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**STB Docket No. EP 698**

**Notice of Establishment of the Toxic by Inhalation Hazard  
Common Carrier Transportation Advisory Committee**



**Comments Submitted by  
Olin Corporation**

Olin Corporation, through its Chlor Alkali Products Division ("Olin"), is submitting the following comments in STB Docket No. EP 698, in response to the "Notice of Establishment of the Toxic by Inhalation Hazard Common Carrier Transportation Advisory Committee ("TIHCCTAC")".

Olin would also like to take this opportunity to formally adopt and incorporate the comments made by the Chlorine Institute and the American Chemistry Council on the TIHCCTAC in STB No. EP 698.

Olin is one of the leading producers of chlorine and caustic soda in North America, having its Chlor Alkali Products Division headquarters in Cleveland, Tennessee and having manufacturing sites in 11 different locations throughout North America. Olin has been involved in the United States' chlor alkali industry for over 100 years, and was the first commercial supplier of chlorine in the United States. Olin continues to grow and service the chlor alkali industry. Besides chlorine and caustic soda, Olin manufactures and sells many derivatives of the chlorine manufacturing process, such as hydrochloric acid, hydrogen, sodium chlorate, bleach products and potassium hydroxide.

***Chlorine is essential to the nation's health, economy, and security.*** According to the Chlorine Institute, chlorine products of all kinds and their derivatives are associated with 45% of the nation's Gross Domestic Product. The chlor alkali industry alone contributes over \$7 billion directly to the U.S. economy each year.

Chlorine chemistry is essential to everyday life. The products of chlorine chemistry make possible clean water and safe foods, pharmaceuticals, medical equipment, construction materials, computers, electronics, automobiles, clothing, sports equipment, agriculture, and much more. For the majority of these applications, there are no reasonable substitutes for chlorine.

In addition to its importance to our nation's health and economy, chlorine is vital to U.S. security. The Department of Homeland Security has deemed chlorine as an essential asset to the "critical infrastructure." Moreover, chlorine is used in materials which promote the national defense, including bullet-proof vests, helmets, and parachutes. Chlorine is helping to protect the men and woman in our armed services.

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## **A. PRELIMINARY COMMENTS**

Olin would like to thank the Surface Transportation Board (the "STB") for the opportunity to comment on the TIHCCTAC in response to the August 5, 2010 Decision in STB No. EP 698 (hereinafter referred to as the "Notice"). Before providing comments on the questions presented in the Notice, it is imperative that one overriding fact first be emphasized. The common carrier obligation for railroads is the result of Federal statute, 49 U.S.C. § 11101(a). The STB and the TIHCCTAC cannot modify this statutory obligation. The STB and this proposed TIHCCTAC can certainly advise Congress on issues related to the common carrier obligation, and can provide important testimony to the relevant congressional committees. However, any modifications to the common carrier obligation can only be implemented by Congress. Moreover, indemnification and tort liability are matters of state law. Virtually every state would hold that it is against public policy for a railroad to impose an indemnity obligation on a shipper due to *the negligence of the railroad*. Federal law would hold the same. And, because no state has ever held that shipping chlorine is an ultrahazardous activity, there is no strict liability for a railroad should there be an accidental release due to the negligence of the shipper. The railroads have no liability exposure for damages caused by the negligence of a shipper of toxic inhalation hazard ("TIH") materials.

## **B. OLIN'S COMMENTS ON THE FOUR QUESTIONS LISTED IN THE NOTICE**

### **(1) What should be the appropriate scope of such a committee's mandate?**

Olin believes that the TIHCCTAC should acknowledge the following:

- a. The importance of the common carrier obligation to the transportation of TIH materials, and therefore to the U.S. economy.

The common carrier obligation is of vital importance to the transportation of chlorine, which is a TIH. The common carrier obligation is the statutory duty of railroads to provide transportation or service for shippers pursuant to 49 U.S.C. § 11101(a). The common carrier obligation was established by Congress to protect all rail shipments, including shipments of chemicals such as chlorine. Olin continues to rely on the common carrier obligation of the railroads to maintain its ability to ship product to Olin's customers at a reasonable rate and with reasonable service.

Olin takes this obligation very seriously because most of its facilities have access to only one rail carrier. Furthermore, more than 75% of Olin's chlorine is transported by rail to customers who have no other option than to receive it by rail. These shipments are subject to what the Staggers Act refers to as "market dominance," which is often described as a customer being "captive" to a single railroad. For a captive shipper like Olin, regardless of its size or location, the efficient movement of its traffic – in some cases even the very survival of its business – depends on the common carrier obligation. Without the explicit common carrier obligation protection provided in the Federal statute,

it is clear that the railroads would not ship TIH materials, despite the fact that they are integral to the functioning of the U.S. economy.

b. The economic importance of shipping TIH materials.

