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**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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<b>AGRIUM INC. and</b>	)	
<b>AGRIUM U.S. INC.</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>Docket No. 42145</b>
	)	
<b>CANADIAN PACIFIC RAILWAY</b>	)	
<b>COMPANY</b>	)	
	)	
<b>Defendant.</b>	)	

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**MOTION TO DISMISS OF CANADIAN PACIFIC RAILWAY COMPANY**

Pursuant to 49 U.S.C. § 11701(b) and 49 C.F.R. § 1111.5 (2014), Canadian Pacific Railway Company (“CP”), by and through its undersigned counsel, hereby moves to dismiss the May 15, 2015 Complaint (“Complaint”) of Agrium Inc. and Agrium U.S. Inc. (collectively, “Agrium”) in the above-captioned docket. The Board should dismiss the Complaint because it presents no live case or controversy and is not ripe for consideration.

**BACKGROUND**

Agrium’s Complaint challenges Item 54 of CP’s Tariff 8, which establishes certain terms and conditions for the transportation of commodities classified as Toxic Inhalation Hazards (“TIH”). TIH is one of the most lethal categories of substances. For example, exposure to anhydrous ammonia, a TIH commodity that Agrium has shipped on CP, *see* Complaint at ¶¶ 18–26, can cause life threatening health effects within ten minutes at a concentration of only 2,700 parts per million. Unfortunately, CP is well acquainted with the dangers associated with transporting TIH by rail. In January 2002, a CP train carrying anhydrous ammonia derailed near Minot, North Dakota. Several cars suffered catastrophic fractures and instantaneously released

approximately 146,700 gallons of anhydrous ammonia into the atmosphere, resulting in one fatality, numerous other serious personal injuries, property damage and environmental impacts. See National Transportation Safety Board, Railroad Accident Report NTSB/RAR-04/01, *Derailment of Canadian Pac. Ry. Freight Train 292-16 and Subsequent Release of Anhydrous Ammonia Near Minot, ND, January 18, 2002*, at 1, 5 (March 9, 2004). Although CP goes to great lengths to ensure the safety of TIH shipments, and almost all such shipments move by rail without incident, an accidental release could have catastrophic consequences, and even a minor incident involving a train carrying TIH can give rise to substantial liabilities due to its dangerous nature.

Given the unique and catastrophic risks associated with TIH products, CP would not participate in the movement of these commodities if given the choice. CP's common carrier obligation, however, currently requires that CP provide rail transportation service to TIH shippers on reasonable request. 49 U.S.C. § 11101(a); *Union Pac. R.R.—Pet. for Declaratory Order*, FD 35219, slip op. at 3-4 (STB served June 11, 2009). Although the law imposes the obligation on CP to provide carriage for TIH products, many of the risk factors associated with transporting these products remain within the exclusive control of TIH shippers and their customers – including, in particular, the threshold decision to move TIH by rail. CP has very limited ability to influence shipper decisions concerning these risk factors. Shippers control, for example, the origin and destination points of shipments, the length of haul, and the volume of TIH commodity to ship. These choices are significant because the probability of a release increases when shippers transport TIH commodities over longer routes, and the potential severity of a release increases as TIH volumes increase and when shippers select origin and destination points that require shipments through more densely populated areas.

Further, TIH commodities are shipped in tank cars that are not made by CP but rather owned or leased by shippers. The tank cars are supplied, maintained, loaded and unloaded by the shippers and tendered to CP for shipment to a specified destination. Tank car design is a key aspect of safety and, in the event of an incident, can be the difference between containment and catastrophic release of TIH products. Although the federal government has established standards for hazardous material tank cars, the current rules permit the use of cars to move TIH that do not meet the most recent design standards and offer significantly less protection in the event of an incident than a car built to recent design standards. Indeed, current rules continue to permit use of tank cars constructed with non-normalized steel notwithstanding the fact that the industry ceased manufacturing such cars in 1989 because of concerns that non-normalized steel provided an inferior level of protection against catastrophic release of TIH in an incident than tank cars constructed with normalized steel.<sup>1</sup> See *Hazardous Materials: Improving The Safety of Railroad Tank Car Transportation of Hazardous Materials*, 74 Fed. Reg. 1770, 1784–85 & n.31 (January 13, 2009). As CP noted in its Answer to Agrium’s Complaint, National Transportation Safety Board reports on train accidents resulting in TIH releases in Minot, North Dakota, (2002) and Macdona, Texas (2004) highlight the substantial impact that TIH shippers’ choices, including the choice of tank cars used for rail transportation, have on the risk to public health and safety and the importance of ensuring that shippers properly account for these risks in making such decisions. See CP Answer at ¶ 40 (June 4, 2015). Even today, despite the known risks and

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<sup>1</sup> In low temperatures steel becomes brittle and is more susceptible to fracturing and separation. “Normalizing” is a heat treatment process that lowers the temperature at which steel will become brittle, making the tank cars more resistant to fractures and reducing the incidence of brittle failures during rail accidents. Railway Investigation Report R10T0020, Transportation Safety Board of Canada, <http://www.bst-tsb.gc.ca/eng/rapports-reports/rail/2010/r10t0020/r10t0020.asp> (last visited June 30, 2015).

the availability of tank cars that are built to substantially higher safety standards, some TIH shippers, including Agrium, continue to ship TIH in older model tank cars.

CP recognizes that it may be appropriate to allocate the risks of a TIH incident to CP where an incident is attributable to CP's negligence or willful misconduct, and Tariff 8, Item 54 in no way seeks to, or does, relieve CP of its obligations under federal regulations or of its responsibility for harm caused by CP's negligence or willful misconduct. However, CP could also face liability for a TIH incident caused by factors outside of CP's control, such as where an incident is caused by acts or omissions of a TIH shipper, intentional or negligent actions of third parties, or acts of nature (*e.g.*, extreme weather, earthquakes and avalanches).<sup>2</sup>

Given the serious risks associated with transporting TIH substances, and the fact that many of the risk factors are outside of CP's control, CP on December 1, 2011, promulgated specific provisions at Item 54 of its Tariff 8 to address the indemnity and defense obligations that would apply in the case of liability arising from an incident involving TIH (other than liability arising from negligence or willful misconduct of CP).

Tariff 8, Item 54 provides:

**Indemnification and liability**

Customer shall fully indemnify and defend CP from and against any and all liabilities, claims, lawsuits, actions, applications, demands, complaints, loss, harm, judgments, liens, awards, costs (including, without limitation, attorney's fees and other reasonable costs of litigation), emergency response and evacuation costs, remediation costs, and government oversight costs, damages (including without limitation special and consequential damages), injury to or death of persons, or adverse effects on wildlife or the environment (collectively "Liabilities") which are caused by or arise from:

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<sup>2</sup> According to Federal Railroad Administration, Office of Safety Analysis data, from January 2010 to February 2015, seventy-seven derailments, seven collisions and forty-three other accidents were caused by extreme weather.

- Any failure of, or defect in Private Equipment tendered by Customer for the transportation of TIH commodity;
- Any actual or threatened discharge, release, leak or escape of the TIH commodity from the Private Equipment tendered by Customer for the transportation of TIH commodity;
- Loading, sealing and/or securing the TIH commodity by Customer in the Private Equipment;
- Removal, unloading, transfer, delivery, treatment, dumping, storage, or disposal of the TIH commodity carried in the Private Equipment; or
- Failing to properly placard or failing to provide complete and accurate shipping information concerning the TIH commodity in such Private Equipment.

However, the Customer shall have no such obligation to indemnify CP to the extent that Liabilities arise from the negligence or willful misconduct of CP. Additionally, nothing contained in this Item 54 shall extend to limit any liability owing to the Shipper by CP that is not permitted by law.

Customer's indemnity obligations under this Item do not include claims for alleged loss, damage, or delay to the TIH commodities.

#### **Joint liability**

If Liabilities are caused in whole, or in part, by the joint, contributory, or concurrent negligence or fault of CP, responsibility for Liabilities shall be adjudicated under usual principles of comparative fault under the law governing joint liability, whereby the trier of fact shall determine the percentage of responsibility for CP, Customer, and any other party. CP shall be liable for the amount of such Liabilities allocated to CP in proportion to CP's percentage of responsibility. Customer shall be liable for all other Liabilities.

CP is not alone in establishing TIH indemnity provisions. *See, e.g.,* Union Pacific UP Tariff 6607, Items 50 and 60.<sup>3</sup>

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<sup>3</sup> Available at: <http://c02.my.uprr.com/wtp/pricedocs/UP6607BOOK.pdf>.

