No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE:

SIERRA CLUB AND FORESTETHICS,

Petitioners,

v.

SECRETARY OF THE U.S. DEPARTMENT OF TRANSPORTATION,

Respondent.

PETITION FOR A WRIT OF MANDAMUS REGARDING AN EMERGENCY ORDER PROHIBITING THE SHIPMENT OF BAKKEN CRUDE IN UNSAFE TANK CARS

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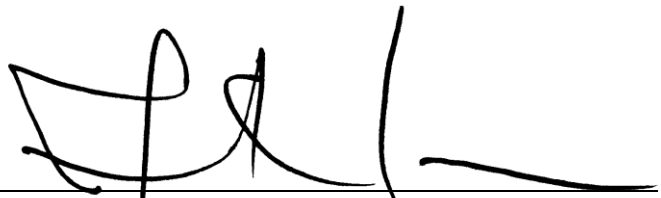
CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Petitioners Sierra Club and ForestEthics have no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 11th day of September, 2014.



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> *We don't need a higher body count before they move forward. That is a tombstone mentality. We know the steps that will prevent or mitigate these accidents. What is missing is the will to require people to do so.*
>
> *National Transportation Safety Board Chair Deborah Hersman*[1]

INTRODUCTION

The Sierra Club and ForestEthics (collectively the "Sierra Club") ask the Court to issue a Writ of Mandamus directing the U.S. Department of Transportation ("DOT") to respond to a petition seeking a ban on the use of unsafe tank cars to ship volatile Bakken crude oil. Petition to the Secretary of Transportation to Issue an Emergency Order Prohibiting the Shipment of Bakken Crude Oil in Unsafe Tank Cars (July 15, 2014) (the "Unsafe Tank Car Petition") (Attachment 1). The tank cars at issue – called DOT-111s – are prone to puncture, spill oil, and trigger fires and explosions in accidents. Indeed, the National Transportation Safety Board ("NTSB") has recommended that no crude oil or ethanol be shipped in these tank cars because they "can almost always be expected to breach in derailments that involve pileups or multiple car-to-car impacts."

[1] Joan Lowy, NTSB Chief Says Obama Administration Needs to Act Immediately on Oil Train Safety, U.S. News & World Report, Apr. 23, 2014 (Exh. 54 to Tank Car Petition).

NTSB, Derailment of CN Freight Train: Cherry Valley, Illinois, June 19, 2009, at 75-76 (adopted Feb. 14, 2012) ("NTSB Cherry Valley Report") (Exh. 29).[2]

Underscoring the untenable risks, in July 2013, one of the worst rail disasters in North American history killed 47 people and destroyed the downtown of Lac Mégantic, Quebec, when DOT-111 tank cars derailed, spilled oil, and exploded. Since that disaster, the Secretary of Transportation has issued several emergency orders and a proposed rule predicated on findings that the surge in the shipment of volatile Bakken crude oil in mile-long trains poses an imminent hazard warranting emergency measures to abate the serious risks to communities and the environment. Astonishingly, none of the emergency orders has addressed the unsafe tank cars that have turned derailments into disasters.

On July 15, 2014, the Sierra Club filed the Unsafe Tank Car Petition seeking an emergency order banning use of the unsafe tank cars to ship volatile crude oil; DOT has provided no response to date. A week after the petition was filed, DOT issued a proposed rule that, if finalized as proposed, still would not ban the use of DOT-111 tank cars to ship Bakken crude until October 2018. This glacial pace is unacceptable. This mandamus petition asks the Court to find that DOT has unreasonably delayed fulfilling its legal obligations to respond to the petition

[2] All exhibits are to the Unsafe Tank Car Petition.

within a reasonable time and to compel DOT to issue a final decision on the Unsafe Tank Car Petition within 30 days.

STATEMENT OF JURISDICTION AND APPLICABLE LAW

This Court has authority to issue a writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651 (authorizing federal courts to issue all writs appropriate "in aid of their respective jurisdictions") and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1) (reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed"). Because this Court has exclusive jurisdiction to review any final action taken by DOT in response to the Unsafe Tank Car Petition, *see* 49 U.S.C. § 20114(c) (a proceeding to review a final action of the Secretary of Transportation under chapters 201 or 51 applicable to railroad safety shall be brought in the appropriate court of appeals); *accord* 49 U.S.C. § 5127(a), this Court has jurisdiction over this mandamus action. *See Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (hereinafter "*TRAC*") (All Writs Act gives courts of appeals jurisdiction to issue orders mandating action that would ultimately be reviewable in that court).

ISSUE PRESENTED

Whether DOT has unreasonably delayed deciding whether to issue an emergency order banning unsafe tank cars, based on the Unsafe Tank Car Petition and findings of the agency and the National Transportation Safety Board,

warranting an order from this Court requiring DOT to issue such a final decision on the petition within 30 days.

STATEMENT OF THE CASE

Over a year ago, on July 6, 2013, one of the worst rail disasters in North American history destroyed Lac Mégantic, Quebec, when an unattended train carrying 72 tank cars filled with Bakken crude oil derailed. Fifty-nine of the 63 derailed tank cars breached and spilled an estimated 1.6 million gallons of crude. The oil ignited, triggering an explosion that killed 47 people, including young children, leveled a four-block radius in the downtown area, and led to the evacuation of over 2,000 residents. Transportation Safety Board of Canada, *Railway Investigation Report R13D0054: Lac Mégantic, Quebec, 06 July 2013*, at Summary & 3, 133 (Aug. 2014) (Attachment 2) ("Lac Mégantic Investigation"). The damage to people and communities from this accident has been estimated to be over $1.2 billion. Draft Regulatory Impact Analysis, Docket No. PHMSA 2012-0082 (July 2014) (Attachment 3) ("Regulatory Impact Analysis").

Crude-by-rail accidents in the United States have likewise caused oil spills, contamination of wetlands, explosions, and evacuations, including a November 2013 derailment near Aliceville, Alabama, that triggered explosions, an extensive fire, and a 630,000-gallon oil spill that severely contaminated wetlands along the tracks and a December 2013 accident near Casselton, North Dakota, that spilled

400,000 gallons of crude oil, ignited a giant fireball, and required the evacuation of 2,300 residents. *See* Tank Car Petition at 3-4. A recent NTSB presentation documented 16 significant accidents between 2006 and the spring of 2014, with dozens of fatalities and 2.8 million gallons of crude oil spilled. *See* NTSB Senior Hazardous Materials Accident Investigator, Rail Accidents Involving Crude Oil and Ethanol Releases, at 3-5 (Apr. 22-23, 2014) (Exh. 8). To put the crisis into perspective, in 2013, more crude oil spilled in the United States (more than 1.1 million gallons) than the total amount that spilled from 1975-2012.[3] More than 4,000 people were evacuated from their homes due to crude-by-rail train explosions in 2013, dwarfing the total number evacuated due to pipeline and rail accidents from 2002-2012. *See* Unsafe Tank Car Petition at 2.

While this case concerns the unsafe tank cars that puncture and spill oil in accidents, two other factors have combined to compound the current crisis. First, the United States is experiencing an unprecedented surge in oil production, driven by hydraulic fracturing in the Bakken shale formation, which lies primarily in North Dakota. That crude oil is being shipped to refineries in unit trains–trains typically carrying more than 100 cars loaded with a single product. The number of tank cars carrying crude oil has skyrocketed, increasing from only 9,500 tank cars

[3] Curtis Tate, More Oil Spilled From Trains in 2013 than in Previous 4 Decades, Federal Data Show, McClatchy DC, Jan. 20, 2014 (available at http://www.mcclatchydc.com/2014/01/20/215143/more-oil-spilled-from-trains-in.html).

in 2008 to over 400,000 tank cars in 2013, an increase of over 4000%. *See* Unsafe Tank Car Petition at 6-7. The NTSB has cautioned that: "[t]he sharp increase in crude oil rail shipments in recent years as the United States experiences unprecedented growth in oil production has significantly increased safety risks to the public." NTSB Recommendations 14-1 through 14-3, at 4 (Jan. 23, 2014) (Exh. 19).

