

TR-151079 Oil Train Safety Rulemaking
Comment Summary Matrix CR102
December 24, 2015

Section	Commenter	Comments	Staff Response
WAC 480-62-270, Safety standards at private crossings	Citizen, Jean Avery	<p>The commenter believes:</p> <ol style="list-style-type: none"> 1. Crossing areas should include distances on both sides of the tracks and in all directions. 2. Crossings should include a posting of the largest area of possible impact of a crude oil spill (similar to the “tsunami zone” signs). 	<ol style="list-style-type: none"> 1. The recommendations and safety measures contained in WAC 480-62-270 are consistent with the federal government and provide additional safety precautions to ensure that the crossing is well marked and there is a process if the crossing has hazards that require more than signage. 2. HB 1449 did not direct the Commission to create impact zones associated with crude oil movement by rail.
WAC 480-62-270, Safety standards at private crossings	Union Pacific (UP), Melissa Hagan	<ol style="list-style-type: none"> 1. In WAC 480-62-270(2), UP is concerned that the railroads only have 90 days following the adoption of the rule to install signage at private crossings. The timeline would impose a significant burden on UP. UP requests the Commission allow 180 days to comply. 2. UP suggests the Commission consider including an exception to its signage requirement for private crossings where only a de minimis amount of crude oil is transported. 3. UP suggests a technical change to the language in WAC 480-62-270(4). UP stated that the rule would require an additional crossbuck to be installed within 90 days of the adoption of the rule. UP believes this is a clerical mistake and the language should read “within 90 days of notification of the insufficient sight restriction.” 	<ol style="list-style-type: none"> 1. The 90-day timeline UP cited is from a previous draft of the proposed rules. The CR102 language that was drafted and posted to the Commission website allows for 120 days following the adoption of the rule to install signage at private crossings. 2. If a railroad uses a private crossing to haul a de minimis amount of oil and believes an exemption from the rule is in order, the railroad may apply for an exemption from the Commission. 3. The 90-day timeline UP cited is from a previous draft of the proposed rules. The CR102 language that was drafted and posted to the Commission website reads that a railroad is required to install an additional crossbuck within 120 days of receiving notification of the hazard from commission staff.

<p>WAC 480-62-300 Annual reports— Regulatory fees</p>	<p>Senator Christine Rolfes</p>	<p>The commenter believes:</p> <ol style="list-style-type: none"> 1. The proposed definition of reasonable worst case spill is far too conservative. 2. The calculation of a potential amount of oil spilled assumes the train will follow the maximum operating speed. A reasonable worst case should cover circumstances when a train is out of control and, therefore, exceeding the maximum speed. 3. Planning and estimating for reasonable worst case should be calculated and assessed for a large metropolitan area such as Spokane or Seattle. 4. The estimate of the per barrel cleanup cost seems excessively low. 	<ol style="list-style-type: none"> 1. The Commission researched similar definitions in other states and at the federal level. The state of California limits the definition to 20% of the train. PHMSA, while not defining a reasonable worst case, calculates a high consequence event in the recently adopted enhanced tank car rule. The Commission utilized the PHMSA calculation as the preferred methodology. 2. The Commission explored ways to calculate a reasonable worst case scenario that was not unduly punitive to railroad operators that operate on small sections of track at speeds less than 10 mph. 3. The Commission looked to other states for guidelines on financial responsibility and PHMSA in its regulatory impact analysis of the federal enhanced tank car rule. The Commission estimate exceeds other states (i.e. California) and matches the PHMSA calculations. 4. The per barrel cleanup cost was calculated using the data available in the PHMSA enhanced tank car rule regulatory impact analysis.
