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Final Rule on Enhanced Tank Car Standards Triggers a Multitude of Challenges, New Regulatory Proposals, and Legislative Efforts

The Final Rule on Enhanced Tank Car Standards and Rail Operational Controls for Flammable Liquid Transport (“Final Rule”) was finalized on May 1, 2015, but implementation and policy implications continue to develop six months following its publication. The Final Rule has prompted administrative appeals, which the U.S. Department of Transportation’s Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has recently ruled on, and judicial appeals, which are currently pending. PHMSA has proposed new regulatory requirements related to some aspects of the rulemaking, and additional proposed rules are expected. Also, the U.S. Congress is developing new legislation that is expected to address some of the topics covered by the Final Rule. Some issues, such as the requirement to implement Electronically Controlled Pneumatic (“ECP”) brakes and the omission of a requirement for thermal blanket protection on the tank cars, are being addressed in more than one of these arenas. Below is an updated summary of these developments, and the expected time frame for their resolution.

Administrative Appeals

On November 9, 2015, PHMSA posted its response to five pending administrative appeals of the Final Rule. PHMSA denied the appeals on all grounds and declined to make any changes to the regulatory regime. The agency also took the opportunity to bolster its support for aspects of the rule, including especially the requirement to implement ECP brakes.

Appellants, the Dangerous Goods Advisory Council (“DGAC”), American Chemistry Council (“ACC”), Association of American Railroads (“AAR”), American Fuel & Petrochemical Manufacturers (“AFPM”), the Umatilla, Yakama, Warm Springs, and Nez Perce tribes and the Quinault Indian Nation, had appealed for agency reconsideration of the Final Rule in seven topic areas: (1) Scope of Rulemaking; (2) Tribal Impacts and Consultation; (3) Information Sharing/Notification; (4) Testing and Sampling Programs; (5) Retrofit Timeline and Tank Car Reporting Requirements; (6) Thermal Protection for Tank Cars; and (7) ECP Braking Systems. PHMSA denied reconsideration on all of these issues, and reinforced its decision making in an 89-page response.

Regarding the first topic area, DAGC, ACC, and AAR had claimed that shippers and railroads do not always control the make-up of a manifest train and therefore the 35-car-per train threshold for requiring new tank cars is impractical. The result, according to these appellants, would require retrofits to an additional 40,000 tank cars that PHMSA had not accounted for to ensure that all Class 3 hazardous materials are properly packaged. PHMSA disagreed with these appellants and observed that railroads have significant fleet management programs in place to ensure that Class 3 materials are placed in trains

appropriate for their packaging (i.e., in trains with fewer than 35 cars of Class 3 materials when packaged in un-retrofitted DOT-111 tank cars). PHMSA found that the claim that an additional 40,000 tank cars would need to be retrofitted “is grossly exacerbated by the railroads advising ACC that they will not manage fleets to avoid their shipments becoming subject to the new regulations. PHMSA does not agree that this is a valid basis for revising the scope of the final rule’s requirements.” Accordingly, PHMSA denied reconsideration of this issue in the Final Rule.

In similar fashion, PHMSA disagreed with other claims raised in the administrative appeals. PHMSA concluded that the Final Rule did not have a significant or unique effect upon the tribes, and therefore denied the tribes’ appeals on the grounds that PHMSA failed to conduct required tribal consultation. PHMSA concluded that the sampling and testing program is “reasonable, justified, necessary, and clear as written” and so declined to provide additional definitions or guidance. PHMSA noted that subsequent agency actions and clarifications sufficiently addressed the appeals on the issues of Information Sharing/Notification and Tank Car Reporting requirements, and so declined to revise the Final Rule on these issues. And PHMSA affirmed its decisions to require ECP brakes but not require thermal protection for tank cars. At this time it does not appear that PHMSA intends to revisit or alter any aspect of the Final Rule.

[Judicial Appeals](#)

In addition to the administrative appeals, five separate groups filed judicial appeals of the Final Rule in the U.S. Court of Appeals for the District of Columbia Circuit. These cases have been consolidated. *See American Petroleum Institute v. USA*, Docket No. 15-1131.

Some of the issues raised in the judicial appeal are similar to issues raised in the administrative appeals, and PHMSA’s ruling serves as a preview into the agency’s arguments in court. For example, the judicial appeal raises previously reconsidered issues, including the scope of the rulemaking, information sharing/notification, retrofit time line, thermal protection for tank cars, and ECP braking requirements. However, the appellants in the judicial appeals have also raised unique issues, including speed restrictions, an inadequate small business impact analysis, improper exemption of certain Class 3 flammable liquids, and insufficiency of the standards for retrofitted cars.