Second, Bakken crude oil has what DOT has called "unique hazardous characteristics" because its flammability is closer to that of gasoline than most crude oil. DOT, Emergency Order DOT-OST-2014-0025 at 10 (Feb. 25, 2014) (Exh. 23); *see also* Congressional Research Service, U.S. Rail Transportation of Crude Oil: Background & Issues for Congress at 12 (Feb. 6, 2014) (Exh. 16) (Bakken crude is much more volatile than other crude); Lac Mégantic Investigation at 111 (same). In accidents, Bakken crude poses extreme risks of igniting and exploding, as the Lac Mégantic, Quebec and Casselton, North Dakota accidents starkly demonstrate. *See* Tank Car Petition at 3.

Crude-by-rail shipments are projected to continue to surge, along with tragic accidents, if current conditions persist. 79 Fed. Reg. at 45,019. Indeed, the State Department projected in its environmental analysis of the Keystone XL pipeline that dozens of injuries and between 6 and 28 deaths will occur annually if an additional 830,000 billion barrels of crude oil is shipped by rail. Keystone XL

Project–Final Supplemental Environmental Impact Statement at ES-35 & 5.1-74 (Exh. 1); Errata Sheet at 1-2 (June 2014) (Exh. 10). These figures likely under-estimate the injuries and fatalities since the State Department drew from rail accident data from 2002-2012, before the record for amount of oil spilled in train accidents was set in 2013. And in its recently proposed rule, DOT estimates that, without a phase-out of the DOT-111 tank cars, 15 mainline rail accidents will occur each year along with an additional ten catastrophic accidents of the magnitude of Lac Mégantic or worse over the next 20 years. 79 Fed. Reg. at 45,022, 45,064.

I. THE U.S. GOVERNMENT HAS REPEATEDLY FOUND THAT THE DOT-111 TANK CARS ARE UNSAFE FOR TRANSPORTING HAZARDOUS MATERIALS.

A train derailment can turn into a disaster when hazardous materials are shipped in DOT-111 tank cars. On impact, the shell of the DOT-111 tank car has a propensity to puncture and the valves on the top and bottom of the car tend to shear off or rip open. When the tank cars are carrying volatile Bakken crude, an oil spill can quickly turn into an exploding fire ball like what occurred in Lac Mégantic, Quebec and Casselton, North Dakota.

NTSB investigations of the accidents have produced an unbroken series of findings that the DOT-111 tank cars are dangerous and should no longer be used to ship hazardous materials like Bakken crude. The first such findings came out in

1991 based on an analysis of 45 accidents in which DOT-111 tank cars breached at twice the rate of cars with additional safety features. *See* NTSB Safety Recommendation R-91-19, at 3-5 (July 1, 1991) (Exh. 27). In response to these and subsequent accidents causing fatalities, DOT upgraded its safety standards for tank cars used to ship some hazardous materials involved in catastrophic accidents, but allowed DOT-111s to continue to be used to transport other products, like crude oil and ethanol. *See* Tank Car Petition at 9. NTSB's focused its attention on the DOT-111 safety hazards with respect to ethanol transport after a train derailed in 2009 and 13 of the 15 derailed DOT-111 tank cars ruptured, spilled ethanol, and caused an intense fire and one fatality. In its investigation of that disaster, NTSB found:

> Clearly, the heads and shells of DOT-111 tank cars ... **can almost always be expected to breach** in derailments that involve pileups or multiple car-to-car impacts . . .. This accident demonstrates the need for extra protection such as head shields, tank jackets, more robust top fittings protection, and modification of bottom outlet valves on DOT-111 tank cars used to transport hazardous materials.
>
> [If the tank cars had these features], the release of hazardous materials likely would have been significantly reduced, mitigating the severity of the accident.

NTSB Cherry Valley Report at 75-76 (emphasis added). NTSB issued official safety recommendations that DOT "require that all newly manufactured and existing tank cars authorized for transportation of denatured fuel ethanol and crude

oil in Packing Groups I and II have enhanced tank head and shell puncture-resistance systems and top fittings protection that exceeds existing design requirements for DOT-111 tank cars." *Id*. at 79.[4]

By the time the NTSB released its Cherry Valley investigation report, the industry had reached a consensus on standards for new crude oil and ethanol tank cars ordered after October 1, 2011, and the Association of American Railroads ("AAR") had petitioned DOT to incorporate the consensus standards into its regulations. *See* AAR Petition 1577 to PHMSA at 5-7 (Mar. 9, 2011) (Exh. 33). The new tank cars, called CPC-1232s, have thicker, more puncture-resistant shells, protective (half-height) head shields at both ends of the tank car, a reclosing pressure relief device, and additional protections for the top fittings. Estimates of the increase in crashworthiness of the CPC-1232 tank cars compared to the DOT-111s range from 50-75%. *See* Tank Car Petition at 11.

Initially, AAR had opposed making the upgraded standards applicable to the existing fleet. NTSB was extremely critical of this position:

> The decision not to phase out or retrofit existing tank cars allows new DOT-111 tank cars with improved protection to be commingled in unit train service with the existing fleet of

[4]The Hazardous Materials Regulations divide flammable liquids into Packing Groups based on their flash and boiling points. Packing Group I materials ignite most readily, followed by Packing Group II and then Packing Group III materials. The Hazardous Materials Regulations imposes additional safety and security requirements on bulk shipments of Packing Group I and II materials compared to Packing Group III. 78 Fed. Reg. 69,745 (Nov. 20, 2013).

> insufficiently protected tank cars . . .. The safety benefits of new specification tank cars will not be realized while the current fleet of DOT-111 tank cars remain in hazardous materials unit train service, unless the existing cars are retrofitted with appropriate tank head and shell puncture-resistance systems.

NTSB Cherry Valley Report at 77, 88. DOT failed to upgrade its tank car standards or begin to phase out DOT-111s in response to AAR's petition or the NTSB's Cherry Valley recommendations. 79 Fed. Reg. at 45,030. In fact, it took DOT until September 2013–after the Lac Mégantic tragedy–to take the first step toward adopting such standards by publishing an advance notice of proposed rulemaking seeking public comment on AAR's petition. *See* 78 Fed. Reg. 54,849 (Sept. 6, 2013).

Indeed, the Lac Mégantic tragedy shocked two nations and created a moral imperative for the regulators on both sides of the border to take strong action to protect the public from this type of disaster. In the wake of Lac Mégantic, the NTSB again recommended that new and existing tank cars should be required to meet stronger safety standards. In December 2013, NTSB offered the following assessment:

> Based on previous and ongoing NTSB accident investigations, the documented poor accident performance of existing specification DOT-111 tank cars continues to raise serious concerns about the safety of communities, emergency responders, and other individuals who may come in contact with flammable hazardous materials transported in these cars. The NTSB would like to take this opportunity to emphasize the

> importance of the expeditious implementation of four Safety Recommendations . . . that were issued as a result of the June 19, 2009, derailment of an ethanol unit train of DOT-111 tank cars in Cherry Valley, Illinois.
>
> [R]ecent railroad accidents have shown that using DOT-111 tank cars to ship flammable liquids creates an **unacceptable public risk**.
>
> In light of the Quebec accident and most recently, the derailment of DOT-111 tank cars in Aliceville, Alabama, on November 7, 2013, that resulted in a large crude oil release and fire, the NTSB urges PHMSA to take **immediate action** to require a safer package for transporting flammable hazardous materials by rail.

NTSB Comments on PHSMA 2013-0082 at 1-3 (Dec. 5, 2013) (Exh. 35) (emphasis added).

