Riverkeeper • Center for Biological Diversity • Earthjustice • Scenic Hudson • Stand.earth
Sierra Club • National Wildlife Federation • Waterkeeper Alliance
Lake Champlain Committee • Vermont Natural Resources Council • NY/NJ Baykeeper
Hackensack Riverkeeper • Milwaukee Riverkeeper • North Sound Baykeeper
Columbia Riverkeeper • Little River Waterkeeper • Black Warrior Riverkeeper
Lake Pend Oreille Waterkeeper • Spokane Riverkeeper • San Francisco Baykeeper
Youghiogheny Riverkeeper • Snake River Waterkeeper • Puget Soundkeeper Alliance
Altamaha Riverkeeper • Communities for a Better Environment

September 27, 2016

Victoria Lehman
Standards and Rulemaking Division
Pipeline and Hazardous Materials Safety Administration
U.S. Department of Transportation
1200 New Jersey Avenue SE.
Washington, DC 20590

Re: Public Comments on Proposed Rules for Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains.

Docket No. PHMSA-2014-0105 (HM-251B)

Dear Ms. Lehman,

On behalf of Riverkeeper, Center for Biological Diversity, Sierra Club, Earthjustice, the Waterkeeper Alliance, Scenic Hudson, and NY/NJ Baykeeper, as well as their members ("the commenters"), we submit the following comments on the Notice of Proposed Rulemaking issued by the Pipeline and Hazardous Materials Safety Administration (PHMSA) July 29, 2016 on Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains (HHFTs) (Docket PHMSA-2014-0105 (HM-251B)).[1]

For the reasons outlined in detail in these comments, we strongly support PHMSA's proposal to require comprehensive oil spill response plans (OSRPs) for railroads around the nation transporting oil (and oil products). However, PHMSA's proposal fails to fully satisfy the requirements of the Clean Water Act (CWA), and must be broadened and strengthened in order to ensure that railroads can and will respond to worst-case discharges to the maximum extent practicable.

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-Mégantic 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 damages. We have seen the real, human

[1] See 81 Fed. Reg. 50067 (July 29, 2016).

consequences of derailments across the nation, including contaminated drinking water intakes shut down and ecological impacts that have yet to be fully realized.

Looking toward the future, the risks are no less real. For example, a worst-case spill near Hudson River drinking water intakes today would result in staggering public health impacts for the hundreds of thousands of people that depend on them. 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 densely packed with millions of people living within potential blast zones.

Nationwide, these risks are compounded and cumulative, endangering tens of millions of people. This issue – preparing to respond to a worst-case discharge from trains to the maximum extent practicable – is not just about the cost of risk measured against the cost of oil spill response plan preparation. Indeed, PHMSA must take precaution and go further than the proposal would require.

There is a very real, very human cost to the shipment of these hazardous materials by rail that the federal government has never prioritized. By law, PHMSA has a mandate to provide for the safe transportation of hazardous materials.[2] PHMSA must also, in making any decisions regarding such transport, maintain safety as its top priority.[3] In our view, PHMSA's proposed oil spill response planning regulations fail to make sufficient progress in ensuring public, community and environmental safety. As such, we ask that PHMSA ensure that, for the simple question of safety preparation, act solely in the best interests of public welfare and environmental safety. Indeed, this request is consistent with federal law and PHMSA's own regulations.

We urge PHMSA to implement the vital, immediate changes discussed below, and, generally, we call on PHMSA to issue much more protective, transparent, and far-reaching regulations than those that are currently proposed.

I. SPILL RESPONSE PLANNING SCOPE & PREEMPTION UNDER THE OIL POLLUTION ACT OF 1990

In the wake of the Exxon-Valdez oil spill, Congress adopted the Oil Pollution Act of 1990 ("OPA"), a comprehensive oil spill liability, compensation, preparedness and response law. OPA makes responsible parties, including railroads, strictly liable "[n]otwithstanding any other provision or rule of law" for the costs of cleaning up an oil spill and for damages from a spill.[4] OPA also amended the Clean Water Act to establish several layers of oil spill response planning with federal contingency plans at the federal, regional and local levels and individual plans for facilities and vessels. Together, these plans govern emergency removal and oil spill cleanup activities.[5]

[2] 49 U.S.C. § 5103(b)(1).
[3] 49 U.S.C. § 108(b).
[4] 33 U.S.C. § 2702(a); *see also id.* § 1321(b)(3).
[5] *Id*. §§ 1321(d)(1) & (j)(1), (5).

A. The Final Rule Should Require Comprehensive Oil Spill Response Plans for All Trains Carrying Oil.

Current regulations under OPA require comprehensive written oil spill response plans ("OSRPs") only for "packages" (including rail cars) carrying more than 42,000 gallons of oil.[6] Because nearly all oil tank cars can only carry approximately 30,000 gallons of oil, the railroads are effectively exempt from preparing OSRPs, as PHMSA concedes in the notice of proposed rulemaking.[7] PHMSA previously acted illegally in exempting the railroads from their obligation to prepare OSRPs under OPA because OPA explicitly requires that owners or operators of "rolling stock" (rail cars) prepare comprehensive OSRPs.[8] The 42,000 gallon threshold, therefore, should be eliminated from the regulations.[9]

PHMSA now instead proposes to add an additional trigger for comprehensive OSRPs, namely when a train is carrying twenty or more loaded oil tank cars in a continuous block, or carrying thirty-five or more loaded oil tank cars in total.[10] In other words, PHMSA proposes to expand the comprehensive OSRP requirement under OPA to apply to high-hazard flammable trains ("HHFTs"). While this proposed expansion represents a laudable step forward (in that it recognizes the recklessness of the agency's previous OSRP regulations), it does not adequately protect the public from the risk of oil spills from rail cars.[11]

A derailment and spill and/or explosion from one single tank car carrying oil could substantially endanger public health and safety and the environment, especially if it occurs in an urban area near schools, hospitals and other community infrastructure or near a water source. This is not a new conclusion; as noted by PHMSA:

> EPA also requires Spill Prevention Control and Countermeasure (SPCC) plans under the CWA authority for onshore non-transportation related facilities with an aggregate aboveground oil storage capacity of more than 1,320 gallons of oil or completely buried storage capacity greater than 42,000 gallons and which have a reasonable expectation of an oil discharge to navigable waters or adjoining shorelines.[12]

The EPA's robust experience responding to and preparing for oil spills on, in, and adjacent to waterways led that agency to require substantial protections for the substantial risks associated

[6] 49 C.F.R. § 130.2.
[7] 81 Fed. Reg. 50,070.
[8] *See* 33 U.S.C. § 1321 (a)(10); *id*. (j)(5)(C)-(D).
[9] Note, further, PHMSA's acknowledgement that "EPA requires Facility Response Plans (FRPs) … for facilities with transfers of oil over water to or from vessels that have aggregate oil storage capacities of 42,000 gallons or more." 81 Fed. Reg. 50,075. Given that all recent HHFT derailments have resulted in releases into waterways and wetlands, PHMSA could have chosen to treat HHFTs as the EPA treats these facilities – by requiring comprehensive OSRPs where the aggregate capacity of any car, consist, or unit train is in excess of 42,000 gallons, but did not.
[10] 81 Fed. Reg. 50,071. Note also, "the proposed applicability in this NPRM generally aligns with the definition of a "High-Hazard Flammable Train" (HHFT) as published in the final rule, "Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains" ("HM-251")." 81 Fed. Reg. 50,090.
[11] "Because the typical rail tank car has a capacity around 30,000 gallons, few if any rail carriers are currently subject to the comprehensive OSRP plan requirements." 81 Fed. Reg. 50,075.
[12] 81 Fed. Reg. 50,075.

with facilities handling crude oil. Here, trains moving crude oil and petroleum products, as well as other hazardous materials, have aggregate capacities far exceeding the thresholds EPA set for triggering the need for SPCC plans.

More egregious, however, is PHMSA's failure to set a lower threshold. According to the rulemaking notice, PHMSA concluded "that a derailment involving two or fewer tank car punctures is less likely, *and therefore* not 'reasonably expected' to cause substantial harm to the environment."[13] For OSRP planning purposes, the question is not whether a release is likely, but whether a spill could substantially harm the environment. Here, PHMSA provides no evidence that a spill of two or fewer tank cars will not substantially harm the environment, and gave no persuasive rationale as to why relevant comments (asking for triggers to be one tank car, or 42,000 gallons, etc.) were dismissed. PHMSA's full discussion of this point was as follows:

> In opposition to an HHFT-like applicability, many commenters have argued that oil spills involving carloads below this threshold could cause considerable harm to the environment. On this point, PHMSA acknowledges that oil spills of a lesser amount can cause harm, but holds that trains carrying less than 20 tank cars of petroleum oil in a continuous block, or less than 35 of such tank cars dispersed throughout the train, are *effectively lower-risk train configurations*, and they cannot be reasonably expected to cause substantial harm. In other words, these trains may be capable of causing harm, but the harm they can cause is significantly less likely to qualify as substantial harm.[14]

The agency here equates the likelihood of oil being moved in small quantities (e.g., fewer than 20 cars per train) with the risk of substantial harm. This logical leap ignored a host of claims made by commenters on the substantial harm that even one tank car can inflict – from lives potentially lost (were a single tank car to explode within a small community) to shutting down drinking water intakes, destroying endangered species, or turning wetlands and aquatic habitat toxic. Moreover, this logical leap ignored the agency's own past conclusions – where even a single tank car carrying over 42,000 gallons could indeed lead to substantial harm.

To move from "substantial" concern over one tank car (with 42,000 gallons or more of oil) to only being concerned about 20 or more tank cars (with hundreds of thousands of gallons of oil) without any basis beyond the claim that trains carrying a small number of tank cars are less reckless. Indeed, PHMSA remains so concerned about the substantial harm of one 42,000-gallon capacity tank car that it decided to keep that regulatory trigger on the books, despite the rarity of any such railcars. Indeed, PHMSA itself states that the number of railcars needing comprehensive spill plans under existing rules is "**possibly non-existent**."[15] In sum, determining that a low-likelihood scenario can lead to substantial harm from one tank car, and then concluding the opposite several sections later is arbitrary and capricious.

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[13] 81 Fed. Reg. 50,091 (emphasis added).
[14] 81 Fed. Reg. 50,092 (emphasis added). Note also that PHMSA cites OSRP development costs ("such as retainer fees, training and drill costs, and plan development and submission costs"), and administrative simplicity () as additional reasons why railroads transporting trains with fewer tank cars than the HHFT definition should be exempt from this rule. 81 Fed. Reg. 50,091.
[15] 79 Fed. Reg. at 45,081 (emphasis added).

In its final rule, PHMSA must apply comprehensive OSRP requirements to *all trains* carrying oil, petroleum products, ethanol, and other hazardous materials.

B. Preemption Provisions Under the Hazardous Materials Transportation Act and the Federal Railroad Safety Act Do Not Apply to This Proposed Rule and The Clean Water Act Expressly Precludes Preemption of State Oil Spill Laws.

The proposed rule is being promulgated under the Clean Water Act and OPA, not under the Hazardous Materials Transportation Act ("HMTA") or the Federal Railroad Safety Act ("FRSA"). As a result, OPA's express non-preemption provisions apply and preclude a finding of preemption of state and local laws in this area.

For approximately forty years, the Clean Water Act ("CWA") has preserved state and local authority to regulate in the area of oil spills, including state and local authority to impose any requirements or liabilities with respect to oil spills.[16] When Congress enacted OPA in 1990, it included non-preemption clauses building upon and extending the CWA's preservation of state authority regarding oil spills.[17] Under OPA, state and local authorities may impose any additional liabilities and requirements regarding oil spills *and* impose their own financial penalties for any legal violations related to oil spills.[18]

This broad non-preemption provision therefore covers more than mere "oil spill planning requirements," as this notice of proposed rulemaking suggests.[19] Any state and local laws that impose oil spill-related requirements, liabilities, or financial penalties on crude-by-rail owners or operators are expressly preserved under OPA and cannot be subject to preemption under the FRSA or HMTA. The proposed rule's unsupported assertion that "elements of state oil spill response plan legislation may be preempted under the FRSA and HMTA," cannot withstand scrutiny under OPA, which broadly preserves all state and local oil spills laws.[20] Thus, this assertion should be removed from the record.

