Before the
United States Department of Transportation
Pipeline & Hazardous Materials Safety Administration

The State of North Dakota
Office of the Attorney General

The State of Montana
Office of the Attorney General

Part 107.203 Application for Preemption of
Washington State's Volatility Restrictions on Crude Oil Transported by Rail
Applicable to the Transportation of Certain Hazardous Materials

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I. INTRODUCTION

In accordance with 49 U.S.C. § 5125(d) and 49 C.F.R. § 107.203(a), the State of North Dakota Attorney General's Office together with the State of Montana Attorney General's Office submit this Application for a Preemption Determination on behalf of the State of North Dakota and the State of Montana, respectively, regarding Washington State Engrossed Substitute Senate Bill 5579, "Crude Oil by Rail – Vapor Pressure"(signed into law May 9, 2019 and effective July 28, 2019), which purports to regulate the volatility of crude oil transported in Washington State for loading and unloading.[1] The States of North Dakota and Montana submit that the Washington state law is preempted twice over: it is an obstacle to the federal hazardous material transportation legal and regulatory regime, and it is not substantively the same as federal regulations governing the classification and handling of crude oil in transportation.

North Dakota and Montana are home to the Bakken Shale Formation, a subsurface formation within the Williston Basin. Following the advent of modern horizontal drilling and hydraulic fracturing, the extraction of crude oil from the Bakken transformed this region into one of the top oil-producing regions in the country—and one of the largest oil producers in the world. Currently there are approximately 58 drilling rigs located throughout the North Dakota and over 15,700 producing wells. In April 2019, operators in North Dakota extracted approximately 1.4 million barrels of oil per day. The oil and gas industry accounts for approximately 7% of the North Dakota economy.[2] And with the bountiful supplies of Bakken crude, North Dakota's economy has boomed, along with the revenues from oil extraction tax that the State relies upon to support its educational and other foundational state systems.

The Bakken region of Montana produced 18 million barrels of crude oil in 2018.[3] Since 2009 this region in Montana has produced an annual average of 22.7 million barrels of crude oil.[4] Because

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[1] This petition is filed pursuant to 49 U.S.C. § 5125(d) and does not address other potential claims outside the express preemption provisions of the HMTA.

[2] Samuel Stebbins, *Largest Industry in Each State*, 24/7 WALL STREET (Aug. 23, 2018), https://247wallst.com/special-report/2018/08/23/largest-industry-in-each-state-5/8/ ("Oil and gas extraction generated $3.2 billion in North Dakota in 2016, 6.6% of the state's GDP.").

[3] The Bakken Shale Formation includes Daniels, Dawson, Fallon, Garfield, McCone, Prairie, Richland, Roosevelt, Sheridan, Valley, and Wibaux counties in Montana. U.S. Dept. of Transportation, Large Truck Safety in the Bakken Oil-Producing Region, p. 3 (Nov. 2015) *available at* https://rosap.ntl.bts.gov/view/dot/210/dot_210_DS1.pdf. Montana's share of Bakken crude oil production is estimated by aggregating the "Annual Production by County" data available on the Montana Board of Oil & Gas Conservation's Online Oil and Gas Information System for Daniels, Dawson, Fallon, Garfield, McCone, Prairie, Richland, Roosevelt, Sheridan, Valley, and Wibaux counties. *Available at* http://www.bogc.dnrc.mt.gov/WebApps/DataMiner/.

[4] *Id.*

the Bakken Shale Formation straddles Montana and North Dakota, any extraterritorial regulations targeting the transport of Bakken crude oil will affect both states.

North Dakota ships approximately 166,700 barrels of Bakken crude oil by rail to Washington refineries every day—approximately ten percent of the State's overall daily production, and nearly 60% of all crude oil that leaves the state by rail.[5] And make no mistake: Washington's new law was designed to target Bakken oil precisely. The shale revolution—and in particular the extraction of crude oil from the Bakken—has driven the overall uptick in transport of crude oil by rail. Washington's vapor-pressure limit is to target Bakken crude because Bakken crude has higher vapor pressure than some other petroleum crude oils. Washington's new requirements are also impossible to satisfy—at least, not without creating a sprawling new rail, road, and facility infrastructure in North Dakota, all to treat Bakken crude to Washington's satisfaction.

Given that Washington's law amounts to a de facto ban on Bakken crude, North Dakota and Montana will be severely adversely impacted by the requirements that are the subject of this Application. North Dakota's and Montana's oil and gas industry will be directly impacted. And more than that, the people of North Dakota also will be adversely affected due to the loss in revenue from the oil extraction tax, which funds, among other things, the state's education system and drinking water infrastructure development. In addition, the State of North Dakota was provided land grants at the time of statehood to support colleges, universities, the state capitol, and other public institutions. North Dakota receives revenues through the prudent management of these assets, which includes approximately 706,600 surface acres and nearly 2.6 million mineral acres. Income from these leases, bonuses, and mineral royalties is distributed monthly to commons schools, colleges, and universities. Washington's actions would negatively affect the value of these assets. Similarly in Montana, Washington's law will impact the collection and distribution of taxes from oil producers to state and local government.[6]

The impacts will be felt well beyond North Dakota and Montana as well: Washington's law sets a troubling precedent where one state with access to particular transportation routes can dictate national and foreign energy policy by restricting or removing other states' ability to move their natural resources and other hazardous materials. And if other states follow Washington's lead and

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[5] *See* North Dakota Indus. Comm'n, *Oil and Gas Monthly Production Report – April 2019* (April 2019), https://www.dmr.nd.gov/oilgas/mpr/2019_04.pdf (summarizing total oil production for the state in March 2019); Dept. of Ecology, Washington State, Crude Oil Movement by Rail and Pipeline, *Quarterly Report: January 1 through March 31, 2019* (May 2019), https://fortress.wa.gov/ecy/publications/documents/1908007.pdf (providing the 2019 Q1 total volume of crude oil movement by rail and stating, "North Dakota was the region of origin for 94.3 percent of crude oil transported by rail").

[6] *See, e.g.*, Montana Department of Revenue, Distribution of Oil and Natural Gas Production Tax for 4th Quarter 2018 (Apr. 25, 2019) *available at* https://mtrevenue.gov/wp-content/uploads/2019/04/2018-Q4-County-Distribution-Cover-Letter.pdf.

set their own idiosyncratic hazardous-material transportation requirements, the patchwork effect of those laws and regulations could ironically make the nation less safe, not more. This is PHMSA's bailiwick, not Washington State's, and PHMSA must step in.[7]

II. BACKGROUND

A. The HMTA and its Regulatory Framework

The Hazardous Materials Transportation Act (HMTA), as amended by the Hazardous Materials Transportation Uniform Safety Amendments Act of 1990, "replace[d] a patchwork of state and federal laws and regulations . . . with a scheme of uniform, national regulations."[8] It gives the Department of Transportation authority "to protect the Nation adequately against the risks to life and property which are inherent in the transportation of hazardous materials in commerce."[9] It also grants the Secretary of Transportation authority to promulgate and enforce regulations governing the transportation of hazardous materials in commerce.[10] The Secretary of Transportation has delegated this authority to the Pipeline and Hazardous Materials Safety Administration (PHMSA).[11]

Recognizing the critical importance of uniform hazardous materials transportation regulations across the country, Congress included express preemption language in the HMTA "to preclude a multiplicity of State and local regulations in the area of hazardous materials transportation."[12] The HMTA accordingly sets forth standards by which laws, regulations, or requirements adopted by states, state political subdivisions, or Indian Tribes are preempted.[13] PHMSA has consistently recognized the importance of uniform regulations governing hazardous materials transportation. As it explained in a recent preemption determination,

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[7] *See* DOT, PHMSA Final Rule, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26644, 26706 (May 8, 2015) (hereafter, "HM-251 Final Rule") ("PHMSA has taken samples at other shale play locations around the United States to compare their characteristics to that of crude oil from the Bakken region. PHMSA continues to examine the role of vapor pressure in the proper classification of crude oils and other flammable liquids.").