In testimony before a Senate Committee, the NTSB Vice Chair (now its Acting Chair) underscored the urgency of DOT action to prohibit the use of DOT-111 tank cars for transporting crude oil:

> [A]s the volume of flammable materials transported by rail grows the Casselton, North Dakota, accident has become an increasingly commonplace story—and multiple recent serious and fatal accidents reflect substantial shortcomings in tank car design that create an **unacceptable public risk.** The crude oil unit train involved in the Casselton accident consisted of railroad tank cars designed and manufactured to Department of Transportation (DOT) Specification 111-A100W1 (DOT-111)—a design that presents demonstrated and serious safety concerns when used to transport hazardous materials such as crude oil. Specifically, the NTSB has identified vulnerabilities in DOT-111 tank car design with respect to tank heads, shells, and fittings that create the **unnecessary and demonstrated risk** that, in an accident, hazardous materials could be released

> and, in the case of flammable materials, such as crude oil and ethanol, could ignite and **cause catastrophic damage.**
>
> The NTSB continues to find that accidents involving the rupture of DOT-111 tank cars carrying hazardous materials often have **violent and destructive results.**

Senate Testimony of NTSB Vice Chair Christopher A. Hart, *Enhancing Our Rail Safety*, Before Subcomm. On Surface Transp. & Merchant Marine Infrastructure, Safety & Security, at 3-4 (Mar. 6, 2014) (Exh. 15) (emphasis added).

At an April 2014 NTSB Public Forum on Rail Safety, then NTSB Chairwoman, Deborah A.P. Hersman, described a serious accident in February 1978 that took 16 lives and spurred DOT to require retrofitting of jumbo tank cars by the end of 1978, which led to a decline in the number of accidents and fatalities. She described 2013—the year of Casselton and Lac Mégantic—as another low point in railroad history that cried out for emergency actions to stem the tide of crude-by-rail disasters. Chair Deborah Hersman, Written Closing Remarks (Apr. 22, 2014) (Exh. 53). She urged DOT to use its emergency authority to toughen tank car standards rather than wait for a cumbersome rulemaking process to run its course, noting: "[t]here is a very high risk here that hasn't been addressed. They aren't moving fast enough."[5]

[5] Joan Lowy, NTSB Chief Says Obama Administration Needs to Act Immediately on Oil Train Safety, U.S. News & World Report, Apr. 23, 2014 (Exh. 54).

The Transportation Safety Board of Canada ("TSB Canada"), NTSB's Canadian counterpart, conducted an investigation of the Lac Mégantic accident and found that 59 of the 63 derailed DOT-111 tank cars spilled oil, including cars traveling at speeds of 40 miles per hour or less. Lac Mégantic Investigation, at 108-11, 131, 133-34. Even before issuing its final investigation report, TSB Canada made the following recommendation:

> Considering the susceptibility of Class 111 general-service tank cars to product release during accidents, the large number of general-service Class 111 cars remaining in service, and the increased movements of large volumes of flammable liquids by rail through many Canadian and American communities, the Board believes that further action is required immediately.
>
> Given the magnitude of the risks and given that tank car standards must be set for the North American rail industry, the Board recommends that:
>
> The Department of Transport and the Pipeline and Hazardous Materials Safety Administration require that all Class 111 tank cars used to transport flammable liquids meet enhanced protection standards that significantly reduce the risk of product loss when these cars are involved in accidents.

TSB Canada Recommendations Ensuing from the Rail Accident in Lac-Mégantic, Quebec (Jan. 23, 2014) (Exhs. 36 & 37).

II. DOT HAS THE AUTHORITY TO ISSUE ORDERS TO EMERGENCY HAZARDOUS CONDITIONS.

Two overlapping statutes authorize DOT to promulgate regulations governing railroad safety. The Hazardous Materials Transportation Act ("HMTA"), which governs the transportation of hazardous materials by any

means, directs the Secretary of Transportation to "prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce." 49 U.S.C. § 5103(b); *see id.* § 5103(b)(1)(B) ("The regulations . . . shall govern safety aspects, including security, of the transportation of hazardous materials as the Secretary considers appropriate."). The Federal Railroad Safety Act ("FRSA") is a comprehensive law authorizing the Secretary "as necessary" to issue regulations and orders "for every area of railroad safety supplementing laws and regulations in effect" when the FRSA became effective in 1970. 49 U.S.C. § 20103(a). The FRSA provides a safety net as it extends to all areas of railroad safety, even those also covered by another statute, like HMTA. 49 C.F.R. Pt. 209, App. A at 7-9.[6]

Both statutes expressly authorize DOT to issue emergency orders to abate unsafe conditions during the time it takes to complete a rulemaking process. Under HMTA:

> If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, and out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

[6] The Pipeline and Hazardous Materials Safety Administration ("PHMSA") administers HMTA, and the Federal Railroad Administration ("FRA") administers the FRSA. 49 C.F.R. §§ 1.97(b), 1.89 (delegations of authority).

49 U.S.C. § 5121(d). An imminent hazard is defined as "the existence of a condition relating to hazardous material that presents a substantial likelihood that death, severe personal injury, or a substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment." 49 U.S.C. § 5102(5).

Under FRSA:

> If, through testing, inspection, investigation, or research carried out under this chapter, the Secretary of Transportation decides that an unsafe condition or practice, or a combination of unsafe conditions or practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Secretary immediately may order restrictions or prohibitions, without regard to section 20103(e) of this title, that may be necessary to abate the situation.

49 U.S.C. § 20104(a). Congress expanded the Secretary's authority to issue emergency orders in the 2008 by adding "significant harm to the environment" as a basis for issuing such an order. Rail Safety Improvement Act of 2008, § 304, Pub. L. 110-432, 122 Stat. 4848. The power to issue emergency orders has been called "FRA's most sweeping enforcement tool" because it can be used to address unsafe conditions and practices whether or not they contravene an existing regulatory or statutory requirement." 49 C.F.R. Pt. 209, App. A, at 14; *see also id.* at 10 ("That authority was designed to deal with imminent hazards not dealt with by existing

regulations and/or so dangerous as to require immediate, ex parte action on the government's part.").

III. DOT HAS ALREADY FOUND THAT EMERGENCY CONDITIONS AND IMMINENT HAZARDS EXIST AND WARRANT REGULATORY ACTION.

The Secretary has responded to the spate of accidents and increase in crude-by-rail shipping by issuing a series of emergency orders, yet not one addresses the inherently unsafe tank cars. Instead, the emergency orders issued to date focus on operational controls and emergency preparedness. *See* 79 Fed. Reg. at 45,021 (summarizing emergency orders).

While petitioners find it indefensible that DOT has failed to take emergency steps to curb the use of DOT-111 tank cars (and hence the Unsafe Tank Car Petition), the findings in the emergency orders lay the groundwork for an emergency order stopping the use of DOT-111 tank cars to ship Bakken crude. As a predicate for issuing each emergency order, the Secretary has made findings that unsafe conditions threaten human life, harm to communities, and environmental destruction and that the emergency situation warrants immediate restrictions and requirements. For example, Secretary Foxx found in a February 2014 emergency order that:

> Shipping hazardous materials is inherently dangerous. Transporting petroleum crude oil can be problematic if the crude oil is released into the environment because of its flammability. This risk of ignition is compounded in the

> context of rail transportation because petroleum crude oil is commonly shipped in unit trains that may consist of over 100 loaded tank cars. With the rising demand for rail carriage of petroleum crude oil throughout the United States, the risk of rail incidents increases along with the increase in the volume of crude oil shipped. There have been several significant derailments in the U.S. and Canada over the last ten months causing deaths and property and environmental damage that involved petroleum crude oil shipments. These accidents have demonstrated the need for emergency action to address unsafe conditions or practices in the shipment of petroleum crude oil by rail.

DOT, Emergency Order DOT-OST-2014-0025 at 4 (Exh. 23); *see also id*. at 3 ("Additionally, the flammability of crude oil being shipped by bulk rail poses a significant risk of endangerment to health, property, or the environment when an explosion occurs.").