Olin has continued to be subjected to higher and higher freight charges from the railroads. The current freight rates that shippers are paying are not fair and equitable. For example, Olin has experienced average annual increases of more than 20% since 2005, and Olin's chlorine freight rates have more than tripled from the average rates of 2002–2004. In one high volume move, rates were increased 177% in one year, and some rates are in excess of 1000% of variable costs. As the Board states in the Notice, it is an economic regulator and as such must address the rapidly increasing cost of shipping TIH materials. It appears to Olin that railroads are attempting to make it cost-prohibitive for chemical companies to continue shipping chlorine. Railroads are effectively pursuing this policy through aggressive increases in rates, fuel surcharges, fees and other efforts. The intention of the railroads appears to be to make it too expensive for chemical companies to ship essential chemicals, such as chlorine, which are a backbone of our public health and economy. Under the common carrier obligation, railroads must provide reasonable rates for shippers. The common carrier obligation is dependent on the rail rates being fair and equitable. The current freight rates that shippers are paying are not fair and equitable, as represented in the Staff Report for Chairman Rockefeller of the Committee on Commerce, Science, and Transportation dated September 15, 2010, entitled "THE CURRENT FINANCIAL STATE OF THE CLASS I FREIGHT RAIL INDUSTRY".

If the railroads do not reduce their rates, these massive price increases threaten the ability of chemical shippers to keep their plants, and their customer's plants, profitable and economically viable. Continued price increases will ultimately make the transport of chlorine by rail economically prohibitive and would essentially have the same effect as the railroad's refusal to ship chlorine.

c. The actual insurance liability costs for the railroads for shipping TIH materials.

Olin recognizes that the railroads have maintained that there are increased cost pressures because of liability concerns. Olin has not been privy to what liability insurance is available to the railroads, or at what cost. Olin has, however, seen significant price increases as the railroads have tacked on a "risk premium" to cover their alleged increase in costs.

During an April 24, 2008 STB hearing regarding the common carrier obligation in Docket No. EP 677, Olin brought to the STB's attention the fact that Olin had discussed a concept whereby Olin would pay to the carrier any incremental insurance premium that the carrier was charged by an insurance carrier for shipping Olin's TIH materials. This is the cleanest and simplest way to assist the railroads in dealing with alleged massive increases in insurance premiums which have led to drastic rate increases. During this

April, 2008 STB hearing, then Chairman Nottingham indicated that this idea was worth examining. However, Olin has not been able to have any railroad carrier advise it of what such premiums would be, or how much rates would be reduced if Olin paid the incremental premium.

It is also important to point out that at this same April 2008 STB hearing, Chairman Nottingham asked the different railroads if they would disclose their liability insurance costs. Olin is not aware of the railroads having provided this information to the STB. In order for the TIHCCTAC to have a chance at an effective result, this information must be disclosed by the railroads. It is Olin's hope that the railroads will match its good faith effort in becoming more transparent by releasing their liability insurance premiums. Without this information, it is impossible for stakeholders to make positive steps forward in addressing the liability costs of transporting TIH.

d. The exemplary safety record of the transportation of chlorine.

To illustrate the reasonableness of the shipment of chlorine by rail, it is important to focus on the exemplary safety record of these shipments. As the Board mentions in the Notice, "for many hazardous materials, including TIH, rail is the safest and most efficient mode of transportation." According to the Chlorine Institute, of the 1.5 million chlorine tank shipments since 1965, there have been 11 breaches of a tank car, representing only 0.00073% of all shipments. This safety record demonstrates the reasonableness of transporting chlorine.

The failure of the railroads to prevent dangerous and avoidable derailments cannot be the basis of a refusal to deny service to shippers, like Olin, under the common carrier obligation. In fact, the National Transportation Safety Board has found that in the three fatal tank car accidents since 2002 involving TIH (in Minot, North Dakota; Macdona, Texas; and Graniteville, South Carolina), the cause was either maintenance or operational errors on the part of the railroads.

**(2) How would the scope of the committee's mandate affect its utility?**

It is the view of Olin that a broader scope to the TIHCCTAC will give the committee greater future utility. To illustrate this, according to page 4 of the Notice, the utility or purpose of this committee will be as follows:

"the TIHCCTAC will be tasked with producing a report and recommendations on how the Board should balance the common carrier obligation to transport this commodity with the risk of catastrophic liability in setting appropriate rail transportation liability terms for TIH cargo."