[8] *Southern Pac. Transp. Co. v. Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1980); *see New York ex rel. Dep't of Envtl. Conservation v. U.S. Dep't of Transp.*, 37 F. Supp. 2d 152, 154 (N.D.N.Y. 1999).

[9] 49 U.S.C. § 5101 (2017).

[10] 49 U.S.C. § 5103(b) (2012).

[11] Codified at 49 C.F.R. §§ 105-110, 171-180 (2018) (the HMRs).

[12] S. Rep. No. 1102, 93rd Cong., 2d Sess. 37 (1974).

[13] 49 U.S.C. § 5125.

> The preemption provisions in 49 U.S.C. 5125 reflect Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Some forty years ago, when considering the Hazardous Materials Transportation Act, the Senate Commerce Committee "endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation."[14]

PHMSA (and its predecessor the Research and Special Programs Administration (RSPA)) has long made clear that "one of the primary purposes of Federal hazmat law is to assure a nationally uniform set of regulations applicable to the transportation of hazardous materials in commerce."[15] Moreover, "the HMR are not minimum requirements that other jurisdictions may exceed if local conditions warrant; rather, the HMR are national standards and must be uniformly applied across jurisdictional lines."[16] The federal courts similarly recognize the importance of uniform regulation in hazardous materials transportation; indeed, the United States Court of Appeals for the Tenth Circuit concluded that uniformity was the linchpin in the design of the HMTA.[17]

Two of the HMTA's preemption provisions are particularly pertinent here. First, Section 5125(a) directs that a State requirement is preempted if "the requirement. . . as applied or enforced, is an obstacle to accomplishing and carrying out [the HMTA]."[18] Second, Section 5125(b)(1) preempts any state law, regulation, or requirement concerning five specific subject matters, including the classification and handling of hazardous materials, that are not "substantively the same" as an HMTA provision or the accompanying Hazardous Material Regulations (HMRs).[19] The HMRs define "substantively the same" to mean "that the non-Federal requirement conforms in every significant respect to the Federal requirement."[20]

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[14] PHMSA, Notice of administration determination of preemption PD-37(R), 82 *Federal Register* 31390 (July 6, 2017) (quoting S. Rep. No. 1192, 93rd Cong. 2nd Sess. 37 (1974)).

[15] RSPA, *Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage*, 68 Fed. Reg. 61909, 61923 (Oct. 30, 2003) (hereafter, "HM-223 Final Rule").

[16] HM-223 Final Rule, 68 Fed. Reg. 61923.

[17] *Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1575 (10th Cir. 1991).

[18] 49 U.S.C. § 5125(a); *see* 49 C.F.R. § 107.202(b).

[19] *See* 49 U.S.C. § 5125 (b)(1)(A) – (E); 49 C.F.R. § 107.202(a).

[20] 49 C.F.R. § 107.202(d).

B. Washington's New Law

Pursuant to 49 C.F.R. § 107.203(b)(2) the following is a description of the Washington requirements for which the determinations are sought. A copy of the Washington law is attached as Appendix A:

1. Washington's Prohibition on Loading and Unloading Crude Oil by Rail

On May 9, 2019, Washington Governor Jay Inslee signed into law Senate Bill 5579, "An Act Relating to the volatility of crude oil received in the state by rail."[21] Under federal law, crude oil is a hazardous material regulated under the HMRs.[22] Under Washington's law:

> (1)(a) A facility constructed or permitted after January 1, 2019, may not load or unload crude oil into or from a rail tank car unless the oil has a vapor pressure of less than nine pounds per square inch.
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> (b) A facility may not load or unload crude oil into or from a rail tank car unless the oil has a vapor pressure of less than nine pounds per square inch beginning two years after the volume of crude oil transported by rail to the facility for a calendar year as reported under RCW 90356.565 has increased more than ten percent above the volume reported for calendar year 2018.
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> (2) The director may impose a penalty of up to twenty-five hundred dollars per day per rail tank car or the equivalent volume of oil for violations of this section. Any penalty recovered pursuant to this section must be credited to the coastal protection fund created in RCW 90.48.390. [23]

The Washington law notes that "[t]his section does not: (a) Prohibit a railroad car carrying crude oil from entering Washington; (b) require a railroad car carrying crude oil to stop before entering Washington; or (c) require a railroad car carrying crude oil to be checked for vapor pressure before entering Washington." But the effect is immediate and categorical: A railroad car carrying crude oil may be transported *through* Washington; it

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[21] *See* S. 5579, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019) (codified at WASH. REV. CODE § 90.56); Amy Dalrymple, *Washington governor signs bill with new Bakken crude oil requirements*, BISMARCK TRIBUNE, May 9, 2019, https://bismarcktribune.com/news/state-and-regional/washington-governor-signs-bill-with-new-bakken-crude-oil-requirements/article_f7a392a0-47c7-5a1b-ba03-c25a8f3c7da9.html.

[22] 49 C.F.R. § 172.101, Hazardous Materials Table.

[23] S. 5579, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019) (codified at WASH. REV. CODE § 90.56).

just cannot be loaded or unloaded at any of the facilities in the State—including those that have invested in facilities specifically designed to receive petroleum crude by rail.[24]

2. Washington's Reporting Requirements

The Washington law also amends certain reporting requirements for facilities receiving crude oil by rail:

> (1)(a) A facility that receives crude oil from a railroad car must provide advance notice to the department that the facility will receive crude oil from a railroad car, as provided in this section. The advance notice must include the route taken to the facility within the state, if known, and the scheduled time, location, volume, region per bill of lading, type, vapor pressure, and gravity as measured by standards developed by the American petroleum institute, of crude oil received. Each week, a facility that provides advance notice under this section must provide the required information regarding the scheduled arrival of railroad cars carrying crude oil to be received by the facility in the succeeding seven-day period. A facility is not required to provide advance notice when there is no receipt of crude oil from a railroad car scheduled for a seven-day period.
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> (2) The department may share information provided by a facility through the advance notice system established in this section with the state emergency management division and any county, city, tribal, port, or local government emergency response agency upon request.
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> ...
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> (4) To further strengthen rail safety and the transportation of crude oil, the department must provide to the utilities and transportation commission data reported by facilities on the characteristics, volatility, vapor pressure, and volume of crude oil transported by rail, as required under subsection (1)(a) of this section.

C. The Washington Law's Legislative History

There was one dominant motive animating Senate Bill 5579's sponsors and supporters: limiting the transportation of Bakken crude oil into Washington State. At public hearings before the Senate Environment, Energy & Technology Committee and House Environment & Energy Committee, the bill's prime sponsor, Senator Andy Billig, testified about the dangers of the potential

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[24] *Id.*; *see also* Press Release, Tesoro Corporation, Tesoro Corporation Closes the Sale of the Anacortes Rail Unloading Facility to Tesoro Logistics (Nov. 15, 2012), http://phx.corporate-ir.net/phoenix.zhtml?c=79122&p=irol-newsArticle&ID=1759180.

derailment of rail cars transporting Bakken crude oil through Spokane and other communities.[25] That was a fig leaf;[26] the bill does not purport to regulate the *movement* by rail of crude oil through the State, only its loading and unloading.[27] Instead, both supporters and detractors of the bill recognized that the bill was intended to limit the shipment of Bakken crude oil into Washington generally or to require prohibitively expensive pretreatment of Bakken crude before transportation into the State,[28] which effectively accomplishes the same thing. The fingerprints on the legislative

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[25] *Crude Oil Volatility/Rail: Hearing on E.S.S.B. 5579 Before the H. Env't & Energy Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (statement of Sen. Andy Billig, Member, S. Env't, Energy & Tech. Comm.), https://www.tvw.org/watch/?eventID=2019031219. *See also Crude Oil Volatility/Rail: Hearing on S.B. 5579 Before the S. Env't, Energy & Tech. Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (statement of Sen. Andy Billig, Member, S. Env't, Energy & Tech. Comm.), https://www.tvw.org/watch/?eventID=2019011291; *see also Crude Oil Volatility/Rail: Hearing on S.B. 5579 Before the S. Env't, Energy & Tech. Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (statement of Breann Beggs, Councilmember, Spokane City Council), https://www.tvw.org/watch/?eventID=2019011291) (similarly identifying derailment fears).