The Secretary's most recent emergency order issued in May 2014 reiterates the above findings and elaborates:

> Upon information derived from recent railroad accidents and subsequent DOT investigations, the Secretary of Transportation (Secretary) has found that an unsafe condition or an unsafe practice is causing or otherwise constitutes an imminent hazard to the safe transportation of hazardous materials. Specifically, a pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail constitute an imminent hazard under 49 U.S.C. 5121(d).
>
> The number and type of petroleum crude oil railroad accidents described below that have occurred during the last year is startling, and the quantity of petroleum crude oil spilled as a result of those accidents is voluminous in comparison to past precedents... Releases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases

> represent an imminent hazard as defined by 49 U.S.C. 5102(5), presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.

DOT, Emergency Restrictions/Prohibition Order, DOT-OST-2014-0067 (May 7, 2014) (Exh. 5).

IV. DOT'S ACTIONS FALL FAR SHORT OF WHAT IS NEEDED TO ABATE THE UNSAFE CONDITIONS POSED BY SHIPPING BAKKEN CRUDE IN DOT-111 TANK CARS.

Despite finding that emergency hazards exist, DOT has failed to take emergency actions to reduce the growing use of unsafe DOT-111 tank cars to ship volatile Bakken crude. DOT has left this critical safety issue to a rulemaking process that has been long in coming and that fails to address the imminent hazards on the rails today.

A. DOT Issued An Advisory That Urges Voluntary Actions To Reduce the Use of DOT-111s To Ship Bakken Crude To The Extent Reasonably Practicable.

DOT acknowledges that shipping Bakken crude in DOT-111 tank cars creates unacceptable hazards. The Secretary of Transportation has publicly stated that he lacks "confidence in the DOT-111" and "the DOT-111 I've always said needs to be either retrofitted or replaced."[7] This spring, DOT made explicit findings about the hazards of shipping Bakken crude in legacy DOT-111 tank cars:

[7] Interview with Anthony Foxx, Secretary of Transportation, Rachel Maddow Show, MSNBC, May 14, 2014 (Unofficial Transcript, Exh. 39).

> Changes in railroad operations over the last several years, including increased rail traffic, higher in-train forces due to the transportation of hazardous materials tank cars at higher gross rail loads, and the likelihood of individual tank cars accumulating more miles annually, have resulted in tank car design changes to accommodate these increased stresses and to significantly reduce the chances of catastrophic failure (i.e., the sudden and total failure of the tank resulting in a release of the tank's contents). Design changes include new tank car steel and improvements of structural features. Older "legacy" tank cars, however, without more modern construction and design enhancements, continue to be used to transport hazardous materials, including Bakken crude oil.

Recommendations for Tank Cars Used for the Transportation of Petroleum Crude Oil by Rail, Safety Advisory 2014-01 at 2 (May 7, 2014) (Exh. 40).

Rather than issue an emergency order restricting the use of DOT-111 tank cars based on these findings, DOT issued a weak advisory that merely urged shippers to use safer cars where available within their fleet to the extent reasonably practicable. The precise language of the safety advisory does no more than:

> **urge** offerors and carriers of Bakken crude oil by rail tank car to select and use the railroad tank car designs with the highest level of integrity reasonably available within their fleet for shipment of [Bakken crude] by rail in interstate commerce.. . .
>
> **recommend** that offerors and carriers of Bakken crude oil by rail select and only use the tank car designs with the highest level of integrity reasonably available within their fleet. The features that offerors should consider in assessing tank car integrity include, without limitations, tank shell jacket systems, head shields, and top fittings protection.. . .
>
> **advise** offerors and carriers to avoid the use of older, legacy DOT Specification 111 or CTC 111 tank cars for the shipment of such oil to the extent reasonably practicable.

Id. at 1, 4 (emphasis added).

B. The Unsafe Tank Car Petition

On July 15, 2014, in light of the imminent threat of another catastrophe involving DOT-111s, the Sierra Club submitted the Unsafe Tank Car Petition asking the Secretary to ban the use of DOT-111 tank cars to ship Bakken crude and other similarly volatile crude oil. The petition targeted the legacy tank cars that lack safety improvements, such as jackets or the CPC-1232 specifications adopted by the industry in 2011. Attachment 1 at 1 n.1. Given the imminent hazards posed by shipping Bakken crude in the unsafe tank cars, the petition asked the Secretary to act expeditiously to impose the requested ban and specifically asked for a response within 30 days. To date, however, the Secretary has not responded to the Unsafe Tank Car Petition.

C. The Rulemaking

On July 23, 2014, the Secretary issued a proposed rule, entitled *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, with comments due by September 30, 2014. 79 Fed. Reg. 45,016 (Aug. 1, 2014).[8] In the proposed rule, the Secretary reiterates that: "The growing reliance on trains to transport large volumes of flammable liquids

[8] High-Hazard Flammable Trains ("HHFTs") are defined in the proposed rule as a single train carrying 20 or more carloads of a flammable liquid. *Id*. at 45,040, 45,075.

poses a significant risk to life, property, and the environment." *Id*. at 45,016. Based on the projected continued growth in crude-by-rail and associated train accidents, the proposed rule concludes that the potential for future severe train accidents involving crude oil has increased substantially and poses risks of higher consequence train accidents. *Id*. at 45,019; *accord id*. at 45,059 ("PHMSA believes that reliance on HHFTs to transport millions of gallons of flammable materials is a risk that must be addressed."). As to the DOT-111 tank cars, the proposed rule states: "[i]t has been demonstrated that the DOT Specification 111 tank car provides insufficient puncture resistance, is vulnerable to fire and roll-over accidents, and the current bottom-outlet valves are easily severable in HHFT accidents." *Id*. at 45,059.

The final rule will eventually replace the DOT-111 specifications with more rigorous standards for crude oil and ethanol tank cars. All of the proposed rule options would dramatically improve crashworthiness in rail accidents compared to the DOT-111 with the survivability of the car increasing as additional safety features are added. *Id*. at 45,053. Overall, the various options for new tank car standards would reduce accident severity compared to the unjacketed DOT-111 tank cars by 40-51% depending on the option. *Id*. at 45,060; Regulatory Impact Analysis at 32.

Under the proposed rule, DOT-111 tank cars would no longer be used to ship crude oil (or ethanol) in high-hazard flammable trains after a phase-out period which runs until October 2020. 79 Fed. Reg. at 45,059 ("the DOT Specification 111 tank car would no longer be authorized for use in HHFT."). For unjacketed DOT-111s–the subject of this case–the phase-out deadline would be October 1, 2018, which applies to Packing Group II. *Id*. at 45,043; Regulatory Impact Analysis at 89, 109 (Bakken crude would most likely be classified as Packing Group II and DOT expects no unjacketed DOT-111s to be used to ship Packing Group I materials as of 2015); Lac Mégantic Investigation §§ 1.19.2.1 & 2.8.3, at 61, 112 (testing showed the Bakken crude involved in the Lac Mégantic accident was Packing Group I despite being marked as Packing Group III).

This is simply too long. Four more years of shipping explosive Bakken crude in unsafe tank cars will expose millions of Americans and countless communities to the risk of explosion and catastrophe. In fact, DOT predicts that, without the proposed rule, 15 mainline accidents would occur in 2015 and in each of the early years under the new rules, plus an additional nine catastrophic accidents comparable to Lac Mégantic and one of even far greater severity over the next 20 years. 79 Fed. Reg. at 45,022, 45,064. These estimates are based on a growing percentage of the tank fleet consisting of new tank cars that meet the industry consensus standards, which means that the DOT-111 tank cars comprise a

disproportionate proportion of the risk underlying DOT's predictions. Despite these extreme risks, nowhere in the proposed rule or in the various emergency orders is there evidence that DOT has considered taking action now to protect U.S. citizens by banning the use of DOT-111s for the transport of Bakken crude.