<p>WAC 480-62-300 Annual reports— Regulatory fees</p>	<p>Department of Ecology, Dale Jensen</p>	<p>The commenter states:</p> <ol style="list-style-type: none"> 1. Ecology supports the Commission’s effort to promote and secure a demonstration of financial responsibility for the cleanup costs of oil spills. 2. The proposed rule appears to establish a reasonable level of financial responsibility for cleanup costs associated with an oil spill. 3. Ecology notes that the estimated cleanup cost of \$400 per gallon is only a portion of the overall costs of an oil spill. The potential costs for restoration of property and natural resources along with 	<ol style="list-style-type: none"> 1. The Commission looks forward to working in partnership with the Department of Ecology on its contingency plan rulemaking. 2. Commission staff agrees. 3. The Commission agrees that the potential costs associated with loss of life and restoration of property and natural resources would far exceed the costs of cleanup. The Commission supports the Department of Ecology as it evaluates the contingency plan rules for the state related to

		<p>loss of life would be additional costs above and beyond the cost for cleanup of spilled oil.</p> <ol style="list-style-type: none"> 4. In the event of a worst case spill, the true cost of damages incurred could certainly exceed the level established within the proposed rule. 5. Ecology recommends the adoption of the rule as currently proposed. 	<p>railroads and believes that the rule process may find that cleanup costs exceed the documented studies and reports available at this time.</p> <ol style="list-style-type: none"> 4. The Commission agrees that an absolute worst case spill could exceed any level of cost that staff was able to find in federal or state rules or in available studies. However, HB 1449 refers to a “reasonable” worst case spill and not an absolute worst case spill. 5. Commission staff agrees.
<p>WAC 480-62-300 Annual reports— Regulatory fees</p>	<p>BNSF, Johan Hellman</p>	<p>The commenter suggests:</p> <ol style="list-style-type: none"> 1. The definition of reasonable worst case in the CR101 and CR102 are flawed. The formula focuses on one aspect of rail safety – speed. There are numerous other factors that may influence the potential of a rail car carrying crude oil to derail and spill. 2. The authority of any state to regulate train speeds is questionable since the federal government has exclusive jurisdiction over train speed. 3. A definition of worst case spill based solely on speed could negatively impact other aspects of rail safety and operations across the state, including at public crossings. 	<ol style="list-style-type: none"> 1. The Commission researched available options to calculate reasonable worst case and found that speed was the one variable that could reduce the amount of kinetic force involved in a derailment. The Commission explored some of the other factors BNSF previously mentioned, but chose to follow the PHMSA calculations. 2. The Commission agrees with BNSF that the state does not have the authority to regulate train speeds. The requirement in the annual report for reporting financial responsibility is for informational purposes only. It does not authorize the Commission to economically regulate railroads or railroad speed, nor do the draft rules propose to do so. 3. The Commission does not believe that a reporting feature on an annual report will cause a railroad to change its speeds or operating practices. The Commission is expressly prohibited from economic regulation of railroads, may not use the information submitted by a railroad as a basis for penalties and nothing in the report may be construed as assigning liability.

<p>WAC 480-62-300 Annual reports— Regulatory fees</p>	<p>Union Pacific (UP), Melissa Hagan</p>	<p>The commenter states:</p> <ol style="list-style-type: none"> 1. The imposition of financial reporting would conflict with federal law. 2. Adoption of the Surface Transportation Board (STB) R-1 report should be a sufficient reporting mechanism for meeting the requirements of the statute. 3. Aspects of the annual reporting provisions remain under the exclusive jurisdiction of the federal government for the preservation of common carrier service obligations. 4. UP is concerned about the “financial fitness” and insurance requirements in the draft rule. 5. Requirements that railroads provide annual reporting statements that identify all insurance carried by the railroad, including coverage amounts, limitations, and other conditions of the insurance as well as a reasonable worst case spill of oil are preempted by federal law. Such requirements compromise the integrity of UP’s confidential business records and are “blatantly discriminatory” on their face. 6. Congress’s assertion of federal authority over the railroad industry has been recognized as “among the most pervasive and comprehensive of federal regulatory schemes.” The ICC Termination Act confers exclusive jurisdiction over licensing and economic regulation of interstate railroad operations on the STB. 7. STB has stated that the ICC Termination Act Section 10501(b) is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce. 8. Federal courts and the STB have found two types of state regulations of railroads to be so pernicious as to be “categorically” preempted without any inquiry into the state’s reason. First, states are categorically prevented from intruding into matters that are directly regulated by the STB – any form of state economic regulation which may include a financial fitness inquiry. Second, states cannot impose permitting or preclearance requirements. 	