[26] The fact that Washington State has experienced *zero* spills by oil or pipeline since 2016 attests to the importance of safety to the industry, and the affront this rule poses to the tremendous efforts the industry has undertaken to improve safety in accordance with federal hazmat policy. *See generally* Crude Oil Movement Quarterly Reports (10 publications 2017-2019), Washington State Department of Ecology, https://fortress.wa.gov/ecy/publications/UIPages/PublicationList.aspx?IndexTypeName=Topic&NameValue=Crude+Oil+Movement+Quarterly+Reports&DocumentTypeName=Publication (last visited May 3, 2019) (listing ten quarterly reports, beginning Oct. 1, 2017, all of which indicate that Washington experienced zero spills during the reporting periods). *See also* Spills Maps, Dept. of Ecology, State of Washington, https://fortress.wa.gov/ecy/coastalatlas/storymaps/spills/spills_sm.html (last visited May 3, 2019) (listing no spills of crude oil by train since Jul 1, 2015 in Washington).

[27] Supporters like Senator Billig consistently left unexplained how vapor pressure loading and unloading limits can improve safety for workers who unload crude oil. *See* Press Release, Washington Senate Democrats, Senate passes oil train safety legislation (Mar. 5, 2019), http://sdc.wastateleg.org/billig/2019/03/05/senate-passes-oil-train-safety-legislation/. This omission is particularly striking when these workers expressed firm, uniform opposition to the bill purportedly meant to benefit them. *See generally Crude Oil Volatility/Rail: Hearing on S.B. 5579 Before the S. Env't, Energy & Tech. Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019), https://www.tvw.org/watch/?eventID=2019011291 (including many statements from workers unloading Bakken crude oil at Washington facilities).

[28] *Crude Oil Volatility/Rail: Hearing on E.S.S.B. 5579 Before the H. Env't & Energy Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (statement of Sen. Andy Billig, Member, S. Env't, Energy & Tech. Comm.), https://www.tvw.org/watch/?eventID=2019031219. *See also Crude Oil Volatility/Rail: Hearing on S.B. 5579 Before the S. Env't, Energy & Tech. Comm.*, 66th Leg., 2019 Reg. Sess. (Wash. 2019) (statement of Sen. Andy Billig, Member, S. Env't, Energy & Tech. Comm.), https://www.tvw.org/watch/?eventID=2019011291; Blake Nicholson, *North Dakota to sue Washington state over oil train standard*, AP NEWS, May 10, 2019,

history give this away: a storage prohibition in the original bill was expressly limited to Bakken crude oil, and the legislative findings were replete with references to Bakken crude oil.[29] Washington state legislators well understood what their law would require: it would "have the effect of requiring the owner of the oil to condition it to meet the standard prior to shipment from the Bakken region."[30]

D. Application for Preemption – Impact of the Washington Law

Under the HMTA and HMR, anyone "directly affected by a requirement of a State" may apply to PHMSA for a determination "whether that requirement is preempted" by the HMTA.[31] The Secretary of Transportation has delegated his authority to make preemption determinations to PHMSA for hazmat issues not involving highway routing.[32]

Pursuant to 49 C.F.R. § 107.203(b)(5), the Applicants state that North Dakota and Montana are adversely impacted by the restrictions enacted by the state of Washington because the law operates as a de facto ban on the loading and unloading of Bakken crude oil in the State of Washington. As discussed in more detail below, if oil producers in North Dakota are unable to ship Bakken crude into the State of Washington by rail, North Dakotans will also suffer due to a loss in revenue from the gross production tax, which the State uses to fund, among other things, its education and drinking water infrastructure. Montana will suffer for similar reasons.

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https://www.apnews.com/83b484f685a34168adc40e8b4af9773b ("Lowering North Dakota crude to a vapor pressure below 9 psi would require the removal of components such as butane, which is needed as an additive for winter gasoline blends so that vehicles can start in cold weather."); Press Release, Washington Senate Democrats, Senate passes oil train safety legislation (Mar. 5, 2019), http://sdc.wastateleg.org/billig/2019/03/05/senate-passes-oil-train-safety-legislation/ (quoting Senator Billig, who admitted that the law effectively "requir[es] producers to condition the oil to meet safer standards prior to shipment from the Bakken region.").

[29] S. 5579, 66th Leg., 2019 Reg. Sess. §§ 1-2 (Wash. 2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5579.pdf#page=1.

[30] Engrossed Substitute S.B. 5579, 66th Leg., 2019 Reg. Sess. (Wash. 2019), http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5579-S.E.pdf. Notwithstanding the subsequent sanitizing of the bill to remove this preamble from the final bill, this language accurately describes the legislative intent, particularly since the substantive provision concerning vapor pressure was unchanged.

[31] *See* 49 U.S.C. § 5125(d)(1); 49 C.F.R. § 107.201(a)(1).

[32] 49 C.F.R. § 1.97(b).

Washington is a significant thoroughfare and destination for crude oil shipments, by rail and otherwise. Washington has five petroleum refineries[33] and access to the Pacific Ocean to facilitate exports. These five existing refineries have a total capacity of nearly 638,000 b/d. The Washington Department of Ecology reported in May 2019 that more than 15.9 million barrels of crude were transported by rail through the state in Q1 2019, or about 174,400 b/d. Refineries in Washington State have been reliable buyers of Bakken-sourced crude oil since 2010.[34] In the first quarter of 2019, North Dakota was the region of origin for 94.3% of crude oil transported by rail in Washington State.[35] The amount of Bakken crude transported to Washington has increased over the years to approximately 166,700 b/d, according to the Washington Department of Ecology's latest data.[36] Moreover, in recent years Washington refineries have made substantial investments to facilitate their ability to handle Bakken crude.[37]

Prior to the Washington law, in-state facilities receiving crude oil by rail could freely transport it into Washington for loading or unloading—subject, of course, to extensive federal requirements under the HMRs. Washington maintains that its new vapor-pressure law does not "[p]rohibit a railroad car carrying crude oil from entering Washington."[38] That is true only on paper. The new Washington law effectively prohibits transporting crude oil by rail with more than 9 psi if the crude oil is loaded or unloaded inside the state—which means, of course, that it effectively prohibits transporting crude oil to any of Washington state's refineries, and from there to export markets.[39]

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[33] Department of Ecology, State of Washington, Oil refinery requirements, https://ecology.wa.gov/Air-Climate/Air-quality/Business-industry-requirements/Oil-refinery-requirements (last visited June 6, 2019).

[34] *See* Housley Carr, *Under Pressure - Will A New Washington State Law Hurt Bakken Crude Oil Producers?*, RBN ENERGY LLC (May 29, 2019), https://rbnenergy.com/under-pressure-will-a-new-washington-state-law-hurt-bakken-crude-oil-producers.

[35] Dept. of Ecology, Washington State, Crude Oil Movement by Rail and Pipeline, *Quarterly Report: January 1 through March 31, 2019* (May 2019), https://fortress.wa.gov/ecy/publications/documents/1908007.pdf.

[36] *See* Dept. of Ecology, Washington State, Crude Oil Movement by Rail and Pipeline, *Quarterly Report: January 1 through March 31, 2019* (May 2019), https://fortress.wa.gov/ecy/publications/documents/1908007.pdf.