The Unsafe Tank Car Petition (at 1 n.1) seeks a ban on the use of unjacketed DOT-111 tank cars for use in shipping Bakken crude and other similarly volatile crude oil. The proposed rule estimates that 22,800 unjacketed DOT-111 tank cars are currently in crude oil service, which includes, but is not limited to, the shipment of Bakken crude. 79 Fed. Reg. at 45,025. Relying on industry estimates, DOT indicated that 33,800 new tank cars can be manufactured each year, 55,400 new tank cars are currently on order, an additional 37,800 CPC-1232 tank cars will be in service by the end of 2015, and over 22,000 tank cars can be retrofitted each year. *Id*. at 45,043; Regulatory Impact Analysis at 77-79, 89-90. These figures demonstrate that the industry has the capacity to replace unjacketed DOT-111s expeditiously. The proposed rule has such a lengthy phase-out of unjacketed DOT-111 tank cars because DOT is allowing for a huge amount of growth in the tank car fleet, primarily for shipping crude oil. Regulatory Impact Analysis at 79-80 (allowing for an increase in 61,000 tank cars in crude oil service between 2014-2019). In other words, newly built safer tank cars will be added to the fleet to

provide more capacity to ship crude oil, rather than be used in the near term to replace the extremely unsafe DOT-111 tank cars.

Moreover, the rulemaking process itself will take time to complete. The phase-out of DOT-111 tank cars is just one of many issues addressed in the rulemaking. DOT will need to decide which of three sets of standards to adopt for new tank cars. In addition to tank car standards, the rulemaking contains proposed regulatory changes governing a series of operational matters, such as speed limits, rail routing, and crude oil testing and classification, as well as emergency preparedness issues. 79 Fed. Reg. at 45,017-18. DOT will need to review public comments and choose among various options floated in the proposed rule with respect to all of these rail safety matters.

SUMMARY OF ARGUMENT

DOT has an obligation to respond to the Unsafe Tank Car Petition within a reasonable time. Its failure to take any action in response to the Petition is unreasonable in light of the extraordinary hazards posed by the continued reliance on DOT-111s to carry Bakken crude. The underlying statutes evince a congressional intent that DOT respond to a petition for an emergency order immediately since such orders by definition are necessary to abate an imminent hazard. NTSB has consistently found that shipping crude oil in DOT-111 tank cars poses unacceptable public health risks and that an immediate ban is warranted.

DOT has indicated that it agrees that the DOT-111 tank cars pose unacceptable risks and that it will someday phase out the use of DOT-111 tank cars to ship crude oil in unit trains. The factual predicate for an emergency order is evident from the NTSB's findings and recommendations, DOT own findings, and the evidence presented in the Unsafe Tank Car Petition. All that remains is for DOT to decide whether to take actions to abate the hazards posed by the unsafe tank cars. An emergency order would go a long way to reducing the toll in 2015, which DOT projects will be 15 or more accidents, some of which may lead to fatalities. Given the severe and indisputable public health risks and the short timelines for action envisioned by the statutory schemes, this Court has ample justification for directing DOT decide within 30 days whether to ban the DOT-111 tank cars for shipping Bakken crude.[9]

[9] The Sierra Club and ForestEthics have standing to pursue this writ of mandamus because both organizations are dedicated to promoting environment protection in particular to reducing the harm to people and the environment from shipping dangerous fuels. Both have been at the forefront of advocacy to prevent the expansion and reduce the hazards of crude-by-rail shipments, including by prohibiting the use of unsafe tank cars to ship crude oil. Declarations of Yolanda Andersen and Matt Krogh. Both have members who live and engage in regular activities in close proximity to rail lines that ship Bakken crude in DOT-111 tank cars. These members have well-founded concerns for their health, safety, homes, and the environment they regularly use and enjoy. Declarations of Sam Saltoun, Nancy Reiser, Nancy Casler, and George Dyson. *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000); *Citizens for Better Forestry v. U.S. Dep't of Agric.,* 341 F.3d 961, 969 (9th Cir. 2003). The petitioners will supplement their standing demonstration with additional member declarations.

ARGUMENT

ISSUANCE OF A WRIT OF MANDAMUS IS WARRANTED TO COMPEL DOT TO DECIDE WHETHER TO BAN SHIPPING BAKKEN CRUDE OIL IN DOT-111S AS REQUESTED IN THE TANK CAR PETITION.

The Administrative Procedure Act requires that federal agencies respond to petitions "within a reasonable time," 5 U.S.C. § 555(b), and authorizes agencies to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). In deciding whether to order mandamus relief because of an agency's unreasonable delay, this Court applies the factors established in *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"):

(1) the time agencies take to make decisions must be governed by a "rule of reason";

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the court should also take into account the nature and extent of the interests prejudiced by the delay; and

(6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

See In re California Power Exchange Corp., 245 F.3d 1110, 1124-25 (9th Cir. 2001) (adopting the *TRAC* factors); *Independence Mining Company, Inc. v. Babbitt*, 105 F.3d 502, 507 & n.7 (9th Cir. 1997) (same).

Here, the *TRAC* factors support issuance of a writ of mandamus directing DOT to decide within 30 days whether to issue an emergency order prohibiting the shipment of Bakken crude in the DOT-111 tank cars, as requested in the Unsafe Tank Car Petition. While most unreasonable delay cases entail lengthier delays, they tend to involve rulemaking proceedings that take years to complete. In contrast, this case seeks emergency action to abate an imminent hazard that cannot wait for a rulemaking. To explain why this is so, this petition begins by addressing the *TRAC* factors applicable to the imminent hazards at issue and congressional intent that DOT address imminent hazards immediately. These factors inform the rule of reason *TRAC* factor, which is discussed next. Finally, this petition addresses two *TRAC* factors pertaining to other priorities and prejudice from further delay are then discussed in order.[10]

A. The Unacceptable Risks of Catastrophic Rail Accidents from Shipping Bakken Crude in DOT-111 Tank Cars Warrants Immediate Action.

Under *TRAC*, 750 F.2d at 80, "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at

[10]No allegation of impropriety has been made and therefore the Court need not address the sixth *TRAC* factor.

stake." Applying this *TRAC* factor, courts have concluded that "[w]hen the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 34-35 (D.C. Cir. 1984); *see Public Citizen Health Research Group v. Brock*, 823 F.2d 626, 629 (D.C. Cir. 1987) (*per curiam*) ("When lives are at stake," as they are here, the agency "must press forward with energy and perseverance in adopting regulatory protections."); *In re Int'l Chemical Workers Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (*per curiam*) (imposing deadline for adoption of a regulation limiting workers' exposures to extremely dangerous cadmium).

Here, "lives are at stake." The DOT-111 tank cars are so prone to rupture and oil spills that NTSB found in its Cherry Valley investigation that they "can almost always be expected to breach in derailments that involve pileups or multiple car-to-car impacts." NTSB Cherry Valley Report at 75-76. Since Lac Mégantic, the NTSB has used even stronger language, repeatedly finding that the DOT-111 tank cars "create an unacceptable risk." Hart Testimony at 3.

> [R]ecent railroad accidents have shown that using DOT-111 tank cars to ship flammable liquids creates an unacceptable public risk. NSTB Comments on PHMSA 2013-0082, at 2.
>
> [T]he unnecessary and demonstrated risk that, in an accident, hazardous materials could be released and, in the case of flammable materials, such as crude oil and ethanol, could ignite and cause catastrophic damage. Hart Testimony at 3-4.

> The NTSB continues to find that accidents involving the rupture of DOT-111 tank cars carrying hazardous materials often have violent and destructive results. Hart Testimony at 4.

To avoid the inevitable breaches and unacceptable risks, the NTSB has consistently recommended phasing out the use of DOT-111s to ship crude oil and ethanol. The NTSB has urged expeditious DOT action on this recommendation after the Lac Mégantic disaster demonstrated the severity of the hazards in the context of crude oil shipping. NTSB Cherry Valley Safety Recommendations 12-5 through 8, at 4-6; NSTB Comments on PHMSA 2013-0082, at 1-3 (urging immediate action to prohibit use of DOT-111s to transport flammable liquids). The first such recommendation came in NTSB's investigation of the 2009 Cherry Valley accident, yet DOT failed even to initiate a rulemaking to act on the NTSB's recommendations until September 2013 by publishing an advance notice of proposed rulemaking; any implementation of a final rule that would ban DOT-111s for shipping crude is still years into the future.