Complainant Agrium is an international manufacturer and distributor of agricultural nutrients and industrial products, including anhydrous ammonia. Complaint ¶¶ 1–2. Agrium ships TIH on CP from its Alberta, Canada facilities approximately 1,000 miles to its facilities in Leal, North Dakota. *Id.* at ¶ 18. Roughly three-quarters of the mileage is in Canada. Although Agrium’s Complaint also references moves from its Alberta, Canada facilities to its Glen Falls, New York facility, *id.*, Agrium has not shipped TIH to the Glen Falls facility in more than one year. Historically, that move has routed east to Montreal and then south to Glen Falls, New York.

Until recently, Agrium’s moves operated under a rail transportation contract. However, the parties were unable to reach agreement on the terms of a new transportation contract. Although CP offered to negotiate over the applicable TIH liability provisions in exchange for a commitment from Agrium to improve the safety of its TIH rail tank car fleet, Agrium refused. Rather than enter into such safety commitments, Agrium demanded a common carrier rate in contemplation of this action. Accordingly, service is now provided under CP’s pricing authority CPRS-2244B, which incorporates Tariff 8, Item 54.

Raising a scattershot litany of objections, Agrium’s Complaint seeks a determination by the Board that “the implementation and continued attempted enforcement by CP of [Tariff 8, Item 54] constitutes an unreasonable and unlawful practice in violation of 49 U.S.C. § 10702(2).” *Id.* at 2. Further, Agrium asks that the Board “enter an order directing CP to cease and desist from its unlawful practices and that [Tariff 8, Item 54] and any amended or successor Tariffs shall not be enforced or given effect in the provision of rail transportation service for Agrium by CP.” *Id.* The Board should dismiss Agrium’s Complaint.

## ARGUMENT

The Board may dismiss a complaint if it “does not state reasonable grounds for investigation and action.” 49 U.S.C. § 11701(b). Even construing the factual allegations in the light most favorable to Agrium, *see, e.g., Sierra Pacific Power Co. & Idaho Power Co. v. Union Pacific Railroad Co.*, STB Docket No. 42012 (STB served Jan. 26, 1998), the Complaint does not state reasonable grounds for investigation and action because Agrium’s objections to CP’s Tariff 8, Item 54 do not involve a live case or controversy and are not ripe for review by the Board.

This is not the first proceeding in which the Board has considered indemnity and comparative fault issues in connection with the transportation of TIH commodities. In Docket No. EP 677 (Sub-No. 1), the Board denied a request by the Association of American Railroads that the Board adopt a policy statement recognizing and approving the right of rail carriers to establish certain liability-sharing arrangements with shippers as a condition of transporting TIH commodities. *Common Carrier Obligation of Railroads – Transportation of Hazardous Materials*, Docket No. EP 677 (Sub-No. 1) slip op. at 4, n.8 (STB served April 15, 2011). The Board, noting the “sharp difference of opinion between railroad and shipper interests regarding the very nature of the Board’s authority,” *id.* at 3, declined to “issue such a policy statement in the abstract” adhering instead to its usual practice of resolving disputes on a case-by-case basis. *Id.* at 4, n.8.

In Docket No. FD 35504, moreover, the Board addressed a petition for declaratory order filed by Union Pacific Railroad Company concerning the reasonableness of TIH indemnity and comparative fault provisions in a Union Pacific tariff. *See Union Pacific Railroad Co.*, Docket No. FD 35504 (STB served April 30, 2013). Over the objection of chemical shippers, who

argued that there was not a sufficient controversy to support the institution of a declaratory order proceeding, the Board instituted the proceeding. *Union Pacific Railroad Co.*, Docket No. FD 35504, slip op. at 3-4 (STB served Dec. 12, 2011). While CP was supportive of Union Pacific's petition, the Board, in ultimately resolving the petition, made clear that it did not believe it would be prudent to make "broad pronouncements" concerning carriage of TIH commodities. *Union Pacific Railroad Co.*, Docket No. FD 35504, slip op. at 3 (STB served April 30, 2013).

Presumably recognizing that it had entered into potentially perilous territory where its decisions could have significant and unintended consequences, the Board again emphasized the need for agency restraint in addressing disputes about TIH transportation:

In recent years, a number of issues related to the carriage of TIH commodities have been raised at the Board, often with complex and potentially broad implications. In general, we have determined that it is prudent to tread carefully in this area, avoiding broad pronouncements and relying instead on narrow adjudications of specific tariffs.

*Id.* at 3 (footnote omitted).

Disregarding the Board's admonition that it is appropriate to "avoid broad pronouncements" in favor of "*narrow adjudications of specific tariffs*," *id.* (emphasis added), Agrium's Complaint launches an exceptionally broad (albeit vague and indefinite) challenge to the defense, indemnity and joint liability provisions included in CP's Tariff 8, Item 54. There is nothing "narrow" about the adjudication that Agrium seeks here. Based on Agrium's sweeping assertions, for example, resolving the Complaint would require the Board to conduct a detailed, yet entirely hypothetical analysis of:

- The interaction of Tariff 8, Item 54 and “defense, indemnity, and liability laws in the states that CP operates,” Complaint at ¶¶ 30, 34;<sup>4</sup>
- The interaction of Tariff 8, Item 54 and “otherwise applicable joint liability law in the individual states that CP operates,” *id.* at ¶ 44;
- The interaction of Tariff 8, Item 54 and unspecified “state and federal law and public policy including, but not limited to railroad employer and environmental strict liability regimes and state tort laws,” *id.* at ¶¶ 30, 34;
- The interaction of Tariff 8, Item 54 and unspecified “[l]ongstanding principles of state and federal law [that] establish the involved rail carrier’s potential sole and joint liability, the principles and standards of fault that should apply in such adjudications, and in instances where there may be joint, contributory, or concurrent negligence, the amount of damages payable by a liable railroad and other potentially liable parties,” *id.* at ¶ 44;
- Whether Tariff 8, Item 54 would adversely impact unspecified “carrier safety and safety incentives for the protection of railroad employees and the public that federal and state policymakers have considered and factored into the prevention-oriented statutory and common law regimes governing liabilities and damages,” *id.* at ¶¶ 30, 34;
- The application of Tariff 8, Item 54 “where the law has otherwise imposed on CP responsibility” for the “Liabilities” as defined in Item 54, *id.* at ¶¶ 30, 34, 38, 39; and
- The relationship between Tariff 8, Item 54 and “CP’s common carrier service obligations to Agrium,” *id.* at ¶¶ 30, 34.

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<sup>4</sup> “CP” as used here refers to U.S. rail operating entities doing business as “Canadian Pacific.” The Canadian Pacific U.S. operating entities operate in ten U.S. states.

Thus, while nominally a challenge to a single tariff provision, Agrium's Complaint plainly attempts to obtain just the sort of "broad pronouncements" concerning TIH carriage issues in the abstract that the Board has said should be avoided.

Such a pronouncement would have far reaching, industry-wide, and potentially significant unintended consequences for public health and safety. Importantly, a determination that Tariff 8, Item 54 is unreasonable would relieve TIH shippers of risks associated with the very decisions that the Board has ruled are generally to be determined by the shipper, not the railroad. *See e.g., Union Pac. R.R.—Pet. for Declaratory Order*, FD 35219, slip op. at 3-4 (STB served June 11, 2009). These decisions include the origin and destination, *i.e.*, the distances the TIH is to be transported by rail and the proximity to population centers, the concentration and form (liquid or gas) of the TIH, the volume to be transported, and when the TIH is to be shipped. Also, the shipper typically decides the type of tank cars used. Each of these decisions have a substantial impact on the safety of TIH rail transportation and on public health and safety. However, if shippers do not properly bear the costs of such critical decisions, they are unlikely to sufficiently take these costs into account in making such decisions.

Further, under the current regulatory construct, carriers have limited tools that can be used to influence shipper decisions on these critical decisions. CP has found that its indemnity provisions provide effective leverage in negotiations with shippers regarding such decisions. A broad pronouncement that finds CP's Tariff 8, Item 54 unreasonable would deprive rail carriers of this crucial leverage.