[37] For example, one Washington refinery invested more than $180 million to build out the capability to receive crude oil by rail. *See* Press Release, Tesoro Corporation, Tesoro Corporation Closes the Sale of the Anacortes Rail Unloading Facility to Tesoro Logistics (Nov. 15, 2012), http://phx.corporate-ir.net/phoenix.zhtml?c=79122&p=irol-newsArticle&ID=1759180.

[38] S. 5579, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019) (codified at WASH. REV. CODE § 90.56).

[39] The Washington law applies to new facilities and existing facilities once they increase the amount of crude oil transported by rail by more than ten percent. There are five oil refineries in Washington.

Since April 1, 2015, the North Dakota Industrial Commission (NDIC) has required all oil producers in North Dakota to install and utilize oil-conditioning equipment to ensure that all Bakken crude oil meets the national standard for stable crude of 14.7 psi, as defined in the latest version of ANSI/API RP3000.[40] Consistent with the national standard, North Dakota imposes a vapor pressure limit of 13.7 psi to account for the accepted one-psi margin of error in the sampling procedures and measurement equipment. Oil conditioning is a process performed at the well site using NDIC-prescribed temperatures and pressures to produce a consistent product prior to shipment.[41] The oil conditioning process involves adding additional heat to the crude oil at the well site to remove certain amounts of propane and butane, which is then forced into the gas stream to be processed by natural gas processing plants. This process does not expand the surface footprint of the well, and the excess gas that is removed or "conditioned" off the oil can be transported in existing and/or planned pipelines to existing and/or planned processing facilities.[42]

To comply with the new Washington law and meet the *9 psi* limit, North Dakota producers will be required to undertake something far more technical, and far more impactful and expensive. Pretreatment of Bakken crude to lower its RVP to that degree requires the removal of a significant portion of liquid petroleum gases and other "light ends" contained in the crude oil. Unlike oil-conditioning, that method requires a producer to heat the crude oil and run it through counter-current towers to remove different percentages of the light-end compounds. And unlike oil conditioning, this cannot be done at the well site. It requires the movement of un-conditioned oil by truck or pipeline to facilities amounting to mini-refineries, infrastructure well beyond what currently exists in North Dakota, to transport and process the lighter compounds. Those facilities would need to be built, and rail or roads built to access them, with all of the attendant environmental and astronomical economic consequences. And once these hypothetical unbuilt facilities complete the conditioning process, the byproducts (*i.e.*, lower vapor pressure crude oil and light ends) must then be transported still elsewhere to bring these products to market, resulting in an increased number of truck and train movements and a higher transportation incident risk exposure on both sides of the oil conditioning process—transporting the crude oil by truck or rail to these new facilities, only to transport the crude oil and light ends back out to their ultimate destinations.[43] If all of this sounds like it would be a prohibitively expensive state undertaking, that is because it is.

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[40] NDIC Order No. 25417, as amended by NDIC Order No. 29398 (Jan 18, 2019).

[41] NDIC, *Oil Conditioning – Frequently Asked Questions* (Apr. 2, 2015), https://www.dmr.nd.gov/oilgas/ConditioningFAQ040215.pdf

[42] *Id.*

[43] AFPM has previously commented on the substantial costs related to pretreatment and the lack of safety benefits associated with vapor pressure regulations. *See* AFPM comments on Docket No. DOT-OST-2017-0069, "Notification of Regulatory Review" pages 11-15 submitted December 1, 2017, https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/AFPM_Comments_DOT_Reg_Review_12.1.17.pdf; AFPM comments on Docket No. PHMSA-2016-0077,

The Washington law also will actually reduce the value of crude oil produced from the Bakken. Butane is among the light-end components that would have to be removed from Bakken crude through the pretreatment process to meet a 9 psi limit. Butane is one of the key components in gasoline, particularly in winter blends. Butane must either be a component of the crude oil when it arrives at the refinery, or it must be purchased and added during the refinery process (likely requiring modification of refinery processes in Washington State). The result of this forced extra step is that the crude oil itself is devalued, since substantial expenses would be incurred to reintroduce butane into the mix.

There also are no feasible alternative modes to transport Bakken crude oil to Washington State. No crude oil pipelines connect the Bakken to west coast refineries. Trucking is not feasible due to distance and volume. And barge transport from North Dakota to Washington State carries a host of complicated logistical impacts, including adding mileage and time in transport, which in turn increase the risk of transportation. The outcome: in light of the safety, environmental, and economic considerations associated with meeting a 9 psi limit, North Dakota producers are likely to forgo shipments to Washington and instead transport their crude oil to different regions, like the Gulf or East Coasts. But these alternative markets are not interchangeable; put bluntly, Bakken crude is of greater value to the West Coast refineries than to the East. That in turn will have expected adverse effects in North Dakota. In North Dakota, produced oil is taxed at 10% of the value as it leaves the well site. If the crude oil has been devalued, North Dakotans will experience a concomitant loss in oil and gas tax revenue that is used to fund, among other things, k-12 education and drinking water infrastructure improvements.[44]

Thus, North Dakota has been presented with an impossible choice: implement pretreatment to meet the 9 psi limit and confront all of its attending safety, environmental, and economic costs, or send its crude oil to an alternative market, resulting in a significant reduction in revenue that the State uses to meet the basic but critical needs of its citizens.

The hazard notification requirements in the Washington law are also problematic in their own right: They differ substantially from the information required under the HMR and could seriously compromise the safe and secure transportation of crude oil to Washington refineries.

We discuss these facts as they relate to preemption below.

"Advance Notice of Proposed Rulemaking, Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials" https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/AFPM%20Comments%20on%20PHMSA%20ANPRM%20for%20CBR%20Volatility_19%20May%202017.pdf.

[44] *See* North Dakota Office of the State Treasurer, *North Dakota Oil Extraction and Gross Production Distribution Fiscal Years 2018 and 2019*, https://www.nd.gov/treasurer/image/cache/O_G_Flow_Charts_17-19_Biennium_.pdf.

III. WASHINGTON'S LAW IS PREEMPTED BY THE HMTA.

Pursuant to 49 C.F.R. § 107.203(b)(3) and (b)(4), the Applicant provides the following statement specifying the grounds for preempting the Washington requirements.

We first address the specific requirements and the impact of the Washington law that requires PHMSA to preempt it under the obstacle standard set forth at 49 U.S.C. § 5125(a)(1). Next, we discuss the Washington requirements that differ from the HMRs and are preempted under "substantive differences" standard set forth at 49 U.S.C. § 5125(b). Finally, we explain why this issue is squarely within PHMSA's jurisdiction.

A. Obstacle Preemption: Washington's Law Imposes Multiple Obstacles to Accomplishing the Purposes of the HMTA and Must be Preempted.

Washington's law prohibiting the loading or unloading of crude oil with more than 9 psi vapor pressure poses an obstacle to federal hazmat transportation policy and the safe transportation of crude oil. There are three primary avenues of complying with the Washington law: (1) pretreating the crude oil prior to loading the tank car; (2) selecting an alternate mode of transportation; or (3) redirecting the crude oil to facilities outside Washington State altogether. Each of these avenues is an obstacle to accomplishing the purposes of the HMTA in that they potentially increase the risk of transporting hazardous materials. Washington State's pre-notification requirements also should be preempted under the obstacle test. We discuss each of these in more detail below.

1. Pretreatment

Preemption Principle: Increased incident of risk itself is an obstacle to the fundamental goal of the HMTA, to protect against risks inherent in the transportation of hazardous materials.[45]

As discussed above, companies seeking to load or unload crude oil transported by rail in Washington must pretreat the crude oil to lower its psi below 9. That pretreatment may require additional transportation to different (and un-built) refineries and would create additional hazardous materials (*i.e.*, the isolated light-ends) in need of transport. These additional movements result in increased exposure and an increase in the risk of a hazardous materials transportation incident in North Dakota. The preemption provisions of the HMTA were expressly designed to avoid these kinds of material obstacles to federal hazardous materials transportation policy.

