

COMMENTS

By The

ASSOCIATION OF STATE RAIL SAFETY PROGRAM MANAGERS

DEPARTMENT OF ENERGY

OFFICE OF CIVILIAN RADIOACTIVE WASTE MANAGEMENT

SAFE ROUTINE TRANSPORTATION AND EMERGENCY RESPONSE TRAINING;

TECHNICAL ASSISTANCE AND FUNDING

NOTICE OF REVISED PROPOSED POLICY AND PROCEDURES

INTRODUCTION

The Association of State Rail Safety Program Managers (Association) is a state organization committed to safe rail transportation. The purpose of this organization, as outlined in its Articles of Association are to “support, encourage, develop, and enhance railroad safety, especially through the Federal/State Railroad Safety Programs as established and defined by the Federal Railroad Safety Act of 1970, as amended, and other laws relative to railroad safety.”

A principle motivation for forming this Association was to attain greater uniformity among States in the conduct of rail regulatory activities and to enable States to speak with a collective voice on rail safety topics. The history of safety regulation supports this idea of uniformity and States have implemented specific policy initiatives with the Federal Railroad Administration (FRA) to ensure that Federal/State actions in the safety arena are coordinated and seamless. These comments are submitted on behalf of all state rail safety programs to urge the Department of Energy, Office of Civilian Waste Management, to aspire to a similar goal of uniformity among states in policies and procedures to provide technical assistance and funding to states to ensure safe routine transportation and emergency response training.

STATE RAIL SAFETY ROLE

Section 205 of the Federal Railroad Safety Act of 1970 (Act) clearly states the Congressional intent to establish national uniformity of railroad safety laws, rules, regulations, orders and standards. Furthering the intent to create a nationally uniform rail safety system under the Act, the Federal Government, in the person of the Federal Railroad Administrator by delegation from the Secretary of Transportation, is given the exclusive authority to assess and compromise monetary penalties and to recommend court action for recovery of such penalties. In addition, for 60 days after a violation has occurred, the Administrator has exclusive authority to seek injunctive relief. Only after 60 days does a participating state have the authority to apply to the U.S. District Court for enforcement of a Federal rule, regulation, order, or standard.

The states have no authority to assess and compromise penalties or to seek state judicial action. Also, if the Administrator determines, in writing, that no violation has occurred, a state cannot act. The intent of Congress, in establishing these procedures, was to assure uniform application of enforcement policy.

Finally, to assure that the application and interpretation of Federal rail safety rules, regulations, orders and standards reflect the same national uniformity, Section 206 of the Act provides that state inspectors must be certified to conduct investigative and surveillance activities.

The legislative history of the Act reflects a Congressional analysis of the nature of railroad operations, and of its local versus national aspects. The result of this analysis led to the conclusion that rail transportation was not subject to a clear demarcation between interstate and local aspects, that railroads formed a national system, and that rail operations were truly interstate in character, requiring a uniform body of regulation and enforcement.

CURRENT STATUS OF STATE RAIL SAFETY PROGRAMS

The Association is comprised of 32 states that currently work in partnership with the FRA to enforce federal railroad safety regulations. States currently contribute 30% of the inspection resources in the national rail safety program. Participating states employ 152 rail safety inspectors in all five safety inspection disciplines: track, motive power and equipment, operating practices, signals and train control and hazardous materials. **Attachment I** to these comments is a table of participating states and the number of inspector positions by technical discipline.

Hazardous materials inspectors are concerned with shippers and rail carriers. Substantive safety rules addressing these rail safety areas set design or performance standards, require adherence to certain procedures, dictate maintenance and inspection intervals, and/or require specific records to be kept or reports made.

State rail safety programs emphasize planned, routine compliance inspections with a goal to prevent rail accidents. Additional priority activities include accident investigation and responding to complaints alleging noncompliance with safety standards. State rail safety programs are also actively involved in promoting the safety goals of Operation Lifesaver, Inc., the national, nonprofit highway-rail grade crossing safety organization.

State Agencies represented by the Association are the only state-level entities with technical rail safety expertise and are the primary *state* voice in forums that set the national rail safety regulatory agenda. State Rail Safety Programs are represented on FRA's Rail Safety Advisory Committee, a participative rulemaking body, and work closely with FRA on major rail safety assurance and compliance projects.

ASSOCIATION COMMENTS

Preemption Issues

While all rail safety partners must work together toward the common goal of eliminating accidents and casualties, states actively involved in the State Participation Program have a unique perspective on regional and local rail safety issues and primary non-federal rail regulatory authority within non-tribal jurisdictions encompassed by state borders. Local governments, as opposed to state governments, are totally preempted from regulating rail safety, even where the subject matter has not been addressed by the FRA. The definitive word on local rail safety preemption is found in the Supreme Court's decision in CSX Transportation, Inc. v. Easterwood.