The Complaint involves no actual case or controversy regarding the application of Tariff 8, Item 54. Pursuing this matter would require the Board to address myriad questions concerning the interaction of Tariff 8, Item 54 and unspecified federal and state laws and policies on a

hypothetical basis. These hypothetical problems alleged by Agrium are not reasonable grounds for investigation and action at this time because they involve facts and circumstances which have not arisen and which may never arise. Although Agrium objects to CP's "implementation and attempted continuing enforcement of CP's Tariff," Complaint at 2, since its publication almost four years ago, CP has not had occasion to "enforce" Tariff 8, Item 54 against Agrium or any other shipper because, fortunately, no TIH incidents have occurred which would require application of this provision.

Importantly, the Complaint is devoid of any allegation of *actual harm* to Agrium as a result of Tariff 8, Item 54. Absent harm, there is no pressing need for the Board to consider Agrium's challenge in the abstract world of hypotheticals. Moreover, while Agrium alleges no current harm, issuing the sort of broad pronouncements Agrium is seeking could, as noted above, adversely affect public health and safety by removing an incentive for shippers to mitigate TIH transportation risk factors within their control.

Given the speculative nature of Agrium's assertions and the lack of any current alleged harm, the Complaint is really a petition for declaratory order in substance, if not in form. The Board will dismiss a petition for declaratory order on ripeness grounds where it finds that the need for the determination raised by a petitioner is premature, or the alleged harm is speculative. The Board's decision in *Ag Processing Inc A Cooperative—Petition for Declaratory Order*, Docket No. FD 35387, 2012 WL 1646867 (STB served May 9, 2012), closely mirrors the circumstances of this case and is instructive concerning the Board's understandable reticence to decide ill-defined controversies. There, the shipper challenged the reasonableness of the rail carrier's Inclement Weather Provision tariff. *Id.* at \*1–2. Because the conditions triggering application of the tariff had never occurred, and were not reasonably likely to occur, the Board

dismissed the petition finding a lack of a present controversy. *Id.* at \*3–4. Importantly, the Board concluded:

We note that it appears to be common industry practice for railroads to create rules to govern overweight railcars. We are reluctant here to opine on the legality of the specifics of Norfolk Southern's particular provision in the absence of actual or likely concrete injury to Petitioners. Such a ruling could have industry-wide implications and possible unintended consequences.

*Id.* at \*4. Numerous Board decisions dismissing declaratory order petitions on comparable grounds exist. *See Bessemer and Lake Erie Railroad Co.*, 1990 WL 288377 (I.C.C., July 10, 1990); *see also San Luis & Rio Grande Railroad*, STB Docket No. FD 35380, 2011 WL 3055358 (STB served July 21, 2011); *Union Oil Company of California*, 1988 WL 225289 (I.C.C. Sept. 12, 1988); *Arvada Transfer Company, Inc.*, 1988 WL 226030 (I.C.C. Mar. 8, 1988). The Board should apply similar reasoning in this matter and dismiss the Complaint on ripeness grounds.

Initially, Agrium, seeking to bypass the Board, challenged CP Tariff 8, Item 54 in the U.S. District Court for the District of North Dakota. The District Court's analysis in dismissing that action is also instructive in considering Agrium's Complaint here. In a May 18, 2014 decision, the District Court concluded that Agrium's challenge was unripe and must be dismissed. The Court reasoned in pertinent part:

In this case Agrium asks the Court to trek deep into the regulatory jungle and issue guidance as to how Item 54 of Tariff 8 may apply to claims under [the Federal Employers' Liability Act], [the Locomotive Inspection Act], [the Safety Appliances Act], [the Comprehensive Environmental Response, Compensation, and Liability Act of 1980], and other provisions of federal law, along with North Dakota law relating to waivers and comparative fault. The Court concludes any such opinion would be advisory and a waste of scarce judicial resources.

The complaint identifies no incident involving the release of TIH materials, no TIH exposure, and no attempt by Canadian Pacific to enforce Item 54 of Tariff 8. Agrium contends there is an ongoing dispute over the meaning, enforceability, and lawfulness of Item 54 of Tariff 8. Agrium's contentions are unavailing. It is not the province of the federal courts to provide advisory opinions on the meaning, enforceability, and lawfulness of disputed contract provisions absent any allegation of breach of contract or actual injury. It was Canadian Pacific's insistence on new contractual terms which lead Agrium to file this lawsuit. Canadian Pacific may decide to change those terms yet again. No TIH incident may ever occur. The hypothetical situations which may be envisioned in relation to a TIH incident are endless.

*Agrium Inc. v. Soo Line R.R. d/b/a Canadian Pac. Railway Co.*, Case No. 1:13-cv-118, "Order Granting Defendant's Motion to Dismiss," slip op. at 7 (D.N.D. May 8, 2014).<sup>5</sup>

While the Board is not subject to the same case or controversy and ripeness requirements as an Article III court, the Board has broad discretion to manage its own dockets. *See Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 527 (2007) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities."). This means that the Board may defer consideration of an issue in appropriate circumstances. *See Mobil Oil Exploration & Producing Se. Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230–31 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures and priorities . . . an agency need not solve every problem before it in the same proceeding.").

The Board, therefore, certainly may consider the District Court's reasoning in deciding whether Agrium's Complaint states reasonable grounds for the Board to commence an

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<sup>5</sup> A copy of the District Court's decision is included as Attachment 1 to CP's Motion to Dismiss.

investigation and action at this time. As the District Court found, and as is true here, Agrium's objections are, at best, unripe. Just as it did in federal District Court, Agrium asks the Board "to trek deep into the regulatory jungle" and resolve issues that may or may not arise in an "endless" number of "hypothetical situations which may be envisioned in relation to a TIH incident."

Moreover, as the District Court noted, there is no guarantee that the specific Tariff provisions challenged in the Complaint will apply in the case of a TIH incident. As CP explained in its June 4, 2015 Answer to the Complaint, CP is generally willing to negotiate on its proposed defense, indemnity, and liability contract language if the TIH shipper agrees to take reasonable actions to reduce the risks associated with transporting TIH commodities. *See* CP Answer at ¶ 20 (June 4, 2015).<sup>6</sup> CP was willing – and remains willing – to negotiate with Agrium on the terms of service for the transportation covered by CPRS-2244B, including defense, liability and indemnity provisions, but Agrium opted instead to request a common carrier rate. In particular, CP was willing to negotiate on its proposed defense, indemnity, and liability contract language in exchange for a commitment to replace older tank cars with newer tank cars that are manufactured to higher safety specifications.

Even the arguably narrower objections Agrium raises to Tariff 8, Item 54 are more appropriate for resolution if and when CP ever seeks to enforce Tariff 8, Item 54 in response to an actual incident involving TIH. For example, Agrium argues that the portion of Item 54 specifying that the defense and indemnity requirements do not apply to liabilities arising from the negligence or willful misconduct of CP is unclear as to how such a determination of

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<sup>6</sup> In this regard, the Board should reject out of hand Agrium's request that the Board make findings or determinations as to "any amended or successor Tariffs" that CP might file. *See* Complaint at 2, 17.

negligence or willful misconduct is to be determined and by whom. *See* Complaint at ¶¶ 12, 37. Likewise, Agrium complains that the joint liability provisions of Item 54 do not specify how “joint, contributory, or concurrent negligence or fault” for TIH incident liabilities would be determined or by whom. *See id.* at ¶¶ 16, 43. Tariff 8, Item 54 adequately describes the terms the conditions for TIH carriage by CP and establishes appropriate general standards to be applied. If and when CP ever seeks to enforce this Tariff provision, the parties involved can address the kinds of specific implementation issues that Agrium raises in its Complaint based on the facts and circumstances of the particular situation. In the meantime, there are no reasonable grounds to try to address in advance how Tariff 8, Item 54 would apply in potentially endless hypothetical situations.

Additionally, recent developments in Congress counsel against the Board’s consideration of these issues in the abstract. Specifically, pending legislation would require the Secretary of Transportation, in consultation with the Secretary of Homeland Security to “initiate a study on the level and structure of insurance for a railroad carrier transporting hazardous materials.”

Hazardous Materials by Rail, S.1626, 114th Cong. § 431. The study requires an evaluation of:

(1) the level and structure of insurance, including self-insurance, available in the private market against the full liability potential for damages arising from an accident or incident involving a train transporting hazardous materials;

(2) the level and structure of insurance that would be necessary and appropriate—

(A) to efficiently allocate risk and financial responsibility for claims; and

(B) to ensure that a railroad carrier transporting hazardous materials can continue to operate despite the risk of an accident or incident;

(3) the potential applicability to trains transporting hazardous materials of—

(A) a liability regime modeled after section 170 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2210); and

(B) a liability regime modeled after subtitle 2 of title XXI of the Public Health Service Act (42 U.S.C. 300aa–10 et seq.).

