



**Via Overnight Mail**

October 20, 2014

Hon. Joseph J. Martens  
Commissioner  
New York State Department of Environmental Conservation  
625 Broadway  
Albany, NY 12233-1010

**Re: Petition for Summary Abatement Order: Receipt and Storage of Bakken Crude Oil  
in DOT-111 Tank Cars at Albany Terminals Operated by Global Companies, LLC  
and Buckeye Partners, LP**

Dear Commissioner Martens:

Earthjustice hereby submits the enclosed Petition for Summary Abatement Order on behalf of the Ezra Prentice Homes Tenants' Association, Sierra Club Atlantic Chapter, Center for Biological Diversity, People of Albany United for Safe Energy, Natural Resources Defense Council, Environmental Advocates of New York, Adirondack Wild: Friends of the Forest Preserve, and Greater St. John's Church of God in Christ.

Respectfully submitted,

Christopher Amato  
Staff Attorney

C: Hon. Andrew M. Cuomo, Governor  
Hon. Neil D. Breslin, Senator, 44th Senate District  
Hon. John T. McDonald, III, Assemblyman, 108<sup>th</sup> Assembly District  
Hon. Patricia Fahy, Assemblywoman, 109<sup>th</sup> Assembly District  
Hon. Kathy M. Sheehan, Mayor, City of Albany  
Hon. Daniel McCoy, Albany County Executive  
Basil Seggos, Deputy Secretary for the Environment  
Marc Gerstman, DEC Executive Deputy Commissioner  
Ed McTiernan, DEC General Counsel  
Melvin Norris, Director, DEC Office of Environmental Justice

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Petition of

EZRA PRENTICE HOMES TENANTS ASSOCIATION;  
SIERRA CLUB ATLANTIC CHAPTER;  
CENTER FOR BIOLOGICAL DIVERSITY;  
PEOPLE OF ALBANY UNITED FOR SAFE ENERGY;  
NATURAL RESOURCES DEFENSE COUNCIL;  
ENVIRONMENTAL ADVOCATES OF NEW YORK;  
ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE;and  
GREATER St. JOHN’S CHURCH OF GOD IN CHRIST

Pursuant to New York Environmental Conservation Law § 71-0301  
And 6 N.Y.C.R.R. Part 620 for a Summary Abatement Order  
Prohibiting Receipt and Storage of Bakken Crude Oil Via  
DOT-111 Tank Cars at Oil Terminals in New York Owned  
and/or Operated by

GLOBAL COMPANIES, LLC, and  
BUCKEYE PARTNERS, LP.

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TO: HON. JOSEPH MARTENS, COMMISSIONER  
New York State Department of Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, NY 12233

**Preliminary Statement**

1. The Ezra Prentice Homes Tenants Association, Sierra Club Atlantic Chapter, Center for Biological Diversity, People of Albany United for Safe Energy, Natural Resources Defense Council, Environmental Advocates of New York, Adirondack Wild: Friends of the Forest Preserve and Greater St. John’s Church of God in Christ (“Petitioners”), by and through their attorney, Earthjustice, submit this Petition requesting that the Commissioner of the New York State Department of Environmental Conservation (“DEC” or “Department”) utilize his

summary abatement power to address the imminent danger to public safety and the environment posed by the receipt and storage of highly volatile Bakken crude oil in outdated and unsafe DOT-111 tank cars at the crude oil transloading facilities operated by Global Companies, LLC (“Global”), and Buckeye Partners, LP (“Buckeye”), in Albany, New York (together, the “Albany Terminals”).

2. New York Environmental Conservation Law (“ECL”) § 71-0301 and 6 NYCRR Part 620 authorize the Commissioner of DEC to summarily order the discontinuance of any condition or activity that he finds, after investigation, “presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources,” so long as the condition or activity “relates to the prevention and abatement powers of the commissioner.”

3. As discussed in detail below, the receipt and storage at the Albany Terminals of Bakken crude in hazardous DOT-111 tank cars presents an imminent danger to the health and safety of the thousands of men, women, and children who live, work, attend school, receive disability and other health-related services, attend church, or are otherwise present in the City of Albany, and who will be at ground zero in the event of an accident, fire, or explosion at the Albany Terminals.

4. The receipt and storage at the Albany Terminals of Bakken crude in DOT-111 tank cars is also likely to result in irreversible or irreparable damage to natural resources, as described in detail below.

5. Governor Andrew Cuomo and New York State’s environmental, health, transportation, energy, and emergency response agencies have publicly recognized the significant public safety and environmental threats posed by transportation of Bakken crude oil

in DOT-111 tank cars and by the recent massive increase in crude oil operations at the Albany Terminals. On January 29, 2014, Governor Cuomo issued Executive Order 125, which reviewed the string of serious accidents involving the transportation of Bakken crude oil in DOT-111 tank cars, and stated that “the significant expansion” in crude oil shipments through the Port of Albany “increases the public’s vulnerability to a serious accident.”<sup>1</sup> Executive Order 125 explicitly noted that “Bakken crude oil has a lower flashpoint and is therefore more prone to ignite during a rail accident,” and recognized that “New York’s waterways . . . [are] especially vulnerable to spills of crude oil and other petroleum products.”<sup>2</sup>

6. An April 30, 2014 report to Governor Cuomo co-authored by DEC and four other New York State agencies explicitly recognized that the rail transportation of Bakken crude oil poses significant public safety and environmental threats. The report noted that from 2008 to 2013, crude-by-rail shipments increased 4,000 percent, and stated that “the boom in crude oil transportation *has also raised serious public safety and environmental concerns due to the inherent volatility of Bakken crude, the sheer volume being transported, and the poor safety record of the type of tank cars used to carry the majority of crude oil.*”<sup>3</sup>

7. The federal government has also recognized the serious threat posed by Bakken crude oil in DOT-111 tank cars. In March 2014, the United States Department of Transportation (“USDOT”) evaluated the recurring accidents involving transport of Bakken crude in DOT-111 tank cars and issued an emergency order stating that “[s]everal accidents since last summer, which caused deaths, injuries and significant property damage, have demonstrated *the need for*

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<sup>1</sup> N.Y. Exec. Order 125, *Directing the Department of Environmental Conservation, the Department of*  
<sup>2</sup> *Id.*

<sup>3</sup> N.Y. Dep’t of Env. Conserv., et al., *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity* at ii (Apr. 30, 2014) (“Crude Oil Report”) (emphasis added), annexed to this Petition as Exhibit 2.

*emergency action to address unsafe practices in the shipment of petroleum crude oil by rail.”*<sup>4</sup>

The emergency order concluded that “the flammability of crude oil being shipped by bulk rail *poses a significant risk of substantial endangerment to health, property, or the environment when an explosion occurs.*”<sup>5</sup>

8. In May 2014, the USDOT issued another emergency order finding that the “pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail *constitute an imminent hazard . . . presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.*”<sup>6</sup>

9. Given the clear evidence of the imminent danger posed by the movement of Bakken crude oil in DOT-111 tank cars, it is respectfully submitted that the storage and receipt at the Albany Terminals of Bakken crude in DOT-111 tank cars clearly and unequivocally meets the criteria for summary abatement.

10. As set forth in detail below, this matter relates to the prevention and abatement powers of the Commissioner in that the receipt and storage of Bakken crude oil in DOT-111 tank cars at the Albany Terminals pertains to or affects the objectives or goals of the Environmental Conservation Law, including the conservation and management of natural resources and the prevention and abatement of water, land, and air pollution. In addition, this matter relates to permitting, licensing, or regulatory programs of the Department with regard to resource conservation and pollution control, and therefore issuance of a Summary Abatement Order under

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<sup>4</sup> Anthony R. Foxx, Sec’y of Transp., Amended and Restated Emergency Restriction/Prohibition Order, Docket No. DOT-OST-2014-0025 at 5 (Mar. 6, 2014) (“USDOT Mar. 6 Emergency Order”) (emphasis added), attached to this Petition as Exhibit 3.

