VIA EMAIL TRANSMISSION

Steven V. King, Executive Director and Secretary
Utilities and Transportation Commission
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RE: RULEMAKING TO CONSIDER ADOPTION OF RULES RELATING TO RAIL SAFETY, WAC 480-62-300(2)(d) ON REPORTING ABILITY TO PAY CLEANUP COSTS IN CASE OF A SPILL, DOCKET NUMBER TR-151079

Dear Mr. King,

Thank you for this opportunity to weigh in on the final adoption of rules relating to rail safety. The rules the Utilities Transportation Commission (UTC) are moving forward are of critical importance for the State of Washington to articulate the worst case scenario of an oil accident and the financial responsibilities of the companies carrying these dangerous substances into our state in the case of an accident. In this letter, we express concerns regarding the worst case spill cost in WAC 480-62-300(2)(d) on behalf of Columbia Riverkeeper, Friends of the Columbia Gorge, ForestEthics, RE Sources for Sustainable Communities, Sierra Club Washington Chapter, The Lands Council, Washington Environmental Council, Washington Physicians for Social Responsibility. These organizations work to ensure that all citizens of Washington and the Pacific Northwest have clean and healthy air, water, and communities; work across the region to stop the increase in shipments of crude oil through the Pacific Northwest; ensure that regulations concerning oil transport, oil spill prevention, and oil spill cleanup are as strong as possible; and seek positive solutions to the challenge of global climate change caused by combustion of fossil fuels.

Together, we write this letter to object to the adoption of the worst case scenario cost of oil spill cleanup outlined in proposed WAC 480-62-300(2)(d). The monetary amount of $16,800 per barrel to be multiplied by the percentage of the largest train of crude oil described in (e) of the same subsection (WAC 480-62-300(2)(e)) gravely underestimates the potential cost of an oil train disaster. As identified in the helpful Comment Summary Matrix provided by UTC staff, the very real and tragic accident that happened on July 6, 2013 in Lac Megantic, Quebec represents something closer to a true worst case scenario at a cost of $78,960 per barrel, more than four times the worst case scenario cost estimated by the draft rule.

Planning should be for "worst case" rather than a "high-consequence" event

Justification for the decision to scale down from Lac Mégantic is offered in the "Staff note for financial responsibility and cleanup costs," which states "a straight clean-up cost linked

with the costs associated with Lac Mégantic were not factored into the calculation, in part because the costs were not all associated with the clean-up of oil. In addition, the commission looked towards the PHMSA enhanced tank car regulation where the federal government determined that an event like Lac Mégantic 'would not be representative of damages from a typical accident or even a high consequence accident.'" Staff seems to have deviated significantly from the charge in the legislation which does not call for financial assurances for a "typical accident" or "high consequence accident," but for a "worst case spill."

In fact, Lac Mégantic may not even be what should be considered the worst case scenario. Lac Mégantic is a small town with a population under 6,000 residents. In contrast, an oil spill in an area with a denser population (such as downtown Seattle) or an area that may be more environmentally sensitive (for example along the Columbia River or into Puget Sound) could very reasonably cleanup costs much more than the Lac Mégantic on a per barrel basis.

Members of our coalition believe that the appropriate way to determine the actual worst case scenario is both to base it on real world examples like Lac Mégantic, and additionally to look at "near miss" incidents to model what could have happened. This seems a far more accurate approach to estimating the costs of possible oil train accidents in particular at risky locations. For example, in July of 2014, two oil tank cars tipped over in downtown Seattle. We are fortunate that this event did not result in a spill, fire, or explosion, but had one of those tanker cars punctured and had a spark ignited the Bakken crude oil, the cost of the disaster, on a per barrel basis, might well have exceeded Lac Megantic. Similarly in 1991 a freight train derailed at an overpass in downtown Spokane. Had the contents of that train been Bakken crude oil, the disaster could have been far worse than the disaster in the comparatively small town of Lac Megantic. These are the kinds of entirely plausible scenarios that many Washingtonians worry about and which the Legislature intended that we be assured that railroads will be financially responsible for.

Barring the best alternative, modeling an actual in-Washington State worst case spill analysis, and assuming that the railroads continue to refuse to share their own worst case scenario modeling, we suggest that the worst case spill be assumed to be as bad as the worst high consequence event considered in the Final PHMSA Regulatory Impact Analysis (http://www.regulations.gov/#!documentDetail;D=PHMSA-2012-0082-3442, see page 110).

PHMSA appears to have projected that there is statistical probability of ten serious derailments and explosions of oil trains in the United States over the next ten years (this estimate predates the existence of the federal tank car rule itself, but as UTC staff noted, that rule is phased in slowly, and our state's rules should account for the risk in the interim). For most of their projections PHMSA uses the average cost of those disasters for purposes of the cost-benefit analysis, $1.4 billion. This average cost, if associated with a full derailment of about 3,000,000 gallons would yield a per gallon cost of $466, similar to the UTC's worst case cost.

However, UTC's charge was not to require assurance for the average high consequence event, but to do so for the reasonable worst case event. PHMSA also projects a 95th percentile high consequence derailment that simulates the cost if a derailment were to happen in a high population density area, were to result in a high fatality rate and were to also cause significant ecological damage, in other words, a worst case scenario. Correspondingly, the cost of these events would be far more serious; PHMSA's estimate is $6.3 billion. Reasonable worst case scenario planning calls for the use of the actual worst case scenario. The US Department of Transportation believes that in any given year, there is a 5% chance that a major derailment will happen in an urban setting somewhere in the United States with a total cost of $6.3 billion dollars.