*Id.*<sup>7</sup>

After the study is completed, the proposed legislation requires a report to be submitted within one year of the study's initiation which includes recommendations for addressing liability issues with rail transportation of TIH. *Id.* This proposed legislation was introduced by Senator John Thune (R-S.D.), Chairman of the Senate Commerce, Science, and Transportation Committee, as an amendment to the Railroad Reform, Enhancement, and Efficiency Act. On June 25, 2015, the Committee approved the amendment.

The proposed legislation demonstrates that Congress recognizes the importance of these issues to public health and safety, as well as to rail carriers and shippers. If enacted, the amendment's study will likely address the questions and concerns raised in Agrium's Complaint. The legislation contemplates a legislative response to address liability allocation. At the very least, the study provides a more appropriate forum for considering such issues in the abstract and should provide key guidance to the Board in its consideration of the issues raised here. Accordingly, the pending legislation weighs heavily in favor of the Board's deferral of consideration of such issues in this proceeding.

In sum, Agrium's Complaint does not state reasonable grounds for investigation and action at this time because the Complaint does not address a live case or controversy involving Tariff 8, Item 54, or even allege any actual harm to Agrium from this provision. Accordingly,

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<sup>7</sup> A copy of S.1626 is included as Attachment 2 to CP's Motion to Dismiss.

the Complaint is not ripe for review. Rather than raising narrowly-tailored objections to Tariff 8, Item 54, Agrium's Complaint launches a broad, indefinite fusillade against the Tariff that would require the Board to consider potentially "endless" situations in which Tariff 8, Item 54 might apply. Accordingly, the Board should dismiss the Complaint.

**CONCLUSION**

Based on the foregoing, CP requests that the Board dismiss Agrium's May 15, 2015 Complaint in this proceeding.

Respectfully submitted,



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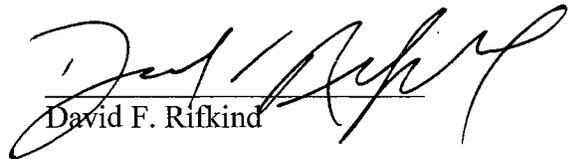
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Dated: July 1, 2015

**CERTIFICATE OF SERVICE**

I, David F. Rifkind, hereby certify that on this 1st day of July 2015, I caused a copy of the Motion to Dismiss of Canadian Pacific Railway Company to be served by First Class United States mail and by e-mail on the following:

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# **ATTACHMENT 1**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

Agrium Inc. and Agrium U.S. Inc.	)	
	)	
Plaintiffs,	)	<b>ORDER GRANTING DEFENDANT'S</b>
	)	<b>MOTION TO DISMISS</b>
vs.	)	
	)	
Soo Line Railroad, d/b/a Canadian	)	
Pacific Railway Company,	)	Case No. 1:13-cv-118
	)	
Defendant.	)	

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Before the Court is a motion to dismiss filed by the Defendant, Soo Line Railroad, d/b/a Canadian Pacific Railway Company (“Canadian Pacific”) on November 12, 2013. See Docket No. 9. Plaintiffs Agrium Inc. and Agrium U.S. Inc. (“Agrium”) filed a response in opposition to the motion on December 24, 2013. See Docket No. 18. Canadian Pacific filed a reply brief on January 21, 2014. See Docket No. 30. For the reasons set forth below, the motion is granted.

**I. BACKGROUND**

Agrium Inc. is a Canadian corporation headquartered in Calgary, Alberta, Canada. Agrium U.S. Inc. is a wholly-owned subsidiary of Agrium Inc. with its headquarters and principal place of business located in Colorado.

Soo Line Railroad Company is a wholly-owned subsidiary of the Soo Line Corporation. Soo Line Railroad Company and Soo Line Corporation are Minnesota corporations with their principal place of business located in Minneapolis, Minnesota. Soo Line Railroad Company does business in North Dakota and elsewhere as Canadian Pacific.

Agrium is a major manufacturer of agricultural nutrients and industrial products, including anhydrous ammonia. The products are distributed throughout North America and South America, primarily by rail. Agrium operates an anhydrous ammonia storage and distribution facility near Rogers, North Dakota, known as the Leal Storage Facility, where it receives between 900 and 1,100 railcar shipments each year. The Leal Storage Facility is entirely dependant on rail transportation service to meet its anhydrous ammonia delivery requirements.

Canadian Pacific is a common carrier railroad providing service over approximately 14,700 miles of track to 1,100 communities across six Canadian provinces and thirteen states, including North Dakota. Common carrier service obligations require railroads to establish carrier rates and service terms for various cargos and provide service or transportation on reasonable request. The rail industry refers to the published conditions and pricing of rail transportation services as “tariffs.”

Canadian Pacific provides rail service to Agrium at the Leal Storage Facility. It is the only rail carrier with access to this facility. Agrium ships over 500,000 metric tons of anhydrous ammonia annually via Canadian Pacific. Agrium contends rail transport is its only feasible transportation option.

Anhydrous ammonia is a critical component in the production of nitrogen and phosphate fertilizers which are essential to commercial agriculture. These fertilizers are essential for the production of many crops, especially corn, and cannot be readily or economically replaced. Anhydrous ammonia is classified as a toxic inhalation hazard (“TIH”) by the United States Hazardous Materials Regulations, the Canadian Transportation of Dangerous Goods Regulations, and the Association of American Railroads circular OT-55. The movement of TIH materials is governed by United States Department of Transportation regulations and Transportation Security

Administration requirements. Common carrier obligations require railroads to accept TIH materials for transport. Canadian Pacific regularly carries TIH materials on its rail lines in both the United States and Canada, much of which crosses the border.

In recent years, tension has developed between the rail industry and customers over the terms of service relating to liability and indemnification. In 2013, Canadian Pacific made changes to its TIH tariff that drew the ire of Agrium, which describes the changes as arbitrary, unilateral, and unlawful. The provision of most concern is Item 54 of Tariff 8, which details indemnification and liability obligations customers take on by shipping TIH materials on Canadian Pacific. Agrium contends these changes have dramatically altered the indemnity and liability provisions that were in place prior to 2013, and conflict with state and federal law. In addition, Agrium contends the level of risk associated with the new tariff terms is such that shippers are being forced to self-insure and in some cases “bet the company” to ship TIH materials by rail. Canadian Pacific maintains that Item 54 does nothing more than ensure that its customers take responsibility for TIH shipment liability that is not due to acts or omissions of Canadian Pacific.

Agrium filed this diversity action in federal court against Canadian Pacific seeking a declaratory judgment that the liability provisions in Item 54 of Tariff 8 are unlawful and in violation of the Federal Employers’ Liability Act (“FELA”), 45 U.S.C. § 51 *et seq.*, the Locomotive Inspection Act (“LIA”), 49 U.S.C. §§ 20701-20703, the Safety Appliances Act (“SAA”), 49 U.S.C. §§ 20301-20306, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA”), 42 U.S.C. § 9613, and other unspecified provisions of federal law and policy, as well as North Dakota law and public policy. Agrium seeks to permanently enjoin Canadian Pacific from enforcing the indemnity and liability provisions in Item 54 of Tariff 8. Canadian

Pacific has moved to dismiss for lack of subject matter jurisdiction.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) allows a defendant to seek dismissal for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can either mount a facial attack on the complaint's claim of jurisdiction or the motion can attack the factual basis for jurisdiction. Precision Press, Inc. v. MLP U.S.A., Inc., 620 F. Supp. 2d 981, 986 (N.D. Iowa 2009) (citing Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993)). A motion which is limited to a facial attack on the pleadings and thus does not consider matters outside the pleadings, is subject to the same standard as a motion brought under Rule 12(b)(6). Mattes v. ABC Plastics, Inc., 323 F.3d 695, 698 (8th Cir. 2003) (citing Osborn v. United States, 918 F.2d 724, 729 n. 6 (8th Cir. 1990) (distinguishing between a facial attack and a factual attack)). Since the Defendant's motion mounts a facial challenge to the claim of jurisdiction in the complaint, the familiar Rule 12(b)(6) standard applies.

Under Rule 12(b)(6), the court must accept all well-pleaded factual allegations in the complaint as true. Goss v. City of Little Rock, 90 F.3d 306, 308 (8th Cir. 1996). Detailed factual allegations are not necessary under the Rule 8 pleading standard, rather a plaintiff must set forth grounds of its entitlement to relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause action will not do." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders a naked assertion devoid of further factual enhancement." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The court must also consider whether the allegations set forth in the complaint "plausibly give rise to an entitlement to relief." Id. at 679.