<sup>5</sup> *Id.* at 4 (emphasis added).

<sup>6</sup> Anthony R. Foxx, Sec’y of Transp., Emergency Order, Docket No. DOT-OST-2014-0067 (May 7, 2014), *available at* <http://www.dot.gov/briefing-room/emergency-order> (“USDOT May 7 Emergency Order”) (emphasis added), attached to this Petition as Exhibit 4.

these circumstances is an appropriate exercise of the Commissioner's authority. *See* ECL § 70-0301; 6 NYCRR § 620.2(a)(2).

11. Federal law does not preempt the Commissioner's summary abatement powers in this context, as neither Global nor Buckeye are rail carriers subject to exclusive federal jurisdiction and the state has primary regulatory authority over crude oil operations at the Albany Terminals. Moreover, the United States Court of Appeals for the Second Circuit has sustained the Commissioner's summary abatement powers in the face of a federal preemption challenge in remarkably similar circumstances involving imminent harm from transportation of oil and sludge in barges.<sup>7</sup>

12. Nor would a DEC Order preventing the use of DOT-111 tank cars to receive and store Bakken crude oil at the Albany Terminals unduly burden or prejudice Buckeye or Global. Global has already announced a planned phase-out of DOT-111 tank cars at its Albany Terminal, which was set to begin on July 1, 2014. Both Global and Buckeye have previously acknowledged the significant public safety and environmental hazards posed by their handling of crude oil.

13. Additionally, a summary abatement order would be consistent with the growing recognition in the oil industry of the dangers posed by DOT-111 tank cars carrying Bakken crude oil. Earlier this month, BP announced that it would no longer accept Bakken crude oil in DOT-111 tank cars at its Cherry Point, Washington refinery.

14. DEC's failure to act immediately would needlessly expose the people of the City of Albany to the continued threat of loss of life or severe injury in the event of a fire or explosion at the Albany Terminals, and place precious natural resources at risk of irreversible or irreparable damage. Indeed, Executive Order 125 explicitly stated that although the federal government is in

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<sup>7</sup> *Berman Enterprises, Inc. v. Jorling*, 3 F.3d 602, 606 (2d Cir. 1993).

the process of reassessing rail car safety standards for crude oil transport, “New York nevertheless cannot await the final outcome of these federal assessments before taking action.”<sup>8</sup>

15. Consequently, Petitioners request that the Commissioner of DEC exercise his summary abatement authority under ECL § 71-0301 and 6 NYCRR Part 620 to order Global and Buckeye to immediately discontinue the receipt and storage of Bakken crude oil in DOT-111 tank cars at their Albany Terminals on the ground that such activity presents an imminent danger to the health or welfare of the people of the state or is likely to result in irreversible or irreparable damage to natural resources.

16. Petitioners further request that such Order remain in effect until such time that Global and Buckeye submit evidence satisfactory to the Commissioner that new or modified rail tank cars will be used to transport Bakken crude to the Albany Terminal and that such new or modified tank cars can be used to transport Bakken crude without posing an imminent danger to the health or welfare of the people of the state and is not likely to result in irreversible or irreparable damage to natural resources.

#### **I. Petitioners’ Interests in This Issue**

17. Petitioner Ezra Prentice Homes Tenants Association is an unincorporated association with approximately 100 members. The Association’s mission is to represent the interests of the tenants of the Ezra Prentice Homes, particularly with respect to matters affecting the health, safety, and welfare of the tenants. The Ezra Prentice Homes are located in close proximity to the Albany Terminals, and directly adjacent to the rail operations serving the Global Terminal.

18. Petitioner Sierra Club Atlantic Chapter is a 501(c)(3) not-for-profit, volunteer-led environmental organization of 38,000 members statewide dedicated to protecting New York’s

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<sup>8</sup> N.Y. Exec. Order 125, Ex. 1.

air, land, water, and remaining wild places. Its offices are located at 353 Hamilton Street, Albany, New York 12210. Sierra Club Atlantic Chapter is actively engaged in working to protect the health and wellbeing of the communities in the City of Albany and up and down the Hudson River Valley. Sierra Club's mission is to explore, enjoy, and protect the wild places of the Earth; to practice and promote the responsible use of the Earth's resources and ecosystems; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives. Sierra Club's mission includes protecting and restoring the quality of wild places, such as national parks, forests and wilderness areas, enjoyed by its members for their scenic views and vistas. Sierra Club's members regularly enjoy recreational activities on the Hudson River and other waterways in the vicinity of the Albany Terminals, and in Island Creek Park, which is located on the Hudson River adjacent to Global's Albany Terminal.

19. Petitioner Center for Biological Diversity is a 501(c)(3) not-for-profit, public-interest corporation with over 675,000 members. The Center for Biological Diversity's members are dedicated to protecting diverse native species and habitats through science, policy, education, and environmental law. The Center's Climate Law Institute works to promote sound conservation strategies in order to protect its members' recreational, wildlife-viewing, scientific, and educational interests. The Center's members derive recreational, conservation, and aesthetic benefits from the existence of rare species in the wild, including species inhabiting the Hudson River and other waterways in the vicinity of the Albany Terminals.

20. Petitioner People of Albany United for Safe Energy ("PAUSE") is an unincorporated association with approximately 240 supporters. PAUSE is a grassroots group of



individuals who support safe, sustainable energy and fight for environmental justice. PAUSE is actively involved in issues surrounding crude oil shipments at the Port of Albany.

21. Petitioner Natural Resources Defense Council (“NRDC”) is a nationwide environmental advocacy organization with over 1.4 million members. NRDC’s mission is to protect the Earth: its people, its plants and animals, and the natural systems on which all life depends. NRDC has over 300,000 members who reside in New York State, including over 200 members who live in the City of Albany.

22. Petitioner Environmental Advocates of New York (“EANY”) is a not-for-profit organization with 18,000 members in New York, including 300 members who reside in the City of Albany. EANY’s mission is to protect the air, land, water, and wildlife and the health of all New Yorkers. Based in Albany, EANY monitors state government, evaluates proposed laws, and champions policies and practices that will ensure the responsible stewardship of our shared environment.

23. Petitioner Adirondack Wild: Friends of the Forest Preserve (“Adirondack Wild”) is a 501(c)(3) not-for-profit corporation, with approximately 600 members, including members who reside in the City of Albany. The mission of Adirondack Wild: Friends of the Forest Preserve is to advance New York’s “Forever Wild” legacy and Forest Preserve policies in the Adirondack and Catskill Parks, and promote public and private land stewardship that is consistent with wild land values through education, advocacy and research.

24. Petitioner Greater St. John’s Church of God in Christ is located at 74 Fourth Avenue, Albany, New York, in close proximity to the Albany Terminals. The majority of the parishioners of the Church live in the City of Albany, and many of them live in close proximity to the Albany Terminals.

## II. The Albany Terminals

25. Bakken crude oil arrives at the Albany Terminals via the CSX Corporation, Inc. (“CSX”) and Canadian Pacific Railway, Ltd. (“CP”) rail lines.<sup>9</sup> The CSX rail line delivers Bakken crude oil to the Buckeye Albany Terminal from Chicago, where it is transferred to the CSX line after arriving from North Dakota via the Burlington Northern Santa Fe rail line. The CSX rail line runs west-east through New York State and moves crude oil through Buffalo, Rochester, Syracuse, and Utica to the Buckeye Terminal in Albany.

