OIL AND HAZARDOUS MATERIALS TRAINS IN YOUR COMMUNITY

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Key Terms

- Surface Transportation Board (STB)
  - 49 U.S.C. Subtitle IV
- Rail carrier
  - 49 U.S.C. § 10102(5)
- Federal Railroad Administration (FRA)
  - 49 U.S.C. §§ 103 et seq.
- Pipeline and Hazardous Materials Administration (PHMSA)
  - 49 USC §§ 60101 et seq.
Federal Preemption

- STB has “exclusive” jurisdiction over:
  - “Transportation by a rail carrier” (49 U.S.C. § 10501)
  - Construction, acquisition, operation, abandonment or discontinuance of spur, industrial, team, switching, or side tracks or facilities (49 U.S.C. § 10501)
  - “Transportation” broadly encompasses real property, equipment and activities (49 U.S.C. § 10102(9))
Federal Preemption

- All remedies provided under ICCTA are exclusive and preempt the remedies provided under Federal or State law (49 U.S.C. § 10501(b))
- For preemption to apply:
  - Activity must constitute “transportation” 49 U.S.C. § 10501(a)(1)
  - Must be performed by a “rail carrier” 49 U.S.C. § 10501(b)
Federal Preemption

- State or local regulation or action preempted if -
  - Such action would unreasonably interfere with railroad operations or interstate commerce, or
  - Would constitute regulation of the railroad’s operations
- Any action requiring “preclearance” by local entity preempted – zoning regulation, building permit
- Railroads have condemnation power in many states
Federal Preemption

- **NOT preempted:**
  - Local laws of general applicability governing public health, safety and welfare
    - Example: Oil production or transloading facilities not owned by a railroad may be subject to local zoning and building codes – analysis will be fact-specific
  - Federal environmental laws
Freight railroads are the backbone
- Competing demands – freight and passenger operations
- Competing demands among freight commodities
- Limitations
  - Space/scheduling
  - Speed restrictions
Rail Safety – General

- FRA - rail safety
  - Track
  - Equipment
  - Workers
- PHMSA – hazardous materials transportation – any mode
- FRA enforces
  - PHMSA requirements within the rail industry
  - FRA’s own regulations
Rail Safety – Grade Crossings

- Regulated at state level
- FRA app – includes accident history: Rail Crossing Locator
  - [www.fra.dot.gov/Page/P0703](http://www.fra.dot.gov/Page/P0703)
- Federal regulation:
  - Use of locomotive horns
  - Establishment of quiet zones – exception to otherwise-applicable requirements
- FRA compendium of state and local grade crossing regulations: [www.fra.dot.gov/Page/P0693](http://www.fra.dot.gov/Page/P0693)
- Important role for local law enforcement
Rail Safety – Crude Oil & Ethanol
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- CSX 109-car train
- All CPC-1232 tank cars
- 25 cars derailed, 20 cars ignited
- 2 local communities evacuated – 1 home destroyed
Oil train incidents - issues and impacts

Volatility of crude oil

PHMSA Final Rule – Oil Tank Cars, May 8, 2015

Federal preemption

Not just Bakken crude:

Since 2006 –

20 derailments involving crude oil

30 derailments involving ethanol
Issues and impacts:

- Externalized risk for railroads – imposition of risk on communities
- Local first responders on front lines
- Explosions, fires spills – injuries, death, property damage, environmental damage
Rail Safety – Crude Oil & Ethanol

- Volatility of crude oil
  - North Dakota Industrial Commission Order #25417 – producers must strip out volatile compounds prior to shipment
Rail Safety – Crude Oil & Ethanol


- High-hazard flammable train; high-hazard flammable unit train
- Tank car standards
- Classification of unrefined petroleum-based products
- Rail routing – risk assessment and notification
- Reduced operating speeds
- Enhanced braking requirements
Tank car standards –
- Phase-out of existing DOT-111 and industry-adopted CPC-1232 cars – retrofit or replacement
  - New cars – DOT-117
  - Retrofit cars – DOT-117R
- New cars must meet standard as of Oct. 1, 2015
- All existing cars to be retrofitted by May 1, 2025
Rail Safety – Crude Oil & Ethanol

Classification of unrefined petroleum-based products:
- Class 3 flammable liquid – most flammable classification
- Packing Group I product – requires most robust packaging for shipment
- Producers must institute testing program and make testing information available to DOT
- Contrast federal position with vigorous risk-reduction effort by ND
Rail routing – risk assessment and notification

- PHMSA final rule only requires RRs to directly notify state, tribal and local first responders upon specific request from state, tribal or local officials
- Required to notify Fusion Centers
Reduced operating speeds:

- HHFTs limited to 50 mph
- 40 mph limit within high-threat urban areas (city limits and 10-mile buffer zone – 40 CFR 1580.3)
- 30 mph if not equipped with two-way end of train device or distributed power system
- Speeds are those the railroad industry had voluntarily agreed to – represent balancing of safety and efficient operation, not optimal safety approach
Enhanced braking requirements:

- Final rule phases in braking improvements
- Immediately requires two-way end-of-train device or distributed power system to perform more even braking throughout train
- By Jan. 1, 2021, all HHFUTs with at least one tank car loaded with a Packing Group I material must have electronically-controlled pneumatic brakes to travel above 30 mph
Federal preemption:
- Municipalities cannot prohibit or limit what railroads may ship or handle within municipal boundaries (49 U.S.C. 10501)
- Facilities owned by non-railroads likely subject to state and local regulation – highly fact-specific analysis
Rail Safety – Crude Oil & Ethanol

Additional Regulatory efforts:

- **Volatility**
  - North Dakota Industrial Commission Oil Conditioning Order #25417 effective April 1, 2015

- **Rail System Risk Reduction**

- **Crew size**

- **Securement of equipment**
  - FRA
Spill response – current requirements:

- **No review by FRA of response plans for use of DOT-111 tank cars**
  - 49 C.F.R. part 130

- **Release of oil – National Oil and Hazardous Substances Pollution Contingency Plan**
  - 40 C.F.R. Part 112

- **Oil discharge into navigable waterways, shorelines or natural resources under control of U.S. – Clean Water Act and CERCLA**
  - 33 U.S.C. § 1321
  - 42 U.S.C. Ch. 103

- **PHMSA ANPRM – proposes to lower thresholds for applicability of OSRP requirements**

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Recent Developments

- **FAST (Fixing America’s Surface Transportation) Act**, December 4, 2015 – Title VII, Subtitle C: Safe Transportation of Flammable Liquids by Rail
  - Grants for safety training and outreach
  - Real-time emergency response information to state and local first responders
  - Retrofit requirements
  - Studies: Crude oil characteristics, liability/insurance, electronically-controlled pneumatic brakes
Recent Developments

- **DOT Audit Report** – FRA Oversight of Hazardous Materials Shipments, February 24, 2016
  - Comprehensive, nationwide evaluation of risk required
  - Recommends criminal investigation and penalties in some cases
  - Inspectors need better access to inspection data and outcomes
Questions?

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