The court generally only looks to the allegations contained in the complaint to make a Rule 12(b)(6) determination. McAuley v. Fed. Ins. Co., 500 F.3d 784, 787 (8th Cir. 2007). However, depending on the nature and circumstances of the case, the court may consider matters outside the complaint. “[I]n considering a motion to dismiss, the district court may sometimes consider materials outside the pleadings, such as materials that are necessarily embraced by the pleadings and exhibits attached to the complaint.” Mattes, 323 F.3d at 697 n.4 (citing Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)).

## **II. LEGAL DISCUSSION**

Canadian Pacific contends the Court lacks subject matter jurisdiction as the dispute is not yet ripe. Agrium contends its claims are ripe because Tariff 8 places immediate burdens upon it which have created a controversy sufficient to invoke the Declaratory Judgment Act.

The Declaratory Judgment Act provides that, “[i]n a case of actual controversy within its jurisdiction ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a). The Declaratory Judgment Act does not extend the jurisdiction of the federal courts beyond the recognized boundaries of justiciability. Rather, it simply enlarges the range of available remedies. Pub. Water Supply Dist. No. 10 v. City of Peculiar, Mo., 345 F.3d 570, 572 (8th Cir. 2003). “The controversy requirement of the Declaratory Judgment Act is synonymous with that of Article III of the Constitution.” Carson v. Pierce, 719 F.2d 931, 933 (8th Cir. 1983) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-40 (1937) (finding federal court jurisdiction is limited to justiciable cases by Article III’s case and controversy requirement)).

The ripeness doctrine applies to actions for declaratory judgment. Pub. Water Supply Dist. No. 8 v. City of Kearney, Mo., 401 F.3d 930, 932 (8th Cir. 2005). Ripeness is a traditional requirement of justiciability. Pub. Water Supply Dist. No. 10, 345 F.3d at 572. The ripeness doctrine derives from both the Article III case and controversy requirement and prudential considerations for refusing to exercise jurisdiction. Id. The basic rationale behind the ripeness doctrine is to prevent the court from entangling themselves in abstract disagreements. Id. In essence, the case and controversy requirement of Article III prohibits the courts from issuing advisory opinions. Pub. Water Supply Dist. No. 8, 401 F.3d at 932. “Parties may not simply submit questions of general interest or curiosity to the federal court.” Neb. Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1038 (8th Cir. 2000). To do so would be a waste of scarce judicial resources. Pub. Water Supply Dist. No. 8, 401 F.3d at 932.

The ripeness inquiry involves examination of both the fitness of the issues for judicial decision and the hardship to the parties of withholding consideration. Pub. Water Supply Dist. No. 10, 345 F.3d at 572. The party seeking relief must satisfy both prongs to at least a minimal degree. Id. at 573. This test is not a precise one and whether the question posed is too hypothetical is one of degree. Pub. Water Supply Dist. No. 8, 401 F.3d at 932; Neb. Pub. Power Dist., 234 F.3d at 1038. Fitness for judicial decision goes to a court’s ability to visit an issue and whether it would benefit from further factual development. Pub. Water Supply Dist. No. 10, 345 F.3d at 573. The hardship prong goes to whether the plaintiff has sustained or is in immediate danger of sustaining some direct injury. Id. In the declaratory judgment context, an action can be sustained where no injury has occurred, but the an injury must be “certainly impending.” Pub. Water Supply Dist. No. 8, 401 F.3d at 932 (quoting Pa. v. W. Va., 262 U.S. 553, 593 (1923)).

In this case Agrium asks the Court to trek deep into the regulatory jungle and issue guidance as to how Item 54 of Tariff 8 may apply to claims under FELA, LIA, SAA, CERCLA, and other provisions of federal law, along with North Dakota law relating to waivers and comparative fault. The Court concludes any such opinion would be advisory and a waste of scarce judicial resources.

The complaint identifies no incident involving the release of TIH materials, no TIH exposure, and no attempt by Canadian Pacific to enforce Item 54 of Tariff 8. Agrium contends there is an ongoing dispute over the meaning, enforceability, and lawfulness of Item 54 of Tariff 8. Agrium's contentions are unavailing. It is not the province of the federal courts to provide advisory opinions on the meaning, enforceability, and lawfulness of disputed contract provisions absent any allegation of breach of contract or actual injury. It was Canadian Pacific's insistence on new contractual terms which lead Agrium to file this lawsuit. Canadian Pacific may decide to change those terms yet again. No TIH incident may ever occur. The hypothetical situations which may be envisioned in relation to a TIH incident are endless.

Agrium analogize's the current situation to the classic declaratory judgment action where an insurer seeks a declaration that it has no obligation to indemnify an insured for damages an injured party may recover against the insured. In such a case the dispute is ripe for declaration despite the very real possibility the injured party may not sue or obtain a judgment against the insured. 10B Wright, Miller, & Kane, Federal Practice and Procedure § 2757 (3d ed. 1998). The problem with Agrium's argument is that while Agrium and Canadian Pacific have a relationship similar to an insurer and an insured, there is no injured party in the present case. There must be an underlying incident before a court will offer a declaration as to policy coverage. See Aetna Cas. & Sur. Co. v. Gen. Dynamics Corp., 968 F.2d 707, 711 (8th Cir. 1992) (declaratory judgment action

was ripe where multiple lawsuits had been filed against insured for environmental pollution and insured had made a demand for payment of defense and indemnity costs). Since no underlying incident has been identified, any injury belongs to the realm of the hypothetical and could hardly be described as certainly impending.

The Eighth Circuit's opinion in Gopher Oil Co. v. Bunker, 84 F.3d 1047 (8th Cir. 1996) is instructive. In *Gopher Oil*, the plaintiff successor corporation brought a declaratory judgment action seeking a declaration that prior owners of a dump sight were liable for the release of hazardous materials that occurred prior the purchase of the dump by the plaintiff. Id. at 1049. The Environmental Protection Agency ("EPA") cleaned up the dump site and demanded reimbursement from a number of parties they determined were responsible, including the plaintiff successor corporation, but not the prior owners who were deceased. Id. The EPA also informed the plaintiff that the matter would be referred to the Department of Justice and that a CERCLA suit was likely. Id. The plaintiff claimed the prior owners of the dump, whose estate remained open, were also a responsible party under CERCLA, the Minnesota Environmental Response and Liability Act ("MERLA"), and Minnesota common law tort and contract principles. Id. The district court dismissed the claims as unripe. Id. The Eighth Circuit agreed with the district court that the MERLA claim and the related state common law tort claims were not ripe because there was no immediate threat of an enforcement action which would create liability. Id. at 1051. However, the Eighth Circuit determined the CERCLA claim and a contract indemnity claim were ripe because the EPA had initiated a cost-recovery action after the district court issued its ruling. Id.

*Gopher Oil* is informative because the live CERCLA claims were found to be ripe while the speculative MERLA claims were not. In the present case there are no live claims relating to Item

54 of Tariff 8. The Court finds that until there is an actual TIH incident which causes injury to a third party and potentially exposes Canadian Pacific and Agrium to liability, there is no case and controversy ripe for consideration.

### **III. CONCLUSION**

The Court concludes Agrium's claims are unripe and thus the Court lacks subject matter jurisdiction. For the reasons set forth above, the motion to dismiss (Docket No. 9) is **GRANTED** and the case is dismissed without prejudice. The briefs submitted by the parties were thorough and more than adequate to decide the issues presented. The hearing scheduled for May 30, 2014, is cancelled.

**IT IS SO ORDERED.**

Dated this 8th day of May, 2014.

/s/ Daniel L. Hovland  
Daniel L. Hovland, District Judge  
United States District Court

# **ATTACHMENT 2**

AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: To improve the safety of freight and passenger rail transportation, and for other purposes.

**IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.**

**S. 1626**

To reauthorize Federal support for passenger rail programs, improve safety, streamline rail project delivery, and for other purposes.

