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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

April 25, 2016

Honorable Anthony Foxx, Secretary
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, DC 20590

Re: Oil Train Safety

Dear Secretary Foxx:

I am writing to request that the U.S. Department of Transportation (USDOT) and the Federal Railroad Administration (FRA) consider additional measures to reduce the risk of oil train accidents. The potential for such accidents continues to threaten New York's communities, environment and the financial resources of the State and its local governments.

A 2014 report produced pursuant to Governor Andrew M. Cuomo's Executive Order 125 emphasized that New York State is a major rail conduit for North American crude oil.¹ The report identified two major routes for oil transport in the State. The CSX rail line enters the State from western Pennsylvania and travels near the shore of Lake Erie to Buffalo, then roughly follows the route of the New York State Thruway through Syracuse to Albany, and then travels south to New Jersey along the western shore of the Hudson River. The Canadian Pacific rail line enters the northeastern corner of New York from Canada and travels south near the shore of Lake Champlain before continuing to Albany. While both of these routes pass through numerous communities, only one (Buffalo) is designated as a High Threat Urban Area community in which federal regulation requires high hazard flammable trains containing tank cars that do not meet enhanced safety standards to operate at slower speeds.²

As State Comptroller, I serve as administrator of the New York Environmental Protection and Spill Compensation Fund. The Fund, created in 1977, provides resources to remediate spills of petroleum products and compensate parties for certain damages

¹New York State Department of Environmental Conservation, et al., *Transporting Crude Oil in New York State: A Review of Incident Prevention and Response Capacity*, April 30, 2014.

²FRA Emergency Order No. 30, Notice No.1.

resulting from oil spills. With approximately 16,000 spills reported annually, the Fund provides important benefits to public health and environmental quality in New York State. State law imposes strict liability on those responsible for releases of petroleum for cleanup costs and direct and indirect damages to third parties. Because the Fund is also strictly liable for these costs, in the absence of payments by responsible parties, the Fund incurs the cost of cleanup and damage payments to third parties which could include, but are not limited to:

- damage to personal property;
- damage to real estate;
- loss of income;
- damage to natural resources; and
- loss of tax revenue.

The Fund receives per-barrel license fees and surcharges for petroleum products transferred to storage facilities licensed by the State of New York as well as costs recovered from responsible parties. In part to address the potential for increased risks associated with oil trains, New York State's Budget for State Fiscal Year 2015-16 increased the fees that capitalize the Fund and increased its maximum authorized level from \$25 million to \$40 million.

Because the Fund is strictly liable for cleanup costs and damages to third parties resulting from oil spills, should such costs exceed amounts in the Fund, the State would have to rely upon its General Fund resources to pay for outstanding cleanup costs and damages. The possibility of a major disaster resulting from an oil train accident thus creates significant budgetary risks for the State and its taxpayers.

I appreciate the fact that in the aftermath of the tragic 2013 Lac-Mégantic accident in Quebec, your Department has been active in evaluating the increased risks associated with the train transport of crude oil from the Williston Basin. As you know, among your agency's most noteworthy findings are estimates that there may be 10 accidents of "higher consequence" involving oil trains within the next 20 years. Further, the USDOT found that nine of these accidents could entail environmental damages and monetized injury and fatality costs exceeding \$1.15 billion in each case, while one of these accidents could incur damages exceeding \$5.75 billion.³ Costs associated with the Lac-Mégantic accident — cleanup costs estimated at \$200 million and total damages estimated at \$2.7 billion — appear to fall in the mid-range of these estimates.⁴ Given the industry's current traffic patterns, the USDOT's findings imply that the risk of such an accident occurring in New York is very real. I am concerned that a major oil train accident would jeopardize the viability of the Fund and impose enormously burdensome costs on New York's taxpayers.

³ USDOT, Draft Regulatory Impact Analysis for Enhanced Hazardous Materials Tank Car Standards and Operational Controls for High-Hazard Flammable Trains (Draft RIA Tank Car Standards). July 2014.

⁴ USDOT, Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains. Final Rule. May 8, 2015.

If the Lac-Mégantic accident had occurred in New York State, it is highly likely that the Fund would have become liable for a portion of the cleanup costs and damages above those covered by any railroad insurance and assets. Statutory provisions related to the Fund authorize the New York State Attorney General to recover Fund expenditures under such a scenario. However, recoveries – when available – often take years to materialize. Like the State, local governments and school districts in New York face an unknown level of risk. A major accident could damage municipal buildings, local roads and bridges and other facilities. Any major damage to industrial or commercial properties could result in a loss of employment and local revenue, and a decrease in property tax bases for affected localities.