26. The CP rail line delivers Bakken crude oil from Canada through Montreal, Rouses Point, Plattsburgh, along the western shore of Lake Champlain, and through Saratoga Springs to the Global Terminal in Albany.<sup>10</sup>

27. According to information provided to DEC by Global, third-party customers, or third-party marketers and other suppliers of crude oil, own or lease rail cars for the transportation of crude oil to the Albany Terminal.<sup>11</sup> In all cases, the transporting railroad is responsible for the operation of the rail cars until they arrive at the Albany Terminal.<sup>12</sup> At that point, the cars are released to Global, and Global becomes responsible for their offloading.<sup>13</sup>

28. Bakken crude oil arriving at the Global Albany Terminal is held in rail cars while waiting to be offloaded. Most unit trains consist of 80 to 120 rail cars.<sup>14</sup> According to Global, two 120-car unit trains can be unloaded at its Albany Terminal within a 24-hour period.<sup>15</sup> Thus,

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<sup>9</sup> Crude Oil Report, Ex. 2 at vii-viii.

<sup>10</sup> *Id.* at vii.

<sup>11</sup> Letter from Dean S. Sommer, Young Sommer, LLC, on behalf of Global, to William J. Clarke, Reg’l Permit Adm’r, DEC Region 4 at 8 (May 15, 2014) (“Global May 15 Letter”), attached to this Petition as Exhibit 5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 9.

<sup>15</sup> Global Partners, LP, Q2 2014 Investor Presentation at 16 (Aug. 19, 2014), available at <http://nocache-phx.corporate-ir.net/phoenix.zhtml?c=190320&p=irol-presentations>.

Bakken crude oil arriving at the Global Albany Terminal is stored in DOT-111 rail cars on-site for several hours.

29. Additionally, while stationed at the Global facility during offloading, the DOT-111 tank cars are shifted down the track two to three times to allow cars towards the rear of the train to be offloaded. Global offloads tank cars continuously, 365 days a year, seven days a week and 24 hours a day.<sup>16</sup>

30. Upon information and belief, the same or similar receipt, storage and unloading process occurs at the Buckeye Albany Terminal.

31. Bakken crude oil off-loaded from DOT-111 tank cars at the Albany Terminals is transferred to on-site storage tanks before being loaded onto barges and tankers for further transport to refineries.

32. Since 2011, there has been a massive increase in the volume of Bakken crude oil being received and stored at the Albany Terminals. During that time period, a series of permit modifications approved by DEC has allowed Global to quadruple the crude oil throughput at its Albany Terminal from 450,000 gallons to 1.8 billion gallons annually.

33. During the same period, DEC approved Buckeye's requests to increase crude oil throughput at its Albany Terminal to 1 billion gallons per year.

34. Thus, since 2011, DEC has allowed the volume of Bakken crude oil received and stored in DOT-111 tank cars at the Albany Terminals to increase from 450,000 gallons to nearly 3 billion gallons annually. These approvals by DEC have been issued without preparation of an Environmental Impact Statement pursuant to the State Environmental Quality Review Act, N.Y. Env'tl. Conserv. L. Art. 8.

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<sup>16</sup> See Global Partners, LP, Terminal Location, Albany, New York, *available at* <http://www.globalp.com/terminals/terminal.cfm?terminalID=3135> (noting "Hours of Operation: Terminal never closes – Always open").

35. The Albany Terminals are located in close proximity to numerous homes, businesses, schools, churches, and social service locations.

36. The Ezra Prentice Homes is a public housing development operated by the Albany Housing Authority and consists of 176 apartment units, all of which are currently occupied. The Ezra Prentice Homes is occupied by approximately 430 residents, including approximately 280 children, and is located directly adjacent to Global's Albany Terminal and in close proximity to Buckeye's Albany Terminal. Approximately one-half (85) of the Ezra Prentice apartments are located within 20-100 feet of the railroad yard serving Global's Albany Terminal, and all 176 Ezra Prentice housing units are in close proximity to the Terminal. The Ezra Prentice Homes include a playground where children from the housing development play on a regular basis. The Playground is located directly adjacent to Global's Albany Terminal rail yard, within 20 feet of the rail cars. The Playground includes a swing set, various recreational sets for young children, and basketball courts.

37. In addition to the Ezra Prentice Homes, there are numerous other residences, businesses health care facilities, parks, and institutions in close proximity to the Global facility, including the Picotte Center for Disability Services; the Mount Hope residential community and playground; the Albany Community Charter School; Krank Park; the Steamboat Square Apartments and Townhouses (361 residential units); the Giffen Memorial Elementary School; the Albany County Health Department; Centro Civic Hispano Americano; the "2 Together" Children's Tutoring Center; St. Peter's Family Health Center; Island Creek Park; and the College of St. Rose Sports Complex at Hoffman Park. There are also a number of churches, agency offices and community gathering places in close proximity to the Albany Terminal, including the Department of Motor Vehicles, St. Francis Catholic Church, the Evangelical Protestant Church,

Mt. Zion Baptist Church, Reigning Life Family Church, the Salvation Army Center for Adult Rehabilitation and Disaster Relief, and the Capital City Rescue Mission.<sup>17</sup>

38. Oil trains waiting to unload at Global's Albany terminal sit within 100 yards of DEC's headquarters, the United States Courthouse, and the administration headquarters for the State University of New York.

**III. The Receipt and Storage at the Albany Terminals of Bakken Crude Oil in DOT-111 Tank Cars Presents an Imminent Danger to the Health and Welfare of the People of the State and is Likely to Result in Irreversible or Irreparable Harm to Natural Resources**

39. It is respectfully submitted that, based upon the extreme volatility of Bakken crude oil, the recognized safety hazards posed by DOT-111 tank cars, and the recent history of catastrophic accidents involving Bakken crude in DOT-111 tank cars, the receipt and storage of Bakken crude oil in DOT-111 tank cars at the Albany Terminals is a condition or activity that presents an imminent danger to the health or welfare of the people of the state and/or is likely to result in irreversible or irreparable damage to natural resources. Consequently, issuance of a Summary Abatement Order prohibiting such activity is necessary and warranted.

**A. The String of Recent Accidents Involving Bakken Crude in DOT-111 Tank Cars Underscores the Public Safety and Environmental Threat Posed by This Activity**

40. Within the past 16 months, a string of catastrophic accidents have occurred involving the transport of Bakken crude oil in DOT-111 tank cars.

41. On July 6, 2013, 63 DOT-111 tank cars carrying Bakken crude oil derailed in Lac-Mégantic, Quebec, resulting in an horrific fire and explosions that killed 47 men, women,

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<sup>17</sup> A map depicting the locations of these institutions is annexed to this Petition as Exhibit 6.

and children and incinerated a four-block downtown area. Fifty-nine of the 63 DOT-111 cars that derailed were breached and spilled their crude oil contents.<sup>18</sup>

42. On November 8, 2013, a 90-car train carrying 2.9 million gallons of Bakken crude in DOT-111 tank cars derailed in a rural area near Aliceville, Alabama, a town of 2,400 near the Mississippi border. Twenty-six cars derailed, triggering a series of explosions and an extensive fire.<sup>19</sup> Preliminary findings of the National Transportation Safety Board (“NTSB”) revealed that 630,000 gallons of crude oil spilled, primarily into a wetland adjacent the tracks.<sup>20</sup> Four months after the accident, the area was still heavily contaminated with oil.<sup>21</sup>

43. On December 30, 2013, an oil train with more than 100 DOT-111s laden with Bakken crude collided with a derailed grain train near Casselton, North Dakota. Eighteen of the 21 derailed tank cars ruptured, releasing an estimated 400,000 gallons of Bakken crude. The ruptured tank cars ignited, causing explosions and a mushroom-shaped fireball that burned for over 24 hours producing heavy plumes of toxic smoke.<sup>22</sup> Emergency responders described a “giant fireball” that went hundreds of feet into the air, and noted that the plume of smoke could

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<sup>18</sup> Transp. Safety Bd. of Can., Runaway and Main-Track Derailment, Montreal, Maine & Atlantic Railway, Freight Train MMA-002, Mile 0.23, Sherbrooke Subdivision, Lac-Mégantic, Quebec, 06 July 2013 at 39 (Aug. 19, 2014), *available at* <http://tsb.gc.ca/eng/rapports-reports/rail/2013/r13d0054/r13d0054.pdf> (“Lac-Mégantic Report”), attached to this Petition as Exhibit 7.

