



September 29, 2014

The Honorable Anthony Foxx
Secretary
U.S. Department of Transportation
1200 New Jersey Avenue S.E.
Washington, D.C. 20590

Re: Comments – Docket No. PHSA-2014-015 (HM-251B)

Dear Secretary Foxx:

In recent years, the number of trains transporting crude oil through New York has increased significantly, resulting in increased risks of spills, threats to public health and safety, and potential damage to the environment. These risks have been dramatically demonstrated by derailments, spills, and fires in Lac-Mégantic, Canada; North Dakota; Pennsylvania; Alabama; Virginia and elsewhere. Four crude oil train car derailments have occurred in New York State in the last year, though fortunately none resulted in spills.

On January 28, 2014, Governor Andrew M. Cuomo issued Executive Order 125 (EO 125), directing a comprehensive evaluation of New York's readiness to prevent and respond to incidents involving the transportation, storage and transshipment of crude oil. In response to EO 125, a report, "Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity," was created as the result of a coordinated review conducted by five state agencies. USDOT reviewed the report containing ten critical federal recommendations including a recommendation to update regulations to require route-specific contingency plans for trains carrying crude oil.

Governor Cuomo remains committed to the partnership fostered between New York State and relevant federal agencies on these issues. Enhancing industry practices and strengthening regulations are critical to ensuring public health and safety and protection of natural resources. New York State urges USDOT to expeditiously promulgate regulations to safeguard the safety of those living and working along crude oil transportation corridors.

New York State respectfully submits the following comments on the Advanced Notice of Proposed Rule Making (ANPRM) for Hazardous Materials: Oil Spill Response Plans (OSRP) for High-Hazard Flammable Trains [Docket No. PHSA-2014-015 (HM-251B)]. The comments are presented as responses to the specific questions posed within the ANPRM.

Comments on the specific questions posed on page 45082:

1. *When considering appropriate thresholds for comprehensive OSRPs, which of the following thresholds would be most appropriate and provide the greatest potential for increased safety? What thresholds would be most cost-effective?*
 - a. 1,000,000 gallons or more of crude oil per train consist;
 - b. An HHFT of 20 or more carloads of crude oil per train consist;
 - c. 42,000 gallons of crude oil per train consist; or
 - d. Another threshold.

New York State recommends Option C: 42,000 gallons of crude oil per train consist. This would maintain consistency with the existing threshold for comprehensive Oil Spill Response Plans (OSRP) while recognizing the hazard posed by the derailment of even a small number of crude oil cars as evidenced by the derailment and subsequent fire in Lynchburg, Virginia in April, 2014. Comprehensive OSRPs for the railroads should be based on the same requirements imposed upon the owners and operators of vessels as dictated by the Federal Water Pollution Control Act as amended by the Oil Pollution Act of 1990 (OPA 90).

2. *In exploring the applicability of comprehensive OSRP requirements to trains carrying large volumes of crude oil, are the requirements of comprehensive OSRPs clear enough for railroads and shippers to understand what would be required of them? If not, what greater specificity should be added?*

The use of comprehensive OSRPs is not a new concept. As stated in the ANPRM, the OSRPs are currently mandated by OPA 90. Facility Response Plans are required by USEPA for facilities which meet a quantity threshold and operators are required to submit plans and have preset agreements for response to releases of hazardous materials. Similar requirements apply to vessels (ships, barges, tankers, etc.) that meet a quantity threshold. The ability to complete these plans is widely held by personnel in industry, government, and the consulting arena, and we strongly urge PHSMA to extend this existing practice to rail transport. New York State believes the requirements of OSRPs are clear enough for railroads and shippers to understand what is required of them.

3. *In exploring the applicability of comprehensive OSRP requirements to trains carrying large volumes of crude oil, are there elements that should be added, removed, or modified from the comprehensive OSRP requirements? Please consider the regulations covering other modes of transporting crude oil (such as pipelines), and the relevant differences between modes of operation, in your response.*

One significant change that New York State recommends has to do with the anticipated environmental impacts that comprehensive OSRPs submitted by railroads must address. The requirement that such a plan "identifies and ensures by contract or other means the availability of private personnel to remove, to the extent practicable, a worst case discharge (including that resulting from fire or explosion) and to mitigate or prevent a substantial threat of such a discharge" must address the impacts of discharges upon land and groundwater, as well as those that impact surface waters.

Additionally, OSRPs should clearly identify the roles and responsibilities of a shipper's own personnel and supporting contractors, including how they would integrate into the local (public agency) incident management system, as well as what role and responsibilities the shipper anticipates or expects local, county/regional and State agencies to play, prior to any incident. This would allow for increased awareness of the responsibilities of all parties and provide for an increased ability to meet those responsibilities or identify gaps which need to be addressed.



New York State emphasizes the continued need for regular exercise of these OSRPs, including the need for unannounced drills, in order to ensure that these plans remain current and widely shared among the local and regional emergency responders. The plans should be updated periodically (every three years) and reviewed when updated.

4. *What costs might be incurred in developing comprehensive OSRPs and submitting them to FRA for approval? To the extent possible, please provide detailed estimates.*

New York State calls on the federal government to set the standards for OSRPs and ascertain cost estimates to develop the plans based on those standards.