As your Department’s analysis references, the shippers of oil and the rail companies they utilize are not insured against the full liability likely to occur from a serious accident involving trains carrying crude oil or other hazardous materials. The USDOT states that Class I railroads commonly are self-insured at \$25 million, although the amount may be as much as \$50 million for some railroads, and Class II and III railroads typically are self-insured below the \$25 million level.⁵ The railroad involved in the Lac-Mégantic accident (the Montreal, Maine and Atlantic Railway) was insured only at a level of \$25 million. A year after the accident, the company's assets were sold in a bankruptcy proceeding. Although a recently announced settlement fund will cover some of the remaining costs, significant expenses may still be borne by damaged parties and/or the provincial and national governments.

A review of Securities and Exchange Commission filings of the two major carriers of crude oil in New York State – Canadian Pacific Railway Limited and CSX Corporation – leaves open questions about the companies’ insurance coverage for large-scale accidents. The 2014 Annual Report filed by CSX states that the railroad is self-insured at a level of \$25 million per occurrence for what it terms as “non-catastrophic” property damage, which it defines as damage caused by a train derailment, and for catastrophes such as floods or hurricanes at a level of \$50 million per occurrence.⁶ Should an event of “higher consequence” as envisioned by the USDOT occur, such insurance would not be adequate to cover potential costs. The Canadian Pacific filings do not provide information on levels of insurance per occurrence.

Federal resources may be available to address petroleum spills under the Oil Spill Prevention Act of 1990, or, in the case of a disaster declaration, under the Stafford Act. However, it is not clear that these other sources of funding would be adequate to cover the full range or level of damages resulting from a catastrophic oil train accident. For example, in the case of a federal disaster declaration under the Stafford Act, federal agencies may, using available funds, step in and undertake cleanup actions. The Stafford

⁵ Draft RIA Tank Car Standards.

⁶ The CSX 2014 Annual Report is available at: http://investors.csx.com/phoenix.zhtml?c=92932&p=irol-sec&secCat01Enhanced.10_rs=21&secCat01Enhanced.10_rc=10.

Act also provides for assistance to individuals, covering damage to property and certain expenses up to a cap of \$25,000 per person or household.⁷

For spills that may threaten the navigable waters of the United States, the Federal Oil Spill Liability Trust Fund (Federal Trust Fund) Emergency Fund may provide emergency response funding of up to \$50 million a year for the federal government to undertake remediation of oil spills and natural resource damage assessments.⁸ If \$50 million is inadequate to address the remediation, an additional \$100 million may be provided to the Emergency Fund. If the spill takes place in U.S. navigable waters, or their adjoining shorelines, parties may be eligible to submit claims for reimbursement of uncompensated damages and cleanup costs from the Federal Trust Fund.⁹ The maximum amount available from the Federal Trust Fund for any one incident is the lesser of \$1 billion, or the balance in the Federal Trust Fund. Given the limitations upon potential federal responses under current law, New York's Fund could be liable for damages not addressed by federal assistance. If any accident approaching the scale of the Lac-Mégantic derailment were to occur in New York, even a small fraction of the damages would overwhelm the Fund's current resources.

I am aware that both the USDOT and New York State have acted to address oil train risk in the aftermath of the major railroad accidents of recent years. Notable federal agency actions have included safety advisories, emergency orders and proposed and final regulations addressing the following issues.

- Securement of unattended trains.
- Enhanced standards for tank cars carrying flammable liquids.
- Operating standards for trains that include a certain number of tank cars carrying flammable liquids.
- Emergency response planning for trains carrying certain volumes of flammable liquids.
- Accident reporting requirements.
- Track and rail car inspection and maintenance standards.
- Testing and packaging standards for flammable liquids.
- Notice to State Emergency Response Commissions of routes traveled by trains carrying certain volumes of flammable liquids.
- Minimum requirements for the size of train crews.
- An increase in the number of federal bridge inspectors.
- Providing railroad grants for safe transportation of energy products by rail.

Building on Executive Order 125, New York State appropriated \$2.1 million in its 2015-16 budget to augment State programs to mitigate risks associated with the transport of petroleum by rail through the State and to enhance response to potential accidents. These

⁷ U.S. Federal Emergency Management Agency, *The Stafford Act: Robert T. Stafford Disaster Relief and Emergency Assistance Act, as Amended*. Public Law 100-707. April 2013.