<sup>19</sup> See USDOT May 7 Emergency Order, Ex. 4 § II.A.

<sup>20</sup> Magdy El-Sibaie, Assoc. Adm’r, Pipeline and Hazardous Materials Safety Admin., U.S. Dep’t of Transp., Presentation at 4, *available at* [http://www.nts.gov/news/events/2014/railsafetyforum/presentations/panel%204\\_b\\_magdy%20el-sibaie.pdf](http://www.nts.gov/news/events/2014/railsafetyforum/presentations/panel%204_b_magdy%20el-sibaie.pdf).

<sup>21</sup> Associated Press, *Oil mars west Alabama swamp months after train crash near Aliceville, AL.com*, Mar. 15, 2014, *available at* [http://blog.al.com/wire/2014/03/oil\\_mars\\_west\\_alabama\\_swamp\\_mo.html](http://blog.al.com/wire/2014/03/oil_mars_west_alabama_swamp_mo.html).

<sup>22</sup> USDOT May 7 Emergency Order, Ex. 4 § II.A.

be seen for 25 miles.<sup>23</sup> The incident occurred a half mile outside of Casselton, a community of 2,300, all of whom were told to evacuate their homes.<sup>24</sup>

44. On January 7, 2014, an oil train derailed in Plaster Rock, New Brunswick, and several DOT-111 tank cars carrying crude caught fire and exploded, leading to the evacuation of approximately 150 people.<sup>25</sup>

45. In April 2014, another train carrying crude oil derailed in downtown Lynchburg, Virginia. Several tank cars fell into the James River, punctured, and spilled up to 30,000 gallons of oil into the river. The oil floating on the river's surface ignited, resulting in the sobering scene of the James River on fire.<sup>26</sup>

#### **B. New York and Federal Agencies Have Recognized the Threat and the Need for Emergency Action**

46. On January 29, 2014, Governor Cuomo issued Executive Order 125, which explicitly recognized the significant threat to public safety and the environment posed by the transport of Bakken crude oil in DOT-111 tank cars. Executive Order 125 required, among other things, that DEC and the four other agencies named in the Order<sup>27</sup> submit a report to the Governor by April 30, 2014, setting forth (i) a summary of the State's readiness to prevent and

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<sup>23</sup> Bruce Crummy, *Mile-long train carrying crude oil derailed, explodes in North Dakota*, NBC News, Dec. 30, 2013, available at [http://usnews.nbcnews.com/\\_news/2013/12/30/22113442-mile-long-train-carrying-crude-oil-derails-explodes-in-north-dakota](http://usnews.nbcnews.com/_news/2013/12/30/22113442-mile-long-train-carrying-crude-oil-derails-explodes-in-north-dakota).

<sup>24</sup> David Shaffer, *As oil train burns, 2,300 residents of Casselton, N.D., told to flee*, Star Tribune, Dec. 31, 2013, available at <http://www.startribune.com/business/238070771.html?page=1&c=y>.

<sup>25</sup> Transp. Safety Bd. Of Can., Railway Investigation R14M0002 (June 12, 2014), available at <http://www.tsb.gc.ca/eng/enquetes-investigations/rail/2014/r14m0002/r14m0002.asp>.

<sup>26</sup> USDOT May 7 Emergency Order, Ex. 4 § II.A; Curtis Tate, *Lynchburg, Va., oil train derailment illustrates threat to rivers*, McClatchy DC, May 2, 2014, available at <http://www.mcclatchydc.com/2014/05/02/226425/lynchburg-va-oil-train-derailment.html>; see also Paul L. Stancil, Senior Hazardous Materials Accident Investigator, NTSB, *Rail Accidents Involving Crude Oil and Ethanol Releases*, Before NTSB Rail Safety Forum: Transportation of Crude Oil and Ethanol (April 22-23, 2014), available at <http://www.nts.gov/news/events/2014/railsafetyforum/presentations/Opening%20Presentation%20Rail%20Accidents%20Involving%20Crude%20Oil%20and%20Ethanol%20Releases.pdf>.

<sup>27</sup> The four other agencies are the New York State Energy Research and Development Authority and the New York State Departments of Health, Transportation, and Homeland Security and Emergency Services.

respond to rail and water accidents involving petroleum products; (ii) recommendations concerning statutory, regulatory, or administrative changes needed at the state level to better prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge; (iii) recommendations concerning the role that local governments across the State have in protecting their communities and their residents from spill of petroleum products shipped by rail and water; and (iv) recommendations concerning enhanced coordination between the State and federal agencies in order to improve the State's capacity to prevent and respond to accidents involving the transportation of crude oil and other petroleum products by rail, ship, and barge.<sup>28</sup>

47. On April 30, 2014, the five agencies submitted their report to the Governor ("Crude Oil Report"). The Crude Oil Report concluded that the rail transportation of Bakken crude oil poses significant public safety and environmental threats. It noted that from 2008 to 2013, crude-by-rail shipments increased 4,000 percent, and stated that "the boom in crude oil transportation *has also raised serious public safety and environmental concerns due to the inherent volatility of Bakken crude, the sheer volume being transported, and the poor safety record of the type of tank cars used to carry the majority of crude oil.*"<sup>29</sup>

48. The Crude Oil Report noted that New York State is a "major conduit for the North American crude oil boom;" rail transport of Bakken crude presents "unique risks;" the majority of rail tank cars used to transport crude oil are "outdated;" and recently adopted measures by federal regulatory agencies "are incomplete" and "voluntary."<sup>30</sup>

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<sup>28</sup> N.Y. Exec. Order 125, Ex. 1.

<sup>29</sup> Crude Oil Report, Ex. 2 at ii (emphasis added).

<sup>30</sup> *Id.* at iv.



49. The Crude Oil Report further concluded that DOT-111 tank cars have the propensity to “fail[] catastrophically,” as in the Lac-Mégantic disaster.<sup>31</sup> “Investigation of more recent incidents,” the Report notes, “confirm[s] that the design of the DOT-111 tank car makes it susceptible to damage and puncture during derailments.”<sup>32</sup>

50. On September 29, 2014, DEC and two other New York State agencies submitted comments on an advanced notice of proposed rulemaking by the U.S. Pipeline and Hazardous Materials Safety Administration (“PHMSA”) to expand the applicability of comprehensive Oil Spill Response Plans to trains carrying crude oil. DEC’s comments note, “In recent years, the number of trains transporting crude oil through New York has increased significantly, resulting in *increased risks of spills, threats to public health and safety, and potential damage to the environment*. These risks have been dramatically demonstrated by derailments, spills, and fires in Lac-Mégantic, Canada; North Dakota; Pennsylvania; Alabama; Virginia and elsewhere. Four crude oil train car derailments have occurred in New York State in the last year, though fortunately none resulted in spills.”<sup>33</sup>

51. In addition, DEC’s comments recommend that USDOT require comprehensive Oil Spill Response Plans for trains transporting as little as 42,000 gallons of crude oil in light of “the hazard posed by the derailment of even a small number of crude oil cars as evidenced by the derailment and subsequent fire in Lynchburg, Virginia in April, 2014.”<sup>34</sup>

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<sup>31</sup> *Id.* at xii.

