

If Energy Transport Solutions intends to run 100+ rail tank cars on the Florida East Coast Railway, PHMSA would be placing large swaths of people and critical infrastructure (hospitals, schools, highways, and even the President's Mar-a-Lago resort) in jeopardy.

When Congress authorized the Secretary of Transportation to issue a special permit to allow a person to deviate from hazardous materials regulations, it put in place specific statutory requirements. The statute requires that, "[w]hen applying for a special permit or renewal of a special permit under this section, the person must provide an analysis prescribed by the Secretary that justifies the special permit. The Secretary shall publish in the Federal Register notice that an application for a new special permit or modification to an existing special permit has been filed and shall give the public an opportunity to inspect the safety analysis and comment on the application."³

PHMSA has incorporated a similar requirement in its regulations, which require that in order for any special permit to be issued, the applicant must provide: information describing all relevant shipping and incident experience; a statement identifying any increased risk to safety or property that may result if the special permit is granted; and either (i) substantiation, with applicable analyses, data, or test results (e.g., failure mode and effect analysis), that the proposed alternative will achieve a level of safety that is at least equal to that required by the regulation from which the special permit is sought; or (ii) an analysis that identifies each hazard, potential failure mode and the probability of its occurrence, and how the risks associated with each hazard and failure mode are controlled for.⁴

The deficiencies in the public filings to date suggest that the special permit was arbitrarily rushed in a way that shortchanged PHMSA's normal review procedures. Specifically, PHMSA seems to have more questions than answers, admitting that, "the risk of puncture [of a tank car of LNG] increases with speed; but there are no test data or computer models that could be used to predict the probability of puncture at any particular speed..." and, "no test data or mathematical models exist to predict whether and when a LNG tank car exposed to an external fire would undergo a BLEVE." These statements, and many others, suggest that the statute and regulations requiring analysis and data to justify an equivalent level of safety have not been complied with. PHMSA states that "incident data with (non-LNG) hazard materials may suggest that incidents involving rail tank cars can lead to a larger area of consequence as compared to hazard areas arising from incidents involving MC-338s cargo tank motor vehicles." This is troublesome because the MC-338 cargo tank, which PHMSA acknowledges is likely safer, is the *only* alternative considered by PHMSA.

There are also concerns that PHMSA did not adequately consider the risks associated with the tank car proposed in the special permit to transport LNG—the DOT-113. Since 2011, there have been two accidents that have led to a breach of both the outer and inner tanks of a DOT-113 tank car. In May 2011, an accident in Moran, Kansas damaged three tank cars containing liquid ethylene, leading to a fire. In October 2014, a DOT-113 tank car carrying argon under a special permit experienced an outer and inner tank car breach. PHMSA notes that there is little that first responders can do if a cryogenic liquid rail tank car is breached.⁵ PHMSA's draft environmental statement acknowledges

³ 49 USC 5117(b).

⁴ 49 C.F.R. § 170.105(d).

⁵ The draft environmental statement says, "Response and mitigation techniques beyond evacuation for breaches in cryogenic tank cars do not exist or are impractical during a derailment scenario. Breach of a cryogenic tank car will result in the loss of the entire volume of material in the tank car. Incidents are rare, though rail impacts can be high-consequence, given the quantity of hazardous materials in transportation"