⁸ More information about the Federal Trust Fund is available at: http://www.uscg.mil/npfc/About_NPFC/osltf.asp.

⁹ *Oil Spill Liability Trust Fund (OSLTF) Funding for Oil Spills*, U.S. Department of Homeland Security and United States Coast Guard. NPCUB 16465.2.

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programs are intended to upgrade the State's preparedness to address rail accidents involving flammable liquids, and to identify defects in tracks and railcars, potentially preventing accidents.

These actions are welcome and can help improve the operational safety of trains carrying flammable liquids. However, due to the interstate nature of rail transport, it seems clear that broader systemic solutions to address these risks must be instituted at the federal level. I respectfully request that you consider these additional measures:

- Expand the number of municipalities where reductions in operating speeds are required to reduce the likelihood and severity of accidents and the potential for loss of life, property damage and environmental harm from accidents involving hazardous materials. As you know, the population of Lac-Mégantic is far less than the "high-threat urban" threshold where reduced speeds are currently required, yet the loss of life there, and the costs of cleanup and liability, were extremely high.
- Reroute trains carrying hazardous materials around population centers to the extent possible and increase required staffing and/or required training levels above those recently proposed for trains carrying such materials.
- Ensure that adequate resources and oversight are directed toward track maintenance. As noted in the FRA's "Safety Advisory 2015-05 Addressing Rail Head Surface Conditions," the February 16, 2015 CSX oil train derailment in Mount Carbon, West Virginia may have been caused by a misdiagnosed rail defect. Failures such as this could be evidence that track and railcar monitoring and maintenance programs may be overburdened and under-resourced.
- Review the FRA's Action Plan for the Safe Transportation of Energy Products to determine if there are additional measures available to mitigate risks related to at-grade crossings. The March 24, 2016 collision of a Canadian Pacific train with a propane truck at an at-grade crossing in Callaway, Minnesota demonstrates the potential risks associated with these crossings.
- Partner with State and local officials to evaluate their emergency response planning and preparedness activities and determine if their programs have the resources needed to respond to high-risk spills associated with train accidents. In Ripley, New York, emergency responders were able to use a pre-staged foam trailer to respond to a March 1, 2016 derailment of a Norfolk Southern train, which resulted in an ethanol spill. This equipment was available due to New York State's actions to prepare for potential spills from oil trains. It is crucial that federal agencies support local efforts to prepare for and deal with spills, including support for required equipment and materials.

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- Require that railroad safety plans mandated in new federal rules and orders, as well as the results of track and railcar safety monitoring, are shared with State Emergency Response Commissions. Sharing this information will help states better understand risks and prepare to address accidents should they occur.
- Require that railroads acquire insurance or provide financial security that adequately addresses emergency response, remediation and liability costs associated with “higher consequence” accidents such as those forecast in the USDOT’s analysis to ensure that states and communities are not burdened financially in case of a disaster.

The increased volume of crude oil transported by rail in recent years increases the potential for catastrophic accidents. While railroads transport a large volume of high-risk materials on a daily basis, the majority of such trips are accomplished safely. However, the risks to human life, property, natural resources and public budgets require the industry and its regulators to take every possible step to ensure the safety of the communities along our rail lines. As you know, this requires development of realistic and adequate mitigation strategies and assurance of the availability of resources needed to address risks that are inherent in this transport.

Any train accident involving crude oil or other hazardous materials creates the risk of significant human trauma and disruption to communities. The possibility of an accident on the scale of the Lac-Mégantic tragedy is not only a significant hazard to New York residents and environmental resources — it is also a financial threat. A higher consequence incident would not only deplete the State’s mechanism for funding cleanup of petroleum spills, but could also divert funding from other vital services. I respectfully ask that you take additional steps to reduce such risks as quickly as possible.

Sincerely,
/s/
Thomas P. DiNapoli
State Comptroller

cc: Sarah Feinberg, FRA, Administrator
Hon. Andrew Cuomo, Governor
Hon. Kirsten Gillibrand
Hon. Charles Schumer
Hon. Yvette Clarke
Hon. Chris Collins
Hon. Joseph Crowley
Hon. Daniel Donovan
Hon. Eliot Engel
Hon. Chris Gibson
Hon. Richard Hanna
Hon. Brian Higgins

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