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# STATE OF OREGON
Legislative Counsel Committee

November 15, 2018

To: Representative Ken Helm

From: Maureen McGee, Deputy Legislative Counsel

Subject: Safe Transportation of Oil by Rail

Enclosed is your requested LC draft relating to safe transportation of oil. This cover memo includes a very abbreviated discussion of potential issues to be aware of with the draft. Please let me know if you would like me to prepare a more detailed discussion for you at a later date.

Federal preemption of state-mandated contingency planning, generally

As you are likely aware, federal preemption is a significant concern in the legal landscape surrounding state regulation of oil transportation by rail. This LC draft amends and adds to the provisions of ORS 468B.300 to 468B.500—Oregon's oil and hazardous material spillage statutes. These statutes are Oregon's state corollary to the federal Oil Pollution Act of 1990 (OPA), which allows states to place stricter regulations than the OPA.[1] In recent years, both California and Washington have passed legislation that builds on those states' authority to regulate under the OPA by placing oil spill contingency planning and financial responsibility requirements on railroads. Those laws are currently being implemented by both states.[2] The goal in preparing this LC draft was to similarly constitute a proper expansion and exercise of state authority under the OPA. That said, there is still a potential risk that provisions of this LC draft could be challenged as impermissible regulation of railroads preempted under the Federal Railroad Safety Act or the Interstate Commerce Commission Termination Act (ICCTA).[3]

Common carrier obligations

Due to common carrier obligations under federal law, state laws cannot prohibit trains without approved contingency plans from operating within state boundaries.[4] To achieve the desired effect of this draft without conflicting with federal law, the language in the amendments to ORS 468B.345 by section 4 of the draft requires railroads that own or operate high hazard train routes to have an approved contingency plan on record but does not prohibit the trains from operating without one. Failure to comply with the contingency plan requirement, however, could subject a railroad that owns or operates a high hazard train route to civil penalties.[5]

[1] 33 U.S.C. 2701 et seq.
[2] *See* California Senate Bill 861 (2014); Washington House Bill 1449 (2015).
[3] 49 U.S.C. 20101 et seq.; 49 U.S.C. 10101 et seq.
[4] 49 U.S.C. 11101.
[5] *See* ORS 468.140 (1)(b) (imposing civil penalties for violation of any provision of ORS chapter 468B).

Financial responsibility statements

Section 15 creates new provisions requiring railroads that own or operate high hazard train routes to submit an annual financial responsibility statement to the Department of Environmental Quality. These provisions are similar to the financial responsibility provisions of Washington's oil train legislation. However, unlike Washington law, section 15 subjects a railroad that owns or operates a high hazard train route to possible civil penalties for failure to comply with the financial responsibility statement provisions.[6] A line of cases suggests that subjecting a railroad to civil penalties for failure to meet financial responsibility provisions could be argued to violate the federal Interstate Commerce Act,[7] but I am not aware of any legal challenge to recent state oil train legislation that has invoked those cases.

Railroad safety assessments and use; federal preemption concerns

Section 17 of the LC draft creates new provisions for levying an annual assessment on railroads that own or operate high hazard train routes. It may be argued that the proposed assessment in section 17 conflicts with the Commerce Clause of Article I, section 8, of the United States Constitution, the ICCTA, the federal Hazardous Materials Transportation Act (HMTA)[8] or the Railroad Revitalization and Regulatory Reform Act.[9] However, I believe a strong argument can be made that the assessment in this LC draft should withstand challenge under each of these provisions.

A colorable claim could also be raised that the assessment levied by section 17 of the LC draft conflicts with Article VIII, section 2, of the Oregon Constitution, which requires that "the proceeds from any tax or excise levied on, with respect to or measured by the extraction, production, storage, use, sale, distribution or receipt of oil or natural gas" be deposited in the Common School Fund. If the assessment in the LC draft were determined to be considered a tax on the distribution of oil, it is an open question as to whether Article VIII, section 2, applies to oil and natural gas produced outside Oregon. The Attorney General concluded in a 1981 opinion that Article VIII, section 2, likely does not apply to oil or natural gas produced outside Oregon, but that conclusion was not free from "substantial doubt."[10] If a court were to determine that Article VIII, section 2, does not apply to oil or natural gas produced outside Oregon, then the constitutional provision might not present a bar to section 17 of the draft; none of the oil being transported over high hazard train routes is produced in Oregon. However, if a court were to determine that Article VIII, section 2, applies more broadly, such that it would include the assessment provided for in section 17, that would require the proceeds from the assessment to be deposited in the Common School Fund. Such a conclusion would both negate the purpose of the assessment and likely cause a conflict with the HMTA, which requires that fees imposed related to transporting hazardous material be used for a purpose related to transporting hazardous material.[11]

Advance notification requirements

Finally, this draft includes a new requirement that facilities receiving crude oil from railroad cars must provide advance notification of those shipments to the Department of

[6] *See* ORS 468.140 (1)(b) (imposing civil penalties for violation of any provision of ORS chapter 468B).
[7] *City of Chicago v. Atchison*, 357 U.S. 77 (1958); *Railroad Transfer Service, Inc. v. City of Chicago*, 386 U.S. 351 (1967).
[8] Hazardous Materials Transportation Act of 1975, 49 U.S.C. 5101 et seq.
[9] Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. 11501.
[10] 41 Op. Att'y Gen. 552 (1981).
[11] 49 U.S.C. 5125 (f)(1).

Environmental Quality. This requirement is modeled after Washington law. The provision is directed at facilities, rather than at the owners or operators of high hazard train routes, because the Pipeline and Hazardous Materials Safety Administration has determined in multiple preemption rulings that advance notice requirements of hazardous material transportation are generally preempted under the HMTA.[12] It is my understanding that not all trains transporting oil as cargo over high hazard train routes deliver oil to facilities in this state. Thus, the advance notifications required by this provision will likely not provide the department with a full and accurate picture of all oil being transported throughout the state at any given time.

Encl.

[12] *See* "Index to Preemption of State and Local Laws and Regulations under the Federal Hazardous Material Transportation Law," December 31, 2017, at 31, https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/docs/standards-rulemaking/hazmat/preemption-determinations/57061/preemption-index-march-2017-december2017.pdf.