

NO. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SIERRA CLUB and FORESTETHICS,

Petitioners,

v.

UNITED STATES and SECRETARY OF THE DEPARTMENT OF
TRANSPORTATION,

Respondents.

PETITION FOR REVIEW

PATTI A. GOLDMAN
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Attorneys for Petitioners

1. Pursuant to 49 U.S.C. §§ 20114(c) and 5127(a) and 28 U.S.C. § 2342(7), the Sierra Club and ForestEthics (the “Petitioners”) hereby petition the United States Court of Appeals for the Ninth Circuit for review of the final action of Respondent Secretary of Transportation in the form of a letter dated November 7, 2014 denying the Petition to Issue an Emergency Order Prohibiting the Shipment of Bakken Crude Oil in Unsafe Tank Cars (July 15, 2014) (attached as Exhibit 1).

2. Jurisdiction lies in this Court pursuant to the Federal Railroad Safety Act, 49 U.S.C. § 20114(c), which provides for review in the court of appeals of final action of the Secretary of Transportation under Chapter 201, except for 49 U.S.C. § 20104(c), which is inapplicable here. *See also* 28 U.S.C. § 2342(7) (the court of appeals has exclusive jurisdiction to enjoin, set aside, suspend, in whole or in part, or determine the validity of all final agency actions described in 49 U.S.C. § 20114(c)). The petitioners sought issuance of an emergency order, in part, under 49 U.S.C. § 20104(a). Accordingly, the Secretary’s denial of the petition is reviewable in the court of appeals. Petitioners also invoked the Secretary’s authority to issue emergency orders under the Hazardous Material Transportation Act, 49 U.S.C. § 5121(d). Both 49 U.S.C. § 5127(a) and 49 U.S.C. § 20114(c) provide for court of appeals jurisdiction to review a final action issued by the Secretary under that Act.

3. Venue is appropriate in this Circuit as the Sierra Club is incorporated in the State of California and has its principal place of business in San Francisco, California, and ForestEthics is incorporated in the State of California and has its principal place of business in San Francisco, California. *See* 28 U.S.C. § 2343 (venue provision).

4. Petitioners ask the Court to set aside and remand the Secretary's denial of the petition to ban shipping Bakken crude oil in unsafe tank cars because the Secretary failed to consider pertinent evidence and several relevant factors, including the Secretary's past findings that the surge in crude-by-rail shipments of Bakken crude in dangerous tank cars poses imminent hazards and emergency unsafe conditions, the number of rail accidents and oil spills likely to occur during the time it will take to stop shipping Bakken crude in the most hazardous tank cars through rulemaking, Canada's more expeditious phase out of the most hazardous tank cars, and the safety hazards of allowing the industry to more than double the crude oil fleet before removing the most dangerous tank cars from crude-by-rail shipping.

Respectfully submitted this 2nd day of December, 2014.

s/ Patti A. Goldman

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*Attorneys for Petitioners Sierra Club and
ForestEthics*

CORPORATE DISCLOSURE STATEMENT

Petitioners, Sierra Club and ForestEthics, have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 2nd day of December, 2014.

s/ Patti A. Goldman

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*Attorneys for Petitioners Sierra Club and
ForestEthics*

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington.

I am over 18 years of age and not a party to this action. My business address is
705 Second Avenue, Suite 203, Seattle, Washington 98104.

On December 2, 2014, I served a true and correct copy of:

1. Petition for Review and Exhibit 1

on the following parties:

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
William Jefferson Clinton Bldg. (WJC South)
1200 Pennsylvania Avenue, N.W., Room 3000
Washington, D.C. 20004
(202) 564-4700 | Phone

- ☒ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via e-mail
- ☐ via ECF filing system

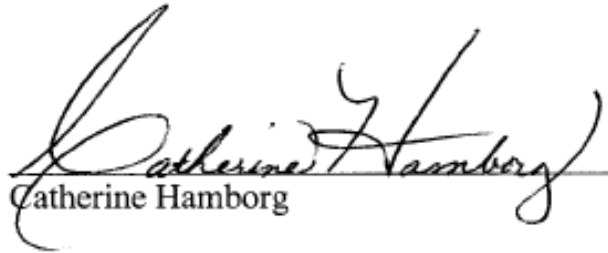
Eric Holder
United States Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2001 | Phone

- ☒ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via e-mail
- ☐ via ECF filing system

Melinda Haag
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Northern District of California
Federal Courthouse
450 Golden Gate Avenue
San Francisco, CA 94102
(415) 436-7200 | Phone

- ☒ via overnight courier
- ☐ via first-class U.S. mail
- ☐ via e-mail
- ☐ via ECF filing system

I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed on this 2nd day of December, 2014, at Seattle, Washington.