While rail safety is the primary venue for states to regulate rail safety, there is disagreement about whether states or tribes have to be part of the State Participation Program to apply and enforce hazardous materials standards applicable to rail transportation of hazardous materials. Currently, states that are not in the State Participation Program do not have inspectors certified to cite railroad violations of federal standards pertaining to track, equipment, operating practices and signals. These technical inspection areas are covered by preemption provisions of the Federal Railroad Safety Act (FRSA). However, there has been no definitive legal determination regarding the right of states to regulate rail hazardous materials shipments, including shipments of spent nuclear fuel and high-level radioactive waste. At issue is whether state inspection authority over hazardous materials shipments is conferred by FRSA or the Hazardous Materials Transportation Act (HMTA).

In CSX Transportation, Inc. v. The Public Utilities Commission of Ohio, the 6th Circuit ruled that FRSA preemption provisions applied to state regulation of rail hazardous materials transportation. The decision was not appealed and is only applicable to states within the Appellate Court's jurisdiction. In addition, the legal basis for the decision is viewed by some states as susceptible to challenge. At least one state that is not in the State Participation Program has adopted federal hazardous materials regulations and is inspecting rail shipments of hazardous materials for shipper compliance with the federal standards. The state in question has also cited rail shippers for hazardous materials violations and has assessed and collected civil penalties.

Policy Considerations

The Association is concerned that the Notice of Revised Proposed Policy and Procedures for Safe Routine Transportation and Emergency Response Training; Technical Assistance and

Funding Office of Civilian Radioactive Waste Management (OCRWM) exhibits a lack of understanding of the role of states in the national rail safety regulatory program. Specifically, the Notice fails to acknowledge the role of State Participation Programs as state-level experts who provide advice and counsel to state officials on rail safety issues.

State Participation Programs have only recently been added as a formal stakeholder to the Transportation External Coordination Working Group. Unfortunately, OCRWM has relied on others, primarily FRA and the railroad industry, to speak to rail safety issues that impact state and local governments. While State Participation Programs enjoy a strong partnership with FRA, the Association encourages OCRWM to end their reliance on that federal agency and the railroad industry to speak for state rail safety programs and deal directly with the states, their true customers, regarding questions of the scope and authority of state rail safety programs.

The Association also notes the absence of another critical safe rail transportation stakeholder at Transportation External Working Group Meetings: rail labor. Issues such as train inspections, crew size, and employee incident response training must be confronted in a uniform, consistent manner. Unilateral industry assertions and assurances on labor issues cannot effectively represent labor's concerns.

Hopefully, future references to state rail safety efforts will cite State Participation Programs rather than obscure reference to rail measures that complement DOT's Federal Railroad Administration (FRA) inspection procedures.

Safe Transportation

A coordinated network of state and federal inspection and regulatory enforcement is crucial to effective rail transportation of spent nuclear fuel and high-level radioactive waste. This network does not exist. As stated earlier, federal law and the interstate nature of railroad operations demand that the national rail safety regulatory program be consistent from state to state. This principle of consistency is not supported by OCRWM's interpretation of its federal mandate under the Nuclear Waste Policy Act (NWPA), which holds DOE responsible for the transportation of spent nuclear fuel and high-level radioactive waste.

The Association contends that DOE's responsibility for safe routine transportation extends beyond a pronouncement that "the current regulatory structure is sufficient to provide for the safety of the shipments." The current regulatory framework consists of minimum federal standards. According to FRA, there are not enough federal inspectors to adequately police major shipping campaigns and sixteen of the forty-eight contiguous states have no rail safety regulatory capability.

Another important consideration is the coordination and consistency of state hazardous materials regulation. As mentioned earlier, states outside of the State Participation Program may be able to legally regulate rail shipments of spent nuclear fuel. While these states must apply regulations that are not inconsistent with federal standards, states that are not part of the State Participation

Program community will not be tied to communication and coordination protocols that State Participation Programs have developed with FRA. Therefore, the Association suggests that OCRWM mandate that any assistance to states for safe rail transportation be contingent upon a state's involvement in the State Participation Program. The Association also asks that OCRWM consider mandating that states along projected rail routes be required to utilize safe transportation funds to employ one hazardous materials candidate meeting the experience and education requirements of 49 CFR Part 212.

Finally, the Association is concerned that DOE has granted states too much latitude to decide how training and assistance funds are allocated between emergency response and safe transportation. The Association believes that DOE should exercise leadership by establishing baseline parameters for fund allocation to ensure that states are prepared for spent nuclear fuel shipments. Further, the Association supports a policy that directs funds to appropriate safety enforcement agencies based on the projected level of shipments by transportation mode.

