

Crude by Rail
How are the States Reacting?
By
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With the development of the Bakken and other producing oil fields in North America, increasing numbers of tank cars have been rolling along tracks across the United States (U.S.). Then came the incident in Lac-Mégantic, located in the Eastern Townships of the Canadian province of Quebec, when at approximately 1:15 EDT on July 6, 2013, a train carrying 72-cars of Bakken crude derailed and caught fire. That incident and others following have changed the way citizens in the U.S. view crude-by-rail transport forever. As the views of the citizens change, so do the views of those who govern the states.

Federal Response to Lac-Mégantic in the United States

In less than a month after the Lac-Mégantic incident, on August 2, 2013, the U.S. Department of Transportation's (USDOT) Federal Railroad Administration (FRA) issued Emergency Order 28 establishing stricter protocols and enforcement for securing trains carrying loads of potentially hazardous materials. However, the FRA noted in that order, "Generally, the transportation of hazardous materials by rail is extremely safe." While the total quantity of rail incidents involving hazardous materials is not great, Lac-Mégantic demonstrated the potential impact even one incident could have.

Under Title 40 Code of Federal Regulations (CFR) Part 130 railroads are required to have either a so-called "basic" response plan or a more "comprehensive" response plan, depending on the volume capacity of the rail car transporting the oil. However, in light of the Lac-Mégantic incident on July 23, 2014 the USDOT issued a Notice of Proposed Rulemaking (NPRM) proposing enhanced tank car standards and new operational requirements for high hazard flammable trains. Specifically, within two years, it proposed the phase out of the use of older DOT 111 tank cars for the shipment of packing group I flammable liquids, including most Bakken crude oil, unless the tank cars are retrofitted to comply with new design standards. In addition, a companion Advanced NPRM sought further information on expanding comprehensive oil spill response planning requirements for shipments of flammable materials.

The USDOT missed its self-imposed January 30, 2015 deadline for submitting the rule-making package. Even though the proposed package is now under review, the May 12 deadline for the package to be finalized is fast approaching.

The States Move Forward

While waiting for the Federal government to act, many states have sought to either make their own rules governing the shipment of crude past their boundaries or urge the Federal government to move forward and finalize a national package that would offer more

protection. At the time of the writing of this article the following state actions had occurred:

Recognizing the increase in oil transport by rail, the **California** Public Utilities Commission developed a Crude Oil Reconnaissance Team in 2014 to proactively monitor crude oil projects before they come online by identifying and seeking remediation on all regulated and non-regulated potential, perceived, and existing risks, and by providing independent safety oversight and guidance to the railroads, crude oil facilities, and their respective contractors to mitigate identified risks and noncompliant issues. California later passed Senate Bill (SB) 861 in June of that year, attempting to impose planning and fee requirements on the railroads.

Minnesota legislation implemented in July 2014 requires submission of disaster prevention plans, new safety measures such as at-grade rail crossing improvements, and funding for three additional state rail inspectors. Minnesota state law now also requires railroads to provide local emergency response training every three years, and railroad personnel must be available by phone within one hour and on-site within three hours of any accident. The legislation secured funding for these initiatives, in part, by assessing new fees on railroads.

Northern **Colorado** officials backed proposed tighter regulations on oil trains in July 2014. U.S. Sen. Mark Udall called for immediate changes to rail safety standards after the LaSalle derailment in May of 2014.

In October 2014 the state of **New Jersey** passed a resolution urging the USDOT to promulgate regulations concerning the transport of crude oil by rail that will ensure the safety of the many state residents who live along the railroads. The resolution also urged Congress to support the regulations proposed by the USDOT in the interest of public safety.

The **North Dakota** Industrial Commission adopted new conditioning standards in December 2014 to improve the safety of Bakken crude oil for transport. Order No. 25417 set operating standards for conditioning equipment to properly separate production fluids into gas and liquid. The order includes parameters for temperatures and pressures under which the equipment must operate to ensure that light hydrocarbons are removed before oil is shipped to market. The standard requires operators to condition Bakken crude oil to a vapor pressure of no more than 13.7 pounds per square inch (psi); national standards set crude oil stability at a vapor pressure of 14.7 psi. The effective date for these regulations was April 1, 2015.

