



OFFICE OF THE ATTORNEY GENERAL
STATE OF OKLAHOMA

September 23, 2019

Docket Operations Facility (M-30)
U.S. Department of Transportation
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue SE
Washington, DC 20590.

RE: Petition for Preemption of Washington State's Crude Oil Volatility Law
Docket No. PHMSA-2019-0149; PDA-40(R)

Dear Mr. Roberti,

The states of Oklahoma, Arkansas, Indiana, Louisiana, Nebraska, Ohio, South Dakota, Utah, West Virginia, and Wyoming submit these comments in response to your invitation in the above-captioned docket. We strongly agree with the states of North Dakota and Montana that federal law preempts Washington's new laws regarding transporting crude oil.

Federal law leaves almost no room for states to regulate hazardous material transportation. *See* 49 U.S.C. § 5125. States may not create laws that make compliance with federal law impossible or are an obstacle to compliance with federal law, *id.* § 5125(a), and may only create laws that are "substantively the same" as federal laws in a wide swath of enumerated areas, *id.* § 5125(b)(1). Aside from an express waiver from the Secretary of Transportation, a state cannot avoid this expansive preemption. *Id.* § 5125(e). "[Hazardous Materials Regulations (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." Research and Special Programs Admin., *Applicability of the Hazardous Materials Regulations to Loading, Unloading, and Storage*, 68 Fed. Reg. 61909, 61923 (Oct. 30, 2003).

We agree with North Dakota and Montana that both of Washington's new statutory provisions are preempted under the "substantively the same" test. "[S]ubstantively the same' means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar de minimis changes are permitted." 49 C.F.R. § 107.202(d).

Washington's first provision designates a new class of crude oil as defined by its vapor pressure and disparately regulates how facilities handle it during loading and unloading. Engrossed Substitute Senate Bill 5579 Sec. 1. Federal law creates no such distinction in crude oil classes. *See* Hazardous Materials: Volatility of Unrefined Petroleum Products and Class 3 Materials, 82 Fed. Reg. 5499, 5502 (Jan. 18, 2017). Thus, Washington's law violates the requirement to be substantively the same as federal laws on "the designation, description, and classification of hazardous material" as well as the "handling" of hazardous material. 49 U.S.C. § 5125(b)(1)(A), (b)(1)(B).

Washington's second provision imposes many new reporting requirements beyond those in federal law. Engrossed Substitute Senate Bill 5579 Sec. 2. It violates the requirement to be substantively the same on "the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents." 49 U.S.C. § 5125(b)(1)(C).

We also agree with North Dakota and Montana that both provisions are an obstacle to compliance with federal law. The first provision increases the time involved in transporting hazardous materials by rerouting some crude oil shipments outside the state of Washington. The second provision requires additional documentation and information for select shipments, risking confusion in a transportation process that relies on uniform information to maintain safety. *See* 49 C.F.R. Part 172, Subpart G (identifying the type and format of information to be provided for emergency response); *id.* § 174.312 (additional requirements for certain operations); *see also Colorado Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1582 (10th Cir. 1991) ("The enactment of separate information and documentation requirements in even a few of the thousands of local jurisdictions across the country would lead to the multiplicitous regulations Congress sought to avoid.").

We offer our support for the petition because we are concerned about the precedent Washington's law could set. States that have access to port cities are uniquely situated to harm landlocked states. As North Dakota and Montana explain, Washington's law targets oil produced in states within the Bakken Shale Formation for disfavor. Processing facilities exist near major commerce hubs like those in Washington, where suppliers ship their finished product. Regulating what goods those facilities can accept is functionally the same as regulating the transportation of goods because states that cannot use the refineries there also cannot ship oil and gas products from there. To conclude that states can invent and impose special burdens on new classifications of oil and gas from their facilities would allow states with port cities to leverage their location to the disadvantage of energy producing states.

The threat to landlocked states may expand beyond Washington and beyond Bakken Shale oil. Five other states joined Washington in asking your agency to adopt limits on the vapor pressure of transported crude oil. *See* Comments by the Attorneys General of New York, California, Illinois, Maine, Maryland, & Washington, Docket No. PHMSA-2016-0077. If Washington can enact those requested regulations in state law, the other states with the same request will likely enact similar laws. Even more states could use the same rationale to deter the shipment of other fuels to their state—like natural gas from Oklahoma or ethanol from Nebraska—as there is no limiting principle to the logic that a state may permissibly target facilities near transportation hubs because it is not targeting transportation.

The threat also directly affects state revenue. While residents and businesses ultimately obtain and market oil and gas, states rely on taxes on that production for large parts of their budget. Harming the ability to sell fuels will decrease production, reducing landlocked states' revenue available for major state programs like education.

Your agency should find that Washington's law is preempted in order to continue a uniform national policy regarding the transportation of hazardous materials. The "overriding aim" of the Hazardous Materials Transportation Act was to prevent states from imposing transportation requirements that vary from federal ones. *Roth v. Norfalco LLC*, 651 F.3d 367, 377 (3d Cir. 2011). If states can create new classifications of hazardous materials, a patchwork of laws will undermine the uniform federal law,

and states with special geographic advantages will wield their newfound power to our disadvantage. We urge you to prevent this law from becoming precedent before it affects states beyond Washington and hazardous materials beyond Bakken Shale oil.

We appreciate the opportunity to comment on this petition, and we certify that copies of this comment have been sent to Mr. Stenejem and Mr. Fox at the addresses specified in the Federal Register.

Sincerely,



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