II. PHMSA'S WORST CASE DISCHARGE ASSESSMENT GROSSLY UNDERESTIMATES THE MAGNITUDE OF A LARGE SCALE DISASTER

PHMSA's proposed requirement that railroads estimate their worst-case discharge (WCD) planning volume is a critical component of oil spill response planning, especially given the recent history of catastrophic accidents involving volatile crude. However, PHMSA's assessment of a WCD fails to meet the purpose of this exercise – to ensure that rail operators can adequately respond to and address the largest foreseeable disaster to protect public health, safety and the environment. As described below, PHMSA's narrow assessment of a potential WCD and the options it provides regulated entities to calculate such an incident allow for gross and unsubstantiated reductions to the largest possible discharge volume. Consistent with federal law, PHMSA must look no further than the full capacity of a loaded train to determine the largest

[16] CWA of 1970, Pub. L. No. 91-224, 84 Stat. 91-115; 33 U.S.C.A. § 1321(o)(2).
[17] 33 U.S.C.A. § 2718(a), (c).
[18] *Id*. § 2718(c).
[19] 81 Fed. Reg. 50,115.
[20] 81 Fed. Reg. 50,115.

potential discharge. However, PHMSA wholly fails to consider this scenario and instead arbitrarily limits review to a narrow subset of recent incidents to make its WCD determination.

A. Worst-Case Discharge Calculations and Assessments Should Apply to All Railroads Transporting Crude

As an initial matter, the WCD assessment and calculation should be required for all railroads carrying flammable fuels, not just HHFTs subject to comprehensive oil spill response plan requirements. A crude train derailment, oil spill, fire, and/or explosion from a train of any size can result in significant, widespread damages depending on the location, proximity to populations and sensitivity of the environment in which an accident occurs. Thus, WCD calculations and a demonstration that railroad operators have the resources and capacity to rapidly respond, mitigate and restore the environment should be requirements for all railroads carrying any amount of flammable fuel.

B. PHMSA Must Define the Worst-Case Discharge as the Total Volume of Petroleum Liquid Cargo Transported in the Largest Train Consist

PHMSA defines a *worst* case discharge as the "largest foreseeable discharge in adverse weather conditions."[21] Based on the explicit language of the proposed definition, it is reasonable to conclude that the largest foreseeable discharge is that of the total lading of liquid petroleum oil transported within the largest train consist. Indeed, PHMSA's existing regulations for oil spill prevention for oil transport further define a "worst case discharge" from a "rail car" as "the capacity of the cargo container."[22] Similarly, Area Contingency Plans implementing Oil Pollution Act of 1990 (OPA) regulations define a worst case discharge as "…a derailment of an entire unit train (80-100 cars) resulting in total cargo loss under adverse weather conditions."[23]

Trains carrying volatile crude oil moving at speeds of up to 50 miles per hour, unlike many stationary oil facilities, and lack onsite containment equipment and systems that act to prevent a maximum discharge. As described below, improvements to tank car puncture resistance under the HM-251 rule will apply to certain tank cars after a phase-in period that could last more than a decade, thus delaying the possibility of disaster prevention mechanisms. Further, PHMSA's proposal would require that rail operators maintain response resources within 12 hours or approximately 420 miles from a given response zone allowing for releases to go unattended for long periods of time. Under these circumstances, it is reasonable to assume that in the time frame it could take an operator to deploy containment resources to a remote accident location, an uncontained release could discharge the full contents of a unit train.

[21] 81 Fed. Reg. at 59,008.
[22] 49 CFR 130.5.
[23] United States Coast Guard, "Promulgation of New York Area Contingency Plan," May 5, 2016, at 43 ("OPA 90 requires that, every ACP, when implemented in conjunction with the NCP "be adequate to remove a worst case discharge, and to mitigate or prevent substantial threat of such a discharge, from a vessel, offshore facility, or onshore facility operating in or near the area." 40 CFR 300.5 as defined by section 311(a) (24) of the CWA, means, "in the case of a vessel, a discharge in adverse weather of its entire cargo; and in the case of an offshore or onshore facility, the largest foreseeable discharge in adverse weather conditions." For the purposes of this plan the worst case discharges are the total loss of cargo from the largest ship operating in the port or a derailment of an entire unit train (80-100 cars) resulting in total cargo loss, under adverse weather conditions.").

Although PHMSA's definition explicitly acknowledges the exacerbating impacts of "adverse weather conditions" on a discharge, the agency fails to discuss and account for how such adverse and extreme weather conditions could affect and contribute to a worst case disaster scenario. Indeed, extreme winds along heavily trafficked railways located in river valleys and gorges can spread fire or make it difficult if not impossible to approach a disaster to engage response equipment. As a result, the impacts of the discharge and other damages could be seriously aggravated.[24] Other extreme weather conditions such as flooding resulting in leaking tank cars being swept away could pose significant obstacles to containment. PHMSA's failure to consider these and other contributing factors to a worst case discharge is egregious, especially given the numerous experiences of responders who have faced significant difficulties approaching and responding to disasters.

As described in detail below, PHMSA's analysis is wholly inconsistent with its own regulatory definitions for a worst case discharge. PHMSA ignores the possibility that a worst case discharge could equal the total volume of the cargo container, i.e., the capacity of a unit trained filled with petroleum oil. Combined with extreme weather conditions and other factors that would delay response times and pose obstacles to response capabilities, this is indeed a realistic scenario.

C. PHMSA Grossly Underestimates a Potential Worst Case Discharge

PHMSA proposes two options for regulated parties to calculate a worst case discharge. "The worst case discharge from a train consist is the greater of: (1) 300,000 gallons of liquid petroleum oil; or (2) 15% of the total lading of liquid petroleum oil transported within the largest train consist reasonably expected to transport liquid petroleum oil in a given response zone."[25] PHMSA's proposed WCD calculation allows for significant reductions of a railroad's total lading capacity. For a "smaller" train of 50 tank cars carrying up to 1.5 million gallons of petroleum crude, a 300,000 gallon WCD calculation allows for an 80% reduction of the train's total carrying capacity.[26] Similarly, under PHMSA's proposed second option, a larger 120-tank car train carrying 3.6 million gallons of petroleum crude would plan for a 540,000 gallon WCD, or an 85% reduction from its total carrying capacity.

PHMSA bases the 80% - 85% volume reductions on the estimated discharge quantity of the 2013 Casselton, ND incident, which, according to the agency, released approximately 15% of the train's total load.[27] PHMSA provides no analysis of how it reached the conclusion that that incident provides a realistic example of a worst case discharge. Nor does it justify how such

[24] "Mosier Oil Train Derailment," Friends of the Columbia River, available at https://gorgefriends.org/protect-the-gorge/mosier-oil-train-derailment.html ("Had the high winds of a typical late spring day in the eastern Columbia Gorge been blowing, a much more catastrophic event would have occurred."); "Oregon Train derail near Mosier in Oregon's Columbia River Gorge," The Oregonian, available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/oil_train_derails_near_hood_ri.html (Mosier Mayor commenting that the disaster could have been significantly worse had the conditions been windy and ground dry and brittle, typical of that area during August.)

[2525] 81 Fed. Reg. at 50,098.

[26] *Id.*

[27] *Id.* at 50,097.

gross reductions are consistent with statutory and regulatory definitions.[28] For example, PHMSA does not discuss the existence of onsite containment mechanisms or other processes that would act to prevent significant discharges during a worst case discharge scenario. By contrast, reports of the Casselton, ND incident note that the sub-zero temperatures and its 20 mile distance from the nearest population center decreased the disaster's potential impacts.[29] PHMSA simply fails to incorporate any other factors or circumstances that might contribute to greater discharge quantities or damages, and instead makes the simple assumption that a potential worst case discharge from a train carrying more than 3 million gallons of crude is 474,936 gallons – the actual discharge volume of the Casselton, ND derailment.

PHMSA arrives at a "small" train's WCD by further reducing the Casselton incident's actual discharge by 33%, accounting for supposed improvements to puncture resistance and thermal protection for tank cars that will go into effect over the next 13 years under the HM-251 rule.[30] However, that reduction fails to account for the current state of affairs, in which tens of thousands of puncture-prone DOT 111 and CPC 1232 tank cars will remain on the rail lines in crude oil service for several years *without* such improvements, and that many of those tank cars will remain in flammable fuel service under a lesser stringent retrofit standard for the duration of the tank car life.[31] PHMSA further decreases that number, without explanation, by *rounding downward* from 318,000 gallons to achieve a flat WCD volume of 300,000 gallons.[32] In reaching the approximate 80% reduction for a "small" train WCD, PHMSA fails to incorporate factors or other evidence from large scale disaster scenarios that demonstrate that the largest foreseeable discharge from a train carrying 1.5 million gallons of volatile crude could in fact be much greater than 300,000 gallons. **In developing spill response plans for *worst-case* spill events, it is irresponsible of the agency to assume a best-technology baseline (when it knows there will**

[28] 49 CFR 130.5; 40 CFR 300.5

[29] Federal Emergency Management Agency, "Challenges Faced During the 2013 Casselton Train Derailment," available at https://www.fema.gov/challenges-faced-during-2013-casselton-train-derailment.

[30] 81 Fed. Reg. 50,097.

[31] FAST Act §7304; 81 Fed. Reg. at 53936. Moreover, PHMSA uses only one safety factor – the supposed improvements made to tank car designs – to round down estimates of WCD, while failing completely to include any factors that might cause more oil to be released during any given derailment, from any derailed tank car (of any design) such as (but not limited to) track condition, compliance history, bridge stability and maintenance history, bridge height, ballast and infrastructure type adjacent to rail lines, speed limit compliance, runaway trains, failed air brakes (which was one of the key causes of the Lac-Mégantic disaster), or even local variables (national security risks, drinking watersheds, dense urban areas, or endangered species habitats). Even the safest tank car design, moving slowly, can be punctured if it derails from a bridge, or is struck by another train, etc. In short, this Cost/Benefit analysis is bereft of a complete "cost" picture as well as a complete "benefit" picture, and the agency should not rely on such simplistic and unrealistic analysis. As we noted in comments to the ANPRM, "PHMSA is ignoring the effect that location, routing, population, human error, track condition, and a host of other elements have on disasters. Is a spill of one railcar's crude oil, if it happens into the drinking water supply of a large city less concerning than 20 cars that don't spill? Are 19 railcars of explosive, flammable crude oil rolling alongside the runway at Newark International Airport, in New Jersey, or running under West Point Military Academy, less of a security threat than 20 railcars? Or, considering that "the existing fleet of DOT Specification 111 tank cars can be repurposed and continue to be used for flammable liquids when *not* being transported in a HHFT" if this rule is promulgated, does PHMSA consider it to be more of a risk to have ten DOT-111 railcars derail or twenty of the new DOT-117 railcars?[31] PHMSA has provided no basis for supporting such risk distinctions." These questions have still not been answered.

[32] 81 Fed. Reg. at 50,097.

be over a decade of worst-technology tanks cars on the rails), and to round down from known spills (after already rounding down 80% - 85% of a unit train's volume).

To account for larger capacity trains, PHMSA again takes the estimated discharge of the Casselton, ND incident and calculates the percentage of the train's total load that was discharged. Based on this one incident, and without looking any further, PHMSA concludes that a WCD to which a large train rail operator would be required to respond is, at most, a spill of 15% of the train's total petroleum lading.[33]

PHMSA fails to substantiate such gross discharge reductions under a *worst* case discharge scenario. Indeed, PHMSA must look beyond the actual discharge of a single incident and consider other contributing factors or circumstances that could lead to increased discharge volumes when planning for a worst case incident. PHMSA is reckless to assume that worst-case planning for hazardous substances moving through our communities, parks, drinking watersheds, and ports should equate to less than one-fifth of the full potential release. The agency's failure to engage in a searching assessment is arbitrary and capricious.

