

## Environmental Law

## Expert Analysis

# Regulation of Movement Of Crude Oil by Rail in New York

Every day “unit trains” consisting of between 75 and 125 tanker cars rumble across New York State carrying crude oil. These trains pass through communities in 22 counties, including Buffalo, Syracuse, Utica, Albany and Plattsburgh. Each tanker car carries 30,000 gallons, and a single unit train can haul 2.2 million gallons of crude oil. The unit trains utilize more than 1,000 miles of rail in New York, much of it located adjacent to the Hudson and Mohawk Rivers, as well as dozens of smaller water bodies. Most of these trains converge on the Port of Albany, where this crude oil is stored for brief periods in terminals that process more than three billion gallons annually.

The Port of Albany is served by two major rail carriers and provides year-round access to barges that can efficiently move large volumes of crude. From the storage terminals in Albany the crude oil is transferred to barges for the trip down the Hudson River and eventually to refineries along the East or Gulf coasts.

As a result, without the addition of any new terminals or rail lines, and despite the fact that it lacks any refining capacity, New York State has become a hub for the movement of crude oil by rail. This article will examine the general scheme for controlling the movement of hazardous cargo such as crude oil by rail and the role that New York is playing in the environmental regulation of this activity.

Although crude oil has been moving by rail since the 1880s, large volumes did not pass through New York until recently. Traditionally pipelines and ocean-going tankers delivered crude oil to refineries in North America. However, the development of the Bakken fields of North Dakota has changed both the volume of crude oil that is produced and the manner in which these liquid hydrocar-

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bons are moved to refineries. The Bakken shale oil formation underlies parts of Montana, North Dakota, Saskatchewan, and Manitoba and is the source of an upward spike in new oil production in both the United States and Canada. However, this region lacks pipelines. As a result, crude from the Bakken fields tends to move by rail. According to the Association of American Railroads, between 2008 and 2014 (about the time that production

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in North Dakota was soaring), domestic shipments of crude oil by rail increased by over 4,000 percent.

These changes in the way crude oil moves, combined with a series of accidents and spills, triggered reactions from regulators, elected officials and concerned citizens. For example, on Jan. 28, 2014, Governor Andrew Cuomo issued Executive Order 125, which called upon state agencies to review safety procedures and emergency response preparedness related to rail and water shipments of crude oil. The joint report from that inter-agency task force<sup>1</sup> provides valuable background concerning New York’s role in this new “pipeline on rails.”

### Federal Regulation

Of course, the Commerce Clause reserves to Congress the power to regulate commerce among

the states. Congress has been vigilant in applying the Commerce Clause to protect railroads from state regulation. In 1887 Congress created the Interstate Commerce Commission and gave it the power to regulate railroads, including the rates charged. During the deregulation wave of the mid-1990s, Congress concluded that rates should be set by the market but was concerned that states might attempt to fill any void. Accordingly, when Congress adopted the Interstate Commerce Commission Termination Act (ICCTA) in 1995 (which ended federal economic regulation of railroads) it included a provision stating that federal regulations governing railroads are “exclusive” and other remedies under federal or state law are “preempt[ed].”<sup>2</sup>

Similar provisions are found in the many other federal statutes, including the Federal Railroad Safety Act<sup>3</sup> and the Hazardous Materials Transportation Act.<sup>4</sup> These limitations are summed up in a rule adopted by the U.S. Department of Transportation which states that any “law, order, or other directive of a state...that designates, limits, or prohibits the use of a rail line...for the transportation of hazardous materials...is prohibited.”<sup>5</sup>

The ICCTA is not limited to preempting state economic regulation of railroads.<sup>6</sup> The U.S. Court of Appeals for the Sixth Circuit in *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield* stated: “[A]ny form of state or local permitting or preclearance that... could be used to deny a railroad the ability to conduct some part of its operations or to proceed with activities that [federal regulators have] authorized” is “categorically” or “facially” preempted.<sup>7</sup> More than one court has noted that federal “power to regulate hazardous materials transportation is absolute.”<sup>8</sup>

Given its central role in regulating the movement of hazardous materials, the federal government has responded to the growing practice of shipping crude oil by rail with a number of initiatives and regulations. For example, the Pipeline and Hazardous Materials Safety Administration recently adopted extensive changes to the rules governing operation of unit trains and the design of tanker cars.<sup>9</sup> These amendments to 49 C.F.R. Parts 171, 172, 173, 174 and 179 are to be phased

in over the next 10 years and are intended to reduce the risk of spills from unit trains.

Despite these federal actions and rules, concerns remain that local communities and natural resources within New York face unacceptable risks due to the movement of crude oil by rail.

### State Role

Although the role of states in regulating the movement of crude oil by rail is constrained, states do have options. In theory, state regulations based upon traditional police powers that do not unreasonably interfere with rail operations can escape the preemptive effect of both federal railroad regulations and federal rules governing movement of hazardous materials.<sup>10</sup> As the U.S. Court of Appeals for the Ninth Circuit noted in the 2010 case *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, "What matters is the degree to which the challenged regulation burdens railroad transportation...."<sup>11</sup>

However, in practice federal courts and regulatory agencies are very concerned that a patchwork of local regulations, each of which might seem like a reasonable response to local conditions, will nevertheless create an unreasonable impediment to interstate commerce. As a result, state efforts to regulate rail transportation seldom prevail based solely on the argument that they constitute the reasonable use of police powers.