<ol style="list-style-type: none"> 1. Commission staff does not believe that requirements of an annual report conflicts with federal law. 2. The Commission currently allows and asks for the STB R-1 as a portion of its annual report but the STB R-1 does not include financial responsibility for spill data as required by Washington state statute. 3. Commission staff does not believe that requirements of an annual report violate common carrier service obligations or the jurisdiction of the federal government. 4. The annual report is not used to determine financial fitness, Section 10 of HB 1449 expressly prohibits the Commission from economic regulation of railroads. The data in the annual report is for informational purposes only. 5. The Commission is sensitive to the need for the railroad industry to maintain confidential business records. However, the requirements in the rule language, including insurance and worst case scenarios, are issues openly discussed by UP. As stated in the UP 2014 STB Annual Report on page 10, “We transport certain hazardous materials and other materials, including crude oil, ethanol, and toxic inhalation hazard (TIH) materials, such as chlorine, that pose certain risks in the event of a release or combustion ... A rail accident or other incident or accident on our network, at our facilities, or at the facilities of our customers involving the release or combustion of hazardous materials could involve significant costs and claims for personal injury, property damage, and
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<p>WAC 480-62-300 Annual reports— Regulatory fees</p>	<p>Columbia Riverkeeper, Friends of the Columbia Gorge, Forest Ethics, RE Sources for Sustainable Communities, Sierra Club Washington Chapter, The Lands Council, Washington Environmental Council, Washington Physicians for Social Responsibility</p>	<p>The commenter includes, in its comments:</p> <ol style="list-style-type: none"> 1. Concerns regarding the worst case spill cost in WAC 480-62-300(2)(d). 2. Objections to the adoption of the worst case scenario cost of oil spill cleanup. 3. The monetary amount of \$16,800 per barrel multiplied by the percentage of the largest train of crude oil gravely underestimates the potential cost of an oil train disaster. 4. The Commission deviated significantly from the charge in the legislation which does not call for financial assurance for a “typical accident” or “high consequence accident” but for a “worst case spill.” 5. Lac Megantic may not be the worst case spill scenario. An oil spill in an area with a denser population, such as Seattle, or an area that is environmentally sensitive, such as the Columbia River, could have cleanup costs much higher than Lac Megantic on a per barrel basis. 6. Recommends looking at real world examples like Lac Megantic and “near miss” incidents to model what could happen. 7. Suggests the Commission use the worst high consequence event considered in the Final PHMSA Regulatory Impact Analysis on page 110. 8. PHMSA projected a 95th percentile high consequence derailment that simulates the cost of a derailment in a high population density area. The cost of these events would be far more serious at an estimate of \$6.3 billion. 9. USDOT believes that in any given year, there is a 5% chance that a major derailment will happen in an urban setting in the U.S. with a cost of \$6.3 billion. 10. The cost of a \$6.3 billion spill results in a per gallon cost of \$2,100. 11. HB 1449 states that the purpose of the bill is to ensure that responsible parties are liable, and have the resources and ability to respond to spills and provide compensation for all costs and 	<ol style="list-style-type: none"> 1. The Commission used available study and report data, as well as the PHMSA regulatory impact analysis to set spill cost. 2. The Commission used available data, through the PHMSA federal enhanced tank car rule to determine reasonable worst case scenario. 3. The Commission used the available data to determine per barrel cleanup costs. The percentage was extracted from the PHMSA enhanced tank car rule. 4. The Commission was charged with defining a “reasonable” worst case spill. The definition of “reasonable” is subjective but the Commission believes that if the legislature had intended an absolute worst case spill, then the quantifier “reasonable” would not have been included. A high consequence event from the PHMSA enhanced tank car rule was used because it calculated costs, showed potential impacts and predicted possible derailments. 5. The Commission agrees that there are numerous scenarios where an absolute worst case spill would be significantly more than what was drafted in the CR102 and in Lac Megantic. The annual report is for informational purposes only and is not intended to be an absolute worst case scenario but rather a “reasonable” worst case. 6. The Commission reviewed available data related to crude oil transportation by rail and used a methodology that was based in fact and accepted by the federal agencies that regulate railroads and tank cars – PHMSA and Federal Railroad Administration.
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			the Commission with any economic regulatory authority and, therefore, sets no standards.
WAC 480-62-300 Annual reports— Regulatory fees	Citizen, Jean Avery	The commenter believes that cleanup requirements should include short and long-term mitigation for neighborhoods, waterways, wetlands, aquatic life and environmental regions and habitats near the tracks.	The rule requires specific data from the railroads for informational purposes only. The Commission supports the Department of Ecology in its contingency plan rulemaking which will have measures in place to mitigate oil spills.