New York State released its 58-page "status report," *Transporting Crude Oil in New York State: A Review of Incident Response and Prevention Capacity* in December 2014. The report noted the relationship between the upsurge in production of crude oil, much of it from the Bakken shale formation in North Dakota and Montana, to a proliferation of crude oil transport through New York State. According to the document, New Yorkers perceive sluggishness in Washington, D.C.'s abilities to pass new regulations. To deal with the problem the state hired five new rail safety inspectors.

Governor Tom Wolf wrote a letter to President Barack Obama in February 2015 to express concern and call for action to improve the safety of transportation of crude oil by rail in **Pennsylvania**. Each week, roughly sixty to seventy trains carrying crude oil from North Dakota's Bakken region travel through the Commonwealth destined for Philadelphia or another East Coast refinery. The letter noted that, "The transport of some shale energy resources, and particularly Bakken shale oil...raises particularly significant safety concerns." The letter said that the state would move forward on its own by holding emergency trainings, participating in meetings with executives, and tasking administration officials to put plans in place to both prevent accidents and mitigate impacts.

In February 2015 state lawmakers in **Maryland** called for the state to conduct a full assessment of the risks and for railroads to be more transparent about their operations. New legislation filed would require the state's health and environment departments to establish statewide accident prevention, emergency response and contingency plans in the case of a major railroad disaster involving crude oil. It also would require railroads to disclose more information about their crude shipments to the public.

In March 2015 the **Washington** State Department of Ecology issued its *Oil Transportation Study*. The objective of the study was to analyze the risks to public health and safety and to the environment associated with the transport of oil in Washington. The report contained 43 findings and recommendations for legislative, regulatory, or voluntary actions. Seven of the appendices in the report contained detailed information on oil transport by rail, facilities and vessels, spill planning and response, properties of oil, and the fate of oil when spilled.

State's Rights vs. The Interstate Commerce Commission Termination Act of 1995

The catch in all this state and local rulemaking is the question of whether those authorities have any right to do it. The Interstate Commerce Commission Termination Act of 1995 ("ICCTA") (49 U.S.C.A. §10101 et seq.) gave the Federal Surface Transportation Board exclusive jurisdiction over transportation by rail carriers and their practices, routes, services, and facilities along with the construction, acquisition, operation, abandonment, or discontinuance of said facilities, even if the tracks are located, or intended to be located, entirely in one state.

So when California passed SB 861 in June 2014, railroads reacted. Under the legislation railroads would have to participate in a state program that plans for oil-spill threats to surface water from pipelines, oil wells, tanker ships and the railroads themselves. It would have financed a beefed-up safety program with fees on oil companies and required railroads to have disaster response plans that pass muster with the state.

Under the ICCTA the railroads claimed preemption from such state regulation. The Union Pacific Rail Road Company and BNSF filed suit and argued that there are already plenty of safeguards from the Federal government regarding the transportation of hazardous materials. The lawsuit, which was joined by the Association of American Railroads, named

as defendants California's Department of Fish and Wildlife's Office of Spill Prevention and Response and California Attorney General Kamala Harris. The result of this lawsuit is still pending, but will undoubtedly inspire further controversy into the future.

What Does the Future Hold?

Even within the Federal government the different parties continue their struggle to move new regulations forward. On April 3rd the National Transportation Safety Board (NTSB) issued a letter calling for more robust and fire-resistant rail cars for carrying crude oil, ethanol and other flammable liquids. The NTSB recommended an aggressive schedule for replacing or retrofitting the existing tank-car fleet saying that the current fleet of older model tank cars, known as type DOT-111, rupture too quickly when exposed to a pool fire caused by a derailment. The letter also recommended transparent reporting to make sure the upgrades are completed quickly.

But while the Federal agencies struggle to develop new regulations the states will undoubtedly continue to press for more stringent reporting if not planning on their home turf. Whether these issues will be settled in the judicial system, Congress, or in the court of public opinion has yet to be seen. In the meantime no one seems to be fooling themselves into thinking that additional response planning will not be required down the road. Already Class I railroads are gathering data and moving forward with updated contingency planning. While a major crude-by-rail accident might be rare, it can have devastating impacts on the environment and the community when it does happen. The responsibility and social awareness shown by Class I railroads in updating and maintaining their plans may just be the key to winning public opinion and keeping crude flowing down the track and into our lives.



Any questions?

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