Since the Lac Mégantic disaster, DOT has found, based on the crude oil rail disasters, that "[r]eleases of petroleum crude oil, subsequent fires, and environmental damage resulting from such releases represent an imminent hazard as defined by 49 U.S.C. 5102(5)" and that "[t]hese accidents have demonstrated the need for emergency action to address unsafe conditions or practices in the shipment of petroleum crude oil by rail." Emergency Order DOT-OST-2014-0067

at 4; Emergency Order DOT-OST-2014-0025 at 4. In its proposal that would eventually prohibit using DOT-111 tank cars to ship Bakken crude or any flammable liquids, DOT has stated: "It has been demonstrated that the DOT Specification 111 tank car provides insufficient puncture resistance, is vulnerable to fire and roll-over accidents, and the current bottom-outlet valves are easily severable in HHFT accidents." 79 Fed. Reg. at 45,059. DOT has gone further and estimated that 15 rail accidents would occur each year and there would be 10 rail accidents as severe as Lac Mégantic or worse over the next 20 years with the hazardous DOT-111 being a primary element of this risk. 79 Fed. Reg. at 45,022, 45,064.

The unacceptable public health and environmental risks from shipping Bakken crude in DOT-111 tank cars warrant emergency action on DOT's part and support an order from this Court directing DOT to respond expeditiously to the Unsafe Tank Car Petition. The NTSB Chair, Deborah Hersman, put it most pointedly when she urged DOT to use its emergency authority to toughen tank car standards rather run the risk of another disaster before new regulations could be promulgated. As she bluntly stated: "We don't need a higher body count before they move forward. That is a tombstone mentality. We know the steps that will prevent or mitigate these accidents. What is missing is the will to require people to

do so."[11] DOT must move expeditiously to take action in response to the Unsafe Tank Car Petition in light of the number of lives and communities at stake.

B. The Underlying Statutes Compel Speedy Action By DOT When Emergency Situations, Like Those Presented By Shipping Volatile Bakken Crude Oil In The Unsafe Tank Cars, Exist.

TRAC directs courts to ascertain "where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute." *TRAC,* 750 F.2d at 80. The overlapping statutes under which DOT has the authority to issue the requested emergency order evince a congressional intent that emergency orders be issued immediately when imminent hazards exist and that DOT will act expeditiously on petitions for emergency action.

First, DOT has the authority to issue emergency orders to abate imminent hazards and emergency unsafe conditions, which, by definition, are so dire that the order must be issued immediately, without compliance with notice and comment rulemaking procedures. HMTA expressly authorizes the Secretary to issue emergency orders "when the Secretary determines that . . . an unsafe condition or practice, constitutes an imminent hazard," 49 U.S.C. § 5121(d), and defines imminent hazard as "the existence of a condition relating to hazardous material that presents a substantial likelihood that death, severe personal injury, or a

[11] Joan Lowy, NTSB Chief Says Obama Administration Needs to Act Immediately on Oil Train Safety, U.S. News & World Report, Apr. 23, 2014 (Exh. 54).

substantial endangerment to health, property, or the environment may occur before the reasonably foreseeable completion date of a formal proceeding begun to lessen the risk of that death, illness, injury, or endangerment." 49 U.S.C. § 5102(5). The FRSA similarly authorizes the Secretary to issue emergency orders when he decides "that an unsafe condition or practice, or a combination of unsafe conditions or practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment." *Id.* § 20104(a).

Second, HMTA and FRSA establish or envision a one-year timeline for notice-and-comment rulemaking proceedings, indicating that decisions to issue emergency orders should take a fraction of that amount of time. *See* 49 U.S.C. § 5103(b)(2); §§ 20103(a) & (e).[12] The FRSA expressly provides that "[t]he time limit for disposition of a proceeding may not be more than 12 months after the date it begins." 49 U.S.C. § 20103(b); *see also* 49 C.F.R. § 211.1(a) ("each proceeding under the Federal Railroad Safety Act shall be disposed of within 12 months after the date it is initiated," which is defined to mean the date a petition is received by DOT). The DOT's implementing regulations require that a rulemaking proceeding initiated as the result of the granting of a petition must be completed within one year after the petition was filed. *Id.* § 211.13. Moreover, Congress has directed

[12] In the past, PHMSA has promulgated Hazardous Materials Regulations governing railroad tank cars that carry hazardous materials, in coordination with the FRA, and has invoked the authority given to the Secretary under both statutes as the basis for doing so. See, e.g., 74 Fed. Reg. 1770, 1789 (2009).

HMTA to adopt temporary regulations within 60 days with final regulations following within one year. 49 U.S.C. § 5121(e).

Third, the statutory timelines specified for issuance and review of emergency orders reveal a congressional design envisioning action within days or weeks. Under both HMTA and FRSA, the Secretary may issue an emergency order immediately upon determining that an imminent hazard or unsafe conditions exist, but must then provide an opportunity for expeditious review of such an order. HMTA prescribes a short deadline of 20 calendar days for seeking administrative review of an emergency order and envisions that any administrative review will be completed within 30 days. 49 U.S.C. § 5121(d)(3)-(4). Indeed, an emergency order issued under the HMTA ceases to be effective if administrative review has been sought but has not been completed within that timeframe, unless the Secretary determines that the imminent hazard providing a basis for the emergency order continues to exist. *Id*. § 5121(d)(4). FRSA similarly provides that an emergency order stops being effective if review is sought and not completed within 30 days from the order's issuance unless the Secretary decides the emergency situation still exists. 49 U.S.C. § 20104(b).[13]

[13] In addition to the authority to issue emergency orders, the Secretary also has the authority to waive regulations or orders without prior notice and comment where necessary to address an actual or impending emergency situation involving a manmade or natural disaster. 49 U.S.C. § 20104(g). Such waivers may be issued for no more than 60 days and may then be renewed only after notice and an

The underlying statutes evince Congress's intent to authorize, indeed require, DOT to act expeditiously to abate emergency hazardous conditions. It follows that DOT must respond expeditiously to a petition seeking an order removing unsafe conditions or abating imminent hazards like those posed by shipping Bakken crude in unjacketed DOT-111 tank cars.

C. DOT's Failure to Respond to the Petition for an Emergency Order Banning Shipping Bakken Crude in DOT-111 Tank Cars Violates the Rule of Reason.

TRAC, 750 F.2d at 80, provides that the amount of time an agency can appropriately take to make decisions is "governed by a rule of reason," which courts assess "in the context of the statute' which authorizes the agency's action." *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1154, 1158 n.30 (D.C. Cir. 1983). While there is no per se rule as to how long is too long, "a reasonable time for agency action is typically counted in weeks or months, not years," particularly when urgent health or environmental harms are at stake, as is the case here. *In re American Rivers*, 372 F.3d 413, 419 (D.C. Circuit 2004).

This case concerns DOT's failure to respond to a petition seeking an emergency order to abate imminent hazards posed by shipping Bakken crude in unjacketed DOT-111 tank cars. The Unsafe Tank Car Petition is predicated on

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opportunity for a hearing. Id. § 20103(g)(2). This authority is limited to a 60-day period evincing Congress's assumption that notice and comment rulemaking in emergency situations could take place in that time frame.

findings by both the NTSB and DOT that emergency unsafe conditions and imminent hazards exist. In NTSB's words, the DOT-111 tank cars pose "an unacceptable public risk." Hart Testimony at 3-4; NTSB Comments on PHMSA 2013-0082, at 2. DOT likewise has determined that the DOT-111 tank cars are too deficient to be used to ship Bakken crude. *See, e.g.*, 79 Fed. Reg. at 45,069.

