



September 9, 2016

Robert Benedict
Program Development Division
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE.
Washington, DC 20590-0001

Submitted via Regulations.gov

Re: Hazardous Materials: FAST Act Insurance and Liability Study; Request for Comments (Docket No. PHMSA-2016-0074)

Dear Mr. Benedict:

Section 7310 of the FAST Act requires the Secretary of Transportation to initiate a study of the levels and structure of insurance for railroad carriers transporting hazardous materials. The Pipeline and Hazardous Materials Safety Administration (PHMSA) initiated this insurance study in March 2016 and is on schedule to complete it by April 2017. In a notice posted to the Federal Register on July 26, 2016 (81 FR 48885), comments on this study were solicited from the public. On behalf of Riverkeeper and its members, please accept the following comments.

At the outset, we note the observed realities of the inherent risks associated with the transport of hazardous materials by rail. The disaster in Lac Megantic led to 47 lives lost, dozens of children orphaned, an entire community devastated and several billions of dollars – and counting – of social, economic and environmental impacts. We have seen the real, human consequences of derailments across the nation, where drinking water intakes needed to be shut down and where ecological impacts have yet to be fully realized.

Looking toward the future, the risks are no less real. For example, hundreds of thousands of people depend on the Hudson River for drinking water; if a worst-case spill happened near those water intakes today, the public health impacts would be staggering. In New York Harbor, crude oil and other hazardous material trains travel through the heart of the third largest port in the nation, alongside one of the busiest airports in the country, and along rail routes so densely packed with people that millions live within potential blast zones. In short, this issue – the liability limits and insurance needs of the industry – is not just about the cost of risk measured

against the cost of insurance. There is a very real, very human cost to the shipment of hazardous materials by rail that has never been analyzed nationally; we ask that PHMSA comprehensively and carefully review the issue of insurance and liability in this sector.

Scope of Agency Review

- **Defining the Existing System.** First and foremost, we ask that PHMSA undertake a thorough examination of the *status quo*. The agency should begin by summarizing all types of the losses that may result from hazardous material rail incidents (including but not limited to loss of life, environmental damages, infrastructure and equipment damage, or secondary business operation losses for commercial and industrial entities affected by a derailment or accident). Next, the agency should detail all forms of financial restitution available for these potential losses (including insurance claims, civil litigation, oil spill response funds, and government grants or aid programs). To properly inform this study, PHMSA must have a complete picture of what is at risk, and a complete database of response, remediation, and restitution funding sources.
- **Private and Public Expense.** Next, we urge PHMSA to catalog when, and to what extent, public funds are or may be used in the aftermath of hazardous material incidents. Oil spill response costs, for example, may be covered initially by public oil spill funds. A full accounting of state and federal funds – for post-incident response or pre-incident subsidized insurance – must be included in this study.
- **Making up the Difference.** If the study ultimately recommends either minimum levels of insurance coverage lower than worst-case scenarios, or proposes limiting liability, PHMSA must provide a detailed explanation of where injured entities can turn to make up any difference between the damages of an incident and the railroad's recoverable costs. PHMSA's study should not consider creation of such a shortfall, which would leave taxpayers, communities, states, and the federal government responsible for any portion of a hazardous material rail incident.

Liability & Insurance Coverage, Costs and Damages

- **Scope of Coverage.** Because incidents or spills of hazardous materials transported by rail have the potential to dramatically affect a wide range of ecosystems, can devastate communities from the most rural to the most densely urban, and have already led to the loss of life, PHMSA must ensure that railroads have insurance policy options that do not exclude any damages. Losses and impacts can also include injuries caused directly or indirectly from rail disasters (including injuries to responders), loss of include, costs of continuing care for injured persons, property damage (including loss of access damage for properties rendered inaccessible after derailments), business and mission interruption impacts, costs incurred by public agencies (for response, restoration, and remediation), and long-term costs for environmental and public health monitoring. Together, loss of life, economic impacts, environmental damage, and any of these other impacts resulting from hazardous material rail disasters must be part of required coverage, and the industry must be held fully responsible.