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[45] Preemption Determination No. 4(R), PHMSA-RSPA-2003-14619, (citing IR-6, Kentucky Ordinance Governing Transportation of Hazardous Materials, etc. 48 FR 760, 765 (Jan. 6, 1983) as saying "Since safety risks are inherent in the transportation of hazardous materials in commerce, ... an important aspect of transportation safety is that transit time be minimized") (internal citations omitted).

2. Alternate Mode of Transportation

Preemption principle: State law designed to favor one mode of transportation over the other is an obstacle to enhancing the safe transportation of hazardous materials in all modes.

Bakken crude oil is transported from North Dakota to Washington State exclusively by rail. No pipelines connect the Bakken Shale region to the west coast and the refineries in that region. And given the distance between the Bakken and Washington and the large volume of crude oil transported, trucking is not feasible.

That leaves transport over water. Some Washington refineries may be able to shift crude deliveries from rail to vessel or barge. Under this scenario crude would move by rail from North Dakota to a west coast port *outside* of Washington where it could be transloaded onto a ship and brought to Washington by sea for unloading at those refineries in Washington with water access. But of course, this shift in mode selection would have implications for crude oil transit time, distance traveled, number of transloading events, accident rates, and other factors that impact the safe transportation of hazardous materials. And equally important for preemption purposes, the HMTA does not establish a hierarchy of safety between modes; regulations promulgated under the HMTA are designed to enhance the safe transportation of hazardous materials in *all* modes. State initiatives that result in favoring one mode over another—as this plainly does—would stand as an obstacle to this comprehensive federal regulatory scheme.

3. Rerouting Crude Oil to Facilities Outside Washington State

Preemption Principle: Several HMRs are designed to ensure that hazardous materials are "transported without unnecessary delay"[46] because "[d]elay is incongruous with safe transportation," and safe transportation is "[t]he manifest purpose of the HMTA."[47]

With pretreatment to 9 psi being both cost-prohibitive and introducing additional hazardous materials (light-ends) into the transportation stream, and with alternative modes of transport from North Dakota to Washington not feasible, producers and refiners are left with one choice: move

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[46] For example, 49 C.F.R. § 174.14 requires a rail carrier to forward each shipment of hazardous materials promptly and within 48 hours (Saturdays, Sundays, and holidays excluded), after acceptance at the originating point or receipt at any yard, transfer station, or interchange point except under certain circumstances and 49 C.F.R. § 177.800 includes requirements for the highway movement of hazardous materials shipments.

[47] *See* State of Rhode Island Rules and Regulations Governing the Transportation of Liquefied Natural Gas and Propane Gas Intended To Be Used By a Public Utility; Inconsistency Ruling (IR-2), 44 Fed. Reg. 75,566, 75,571 (Dec. 20, 1979). *See also* Preemption Determination No. PD-22(R); New Mexico Requirements for the Transportation of Liquefied Petroleum Gas, 67 Fed. Reg. 59,396, 59,396, 59,399 (Sept. 20, 2002).

crude oil to facilities in other parts of the west coast or even to the gulf coasts, creating lengthy delays.

State laws that result in rerouting delays, increased miles traveled, increased time in transit, increased handling and transloading have been found preempted under the HMTA. In PD-22, for example, PHMSA declared preempted a New Mexico law requiring inspections of liquefied petroleum entering the state based on the possibility that state vehicle inspectors could be unavailable, causing a delay in the transportation of hazardous materials.[48] As PHMSA explained, "[t]he State cannot require a permit or inspection for trucks that are not based within the local jurisdiction if the truck must interrupt its transportation of hazardous materials for several hours in order for an inspection to be conducted." Even more recently, PHMSA declared preempted California's meal and rest break requirements as applied to hazmat transporters, since it results in an unnecessary delay due to deviations from a driver's route necessary to comply with the California regulations.[49]

The delays introduced here by Washington State's new law are orders of magnitude more consequential. *All* shipments of 9 psi crude oil are prohibited from transportation into Washington State for loading or unloading to new Washington facilities or facilities that expand their crude by rail shipments by at least 10% beyond a 2018 baseline. Therefore, the Washington law will create unnecessary delays on an even greater scale, as rail shipments must either be rerouted to a delivery point outside the state, then brought by barge into the state, or are forced to other more distant receiving points altogether.

4. Pre-notification of Hazardous Materials Shipments

Preemption Principle: 49 C.F.R. Part 172, Subpart G and 49 C.F.R. § 174.312 provide (a) requirements for maintaining emergency response information during transportation and at facilities that load, store, or handle hazardous material for transportation as well as (b) additional notification requirements for HHFTs.[50] The HMRs specifically prescribe required emergency response information during transportation and at facilities that load, store, or handle hazardous material for transportation[51]—none of which include the "type, vapor pressure, and gravity" of

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[48] *See* Preemption Determination No. PD-22(R); New Mexico Requirements for the Transportation of Liquefied Petroleum Gas, 67 Fed. Reg. 59,396, 59,400 (Sept. 20, 2002).

[49] *See* Hazardous Materials: California Meal and Rest Break Requirements, PD-38(R), 83 Fed. Reg. 47,961, 47,962 (Sept. 21, 2018).

[50] 49 C.F.R. § 172.600(a).

[51] 49 C.F.R. § 172.602(a) (requiring that shipping papers or other emergency response documentation contain "(1) The basic description and of the as required by . . . (2) Immediate hazards to health; (3) Risks of fire or explosion; (4) Immediate precautions to be taken in the event of an accident or incident; (5) Immediate methods for handling fires; (6) Initial methods for handling spills or leaks in the absence of fire; and (7) Preliminary first aid measures."; 49 C.F.R.

crude oil. The federal regulations also address pre-transportation functions—those "specified in the HMR that [are] required to assure the safe transportation of a hazardous material in commerce, including . . . [p]roviding and maintaining emergency response information."

Additionally, HM-251B includes notice requirements for railroads to share information about HHFT operations with emergency responders to mitigate the effects of rail accidents involving crude oil. Those requirements do not apply to consignees and do not require notice of the vapor pressure, gravity, or type of crude oil being transported.[52]

As noted above, Washington's new law covers a great deal more territory. It requires consignees to provide 7-day advance notice of crude oil shipments that will be received by rail, with particularized data:

> A facility that receives crude oil from a railroad car must provide advance notice to the department that the facility will receive crude oil from a railroad car. . . . The advance notice must include the route taken to the facility within the state, if known, and the scheduled time, location, volume, region per bill of lading, type, vapor pressure, and gravity . . . of crude oil received.[53]

Instead of simply being labelled "petroleum crude oil," as shipping papers require, the advance notice given to Washington State must further specify that it is "*X* psi vapor pressure, *Y* gravity, *Z*-type petroleum crude oil," which will create confusion for companies, regulators, and first-responders, who are left to figure out whether this extraneous information is relevant to their emergency response efforts.[54] (It is not.[55]) Emergency responders are trained to quickly assess

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§ 172.600(a). Because emergency response information may be contained within shipping papers, and serves the same purpose as the shipping paper requirements, 49 C.F.R. § 172.200 et seq, it is also possible that the Washington requirement to provide emergency response information should be preempted as not substantively the same as the HMRs' shipping papers requirements.

[52] 49 C.F.R. § 174.312; Hazardous Materials: Oil Spill Response Plans and Information Sharing for High-Hazard Flammable Trains (FAST Act), 89 Fed. Reg. 6910 (Feb. 28, 2019), https://www.federalregister.gov/documents/2019/02/28/2019-02491/hazardous-materials-oil-spill-response-plans-and-information-sharing-for-high-hazard-flammable.