The parties had been directed to file proposals for a briefing schedule in the consolidated case by November 23, 2015.

[Regulatory Proposals](#)

On May 28, 2015, PHMSA announced that it would extend indefinitely the Emergency Order of May 7, 2014 which requires railroads transporting over 1,000,000 gallons of Bakken crude oil in a single train to provide certain information to State Emergency Response Commissions (“SERCs”) while it considered options for codifying the disclosure requirement permanently. Furthermore, on July 22, 2015, the Federal Railroad Administration (“FRA”) issued a public letter instructing railroads transporting crude oil that they must continue to notify SERCs of the expected movement of crude oil trains carrying Bakken crude oil. Thus, railroads remain required to notify states of the transportation of unit trains of Bakken crude oil notwithstanding the Final Rule.

On October 14, 2015, PHMSA issued a notice of a new reporting requirement that would require tank car owners to report their progress in the retrofitting of tank cars in the event they have not completed required retrofits by January 1, 2017. 80 FR 61886. The new reporting requirement would require all owners of non-jacketed DOT-111 tank cars in Packing Group I service who do not meet the January 1, 2017 deadline to submit the following information regarding their retrofitting progress: (1) the total number of tank cars retrofitted to the DOT-117R specification (for retrofitted tank cars); (2) the total number to tank cars built or retrofitted to the DOT-117P specification (the performance standard specification); (3) the total number of DOT-111 tank cars (including those built to the CPC-1232 industry standard) that have not been modified; (4) the total number of tank cars built to the DOT-117

specification; and (5) the total number of tank cars built to a DOT-117, -117R or -117P specification that are ECP brake equipped. This reporting requirement appears to have been crafted partially in response to some of the administrative and judicial appeals, which raise concerns about the retrofit deadlines and implementation of ECP brakes within the deadline.

The comment period for this proposed reporting requirement closed on November 13, 2015.

On another front, PHMSA has not yet published the Proposed Rule for Oil Spill Response Plans for High Hazard Flammable Trains (Docket No. PHMSA-2014-0105). PHMSA published its Advanced Notice of Proposed Rulemaking more than one year ago, concurrently with the proposed rule on Enhanced Tank Car Specifications and Operational Controls for High Hazard Flammable Trains. PHMSA has not updated its internal anticipated deadline for publication of the proposed rule of August 31, 2015, and it is unknown at this time when the proposed rule will be issued.

Legislative Proposals

The United States House of Representatives and Senate have two major transportation bills in conference: H.R. 22, which was passed by the House and amended in the Senate over the summer, and, H.R. 3763, the House's latest version of a 6-year transportation package. A transportation package that reconciles the differences between the two bills is expected to pass in early December. As currently drafted, H.R. 3763 contains several provisions that would codify or alter the Final Rule:

- *Phase-Out of tank cars that do not meet DOT-117 or DOT-117R specifications.* Would codify phase-out dates for un-retrofitted DOT-111 tank cars. These deadlines would codify into law the retrofit timetable in the Final Rule.
- *Thermal blankets for tank cars.* Would require the Secretary of Transportation to issue regulations to require DOT-117 tank cars and those modified to meet DOT-117R specifications to be equipped with an insulating thermal blanket of at least ½ inch thick material.
- *Comprehensive Oil Spill Response Plans.* Would require the Secretary to issue regulations to require railroads transporting Class 3 flammable liquids to maintain a Comprehensive Oil Spill Response Plan.
- *Information on high-hazard flammable trains.* Would require railroad carriers to provide information on HHFTs to state emergency response commissions consistent with DOT's May 2014 Emergency Order.
- *Study and Testing of Electronically-Controlled Pneumatic Brakes.* Would require the U.S. Comptroller General to conduct an independent evaluation of ECP brake systems, pilot program data, and DOT's research on the costs, benefits, and effects of ECP brake systems.

Congress is expected to vote on the final bill in early December.

PTC Compliance Timeline Extended by Three Years

On October 28, 2015, the U.S. Senate passed a bill extending the deadline for implementation of Positive Train Control ("PTC") by at least 3 years. The U.S. House of Representatives had previously passed the bill, and the bill is on its way to the President for signature. The extension was included in a short-term transportation funding bill that serves as a stopgap while Congress works out the details of a comprehensive transportation bill. This extension resolves concerns about large scale interruptions in rail service for shippers of hazardous materials.