Referred to the Committee on \_\_\_\_\_ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by \_\_\_\_\_

Viz:

1 At the end of title IV, insert the following:

2 **Subtitle C—Hazardous Materials**  
3 **by Rail**

4 **SEC. 431. REAL-TIME EMERGENCY RESPONSE INFORMA-**  
5 **TION.**

6 (a) IN GENERAL.—Not later than 1 year after the  
7 date of enactment of this Act, the Secretary, in consulta-  
8 tion with the Secretary of Homeland Security, shall pro-  
9 mulgate regulations—

10 (1) to require a Class I railroad transporting  
11 hazardous materials—

1 (A) to generate accurate, real-time, and  
2 electronic train consist information, including—

3 ~~(i) the identity, quantity, and location~~  
4 of hazardous materials on a train;

5 (ii) the point of origin and destination  
6 of the train;

7 (iii) any required emergency response  
8 information or resources; and

9 (iv) an emergency response point of  
10 contact designated by the Class I railroad;  
11 and

12 (B) to enter into a memorandum of under-  
13 standing with each applicable fusion center to  
14 provide that fusion center with secure and con-  
15 fidential access to the electronic train consist  
16 information described in subparagraph (A) for  
17 each train transporting hazardous materials in  
18 that fusion center's jurisdiction;

19 (2) to require each applicable fusion center to  
20 provide the electronic train consist information de-  
21 scribed in paragraph (1)(A) to first responders,  
22 emergency response officials, and law enforcement  
23 personnel requesting such information following an  
24 incident, accident, or public health or safety emer-

1 agency involving the rail transportation of hazardous  
2 materials;

3 ~~(3) to prohibit any Class I railroad, employee,~~  
4 or agent from withholding, or causing to be withheld  
5 the electronic train consist information described in  
6 paragraph (1)(A) from first responders, emergency  
7 response officials, and law enforcement personnel in  
8 the event of an incident, accident, or public health  
9 or safety emergency involving the rail transportation  
10 of hazardous materials; and

11 (4) to establish security and confidentiality pro-  
12 tections to prevent the release of the electronic train  
13 consist information to unauthorized persons.

14 (b) DEFINITIONS.—In this section:

15 (1) APPLICABLE FUSION CENTER.—The term  
16 “applicable fusion center” means a fusion center  
17 with responsibility for a geographic area in which a  
18 Class I railroad operates.

19 (2) CLASS I RAILROAD.—The term “Class I  
20 railroad” has the meaning given the term in section  
21 20102 of title 49, United States Code.

22 (3) FUSION CENTER.—The term “fusion cen-  
23 ter” has the meaning given the term in section  
24 124h(j) of title 6, United States Code.

1           (4) HAZARDOUS MATERIALS.—The term “haz-  
2           ardous materials” means material designated as haz-  
3           ardous by the Secretary of Transportation under  
4           chapter 51 of the United States Code.

5           (5) TRAIN CONSIST.—The term “train consist”  
6           includes, with regard to a specific train, the number  
7           of rail cars and the commodity transported by each  
8           rail car.

9           (c) SAVINGS CLAUSE.—

10           (1) Nothing in this section may be construed to  
11           prohibit a Class I railroad from voluntarily entering  
12           into a memorandum of understanding, as described  
13           in subsection (a)(1)(B), with a State emergency re-  
14           sponse commission or an entity representing or in-  
15           cluding first responders, emergency response offi-  
16           cials, and law enforcement personnel.

17           (2) Nothing in this section may be construed to  
18           amend any requirement for a railroad to provide a  
19           State Emergency Response Commission, for each  
20           State in which it operates trains transporting  
21           1,000,000 gallons or more of Bakken crude oil, noti-  
22           fication regarding the expected movement of such  
23           trains through the counties in the State.

1 **SEC. 432. THERMAL BLANKETS.**

2 (a) **REQUIREMENTS.**—Not later than 180 days after  
3 the date of enactment of this Act, the Secretary shall pro-  
4 mulgate such regulations as are necessary to require each  
5 tank car built to meet the DOT-117 specification and each  
6 non-jacketed tank car modified to meet the DOT-117R  
7 specification to be equipped with a thermal blanket.

8 (b) **DEFINITION OF THERMAL BLANKET.**—In this  
9 section, the term “thermal blanket” means an insulating  
10 blanket that is applied between the outer surface of a tank  
11 car tank and the inner surface of a tank car jacket and  
12 that has thermal conductivity no greater than 2.65 Btu  
13 per inch, per hour, per square foot, and per degree Fahr-  
14 enheit at a temperature of 2000 degrees Fahrenheit, plus  
15 or minus 100 degrees Fahrenheit.

16 (c) **SAVINGS CLAUSE.**—

17 (1) **PRESSURE RELIEF DEVICES.**—Nothing in  
18 this section may be construed to affect or prohibit  
19 any requirement to equip with appropriately sized  
20 pressure relief devices a tank car built to meet the  
21 DOT-117 specification or a non-jacketed tank car  
22 modified to meet the DOT-117R specification.

23 (2) **HARMONIZATION.**—Nothing in this section  
24 may be construed to require or allow the Secretary  
25 to prescribe an implementation deadline or author-  
26 ization end date for the requirement under sub-

1 section (a) that is earlier than the applicable imple-  
2 mentation deadline or authorization end date for  
3 ~~other tank car modifications necessary to meet the~~  
4 DOT-117R specification.

5 **SEC. 433. COMPREHENSIVE OIL SPILL RESPONSE PLANS.**

6 (a) REQUIREMENTS.—Not later than 120 days after  
7 the date of enactment of this Act, the Secretary shall issue  
8 a notice of proposed rulemaking to require each railroad  
9 carrier transporting a Class 3 flammable liquid to main-  
10 tain a comprehensive oil spill response plan.

11 (b) CONTENTS.—The regulations under subsection  
12 (a) shall require each rail carrier described in that sub-  
13 section—

14 (1) to include in the comprehensive oil spill re-  
15 sponse plan procedures and resources for respond-  
16 ing, to the maximum extent practicable, to a worst-  
17 case discharge;

18 (2) to ensure the comprehensive oil spill re-  
19 sponse plan is consistent with the National Contin-  
20 gency Plan and each applicable Area Contingency  
21 Plan;

22 (3) to include in the comprehensive oil spill re-  
23 sponse plan appropriate notification and training  
24 procedures;

1 (4) to review and update its comprehensive oil  
2 spill response plan as appropriate; and

3 ~~(5) to provide the comprehensive oil spill re-~~  
4 sponse plan for acceptance by the Secretary.

5 (c) SAVINGS CLAUSE.—Nothing in the section may  
6 be construed as prohibiting the Secretary from promul-  
7 gating different comprehensive oil response plan standards  
8 for Class I, Class II, and Class III railroads.

9 (d) DEFINITIONS.—In this section:

10 (1) AREA CONTINGENCY PLAN.—The term  
11 “Area Contingency Plan” has the meaning given the  
12 term in section 311(a) of the Federal Water Pollu-  
13 tion Control Act (33 U.S.C. 1321(a)).

14 (2) CLASS 3 FLAMMABLE LIQUID.—The term  
15 “Class 3 flammable liquid” has the meaning given  
16 the term in section 173.120(a) of title 49, Code of  
17 Federal Regulations.

18 (3) CLASS I RAILROAD, CLASS II RAILROAD,  
19 AND CLASS III RAILROAD.—The terms “Class I rail-  
20 road”, “Class II railroad” and “Class III railroad”  
21 have the meanings given the terms in section 20102  
22 of title 49, United States Code.

23 (4) NATIONAL CONTINGENCY PLAN.—The term  
24 “National Contingency Plan” has the meaning given

1 the term in section 1001 of the Oil Pollution Act of  
2 1990 (33 U.S.C. 2701).

3 ~~(5) RAILROAD CARRIER.—The term “railroad~~  
4 carrier” has the meaning given the term in section  
5 20102 of title 49, United States Code.

6 (6) WORST-CASE DISCHARGE.—The term  
7 “worst-case discharge” means a railroad carrier’s  
8 calculation of its largest foreseeable discharge in the  
9 event of an accident or incident.

10 **SEC. 434. HAZARDOUS MATERIALS BY RAIL LIABILITY**  
11 **STUDY.**

12 (a) IN GENERAL.—Not later than 30 days after the  
13 date of enactment of this Act, the Secretary shall initiate  
14 a study on the levels and structure of insurance for a rail-  
15 road carrier transporting hazardous materials.