Olin strongly believes that the purpose of this committee will have the greatest utility if it focuses on the overall context of the total economic cost to transport TIH cargo via rail. Therefore, the TIHCCTAC must have the capability to address freight rates, liability costs, fees, and any other costs as these costs are inseparable. This liability

component of TIH transport is intertwined with the overall economics of transporting TIH materials, and this committee cannot facilitate a dialogue or find a resolution to these liability concerns without addressing the overall economics of transporting these materials, which requires a discussion of freight rates. It is not enough for this committee to focus on “a reasonable response to a shipper’s request that a railroad transport TIH Cargo” (page 3 of the Notice). This issue of “reasonable response” should get no more attention than the issues of freight rates and/or anti-competitive behavior by the railroads.

Furthermore, the value and/or utility of this committee is also dependent upon a proper understanding of the meaning of a “**reasonable request for service involving the movement of TIH.**” When examining the common carrier obligation, Olin believes it is important to review the exact language of 49 U.S.C. § 11101(a), which is as follows:

“(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide the transportation or service on reasonable request...”

As this statute illustrates, the common carrier obligation is not conditioned on whether or not a chemical is classified as a TIH. In fact, this statute makes no reference as to the particular classification of a commodity which is being transported. Rather, the duty applies to all shipments by rail that is based on a reasonable request. Olin believes it is very reasonable to require railroads to carry substances such as chlorine.

**(3) What would be the optimum size of such a committee?**

In Olin’s view, the optimal size of the committee would be 25 members, rather than the 27 members as suggested in the Notice. When a committee has over 25 members, Olin’s view is that it becomes more unworkable. In the Notice, the STB suggests 4 representatives for the committee who are currently engaged in academia or policy analysis. In Olin’s view, this number is too high. One representative from academia or policy analysis should suffice, or perhaps should be replaced with an economist who could bring a skill set of practical analysis of data to the committee. While the academic and/or public policy perspective can be helpful, Olin believes that those who are involved directly with TIHs (such as shippers, railroads, insurance underwriters, and tank car owners) should be the primary decision makers on any committee.

Olin would also like to take this opportunity to comment on the status of the chair of this committee. Olin believes that the selection of the chair of the TIHCCTAC by the Chairman of the STB is a very important decision. The chair of this committee should be fair and impartial, and should not have a vested interest in the outcome. For that reason, Olin’s recommendation is that the committee have 2 co-chairs, one each from the railroad and shipper community, or that neither a railroad or shipper representative be selected chair. Instead, the chair should be one of the remaining members.

- (4) **How should the committee's membership be allocated among various stakeholder groups to achieve a fairly balanced "cross section of those directly affected, interested, and qualified," as required under FACA, 41 C.F.R. Section 102-3.60(b)(3)?**

In Olin's view, the makeup of the committee needs to equitably represent all stakeholders. In the Notice, the STB suggests the following makeup of the committee:

- 10 representatives of the railroads (7 from Class I and II railroads and 3 representatives from Class III railroads)
- 5 representatives from chlorine shippers
- 5 representatives from anhydrous ammonia shippers
- 4 representatives currently engaged in academia or policy analysis
- 2 representatives with an insurance or underwriting background
- 1 representative from tank car owners, car lessors, or car manufacturers.

Olin agrees that there needs to be an equal number of railroad and shipper representatives. If there are 10 railroad representatives (as is proposed), then there should be 10 TIH shipper representatives (5 chlorine shipper representatives and 5 anhydrous ammonia shipper representatives). In fact, Olin is supportive of the following statement on page 4 of the Notice: "...for any proposal to become a recommendation of the TIHCCTAC, a majority vote of the railroad interests and a majority vote the shipping interests will be required." This approach is a positive step forward in providing for a balanced committee.

It is important to note that there are shippers of TIH chemicals other than chlorine and ammonia who rely on the common carrier obligation. In Olin's view, their interests should also be represented in some capacity on the committee. One alternative would be to add one new TIH shipper who represents the interests of non-chlorine and non-anhydrous ammonia shippers and balance this with an additional railroad representative (which could be a Class III railroad.) Another important fact that is not directly represented here is the receiver, or consumer of the TIH material. It is their business which will be directly impacted and which must ultimately bear the cost of any recommendations emanating from this committee and they should have a voice on the committee.

## **C. CONCLUSION**

Thank you for this opportunity to provide comments on the establishment of the TIHCCTAC in STB No. EP 698. The focus of this committee ultimately needs to be on the common carrier obligation and its vital role in ensuring the safe, secure and efficient transportation of chemical products. Olin looks forward to the continued opportunity to provide input into the TIHCCTAC. If you have any questions regarding these comments by Olin, please do not hesitate to contact us.

Respectfully submitted on behalf of Olin Corporation by:

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