WAC 480-62-300 Annual reports— Regulatory fees	Rail Safety Policy Expert, Fred Millar	<p>The commenter states:</p> <ol style="list-style-type: none"> 1. The Commission should apply federal regulatory precedents in chemical accident prevention to objectively define reasonable worst case oil spill. 2. Worst case should be based on the capacity of the longest crude by rail train and not half a train. 3. The rule should cover oil spills and other kinds of harmful discharges (fire, explosion, toxic gas cloud). 4. The Commission should make a direct request to each crude by rail carrier to provide information relevant to any state assessment of crude by rail risks, railroads worst case scenarios, catastrophic insurance coverage limits, comprehensive emergency response plans, routing analysis and route selection documents. 5. Scaling down the worst case understates the common public understanding and longstanding federal regulatory definitions. 6. Worst case needs to include dense cities or sensitive environmental areas. 7. Discharges go beyond the bare “oil cleanup” costs. 8. HB 1449, Section 5(3), mandates that the department “determine the contingency plan requirements for railroads transporting oil in bulk.” HB 1449 does not include, in subsections (4) through (11), the requirement that a railroad provide calculations of its worst case scenario, as in other federal accident prevention and emergency response legislation. 9. Legislation fails to require the railroad to provide documentation on its worst case scenarios for hazardous cargoes. 	<ol style="list-style-type: none"> 1. The Commission looked at the federal agencies that regulate railroads and utilized the data available to define reasonable worst case spill. 2. The Commission used the PHMSA enhanced tank car rule to establish a methodology for determining a reasonable worst case spill. The quantifier “reasonable” is interpreted to mean less than the largest amount of oil being carried. 3. Discharges are defined in the oil spill statutes at the state level and do not include fires, explosions or toxic gas clouds. 4. Commissioners requested information pertaining to company calculations on worst case spills and insurance levels at the rulemaking workshop, but has not received any information from the railroads. 5. The scale down approach was used in the PHMSA enhanced tank car rule and was the best available data for the Commission to review in determining a reasonable worst case spill. 6. The Commission supports the Department of Ecology in its rulemaking on contingency plan standards including spill risks in environmentally sensitive areas. Reporting financial responsibility data as required in HB 1449 is for informational purposes only and relates directly to cleanup costs.

		<ol style="list-style-type: none"> 10. The Commission should define “reasonable” as what could happen versus what has already happened. 11. The Commission’s cleanup cost calculations are dubious. 12. The Commission process for calculating fees does not properly weight safety. 13. The Commission relies on estimates on future railroad compliance with voluntary speed limits. Human error or criminal negligence is a key causal factor in runaway train disasters. 14. The Commission should look at federal regulatory regimes besides the PHMSA HHFT rule for worst case scenario. 15. The entire train should be used to calculate release potential. 16. New HHFT rule does not include the societal costs of crude by rail accidents. 17. The EPA definition of worst case scenario is based on the largest release of what could happen. 18. The PHMSA HHFT Regulatory Impact Analysis underlying most of the Commission’s analysis is a cost-benefit analysis and used to justify the cost of the new safety regulations. 19. HHFT regulations are less than maximally stringent for accident protection regarding speed and tank car puncture resistance. 20. The Commission should not be limited to scaling down a worst case scenario since any regulations in this area are heavily preempted. 21. HB 1449 is only an information law. 	<ol style="list-style-type: none"> 7. The Commission believes the intent of the legislature, as stated in the bill analysis before final amendment, relates directly to oil spill cleanup and damages directly related to the spilled oil. 8. The requirement in HB 1449, Section 5(3), requires the Department of Ecology, not the Commission, to determine contingency plan requirements. The Commission supports the Department of Ecology in its rulemaking on contingency plans. 9. The Commission is limited to the scope of the legislation. 10. The Commission used the PHMSA enhanced tank car rule to determine reasonable worst case spill. 11. The per barrel cleanup cost was calculated using the data available in the PHMSA enhanced tank car rule regulatory impact analysis and in reviewing the standards in California on railroads. Washington’s per barrel costs are higher than California and is consistent with the studies and reports used for the PHMSA regulatory impact analysis. 12. Commission rail program staff is supported by the railroad industry through a regulatory fee. The fee is used to promote rail safety. Oil underlies only a portion of the duties performed by rail staff. 13. The Commission relies on operating speed as a determination of reasonable and to allow railroads that operate at very low speeds to not have the same reporting requirement as railroads operating at 55 mph. 14. The Commission reviewed the PHMSA enhanced tank car rule and standards related to oil pollution and contingency planning.
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