BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

PROPOSED RULE

DOCKET NO. EPA-HQ-OLEM-2022-0174

ACCIDENTAL RELEASE PREVENTION REQUIREMENTS: RISK MANAGEMENT PROGRAMS UNDER THE CLEAN AIR ACT; SAFER COMMUNITIES BY CHEMICAL ACCIDENT PREVENTION

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads ("AAR"), on behalf of itself and its member railroads, respectfully submits the following response to the U.S. Environmental Protection Agency's "Accidental Release Prevention Requirements: Risk Management Programs under the Clean Air Act; Safer Communities by Chemical Accident Prevention" proposed rule ("Proposed Rule").

AAR is a non-profit industry association whose membership includes freight railroads that operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents railroads that provide intercity passenger and commuter rail service.

America's freight rail industry is among the safest sectors in the country. U.S. freight railroads have lower employee injury rates than most other major industries, including trucking, airlines, agriculture, manufacturing, and construction. Between 2000 and 2021, train accident rates were reduced by 30%; and between 2000 and 2020, hazardous materials accident rates

were reduced by 60%. Railroads continue to strive toward the ultimate goal of zero accidents through continued investment, technology development, and operational improvements.

AAR appreciates this opportunity to comment on the Proposed Rule. As explained in greater detail below, we are concerned that the proposed changes to regulatory definitions impacting the rail industry overlap and potentially conflict with Department of Transportation ("DOT"), Pipeline and Hazardous Materials Safety Administration ("PHMSA") regulations governing the transportation of hazardous materials.

I. Introduction

Section 112(r)(7)(A) of the Clean Air Act authorizes the EPA Administrator to promulgate regulations to prevent the accidental release of regulated substances from "stationary sources." 42 U.S.C. 7412(r)(7)(A). The term "stationary source" is defined as "any buildings, structures, equipment, installations or substance emitting *stationary activities*, or installation which emits or may emit any air pollutant." 42 U.S.C. 7412(r)(C) (emphasis provided). Mobile sources are notably exempt from this provision.

The distinction between a stationary source and a mobile source transporting hazardous materials is critical because the former is regulated by EPA and the latter by DOT. Unfortunately, the Proposed Rule would blur these lines and subject some shipments of hazardous materials to both EPA's and PHMSA's regulations, with potentially conflicting requirements and obligations.

AAR urges EPA to coordinate with DOT and to adopt PHMSA's existing definitions regarding when a shipment is "in transport" and when a rail car is in "storage incidental to transportation," and therefore within the exclusive jurisdiction of PHMSA.

II. PHMSA Regulates Hazardous Materials in Transport.

PHMSA's regulations define "transportation or transport" as "the movement of property and loading, unloading, or storage incidental to that movement." 49 C.F.R. § 171.8. The Hazardous Materials Regulations ("HMR") dictate that transportation in commerce begins when a carrier takes physical possession of the hazardous materials transport for the purposes of transporting it and continues until the materials are delivered to the destination indicated on the shipping paper or until a railcar is delivered to a private track or siding. 49 C.F.R. 171.1(c).

Notably, "storage incidental to movement of a hazardous material" is included in "transportation" under the HMR. 49 C.F.R. 171.1(c)(4). This includes "[s]torage at the destination shown on a shipping document, including storage at a transloading facility, provided the original shipping documentation identifies the shipment as a through-shipment and identifies the final destination or destinations of the hazardous material and [a] rail car containing a hazardous material that is stored on track that does not meet the definition of 'private track or siding' [] even if the car has been delivered to the destination shown on the shipping document." *Id.* Put differently, railcars containing hazardous materials that are on railroad property, including rights-of-way, sidings, and yards, fall under the jurisdiction of PHMSA and are "in transportation," even if temporarily stored "incidental to movement." PHMSA regulations apply to those railcars and allow "storage incidental to movement" only under certain circumstances and for limited periods of time, as explained below.

For safety and security reasons, the HMR encourages the expedited movement of hazardous materials transports from origin to destination. This is referred to within the rail industry as the "48-hour rule" and requires rail carriers to forward shipments promptly and

within 48-hours after acceptance at the origination or receipt at any yard. 49 C.F.R. § 174.14. Notably there are exceptions for areas with limited service and for weekends and holidays, and the rule only applies to loads, not residue cars.[1] In addition, 49 C.F.R. § 174.14(b) specifies that tank cars loaded with flammable gas, poisonous gas, and flammable liquids may not be held at any point subject to forwarding orders.[2]

Regulations specific to hazardous materials *transport* makes sense because, in contrast to a stationary source such as a chemical plant with a relatively constant list of hazardous materials contained there, the inventory of hazardous materials at any railyard is highly dynamic. Hazardous materials transports can arrive and depart from railyards on an hourly basis and the commodities within those transports can widely vary. Given this variability, emergency response procedures may change depending on the commodity. Therefore, static requirements, such as those in Accidental Release Prevention program and Proposed Rule, would have limited use.[3]

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[1] *See* 49 C.F.R. 174.14(a) (stating that a "carrier must 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 that where biweekly or weekly service only is performed, a shipment of hazardous materials must be forwarded on the first available train*.") (emphasis provided).

[2] "Forwarding orders" is an undefined term, but PHMSA has explained that a destination is required for these materials and that these materials cannot be stored by a railroad awaiting a final destination.

[3] The rail industry has developed an application, called AskRail, that can be installed on mobile devices to inform first responders in real time as to the contents of a particular rail car and the appropriate response to an incident involving those specific contents. The industry conducts ongoing training for first responders and has made the application available to first responders and some regulators.