[53] S. 5579, 66th Leg., 2019 Reg. Sess. § 2(1)(a) (Wash. 2019) (codified at WASH. REV. CODE § 90.55.565).

[54] Indeed, 40 C.F.R. 172.202(b) requires the shipping papers description from 172.202(a) to appear *in a particular order*, "[f]or example, 'UN2744, Cyclobutyl chloroformate, 6.1, (8, 3), PG II.'"

[55] *See* 49 C.F.R. Part 172, Subpart G – Emergency Response Information (identifying what information must be provided for emergency response and, for certain information, indicating the exact format in which it must be provided). This rule requires, among other things, identification of the commodity using the "basic description and technical name of the hazardous material" as required by 49 C.F.R § 172.202. Section 172.202 does not include any information related to

relevant information from emergency response documents in time-sensitive situations. In the event of an incident, what should first responders look to when both documents are geared toward safety, yet they differ in content—Washington's advance notice or HMR-mandated shipping papers? What happens when fifty states each have their own, differing advance notices?

The Washington law thus directly regulates "pre-transportation functions" by requiring advance notification and the provision of crude oil shipment information, including emergency response information, that goes well beyond even the federal government's stringent requirements.

Also under the Washington law, information is required to be submitted "weekly."[56] The federal requirement requires updates of "the notifications for changes in volume greater than 25%."[57] The Washington law also now requires a third entity -- the consignee -- to submit information, in addition to the offeror (49 C.F.R. § 172.600-602) and the carrier (49 C.F.R. § 174.312) as required by federal regulation. By requiring additional descriptive emergency response information not required under the HMRs, companies may expose themselves to HMRs violations for including "inconsistent" information in when responding to an incident.[58]

Analogous court rulings are instructive. In *Colorado Public Utilities Commission v. Harmon*, for example, the Tenth Circuit analyzed a Colorado prenotification requirement that required that required shippers to provide advance notification of any nuclear material shipments, including the name, address, and phone number of the shipper, carrier and receiver, a description of the materials, a list of routes, the transportation index, and the estimated date and time of arrival and departure. In analyzing the Colorado prenotification requirement, the Court emphasized that "Congress expressly found that state 'notification' requirements that 'vary from Federal laws and regulations' create 'unreasonable hazards and pose 'a serious threat to public health and safety."[59]

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vapor pressure of the commodity, but rather requires identification using the HMR classification system.

[56] S. 5579, 66th Leg., 2019 Reg. Sess. § 2(1)(a) (Wash. 2019) (codified at WASH. REV. CODE § 90.55.565) ("Each week, a facility that provides advance notice under this section must provide the required information regarding the scheduled arrival of railroad car carrying crude oil to be received by the facility in the succeeding seven-day period.").

[57] 49 C.F.R. § 174.312 ("railroads must update the notifications [for high-hazard flammable trains] for changes in volume greater than 25%").

[58] *See e.g.,* 49 C.F.R. § 172.202(b) (listing requirements for the description of hazardous material on shipping papers and stating "the basic description specified [in this rule]...must be shown in sequence and with no additional information interspersed"); *see also* 49 C.F.R. Appendix A to Subpart D of Part 107 – Guidelines for Civil Penalties (listing the penalty associated with using a shipping description that includes "additional unauthorized information (extra or incorrect words)").

[59] *Colorado Pub. Utilities Comm'n v. Harmon*, 951 F.2d 1571, 1582 (10th Cir. 1991).

The court of appeals explained that "Congress directed that safety be achieved through uniformity" and concluded that the requirement "pose[d] a threat to uniformity, and thereby threaten[ed] public safety" and was preempted by Nuclear Regulatory Commission prenotification requirements concerning the shipment of "irradiated reactor fuel."[60]

Also instructive is a recent National Transportation Safety Board recommendation issued to PHMSA focused on emergency response information. NTSB R-07-004 instructs PHMSA, with the assistance of the Federal Railroad Administration, to require that railroads immediately provide to emergency responders accurate, real-time information regarding the identity and location of all hazardous materials on a train.[61] The confusion introduced by the Washington law runs counter to this recommendation because the weekly advance information may not reflect accurate, real-time information if changes are made in transit.

Washington's requirements are confusing and conflicting, given the federal HHFT notification requirements, emergency response information requirements, and shipping papers requirements. Indeed, the *federal* reporting requirements for railroads are expressly designed for *state* emergency responders. Having two sets of information reported to the state clashes with the fundamental uniformity goal of federal hazmat law. Washington's requirement that facilities provide notice to the state about the "type, vapor pressure, and gravity" of crude oil received by in-state facilities also must be preempted as an obstacle to achieving the HMRs.

The obstacles posed by the Washington law to uniform federal hazmat transportation law and regulation are clear, and they are many. Washington's law must be found preempted.

B. Subject-Matter Preemption: Aspects of Washington's Law are Not Substantively the Same as the HMRs and must be Preempted.

Washington's law is preempted in other ways, as well. HMTA § 5125(b)(1) specifically preempts any state law, regulation, or requirement concerning specific subject-matter that is not "substantively the same" as an HMTA provision or the HMRs.[62] The HMRs define "substantively the same" to mean "that the non-Federal requirement conforms in every significant respect to the Federal requirement."[63] Washington's law runs afoul of two hazardous materials transportation subjects that Congress specifically chose to preempt where the state or local requirements are not

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[60] *Colorado Pub. Utilities Comm'n v. Harmon*, 951 F.2d at 1582-83.

[61] Safety Recommendation R-07-004, NAT'L TRANSP. SAFETY BD., https://www.ntsb.gov/safety/safety-recs/_layouts/ntsb.recsearch/Recommendation.aspx?Rec=R-07-004.

[62] *See* 49 U.S.C. § 5125(b)(1); 49 C.F.R. § 107.202(a).

[63] 49 C.F.R. § 107.202(d).

"substantively the same" as the HMTA or HMRs: (1) "classification" and (2) "handling" of hazardous materials."[64]

Washington's law prohibiting the loading and unloading of crude oil with more than 9 psi at certain facilities is preempted because it is not substantively the same as the HMTA and HMRs, which neither classify crude oil by its vapor pressure nor prohibit the loading or unloading of crude oil with more than 9 psi.

1. Classification

PHMSA has exclusive jurisdiction over the classification of hazardous materials in transportation and has developed detailed requirements for each hazardous material in transportation that are driven by the material's classification.[65] PHMSA's classification of petroleum crude oil establishes the rules by which this hazardous material may be transported by rail and other modes. Crude oil is designated as a Class 3 (flammable liquid) under the HMRs.[66] Column 3 of the Hazardous Materials Table in § 172.101 indicates in which hazard class or division a hazardous material is so it can be properly designated and packaged when shipped.[67] When the designation of column 3 indicates the material is "forbidden," that material "may not be offered for transportation or transported"[68] because it poses too great a risk. Column 7 of the Hazardous Materials Table indicates special provisions applicable to individual hazardous materials and often includes additional requirements relating to classification or handling the material.

The Washington law restricting the transportation of crude oils has effectively bifurcated this hazardous material into two classifications based on the RVP. The HMRs do not classify petroleum crude oils according to the material's RVP. They designate petroleum crude oil as a Class 3 flammable liquid. The HMRs also do not alter the classification of petroleum crude oil based on its vapor pressure; nor do they establish any "special provisions" keyed to the vapor pressure of petroleum crude oil.[69] Washington's classification of petroleum crude oil in transportation therefore is not substantively the same as the classification set forth in the HMRs. By prohibiting the loading and unloading of crude oil that is more than 9 psi, Washington imposes an additional classification parameter that differs from federal law and is therefore preempted.[70]

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[64] 49 U.S.C. § 5125(b)(1)(A)-(B); 49 C.F.R. § 107.202(a)(1)-(2).