D. PHMSA Omits Information Critical to Accurately Assessing a WCD

PHMSA's calculation options for a WCD omit critical data. The proposed WCD calculation options are based on a narrow subset of accidents that occurred in the United States.[34] PHMSA's use of the 2013 Casselton, ND accident as the basis for its calculations overlooks U.S. crude rail disasters that released much greater quantities of crude. Although the preliminary RIA for the proposed rule reports that the November 2013, Aliceville, Alabama accident discharged 455,000 gallons,[35] more recent PHMSA documents report that the incident discharged 630,000 gallons into nearby navigable waters and involved the derailment of 26 tank cars, most of which punctured and exploded.[36] It appears that PHMSA relied on data from the Final Regulatory Impact Analysis for the Hazardous Materials: Enhanced Tank Car Standards and Operational Control for High-Hazard Flammable Trains Rule (HM-251), which was first prepared almost three years ago, soon after the Aliceville incident. Notably, PHMSA states in the HM-251 RIA that the data is unreliable and in a number of cases misreported.[37] Moreover, while recent PHMSA documents reported a discharge of 630,000 gallons into navigable waters, other reports from that incident cite a total of 750,000 gallons of crude released.[38] Based on these updated discharge estimates, the Aliceville incident discharged between 23% and 28% of the train's 2.7 million gallon load – well over PHMSA's 15% to 20% WCD cap.

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[33] *Id.*
[34] 81 Fed. Reg. at 50097.
[35] RIA at 60.
[36] 80 Fed. Reg. 26739; Pipeline Hazardous Materials Safety Administration Power Point prepared by Dr. Magdy El-Sibaie Associate Administrator at 4, available at http://www.ntsb.gov/news/events/Documents/Panel%204_B_Magdy%20El-Sibaie.pdf ("Major Crude Oil/Ethanol Derailments").
[37] Final Regulatory Impact Analysis, "Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains"; Final Rule [Docket No. PHMSA-2012-0082] (HM-251) at 85.
[38] Facing South, "Alabama Oil Train Disaster Met with Official Neglect," Sue Sturgis, January, 21, 2014, available at https://www.facingsouth.org/2014/01/alabama-oil-train-disaster-met-with-official-negle.html.

Recent PHMSA documents also report an accident involving identical tank cars discharging 834,840 gallons of ethanol in Arcadia, Ohio in February of 2011.[39] Indeed, these quantities are significantly greater than that discharged in Casselton, ND, yet PHMSA provides no explanation for omitting this critical data as part of its proposed WCD calculation.[40] PHMSA's accident discharge assessment simply fails to use updated accident data from a host of HHFT unit train derailments like Arcadia. At a minimum, PHMSA must consider updated release data in its WCD determination; its failure to do so is arbitrary and capricious.

Furthermore, PHMSA fails to consider relevant information and data from crude rail accidents that occurred in Canada. Notably, the largest of all North American oil train disasters was the July 2013 Lac-Mégantic, Quebec disaster which led to 47 deaths, thousands of evacuations, the leveling of an entire town, and explosions and fires that burned for days.[41] The derailment ultimately discharged approximately 1.6 million gallons of U.S.-produced crude from the Bakken shale reservoir, or 73% of the train's total load.[42] Importantly, reports have emphasized that the disaster in Lac-Mégantic could easily have occurred in the United States.[43] Yet the evidence and data from the worst crude rail disaster to date is entirely absent from PHMSA's WCD analysis.

In addition to Lac-Mégantic, which involved volatile Bakken crude, the February 2016 Gogama, Ontario crude rail accident involved the derailment of 38 of the train's 94 tank cars filled with volatile diluted bitumen that exploded, burned and leaked for days.[44] The same tar sands crude is slated for rail transport to several west and east coast crude oil train terminals and refineries proposed in the United States.[45] Indeed, Canadian and U.S. accidents have involved identical fuels transported in identical tank cars, on the same interconnected network of rail lines, by the same railroad companies, offered for transportation by the same production sites, in the same unit-train configurations.[46]

Although PHMSA should look no further than a train's total cargo capacity for determining a WCD scenario, its failure to use the largest release of any accident on record – Lac-Mégantic's 1.6 million gallons – as the basis for the WCD determination is particularly troubling. Despite agency records incorporating data from Lac-Mégantic and other large scale

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[39] Pipeline Hazardous Materials Safety Administration Power Point prepared by Dr. Magdy El-Sibaie Associate Administrator at 4, available at http://www.ntsb.gov/news/events/Documents/Panel%204_B_Magdy%20El-Sibaie.pdf ("Major Crude Oil/Ethanol Derailments").
[40] 81 Fed. Reg. at 50097; RIA at 60, 78, Appendix C at 28.
[41] The Oregonion, "Oregon derailment is the latest in string of U.S. oil trains crashes," June 3, 2016, available at http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/06/oregon_oil_train_derailment_is.html.
[42] *Id.*
[43] The Weather Channel, "Boom: North America's Explosive Oil by Rail Problem," video available at https://www.youtube.com/watch?v=v15LMXhHdB4.
[44] Transportation Safety Board of Canada, "Update on Derailment and Fire of Canadian National Oil Train Near Gogama, Ontario," modified on Feb. 23, 2015, available at http://www.tsb.gc.ca/eng/medias-media/communiques/rail/2015/r15h0013-20150223.asp.
[45] Kyle Ferrar, "CA Refineries: Sources of Oil and Crude-by-Rail Terminals," May 23, 2016, available at https://www.fractracker.org/2016/05/ca-crude-by-rail-sources-terminals/.
[46] Transportation Safety Board of Canada, "Update on Derailment and Fire of Canadian National Oil Train Near Gogama, Ontario," modified on Feb. 23, 2015, available at http://www.tsb.gc.ca/eng/medias-media/communiques/rail/2015/r15h0013-20150223.asp.

Canadian accidents, PHMSA wholly ignores the possibility of releases of much greater magnitudes.[47]

Indeed, PHMSA has an obligation to consider data from accidents involving identical hazard risks and known to have released greater quantities of petroleum crude and other flammable fuels (such as ethanol travelling in HHFTs). PHMSA's failure to consider critical and relevant data from its WCD assessment without explanation is imprudent, and ultimately places communities and the environment at greater risk. PHMSA's omissions are thus arbitrary and capricious.

E. PHMSA's Proposed Worst-Case Discharge Calculation is Inconsistent with the Oil Pollution Act

PHMSA's failure to even consider that a train's fully loaded capacity is a likely maximum discharge scenario is wholly inconsistent with OPA. OPA regulations determining WCD volumes for other types of oil facilities reflect the *total capacity* volume of vessels and storage tanks, as well as the *maximum* flow rates of wells, pipelines and other infrastructure at those facilities.[48] In fact, OPA regulations build in discharge multiplying factors to maximize output flow rates and the time a release may go unattended when such information is uncertain or unknown.[49] Here, incongruously, PHMSA proposes, for the first time, a standard that is *less than one-fifth the maximum possible product release*, for no rational reason.

OPA regulations provide that facility operators, in calculating a WCD, can account for reductions to a discharge of the total carrying capacity only under limited circumstances. Facilities may subtract from the full capacity volume only if *onsite secondary containment exists*, (or when other factors are at play, such as emulsification and other natural dissipation processes relevant only in offshore drilling or transport situations).[50]

By contrast, PHMSA's proposed standard for HHFTs is much weaker. As described above, it allows for an across-the-board gross and unsubstantiated reduction of up to 85% of a train's total carrying capacity despite existing PHMSA regulations that define a worst-case

[47] 80 Fed. Reg. 26739; Pipeline Hazardous Materials Safety Administration Power Point prepared by Dr. Magdy El-Sibaie Associate Administrator at 4, available at http://www.ntsb.gov/news/events/Documents/Panel%204_B_Magdy%20El-Sibaie.pdf ("Major Crude Oil/Ethanol Derailments").

[48] 40 CFR 112, Appendix D (Determination of a worst case discharge planning volume for onshore storage and production facilities – "worst case discharge planning volume equals the capacity of the storage tank" . . . for production facilities, "If the pumping rate of the well with the highest output is estimated [not known] or the maximum number of days the facility is unattended is estimated [not known], then the production volume is determined from the pumping rate of the well multiplied by 1.5 times the greatest number of days that the facility has been or is expected to be unattended."; 33 CFR 154.1029 Facilities Transferring Oil or Hazardous Material in Bulk on Navigable Waters (worst case discharge "for a mobile facility [ ] means the loss of the entire contents of the container in which the oil is stored or transported.").

[49] *Id.*

[50] 33 CFR Part 155, Appendix B (worst case discharge volume calculations for on-water and shoreline recovery); 40 CFR 112, Appendix D (reductions for onshore storage facilities that include onsite secondary containment).

discharge for a rail car as "the capacity of the cargo container."[51] These reductions are not based on readily available discharge secondary containment infrastructure or scientifically proven natural dissipation processes such as those authorized under OPA regulations. Indeed, mile-long trains moving at speeds of up to 50 miles per hour with propensities to derail, puncture and ignite, lack onsite containment equipment to prevent immediate and significant discharges. Further, unlike OPA regulations which mandate regulated entities account for increased releases due to the time that disasters remain unattended, PHMSA's proposal simply prescribes a 12-hour deployment response time without factoring in any consequential increase in discharge volume.

OPA's direction is unambiguous. PHMSA's regulations are also unambiguous. Given that oil trains lack onsite discharge prevention infrastructure, PHMSA must continue to define a worst case discharge for a train carrying petroleum oil as the release of the train's full cargo capacity. Put simply, the WCD for 120-, 100- and 50-tank car trains are 3.6 million, 3 million and 1.5 million gallons respectively, assuming an individual tank car capacity of 30,000 gallons. At bottom, PHMSA's single incident WCD determination ignores a host of critical information and data, including relevant data from HHFT and Canadian derailments, and conflicts with OPA's conservative approach to ensure communities and the environment are adequately protected from the dangers and realities of a true worse case discharge scenario. PHMSA's stark departure from OPA, the CWA, its own regulations, and common sense is thus arbitrary and capricious.

F. A Worst Case Discharge Assessment Must Evaluate and Address Damages Beyond Discharge Volume and Containment

PHMSA's assessment of a worst case discharge must include an assessment of and requirements for rail operators to address damages beyond containing and preventing the largest foreseeable petroleum oil discharge volume. The lessons from Lac-Mégantic and other crude rail disasters demonstrate that once the oil release is contained, clean up, remediation and rebuilding community infrastructure is extremely costly and resource intensive. Indeed, the cost of restoring and rebuilding Lac-Mégantic has already eclipsed $2.7 billion, and recovery is far from complete.[52]

PHMSA also must account for natural resource damages, i.e. the cost estimate and resource requirements for an oil spill must include not only the costs and resources required for removing the oil, but also the costs and resources needed for restoration, replacement or rehabilitation of the damaged natural resources.[53] The restoration of aquatic and other sensitive ecosystems and vital drinking water sources can take years and cost millions of dollars. Further, the known persistence of oil contamination in waterbodies especially caused by spills of heavier

[51] 49 CFR 130.5; "largest foreseeable discharge from a motor vehicle or rail car is the capacity of the cargo container."
[52] ThinkProgress, "Spring Bring New Environmental Worries for Weary Lac-Mégantic," April 17, 2014, available at https://thinkprogress.org/spring-brings-new-environmental-worries-for-weary-lac-m%C3%A9gantic-72333d8490b1#.j3ocq0fg6.
[53] 33 U.S.C. § 1321(f)(4).

crudes such as tar sands can make clean up extremely difficult, if not impossible.[54] However, the proposed rule is virtually silent as to natural resource damages and the challenges of containing and remediating extreme, heavy crudes.[55]

The proposed rule must appropriately account for a range of damages and resources required to rehabilitate communities and the environment after a worst case disaster. These damages should include: loss of life, injuries, rebuilding destroyed areas, lost business activity, temporary unemployment of those employed at destroyed businesses, clean-up costs, value of the lost product (i.e. crude), the costs of evacuation, the emotional impacts of being evacuated and injured by a violent and horrific explosion and fire, inability to get to hospitals for care, latent illnesses caused in whole or in part by the emissions from oil explosions or exposure to contaminated soils and water, and the decline in property values due to damages from explosion and fire, as well as from the fear of a future catastrophe.

III. PHMSA'S PROPOSED 12-HOUR RESPONSE ZONES DO NOT ADEQUATELY PROTECT THE PUBLIC OR THE ENVIRONMENT FROM OIL SPILLS

The proposed rules call for a basic level of railroad oil spill preparedness requiring that response assets are located within 12 hours of any point along a rail route that has HHFT traffic.[56] The proposal would require "response zone" asset availability onsite for a a worst-case discharge, or the substantial threat of one," within this window.[57] The agency assumes that "response resources can travel according to a land speed of 35 miles per hour," meaning that response assets will be located up to 420 miles away from any given potential worst-case oil discharge.[58] As discussed below, we disagree with PHMSA's premise that locating response personnel, equipment, or other assets 420 miles or 12 hours away from oil spill locations could ever meet the "maximum extent practicable" response threshold. Having oil booms in Chicago for a spill in Buffalo, or having a skimmer in Boston for a spill in Philadelphia would mean that the railroad's OSRO and response assets may be guaranteed to be the last on the scene. This is functionally and legally inconsistent with the entire purpose of PHMSA's reassessment of its OSRP regulations for oil trains.

