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Citizens Acting for Rail Safety • Delaware Riverkeeper Network • Friends of Grays Harbor
Friends of the Earth • James River Association • Lake Pend Oreille Waterkeeper
LEAD Agency • Milwaukee Riverkeeper • Minnesota 350 • National Wildlife Federation
NRDC • NY/NJ Baykeeper • Raritan RIVERKEEPER • San Francisco Baykeeper
Santa Lucia Sierra Club • Sierra Club • Snake River Waterkeeper
Three Rivers Waterkeeper • Waterkeeper Alliance • Waterkeepers Chesapeake**

September 23, 2015

Hon. Anthony Foxx
Secretary of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

**RE: Immediate Need for Final Regulations on Oil Spill Response Plans for Crude Oil,
Ethanol, and Hazardous Liquids Transport by Rail**

Dear Secretary Foxx,

On behalf of the undersigned organizations, their members, and the public at large, we write today to ask you to expedite review of the proposed rule on the Oil Spill Response Plan for High Hazard Flammable Trains. On a daily basis around the nation, communities, the public, and the environment are put at risk by hazardous material trains operating without comprehensive, locally applicable, spill response plans. A final rule that requires this level of planning, confirmation of contracts for personnel and equipment, pre-staged assets, and oversight by the Federal Railroad Administration, should be issued as quickly as possible.

Recognizing that the issuance of such a final rule will take time under the most expedited scenario available, we strongly urge that the Pipeline and Hazardous Materials Safety Administration (PHMSA) and Department of Transportation (DOT) issue an emergency order immediately requiring comprehensive spill response plans for all trains hauling more than 600 barrels of crude oil. In this vein, we would like to draw your attention to a September 30, 2014 petition for an emergency order requiring comprehensive oil spill response plans for high hazard flammable trains (HHFTs) which was submitted to PHMSA by the Center for Biological Diversity. As laid out below, the prospect of any further delay on this matter places communities across the country at unacceptable risk and threatens sensitive environments and natural resources that we depend upon daily. We therefore urge PHMSA to act on this petition, and immediately require such plans for oil trains.

On September 30, 2014, almost a full year ago, PHMSA comment period closed on an Advance Notice of Proposed Rulemaking regarding “Oil Spill Response Plans for High-Hazard Flammable Trains.” PHMSA received over 200 comments to that notice (many by the below-listed organizations), and has ostensibly been reviewing the rule ever since.

In a series of rulemaking updates issued by the Department of Transportation (DOT) the timeframe for this rule to move through the rest of the rulemaking process keeps getting delayed. In the most recent update, the public will be given a proposed final rule (for another round of comments) on December 29th, 2015, with a comment period that ends in February 2016. At that point, we expect DOT to face continuing delays prior to issuing a final, enforceable rule due to the need to review comments and the potential for future litigation in relation to the final rule.

Thus, we could be years away from final agency action on oil spill response planning. Any delay continues to place an unacceptable burden on the environment, public health and safety, and the economy.

Under the Oil Pollution Act (OPA) of 1990, Congress directed federal agencies to issue regulations requiring owners and operators of railroads (and railcars) to “develop, submit, update and in some cases obtain approval of spill response plans.”¹ Oil spill response plans (OSRPs), according to the law, shall:

- be consistent with Area Contingency Plans;
- require immediate communications between “Qualified Individuals” (i.e., specific railroad contacts), Federal officials, and response agents;
- identify (and ensure by contract the availability of) private personnel and equipment necessary to remove to the maximum extent practicable a worst case discharge (including a discharge resulting from fire or explosion);
- mitigate or prevent substantial risks threatening such a discharge;
- describe the training, equipment testing, periodic unannounced drills, and response actions of persons on the train, to be carried out to both ensure train safety and to mitigate or prevent discharges;
- be updated periodically; and
- be resubmitted for approval upon each significant change.²

In 1996, PHMSA decided that only railcars with capacities larger than 1,000 barrels would have to develop response plans that met what federal law required.³ For railcars with smaller capacity, PHMSA created a separate, new class of response plans called “basic” plans which fail to meet any of the above requirements laid out by Congress under the OPA.

Unfortunately, this decision created a standard dangerously out of touch with reality. According to PHMSA itself, “the number of railroads required to have a comprehensive OSRP is ... *possibly non-existent*, because a very limited number of rail tank cars in use” have capacities above 1,000 barrels.⁴

¹ 79 F.R., at 45080, citing 33 U.S.C. § 1321(j)(5), 101.

² 33 U.S.C. § 1321(j)(5)(D).