<sup>32</sup> *Id.*

<sup>33</sup> Letter from Joan M. McDonald, Comm’r, N.Y. State Dep’t of Transp., et al. to Anthony R. Foxx, Sec’y of Transp., at 1 (Sept. 29, 2014), *available at* <http://www.regulations.gov/#!documentDetail;D=PHMSA-2014-0105-0177> (emphasis added).

<sup>34</sup> *Id.* at 2.

52. DOT-111 tank cars are dangerous and inadequate for the transportation of crude oil because of their comparatively thin shells and heads, in particular.<sup>35</sup> The Crude Oil Report noted that studies show that DOT-111 tank cars have a high incidence of failure in crashes that is more than double that of pressure tank cars with thicker shells and heads.<sup>36</sup> DOT-111 tank cars are thus “more likely to experience head or shell punctures as well as release hazardous materials product during an incident.”<sup>37</sup>

53. The Crude Oil Report further highlighted the federal investigation of a 2009 derailment in Cherry Valley, Illinois, that showed a failure rate as high as 68 percent for DOT-111 cars involved in car-to-car impacts or pileups.<sup>38</sup> Indeed, a full 94 percent of the DOT-111 tank cars that derailed in the Lac-Mégantic disaster were breached and released crude oil, and over half of the derailed cars released product because of damaged tank shells or heads.<sup>39</sup>

54. Thin shells and heads are not the only design characteristic of DOT-111 cars that make them particularly dangerous. Many DOT-111 cars have no top fitting protection, leaving the top fittings vulnerable to damage that can result in the release of crude oil and other contents.<sup>40</sup> And unlike more protective pressure tank cars, DOT-111s have bottom outlet valves,

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<sup>35</sup> DOT-111 tank cars have a minimum shell and head thickness of 7/16 inch, while pressure tank cars have minimum shell and head thicknesses of 9/16 or greater. *Compare* 49 C.F.R. § 179.201–1 *with id.* § 179.101–1.

<sup>36</sup> Crude Oil Report, Ex. 2 at 23.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 24; *see also* NTSB Safety Recommendation, Mar. 2, 2012, at 2, *available at* <http://www.nts.gov/doclib/recletters/2012/R-12-005-008.pdf> (“NTSB Safety Recommendation”) (“This represents an overall failure rate [at Cherry Valley] of 87 percent and illustrates the continued inability of DOT-111 tank cars to withstand the forces of accidents, even when the train is traveling at 36 mph, as was the case in this accident.”).

<sup>39</sup> Lac-Mégantic Report, Ex. 7 at 39, 41.

<sup>40</sup> Transp. Safety Bd. of Can., Rail Safety Recommendations at 3 (Jan. 23, 2014), *available at* <http://www.tsb.gc.ca/eng/recommandations-recommendations/rail/2014/rec-r1401-r1403.pdf>; *see also* NTSB Safety Recommendation at 5 (“Top fittings on tank cars generally project from the tank and are thus vulnerable to impact damage in derailments where the fittings may impact the ground or another object with the entire weight and momentum of the tank car behind it.”)

which are similarly “prone to failure” in derailment accidents and can result in leakage.<sup>41</sup> DOT-111 cars also commonly lack thermal protection, which can lead to total crude oil leakage from thermal tears.<sup>42</sup>

55. In March 2014, the United States Department of Transportation (“USDOT”) reviewed the string of accidents involving transport of Bakken crude in DOT-111 tank cars and issued an emergency order stating that “[s]everal accidents since last summer, which caused deaths, injuries and significant property damage, have demonstrated *the need for emergency action to address unsafe practices in the shipment of petroleum crude oil by rail.*”<sup>43</sup> The USDOT emergency order concluded that “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.*”<sup>44</sup>

56. In May 2014, the USDOT issued another emergency order finding that the “pattern of releases and fires involving petroleum crude oil shipments originating from the Bakken and being transported by rail *constitute an imminent hazard . . . presenting a substantial likelihood that death, serious illness, severe personal injury, or a substantial endangerment to health, property, or the environment may occur.*”<sup>45</sup>

### **C. Bakken Crude Operations at the Albany Terminals Pose Significant Risks to Public Safety and the Environment Despite the Relatively Slow Speed of Train Movements There**

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<sup>41</sup> NTSB Safety Recommendation at 2.

<sup>42</sup> Transp. Safety Bd. of Can., Rail Safety Recommendations at 3 (Jan. 23, 2014); Lac-Mégantic Report, Ex. 7 at 46.

<sup>43</sup> USDOT Mar. 6 Emergency Order, Ex. 3 at 5 (emphasis added).

<sup>44</sup> *Id.* at 4 (emphasis added).

<sup>45</sup> USDOT May 7 Emergency Order, Ex. 4.

57. The receipt and storage at the Albany Terminals of Bakken crude poses significant risks to public safety and the environment because derailments or other accidents can occur even when a train is moving slowly or not at all.

58. A train's high speed may be a contributing factor in derailments, but high speeds are not necessarily a prerequisite for train derailments. The tank cars that derailed, spilled crude oil, and caught on fire in Lynchburg, Virginia, were travelling only 24 miles per hour at the time of the derailment.<sup>46</sup>

59. In fact, train derailments can occur at even the most conservative speeds. USDOT shell impact test results show that DOT-111 tank cars can be punctured and spill their contents when struck at puncture speeds of only 12 mph.<sup>47</sup> Thicker-shelled tank cars, on the other hand, maintained tank integrity when struck at these low speeds.<sup>48</sup>

60. The NTSB recognizes that "catastrophic tank car ruptures can occur at speeds below even 10 mph."<sup>49</sup>

61. On November 30, 2012, for example, seven tank cars containing vinyl chloride and ethanol derailed and spilled while travelling over a bridge in Paulsboro, New Jersey at only

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<sup>46</sup> Betsy Morris & Laura Stevens, *Oil Train that Crashed in Lynchburg Was Moving Below New Speed Limit*, Wall St. J., May 1, 2014, available at <http://online.wsj.com/news/articles/SB10001424052702304178104579535732934152004>; see also Kathryn A. Wolfe, *DOT: Companies must disclose oil trains' risks*, Politico, May 7, 2014, available at <http://www.politico.com/story/2014/05/oil-train-safety-department-of-transportation-106460.html> (noting that the cars that derailed and spilled in Lynchburg met the CPC-1232 standard that is more stringent than DOT-111).

<sup>47</sup> Presentation of David Y. Jeong, Volpe Nat'l Transp. Sys. Ctr., USDOT, Volpe Center Support in FRA Hazardous Materials Tank Car Safety Research Program at 6, 27-28 (April 22, 2014), available at <http://dms.nts.gov/public%2F56000-56499%2F56186%2F552990.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> Letter from Christopher A. Hart, Acting Chairman, NTSB, to U.S. Dep't of Transp. at 9 (Sept. 26, 2014), available at <http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0082-1471>.

seven miles per hour.<sup>50</sup> This slow-speed derailment resulted in the spilling of 180,000 pounds of vinyl chloride into the Mantua creek and surrounding area.<sup>51</sup>

62. Indeed, railyards can have accident rates that are 100 times greater than mainline routes.<sup>52</sup> The Selkirk Rail Yard, a major switching center eight miles south of Albany on the CSX rail line, has already experienced at least two slow-speed train derailments this year. On February 28, 2014, thirteen DOT-111 tank cars carrying Bakken crude oil derailed at the Selkirk Yard. Fortunately, none of the cars rolled over or spilled their contents.<sup>53</sup> But the July 30, 2014, derailment of a locomotive and three rail cars at the Selkirk Yard did result in the leakage of fifteen gallons of diesel fuel.<sup>54</sup>

63. A rail yard in Cheektowaga, New York, also saw the derailment of five tank cars – three of which were DOT-111s – on December 10, 2013.<sup>55</sup>

64. In addition, a CSX train carrying 97 empty oil cars that derailed in Ulster, New York, was reported to have been going only “a couple of miles an hour” at the time of the derailment.<sup>56</sup>

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<sup>50</sup> NTSB Train Derailment with Hazardous Materials Release, Paulsboro, N.J., Preliminary Report (Nov. 30, 2012), *available at* [https://www.nts.gov/investigations/2012/paulsboro\\_nj/paulsboro\\_preliminary\\_report.pdf](https://www.nts.gov/investigations/2012/paulsboro_nj/paulsboro_preliminary_report.pdf).