In *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984), the D.C. Circuit addressed a similar situation where petitioners had presented scientific evidence to the Food and Drug Administration ("FDA") supporting the need to require aspirin warnings to protect children from Reyes Syndrome, but FDA had chosen "the least responsive course short of inaction" by withdrawing a proposed rule and issuing an advance notice of proposed rulemaking. 740 F.2d at 34 (quoting *Auchter*). In remanding for the district court to determine whether FDA had unreasonably delayed resolution of the petition, the Court noted that "when an agency's enabling statute mandates certain investigatory procedures upon particular factual findings, the court can order an agency to invoke such a procedure . . . when a citizen petition presents the agency with factual data *indisputably* sufficient to trigger the statutory investigative procedures. 740 F.2d at 35 (citing *Environmental Defense Fund, Inc. v. U.S. Dep't of HEW*, 428 F.2d 1083, 1089-90 (D.C. Cir. 1970)) (emphasis in original).

This case is analogous. The Unsafe Tank Car Petition presents the factual predicate and is indisputably sufficient to trigger a decision by the Secretary to issue the requested emergency order. The groundwork has been laid. All that is left is for the Secretary to decide whether to issue the requested emergency order. Yet DOT has folded the emergency hazards posed by the DOT-111 tank cars into its comprehensive rulemaking process. In that process, it currently is proposing not to phase out the use of DOT-111 tank cars to ship Bakken crude until October 2017 at the earliest and more likely October 2018, the same time line that it has proposed for the phase out of crude oil shipments in CPC-1232 tank cars that have not been retrofitted to add additional safety features. Such a course of action is unresponsive to the imminent hazard conditions that exist today and would run the risk of numerous rail accidents, oil spills, explosions, property damage, injuries and even deaths.

As explained above, time is of the essence when emergency unsafe conditions and imminent hazards exist. Congress has made it clear that taking steps to abate imminent hazards is too urgent to proceed through notice and comment rulemaking. In the ongoing rulemaking, DOT will need to resolve numerous complex issues concerning the new tank car standards, train speeds, rail routing, testing and classifying crude oil, and emergency response information. The Unsafe Tank Car Petition focuses on one issue against the backdrop of a long

history of NTSB findings and recommendations for urgent action and DOT findings and analyses that agree with NTSB's call for a phase out of DOT-111s for shipping Bakken crude oil. The factual data presented in the Unsafe Tank Car Petition and the findings made by NTSB and DOT are indisputably sufficient to trigger a decision by DOT as to whether to ban shipping Bakken crude in unjacketed DOT-111 tank cars immediately.

D. No Higher, Competing Priorities Justify EPA's Delay.

TRAC, 750 F.2d at 80, directs courts to "consider the effect of expediting delayed action on agency activities of a higher or competing priority." Given that this mandamus petition seeks emergency action to abate an imminent hazard, it is hard to imagine what competing priority might take precedence. *See Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987) (justifications for delay "must always be balanced against the potential for harm"). Congress has made it clear that rail safety must be given "the highest priority," *see* 49 U.S.C. § 103(c), and has adopted a statutory scheme that calls for expeditious action to address emergency unsafe conditions. It is hard to imagine what other priorities could justify DOT's delay.

In addition, DOT has already conducted investigations and made findings that seal the fate of the DOT-111 tank cars. It has determined these cars are too prone to ruptures and oil spills to be used to ship Bakken crude and other

hazardous materials. All that remains to resolve the Unsafe Tank Car Petition is making a decision and, if affirmative, crafting the emergency order.

E. Further Delay Will Cause Prejudice Because States, Local Governments, Emergency Responders, and The Public Lack Any Means To Protect Themselves Against The Hazards Posed by Shipping Bakken Crude In The Unsafe Tank Cars.

Under *TRAC*, 750 F.2d at 80, the court must "take into account the nature and extent of the interests prejudiced by the delay." DOT's delay in acting on the Unsafe Tank Car Petition causes prejudice because federal railroad law leaves states, local governments, emergency responders, and the public without means to protect themselves. This is a situation where "[l]ack of alternative means of eliminating or reducing the hazard necessarily adds to unreasonableness of a delay." *See Cutler v. Hayes*, 818 F.2d at 898.

As common carriers, railroads must accept reasonable requests to ship goods where the shipment complies with the law. 49 U.S.C. § 11101(a); *see Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers' Elevator Co.*, 226 U.S. 426 (1913). The courts have held that this obligation extends to the shipment of hazardous materials where a federal agency has promulgated comprehensive safety regulations for the particular type of cargo. *See Riffin v. Surface Transp. Bd.*, 733 F.3d 340, 345-48 (D.C. Cir. 2013) (Surface Transportation Board appropriately determined common carrier obligation extended to toxic by inhalation materials because the conformance of the shipment with comprehensive hazardous materials

regulations transformed the shipping request into a presumptively reasonably one); *Akron, Canton & Youngstown RR Co. v. Interstate Commerce Comm'n*, 611 F.2d 1162, 1166-70 (6th Cir. 1979) (affirming determination that railroad had to carry irradiated fuel and radioactive waste in light of its long history of doing so and the national need for rail shipment of nuclear materials). Because current DOT regulations allow the shipment of Bakken crude in DOT-111 tank cars, the railroads have little choice but to accept trains with DOT-111 tank cars, the hazards notwithstanding. It is presumably for this reason that BNSF and AAR have themselves advocated for new tank car standards that will significantly improve safety. Notes from Administrator's Meeting with BNSF for Docket PHMSA-2012-0082, at 2 (Mar. 19, 2014) (Exh. 30); Comments of AAR, Docket PHMSA-2012-0082, at 3-7 (Nov. 14, 2013) (Exh. 31). It will take action by DOT in the form of new federal tank car regulations or an emergency order over-riding the existing regulations to give the railroads a green light to refuse shipments of Bakken crude or other similarly volatile materials in DOT-111 tank cars.

Both HMTA and FRSA have preemption provisions that preclude states and local governments from banning the shipment of Bakken crude in DOT-111 tank cars on mainline railroads. The FRSA provides that "[l]aws, regulations and orders related to railroad safety . . . and railroad security shall be nationally uniform to the extent practicable." 49 U.S.C. § 20106. State or local governments

may adopt more stringent laws only where such law is necessary to eliminate a local safety hazard, is not incompatible with a federal law or regulation, and will not unreasonably burden interstate commerce. *Id*. The HMTA expressly preempts non-federal requirements that relate to five specified subject matters, which include the design and reconditioning of packaging and containers qualified for use in transporting hazardous materials. *Id*. § 5125(b)(1). Under these preemption provisions, DOT's hazardous materials regulations allowing DOT-111 tank cars to be used to ship hazardous materials likely preempt state and local regulatory authority to bar the entry into their territories of DOT-111 cars laden with Bakken crude. Accordingly, despite widespread public demands for greater rail safety, state and local governments are likely powerless to protect their residents from the imminent hazard posed by Bakken-filled DOT-111 tank cars on the rails.[14]

It is the shippers that control whether DOT-111 tank cars will be used to ship hazardous materials. Yet the shippers generally do not bear liability for rail accidents once a rail carrier accepts a shipment. Regulatory Impact Analysis at 17.

[14] *See, e.g*., California Interagency Rail Safety Working Group, *Oil By Rail Safety in California* (June 2014) (available at http://www.caloes.ca.gov/HazardousMaterials/Pages/Oil-By-Rail.aspx); *Washington Residents Rail Against Crude Oil Shipments*, Huffington Post, June 18, 2014 (available at http://www.huffingtonpost.com/2014/06/18/washington-crude-oil-shipments_n_5507798.html); *Governor Cuomo Orders Review of Crude Oil Rail Safety in New York State* (Press Release Jan. 29, 2014) (available at http://www.governor.ny.gov/press/01292014-crude-oil-rail-safety).

As a result, the shippers lack the incentives created by financial liability to using DOT-111 tank cars to ship Bakken crude. *Id*.

