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State of Washington Rail Transport Crude Oil Volatility Rules: U.S. Pipeline and Hazardous Materials Safety Administration Public Notices North Dakota/Montana Request for Preemption Determination

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The United States Pipeline and Hazardous Materials Safety Administration (“PHMSA”) issued a July 24th Public Notice and Invitation to Comment (“Notice”) addressing the states of North Dakota and Montana’s (“States”) request for an administrative determination that the federal Hazardous Materials Transportation law preempts certain State of Washington rules applicable to crude oil transportation in the state. See 84 Fed. Reg. 35707.

The States applied to PHMSA for determination whether the State of Washington’s rules related to the volatility of crude oil transported by rail in the state were preempted.

The federal Hazardous Materials Transportation Act (“HMTA”) provides in Section 5125 of 49 U.S.C. express preemption provisions that are applicable to certain state activities. A requirement of a State, political subdivision of a State, or Indian tribe is preempted – unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under section 5125(e) – if:

1. complying with the non-Federal requirement and the Federal requirement is not possible; or
2. the non-Federal requirement, as applied and enforced, is an obstacle to accomplishing and carrying out the Federal requirement.

North Dakota and Montana applied to PHMSA for a determination that HMTA preempts the State of Washington’s Engrossed Substitute Senate Bill 5579, Crude Oil By Rail – Vapor Pressure. The states argue that the Washington law regulating the volatility of crude oil transportation in Washington State for loading and unloading amounts to a de facto ban on Bakken crude.

The Notice states that North Dakota and Montana put forth two arguments why the Washington law should be preempted:

1. The law’s prohibition on the loading or unloading of crude oil with more than 9 psi vapor pressure poses obstacles to the HMTA because compliance with the law can only be accomplished by:

- a. Pretreating the crude oil prior to loading the tank car;
 - b. selecting an alternate mode of transportation; or
 - c. redirecting the crude oil to facilities outside Washington state.
2. The law's pre-notification requirements are an obstacle and aspects of the law are not substantively the same as the federal requirements for the classification and handling of this type of HMTA hazardous material.

The Secretary of Transportation has delegated authority to PHMSA to make determinations of preemption (except for those concerning highway routing, which have been delegated to the Federal Motor Carrier Safety Administration).

A copy of the Federal Register Notice can be found [here](#) and a copy of North Dakota's and Montana's Application of Preemption [here](#).