16 (b) CONTENTS.—In conducting the study under sub-  
17 section (a), the Secretary shall evaluate—

18 (1) the level and structure of insurance, includ-  
19 ing self-insurance, available in the private market  
20 against the full liability potential for damages aris-  
21 ing from an accident or incident involving a train  
22 transporting hazardous materials;

23 (2) the level and structure of insurance that  
24 would be necessary and appropriate—

1 (A) to efficiently allocate risk and financial  
2 responsibility for claims; and

3 ~~(B) to ensure that a railroad carrier trans-~~  
4 ~~porting hazardous materials can continue to op-~~  
5 ~~erate despite the risk of an accident or incident;~~

6 (3) the potential applicability to trains trans-  
7 porting hazardous materials of—

8 (A) a liability regime modeled after section  
9 170 of the Atomic Energy Act of 1954, as  
10 amended (42 U.S.C. 2210); and

11 (B) a liability regime modeled after sub-  
12 title 2 of title XXI of the Public Health Service  
13 Act (42 U.S.C. 300aa–10 et seq.).

14 (c) REPORT.—Not later than 1 year after the date  
15 the study under subsection (a) is initiated, the Secretary  
16 shall submit a report containing the results of the study  
17 and recommendations for addressing liability issues with  
18 rail transportation of hazardous materials to—

19 (1) the Committee on Commerce, Science, and  
20 Transportation of the Senate; and

21 (2) the Committee on Transportation and In-  
22 frastructure of the House of Representatives.

23 (d) DEFINITIONS.—In this section:

24 (1) HAZARDOUS MATERIAL.—The term “haz-  
25 arduous material” means a substance or material the

1 Secretary designates under section 5103(a) of title  
2 49, United States Code.

3 ~~(2) RAILROAD CARRIER.—The term “railroad~~  
4 carrier” has the meaning given the term in section  
5 20102 of title 49, United States Code.

6 **SEC. 435. STUDY AND TESTING OF ELECTRONICALLY-CON-**  
7 **TROLLED PNEUMATIC BRAKES.**

8 (a) GOVERNMENT ACCOUNTABILITY OFFICE  
9 STUDY.—

10 (1) IN GENERAL.—The Government Account-  
11 ability Office shall complete an independent evalua-  
12 tion of ECP brake systems pilot program data and  
13 the Department of Transportation’s research and  
14 analysis on the effects of ECP brake systems.

15 (2) STUDY ELEMENTS.—In completing the  
16 independent evaluation under paragraph (1), the  
17 Government Accountability Office shall examine the  
18 following issues related to ECP brake systems:

19 (A) Data and modeling results on safety  
20 benefits relative to conventional brakes and to  
21 other braking technologies or systems, such as  
22 distributed power and 2-way end-of-train de-  
23 vices.

1 (B) Data and modeling results on business  
2 benefits, including the effects of dynamic brak-  
3 ing.

4 (C) Data on costs, including up-front cap-  
5 ital costs and on-going maintenance costs.

6 (D) Analysis of potential operational chal-  
7 lenges, including the effects of potential loco-  
8 motive and car segregation, technical reliability  
9 issues, and network disruptions.

10 (E) Analysis of potential implementation  
11 challenges, including installation time, positive  
12 train control integration complexities, compo-  
13 nent availability issues, and tank car shop capa-  
14 bilities.

15 (F) Analysis of international experiences  
16 with the use of advanced braking technologies.

17 (3) DEADLINE.—Not later than 2 years after  
18 the date of enactment of this Act, the Government  
19 Accountability Office shall transmit to the Com-  
20 mittee on Commerce, Science, and Transportation of  
21 the Senate and the Committee on Transportation  
22 and Infrastructure of the House of Representatives  
23 a report on the results of the independent evaluation  
24 under paragraph (1).

25 (b) EMERGENCY BRAKING APPLICATION TESTING.—

1           (1) IN GENERAL.—The Secretary of Transpor-  
2           tation shall enter into an agreement with the  
3           ~~NCRRP Board~~—

4                   (A) to complete testing of ECP brake sys-  
5                   tems during emergency braking application, in-  
6                   cluding more than 1 scenario involving the un-  
7                   coupling of a train with 70 or more DOT 117-  
8                   specification or DOT 117R-specification tank  
9                   cars; and

10                   (B) to transmit, not later than 2 years  
11                   after the date of enactment of this Act, to the  
12                   Committee on Commerce, Science, and Trans-  
13                   portation of the Senate and the Committee on  
14                   Transportation and Infrastructure of the House  
15                   of Representatives a report on the results of the  
16                   testing.

17           (2) INDEPENDENT EXPERTS.—In completing  
18           the testing under paragraph (1), the NCRRP Board  
19           may contract with 1 or more engineering or rail ex-  
20           perts, as appropriate, with relevant experience in  
21           conducting railroad safety technology tests or similar  
22           crash tests.

23           (3) TESTING FRAMEWORK.—In completing the  
24           testing under paragraph (1), the NCRRP Board and  
25           each contractor described in paragraph (2) shall en-

1       sure that the testing objectively, accurately, and reli-  
2       ably measures the performance of ECP brake sys-  
3       ~~tems relative to other braking technologies or sys-~~  
4       tems, such as distributed power and 2-way end-of-  
5       train devices, including differences in—

- 6               (A) the number of cars derailed;
- 7               (B) the number of cars punctured;
- 8               (C) the measures of in-train forces; and
- 9               (D) the stopping distance.

10       (4) FUNDING.—The Secretary shall require, as  
11       part of the agreement under paragraph (1), that the  
12       NCRRP Board fund the testing required under this  
13       section—

14               (A) using such sums made available under  
15       section 24910 of title 49, United States Code;  
16       and

17               (B) to the extent funding under subpara-  
18       graph (A) is insufficient or unavailable to fund  
19       the testing required under this section, using  
20       such sums as are necessary from the amounts  
21       appropriated to the Office of the Secretary.

22       (5) EQUIPMENT.—The NCRRP Board and  
23       each contractor described in paragraph (2) may re-  
24       ceive or use rolling stock, track, and other equip-  
25       ment or infrastructure from a private entity for the

1 purposes of conducting the testing required under  
2 this section.

3 ~~(e) PHASED APPROACH.—~~

4 (1) PHASE 1.—Not later than 60 days after the  
5 date of enactment of this Act, the Secretary shall re-  
6 quire each new tank car built to meet the DOT-117  
7 specification and each tank car modified to meet the  
8 DOT-117R specification to have an ECP-ready con-  
9 figuration if the DOT-117 or DOT-117R specifica-  
10 tion tank car will be used in high-hazard flammable  
11 unit train service.

12 (2) PHASE 2.—After the reports are trans-  
13 mitted under subsections (a)(3) and (b)(1)(B), the  
14 Secretary may initiate a rulemaking, if the Secretary  
15 considers it necessary, to require each railroad car-  
16 rier operating a high-hazard flammable unit train to  
17 operate that train in ECP brake mode by 2021 or  
18 2023, unless the train does not exceed a certain  
19 maximum authorized speed as determined by the  
20 Secretary in the rulemaking.

21 (d) CONFORMING AMENDMENT.—Not later than 60  
22 days after the date of enactment of this Act, the Secretary  
23 shall issue regulations to repeal the ECP brakes and ECP  
24 brake mode requirements in sections 174.310(a)(3)(ii),  
25 174.310(a)(3)(iii), 174.310(a)(5)(v), 179.102-10,

1 179.202-12(g), and 179.202-13(i) of title 49, Code of  
2 Federal Regulations, and, except as provided in subsection  
3 ~~(e), any other regulation in effect on the date of enactment~~  
4 of this Act requiring the installation of ECP brakes or  
5 operation in ECP brake mode.

6 (e) SAVINGS CLAUSE.—

7 (1) ECP BRAKE MODE.—Nothing in this sec-  
8 tion may be construed as prohibiting or requiring a  
9 railroad carrier from operating its trains in ECP  
10 brake mode.

11 (2) HARMONIZATION.—Nothing in this section  
12 may be construed to require or allow the Secretary  
13 to prescribe an implementation deadline for the re-  
14 quirement under subsection (c)(1) that is earlier  
15 than the applicable implementation deadline for  
16 other tank car modifications necessary to meet the  
17 DOT-117R specification for tank cars that will be  
18 used in high-hazard flammable unit train service.

19 (f) DEFINITIONS.—In this section:

20 (1) CLASS 3 FLAMMABLE LIQUID.—The term  
21 “Class 3 flammable liquid” has the meaning given  
22 the term in section 173.120(a) of title 49, Code of  
23 Federal Regulations.

1           (2) ECP.—The term “ECP” means electroni-  
2 cally-controlled pneumatic when applied to a brake  
3 ~~or brakes.~~

4           (3) ECP BRAKE MODE.—The term “ECP brake  
5 mode” includes any operation of a rail car or an en-  
6 tire train using an ECP brake system.