It is inconceivable that the Washington State Legislature intended that in calling for reasonable worst case spill planning that we not plan for the potential that this entirely possible accident could occur here. Assuming that a worst case scenario event were to be a result of a 100% spill of a typical 3,000,000 gallon oil train, that $6.3 billion comes to $2100 per gallon.

Damages are not limited to clean up costs

House Bill 1449 states that the purpose of the bill is to "To ensure that responsible parties are liable, and have the resources and ability, to respond to spills and provide compensation for *all costs and damages*" (Section 1(3)(c)) (emphasis added).

It goes on to state that "The commission must require a railroad company that transports crude oil in Washington to submit information to the commission relating to the railroad company's ability to pay *damages* in the event of a spill or accident involving the transport of crude oil by the railroad company in Washington. The information submitted to the commission must include a statement of whether the railroad has the ability to pay for *damages* resulting from a reasonable worst case spill of oil, as calculated by multiplying the reasonable per barrel cleanup *and damage* cost of spilled oil times the reasonable worst case spill volume as measured in barrels." (Section 10(1)) (emphasis added)

However, based on the "Staff note for financial responsibility and cleanup costs," it appears that the UTC staff in the draft rule making only considered the cleanup costs, and ignored the separate cost of damages. "In determining the clean-up costs associated with a 'reasonable worse case' spill, the commission looked at costs associated with the spill and did not extrapolate into other potential cost factors."

The proposal unlawfully limits the potential costs in ways that are inconsistent with the governing legislation. The Legislature repeatedly used the more inclusive word "damages" rather than the more limited "cleanup costs." In the event of a disaster, the railroad's liability will extend well beyond cleanup. They will be responsible for loss of life, damaged property, medical expenses, lost work and lost business opportunities and many other related expenses. The State's assurance of railroads' financial solvency should extend to all of the costs involved in the risks that the industry is taking.

Although “damages” is undefined in this chapter, elsewhere RCWs include a definition of two types of damages:

a) "Economic damages" means objectively verifiable monetary losses, including medical expenses, loss of earnings, burial costs, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, and loss of business or employment opportunities.
(b) "Noneconomic damages" means subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship. (RCW 4.56.250)

The rule should account for both cleanup costs, and damages--broadly defined--as the legislature intended.

Analysis should fully account for both spills and accidents

The staff note suggests that the UTC appears to have focused on cleanup costs associated exclusively with spills while the legislation calls for assurance that the railroad can pay for the consequences “in the event of a spill or accident involving the transport of crude oil by the railroad company in Washington.”

Worst case spill planning should focus on low probability/high risk events

In depending upon the PHMSA account, which was, by definition a cost-benefit analysis, the draft rule is unduly focused on low-risk, high probability spill events. By definition, worst case planning needs to include medium/high risk events.

Other agencies with a longer track record of completing worst case risk analysis may be instructive. The Environmental Protection Agency (EPA) defines a “reasonable worst case” as: *An estimate of the individual dose, exposure, or risk level received by an individual in a defined population that is greater than the 90th percentile but less than that received by anyone in the 98th percentile in the same population.* This definition is applicable here in terms of risk of derailment and exposure in terms of the frequency oil trains travel by rail through our state. By scaling down the worst case scenario so greatly from an actual worst case scenario to date indicates that the UTC believes it is reasonable to take the risk of a catastrophic spill by completely ignoring scenarios in the medium/high risk categories and the risks these spills would have on our communities and sensitive environments along the rail line of our beautiful Washington State.

Consider maximum possible speed, not maximum operating speed

The formula for calculating the spill volume in a worst case scenario erroneously assumes that “the top speed that the railroad company operates any train carrying crude oil in the

state" is the top speed at which a worst case scenario derailment could occur. There simply is no reason to assume that a train involved in a worst case scenario will be traveling at their normal operating speeds. High profile derailments resulting from trains exceeding their normal operating speeds occurred recently in, of course, Lac Megantic, as well as an Amtrak in Philadelphia over the summer. These are exactly the sorts of worst case scenarios which ought to be considered. Railroad companies are well behind on congressional mandates to implement positive train control systems which would help prevent these kinds of disasters, and until such systems are in place, loss of train control is a potential that should be accounted for in anticipating a worst case scenario. This calculation should be based on the assumption that the trains involved in the accident could be traveling in excess of 65 MPH.

Conclusion

As oil-by-rail projects seek to bring more oil trains through our state each year, we and our supporters believe that careful consideration of the protection of our communities and environment along the rail is of critical importance. This rulemaking on improving rail safety will help minimize risk and ensure that proper safety nets are in place in case of catastrophes. By scaling down from actual worst case scenarios to date, this rule would set a weak standard and leave rail communities and environmentally sensitive areas vulnerable to inadequate cleanup, or will leave taxpayers to foot the bill.

For the reasons listed above, we believe that UTC staff needs to conduct a more complete analysis of a worst case spill and a comprehensive study of the potential costs of damages and cleanup for such an event. At a minimum, please remove the assumption that trains will be following the speed limit during disasters and update the per barrel cost of spill damages to reflect the actual costs incurred in recent events and/or the likely costs from events that the US Dept. of Transportation projects to have a 5% probability each year.

Thank you for the opportunity to provide comment on this rulemaking.

Sincerely,

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