- **Scope of Costs and Damages.** Regarding the scope of costs and damages that may result from rail incidents involving hazardous materials, PHMSA must include three key elements of its review. First, the agency should consult and include previous estimates of risk included in recent rulemakings regarding crude oil transport by rail. For example, some of PHMSA’s recent calculations estimate that disasters within major cities could cost up to \$12.6 billion.¹ Second, PHMSA should include in this report case studies of the costs and damages which have resulted from actual, recent railroad incidents. With dozens of such examples having occurred in the past few years, PHMSA and agencies like the Federal Railroad Administration or the NTSB have enough information to describe in full detail what costs and damages were for low-, medium-, and worst-case disasters. Third, PHMSA must include Canadian incidents and disasters in its review. There is no basis in law or reason to exclude such incidents; examples of spills of different types of product releases and large-scale disasters (i.e., Lac Megantic) are all relevant to the review at hand. Only by incorporating all available data, reviewing real-world case studies, and incorporating information on all North American hazardous material rail incidents can PHMSA develop a full and complete assessment of costs and damages.

Negligence and Risk

- **Defining Negligence.** PHMSA’s study should include a robust discussion of railroad industry safety, maintenance, enforcement, inspection, and oversight programs to determine how best to define “negligence” for the purposes of liability and insurance governance. The agency should consult with NTSB and include in the final report specific examples from recent derailments and hazardous material releases. Specifically, PHMSA look at systems where the railroads themselves self-govern and self-audit (e.g., railroad bridge integrity, rail inspection plans, and “basic” oil spill response plans). The industry should not be allowed to preemptively bootstrap its own defense to negligence. Because railroads are largely left to govern themselves, to certify their own infrastructure as safe, and to judge their own response protocols sufficient, PHMSA must fully discuss and define where negligence begins and ends for hazardous material rail incidents.
- **Bearing Risks.** 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,” given that any disaster could force a railroad carrier into bankruptcy.² During recent rulemakings on crude oil and hazardous material transport issues, railroads (and many industry observers) have noted that some of the risk can be attributed to the entities offering those materials for transport. In the case of crude oil shipment, the offerors often control tank car vapor pressure, can choose which type of tank car to use, and can be negligent in tank car maintenance. These risks can also be attributed to tank car leasing

¹ See DOT/PHMSA Final Regulatory Impact Analysis (RIA) Hazardous Materials: Enhanced Tank Car Standards, available at <https://www.regulations.gov/document?D=PHMSA-2012-0082-3442>.

² See “Who pays if a crude oil train crashes?” *Albany Times-Union*, available at <http://www.timesunion.com/tuplus-business/article/Who-pays-if-a-crude-oil-train-crashes-No-6238612.php>.

companies or even third party maintenance companies. In short, a host of entities can be responsible (through negligence or not) for rail disasters. PHMSA must examine whether it is appropriate here to distribute risk across multiple sectors, and how insurance and liability would work for non-railroad entities.

State and Local Considerations

- **Locally Tailored Planning.** Given that railroads are shipping hazardous materials throughout the nation – through New York City, above mid-western drinking water systems, and across the Rocky Mountains – the agency should examine how these different profiles change risk estimates. At the local level, each segment of most railroad systems can present different risks. PHMSA should include in this report consideration of local insurance and liability diversity.
- **Surveying State and Local Requirements.** There are – to our knowledge – no current requirements by federal agencies for any liability coverage minimums. The State of Washington has enacted requirements that any major rail company operating in Washington report whether they have sufficient financial resources or insurance to cover the costs of a derailment, and a few more states around the nation are considering legislative and regulatory actions in this field. In this report, PHMSA should include a survey of existing and proposed state and local insurance and liability initiatives.

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Given the catastrophic potential inherent in the shipment of hazardous materials by rail – through farms and cities, along and above rivers and coasts, and down the heart of many communities around the nation – PHMSA should ensure that this report is as complete and comprehensive a look as possible. The agency must include a full accounting of the types of risks this industry poses, the sources of response, remediation, and restoration funding available in the event of an incident, and the efforts already underway across North America to address insurance gaps and liability coverage. Finally, the agency must tailor its review to the particulars of the rail industry, where the industry largely self-governs, where each crossing or bridge can spell disaster, and where the railroads are under an obligation to accept materials for transport in packages over which they have little control.

Thank you very much for this opportunity to comment on the proposed study. We look forward to reviewing the final work product.

Sincerely,



John Parker
Legal Director
Riverkeeper, Inc.