In contrast, rail cars that have been delivered to their destination and are being stored by the end-purchaser of the commodity on private (non-railroad owned) track or sidings are *not* "in transportation" and are not subject to oversight by PHMSA or to the HMR. This often occurs when the recipient of the hazardous materials transport stores materials in the tank cars until the contents are needed or until unloading space frees up at their facility. This distinction between non-railroad owned ("private") track and railroad property makes sense, because railroads have no control, responsibility, or authority over private track outside of the railroad's right-of-way or yard.[4]

III. The Proposed Rule Unnecessarily Overlaps and Potentially Conflicts with PHMSA Regulations.

The Proposal states that "EPA is proposing to apply a 48-hour time frame" to the definition of a stationary source, "based on the Department of Transportation (DOT), Pipeline and Hazardous Materials Safety Administration, Carriage by Rail regulations at 49 C.F.R. 174.14(a), that indicate rail carriers must forward each shipment of hazardous materials promptly within 48 hours after acceptance or receipt." 87 Fed. Reg. 53605, 53609. In addition, the Proposed Rule seeks to amend EPA's definition of "storage incident to transportation" by including examples of when a transportation container should be treated as in transit versus in stationary. *Id.* It states that "railyards and other stationary sources actively engaged in

[4] *See* 49 C.F.R. § 171.8 (defining "private track" as track located outside of a carrier's right-of-way, yard, or terminals where the carrier does not own the rails, ties, roadbed, or right-of-way or track leased by a railroad to a lessee, where the lease provides for, and actual practice entails, exclusive use of that trackage by the lessee and/or a general system railroad for purposes of moving only cars shipped to or by the lessee, and where the lessor otherwise exercises no control or responsibility for the trackage or the cars on the trackage.)

transloading activities may store regulated substances up to 48 hours total in a disconnected transportation container without counting the regulated substances contained in that transportation container toward the regulatory threshold." *Id.*

This is inconsistent with PHMSA's regulations and, if finalized as proposed, would create confusion and potential conflicts with the applicability of PHMSA's regulations versus those of EPA when applied to the rail industry. Contrary to the stated goal of aligning the Proposed Rule with PHMSA's regulations, the treatment of transportation containers that are not "attached to the motive power that delivered it to the site" for more than 48-hours as stationary sources is inconsistent with PHMSA's definition of "storage incident to transportation." Moreover, the HMR does not treat tank cars located within railyards, or railyards themselves, as "stationary" sources. Under PHMSA's regulations, a container under these circumstances would be considered "in transportation" and would be regulated under the HMR; thus, EPA's proposal would overlap (and potentially conflict with) the HMR.

By way of example, consider a hypothetical tank car containing a hazardous material that has been located within a rural railyard with limited weekly service for 50 hours. The car is not connected to a locomotive. This car is classified as "in transportation" because it is in "storage incident to transportation" under PHMSA's regulations and is subject to the HMR and to PHMSA's oversight. Under those rules, the tank car must be moved on the next available train. However, if finalized as proposed, this tank car would also either be classified as a "stationary source" or would cause the railyard to be so classified under EPA's regulations. This would then trigger the Accidental Release Prevention requirements – a completely separate and unrelated

regulatory regime from the HMR and its requirements – one that has never applied to railyards, or the cars located therein.

The implications for this conflict are important. First, the Proposed Rule, if finalized as drafted as applied to rail, exceeds the authority granted to EPA under the Clean Air Act – authority appropriately vested in the DOT and PHMSA.

Second, from a purely practical perspective, the Proposed Rule would subject the rail industry to conflicting regulatory definitions and impractical requirements. For example, as noted above, finalizing the rule as proposed would mean that the same hazardous material transport could be classified as "in storage incident to transport" under PHMSA's regulations but as a "stationary source" for the purposes of EPA's regulations.[5] Because of the ever-changing mix of commodities located within any given railyard at any given time, compliance with the Accidental Release Prevention requirements would be impractical, if not impossible.

This would result in confusion, particularly because PHMSA's regulations were promulgated decades ago and address the precise issue – the safe handling of hazardous materials – that the Proposed Rule seeks to address.

IV. EPA Should Expressly Adopt PHMSA's Definitions Regarding the Transport of Hazardous Materials.

Rather than creating its own definition of when materials are "in transportation" or when a railcar is "in storage incident to transportation," EPA should instead formally adopt PHMSA's

[5] In addition, the Proposed Rule could be read as requiring compliance with the Accidental Release Prevention requirements on sidings along railroad rights-of-way across the country. With a rail network spanning almost 140,000 route miles across the United States transporting a wide range of hazardous materials, complying with the requirements would be completely impractical and very nearly impossible.

definitions at 49 C.F.R. 171.1(c) by cross-reference. Doing so would eliminate the overlap between existing regulations and the Proposed Rule and clearly delineate when a particular hazardous materials transport falls under the jurisdiction and authority of PHMSA and when it is governed by EPA's regulations. It would also negate the need for EPA to create its own version of a "48-hour" rule, because a hazardous materials shipment in transport would be subject to PHMSA's well- and long-understood and applied 48-hour rule.

In addition, adopting PHMSA's definitions would address concerns regarding a perceived regulatory gap for railcars that truly are in storage pending use by the end-customer of the shipment. Specifically, PHMSA's HMR do not apply to cars carrying hazardous materials that are stored on "private track" (as defined at 49 C.F.R. § 171.8), but existing EPA regulations do not clearly identify these cars as subject to the Accidental Release Prevention Requirements. Adopting PHMSA's regulatory definitions would clarify this issue and close any perceived gap by clarifying that hazardous materials transports stored on **private track** *are* subject EPA's jurisdiction under the Clean Air Act.

V. Conclusion

AAR appreciates this opportunity to comment on EPA's Proposed Rule and welcomes the opportunity to further discuss the Proposed Rule with EPA and DOT.

Respectfully submitted,

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