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**U.S. Department of  
Transportation**

Office of the Secretary  
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE  
Washington, DC 20590

November 7, 2014

Ms. Patti Goldman  
Earthjustice  
Northwest Office  
705 Second Avenue, Suite 203  
Seattle, WA 98104

Dear Ms. Goldman:

Thank you for your letter dated July 15, 2014, enclosing a petition to issue an Emergency Order pursuant to 49 U.S.C. §§ 5121(d) and 20104(a) prohibiting the shipment of Bakken crude oil in DOT-111 tank cars. Secretary Foxx has asked me to respond to your petition.

The Department of Transportation (DOT or Department) appreciates Sierra Club's and ForestEthics' concerns regarding the current standards for tank cars and shares your clients' sense of urgency in working to improve the tank car design in an effort to decrease the likelihood of releases of hazardous materials during or after a train derailment. After careful review of your petition and accompanying exhibits, DOT has concluded that the issues the petition raises should be, and are being, addressed within the Department's current, ongoing regulatory and enforcement efforts. Accordingly, your petition to issue an Emergency Order is denied.

The Department has the authority to issue an Emergency Order relating to hazardous materials transportation safety under 49 U.S.C. § 5121(d)(1), which states as follows:

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 or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

Similarly, the Department has the authority to issue an Emergency Order relating to rail transportation safety under 49 U.S.C. § 20104(a)(1), which states as follows:

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 and practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Secretary immediately may order restrictions and

prohibitions, without regard to section 20103(e) of this title, that may be necessary to abate the situation.

Under both provisions, DOT “may” issue an Emergency Order if the applicable statutory requirements are met. Thus, a decision not to issue an Emergency Order is always committed solely to the Department’s discretion. Accordingly, even if DOT were to find that conditions warranting issuance of an Emergency Order existed under either or both statutes, the Department would have the discretion to forego such action and, as appropriate, address the conditions through alternative measures.

With respect to DOT-111 tank cars, the Department, as petitioners acknowledge (Petition 14-15), has in fact issued Emergency Orders and taken other measures, including the issuance of notices of proposed rulemakings. Since the July 2013 rail accident in Lac-Mégantic, Québec, the Department and two of its operating administrations, the Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA), have issued the following Emergency Orders, Safety Advisories, and Safety Alerts:

- FRA issued Emergency Order 28 (EO 28) on August 7, 2013, implementing enhanced attendance and securement requirements for trains transporting certain hazardous materials by rail, including crude oil and ethanol (78 Fed. Reg. 48,218);
- The Department issued an Emergency Order on March 6, 2014, amending, restating, and superseding a February 25, 2014 Emergency Order, and requiring proper testing for classification and characterization of crude oil, while also prohibiting shippers from switching to an alternate classification that involves less stringent packaging;
- The Department issued an Emergency Order on May 7, 2014, requiring all railroads that operate trains containing one million gallons of Bakken crude oil to notify state emergency response commissions about the operation of these trains through their States;
- PHMSA and FRA issued joint Safety Advisories on August 7, 2013 (78 Fed. Reg. 48,224) and November 20, 2013 (78 Fed. Reg. 69,745) stressing the importance of safety and security planning and proper characterization and classification of hazardous materials being shipped;
- FRA and PHMSA issued a joint Safety Advisory on May 7, 2014, recommending that offerors and carriers of Bakken crude oil use tank car designs with the highest level of integrity available in their fleets; and
- PHMSA issued a Safety Alert on January 2, 2014, that warned of crude oil variability and emphasized that unprocessed crude oil may affect the integrity of packaging or present additional hazards related to corrosivity, sulfur content, and dissolved gas content.

Rulemaking notices and other actions taken by DOT, including FRA and PHMSA, include the following:

- PHMSA and FRA initiated a comprehensive review of operational factors that affect the transportation of hazardous materials by rail (see 78 Fed. Reg. 42,998 (July 18, 2013));
- PHMSA engaged in significant outreach efforts to gain additional technical, commodity classification, and practical information regarding the current use and future phase out of DOT-111 tank cars;
- DOT referred safety issues related to EO 28 and the joint Safety Advisories to FRA’s Railroad Safety Advisory Committee;

- PHMSA published an Advance Notice of Proposed Rulemaking (ANPRM) on September 6, 2013, responding to eight petitions for rulemaking related to the transportation of hazardous materials by rail on (78 Fed. Reg. 54,849);
- PHMSA published a comprehensive regulatory proposal on August 1, 2014 (79 Fed Reg. 45,015) focused on the safe rail transportation of flammable liquids, including crude oil, which was informed in part by the comments to the September 6, 2013, ANPRM. Pursuant to this proposed rule, the use of DOT-111 tank cars for transporting crude oil and ethanol would be phased out. The comment period for this proposed rule closed on September 30, 2014, following a sixty-day comment period. The agency is currently reviewing all comments and drafting a final rule.
- On September 9, 2014, FRA published a proposed rule that would improve the securement and attendance of trains carrying hazardous materials (79 Fed Reg. 53,356).
- The Department initiated *Operation Classification*, involving joint activities at all phases of transportation to investigate how shippers are classifying crude oil and what actions they are taking to determine the characteristics of the material;
- Secretary Foxx hosted a “Call to Action” meeting with DOT senior leadership and the railroad and petroleum industries in order to discuss improving rail safety by preventing accidents and by mitigating the impacts of those that occur;
- As a result of the Call to Action, railroads committed to implementing speed restrictions in designated urban areas, providing train braking enhancements, making more frequent inspections of rail and equipment, installing defective bearing detection equipment, and providing resources to enhance emergency response capabilities; and
- As a result of the Call to Action, the petroleum industry committed to developing a comprehensive industry standard for testing, characterizing, classifying, and loading and unloading crude oil in rail tank cars.

The above-referenced Emergency Orders and other actions collectively reflect DOT’s considered, expert judgment regarding the most appropriate response at this time to the safety risks posed by the transport of Bakken crude oil in DOT-111 tank cars. Most significantly, DOT has responded by Emergency Order to the risks that, in its judgment, were properly addressed by Emergency Order. DOT has also decided, in its discretion, to consider other actions related to DOT-111 tank cars through notice-and-comment rulemakings, which, as noted above, are currently ongoing and include a proposed phase-out of the use of DOT-111 tank cars for the transport of crude oil and ethanol.

DOT will carefully consider all comments on its proposed rules, including those comments that Earthjustice, ForestEthics, and Sierra Club submitted, which, among other things, urge DOT to adopt a ban on DOT-111 tank cars through the rulemaking process. Your petition, however, fails to demonstrate that it is appropriate at this time for the Department to issue an Emergency Order under 49 U.S.C. § 5121(d) or 49 U.S.C. § 20104(a) requiring an absolute ban on the use of DOT-111 tank cars to transport Bakken crude oil, rather than addressing the issue in the ongoing rulemaking.

Sincerely,



Kathryn B. Thomson