A. Shorter Response Times, Nationwide, are Necessary to Protect Public Health, Welfare, and the Environment

At the outset, we would like to respond to PHMSA's question asking the public "whether the 12-hour response time is sufficient for all areas subject to the plan."[59] The answer to that question is a clear and unequivocal **no**. In many of the nation's communities, parks, waterways,

[54] EcoWatch, "Five Years Since Massive Tar Sands Oil Spill, Kalamazoo River Still Not Clean," July 25, 2015, available at http://www.ecowatch.com/5-years-since-massive-tar-sands-oil-spill-kalamazoo-river-still-not-cl-1882075674.html
[55] Natural Resource Damages are only mentioned briefly in the RIA's Appendix B: Oil Spill Literature Review)
[56] 81 Fed. Reg. 50,068.
[57] *Id.*
[58] 81 Fed. Reg. 50,096.
[59] 81 Fed. Reg. 50,079.

farms, and cities, a 12-hour delay in accessing the site of an oil spill risks lives, homes, business, schools, and the environment. PHMSA's alternative 6-hour response time for "certain areas" is more practical, but still short of the legally mandated spill response effort: "maximum extent practicable."[60]

As we discuss throughout these comments – and as mentioned in our advanced NPRM comments – there are a host of more reasonable criteria by which to define areas that should have assets located closer than 420 miles. Among the options discussed herein include protections for environmentally sensitive areas (such as drinking water supplies, critical habitats, fisheries and shellfisheries, parks and refuges, or areas near significant or historic coastal districts), protections for communities (including densely developed areas within the evacuation zone for oil spill responses, environmental justice communities, or neighborhoods with critical infrastructure, schools, or homes adjacent to HHFT routes), and protections for economies (from industries dependent on oil-free environments to farms, commerce, and energy industries within spill and blast radii).

For these types of areas, PHMSA asks whether "staging resources using alternative response times, including shorter response times for spills that could affect such high volume areas," is necessary.[61] Clearly, it is. PHMSA also asks whether railroads should be allowed to push back response times (to longer than 12 hours) in some areas if they are required to have quicker response times where there is increased risk ("in order to offset costs"). Clearly, it should not.[62]

By the agency's own admission, this 12-hour response time, which was modeled on existing pipeline spill response planning thresholds, was proposed to the agency by the American Petroleum Institute. "API asks that DOT consider adopting the 'Response Zone' concept that is currently utilized by pipeline operators."[63] The agency (and the API) note the similarities between pipelines and railroads – describing how each has a widely dispersed network of facilities, any part of which could result in a substantial oil disaster. The similarities end there, however, as "there are some differences between responses to pipelines and railroads."[64] Among those difference are:

- Pipelines are generally accessible by land, through rights-of-way, along their entire lengths; railroads are often completely inaccessible.
- Pipelines have generally been sited with hazardous material safety, community right-to-know, and oil spill response concerns in mind; railroads were not, having been largely built out for over a century.
- Pipelines have safety and engineering standards designed with spill prevention in mind; railroads are not subject to federal minimum rail bridge safety standards.
- Pipelines cannot be operated above maximum pressure tolerances; railroads can run tank cars rated to withstand punctures of up to 15 mph in large unit trains traveling 50 mph.

[60] *Id.*
[61] 81 Fed. Reg. 50,068.
[62] 81 Fed. Reg. 50,079.
[63] 81 Fed. Reg. 50,094.
[64] 81 Fed. Reg. 50,096

At the agency, the only tailoring done to translate the 12-hour pipeline standard to HHFTs was to "clarify the chain of command and communication requirements, and to provide more information about the resources available for response and the conditions the plan addresses."[65] Given the clear distinctions between oil pipeline and oil train spill response, and the agency's failure to adequately address this disconnect with regulatory specificity, we find PHMSA's reliance on the pipeline12-hour response time standards to be meaningless.

Finally, a number of other key concerns lead us to call on PHMSA to reassess its 12-hour response zone proposal. Chief among those is the difficulty inherent in responding to an explosive oil train derailment. As PHMSA notes,

> In multiple instances, those responding to oil spills have encountered difficulties in assessing the extent of oil spills due to smoke or fire. In several of the derailments discussed in this rulemaking, the relatively remote location of the town or derailment site limited responders' access to the derailment site and encumbered the deployment of response equipment (*e.g.,* heavy machinery) at the site. Response providers have also faced adverse weather or the potential for adverse weather, which can complicate response protocols and compound the adverse effects of spills. Communications between railroads, response providers, and Federal, State, and local officials are often challenging due to the broad array of organizational representation at derailment sites and the lack of formal response communications protocols. Further, derailments involving energetic ruptures and fires can threaten public safety, necessitating evacuations that span multiple days and require significant resources, including personnel and leadership with experience and training in emergency management.[66]

The complexity, danger, and risk involved in HHFT spills is what an OSRP is designed to mitigate. Developing a plan with the understanding that the best-case response allows this kind of destruction and devastation to continue unabated for 12 hours is not in the public's interest. Other concerns about the proposed 12-hour response zone include:

- **Accessibility**. Many railroad segments are relatively inaccessible – some are entirely inaccessible. PHMSA gives the industry no guideposts for designing responses that account for sections of track which may only be accessible by boat, or another train. The first responders in Galena, Il., in fact, had to make use of a bicycle path to access the derailment location. Given these complexities, PHMSA must be more precise in its instructions to the industry for handling accessibility issues.

- **Weather**. PHMSA's definition of worst-case scenario (discussed above) includes reference to foul weather, but the agency's discussion of response zones is bereft of such considerations. Given that snow, rain, flooding, and other extreme weather can turn a normal 12-hour (420 mile) drive into a multiple-day odyssey, the agency must clarify how spill response assets will get to response sites in foul weather, not just how a railroad will respond in foul weather once on-site.

[65] *Id.*
[66] 81 Fed. Reg. 50,086.

- **PHMSA's Emergency Response Guidebook**. The ERG "provides emergency responders with a go-to manual to help deal with hazardous materials incidents during the critical first 30 minutes."[67] In the ERG, PHMSA regularly and repeatedly stresses the vital importance of responding to spills in those "critical first 30 minutes." For spills and fires from rail cars, immediate evacuations for a half mile around the accident are necessary,[68] and immediate steps need to be taken to prevent entry [of oil] into waterways or sewers.[69] In a 12-hour absence of railroad first responders, these tasks will fall on the shoulders of local responders, or they will not be done at all. Evacuations, critical water pollution protections, and asset staging need – under the clear terms of the ERG – to begin within 30 minutes of a derailment. The proposed 12-hour response zone window is therefore, based on PHMSA's own "go-to" advice, woefully inadequate.

- **Tank Car Design**. Finally, both the tank cars on the rails today, and the proposed new DOT-117 tank cars are inadequately designed for a 12-hour response timeframe. As noted in PHMSA's rulemaking for HM-251 (the HHFT tank car design rule), "[a]ll three DOT Specification 117 options proposed in the NPRM required a thermal protection system sufficient to meet the performance standard of § 179.18 of the HMR."[70] This performance standard "requires that a thermal protection system be capable of preventing the release of any lading within the tank car … when subjected to a pool fire for 100 minutes and a torch fire for 30 minutes."[71] This "100-minute survival time … was *established to provide emergency responders with adequate time to assess a derailment, establish perimeters, and evacuate the public as needed, while also giving time to vent the hazardous material from the tank and prevent an energetic failure of the tank car*."[72] In short, the tank cars are designed with a specific response time in mind: a maximum of 100 minutes. The proposed 12-hour response zone is 7.2 times longer than the rated thermal tolerance of tank cars, and is therefore a recklessly long time to allow derailed HHFTs to burn.

Waiting 12 hours for response assets to arrive to an oil spill site is irresponsible. A six-hour window is faster (by definition), but still more than 12 times longer than PHMSA's own "critical" response window – the first 30 minutes wherein evacuations, booms, and other vital initial steps for response must be undertaken. Given the difficulties involved in HHFT oil spill response, inaccessible railroad segments, variable weather, and the fact that tank cars are only designed to burn for 100 minutes without complete failure, PHMSA's response zone proposal should be substantially revised.

B. 12-Hour Response Time is Insufficient to Prevent Harm to Nation's Waterways

The goal of establishing oil response timeframes should focus on ensuring a rapid response that prevents oil from spreading to areas where it is likely to cause extensive, long-

[67] 81 Fed. Reg. 50,081.
[68] Emergency Response Guide, 2016 (http://www.phmsa.dot.gov/hazmat/outreach-training/erg), see page 198.
[69] *Id.*, see page 195.
[70] 80 Fed. Reg. 26,6871.
[71] *Id.* See also, 49 CFR 179.18.
[72] *Id.*

lasting damage. Therefore, response times should take into account the movement of nearby bodies of water and how quickly an oil spill might spread to areas where oil contamination would be of higher consequence. This is especially important given that the most effective damage prevention requires preventing the oil from reaching an area in the first place, especially areas that are high-risk and where the effects of oil contamination could be extensive, dangerous to health, and/or costly or difficult to remediate. These high-risk areas include drinking water intakes, sensitive wildlife areas, and areas of particular economic or recreational significance.

In areas where oil trains run along bodies of water upstream from drinking water intakes, the required oil spill response time should be less than the amount of time it would typically take the oil to travel to the drinking water intake. When an oil spill reaches a drinking water intake, the best-case scenario is that the intake has been shut down, cutting off the water supply for communities.[73] However, if the drinking water intake is not shut down, the contaminated water can damage the water treatment system.[74] Furthermore, if the contaminated water is allowed to go through the system, the treatment process can actually convert bromine in the oil into highly-toxic trihalomethanes.[75] To avoid the possibility of thousands, possibly millions of people losing access to safe drinking water, oil spill response times should be calculated to allow a majority of the oil to be captured before it reaches drinking water intakes.

This principle is applicable to other types of areas – during an oil spill and for a significant period of time after a spill – where an oil spill would pose a significant risk of devastating impact to wildlife or nearby communities. For example, oil spill response times should be designed to require response before an oil spill reaches certain sensitive habitats or areas with protected wildlife.[76] Oil response times should also take into account important economic and recreational uses of the water body downstream, so as to minimize the impact that an oil spill might have on downstream communities. As PHMSA noted, there are complexities upon complexities that result from spills into or onto waterways, each of which demands immediate response and immediate implementation of recovery and remediation strategies:

> Derailments often require a significant, long-term commitment of personnel and equipment to remediate an oil spill. Moreover, derailments involving petroleum oil typically require diverse technical or scientific response services. For example, monitoring a direct discharge into a waterway requires water sampling services to detect if harmful levels of compounds found in petroleum oils have contaminated affected waterways. Depending on the proximity of an oil spill to rivers, the spill response could also require monitoring of river levels, since rising river levels could rapidly exacerbate the extent of an oil spill.[77]

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[73] *See, e.g.*, *Drinking water measures could be in place for months due to oil spill: official*, The Canadian Press (Jul. 25, 2016) http://globalnews.ca/news/2845661/oil-spill-triggers-prince-albert-sask-to-shut-down-water-intake/.
[74] EPA, *Water Enforcement* (last revised on Aug. 4, 2016) https://www.epa.gov/enforcement/water-enforcement.
[75] *See, e.g.,* Amy Mall, *More drinking water contamination linked to the oil and gas industry in Texas and Pennsylvania* (February 05, 2016), available at https://www.nrdc.org/experts/amy-mall/more-drinking-water-contamination-linked-oil-and-gas-industry-texas-and.
[76] EPA, *Sensitivity of Freshwater Habitats*, (revised Feb. 2, 2016) available at archive.epa.gov/emergencies/content/learning/web/html/freshwat.html.
[77] 81 Fed. Reg. 50,086.