Catherine Hamborg

EXHIBIT 1



**U.S. Department of
Transportation**

Office of the Secretary
of Transportation

GENERAL COUNSEL

1200 New Jersey Avenue, SE
Washington, DC 20590

November 7, 2014

Ms. Patti Goldman
Earthjustice
Northwest Office
705 Second Avenue, Suite 203
Seattle, WA 98104

Dear Ms. Goldman:

Thank you for your letter dated July 15, 2014, enclosing a petition to issue an Emergency Order pursuant to 49 U.S.C. §§ 5121(d) and 20104(a) prohibiting the shipment of Bakken crude oil in DOT-111 tank cars. Secretary Foxx has asked me to respond to your petition.

The Department of Transportation (DOT or Department) appreciates Sierra Club's and ForestEthics' concerns regarding the current standards for tank cars and shares your clients' sense of urgency in working to improve the tank car design in an effort to decrease the likelihood of releases of hazardous materials during or after a train derailment. After careful review of your petition and accompanying exhibits, DOT has concluded that the issues the petition raises should be, and are being, addressed within the Department's current, ongoing regulatory and enforcement efforts. Accordingly, your petition to issue an Emergency Order is denied.

The Department has the authority to issue an Emergency Order relating to hazardous materials transportation safety under 49 U.S.C. § 5121(d)(1), which states as follows:

If, upon inspection, investigation, testing, or research, the Secretary determines that a violation of a provision of this chapter, or a regulation prescribed under this chapter, or an unsafe condition or practice, constitutes or is causing an imminent hazard, the Secretary may issue or impose emergency restrictions, prohibitions, recalls, or out-of-service orders, without notice or an opportunity for a hearing, but only to the extent necessary to abate the imminent hazard.

Similarly, the Department has the authority to issue an Emergency Order relating to rail transportation safety under 49 U.S.C. § 20104(a)(1), which states as follows:

If, through testing, inspection, investigation, or research carried out under this chapter, the Secretary of Transportation decides that an unsafe condition or practice, or a combination of unsafe conditions and practices, causes an emergency situation involving a hazard of death, personal injury, or significant harm to the environment, the Secretary immediately may order restrictions and

prohibitions, without regard to section 20103(e) of this title, that may be necessary to abate the situation.

Under both provisions, DOT “may” issue an Emergency Order if the applicable statutory requirements are met. Thus, a decision not to issue an Emergency Order is always committed solely to the Department’s discretion. Accordingly, even if DOT were to find that conditions warranting issuance of an Emergency Order existed under either or both statutes, the Department would have the discretion to forego such action and, as appropriate, address the conditions through alternative measures.

With respect to DOT-111 tank cars, the Department, as petitioners acknowledge (Petition 14-15), has in fact issued Emergency Orders and taken other measures, including the issuance of notices of proposed rulemakings. Since the July 2013 rail accident in Lac-Mégantic, Québec, the Department and two of its operating administrations, the Federal Railroad Administration (FRA) and the Pipeline and Hazardous Materials Safety Administration (PHMSA), have issued the following Emergency Orders, Safety Advisories, and Safety Alerts:

- FRA issued Emergency Order 28 (EO 28) on August 7, 2013, implementing enhanced attendance and securement requirements for trains transporting certain hazardous materials by rail, including crude oil and ethanol (78 Fed. Reg. 48,218);
- The Department issued an Emergency Order on March 6, 2014, amending, restating, and superseding a February 25, 2014 Emergency Order, and requiring proper testing for classification and characterization of crude oil, while also prohibiting shippers from switching to an alternate classification that involves less stringent packaging;
- The Department issued an Emergency Order on May 7, 2014, requiring all railroads that operate trains containing one million gallons of Bakken crude oil to notify state emergency response commissions about the operation of these trains through their States;
- PHMSA and FRA issued joint Safety Advisories on August 7, 2013 (78 Fed. Reg. 48,224) and November 20, 2013 (78 Fed. Reg. 69,745) stressing the importance of safety and security planning and proper characterization and classification of hazardous materials being shipped;
- FRA and PHMSA issued a joint Safety Advisory on May 7, 2014, recommending that offerors and carriers of Bakken crude oil use tank car designs with the highest level of integrity available in their fleets; and
- PHMSA issued a Safety Alert on January 2, 2014, that warned of crude oil variability and emphasized that unprocessed crude oil may affect the integrity of packaging or present additional hazards related to corrosivity, sulfur content, and dissolved gas content.

Rulemaking notices and other actions taken by DOT, including FRA and PHMSA, include the following:

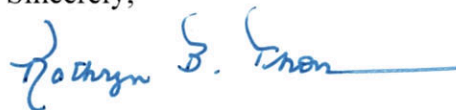
- PHMSA and FRA initiated a comprehensive review of operational factors that affect the transportation of hazardous materials by rail (see 78 Fed. Reg. 42,998 (July 18, 2013));
- PHMSA engaged in significant outreach efforts to gain additional technical, commodity classification, and practical information regarding the current use and future phase out of DOT-111 tank cars;
- DOT referred safety issues related to EO 28 and the joint Safety Advisories to FRA’s Railroad Safety Advisory Committee;

- PHMSA published an Advance Notice of Proposed Rulemaking (ANPRM) on September 6, 2013, responding to eight petitions for rulemaking related to the transportation of hazardous materials by rail on (78 Fed. Reg. 54,849);
- PHMSA published a comprehensive regulatory proposal on August 1, 2014 (79 Fed Reg. 45,015) focused on the safe rail transportation of flammable liquids, including crude oil, which was informed in part by the comments to the September 6, 2013, ANPRM. Pursuant to this proposed rule, the use of DOT-111 tank cars for transporting crude oil and ethanol would be phased out. The comment period for this proposed rule closed on September 30, 2014, following a sixty-day comment period. The agency is currently reviewing all comments and drafting a final rule.
- On September 9, 2014, FRA published a proposed rule that would improve the securement and attendance of trains carrying hazardous materials (79 Fed Reg. 53,356).
- The Department initiated *Operation Classification*, involving joint activities at all phases of transportation to investigate how shippers are classifying crude oil and what actions they are taking to determine the characteristics of the material;
- Secretary Foxx hosted a "Call to Action" meeting with DOT senior leadership and the railroad and petroleum industries in order to discuss improving rail safety by preventing accidents and by mitigating the impacts of those that occur;
- As a result of the Call to Action, railroads committed to implementing speed restrictions in designated urban areas, providing train braking enhancements, making more frequent inspections of rail and equipment, installing defective bearing detection equipment, and providing resources to enhance emergency response capabilities; and
- As a result of the Call to Action, the petroleum industry committed to developing a comprehensive industry standard for testing, characterizing, classifying, and loading and unloading crude oil in rail tank cars.

The above-referenced Emergency Orders and other actions collectively reflect DOT's considered, expert judgment regarding the most appropriate response at this time to the safety risks posed by the transport of Bakken crude oil in DOT-111 tank cars. Most significantly, DOT has responded by Emergency Order to the risks that, in its judgment, were properly addressed by Emergency Order. DOT has also decided, in its discretion, to consider other actions related to DOT-111 tank cars through notice-and-comment rulemakings, which, as noted above, are currently ongoing and include a proposed phase-out of the use of DOT-111 tank cars for the transport of crude oil and ethanol.

DOT will carefully consider all comments on its proposed rules, including those comments that Earthjustice, ForestEthics, and Sierra Club submitted, which, among other things, urge DOT to adopt a ban on DOT-111 tank cars through the rulemaking process. Your petition, however, fails to demonstrate that it is appropriate at this time for the Department to issue an Emergency Order under 49 U.S.C. § 5121(d) or 49 U.S.C. § 20104(a) requiring an absolute ban on the use of DOT-111 tank cars to transport Bakken crude oil, rather than addressing the issue in the ongoing rulemaking.

Sincerely,



Kathryn B. Thomson