Training Standards

OCRWM's stated objective is to provide funding and technical assistance for states and tribes to obtain training to conduct rail inspections under the FRA's State Participation Program. This statement is followed by a pronouncement that no training assistance is needed by State Participation Programs since FRA covers all state training costs. This conclusion assumes that FRA training is adequate to prepare inspectors for major rail shipments of spent nuclear fuel and high-level radioactive waste.

In fact, FRA has not provided training to states for rail transportation of radioactive materials or accident investigation. In addition, states pay for the majority of their rail inspector training because FRA training for state inspectors is 95% on-the-job training as opposed to formal classroom training. States pay for salaries, travel, lodging, meals and incidental expenses associated with on-the-job inspector training. The extended time required to train a state inspector to certification and the costs associated with that training are a barrier to expansion of the State Participation Program.

In addition, the Notice fails to recognize that State Participation Programs are uniquely qualified to address safe routine transportation and emergency response training. The use of State Participation Programs to provide local emergency response agencies with knowledge of rail operations is critical to effective response to rail incidents within local jurisdictions, particularly incidents involving a release of hazardous materials. State hazardous materials inspectors currently produce rail-specific hazardous materials training to shippers, railroad employees and state and local emergency responders. There are specific rail incident training areas that benefit local emergency response agencies:

- ▶ knowledge of hazardous materials documentation included on train consists
- ▶ placard requirements

- ▶ hazardous materials package train placement requirements
- ▶ basic railroad crew assignments and operating requirements
- ▶ the railroad industry's hazard communications network
- ▶ the rail industry's response or hazard mitigation capabilities

Rail incident response is particularly important if OCRWM maintains its present position limiting local training to the first responder awareness level. The Association believes that awareness level training is inadequate and will result in an insignificant increase in local agency preparedness for an incident involving spent nuclear fuel shipments. The Association believes that it is imperative for OCRWM to train local agencies to at least operations level and require additional modal training by the appropriate modal regulatory agency.

Respectfully submitted,

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FY 1998 RAILROAD SAFETY STATE PARTICIPATION PROGRAM

| STATE | TRACK | MP&E | OP | HM | S&TC | XING | TOTAL |
|--------------|-----------|-----------|-----------|-----------|----------|-----------|------------|
| AL | 2 | 2 | 0 | 0 | 0 | 0 | 4 |
| AZ | 1 | 1 | 1 | 2 | 1 | 0 | 6 |
| CA | 4 | 6 | 8 | 3 | 2 | 0 | 23 |
| CT | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| FL | 2 | 2 | 2 | 1 | 1 | 0 | 8 |
| ID | 0 | 0 | 0 | 1 | 0 | 0 | 1 |
| IL | 3 | 0 | 0 | 2 | 0 | 0 | 5 |
| IA | 2 | 0 | 0 | 0 | 0 | 0 | 2 |
| ME | 2 | 0 | 0 | 0 | 0 | 0 | 2 |
| MD | 1 | 1 | 1 | 0 | 0 | 0 | 3 |
| MA | 0 | 0 | 0 | 0 | 0 | 1 | 1 |
| MS | 1 | 0 | 0 | 0 | 0 | 1 | 2 |
| MO | 2 | 0 | 0 | 1 | 0 | 2 | 5 |
| MT | 0 | 2 | 0 | 0 | 0 | 0 | 2 |
| NE | 1 | 1 | 0 | 0 | 0 | 0 | 2 |
| NV | 1 | 1 | 1 | 1 | 0 | 0 | 4 |
| NH | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| NJ | 0 | 0 | 0 | 2 | 0 | 0 | 2 |
| NM | 0 | 0 | 1 | 0 | 0 | 2 | 3 |
| NC | 2 | 1 | 0 | 0 | 0 | 0 | 3 |
| NY | 3 | 4 | 0 | 0 | 0 | 0 | 7 |
| OH | 3 | 2 | 2 | 2 | 0 | 4 | 13 |
| OK | 1 | 0 | 0 | 0 | 0 | 0 | 1 |
| OR | 2 | 2 | 0 | 1 | 0 | 1 | 6 |
| PA | 3 | 2 | 1 | 0 | 0 | 0 | 6 |
| SC | 1 | 1 | 0 | 0 | 0 | 0 | 2 |
| TN | 2 | 1 | 1 | 0 | 1 | 0 | 5 |
| TX | 3 | 4 | 5 | 3 | 1 | 0 | 16 |
| UT | 1 | 1 | 0 | 0 | 0 | 0 | 2 |
| VA | 2 | 0 | 0 | 0 | 0 | 0 | 2 |
| WA | 1 | 1 | 0 | 1 | 0 | 1 | 4 |
| WV | 1 | 3 | 2 | 1 | 1 | 0 | 8 |
| TOTAL | 49 | 38 | 25 | 21 | 7 | 12 | 152 |