Given this complexity, PHMSA acknowledged "that some areas in proximity to certain navigable waters may benefit more than other areas from staging and deploying resources in closer proximity, due to the potentially higher consequences of spills in these areas."[78] As such, commenters recommend that PHMSA require much shorter response time requirements than 12 hours for railroad segments in proximity to navigable waterways. Assets should be deployed where needed to respond immediately to a spill where there are endangered species at risk (see below), to spills that may threated drinking water supplies, to spills that may impact navigation or safety of commercial and recreational boat traffic, where there are state, local, or federal restoration projects underway, or where there are any other significant maritime interests (e.g., coastal zone management plans and policies, shellfisheries or fisheries, or state, local, or national refuges, parks, or estuaries) – in short, immediate response should be required for any and all environmentally sensitive or significant areas.[79] Requiring immediate, on-scene response resource capabilities as part of a response will lead to vastly improved response efforts, and may be the only way to prevent dangerous consequences such as drinking water contamination, significant economic devastation, and endangered species and fisheries loss.[80]

C. 12-Hour Response Time is Insufficient to Prevent Harm to Listed Species

As set forth herein, a 12-hour response time for HHFT derailments is insufficient to ensure that adequate equipment and personnel are available to prevent undue harm to people, property, and the environment from the fires and toxic spills associated with these accidents. This protracted response time is especially inadequate where HHFT derailments pose a threat of harm to imperiled species protected under the Endangered Species Act (ESA). A shorter response time is necessary to prevent HHFT derailments from resulting in take of listed species and harming critical habitat, and PHMSA must fulfill its ESA Section 7 duties by consulting with the FWS and NMFS to ensure that adequate response methods and timeframes are employed to prevent HHFT derailments from jeopardizing protected species.

PHMSA has solicited comment on whether the rule should define specific track locations where shorter response times might be warranted. Commenters submit that areas with designated critical habitat within 1-mile of rail lines with HHFT traffic require shorter response times to ensure that these essential habitat areas are protected.[81] Designated critical habitats are specific

[78] 81 Fed. Reg. 50,096.

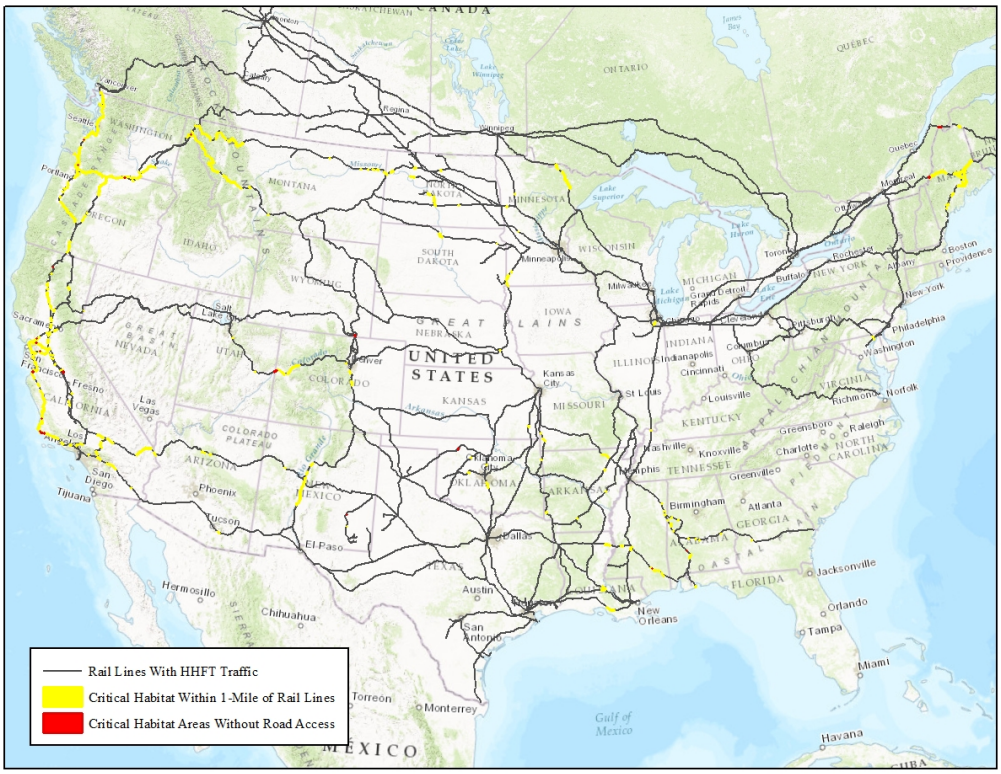
[79] "Environmentally sensitive or significant areas" as defined by PHMSA, includes, but is not limited to "wetlands, National and State parks, critical habitats for endangered or threatened species, wilderness and natural resource areas, marine sanctuaries and estuarine reserves, conservation areas, preserves, wildlife areas, wildlife refuges, wild and scenic rivers, recreational areas, national forests, Federal and State lands that are research national areas, heritage program areas, land trust areas, and historical and archaeological sites and parks. These areas may also include unique habitats such as aquaculture sites and agricultural surface water intakes, bird nesting areas, critical biological resource areas, designated migratory routes, and designated seasonal habitats." See proposed 49 C.F.R. 130.5, at 81 Fed. Reg. 50,124 - 50,125.

[80] Note, we incorporate by reference comments submitted by Riverkeeper and Scenic Hudson during the Advanced NPRM comment period, citing reasons why, for example, the Hudson River deserves enhanced protections and oil spill response assets capable of being deployed immediately, not 12 hours after a spill. The specific circumstances on the Hudson cited in those comments are facing waterways around the nation.

[81] The 1-mile "hazard zone" that Commenters suggest for this is based on the PHMSA Emergency Response Guide (ERG 2016), which states that "If rail car or trailer is involved in a fire, ISOLATE for 1600 meters (1 mile) in all directions; also, initiate evacuation including emergency responders for 1600 meters (1 mile) in all directions."

geographic areas that contain features *essential* for the conservation of a threatened or endangered species and that may require special management and protection.[82] PHMSA has a specific duty to protect these areas pursuant to ESA Section 7.[83]

Several rail lines carrying HHFTs are in the direct vicinity of designated critical habitat for listed species. For example, this includes (but is not limited to) salmon and steelhead habitat along the Columbia River in Oregon and Washington; green sturgeon habitat around San Francisco bay; black abalone and California red legged frog habitat in Southern California; Colorado pike minnow in Eastern Colorado; Rio Grande silvery minnow in Central New Mexico; Topeka shiner near Sioux Falls South Dakota; bull trout in Northern Montana; Atlantic salmon in Maine; and gulf sturgeon along the Gulf Coast.



Commenters note that the ERG recommends an initial evacuation zone of ½ mile in all directions for single car derailments; however, a one-mile or more evacuation zone can result when there are explosions and fires involving multiple tanker cars which can produce extensive plumes of toxic fumes, smoke, particulate matter and heat at significant distances from burning oil tankers. For example, a one-mile evacuation zone was ordered during the February 2015 oil train accident near Mount Carbon, West Virginia, in which a 109-car oil train derailed, resulting in multiple-car explosions and fires. A much larger, five-mile evacuation zone was recommended during the December 2013 oil train derailment near Casselton, North Dakota, in which explosions and intense fires from multiple cars produced huge clouds of flames and smoke.

[82] *See* https://www.fws.gov/midwest/endangered/saving/CriticalHabitatFactSheet.html.

[83] To fulfill the substantive purposes of the ESA, federal agencies are required to engage in Section 7 consultation with the Fisheries Service or the Fish and Wildlife Service, depending on the species at issue, to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2).

The map above depicts all HHFT routes that commenters are aware of, and highlights those areas where rail lines are within 1-mile of designated critical habitat. It further highlights several areas where rail lines near critical habitat are more than 2 miles from the nearest road, indicating sensitive areas that may be difficult to access, and which may therefore require additional consideration regarding staging of resources for responding to HHFT derailments. A web version of the map has also been made available,[84] which allows PHMSA to click on these areas to see the specific species and critical habitats that are at risk from HHFT derailments.

These imperiled species are being put at great risk of harm from HHFT derailments, and a 12-hour response time as set forth in the NPRM does almost nothing to ensure that spills following derailments are sufficiently contained to prevent contamination of critical habitat. While details concerning the timeframes of recent spill events from HHFT derailments are hard to pin down, the derailment in Mosier, OR provides some insight into the need for more rapid response. In that instance, the derailment occurred mid-day; however, according to news reports, at 9:30 pm that day (just 9 hours later) Governor Brown had to invoke the Emergency Conflagration Act to funnel more resources toward the firefighting effort, since it was determined that the incident exceeded local resources.[85] Moreover, even though press reports indicated that booms had been set up by 9:30 pm to prevent spilled oil from reaching the Columbia River, the next day crews found an oil sheen on the bank of the river, and according to DEQ, oil spilled from the derailment contaminated groundwater at levels that could harm wildlife.[86] This suggests that even a 9-hour response time was insufficient to prevent spilled oil from reaching waters that are critical habitat for several species of fish, such as salmon and steelhead. Had sufficient resources been available within a faster timeframe (i.e. 4-6 hours), then perhaps the incident would have been contained faster, preventing toxic benzene from contaminating local groundwater and the river ecosystem.

PHMSA itself has set forth in the NPRM precisely why a shorter response time is necessary where there is an increased risk of a high consequence spill event. As PHMSA notes, a shorter response time would result in "a smaller area [being] contaminated, fewer environmental consequences would result, and less property would be damaged."[87] PHMSA adds that, as an example, "quicker deployment of downriver booms, [would reduce] the amount of shoreline oiling, damage to riparian environments, and impairment of downstream sources of drinking water."[88] A shorter response time could, therefore, make the difference between limited harm and extensive ecological damage following a derailment.

Rapid deployment of response measures is especially important given the product that many of these HHFTs are carrying. Much of the product being hauled in HHFTs is fuel from the

[84] Note, map does not include *proposed* critical habitat for Atlantic Sturgeon, which is within 1 mile of rail lines throughout much of the northeast, including the Hudson River. Map available at http://center.maps.arcgis.com/apps/View/index.html?appid=c42abbbe2a3c470693ab128ecdee29ef.
[85] KATU/Associated Press: 14 Oil Tran Cars Derail In Columbia River Gorge, Railcars Erupt In Flames (June 3, 2016), *available at* http://katu.com/news/local/train-catches-fire-outside-mosier-in-the-columbia-river-gorge-oil-smoke-hood-river.
[86] Oregon Public Broadcasting: Mosier Groundwater Contaminated After Oil Train Derailment (July 21, 2016), *available at* http://www.opb.org/news/series/oil-trains/mosier-groundwater-contaminated-oil-train-derailment/.
[87] 81 Fed. Reg. 50,114.
[88] *Id.*

Bakken oil formation in North Dakota. Bakken crude is a lighter weight fuel, sometimes called "light sweet" crude for its low API gravity and sulfur content; however, lighter fuels, including Bakken crude, generally have a higher vapor pressure, making them more explosive, and they are more toxic and can penetrate shorelines more quickly and deeply than conventional crude.[89] Bakken fuels are therefore dangerous not only for their capacity for explosive fires in the event of a derailment, but spilled fuel that does not burn can penetrate deep into aquifers, potentially contaminating water supplies or benthic habitats that support species such as salmon and sturgeon.

The other crude product being moved by rail through North America is tar sand crudes from Alberta, Canada. Tar sand bitumen is a very heavy crude, which persists longer and can smother shorelines and the biota that live there. This viscous type of oil, once spilled into aquatic environments, creates a nightmare clean up scenario with lasting and perhaps irreversible impacts to water quality and aquatic ecosystems.[90] Tar sands oil is not only dangerous for its inherent corrosive and acidic properties and for its tendency to sink in water bodies, but since it is generally only transported when blended with volatile toxic gas condensates to thin the bitumen for transport, it is also highly flammable in the event of a spill, as evidenced by the March 7, 2015 derailment in Gogama, Ontario, where a train hauling tar sand crude exploded and burned for several days.

Spills of these products risk extensive ecological harm, and can have devastating impacts on listed species. Oil spills have the potential to cause catastrophic harm to listed species through direct harm and poisoning of the habitat and food chains on which these species rely. Oil spill response activities, if not carefully planned, can cause additional harm, such as through the use of toxic dispersants, dredging and in-situ burning, which can directly impact species and their habitat. It is therefore essential that PHMSA require comprehensive response plans for HHFTs that ensure a prompt and safe response where listed species are at risk of harm. As set forth below, the required response time where listed species are present should be developed through consultation with the Services to ensure that PHMSA fulfills its ESA duties.