<sup>51</sup> *Id.*

<sup>52</sup> Phyllis Fox, Ph.D., Report on Air Quality and Rail Safety Impacts of Proposed Expansion of Crude Rail Operations at the Global Albany Terminal 18 (June 5, 2014), attached hereto as Exhibit 8.

<sup>53</sup> Brian Nearing, *State transportation probes Selkirk oil train derailment*, Times Union, Mar. 3, 2014, *available at* <http://www.timesunion.com/business/article/State-transportation-probes-Selkirk-oil-train-5285857.php>.

<sup>54</sup> Paul Grondahl, *Minor rail derailment at Selkirk yard*, Times Union, July 30, 2014, *available at* <http://www.timesunion.com/local/article/Minor-rail-derailment-at-Selkirk-yard-5658367.php>.

<sup>55</sup> Luke Moretti, *Loaded cargo: rails hauling crude*, WIVB 4 News, Feb. 3, 2014, *available at* <http://wivb.com/2014/02/03/loaded-cargo-rails-hauling-crude>.

<sup>56</sup> Diane Pineiro-Zucker, *Train engine, one other car derail in town of Ulster; no injuries or leakage (videos)*, Daily Freeman, Feb. 25, 2014, *available at* <http://www.dailyfreeman.com/general-news/20140225/train-engine-one-other-car-derail-in-town-of-ulster-no-injuries-or-leakage-videos>.

65. If, as Global states, it can offload two 120-car trains at its Albany Terminal within a 24-hour period, but only 40 cars can be offloaded at a time,<sup>57</sup> then trains move down the tracks through the terminal up to six times per day.

66. The Port of Albany itself is no stranger to accidents, having seen fires and explosions in its past as a result of equipment malfunctions, including events in 1980 and 1984.<sup>58</sup>

67. The Albany County Sheriff has stated that the county has limited resources to fight a fire caused by more than four to six train cars, and that the likely response in such a situation would be to evacuate the area, try to stabilize the fire, and “let it burn.”<sup>59</sup>

68. On September 24, 2014, state officials inspected Global’s Albany Terminal and found 12 “non-critical” defects, including 7 worn brake shoes, four defective wheels, and one missing knuckle pin.<sup>60</sup>

69. Both Buckeye and Global concede in recent submissions to the federal Securities and Exchange Commission that their operations pose significant risks to public health and safety and the environment, and that the companies may not have the financial resources to fully respond to a serious accident. Global’s submission states:

We are not fully insured against all risks incident to our business. Our operations are subject to operational hazards and unforeseen interruptions such as natural disasters, adverse weather, accidents, fires, explosions, hazardous materials releases, mechanical failures,

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<sup>57</sup> See Letter from Daniel R. Herschberg, Herschberg & Herschberg, to Brad Glass, Senior Planner, City of Albany Dep’t of Dev. & Planning at 5 (Jan. 9, 2014), available at [http://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/gijan914letter.pdf](http://www.dec.ny.gov/docs/permits_ej_operations_pdf/gijan914letter.pdf).

<sup>58</sup> Associated Press, ‘Mushroom ball of flame’ forces Albany evacuation, Gannett Westchester Newspapers, Sept. 8, 1980, attached to this Petition as Exhibit 9; Brian Nearing, *Faulty Pump Blamed for Fire at Port of Albany Oil Refinery*, Schenectady Gazette, June 25, 1984, attached to this Petition as Exhibit 10.

<sup>59</sup> Jenna Flanagan, *Albany not ready for crude oil accident + video report*, Innovation Trail, May 19, 2014, available at <http://innovationtrail.org/post/albany-not-ready-crude-oil-accident-video-report>.

<sup>60</sup> Press Release, N.Y. Executive Chamber, Governor Cuomo Announces Results From Latest Round of Crude Oil Rail Inspections (Sept. 26, 2014), available at <http://www.governor.ny.gov/press/09262014Crude-Oil-Rail-Inspections>.

disruptions in supply infrastructure or logistics and other events beyond our control. *If any of these events were to occur, we could incur substantial losses because of personal injury or loss of life, severe damage to and destruction of property and equipment, and pollution or other environmental damage* resulting in curtailment or suspension of our related operations.<sup>61</sup>

70. Buckeye's submission contains substantially similar language about the hazards posed by its operations and similarly suggests that its insurance policies may not fully cover significant liabilities that may result from these hazards.<sup>62</sup>

#### **IV. Issuance of a Summary Abatement Order Would Not Unduly Prejudice Global and Buckeye and is Consistent With Growing Industry Practice**

71. It is respectfully submitted that issuance of the requested Summary Abatement Order would not unduly prejudice Global or Buckeye. Indeed, on April 30, 2014, Global announced that it would begin phasing out receipt of all types of crude oil in DOT-111 tank cars at its Albany Terminal and that the phase-out was scheduled to begin on July 1, 2014.<sup>63</sup>

According to Eric Slifka, Global's Chief Executive Officer, the phase-out "pertains to all crude oil rail cars received at the facility, regardless of whether they are operated by a third party or leased by Global."<sup>64</sup> Thus, issuance of the requested Order would be consistent with Global's stated intention to cease the use of DOT-111s for receipt and storage of Bakken crude oil.

72. Given Global's stated intention and ability to discontinue, within a relatively short time frame, the use of DOT-111 tank cars for Bakken crude shipments, it is reasonable to assume that Buckeye could do the same.

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<sup>61</sup> Global Partners, LP, U.S. Sec. and Exch. Comm'n Form 10-K at 29 (Mar. 15, 2013) (emphasis added).

<sup>62</sup> Buckeye Partners, L.P., U.S. Sec. and Exch. Comm'n Form 10-K at 27 (Feb. 26, 2014).

<sup>63</sup> Global May 15 Letter, Ex. 5 at 11. Although Global claimed that the phase-out would begin on July 1, 2014, there is no evidence that the receipt and storage of Bakken crude in DOT-111s has declined, or that DOT-111s are being phased out at Global's Albany facility.

<sup>64</sup> Global Partners LP, *Global Partners to Begin Requiring Safety-Enhanced Rail Cars for Crude Oil Received at New York and Oregon Terminals*, April 30, 2014, available at <http://www.marketwatch.com/story/global-partners-to-begin-requiring-safety-enhanced-rail-cars-for-crude-oil-received-at-new-york-and-oregon-terminals-2014-04-30>.

73. Additionally, a Summary Abatement Order would be consistent with the growing recognition in the oil industry of the dangers posed by DOT-111 tank cars carrying Bakken crude oil. For example, earlier this month, BP announced that it would no longer accept Bakken crude oil in DOT-111 tank cars at its Cherry Point, Washington refinery.<sup>65</sup>

**V. The Significant Threat Posed by Receipt and Storage at the Albany Terminals of Bakken Crude in DOT-111 Tank Cars is an Appropriate Subject for Summary Abatement**

**A. The Commissioner Has Broad Summary Abatement Authority**

74. ECL § 71-0301 provides the Commissioner with broad authority to order summary abatement of conditions or activities that pose an imminent risk to public safety or the environment:

Notwithstanding any inconsistent provisions of law, whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgment, presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement powers of the commissioner and it therefore appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the commissioner may, without prior hearing, order such person . . . to discontinue, abate or alleviate such condition or activity.