[65] *See* 49 C.F.R. § 107.101.

[66] 49 C.F.R. § 172.101, Hazardous Materials Table.

[67] 49 C.F.R. §§ 172.101(d), 173.21(a).

[68] 49 C.F.R. § 172.101(d)(1).

[69] 49 C.F.R. § 172.101, Hazardous Materials Table.

[70] 49 U.S.C. § 5125(b)(1)(A); 49 C.F.R. § 107.202(a)(1).

Section 173.21 of the HMRs also lists those hazardous materials that are "forbidden" to be transported. Petroleum crude oil is not "forbidden" from transportation when the crude oil has a vapor pressure above 9 psi.[71] Quite the contrary: the HMRs authorize the transportation of petroleum crude oil at vapor pressures greater than 9. By contrast, the Washington law effectively re-classifies petroleum crude oil with a vapor pressure greater than 9, which is loaded or unloaded in Washington, as forbidden from transportation. And as explained above, it is too clever by half to say that because Washington's law forbids only the loading or unloading of crude oil with a vapor pressure greater than 9, when the obvious and immediate practical impact of a prohibition on "loading and unloading" is to prohibit the material's transportation into the state. Because the HMRs and Washington's petroleum crude oil classification requirements are not substantively the same, Washington's law establishing a vapor pressure classification parameter is therefore preempted.

By forbidding rail transportation of crude oil with vapor pressures below 9.0, the Washington law effectively removes PHMSA's authorization to transport these hazardous materials. Classification is a covered subject under 49 U.S.C. 5125 and Washington's reclassification of crude oil for transportation is not substantively the same as the HMRs and is therefore preempted.

2. Handling

State or local requirements concerning "handling" of hazardous materials are preempted by federal law when these requirements are not substantively the same as the federal hazmat law or regulation.[72] Handling includes loading and unloading.[73] Washington's law restricts loading and unloading crude oil from rail cars based on vapor pressure. And to bring the point home, the Washington law explicitly states that its purpose is to regulate the *handling* of hazardous materials during transportation by imposing volatility limits.[74] The HMRs contain no such restriction. Therefore the two regulations cannot be interpreted as being "substantively the same."

"Handling" as a noun means "the manner of treating or dealing with something; management; treatment" and "the manual or mechanical method or process by which something is moved, carried, transported, etc."[75] To "unload" as a verb means "to take the load from; remove the cargo

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[71] See 49 C.F.R. § 173.21.

[72] *See* 49 U.S.C. § 5125(b)(1)(B); 49 C.F.R. § 107.202(a)(2).

[73] *See* http://lawfilesext.leg.wa.gov/biennium/2019-20/Pdf/Bills/Senate%20Bills/5579-S.E.pdf.

[74] *See* Engrossed Substitute Senate Bill 5579, 66th Leg., 2019 Reg. Sess. (Wash. 2019) ("Volatility limits are necessary to ensure that Bakken crude oil is packaged and *handled* safely and securely during transportation.") (emphasis added).

[75] *Handling*, DICTIONARY.COM, https://www.dictionary.com/browse/handling (last visited May 3, 2019).

or freight from"[76]; "load" as a verb means "to put a load on or in"; and the noun "load" means "anything put in or on something for conveyance or transportation; freight; cargo."[77] As noted above, the HMTA, which gives PHMSA authority to "prescribe regulations for safe transportation of hazardous materials,"[78] defines "transportation" as "the movement of property and *loading, unloading*, or storage incidental to movement."[79] Furthermore, in defining "Loading incidental to movement of a hazardous material," and "unloading incidental to movement" the HMRs definitions include "loading . . . packaged or containerized hazardous material."[80] It could not be clearer that loading and unloading hazardous materials is encompassed within the "handling" of hazardous materials, since loading and unloading crude oil is a process by which crude oil, a type of cargo or freight, is put onto or removed from rail cars for transportation.

It also could not be clearer that Washington's law is not "substantively the same" as federal law. 49 C.F.R. Part 174 Subpart C sets forth the "General Handling and Loading Requirements" for transporting hazardous materials by rail, none of which prohibit loading or unloading based on the vapor pressure of the hazardous material.[81] The Washington law imposes an outright prohibition on the loading and unloading of more than 9 psi crude oil in certain facilities. The HMRs include specific handling requirements for Class 3 flammable liquids, like crude oil, none of which amount to a general prohibition on loading or unloading crude oils of vapor pressure at or above 9 psi at facilities.[82] The Washington law, by contrast, prohibits loading and unloading based on the oil's vapor pressure, even though the same activities are permitted under the HMRs.[83] Additionally, to the extent the new Washington law requires pretreatment of crude oil before transportation through its loading and unloading prohibition, the requirement comes squarely within the definition of

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[76] *Unload*, DICTIONARY.COM, https://www.dictionary.com/browse/unload?s=t (last visited May 3, 2019).

[77] *Load*, DICTIONARY.COM, https://www.dictionary.com/browse/load?s=t (last visited May 3, 2019).

[78] 49 U.S.C. § 5103(b).

[79] 49 U.S.C. § 5102(12).

[80] 49 C.F.R. § 171.8 (defining unloading as well); *see also* 49 C.F.R. § 171.1(c)-(d) (defining "transportation functions," to which the HMRs are applicable, to include "loading [and unloading] of packaged or containerized hazardous material onto a transport vehicle" but not "Unloading of a hazardous material from a transport vehicle or a bulk packaging performed by a person employed by or working under contract to the consignee following delivery of the hazardous material by the carrier to its destination and departure from the consignee's premises of the carrier's personnel or, in the case of a private carrier, departure of the driver from the unloading area").

[81] *See generally* 49 C.F.R. Part 174.

[82] *See* 49 C.F.R. § 174.300 (listing requirements, which nearly all pertain to proximity to apparatus that could ignite flammable liquids).

[83] S. 5579, 66th Leg., 2019 Reg. Sess. § 1 (Wash. 2019) (codified at Wash. Rev. Code § 90.56).

"Pre-transportation function," which "means a function specified in the HMRs that is required to assure the safe transportation of a hazardous material in commerce,"[84] such as handling, to which the HMRs apply.[85] Therefore, Washington law must be substantively the same as the HTMA and HMRs' handling requirements to survive preemption scrutiny. Plainly it is not.

This is not the first, or even the second, time PHMSA has found preempted state handling requirements that differ from those in the HMR. For example, in Preemption Determination 24(R), PHMSA determined that New Jersey's prohibition against transporting blasting caps on the same vehicle with more than 5,000 lbs. of other commercial explosives was preempted to the extent that these restrictions applied to transportation activities, because the state restriction imposed handling requirements that were not substantively the same as the HMRs.[86]

In another instance, PHMSA's predecessor (RSPA) has found that a Missouri law prohibiting recontainerization of hazardous wastes at a transfer station was preempted because it was not substantively the same as the HMRs provisions on handling hazardous materials, which do not prohibit it.[87] Similarly, in *New York ex rel. Department of Environmental Conservation v. U.S. Department of Transportation*, a federal court upheld RSPA's determination that a New York regulation prohibiting "consolidation or transfer of loads [that] occurs either by repackaging, mixing, or pumping from one container or transport vehicle into another" was preempted because it was not substantively the same as the HMTAs, which *permitted* packaging and repackaging hazardous materials that did not cause an unsafe condition.[88] These preemption determinations showcase PHMSA's and federal courts' consistent understanding that prohibitions on handling hazardous materials in ways that are otherwise allowed under the HMRs, must be preempted.