Oil spills have the potential to cause catastrophic harm to listed species through direct harm and poisoning of the habitat and food chains on which these species rely. Since many oil trains travel through areas where there are listed species and critical habitat, the decision as to which trains must have a comprehensive plan, and the required response times for equipment to be in place for responding to oil spills, is an action that certainly "may affect" listed species. If PHMSA fails to provide for an adequate response time, it will put endangered species at risk, in violation of the Endangered Species Act. We therefore urge PHMSA to initiate consultation with the Services regarding this proposed rulemaking, to ensure that the regulations (especially the 12-hour response time for HHFT derailments) are not jeopardizing the continued existence of listed species.

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[89] PHMSA Safety Alert: *Preliminary Guidance from Operation Classification* at 1 (Jan. 2, 2014) (stating that "crude oil being transported from the Bakken region may be more flammable than traditional heavy crude oil") (available at http://www.phmsa.dot.gov/pv_obj_cache/pv_obj_id_8681A938B81B71A0E897AC2B9E38B8242DC70000/filename/1_2_14%20Rail_Safety_Alert.pdf).

[90] NATURAL RESOURCES DEFENSE COUNCIL, TAR SANDS PIPELINES SAFETY RISKS 7 (February 2011) (*available at* http://www.nrdc.org/energy/files/tarsandssafetyrisks.pdf).

D. 12-Hour Response Time is Insufficient to Handle Local Spill Response Needs

Chief among PHMSA's list of comprehensive OSRP elements is the mandate that any and all spill response plans reflect "the requirements of the National Contingency Plan (40 CFR part 300) and Area Contingency Plans."[91] As noted above, a 12-hour response zone window will leave communities on the hook for most of the "critical first 30 minutes" of response, and the railroad spill response efforts – 420 miles and 12 hours away – will be inadequate to protect waterways or critical habitats.[92]

As these OSRPs nonetheless must adhere to the requirements of the NCP and local ACPs, it is worth examining what those contingency plans suggest as response timeframes, and how a 12-hour delay would affect local first responders. In the New York/New Jersey ACP, updated in 2016, the EPA and USCG wrote the following about response times:

> *An important element of any risk assessment is the amount of time it takes to mount an effective response. Many factors affect the time it takes for pollution responders to arrive on scene*. In many cases, information as to the nature of the incident is initially incomplete, decisions as to the method and level of response may be delayed until the [federal agency lead] fully understands the situation. … In most situations within the COTP New York area of responsibility, it is possible for the oil to wash up on the beach or shoreline within minutes of the spill. As a result, unless conditions are such that a containment boom can be deployed immediately and such boom will be effective under the given wind/sea conditions, most strategies are confined to deflecting oil to collection areas.[93]

Immediate ("within minutes") action, the ACP states, is key in the NY/NJ region. Notably, the ACP raises locality-specific accessibility concerns, warning that OSRO and contractor response times are

> greatly affected by the time of the day and day of the week the contractor is called. Traffic jams in metropolitan New York City can occur 24 hours per day. Vital bridges and tunnels are routinely closed down at night for repairs. Morning and afternoon rush hours greatly increase response times. There can be a significant delay in deploying a contractor to remote areas since travel times can vary.[94]

Moreover, for oil spills from railcars, "[e]nvironmental concerns could be substantial in some of the more sensitive areas, areas where the remote location could cause substantial delays in

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[91] 81 Fed. Reg. 50,075.

[92] Note, in those critical first 30 minutes, and in the next 70 minutes before pool fires eclipsed derailed tank car thermal tolerances, as well as the following ten hours of evacuations, clean-ups, booming, skimming, communications, and testing that follow hazardous material and oil spills, local first responders and federal first responders will, by necessity, be the only assets engaged until the railroad OSROs arrive. This represents PHMSA's knowing appropriation of public goods for private benefit – relying on the help of volunteer fire stations, the EPA, USCG, and others in place of private railroad assets in order to, as noted above, save the railroads money. This is egregious, and must be revisited.

[93] NY/NJ ACP, supra, at 246.

[94] *Id.*, at 246-247.

the deployment of containment boom and generally slow cleanup operations."[95] Given the importance of immediate action in this ACP area, and the unique accessibility issues, the EPA and USCG require oil transfer facilities to have booms "available for deployment within 1 hour," and oil recovery devices and oil storage capacity "on scene within 2 hours of discovery."[96]

In running through a range of oil spill scenarios for the region, the NY/NJ USCG and EPA discuss response needs in three different situations. First, the ACP notes that for small spills along waterfronts (see "Arthur Kill Barge" scenario), Coast Guard teams would be on-site within an hour and the "bulk of the on-water recovery will take approximately 12 hours from initial notification."[97] Thus, under PHMSA's proposed rules, the railroad's OSROs might arrive on scene well after oil recovery operations have ended – potentially putting the entire burden of the response effort on the Coast Guard.

Second, the ACP discusses a larger spill in the NY/NJ Harbor – bigger in scope and impact than the first response – where, nonetheless, OSRO contractors must be on the scene and booming harbor islands within 90 minutes of the spill, and response boats arrive on scene within 6-24 hours.[98] Within 12 hours in this scenario, half of all the total OSRO contractors are to be on-site and engaged in cleanup operations.[99] PHMSA's 12-hour response zone proposal is therefore insufficient to ensure a meaningful response.

Third, in the ACP's worst-case scenario, the Coast Guard still projects that, in the first 4 hours, evacuations and booming will have begun, the Hudson River will have been closed, and all interested and involved parties will have conferred as to the best course of response.[100] In the next 4 hours, "representatives of the contractor and subject matter experts" – such as the railroad hazmat response experts from the FRA or PHMSA – are "incorporated into a planning and strategy advisory group for utilization by the state and federal decision makers."[101] Spill response to this disaster scenario continues well beyond the first 8 hours, but clearly a 12-hour response time would mean that railroad assets and contractors could arrive too late to meaningfully strategize and confer with response assets. PHMSA's proposal thus shifts the burden of emergency response and clean-up from the responsible party to community, local response and federal government resources.

In conclusion, PHMSA should reopen and revisit the proposed 12-hour response zone standard. As currently drafted, the requirement fails to comply with at least one ACP, falls far short of providing for the maximum oil cleanup practicable, is incongruous with PHMSA's own emergency response practices and basic tank car designs, is based on pipeline regulations that do not apply to unique railroad circumstances, and fail to even minimally protect water and endangered species from harm. Moreover, the rule puts an unnecessary burden on the public, asking for input in establishing response zone timeframes when the railroads and agencies are in

[95] *Id.*, at 249.
[96] *Id.*, at 247.
[97] *Id.*, at 249.
[98] *Id.*, at 252.
[99] *Id.*
[100] *Id.*, at 257-258.
[101] *Id.*, at 258.

the best position to develop nuanced mile-by-mile assessments of response risk and asset staging need. Forcing the public to bear the burden of setting a faster response time is as egregious as knowingly burdening local responders with the first 12 hours of evacuation and spill response work.[102] PHMSA should revisit the 12-hour response zone plan, set a standard that actually protects and responds to the maximum (not minimum) extent practicable, and requires consideration of a many environmental and public welfare criteria before creating a new trigger.

IV. NOTIFICATIONS SHOULD BE EXPANDED TO APPLY TO ALL TRAINS CARRYING ONE TANK CAR OR MORE OF CRUDE OIL OR ETHANOL, AND NOTIFICATIONS SHOULD BE GIVEN TO THE DOT AS WELL AS STATE AND TRIBAL EMERGENCY RESPONSE CENTERS

On May 7, 2014, the Department of Transportation issued an Emergency Order (DOT-OST-2014-0067) requiring railroad companies with trains transporting one million gallons of Bakken crude oil or more to submit notifications to state emergency response centers ("SERCs") in each state in which the railroad operates those trains. The disclosures must: (1) estimate the number of trains expected to travel weekly through each county within the state; (2) identify and describe the petroleum crude oil expected to be transported; (3) provide basic emergency response information; (4) identify the rail routes over which the material will be transported; and (5) a railroad point of contact for SERCs and other emergency responders.[103] The initial notifications were due in early June 2014, and the railroads must update the notifications prior to making material changes in the estimated volumes or frequencies of trains traveling through any county.[104] The Order specifies that any increase or decrease in the number of implicated trains per week constitutes a material change.[105]

In August 2014, PHMSA proposed to codify that emergency order in its HHFT rulemaking, requesting public comment.[106] However, the final HHFT rule did not include the notification provisions for various reasons.[107] The issue of notification remained important to many communities, and Congress addressed it in the FAST Act of 2015. The FAST Act section 7302 directs the Secretary to issue regulations for the real-time sharing of electronic train consist information for hazardous materials; it also requires regulations for Class I railroads to provide SERCs advanced notification of HHFTs traveling through their jurisdictions.

The proposed rule requires Class I railroads to provide advanced notification and information on HHFTs to SERCs and their tribal counterparts – tribal emergency response centers or "TERCs" in the same manner as the May 2014 Emergency Order, except that, as ordered by the FAST Act, the proposed rule applies to all HHFTs, not just trains carrying a

[102] Interestingly, PHMSA did not seem to consider – and it should do so in the final regulations – requiring railroads with HHFTs to include in unit or manifest trains railcars loaded with response equipment (e.g., booms and skiffs) buffered from any hazardous cargo.
[103] Emergency Order, Docket DOT-OST-2014-0067, at 2, 15 (May 7, 2014).
[104] *Id.* at 2, 13, 15-16.
[105] *Id*. at 13, 15-16.
[106] 79 Fed. Reg. 45015 (Aug. 1, 2014).
[107] 80 Fed. Reg. 26643 (May 8, 2015).

million gallons of Bakken crude oil. This is a step in the right direction, but still does not meet the goal of providing clear and complete information to the public. Extension of the notification to be provided to TERCs, as well as SERCs is another positive modification.

We urge that the final rule: (a) change the threshold for the SERC notifications to extend to all trains carrying even one tank car of crude oil or ethanol (not just HHFTs); and (b) ensure that the notifications are affirmatively made available to the public in easily accessible form upon their submission. With these changes, the notifications will better supply emergency responders and communities along the rail lines with critical information needed to make decisions about toxic exposures and to safeguard people and private property in harm's way.

A. All Trains Shipping Any Amount of Crude Oil or Ethanol Should Be Subject to the Notification Mandates.

We propose that the final rule lower the threshold for SERC notifications to trains with one or more cars carrying hazardous materials, including crude oil and ethanol. Changing the trigger for the SERC notifications would help the Emergency Order achieve its purpose of notifying responders of hazardous trains that pose public health and safety threats.

First, the HHFT restriction is unsupported by the recent accident record. Accidents occur for many reasons that are not necessarily related to the length of the train or number of tank cars in the train. While unit trains pose heightened risks because of the number of cars that can collide and breach and the amount of hazardous fuel that can ignite and explode, many recent spills, explosions, fires and evacuations occurred when far fewer than 20 tank cars derailed and spilled oil. For example, the Lynchburg, Virginia accident in April 2014 involved one tank car spilling its load into the James River, as well as a fire and evacuation of 350 people.[108] In light of the extensive harm when fewer than 20 tank cars have spilled, limiting the rule to trains with 20 tank cars in a row (or 35 scattered throughout the train) is not a rational decision. Shipping volatile crude in any amount, particularly in unsafe tank cars that are prone to puncture, presents public health and safety threats.

Accordingly, we urge DOT to require notification to SERCs and TERCs for rail operators carrying as little as one tank car of crude oil.

Second, in its 1996 oil spill response plan regulation, PHMSA adopted a 42,000 gallon per packaging trigger for preparation of comprehensive oil spill response plans; such plans must include substantial training and coordination between public and private emergency responders.[109] Given this 42,000 gallon trigger, PHMSA decided a spill involving that amount of oil posed substantial risks that warranted rigorous emergency preparations, although its 1996 rule defeated the response planning goals by basing it on a single tank car rather than aggregated volume. As noted above, we urge PHMSA to require comprehensive oil spill response plans for trains with a single tank car laden with crude oil or ethanol because of the severe human and environmental risks posed by an explosion or spill of even one tank car. A single tank car threshold for the notifications should be adopted as well.

[108] RIA at 199.
[109] 61 Fed. Reg. 30,533 (1996).

