

HAZ MAT

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GAO Report Says Railroads Will Not Meet Positive Train Control Deadline; HazMat Transportation Likely To Be Affected

A new report released by the Government Accountability Office (GAO) (Positive Train Control: Additional Oversight Needed As Most Railroads Do Not Expect to Meet 2015 Implementation Deadline, GAO-15-739, issued September 16, 2015) warns that most railroads will not be able to meet the fast-approaching December 31, 2015 deadline for installing positive train control (PTC). If Congress does not extend the deadline, railroads may suspend or curtail transportation HazMat transportation, resulting in serious service problems.

PTC is a communications-based system for monitoring and controlling train movements. PTC can automatically slow or stop a train if it is being operated at excessive speeds. The Rail Safety Improvement Act of 2008 mandated the installation of PTC systems by December 31, 2015, for “mainline” railroads (*i.e.*, lines carrying 5 million or more gross tons of freight annually) that are used for

transportation of any amount of toxic-by-inhalation HazMat or for passenger service.

The GAO report found that both freight and passenger railroads continue to face significant difficulties in implementing PTC – such as cost concerns, delays in vendor shipments of components and software, problems obtaining Federal Communications Commission permits necessary for constructing and testing PTC systems, and issues with host railroad/tenant railroad coordination. Most railroads told the GAO that they would require one to five additional years to comply with the mandate. In 2013, the GAO reported that most railroads were not on track to meet the December 31, 2015 deadline (Positive Train Control: Additional Authorities Could Benefit Implementation, GAO-13-720).

The Federal Railroad Administration (FRA) is responsible for overseeing and enforcing implementation of the PTC mandate. The FRA recognizes that many railroads will not be able to fully install PTC by December 31, but maintains that the agency does not have authority to extend the deadline. Accordingly, the FRA plans to enforce the requirement starting on January 1, 2016. (See article below regarding discussion of PTC at September 17 Confirmation Hearing for FRA Administrator Nominee Sarah Feinberg). The GAO report recommended that FRA develop a plan for holding railroads accountable for making continued progress towards PTC implementation.

If Congress does not extend the PTC deadline, widespread rail service problems are expected to affect the national network; service disruptions could be particularly severe for HazMat shippers. Railroads assert that, without an extension, they will be forced to stop most freight and passenger operations on January 1. In addition to FRA civil penalty exposure, non-compliant railroads could face problems regarding insurance coverage, tort or other commercial liability, and labor-relations issues. Because railroads can apply to have segments of mainline track excepted from the PTC requirement if they no longer carry any toxic-by-inhalation material, it is possible that railroads will begin to refuse to carry this class of HazMat.

Railroads that suspend or curtail service because they have not met the PTC deadline, however, may violate their common carrier obligations (pursuant to 49 U.S.C. § 11101), including the obligation to carry HazMat. On September 3, Chairman Elliott of the Surface Transportation Board stated, in a letter to Sen. John Thune (Chairman of the Committee on Commerce, Science, and Transportation), that a carrier-initiated curtailment due to that carrier's noncompliance with the PTC requirement would be a matter of first impression before the Board. Sen. Thune has predicted that service impacts could be felt as early as November, when the railroads could start winding down their operations in anticipation of the deadline.

Confirmation Hearing Held on September 17 for FRA Administrator Nominee Sarah Feinberg

On September 17, the Senate Committee on Commerce, Science, and Transportation held a confirmation hearing for Ms. Sarah Feinberg, President Obama's nominee to be the next administrator of the FRA. Ms. Feinberg has been serving as the Acting Administrator of the FRA since January 2015, and was nominated for the Administrator post on May 29. During her tenure at FRA, Ms. Feinberg has focused on rail accident prevention and transparency in rail investigations.

A native of West Virginia, Ms. Feinberg served for eighteen months as Chief of Staff to Mr. Anthony Foxx, Secretary of the Department of Transportation, before taking up the Acting Administrator post at FRA. While criticized by some for having fairly limited experience in transportation matters, Ms. Feinberg is no stranger to getting things done in Washington. She previously worked for former Congressman Rahm Emanuel as the Communications Director of the House Democratic Caucus, and later as a senior adviser at the White House. She has also worked in communications in the private sector. The Association of American Railroads supports her nomination. Petroleum trade associations criticized Ms. Feinberg after she told the press that industry needs to take greater responsibility for safe shipment of energy products.

During the confirmation hearing, Ms. Feinberg faced questions about the year-end deadline for implementation of PTC. (See article above for further information on PTC and the upcoming deadline.) After noting that several serious train accidents have occurred during her tenure as Acting Administrator, including the May 2015 derailment of an Amtrak passenger train in Philadelphia, Pennsylvania, which killed eight people and injured 200, Ms. Feinberg asserted that FRA will enforce the December 31 deadline if she is confirmed. She reiterated the position that FRA does not have authority to extend the deadline, and said that FRA will work with railroads to address technical and financial challenges related to PTC installation. During the hearing, Senators from both sides of the aisle expressed frustration that FRA does not appear to have a contingency plan in the event that Congress does not pass an extension.

Committee Chairman Sen. John Thune voiced his support for Ms. Feinberg's confirmation following the hearing. He noted that five out of nine of the Department of Transportation agencies, including FRA, are currently overseen by acting leaders who have not been through the Senate confirmation process. Ms. Feinberg is likely to be confirmed in the coming weeks.

A webcast recording of the hearing and copies of statements are available at: http://www.commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=10a0e71e-108d-45b4-bd76-40cf434a6108&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a

PHMSA Awards Grants to First Responders for HazMat Transportation Incidents

On September 2, 2015, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) announced the release of \$19.9 million in grants to first responders to address HazMat transportation incidents. All 50 states, as well as five U.S. territories and ten American Indian tribes, will receive grants. The grants are funded by annual user registration fees paid by shippers and carriers of certain HazMat.

The grants will be issued by PHMSA's Hazardous Materials Emergency Preparedness Program. This program supports planning, training, and preparedness for HazMat response teams. This year's grant cycle focused on the following activities:

1. emergency planning and training related to bulk transportation of energy products by rail and motor vehicle;
2. coordinating federal, state, and local emergency planning; and
3. providing HazMat training to volunteer organizations.

PHMSA Final Rule Streamlines Special Permits Process

On September 10, PHMSA issued a final rule to make the special permits application review process more efficient and transparent. *Hazardous Materials: Special Permit and Approvals Standard Operating Procedures and Evaluation Process*, 80 Fed. Reg. 54418 (Sept. 10, 2015). The final rule establishes standard operating procedures (SOPs) for PHMSA to follow when processing special permit applications. The SOPs will be codified in a new Appendix A to 49 C.F.R. Part 107. Special permits allow variations from PHMSA's Hazardous Materials Regulations (HMR) while achieving a level of safety at least equal to that required under the HMR. Special permits promote HazMat transportation efficiency and innovation, while fostering international commerce.

The SOPs set forth a process for PHMSA to follow when reviewing special permit applications:

1. Determine whether the application is complete;
2. Publish a summary of the application in the *Federal Register*;

3. Perform a technical evaluation (*i.e.*, whether the proposed permit will achieve a level of safety at least equal to that required under the HMR, or if no safety level is prescribed, whether the proposal is in the public interest and protects against risks to life and property) and a safety profile evaluation (*i.e.*, whether the applicant is fit to conduct the activity authorized in the special permit); and
4. approve or deny the permit.

PHMSA also announced that, in an effort to improve transparency in the application review process, it is developing an online portal for use by the public in submitting and checking the status of special permit applications. The system is designed to notify applicants when an application does not meet the required criteria.

The final rule takes effect on November 9.