5. *What costs might be incurred to procure or contract for resources to be present to remove discharges? In these estimates, what are your assumptions about the placement of equipment along the track, types of equipment, and maximum time to contain a worst-case discharge?*

New York State stresses the importance of using risk analysis to determine the areas of highest vulnerability or most areas that have impediments to access for first responders. New York State acknowledges that costs are associated with response and recovery but at this time cannot estimate the cost without a risk analysis. Additionally, a risk analysis is necessary to determine the best allocation of resources along shipping corridors of crude oil. It is suggested that the same 27 factors used for the rail re-routing analysis be used for such a risk analysis exercise. Those factors and their respective "weights" in the analysis should be transparent and regularly reviewed and updated for relevancy. Further, the federal government needs to set the standards for response time for private partners according to the risk analysis to be sure that sufficient resources can be marshaled. Local government first responders will likely be the first on the scene of an incident and the railroads and industry must be prepared to assist with extraordinary measures in response and recovery.

As an example of the costs associated with response, New York State has provided the estimates for foam concentrate, a key resource. The cost for 600 or more gallons of Class B foam concentrate estimated as necessary for fire control and post-fire vapor suppression for an incident involving a single DOT-111 rail car carrying crude oil, pursuant to the flow rates identified in NFPA 11, exceeds \$23,000 at current New York State Contract pricing. Combined with the costs of the apparatus needed to apply "finished" foam onto a fire or spill, the estimated cost can total \$40,000 or more per unit. The challenges of having sufficient equipment available within the response time needed to protect the public and the environment are great. A risk analysis would help New York State determine the appropriate allocation of those resources. The federal government should identify resources which could be available to states, local governments and first responders for the purchase of equipment and materials.

6. *What costs might be incurred to conduct training, drills, and equipment testing? To the extent possible, please provide detailed estimates.*

To be most effective, training, drills, and exercises should include each agency that would respond to an actual incident to an incident in a defined area to allow verification of performance, increase interoperability and identify any gaps in coverage or capability. Costs associated with doing so include the costs of providing staffing (backfills) for career fire departments and other response agencies and consumables required for effective and realistic training such as training foam. Staffing backfill costs will vary by jurisdiction but can be significant, and if not addressed, limit participation of critical response agencies with a corresponding negative impact upon effectiveness.

7. *It is assumed that most railroads and shippers currently have basic OSRPs in place. What, if any, aspects beyond the basic plan requirements do these plans voluntarily address? To what extent do current plans meet the comprehensive OSRP requirements, including procurement or contracting for resources to be present to respond to discharges?*

To date, the railroads and associated shippers have not shared their OSRPs with New York State as they currently are not required to under federal law or regulations.

8. *To what extent should recent commitments to the Secretary of Transportation's "Call to Action," and other voluntary industry actions, inform the exploration of additional planning requirements for trains carrying large volumes of crude oil? For example, how should voluntary emergency response equipment inventories and hazardous material training efforts be factored into the exploration of additional planning requirements? Should PHMSA require that resources be procured to respond on a per route basis, or at the state/county/city/etc. level? What is the rationale for your response?*

While recognizing the existing efforts of the AAR and the individual railroads to provide emergency response training and pre-position response equipment inventories and supplies, to be most effective these efforts must further integrate and be coordinated with local, county/regional, state and federal planning, preparedness and response efforts. This expanded effort must be formalized and reflected in OSRPs. The adoption of formal regulations requiring these measures should ensure a level playing field across the United States for all companies engaged in this industry. It would also ensure that all areas of the country have equal access to assets.

Instead of requiring that resources be procured on a route or locality basis, New York State believes that both physical and human resources should be available to respond within a set timeframe based on risk. Areas of high risk (i.e., frequently traveled routes, locations near sensitive resources, etc.) need to be identified and should get high priority for resource allocation. Analysis of any gap in response coverage should also merit special action by the railroads and shippers.

An important aspect of initial response is the ability of local response agencies to protect themselves and their response area. Even a 2 to 3 hour privately supported response time leaves a gap to be filled by local responders. These local resources should be provided training and equipment to cover this time period. Funding by the railroads, shippers, or the federal government should be provided to local agencies along the routes of the crude oil trains so they have the proper training and response posture.

A good example is the Traffic Incident Management (TIM) model promoted by USDOT. Here in New York State, NYSDOT, State Police, the Division of Homeland Security and Emergency Services and local governments have a strong TIM with participation by agency heads, executive staff, and front line staff.

9. *Should PHMSA require that the basic and/or the comprehensive OSRPs be provided to State Emergency Response Commissions (SERCs), Tribal Emergency Response Commissions (TERCs), Fusion Centers, or other entities designated by each state, and/or made available to the public? Should other federal agencies with responsibilities for emergency response under the National Contingency Plan (e.g., U.S. Coast Guard, EPA) also review and comment on the comprehensive OSRP with PHMSA?*



The OSRP should be made available to SERCs, and other entities charged with emergency planning in the states. The information contained in these plans can be distributed to the local and regional emergency planning and response agencies using the same conditions and agreements for security currently in use to share similar plans developed pursuant to OPA 90. Release of the non-security sensitive portions of these plans to the public can also be accommodated using the policies already established for the Area Contingency Plans established by OPA 90. PHMSA can also benefit from the experience of the US Coast Guard, USEPA, and their state partners for the review of these proposed OSRPs. The policies already in place for the review and approval of the Contingency Plans required by OPA 90 could be applied to the OSRPs.

We greatly appreciate your consideration of these comments as well as your continued efforts to work with New York State and our other federal partners in striving to improve the safety of crude oil transportation by rail.

Sincerely,

A handwritten signature in black ink that reads "Joan McDonald".

Joan M. McDonald, Commissioner
New York State Department of Transportation

A handwritten signature in black ink that reads "Joseph J. Martens".

Joseph J. Martens, Commissioner
New York State Department of Environmental Conservation

A handwritten signature in black ink that reads "Jerome M. Hauer".

Jerome M. Hauer, Ph.D., MHS, Commissioner
New York State Division of Homeland Security and Emergency Services