PHMSA need not look further than the guidance provided in the Department of Transportation's "Orange Book" guide for emergency first responders, which recommends clearing and evacuating a half-mile area surrounding even just one rail car on fire.[110] In addition, a single tank car threshold is consistent with PHMSA's proposed 40 m.p.h. speed limits, which would apply to any HHFT that has even a single tank car that does not comply with the new tank car standards.[111]

In sum, given the known inherent hazards of crude and ethanol transported in any quantity, PHMSA should make SERC notification requirements applicable to operators carrying any amount of crude oil or ethanol.

B. The Notifications Should Affirmatively Be Made Available to the Public in Easily Accessible Formats.

Shortly after issuance of the Emergency Order, controversy arose over public disclosure of the notifications. In particular, the railroads sought to enter into nondisclosure agreements with the SERCs in order to keep the train routes and emergency preparedness information from the public.[112] For its part, the DOT issued a document providing answers to frequently asked questions ("FAQ Document") in which it indicated that "DOT prefers that this information be kept confidential, and acknowledged that railroads may have an appropriate claim that this information constitutes confidential business information, but that such claims may differ by state depending on each state's applicable laws."[113]

Neither the Emergency Order nor DOT's FAQ Document required that states sign confidentiality agreements in order to receive the SERC notifications, and DOT eventually decided not to designate the notifications as Sensitive Security Information ("SSI") that must be kept confidential.[114] When pressed by the railroads to agree to confidentiality, some states reportedly agreed to withhold the information from the public, while others refused, deciding instead to let their public records laws control public access.[115] Throughout the country, news outlets and nongovernmental organizations filed public records requests seeking access to the notifications, including requests filed by Earthjustice on behalf of Sierra Club and Sightline Institute in over a dozen states. Most states determined that the notifications did not contain confidential business information and had to be released to the public, despite the pleas of the railroad companies seeking secrecy.[116]

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[110] U.S. Department of Transportation / Transport Canada, Emergency Response Guidebook: A Guidebook for First Responders During the Initial Phase of a Dangerous Goods/Hazardous Materials Transportation Incident (2012).
[111] 79 Fed. Reg. at 45,047.
[112] 79 Fed. Reg. at 45,041.
[113] *Id*.
[114] *Id*.
[115] *See* Joshua Shneyer, *Dozens of Trains Haul Volatile Bakken Oil to NY Weekly: Railroads*, REUTERS, (September 23, 2016). *available at* http://www.reuters.com/article/2014/07/15/us-oil-trains-new-york-idUSKBN0FK2NR20140715.
[116] *Id.; see also* Scott Fallon, *Trains Carrying Highly Explosive Bakken Oil Coming Into N.J. By The Dozens Every Week,* NORTHJERSEY.COM (September 23, 2016), *available at* http://www.northjersey.com/news/trains-carrying-highly- explosive-bakken-oil-coming-into-n-j-by-the-dozens-every-week-1.1066053.

The FAST Act also focused on this issue of notification, directing Class I railroads to provide advanced notification and information on HHFTs to SERCs, as well as requiring SERCs that receive this advanced notification provide that information to law enforcement and emergency response agencies upon request. This rule proposes that the information-sharing requirements apply to all railroads with HHFTs operating on them, not just Class I railroads. This proposal makes sense, as recent railroad accidents involving crude oil have not been limited to Class I railroads. Because the proposed rule expands the notification requirements, we support those provisions.

The FRA has rejected the railroads' argument that the sharing of such information could require them to reveal proprietary business information.[117] Indeed, the FRA noted that the railroads did not specifically identify any prospective harm caused by the sharing of this information.[118] The proposed rule, however, adds qualification language to the notification requirements that could result in the railroads again attempting to limit public information.[119] Given their statements to date, we expect the railroads to attempt to hide much information by labeling it exempt and leaving it to individual states to decide what is made available. A patchwork pattern of public notification availability will not help inform and coordinate emergency and first responders.

Simply put, the notifications have already been found to be ineligible for SSI treatment and do not constitute confidential business information. We continue to urge DOT to require submission of the SERC notifications to DOT, which would make them available to the public under the federal Freedom of Information Act, and to establish mechanisms for obtaining and posting the information in electronic format so that it will be easily accessible to the public.

i. The notifications cannot be kept secret as SSI.

Prior to September 11, 2001, the Federal Aviation Authority was the primary agency that engaged in security screening programs and had the statutory authority to prohibit "disclosure of information obtained or developed in carrying out security or in research and development activities."[120] In the aftermath of the September 11 attacks, Congress enacted a series of statutes that gave DOT authority to conduct security research and develop programs.[121] The statute describes the scope of that authority as encompassing:

> research (including behavioral research) and development activities appropriate to develop, modify, test, and evaluate a system, procedure, facility, or device to protect passengers and property against acts of criminal violence, aircraft piracy, and terrorism and to ensure security.

[117] 79 Fed. Reg. 59891 (Oct. 3, 2014).
[118] *Id.*
[119] The additional language reads: "If the disclosure includes information that railroads believe is security sensitive or proprietary and exempt from public disclosure, the railroads should indicate that in the notification."
[120] S*ee also* 69 Fed. Reg. 28,068.
[121] Aviation and Transportation Security Act, Pub. L. 107-71; 69 Fed. Reg. 28,068; Homeland Security Act, Pub. L. 107-296, codified at 49 U.S.C. § 40119 (granting authority to Secretary of Transportation and Transportation Security Administration); *see also* 49 U.S.C. §114(r).

That authority includes the power to designate information generated in the course of such research and development as SSI, which can then be kept withheld from the public. Specifically, the statute provides:

> [T]he Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would–
>
> (A) be an unwarranted invasion of personal privacy;
>
> (B) reveal a trade secret or privileged or confidential commercial or financial information; or
>
> (C) be detrimental to transportation safety.[122]

The statute goes on to clarify that information may not be withheld under a pretext of SSI when it is actually being withheld to "prevent embarrassment to a person, organization, or agency."[123]

Pursuant to this authority, the DOT promulgated regulations jointly with the Transportation Security Administration in May 2004.[124] The joint regulations repeat the statutory description of SSI and contain a list of 16 categories of information that could be designated as SSI. The sixteen categories include security training materials, security directives, vulnerability assessments, threat information, systems security information, and aviation and maritime infrastructure asset information.[125]

DOT appropriately determined that the SERC notifications are ineligible for designation as SSI. The notifications fall outside the statutory and regulatory SSI parameters because the notifications and their contents were neither developed nor obtained by DOT in the course of security research and development programs. Both the underlying statutes and the implementing regulations limit SSI to information "obtained or developed" in carrying out research and development related to transportation security. DOT clearly did not develop the information contained in the notifications; the railroads did. And as currently structured in the Emergency Order, DOT has not obtained the notifications. The railroads are required to submit the notifications to state emergency response agencies. Even if they were submitted directly to DOT, as we urge the final rule to require, however, the notifications would remain outside the purview of SSI applicability because the information they contain was not developed as part of DOT security research and development programs.

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[122] 49 U.S.C. § 40119(b)(1).
[123] 49 U.S.C. § 40119(b)(3)(B).
[124] *See* 69 Fed. Reg. 28,069.
[125] 49 C.F.R. § 15.5(a) (Department of Transportation regulations); 49 C.F.R. § 1520.5(a) (Transportation Security Administration regulations). The 16 categories are: (1) security programs and contingency plans; (2) TSA directives regarding security; (3) information circulars (notices issued by DOT regarding threats to transportation); (4) performance specifications; (5) vulnerability assessments; (6) security inspection or investigative information; (7) threat information; (8) security measures; (9) security screening information; (10) security training materials; (11) identifying information of certain transportation security personnel; (12) critical aviation or maritime infrastructure asset information; (13) systems security information; (14) confidential business information; (15) research and development; and (16) other information the Department determines is SSI. 49 C.F.R. § 15.5(b).

ii. The notifications cannot be kept secret as confidential business information.

Nor do the notifications contain information that can be kept secret as confidential business information.[126] The linchpin of such a basis for withholding is that the information must be confidential and its disclosure would cause the business entity competitive harm.[127] The notifications contain two types of information: (1) basic emergency response information; and (2) the routes of trains carrying huge quantities of explosive crude.

As to the emergency preparedness information, there is absolutely no basis for claiming the basic emergency response information is confidential or that its disclosure would cause any competitive harm. The notifications must disclose the technical name of the hazardous cargo, immediate hazards posed to health, risks of fire or explosion, and immediate measures for handling spills or fire, and preliminary first aid measures.[128] Much of this information in contained in Material Safety Data Sheets and PHMSA's Emergency Response Guidebook (the "Orange Book"), all of which are in the public domain. To illustrate the nature of the information, a BNSF disclosure made pursuant to the Emergency Order revealed that that the proper treatment when crude oil irritates the eyes is to "immediately flush eyes with plenty of water for at least 15 minutes, while holding eyelids apart in order to rinse entire surface of eye and lids with water."[129] The disclosures also describe appropriate protective clothing, such as rubber boots, which could let people who live near the tracks know they should have a pair of rubber boots in their disaster kits. None of this information is confidential, and no competitive harm would result for its release.

As to the train route information, the number and frequency of trains laden with significant quantities of Bakken crude (or other crude oils, petroleum products, or ethanol) is not confidential business information both because it is hardly a secret and the railroads would be unable to demonstrate that its disclosure would cause them competitive harm. Trains must literally follow the tracks. Any competitor can easily see the routes the trains follow and knows which company owns each rail line. Competitors can also tell whether a train consists of rail cars that carry hazardous flammable liquids. The DOT-111 and CPC-1232 tank cars, for example, have signature features that can readily be observed as a train passes by, even from a distance. Unit trains, which have emerged in recent years to carry crude oil or ethanol, are visible for miles. Again, competitors can discern merely from observing a passing train that it is carrying crude oil or ethanol. Competitors are also privy to industry trends, which document the surge in crude-by-rail and ethanol shipments and which identify the Bakken formation as a key source of the crude oil dominating the rails. Competitors could also readily figure out that unit trains that begin their journey in North Dakota and move toward refineries are carrying Bakken crude.

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[126] Using the federal FOIA standard to illustrate this point, FOIA's exemption 4 "permits an agency to withhold "commercial or financial information [that was] obtained from a person [and is] privileged or confidential." 5 U.S.C. § 552(b)(4); *see also* Pub. Citizen Health Research Grp. v. Food & Drug Admin., 185 F.3d 898, 903 (D.C. Cir. 1999).

[127] *See e.g., Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999); *see also Inner City Press/Cmty. on the Move v. Bd. of Governors of Fed. Reserve Sys.,* 463 F.3d 239, 244 (2d Cir. 2006).

[128] Emergency Order at 2, 15 (requiring disclosure of information specified in 49 C.F.R. §172.602).

[129] BNSF Notification to Emergency Management Division, Response Section of the Washington State Military Department (June 6, 2004).

Given the clear public interest in obtaining the basic safety information and the lack of competitive harm from disclosure, most states have appropriately determined that the notifications may not be kept from the public as confidential business information.

iii. DOT should require submission of the notifications to DOT and should make the information easily accessible to the public.

We urge DOT to require the railroads to submit their notifications to DOT, which would lessen the burdens on states to facilitate public access, subject the notifications to uniform public access standards, and enable DOT to fulfill its obligations to make regularly sought information easily accessible to the public.

By setting up a system in which the railroads sent their notifications to each state, DOT imposed burdens on the states to process public records requests, which entailed making exemption determinations and setting up mechanisms for public access. As the proposed rule acknowledges, Congress has counseled federal agencies to avoid imposing unfunded mandates on states and local governments, and DOT has addressed this obligation in the proposed rule.[130]

The state notification approach made the notifications subject to different public access standards depending on the laws of each state. As discussed above, some states reportedly entered into nondisclosure agreements with the railroads, while others released the SERC notifications available under the state public records laws. Some states posted the entirety of the SERC notifications on a state-agency website.[131] Such a patchwork of public access to train routes information makes no sense. It is hard to imagine what public policy would be served by allowing the public to know the contents of a unit train up to the border of a state and then stop again until the train enters the next state that embraces public disclosure. The risks to the public are comparable. The need for emergency preparedness and self-help on the part of communities along the tracks is no different.

To put an end to the burdens imposed on the states and a patchwork system of public disclosure, we urge DOT to require the railroads to submit their notifications directly to DOT in addition to the SERCs and TERCs. Since the federal Freedom of Information Act ("FOIA") applies to records in the possession of federal agencies, the notifications would then be subject to public disclosure under one uniform standard throughout the country. For the reasons laid out above, the notifications fall within no FOIA exemption to disclosure and therefore would need to be made available to the public.

