

November 19, 2015

The Honorable Patty Murray
Congress of the United States
House of Representatives
2113 Rayburn House Office Building
Washington, DC 20515

Re: “Surface Transportation Reauthorization and Reform Act of 2015” – H.R. 3763

Dear Senator Murray,

On behalf of the Pacific States/British Columbia Oil Spill Task Force (Task Force), I am submitting this letter to you regarding our concerns with a section of H.R. 3763 addressing oil spill contingency planning for railroads. The relevant language also appears in H.R. 22 as Amended by the Senate (the DRIVE Act; see Sec. 35433).

Who We Are

The Task Force consists of senior agency representatives from the five West Coast states (Alaska, California, Hawaii, Oregon and Washington) and the Canadian Province of British Columbia¹, who have primary responsibility for protecting their jurisdiction’s natural resources and communities from oil spills. The Task Force collaborates on identifying emerging risks, developing better means to prevent and respond to spills, conducts joint training drills and research projects and facilitates the sharing of spill response assets and best practices. Collectively and individually, we collaborate with our federal partner agencies, local governments, tribes, and industry organizations to reduce the risk of spills. The Task Force has been a key player for over twenty years in bringing all of these resources together along the Pacific Coast and making it a safer place to store and transport crude oil and fuel.

Background

The U.S. Clean Water Act (CWA) and the Oil Pollution Act of 1990 (OPA) create the *national* framework in the U.S. for oil spill planning and response for the federal government, state and local governments, and industry. Both the CWA and OPA recognize the important role of the states in addressing the risk of spills. The CWA/OPA requirements already apply to “rolling stock”. [See 33 USC §2701(9)]

The President of the United States is expressly tasked with implementing the CWA/OPA mandates. [See 33 USC §1321(d) and (j)] In 1991, by Executive Order 12777, President George H. W. Bush delegated his duties to implement the

¹ While British Columbia is a member of the Task Force, with regards to this letter B.C. remains neutral and is not commenting on this U.S. bill.

CWA/OPA mandates to various federal agencies. Not surprisingly, the President delegated establishment of oil spill planning requirements for railroads, pipelines, and trucks to the U.S. Department of Transportation (U.S. DOT). Executive Order 12777 did not diminish the role of state and local agencies and they have continued to play their key role in preparing and responding to spills. This includes in being involved in the development and drilling of spill contingency plans at the local and state levels to assure companies and government entities are prepared to safely respond to spills in their communities. Taking the spill contingency planning down to the community level is critical since the initial response to a spill is likely to be at the local level with the resources at hand, supported by state then federal resources as they are brought in supplement the local response.

Over the past four years, movement of Bakken crude across the Northwest and California has increased dramatically. In Washington alone, transport of crude by train has gone from negligible volumes in 2010 to 30 million barrels in 2014. Increases in movement of crude by rail are taking place across California and Oregon as well. Given this striking increase in the movement of crude oil by rail across the West Coast, we believe it is all the more important to maintain a strong collaboration among federal, state, and local planners and responders in preparing for and responding to spills. H.R. 3763 would be a departure from this collaborative model and could, at least in some areas, diminish oil spill response capacity.

Specific Concerns with the Bill

Section 7011 of H.R. 3763 purports to establish new oil spill planning requirements for railroads, raising significant questions. The Task Force has the following concerns:

- There is no express states' rights savings clause. At a minimum the CWA/OPA savings clauses should be made applicable. [Ref. 33 USC §1370 and 33 USC §2718]
- Some stakeholders may argue this section would result in "field preemption" over the subject matter of oil spill planning for railroads, thus preempting States from establishing different or more protective mandates. Such preemption would be clearly contrary to the purpose and intent of the Clean Water Act and OPA '90.
- The bill seems to allow each railroad to define for itself what a "Worst-Case Discharge" is. [See the definition at (f)(6)] Without a government process to determine the "worst-case" scenario, we risk eliminating the capability to establish uniformity in planning standards.
- The CWA/OPA establishes the national framework for oil spill planning for all industries, with the ultimate responsibility falling to the President. [See 33

USC §1321(j)(5)] This bill would shift oil spill planning for railroads to the Hazardous Materials Transportation Act [49 USC §5101 et seq.], and the responsibility to the Secretary of U.S. DOT. This bill would create a redundant, and legally confusing regulatory authority for national oil spill planning as it relates to railroads. Would the HMTA and the CWA/OPA be read together – or separately? If separate, which Act would take precedence?

- Read side-by-side, the bill establishes *less* oil spill planning requirements for railroads than existing CWA/OPA provisions or existing U.S. DOT regulations. [See 49 CFR Part 130.]

Existing law provides: "It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter." [33 USC §1251(b)]

For the reasons stated above, this bill appears to directly contravene that policy.

The Task Force has the following recommendations:

- Since this section of the bill is unnecessary –the CWA and OPA already cover the subject matter – this section of the bill should be stricken.
- Expressly keep all oil spill planning authority with the President pursuant to the CWA and OPA; the President can give new direction to U.S. DOT if that is necessary.
- At a minimum, the section should expressly incorporate the savings clauses of the CWA and OPA to preserve states' rights for oil spill planning and response.

Respectfully submitted,



Sarah Brace
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PS/BC OSTF