75. DEC regulations further specify that a Summary Abatement Order may be issued where a condition or activity “(1) presents an imminent danger to the health or welfare of the people of the State, or results in or is likely to result in irreversible or irreparable damage to natural resources; and (2) relates to the prevention and abatement powers of the commissioner in that the condition or activity pertains to or affects any of the objectives or goals of the

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<sup>65</sup> Associated Press, *Washington BP Refinery Says That it Will Only Accept Newer Rail Cars of Volatile Bakken Crude Oil*, Fox Business News, Oct. 11, 2014, available at <http://www.foxbusiness.com/markets/2014/10/11/washington-bp-refinery-says-it-will-only-accept-newer-rail-cars-volatile-bakken>.



Environmental Conservation Law, or relates to any of the permit, licensing, or regulatory programs of the Department.” 6 NYCRR § 620.2(a)(1), (2). The regulations further provide that it must “appear[] to be prejudicial to the interest of the people of the State to delay action until an opportunity for hearing can be provided.” *Id.* § 620.2(a)(2).<sup>66</sup>

76. In the past, the Commissioner has exercised the summary abatement power to address the discharge of petroleum and petroleum products from a vehicle scrap yard;<sup>67</sup> persistent permit violations at solid waste management facilities;<sup>68</sup> chronic environmental and safety violations by a company operating a fleet of oil and sludge barges;<sup>69</sup> fire hazards posed by a waste tire storage facility;<sup>70</sup> discharge of petroleum from a petroleum bulk storage facility;<sup>71</sup> and odors from a composting facility.<sup>72</sup>

77. In these prior cases, the summary abatement order was used to halt most or all of the respondents’ operations. *See, e.g., Berman Enterprises*, 3 F.3d at 604 (DEC Commissioner “issued a summary abatement order, which . . . . (1) immediately suspended the petroleum-facility licenses for 14 of Berman’s barges, (2) required Berman to empty all cargo from the barges, and (3) ordered that the barges ‘shall remain docked and shall not be operated in the New York Marine district.’”); *Brookhaven Aggregates*, 1985 WL 6062, at \*1 (“DEC . . . issued a ‘Notice of Order of Summary Suspension’ pursuant to . . . ECL § 71-0301, ordering plaintiff to

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<sup>66</sup> The Commissioner is required to schedule a hearing before an administrative law judge within fifteen days of the issuance of the summary abatement order in order to determine whether the abatement order should be continued. ECL § 71-0301; 6 NYCRR § 620.3(a).

<sup>67</sup> *Murtaugh v. New York State Dep’t of Env’tl. Conservation*, 42 A.D.3d 986, 986 (4th Dep’t 2007).

<sup>68</sup> *Brookhaven Aggregates, Ltd. v. Williams*, No. 85-355, 1985 WL 6062, at \*1 (E.D.N.Y. July 24, 1985); *State v. Hubbard*, 126 A.D.2d 717, 717 (2d Dep’t 1987); *State v. Brookhaven Aggregates, Ltd.*, 121 A.D.2d 440, 440-41 (2d Dep’t 1986).

<sup>69</sup> *Berman Enterprises, Inc. v. Jorling*, 3 F.3d 602, 604 (2d Cir. 1993); *Standard Marine Servs., Inc. v. Jorling*, 214 A.D.2d 424, 424 (1st Dep’t 1995).

<sup>70</sup> Mohawk Tire Storage Facility, Decision and Order (Oct. 18, 1999), *available at* <http://www.dec.ny.gov/hearings/11517.html>.

<sup>71</sup> 102 Elmont Realty Corp., Elmont Gasoline Co., Inc., and Nedjet Yetim, Order (Mar. 26, 2009), *available at* <http://www.dec.ny.gov/hearings/53170.html>.

<sup>72</sup> Alfredo, Albert C., Order (Aug. 21, 1996), *available at* <http://www.dec.ny.gov/hearings/10951.html>.

cease its landfilling operation at the Coram site. This order forced plaintiff to completely shut down its landfill business . . .”); *Murtaugh*, 42 A.D.3d at 986 (“By a summary abatement order . . . [DEC] halted allegedly environment-polluting operations at a vehicle scrap yard.”).

78. The relief Petitioners seek is far more limited. Petitioners do not seek to completely close down operations at the Albany Terminals. To the contrary, Global and Buckeye will remain free to continue to receive and store non-Bakken crude oil and other petroleum products after issuance of the Summary Abatement Order. And the Albany Terminals would be able to resume the receipt and storage of Bakken crude once Global and Buckeye are able to demonstrate to the Commissioner’s satisfaction that new or modified tank cars for such activity do not pose an imminent danger to public safety and the environment.

**B. The Dangers Posed by Receipt and Storage of Bakken Crude Oil in DOT-111 Tank Cars Relate to the Prevention and Abatement Powers of the Commissioner**

1. The Condition or Activity Pertains to or Affects the Objectives or Goals of the ECL

79. The receipt and storage of Bakken crude oil in DOT-111 tank cars at the Albany Terminals pertains to or affects the goals or objectives of the ECL, including:

a). “the policy of the State of New York to conserve, improve and protect its natural resources and environment and to prevent, abate and control water, land and air pollution, in order to enhance the health, safety and welfare of the people of the state and their overall economic and social well being.” ECL § 1-0101(1).

b). “the policy of the state . . . to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.” *Id.* § 1-0101(2).

c). “the policy of the state to foster, promote, create and maintain conditions under which man and nature can thrive in harmony with each other, and achieve social, economic and technological progress for present and future generations by: a. [a]ssuring surroundings which are healthful and aesthetically

pleasing; b. [g]uaranteeing that the widest range of beneficial uses of the environment is attained without risk to health or safety, unnecessary degradation or other undesirable or unintended consequences; [and] c. [p]romoting patterns of development and technology which minimize adverse impact on the environment . . . .” *Id.* § 1-0101(3).

2. The Condition or Activity Relates to the Permit, Licensing, or Regulatory Programs of the Department

80. The receipt and storage of Bakken crude oil in DOT-111 tank cars at the Albany Terminals relates to permit, licensing, or regulatory programs of the department, including the power of the Commissioner to:

a). “Promote and coordinate management of water, land, fish, wildlife and air resources to assure their protection, enhancement, provision, allocation, and balanced utilization consistent with the environmental policy of the state and take into account the cumulative impact upon all of such resources in making any determination in connection with any license, order permit, certification or other similar action or promulgating any rule or regulation, standard or criterion.” *Id.* § 3-0301(1)(b).

b). “Provide for the . . . protection . . . of fish and other aquatic life and wildlife and the preservation of endangered species.” *Id.* § 3-0301(1)(c).

c). “Provide for the protection . . . of marine and coastal resources and of wetlands, estuaries and shorelines.” *Id.* § 3-0301(1)(e).

d). “Provide for prevention and abatement of all water, land and air pollution including, but not limited to, that related to hazardous substances, particulates, gases, dust, vapors, noise, radiation, odor, nutrients and heated liquids.” *Id.* § 3-0301(1)(i).

e). “[A]bate and prevent the pollution of waters of the state . . . .” *Id.* § 17-0303(2).

f). “[M]ake, amend and repeal rules and regulations for the storage of liquids likely to pollute the waters of the state . . . .” *Id.* § 17-0303(3).

g). “Make, modify or cancel orders requiring the discontinuance of the discharge of . . . industrial waste or other wastes into any waters of the state . . . .” *Id.* § 17-0303(4)(b).

h). “Revoke or modify any . . . permit . . . whenever . . . the commissioner determines that such revocation or modification is necessary or

desirable to prevent or abate pollution of any waters of the state . . . .” *Id.* § 17-0303(4)(f).

i). “[P]romulgate rules and regulations establishing standards for new and existing petroleum bulk storage facilities . . . .” *Id.* § 17-1015(1).

j). “Formulate, adopt and promulgate, amend and repeal codes and rules and regulations for preventing, controlling or prohibiting air pollution . . . .” *Id.* § 19-0301(1)(a).

k). “Enter and inspect any property, premise or place . . . for the purpose of investigating either an actual or suspected source of air pollution or air contamination . . . .” *Id.* § 19-0305(2)(a).

