

HAZ MAT

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Repeal of Electronically Controlled Pneumatic Brake Rule

The U.S. Department of Transportation (DOT) will repeal a 2015 final rule requiring certain trains carrying hazardous materials (HazMat) to be equipped with electronically controlled pneumatic (ECP) brakes.¹ This rule has faced stiff criticism from rail industry groups, which argue that enhanced train braking does not yield any appreciable safety benefit during an accident.

The Fixing America's Surface Transportation Act (FAST Act; Pub. L. No. 114-94, § 7311(a), 129 Stat. 1312, 1601 (Dec. 4, 2015)) mandated several reviews of the ECP brake rule. One was an October 2016 report issued by the U.S. Government Accountability Office (GAO), which found that the ECP brake requirement may not be well-supported by evidence.² Two additional reviews were released this fall.

¹ *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, Final Rule, 80 Fed. Reg. 26,644 (May 8, 2015) (49 C.F.R. § 174.310) (2015 Final Rule), imposes ECP brake requirements on High-Hazard Flammable Unit Trains (HHFUT) (defined as a train transporting 70 or more loaded cars of Class 3 flammable liquid). See 80 Fed. Reg. at 26,645. It prescribes that HHFUTs containing any Packing Group I material and operating at speeds above 30 mph must have ECP brakes by January 1, 2021, and that all HHFUTs operating above 30 mph, regardless of the Packing Group of the material, must be equipped with ECP brakes by May 1, 2023.

² For more information about the 2016 GAO study, see the HazMat column in the November – December 2016 edition of *Highlights*. The GAO report is available at: <http://www.gao.gov/products/GAO-17-122>.

On September 29, 2017, the Transportation Research Board of the National Academies of Sciences, Engineering, and Medicine released the findings of its Committee on the Review of Department of Transportation Testing of Electronically Controlled Pneumatic Brakes (Committee), as required by the FAST Act.³ The Committee’s findings are based on its review of DOT’s field and laboratory testing of ECP brakes and modelling of train derailment scenarios. The Committee concluded that it was “unable to make a conclusive statement about the emergency performance of ECP brakes relative to other braking systems.” Letter Report at 13.

In a similar vein, on October 16, 2017, DOT issued a Draft Updated Regulatory Impact Analysis (RIA) for the ECP brake rule in response to the FAST Act mandate.⁴ It concluded that the estimated costs of the rule exceed the estimated benefits based on current carload volumes. Compared to the RIA issued during promulgation of the 2015 Final Rule, the Draft Updated RIA found that both the costs and benefits of the rule had decreased relative to the initial estimates, with the decrease in benefits outstripping the decrease in costs. Two leading factors accounting for the revised numbers are lower projected carload volumes of crude oil and ethanol, and data gathered regarding recent derailments of trains carrying crude and ethanol. The public comment period on the Draft Updated RIA closed on November 1, 2017.

Pursuant to the FAST Act, DOT was required to issue the Final Updated RIA by December 4, 2017, and determine by that date whether the ECP brake rule is justified because its benefits exceed its costs, or otherwise must be repealed. On that date, DOT decided to rescind the rule.

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[NTSB Hosts Roundtable on Progress Towards 2017-2018 Transportation Safety “Most Wanted List”](#)

On November 15, 2017, the National Transportation Safety Board (“NTSB”) hosted a roundtable discussion on progress towards its 2017-2018 “Most Wanted List” of transportation safety improvements.⁵ There were approximately 50 attendees, primarily representing DOT and its modal agencies, as well as carriers, shippers, and consultants. Issues such as distractions posed by cell phones, and effects of the opioid epidemic on the transportation sector, received significant attention.

“Ensure the Safe Shipment of Hazardous Materials” is one of the “Most Wanted” improvements for the time period. There are 22 open recommendations in this category—six pertaining to aviation and 16 to rail transportation. The aviation recommendations focus on fire suppression systems and the risks posed by lithium batteries. The rail recommendations largely focus on transportation of energy products, with an emphasis on classification, risk assessment, tank car design and testing, and emergency response.

Several other “Most Wanted” improvements also relate to HazMat transportation safety—such as “Increase Implementation of Collision Avoidance Technologies,” “Improve Rail Transit Safety Oversight,” “End Alcohol and Other Drug Impairment in Transportation,” “Reduce Fatigue-Related Accidents,” and “Eliminate Distractions.” NTSB and DOT representatives discussed progress towards the objectives, and opportunities for agencies to comply with the spirit of the NTSB’s recommendations without formal rulemaking, such as through educational campaigns and voluntary initiatives.

³ The Letter Report is available at: <http://www.trb.org/main/blurbs/176644.aspx>.

⁴ *Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, 82 Fed. Reg. 48,006 (Oct. 16, 2017).

⁵ For more information about the NTSB’s Most Wanted List, see www.nts.gov/safety/mwl/Pages/default.aspx (last visited Nov. 17, 2017).

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Steven Bradbury Confirmed as DOT General Counsel

On November 14, 2017, the Senate confirmed Steven Bradbury as General Counsel of DOT. The vote was 50-47, with two Republicans (Sen. John McCain (R-Arizona)) and Sen. Rand Paul (R-Kentucky)) joining the Democrats in opposing the confirmation. In the new role, Bradbury will oversee nearly 500 attorneys.