No federal law requires that railroads or shippers carry sufficient insurance coverage to cover the costs of rail accidents. Insurance coverage is left to the marketplace. By way of example, the railroad responsible for Lac Mégantic had only $25 million in insurance and declared bankruptcy after the accident, leaving the public to foot much of the bill, which is predicted to exceed $1.2 billion. Regulatory Impact Analysis at 17. According to the Association of American Railroads, the maximum liability coverage available on the market is about $1.1 billion and "[t]here is simply not enough available coverage in the commercial marketplace anywhere in the world to insure against a catastrophic hazardous materials incident." Comments of AAR Before Canadian Transportation Agency Review of Railway Third-Party Liability Insurance Coverage Regulations at 8 (Jan. 21, 2014) (Exh. 52).

In its determination of need for the new tank car standards, DOT described the "market failure" created by the fact that "the shippers and rail companies are not insured against the full liability consequences of incidents involving hazardous materials." Regulatory Impact Analysis at 17. As a result, "rail carriers and shippers may not bear the entire cost of 'making whole' those affected when an incident involving crude and ethanol shipment by rail occurs." *Id*. Local

governments and local emergency responders will be the first called to respond to rail accidents with state governments called into assist. They may well lack the resources and capacities to deal with an accident of the magnitude of Lac Mégantic, and it would strain public coffers to try to make the people and community facing such a disaster whole.

DOT's delay is also causing prejudice because the U.S. is lagging behind Canada in removing DOT-111 tank cars from the crude-by-rail fleet. Deciding that it had to "move aggressively to address the safety concerns of Canadians" and could not wait for harmonization with U.S. regulatory actions, Canadian regulators have taken steps to stop the use of DOT-111 tank cars. 2014 TSB Canada Recommendations & TC Responses at 2 (Exh. 48). In April 2014, Transport Canada issued an emergency order "immediately and unilaterally" prohibiting the use of the oldest DOT-111 tank cars for transporting crude oil and ethanol. The prohibition became effective in late May 2014. Transport Canada Protective Directive No. 34 (Apr. 23, 2014) (Exh. 47). Transport Canada has also announced a May 1, 2017 phase-out of the use of DOT-111 tank cars for shipping crude oil and ethanol, even while it is still poised to adopt additional safety improvements to the CPC-1232 specifications this fall. Lac Mégantic Investigation at § 4.1.21, 134-36; Transport Canada, Explanatory Note to Tank Car Regulatory Changes (July 18, 2014) (available at http://www.tc.gc.ca/eng/tdg/clear-modifications-menu-

1193.html). While that phase-out, which will be implemented over a three-year period, will allow DOT-111 tank cars to remain in crude service for far too long in light of the extreme risks, Transport Canada has provided clarity as to the rules of the road, and railroads and shippers are presumably modifying their practices accordingly. In addition, in February 2014, Canada's Class 1 Railways imposed a surcharge for shipments using DOT-111 tank cars, *id*. § 4.1.21, at 134, and they made commitments to phase out or retrofit their DOT-111 tank cars, in some instances by the end of 2014. *Id*. The actions taken by the regulators and railroads in Canada, coupled with DOT's failure to act, create incentives for shippers to shift DOT-111s to the U.S. fleet. Indeed, BNSF officials have expressed concern "that the DOT 111s will come to the U.S. and the CPC-1232s will end up in Canada." Notes from Meeting with BNSF for Docket PHMSA-2012-0082 at 2 (Mar. 19, 2014) (Exh. 30). DOT has recognized that the risks are simply too great to leave to market forces, in light of the market failures. Regulatory Impact Analysis at 17. The market, however, is transnational and actions to over-ride market forces in Canada to protect the public from undue hazards will likely exacerbate the hazards on the U.S. side of the border.

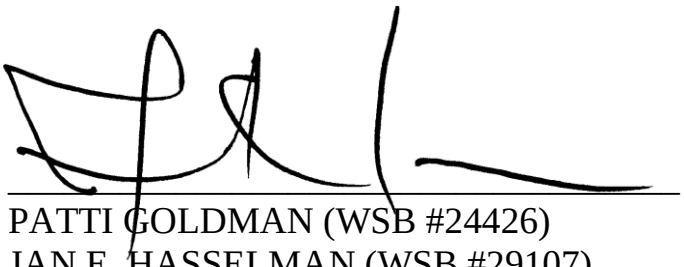
The U.S. public is demanding safety improvements on the rails. Many state and local governments are trying to heed public demands, much as Canada did. However, their hands are tied as a result of federal preemption of state and local

authority to ban unsafe tank cars. Local and state governments and the public have no alternative means of eliminating the imminent hazards posed by shipping Bakken crude in DOT-111 tank cars, further supporting the need for urgent action on DOT's part.

CONCLUSION

For the reasons set forth above, the Sierra Club asks this Court to order DOT to respond to the Unsafe Tank Car Petition within 30 days.

Respectfully submitted this 11th day of September, 2014.



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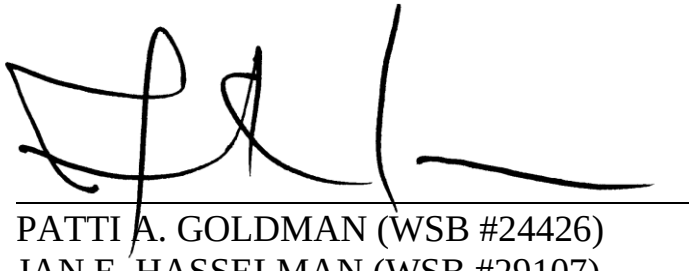
STATEMENT OF RELATED CASES

The undersigned counsel of record for Petitioners Sierra Club and ForestEthics are aware of no cases related to this petition pending before this Court.

Respectfully submitted this 11th day of September, 2014.



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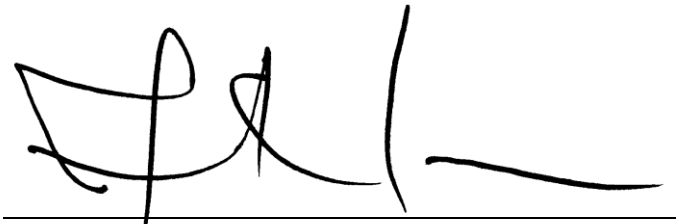
CERTIFICATE OF COMPLIANCE

This petition for writ of mandamus complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,057 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This petition for writ of mandamus complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14 point font.

Respectfully submitted this 11th day of September, 2014.



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing documents via United States Postal Service, electronic mail and/or overnight courier:

1. Petition for a Writ of Mandamus, including Corporate Disclosure Statement, Statement of Related Cases and Certificate of Compliance;
2. Declaration of Yolanda Andersen in Support of Petition for Writ of Mandamus;
3. Declaration of Nancy Casler in Support of Petition for Writ of Mandamus;
4. Declaration of George Dyson in Support of Petition for Writ of Mandamus;
5. Declaration of Matthew Krogh in Support of Petition for Writ of Mandamus;
6. Declaration of Nancy Rieser in Support of Petition for Writ of Mandamus; and
7. Declaration of Samuel Saltoun in Support of Petition for Writ of Mandamus

on the following parties:

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Eric Holder United States Attorney General U.S. Department of Justice 950 Pennsylvania Avenue, N.W. Washington, D.C. 20530-0001 (202) 514-2001 *United States Attorney General*	☐ via facsimile ☒ via overnight courier ☐ via first-class U.S. mail ☐ via hand delivery ☐ via e-mail ☐ via electronic service by Clerk
Melinda Haag United States Attorney U.S. Attorney's Office 450 Golden Gate Avenue, 11th Floor San Francisco, CA 94102 (415) 436-7200 | Phone (415) 436-7234 | Fax *Local U.S. Attorney*	☐ via facsimile ☒ via overnight courier ☐ via first-class U.S. mail ☐ via hand delivery ☐ via e-mail ☐ via electronic service by Clerk

Executed this 11th day of September, 2014, at Seattle, Washington.

Eudora Powell

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