81. Consequently, the dangers posed by the receipt and storage of Bakken crude oil in DOT-111 tank cars relate to the prevention and abatement powers of the Commissioner of DEC.

### **C. Delaying Action Would be Prejudicial to the Interests of the People of the State**

82. Given the string of derailments, fires, and explosions involving Bakken crude oil transported in DOT-111 tank cars, the question is when — not whether — an accident will occur at the Albany Terminals.

83. In response to increases in crude-oil spills, the Association of American Railroads (“AAR”) began to take steps towards the introduction of a new, voluntary design specification for crude oil tanks known as CPC-1232. These include thicker, more puncture-resistant shells or jackets, a reclosing pressure relief device, and additional protections for the top fittings.<sup>73</sup> Notwithstanding these voluntary design standards, older DOT-111 tank cars continue to transport the vast majority of crude oil travelling by rail. As the Crude Oil Report notes, “[a]s much as 82 percent of the DOT-111 tank cars carrying Bakken crude across North America are the older models with a poor safety record.”<sup>74</sup> With such a low adoption rate, these types of voluntary

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<sup>73</sup> See NTSB Safety Recommendation at 3, 5-6.

<sup>74</sup> Crude Oil Report, Ex. 2 at xii; see also Comments of AAR and American Short Line and Regional Railroad Association on PHMSA Advance Notice of Proposed Rulemaking - 2012-0082 at 10-11 (Nov. 14, 2013), available at <https://www.aar.org/public/Documents/Filing/PHMSA-ANPRM.pdf> (estimating

retrofits are insufficient to ensure public safety as long as the vast majority of DOT-111 cars in use are the older models.<sup>75</sup>

84. On August 1, 2014, DOT published a Proposed Rule for Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains that proposes the gradual phase-out of the use of DOT-111 tank cars to transport crude oil and other flammable liquids in certain situations.<sup>76</sup> The rule proposes three different options to phase out DOT-111 tank cars, but even the most protective option would not begin phasing out these cars until 2017.<sup>77</sup> Under this option, DOT-111 cars will not be allowed to transport most forms of crude oil by the end of 2018, and DOT-111s will not be completely phased out until 2020.<sup>78</sup>

85. It is respectfully submitted that the people of Albany cannot wait six years to be safe from the imminent threat of crude-oil leakage or explosions.

#### **D. The Commissioner's Summary Abatement Powers Are Not Preempted by Federal Law**

86. The Albany Terminals are primarily subject to state, not federal, regulatory authority. Specifically, the Global and Buckeye terminals are subject to New York State regulation under the Title V air permitting program, the stormwater permitting program, the

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that approximately 78,000 DOT-111 cars in service do not meet the requirements of CPC-1232, while only 19,000 DOT-111 cars do meet these requirement).

<sup>75</sup> See NTSB Safety Recommendation at 4-5 (“The NTSB concluded that the safety benefits of new [CPC-1232] specification tank cars will not be realized while the current fleet of DOT-111 tank cars remains in hazardous materials unit train service, unless the existing cars are retrofitted with appropriate tank head and shell puncture resistance systems.”).

<sup>76</sup> Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 79 Fed. Reg. 45016 (proposed Aug. 1, 2014).

<sup>77</sup> *Id.* at 45076, §§ 173.242, 173.243.

<sup>78</sup> *Id.* The most protective option of the proposed rule would ban the use of DOT-111 tank cars to transport Packing Group I flammable liquids after October 1, 2017, Packing Group II liquids after October 1, 2018, and Packing Group III liquids after October 1, 2020. *Id.* Though crude oil could previously be classified under Packing Group III, DOT’s March 2014 Emergency Order mandated that crude oil be transported under the more protective requirements of Packing Groups I or II in response to the increase in crude-oil incidents and the “imminent hazard to public health and safety and the environment” that misclassification of crude oil threatens. USDOT Mar. 6 Emergency Order, Ex. 3 at 4-5, 16.

State Pollution Discharge Elimination System program, the Major Oil Storage Facility licensing requirements, and the petroleum bulk storage requirements. *See* 6 NYCRR Parts 201-6, 610, 613, 614, 750. Moreover, the safety of rail operations at the Albany Terminals is under the jurisdiction of the New York State Department of Transportation. *See* 17 NYCRR §§ 912-24; 49 CFR Part 212.

87. Federal law does not preempt issuance of a Summary Abatement Order regarding crude oil operations at the Albany Terminals. Though under some limited circumstances, transloading facilities that are operated under the auspices of a rail carrier may fall within the jurisdiction of the Surface Transportation Board under the Interstate Commerce Commission Termination Act, Pub. L. No. 104-88, 109 Stat. 803, neither Buckeye nor Global are rail carriers as defined under the Act, and state regulation of their transloading activities is thus not preempted by federal law. *See Hi Tech Trans, LLC-Petition for Declaratory Order-Newark, NJ*, STB F.D. No. 34192, 2003 WL 21952136, at \*4 (S.T.B. Aug. 14, 2003) (collecting cases) (“In every case, [federal] jurisdiction was found and local regulations relating to transportation facilities preempted only when those facilities have been operated or controlled by a rail carrier.”).

88. Moreover, as Global has acknowledged, once rail cars arrive at its Albany Terminal, the cars are released from the transporting railroad to Global, and Global becomes responsible for their offloading.<sup>79</sup>

89. Significantly, the Second Circuit has affirmed DEC’s use of a summary abatement order in circumstances analogous to the present matter. In *Berman Enterprises*, the U.S. District Court for the Eastern District of New York upheld the Commissioner’s authority to issue a Summary Abatement Order against various legal challenges by barge owners, including

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<sup>79</sup> Global May 15 Letter, Ex. 5 at 8.

the claim that such authority was preempted by federal law. In an analysis of federal preemption that the U.S. Court of Appeals for the Second Circuit later affirmed and lauded as “scholarly,” 3 F.3d at 606, the District Court rejected the barge owners’ preemption claim, holding:

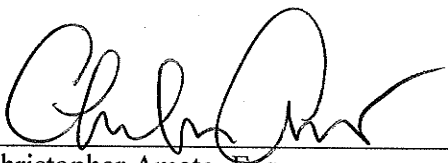
Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coasts that would otherwise surely result from the high volume of oil barge traffic on the state’s waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

793 F. Supp. at 416-17; *see also Brookhaven Aggregates*, 1985 WL 6062, at \*6-\*7 (abstaining from ruling on plaintiff’s § 1983 challenge to DEC’s summary abatement order because it is “clearly inappropriate for this federal court to inject itself into a matter of such grave importance to state and local concerns.”).

**WHEREFORE**, based on the above, Petitioners respectfully request that the Commissioner immediately issue a Summary Abatement Order prohibiting receipt and storage of Bakken crude oil in DOT-111 tank cars by Global and Buckeye at the Albany Terminals, or at any other facility in the State of New York, and that such Order remain in full force and effect until such time that Global and Buckeye submit evidence satisfactory to the Commissioner that new or modified rail tank cars will be used to transport Bakken crude to the Albany Terminal and that such new or modified tank cars can be used to transport Bakken crude without posing an imminent danger to the health or welfare of the people of the state and is not likely to result in irreversible or irreparable damage to natural resources.

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New York, New York

Respectfully submitted,



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