

## **HAZ MAT**

**Athena Kennedy**

**Van Ness Feldman LLP**

**1150 Second Avenue, Suite 1150**

**Seattle, WA 98104**

**(206) 623-9372**

***amk@vnf.com***

**Robin Rotman**

**Van Ness Feldman LLP**

**1050 Thomas Jefferson Street NW**

**Seventh Floor**

**Washington, DC 20007**

**(202) 298-1800**

***rnr@vnf.com***

On August 1, 2014, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”) of the U.S. Department of Transportation (“DOT”), in coordination with the Federal Railroad Administration, issued a Notice of Proposed Rulemaking on Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains (“NPRM”). The deadline for public comments was September 30, 2014. In the NPRM, PHMSA proposes stricter standards for new and retrofitted rail tank cars and certain operational controls for “high-hazard flammable trains” (“HHFT”), defined in the NPRM as trains carrying 20 or more tank carloads of “Class 3” flammable liquids, such as crude oil and ethanol.

PHMSA's NPRM responds to numerous petitions for rulemaking and is intended to improve rail transportation safety in the wake of several recent accidents in the United States and Canada involving trains carrying crude oil or ethanol. To further that objective, the NPRM proposes three alternative specifications for a new DOT-117 tank car standard. The NPRM prescribes a retrofit or phase-out schedule pursuant to which new DOT-117 tank cars or existing DOT-111 cars retrofitted to the DOT-117 standard would replace legacy DOT-111 cars in HHFT service by 2020 (in a phased timeline based on packing group). The NPRM also proposes speed restrictions, braking requirements, rail routing requirements, and emergency response notifications for certain trains.

DOT has received approximately 3,500 comments on the NPRM from various entities and individuals, including: railroads; tank car manufacturers; petroleum and ethanol producers; chemical manufacturers and other shippers; state, local, and tribal governments; public officials; and public interest organizations.

The commenters offer a wide range of positions on the various options presented by DOT in the NPRM. State, local, and tribal agencies, public officials, and environmental organizations generally advocate adoption of the most stringent tank car standards proposed. By contrast, shippers of petroleum, ethanol, and other Class 3 materials tend to support the least stringent tank car standards proposed in the NPRM, arguing that the stricter options would cost more, without a corresponding safety benefit, and would lead to a reduction in tank car lading capacity (because some safety features would increase tank car weight). The railroad industry appears to support an intermediate tank car option. Commenters have diverse views as to the appropriate retrofit or phase-out schedule, with some environmental groups calling for an immediate ban on DOT-111 tank cars, while some trade associations assert that the proposed timeline is too aggressive in light of limited tank car manufacturing and retrofit shop capacity. Commenters also vary in their treatment of the proposed operational controls, with some arguing that they would compound existing rail traffic delays, while others assert that the controls do not go far enough to promote safe transport of hazardous goods by rail.

A number of commenters from diverse sectors identify potential flaws or gaps in the NPRM, stating that failure to resolve these issues in a final rule could result in litigation. These alleged deficiencies include procedural problems with the NPRM, such as alleged failures to comply with applicable procedural statutes, regulations, or Executive Orders (e.g., failure to prepare an Environmental Impact Statement). Many commenters challenge key assumptions in PHMSA's Draft Regulatory Impact Analysis, including retrofit cost estimates, projections regarding the likelihood and potential consequence of a major incident, and the assumption that legacy DOT-111 tank cars would be shifted to Canadian oil sands service with little or no modification. Additionally, many commenters request that DOT address railroad track inspection and maintenance and railroad operator training and oversight, arguing that these are root causes of derailments. Commenters on both sides of the U.S. – Canada border emphasize the need for harmonization between DOT's final rule and rules that are currently being promulgated by Transport Canada, given the substantial number of cross-border shipments.

Although DOT has not established a clear deadline for issuing the final rule, the Draft Regulatory Impact Analysis assumes that production of DOT-117 tank cars would begin in early 2015. In light of the large number of comments received and the risk of litigation, it was speculated that DOT could issue the final rules in stages, beginning with rules covering the new tank car specifications and later addressing operational controls. A final rule was sent to OMB for review on February 5, 2015. OMB review typically takes 90 days, but can be shorter or longer depending on internal factors. PHMSA recently pushed back its estimate for publication of the final rule to May 12, 2015, assuming a January 30, 2015 submittal to OMB. This delay comes on the heels of aggressive timeframes set out in the fiscal year 2015 omnibus appropriations bill, passed on December 13, 2014, which required PHMSA to release the final Tank Car Rule by January 15, 2015.

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### *North Dakota Finalizes Bakken Crude Conditioning Rule*

On December 9, 2014, notwithstanding industry objections, the North Dakota Industrial Commission published new rules for “conditioning” of Bakken crude oil prior to transport. The rule sets operating standards for conditioning equipment to separate crude oil into gas and liquids at the well-heads. As of April 1, 2015, all Bakken wells subject to the rule must be produced through equipment that conditions the oil to “improve marketability and safe transportation” of the crude oil. This equipment can be a gas-liquid separator or emulsion heater that heats the liquids to not less than 110 degrees F (with other operating conditions specified).

Production facilities can operate the required stabilizing equipment at temperatures and pressures other than those prescribed in the regulations, but only if the operator can demonstrate through testing that the crude oil produced has a vapor pressure of 13.7 psi or less, or 1 psi less than the vapor pressure of stabilized crude as defined in the latest version of ANSI/API RP3000, whichever is lower. The majority of Bakken Crude has vapor pressure measurements averaging 11.8 psi.

Under the final rule, Operators of rail transloading facilities must notify the state “upon discovery” if any Bakken crude oil received violates “federal crude oil safety standards.” However, there is no affirmative obligation to test the product at the transloading facility. The final rule also prohibits the blending of Bakken crude oil with natural gas liquids.

On February 6, 2015, the North Dakota House of Representatives passed a bill that, if enacted, would effectively stay the conditioning rule pending full review by the legislature.