7           (4) ECP BRAKE SYSTEM.—

8           (A) IN GENERAL.—The term “ECP brake  
9 system” means a train power braking system  
10 actuated by compressed air and controlled by  
11 electronic signals from the locomotive or an  
12 ECP-EOT to the cars in the consist for service  
13 and emergency applications in which the brake  
14 pipe is used to provide a constant supply of  
15 compressed air to the reservoirs on each car but  
16 does not convey braking signals to the car.

17           (B) INCLUSIONS.—The term “ECP brake  
18 system” includes dual mode and stand-alone  
19 ECP brake systems.

20           (5) ECP-READY CONFIGURATION.—The term  
21 “ECP-ready configuration” means mounting brack-  
22 ets and fixed conduit on the tank car to facilitate  
23 the future application of additional ECP  
24 componentry and required cables.

1 (6) HIGH-HAZARD FLAMMABLE UNIT TRAIN.—

2 The term “high-hazard flammable unit train” means  
3 ~~a single train transporting 70 or more loaded tank~~  
4 cars containing Class 3 flammable liquid.

5 (7) NCRRP BOARD.—The term “NCRRP  
6 Board” means the independent governing board of  
7 the National Cooperative Rail Research Program.

8 (8) RAILROAD CARRIER.—The term “railroad  
9 carrier” has the meaning given the term in section  
10 20102 of title 49, United States Code.

11 **SEC. 436. RECORDING DEVICES.**

12 (a) IN GENERAL.—Subchapter II of chapter 201 is  
13 amended by adding after section 20167 the following:

14 **“§ 20168. Installation of audio and image recording**  
15 **devices**

16 “(a) IN GENERAL.—Not later than 2 years after the  
17 date of enactment of the Railroad Reform, Enhancement,  
18 and Efficiency Act, the Secretary of Transportation shall  
19 promulgate regulations to require each rail carrier that  
20 provides regularly scheduled intercity rail passenger or  
21 commuter rail passenger transportation to the public to  
22 install inward- and outward-facing image recording de-  
23 vices in all controlling locomotive cabs and cab car oper-  
24 ating compartments in such passenger trains.

1       “(b) DEVICE STANDARDS.—Each inward- and out-  
2 ward-facing image recording device shall—

3           ~~“(1) have a minimum 12-hour continuous re-~~  
4 cording capability;

5           “(2) have crash and fire protections for any in-  
6 cab image recordings that are stored only within a  
7 controlling locomotive cab or cab car operating com-  
8 partment; and

9           “(3) have recordings accessible for review dur-  
10 ing an accident investigation.

11       “(c) REVIEW.—The Secretary shall establish a proc-  
12 ess to review and approve or disapprove an inward- or out-  
13 ward-facing recording device for compliance with the  
14 standards described in subsection (b).

15       “(d) USES.—A rail carrier that has installed an  
16 inward- or outward-facing image recording device ap-  
17 proved under subsection (c) may use recordings from that  
18 inward- or outward-facing image recording device for the  
19 following purposes:

20           “(1) Verifying that train crew actions are in ac-  
21 cordance with applicable safety laws and the rail  
22 carrier’s operating rules and procedures.

23           “(2) Assisting in an investigation into the cau-  
24 sation of a reportable accident or incident.

1           “(3) Carrying out efficiency testing and system-  
2 wide performance monitoring programs.

3           ~~“(4) Documenting a criminal act or monitoring~~  
4 unauthorized occupancy of the controlling locomotive  
5 cab or car operating compartment.

6           “(e) VOLUNTARY IMPLEMENTATION.—

7           “(1) IN GENERAL.—Each rail carrier operating  
8 freight rail service may implement any inward- or  
9 outward-facing image recording devices approved  
10 under subsection (c).

11           “(2) AUTHORIZED USES.—Notwithstanding any  
12 other provision of law, each rail carrier may use re-  
13 cordings from an inward- or outward-facing image  
14 recording device approved under subsection (c) for  
15 any of the purposes described in subsection (d).

16           “(f) DISCRETION.—

17           “(1) IN GENERAL.—The Secretary may—

18           “(A) require in-cab audio recording devices  
19 for the purposes described in paragraphs (1)  
20 through (4) of subsection (d); and

21           “(B) define in appropriate technical detail  
22 the essential features of the devices required  
23 under subparagraph (A).

24           “(2) EXEMPTIONS.—The Secretary may exempt  
25 any rail passenger carrier or any part of a rail pas-

1       senger carrier's operations from the requirements  
2       under subsection (a) if the Secretary determines  
3       ~~that the rail passenger carrier has implemented an~~  
4       alternative technology or practice that provides an  
5       equivalent or greater safety benefit or is better suit-  
6       ed to the risks of the operation.

7       “(g) TAMPERING.—A rail carrier may take appro-  
8       priate enforcement or administrative action against any  
9       employee that tampers with or disables an audio or  
10      inward- or outward-facing image recording device installed  
11      by the rail carrier.

12      “(h) PRESERVATION OF DATA.—Each rail passenger  
13      carrier subject to the requirements of subsection (a) shall  
14      preserve recording device data for 1 year after the date  
15      of a reportable accident or incident.

16      “(i) INFORMATION PROTECTIONS.—

17          “(1) SECTION 552(B)(3) OF TITLE 5 EXEMP-  
18      TION.—An in-cab audio or image recording, and any  
19      part thereof, that the Secretary obtains as part of  
20      an accident or incident investigated by the Depart-  
21      ment of Transportation shall be exempt from disclo-  
22      sure under section 552(b)(3) of title 5.

23          “(2) RESTRICTIONS ON DISCLOSURE.—The  
24      Secretary may allow an audio or image recordings  
25      derived from an audio or inward- or outward-facing

1 image recording device to receive any of the informa-  
2 tion and legal protections available to any report,  
3 ~~survey, schedule, list, or data compiled or collected~~  
4 as part of the Department of Transportation rail-  
5 road safety risk reduction program if—

6 “(A) the recording is derived from—

7 “(i) an audio or inward- or outward-  
8 facing image recording device that was im-  
9 plemented pursuant to its railroad safety  
10 risk reduction program under section  
11 20156; and

12 “(ii) an inward- or outward-facing  
13 image recording device that was approved  
14 under subsection (c); or

15 “(B) an audio recording device that is  
16 compliant with the requirements under sub-  
17 section (f)(1).

18 “(j) SAVINGS CLAUSE.—Nothing in this section may  
19 be construed as requiring a rail carrier to cease or restrict  
20 operations upon a technical failure of an inward- or out-  
21 ward-facing image recording device. Such rail carrier shall  
22 repair or replace the failed inward- or outward-facing  
23 image recording device as soon as practicable.”

1 (b) CONFORMING AMENDMENT.—The table of con-  
2 tents for subchapter II of chapter 201 is amended by add-  
3 ~~ing at the end the following:~~

“20168. Installation of audio and image recording devices.”.

4 **SEC. 437. RAIL PASSENGER TRANSPORTATION LIABILITY.**

5 (a) LIMITATIONS.—Section 28103(a) is amended—

6 (1) in paragraph (2), by striking  
7 “\$200,000,000” and inserting “\$295,000,000, ex-  
8 cept as provided in paragraph (3).”; and

9 (2) by adding at the end the following:

10 “(3) The liability cap under paragraph (2) shall  
11 be adjusted every 10 years by the Secretary of  
12 Transportation to reflect changes in the Consumer  
13 Price Index-All Urban Consumers.

14 “(4) The Federal Government shall have no fi-  
15 nancial responsibility for any claims described in  
16 paragraph (2).”.

17 (b) DEFINITION OF RAIL PASSENGER TRANSPOR-  
18 TATION.—Section 28103(c) is amended—

19 (1) in the heading, by striking “DEFINITION.—  
20 ” and inserting “DEFINITIONS.—”;

21 (2) by redesignating paragraphs (2) and (3) as  
22 paragraphs (3) and (4), respectively; and

23 (3) by inserting after paragraph (1), the fol-  
24 lowing:

1           “(2) the term ‘rail passenger transportation’ in-  
2           cludes commuter rail passenger transportation (as  
3           ~~defined in section 24102~~);”

4           (c) PROHIBITION.—No Federal funds may be appro-  
5           priated for the purpose of paying for the portion of an  
6           insurance premium attributable to the increase in allow-  
7           able awards under the amendments made by subsection  
8           (a).

9           (d) EFFECTIVE DATE.—The amendments made by  
10          subsection (a) shall be effective for any passenger rail acci-  
11          dent or incident occurring on or after May 12, 2015.