States have had slightly better luck when attempting to apply environmental requirements to activities that are, or are alleged to be, merely ancillary to transportation. Federal courts have recognized that a wide range of activities undertaken by railroads do not constitute "transportation by rail" and therefore fall outside of the reach of the ICCTA.<sup>12</sup>

This pattern of state activity tending to focus on ancillary activities is evident at the Port of Albany. Although the increase in rail traffic is driving the concerns and citizen reactions, environmental advocacy groups and regulators have largely focused on the oil storage terminals that are not owned or operated by federally regulated railroads. Indeed, at the moment, the application for a modification of an air pollution permit at one of the terminals in the Port of Albany has generated multiple lawsuits. At the same time, the increase in the total number of unit trains traveling the rails of New York State has gone largely unchallenged and unexamined.

### Cooperative Federalism

The Federal Railroad Safety Act allows states to undertake safety inspection of federally regulated rail lines.<sup>13</sup> In response to the changes in crude oil movement by rail, New York has taken full advantage of this provision and has increased the number and frequency of state-lead inspections. In the past few months, inspection teams

from the New York State Department of Transportation and the Federal Railroad Administration carried out crude oil tanker inspections at various terminals and lines primarily in Albany and Buffalo. These joint inspections focused on track, track hardware and tank car mechanical safety equipment, including wheels and brakes. The federal/state teams also performed hazardous materials inspections to ensure that equipment used to move crude oil and other hazardous cargo complies with applicable federal regulations.<sup>14</sup>

State authority derived from federal law provides an alternative basis to regulate certain aspects of these rail facilities. For example, if a project related to transportation of crude requires a federal permit or license, the states through which it passes may each be required to issue a Water Quality Certificate pursuant to §401 of the Clean Water Act,<sup>15</sup> or a coastal consistency determination.<sup>16</sup> In such instances, states are acting based upon federal law and may be able to distinguish their approvals or disapprovals from those that are based upon state law, and thereby avoid the preemptive effects of the ICCTA.

In *Association of American Railroads v. South Coast Air Quality Management District*, the Ninth Circuit discussed the intersection of the ICCTA and these state environmental requirements based upon federal statutes.<sup>17</sup> The circuit court concluded that whenever possible, courts must "strive to harmonize" the pro-transportation mandates of the ICCTA and the environmental mandates of federal law.<sup>18</sup> It remains to be seen how other courts might deal with such conflicts.

### Other Options

Regardless of the framework established under the ICCTA, states have an important role in protecting residents, communities and natural resources from the threat of crude oil being spilled while in transit. New York has responded to the increased movement of crude by rail by enhancing emergency preparedness and response capabilities. In particular, the Department of Environmental Conservation (DEC) has publicly announced that it has updated the NY/NJ Area Contingency Plan, which is a plan developed by the Coast Guard, the Environmental Protection Agency and state governments to outline how to respond to spills involving hazardous materials. Similar updates are underway to NY Inland Area Contingency Plan, for areas not covered by a coastal plan.

DEC is also working with the National Oceanic and Atmospheric Administration (NOAA) to revise the New York-Hudson River Area Environmental Sensitivity Index. This index of critical natural resources includes NOAA-maintained maps of sensitive environmental areas such as wetlands or endangered species.<sup>19</sup>

New York has also taken an active role in attempting to shape federal activities. Governor Cuomo and the commissioners of both the DEC and DOT have engaged federal regulators in an effort to ensure that New York's concerns are considered as new federal programs take shape.

The movement of large quantities of crude oil across New York State is a recent development. The federal government has primacy over both the transportation of goods by rail and the movement of hazardous substances in interstate commerce. Nevertheless, states like New York that find themselves at the center of this activity can influence this activity by being active and applying all of the tools available to them under state and federal laws.

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1. <http://www.governor.ny.gov/assets/documents/CrudeOilReport.pdf>

2. 49 U.S.C. §10501(b)(2).

3. 49 U.S.C. §§20101 et seq.

4. 49 U.S.C. §§5101 et seq.

5. 49 C.F.R. §172.822.

6. See *Ass'n of Am. Railroads v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

7. *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008) (quoting *In re CSX Transp.*, 2005 STB LEXIS 675 (S.T.B. May 3, 2005); see also *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005) (state environmental laws requiring preconstruction approvals or environmental reviews for rail facilities are preempted).

8. See, e.g., *CSX Transp. v. Pub. Utils. Comm'n of Ohio*, 901 F.3d 497, 502 (6th Cir. 1990), aff'g 701 F.Supp. 608 (S.D. Ohio 1988); see also *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

9. See Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 Fed. Reg. 26644 (May 8, 2015).

10. See *Island Park v. CSX Transp. & Consol. Rail Corp.*, 559 F.3d 96 (2d Cir. 2009).

11. *Ass'n of Am. Railroads*, 622 F.3d at 1097 (quoting *New York Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 254 (3d Cir. 2007)).

12. See *Fla. E. Coast Ry. Co. v. City of W. Palm Beach*, 110 F.Supp.2d 1367 (S.D. Fla. 2000), aff'd, 266 F.3d 1324 (11th Cir. 2001) (aggregate distribution center on property owned by railroad is not transportation by rail); *J.P. Rail v. N.J. Pinelands Comm'n*, 404 F.Supp.2d 636 (D.N.J. 2005) (solid waste transfer station on property adjacent to rail line—even when owned and operated by a railroad—does not constitute transportation by rail).

13. See 49 U.S.C. §20105.

14. See generally Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Latest Round of Rail Inspections (July 22, 2015), <https://www.governor.ny.gov/news/governor-cuomo-announces-latest-round-rail-inspections-0>.

15. See 33 U.S.C. §1341.

16. See 16 U.S.C. §1456.

17. 622 F.3d 1095 (9th Cir. 2010).

18. *Id.* at 1097.

19. See generally State's Actions on Transport of Crude Oil, DEC, <http://www.dec.ny.gov/permits/95614.html> (last visited Oct. 28, 2015).