foreign requirements related to insurance and liability coverage impact the level, structure and type of insurance and liability coverage held domestically?

Insurance and Liability Alternatives

5. Please comment on, or provide data relating to, any previous or current initiatives for sharing the cost of insurance and/or legal liability for hazardous material by rail incidents between shipper and carrier.

6. Please comment on, or provide data relating to, any other legislative, policy, or voluntary approaches from other industries that may be applicable to liability and insurance related to hazardous materials transportation by rail. To

the extent possible, please comment on any potential economic, safety, and environmental considerations related to these alternative approaches.

7. Other industries and foreign governments have implemented programs that impose fees to fund secondary liability coverage and/or create liability caps. Is this a feasible alternative for hazardous materials transportation by rail?

Other Information

8. Please provide any potential studies and data sources that may inform this study.

9. Commenters are invited to address any other considerations related to liability and the rail transport of hazardous materials not addressed above.