Federalizing public access to the train routes and basic emergency preparedness information is consistent with how rail safety and the transportation of hazardous materials by rail are regulated. Both are the purview of the federal government with pervasive preemption of state and local authority. It makes sense, in light of such a pervasive federal role and the fact that crude-by-rail safety has created a national (indeed international) safety crisis, to have uniform public disclosure of train route and emergency response information.

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[130] *See* 79 Fed. Reg. at 45,068.

[131] *See Oregon State Police - Oregon Office of State Fire Marshal,* OREGON.GOV available at http://www.oregon.gov/osp/SFM/Pages/SERC/CrudeOilReports.aspx (last visited Sept. 5, 2014).

In addition, federalizing public access to the notifications would trigger the Electronic Freedom of Information Act Amendments of 1996 (Electronic FOIA), which require that federal agencies affirmatively facilitate public access to information that is likely to be requested frequently under FOIA. Given the tremendous public concern about rail safety in the wake of the spate of horrific rail disasters, it is certain that news media and the public will repeatedly seek access to the notifications. In fact, the states received numerous public records act requests from the news media, community groups, and environmental and safety advocacy organizations when the first notifications were submitted to the states.

One of the driving policy considerations of the Electronic FOIA mandate is to "maximize the usefulness of agency records and information collected, maintained, used, retained, and disseminated by the Federal Government." President Obama has echoed this policy with his 2013 executive order directing the federal government to be open and accessible:

> To promote continued job growth, Government efficiency, and the social good that can be gained from opening Government data to the public, the default state of new and modernized Government information resources shall be open and machine readable. Government information shall be managed as an asset throughout its life cycle to promote interoperability and openness, and, wherever possible and legally permissible, to ensure that data are released to the public in ways that make the data easy to find, accessible, and usable.[132]

Anticipating that requiring submission of the notifications to DOT would trigger the Electronic FOIA, DOT could affirmatively provide in the final rule that the notifications should be made in a form that would facilitate immediate posting on DOT's website. It is instructive to look at how some states have handled repeat state public records requests as a railroad's weekly train schedules and cargo has changed. For example, the State of Oregon posts the notifications on a government website, featuring the latest disclosures.[133] Requiring e-filing and immediate posting of the notifications would give the public access to the latest data as soon as it is available, instead of necessitating the filing of repeat FOIA requests and postponing disclosure until the process of fulfilling that request runs its course.

Making this information available on the federal agency's website would also ensure the public can obtain the most up-to-date data. Streamlining the process in this manner and affirmatively invoking Electronic FOIA would also spare the state agencies the burdens of processing repeat public records requests and designing their own disclosure systems. In keeping with federal mandates to lessen compliance burdens imposed on state governments, DOT should take on these burdens and design a system that would minimize burdens on states and maximize public access to safety information before the crude-by-rail trains have passed through communities. We urge the Department to make the information public for the entire country under the federal FOIA standards.

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[132] Executive Order 13,642 (May 9, 2013).

[133] *See Oregon State Police - Oregon Office of State Fire Marshal,* OREGON.GOV available at http://www.oregon.gov/osp/SFM/Pages/SERC/CrudeOilReports.aspx (last visited Sept. 5, 2014).

iv. PHMSA's rationale for withholding OSRP information is unconvincing and unsupportable.

During the comment period for the advance notice of these OSRP regulations, several commenters called on PHMSA to provide for full disclosure of plans, and full involvement of the public and local response agencies during plan development. In dismissing these requests, PHMSA said:

> We disagree however that providing the entire OSRP to emergency responders will lead to better preparedness. Some elements of the OSRP may be sensitive for security, business, or privacy reasons. Other elements are specific to railroad operations, and will not inform the actions of first responders or communities.[134]

No basis was given that suggests what specific elements in an OSRP would be sensitive information. No examples of OSRPs "specific to railroad operations" were cited that wouldn't or couldn't be helpful for responders to know during a response action. No rationale was given as to why, for a program built upon a call for better preparation and precaution, secrecy and confidentiality should be the presumption instead of the exception.

PHMSA did not, to be fair, propose full opacity for OSRPs. In order to "ensure emergency responders have pertinent information from plans," the agency noted, the final rules propose allowing "information describing the response zones and contact information for the qualified individual" to be shared with SERCs and TERCs.[135] According to the agency, sharing this information would allow "emergency responders to understand which communities are included in the same response zone" and who to contact in the event of a spill.[136] In short, localities would be allowed access to the information they already know: that HHFTs move through their jurisdictions.

Thus, responders will know about the problems they face, but nothing about how to respond to any incidents, what role exactly a railroad (or it's ORSOs, or the physical assets on contract by the railroads) will play during a response action, or even when the railroads will be able to be on site (within the PHSMA-proposed 12-hour window). This, we believe, falls short of the spirit and letter of the Clean Water Act, the NCP, and regional ACPs, and it recklessly closes the door to meaningful spill response preparation and planning.

V. Several Key Improvements Needed to the Proposed Regulations

In addition to the considerations above, PHMSA should reexamine the specific wording and requirements of the proposed regulatory sections. From the OSRP approval process to agency involvement in enforcing these new regulations, key improvements are needed to best protect the public and environment, and to follow the letter of the law.

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[134] 81 Fed. Reg. 50,102.
[135] *Id*.
[136] *Id*.

A. OSRP Approval Process Must Be Improved

The proposed rule requires railroads to have approved comprehensive oil spill response plans in most instances. However, it allows railroads to continue transporting oil without an approved OSRP, if it has submitted an OSRP to FRA, is operating in compliance with the plan, and has certified that it has ensured by contract or other means the resources needed to remove a worst-case discharge to the maximum extent practicable.[137] During OSRP submission and approval, a railroad can continue to operate if FRA has specifically denied a plan, while the plan is being re-developed.[138]

OPA contains a similar provision, except that the law imposes a two-year limit on the ability of an onshore facility or other handler/transporter of oil to operate without an approved OSRP.[139] In that case, though, the regulated entity must still "certif[y] that the owner or operator has ensured by contract or other means approved by the President the availability of private personnel and equipment necessary to respond, to the maximum extent practicable, to a worst case discharge or a substantial threat of such a discharge."[140]

Here, PHMSA should put a limit on the length of time a train can operate without an approved OSRP, potentially set at two years, and otherwise bring the OSRP approval regulations into compliance with the law.

Finally, with respect to PHMSA's proposed ORSP approval regulations two last clarifications are required. First, in the proposed new section 49 CFR 130.11(d), PHMSA should amend "FRA will approve the response plan if FRA determines that the response plan meets all requirements of this part" to require compliance with these regulations ("this part") and both the OPA and CWA.[141] Second, PHMSA's final rule must include a regulatory impact survey of FRA's ability to enforce these programs, considering the agency's budget and expertise in oil spill response planning adjacent to waterways.

B. Compliance with OPA and CWA Must Be Demonstrated, Not Certified

Throughout the proposed regulations, PHMSA misinterprets OPA requirements requiring demonstrated response capacity as allowing railroads to self-certify they have sufficient response capacity. This is an inaccurate reading of the law, and should be amended in the final regulations.

As an example, the Oil Pollution Act requires that OSRPs "shall" "be consistent" with the NCP and ACPs.[142] Conversely, PHMSA's proposed oil spill response plan regulations take a step away from these declarative requirements, proposes, instead, that OSRPs only need to "reflect" the NCP and ACPs.[143] PHMSA's proposed new section 49 CFR 130.103 would allow a

[137] *Proposed* 49 C.F.R. § 130.101(e).
[138] *Id*. § 130.101(e)(4).
[139] 33 U.S.C. § 1321(j)(5)(G).
[140] *Id.*
[141] 81 Fed. Reg. 50,128.
[142] 33 U.S.C. § 1321(j)(5)(D).
[143] 81 Fed. Reg. 50,075.

railroad to self-certify that its OSRP reflects the NCP and ACP, and creates a new subset of NCP/ACP adherence called "minimum compliance."[144] The OPA, clearly, demands that OSRPs are consistent with (not reflective of) the NCP and ACPs, and allows for a new subset of requirements that could be "minimum compliance."[145] We ask that PHMSA strike "reflect" in favor of "be consistent with", and strike any reference to "minimum compliance" standards. Several other sections have similar issues:

- **Training Certifications**. As with an OSRP's consistency with the NCP and ACPs, PHMSA's proposed regulations would allow railroads to "certify" in the response plan that it conducted sufficient training and testing.[146] The OPA requires that "a response plan must describe the training to be carried out under the plan to ensure the safety of the facility and to mitigate or prevent the discharge."[147] Certification of compliance is not a demonstration of compliance; PHMSA must correct this proposed regulatory wording to come into compliance with the OPA's statutory language.[148]

- **Communications**. In PHMSA's proposed new sections § 130.104 and 130.105, the agency requires "identification of qualified individual for each response zone in quickly accessible information summary," and requires that an OSRP include a "checklist of necessary notifications, contact information, and necessary information to clarify communication procedures."[149] OPA, however, requires "immediate communications" between OSROs or the affected industry and the federal official in charge of spill response.[150] PHMSA does not have the authority to step back from that absolute requirement and permit a weaker standard that downplays the urgent and immediate nature of response communications. Instead, PHMSA should require immediate communications consistent with OPA.

- **Contracts & Maximum Extent**. In PHMSA's proposed new sections § 130.102 and 130.106, the agency introduces the concept of response zones, but also mandates that OSRPs "ensure the availability of personnel and equipment" necessary for a response action in those zones. The OPA requires that response action personnel and equipment are ensured "by contract," a vital clarification missing from PHMSA's proposal.[151] In these proposed regulations, PHMSA also omits reference to the federal statutory standard for oil spill response effort – namely, that OSRPs are built to remove oil "to the maximum extent practicable."[152] In its final proposed regulations, PHMSA should

[144] 81 Fed. Reg. 50,076.
[145] See 33 U.S.C. § 1321(j)(5). Note, also, that the arbitrary creation of new classes of standards that do not exist in the law led to the original creation of "Basic" OSRPs and "Comprehensive" OSRPs, where the agency should have just created one type of plan that covered some entities but not others.
[146] See Proposed Regulation 49 CFR § 130.107.
[147] 33 U.S.C. § 1321(j)(5)(D)(iv).
[148] Note, PHMSA proposes regulations for equipment testing that provide a demonstration of adequacy – as intended by OPA – instead of a certification system where its mandates OSRPs to "*include a description of the methods* used to ensure equipment testing." See Proposed Regulation 49 CFR § 130.108 (emphasis added).
[149] 81 Fed. Reg. 50,077.
[150] 33 U.S.C. § 1321(j)(5)(ii).
[151] *Id.*, at (j)(5)(iii).
[152] *Id.*

reintroduce the requirement that OSRPs show – by contract – that preparations have been made to respond to the maximum extent practicable.

In conclusion, PHMSA cannot and should not allow railroads to certify that their OSRPs reflect the NCP and ACPs, the agency must require that OSRPs have a plan that is consistent with the NCP and ACPs. PHMSA should not allow railroads to certify that they have a plan and sufficient training for removing the worst case spill to the maximum extent practicable, railroads should be required to describe and ensure by contract they have plans and the proper training for removing such spills. In short – the law requires OSRPs to show, and have plans, training, and capacity for removing oil spills.

VI. CONCLUSIONS

PHMSA's proposed oil spill response regulations are a long overdue step toward adequate oil spill response planning. Given, however, the complexities of HHFT transport of oil along railroads throughout the nation – the accessibility, endangered species, water protection, community safety, and localized response issues that arise each time a new oil train derailment occurs – PHMSA has much to clarify, reconsider, and revisit before it finalizes the proposed rules. PHMSA creates an overbroad 12-hour response window – allowing spill response assets to be staged up to 420 miles from any given spill. PHMSA uses a grossly inadequate definition of "worst-case discharge." PHMSA's proposed rule is wholly inconsistent with the Oil Pollution Act, a departure that was not envisioned by Congress. PHMSA doesn't consider issues such as different response needs based on different product types (such as shale oils versus tar sands oils). Taken together, PHMSA's proposal fails to comply with the Oil Pollution Act as well as common sense, and must be improved before it becomes final.

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