³ See, 59 F.R. 34099 (July 1, 1994).

⁴ 79 F.R., at 45081 (emphasis added).

In short, “[t]ank cars of this size are not used to transport oil;” therefore, “railroads do not file” comprehensive OSRPs.⁵ Without response plans that meet federal standards, there is no required consistency with Area or National Contingency Plans, there is no obligation to show – by contract – that response capacity is in place and ready to go, there are no training or drill confirmation requirements, and there is no oversight by federal agencies.⁶

In its January 2014 safety recommendations, the National Transportation Safety Board stated that the current regulatory *status quo* does not comply with the law:

“[A]s currently written, the regulation circumvents the need for railroads to comply with spill response planning mandates of the federal Clean Water Act ... [the] regulation is rendered ineffective because of its lack of applicability to any real-world transportation scenario. By limiting the comprehensive planning threshold for a single tank size that is *greater than any currently in use*, spill-planning regulations do not take into account the potential of a derailment of large numbers of 30,000-gallon tank cars [(714 barrels)], such as in Lac-Mégantic where 60 tank cars together released about 1.6 million gallons [(38,095 barrels)] of crude oil.”⁷

Today, despite PHMSA's 1,000 barrel regulatory trigger, trains carrying tens of thousands of barrels of oil cross the nation on a daily basis with no applicable comprehensive response plans in place should they derail, rupture, and spill. Even though moving over a million gallons of oil by rail poses – in the real world – a disconcerting, clear, and significant threat to public safety, welfare and the environment, under PHMSA regulations there is no requirement for comprehensive oil spill response planning.

As many organizations noted in comments on PHMSA’s advanced notice of proposed rulemaking, three major adjustments should be made to this program:

- First, PHMSA should require comprehensive spill response plans for any train carrying oil; whether in one car, twenty cars, or a hundred cars, crude-by-rail is *inherently dangerous*, and the agency must require railroads to adequately prepare for any size spill.
- Second, because the law requiring response plans does not differentiate between types of oil, comprehensive spill response plans must be prepared regardless of the type of oil being transported.⁸
- Third, spill response plans should be regionally-appropriate; there should be no need to wait for spill response assets to arrive on the scene hours after an accident, or to not have plans that account for local conditions.

⁵ 79 F.R., at 45027. Without these comprehensive plans, PHMSA warns that it “does not have assurance that railroads have taken steps to plan for response needs and identified and coordinated with the appropriate responders.” Oil and Gas Transportation, Government Accountability Office Report GAO-14-667, at 45.

⁶ 79 F.R., at 45028 (Table 9).

⁷ National Transportation Safety Board Safety Recommendations R-14-4 – R-12-6, at 9. Available at <http://www.nts.gov/doclib/reclatters/2014/R-14-004-006.pdf> (emphasis added).

⁸ Spill response plans should be required for any oil transport quantity; separate and above this minimum, response plans should take into account the differences in oil type as they relate to risk and remediation – for example, heavy, sinking oil spills would need different plans, actions, and timelines than shale oil spills.

The bottom line is that PHMSA must adjust its 1,000-barrel threshold as quickly as possible if it is to protect the public and comply with the law. Each day that passes without fixing this loophole puts the public in extreme, preventable, danger. This unfair risk burdens not only the communities in harm's way, but the local responders that must – in the event of a derailment – step in. According to PHMSA,

“Because there is no mandate for railroads to develop comprehensive plans or ensure the availability of necessary response resources, carriers have effectively placed the burden of remediating the environmental consequences of an accident on local communities along their routes.”⁹

Overall, the NTSB has called for, and PHMSA has acknowledged the need for, OPA-required response plans that apply broadly to crude oil moved by rail. PHMSA must take action now to require the development of region-specific, comprehensive, transparent, accessible, OSRPs for all trains carrying any amount of any type of crude oil.

Further delay in the final implementation of spill response reforms would needlessly endanger the public and the environment and is unacceptable. The process – which will not result in even a closed comment period for another 6 months – has gone on too long.

* * *

The undersigned organizations, on behalf of their members, the public, and the environment, ask that you expedite the review and finalization of a rule that requires comprehensive spill response plans for each and every train hauling crude oil – of any type, in any quantity. In the meantime, PHMSA must move to issue an emergency order that closes the egregious gap left by current regulations and require all railroads hauling crude oil to prepare and submit comprehensive spill response plans. The law is clear, the need is real, and the time is long-overdue for these changes to be made.

Sincerely,

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⁹ 79 F.R., at 45082.

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