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[84] 49 C.F.R. § 171.8

[85] *But see* Preemption Determination PDs 8(R)-11(R); Hazardous Materials: California and Los Angeles County Requirements Applicable to the On-Site Handling and Transportation of Hazardous Materials, 80 Fed. Reg. 70,874, (Nov. 16, 2015) (citing 49 CFR 171.1(d)(2), which specifies that unloading hazardous materials from bulk packaging by the consignee following delivery is not subject to the HMRs, to justify the refusal to preempt Los Angeles hazardous material unloading requirements from rail tank cars). This determination, however, is not decisive here because Los Angeles' unloading requirements did not amount to a prohibition, whereas as here Washington's requirements do. This means that these loading and unloading requirements regulate actual transportation activities, rather than solely post-delivery activities. And because pretreatment would come within pre-transportation functions, it is not outside the HMRs.

[86] New Jersey Restrictions on Transportation of Blasting Caps With Other Commercial Explosives, 66 Fed. Reg. 30,985, 30,988 (June 8, 2001).

[87] Missouri Prohibition Against Recontainerization of Hazardous Waste at a Transfer Facility, 66 Fed. Reg. 37,089, 37,091-92 (July 16, 2001).

[88] 37 F. Supp. 2d 152, 161-62 (N.D.N.Y. 1999).

C. Washington Seeks to Regulate Activities that are Squarely within PHMSA's Jurisdiction.

Federal hazardous material transportation law directs DOT to establish regulations for the "safe transportation of hazardous materials in commerce" and authorizes DOT (through PHMSA) to apply these regulations to persons who transport hazardous materials in commerce as well as persons who perform pre-transportation functions that relate to assuring the safe transportation of hazardous materials in commerce.[89] The HMTA and the HMR define "transportation" as "the movement of property and loading, unloading, or storage incidental to that movement."[90] There is no question that loading of crude oil is regulated by the HMR and subject to PHMSA's jurisdiction. In the context of discussing its own jurisdiction and HMR applicability, PHMSA's predecessor (RSPA) explained that "irrespective of the person performing the function [*i.e.*, shipper versus carrier] or the designation as a pre-transportation or transportation function, loading is regulated under the HMR."[91]

With respect to unloading, "unloading incidental to movement" includes "the emptying of a hazardous material from a bulk packaging after a hazardous material has been delivered to a consignee and prior to the delivering carrier's departure from the premises."[92] Thus, any unloading that occurs prior to a railroad's departure, including unloading activities where carrier personnel are present, is also subject to the HMR. Accordingly, both the loading and unloading aspects of this law are subject to the HMR and therefore squarely within PHMSA's jurisdiction.

And PHMSA has been active in this area. In May 2015, PHMSA together with the Federal Railroad Administration published the HM-251 final rule, which, among other things enhanced the design standards for tank cars transporting crude oil and other flammable liquids and established certain operational controls for "high-hazard flammable trains."[93] HM-251 was a comprehensive rulemaking to improve tank car safety and address many of the issues associated with recent derailments involving crude oil and other flammable liquids. During this rulemaking, PHMSA examined the classification requirements for crude oil, considered the question of crude oil pretreatment, and specifically asked for comment on issues related to the volatility of crude oil

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[89] 49 U.S.C. § 5103(b); 49 C.F.R. § 171.1.

[90] 49 U.S.C. § 5102(13); 49 C.F.R. § 171.8.

[91] HM-223 Final Rule, 68 Fed. Reg. 61909.

[92] HM-233 Final Rule, 68 Fed. Reg. 61907.

[93] *See* DOT, PHMSA Final Rule, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26644 (May 8, 2015) (hereafter, "HM-251 Final Rule").

and incentivizing producers to pursue pretreatment activities.[94] PHMSA ultimately declined to revise the classification scheme to incorporate volatility in the HM-251 rule, explaining that the role of vapor pressure in crude oil classification was still under review.[95] The HM-251 requirements, including those associated with classification, were subsequently ratified by Congress when it passed the Fixing America's Surface Transportation (FAST) Act.

Also in 2015, the New York Attorney General petitioned PHMSA to establish an RVP limit of 9.0 psi for crude oil transported by rail. PHMSA issued an advance notice of proposed rulemaking to consider establishing vapor pressure limits for the transportation all Class 3 flammable liquids by any mode.[96] Indeed, in responding to PHMSA's ANPRM, the Washington State Attorney General acknowledged PHMSA's jurisdiction over this issue as well as the need for uniformity on this issue *by calling for a "nationwide limit*" on the vapor pressure of crude oil transported by rail and describing the need for a "federal vapor pressure standard."[97]

To date, PHMSA has not determined that such a requirement is appropriate for crude oil transported by rail. DOT and the United States Department of Energy are currently conducting a multi-phase study to investigate the role of vapor pressure in thermal activity and PHMSA indicated it would not take action in this area until the study is completed.[98] With its law, Washington has circumvented PHMSA's authority, countermanded its own previous call for a

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[94] HM-251 Final rule, 80 Fed. Reg. 26665 and 26706 ("PHMSA continues to examine the role of vapor pressure in the proper classification of crude oils and other flammable liquids").

[95] HM-251 Final rule, 80 Fed. Reg. 26706 ("We also continue to work with various stakeholders, including other government agencies such as the Department of Energy, to understand best practices for testing and classifying crude oil.").

[96] *See* Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials, 82 Fed. Reg. 5499, 5499-5500 (Jan. 18, 2017). AFPM commented on the substantial costs related to pretreatment and the lack of safety benefits associated with vapor pressure regulations. *See* AFPM comments on Docket No. PHMSA-2016-0077, "Advance Notice of Proposed Rulemaking, Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials." https://www.afpm.org/uploadedFiles/Content/Policy_Positions/Agency_Comments/AFPM%20Comments%20on%20PHMSA%20ANPRM%20for%20CBR%20Volatility_19%20May%202017.pdf.

[97] Joint comments of the Attorneys General of New York, California, Illinois, Maine, Maryland, and Washington on Docket No. PHMSA-2010-0077, "Advance Notice of Proposed Rulemaking, Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials."

[98] See *Crude Oil Characteristics Research Sampling, Analysis and Experiment (SAE) Plan*, U.S. DEP'T OF ENERGY OSTI (June 29, 2015), https://www.energy.gov/sites/prod/files/2016/06/f32/Crude%20Oil%20Characteristics%20Research%20SAE%20Plan.pdf. *See also* Letter from Acting Deputy Administrator of PHMSA Howard W. McMillan to Representative Kevin Cramer (May 16, 2017). http://www.dgac.org/sites/dgac.cms.memberfuse.com/dgac/files/PHMSA_Response_to_Congressional_Letter-2.pdf.

"nationwide limit," and implemented its own vapor pressure standard. This not only undermines DOT's authority, but also discounts DOT's research and analysis on this issue and its duty to ensure hazardous materials transportation regulations are grounded in sound science. Ultimately, the state of Washington has undermined the uniformity of hazardous material transportation.

IV. CONCLUSION

The Washington State law prohibiting the in-state loading and unloading of crude oil with a vapor pressure more than 9 psi, and its accompanying reporting requirements, create an obstacle to federal hazmat transportation policy and the safe transportation of crude oil. In addition, the Washington state requirements are not substantively the same as federal regulations for classification and handling, two subject matter areas where Congress *explicitly* indicated federal law must control. Washington's law violates the preemption standards in 49 C.F.R. § 107.202 and 49 U.S.C. § 5125.

For the reasons stated herein, the State of North Dakota, through its Attorney General, and the State of Montana, through its Attorney General, respectfully request that PHMSA issue a determination that Washington State Engrossed Substitute Senate Bill 5579, "Crude Oil by Rail – Vapor Pressure" is preempted. Should you have additional questions concerning this Application, please contact the undersigned at (701) 328-2210 or ndag@nd.gov for the North Dakota Attorney General or (406) 444-2026 or contactdoj@mt.gov for the Montana Attorney General.

Respectfully submitted,

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