

NO. _____

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RIVERKEEPER, INC.,

Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION;
SECRETARY OF TRANSPORTATION ANTHONY FOXX,

Respondents.

PETITION FOR REVIEW

DANIEL E. ESTRIN, ESQ.
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343 (phone)
(914) 422-4437 (fax)
destrin@law.pace.edu

Attorney for Petitioner

SEAN T. DIXON, ESQ.
Riverkeeper, Inc.
20 Secor Road
Ossining, New York 10562
(914) 478-4501 x247 (phone)
(914) 478-4527 (fax)
SDixon@Riverkeeper.org

Of Counsel

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Petitioner Riverkeeper, Inc. hereby discloses that it is a not-for-profit organization, and as such, has no parent corporations or publicly held corporations owning 10% or more of any of its stock.

/s/ Daniel E. Estrin
DANIEL E. ESTRIN
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343 (phone)
(914) 422-4437 (fax)
destrin@law.pace.edu

Attorney for Petitioner

PETITION FOR REVIEW

1. Riverkeeper, Inc. (the “Petitioner”), hereby petitions the United States Court of Appeals for the Second Circuit for review of the final rule issued by Respondents (the Department of Transportation and Secretary of Transportation Anthony Foxx) entitled “Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains.” The final rule was published in the Federal Register on May 8, 2015, at 80 Fed. Reg. 26644 (May 8, 2015) and is attached to this Petition as Exhibit 1.

2. The Secretary issued the final rule pursuant to the Hazardous Material Transportation Act (“HMTA”) and the Federal Railroad Safety Act (“FRSA”). Jurisdiction lies in this Court under the HMTA, which provides for judicial review of the Respondents’ final actions through a petition for review in the courts of appeals. 49 U.S.C. § 5127(a); *see also* FRSA, 49 U.S.C. § 20114(c) (providing for court of appeals review of final actions by the Secretary of Transportation), and 28 U.S.C. § 2342(7) (giving the court of appeals exclusive jurisdiction to enjoin, set aside, suspend, in whole or in part, or determine the validity of all final agency actions described in 49 U.S.C. § 20114(c)).

3. Venue is appropriate in this Circuit as Petitioner Riverkeeper, Inc., is incorporated in the State of New York and has its principal place of business in Ossining, New York. *See* 28 U.S.C. § 2343. Furthermore, as a membership-based

organization, Petitioner has thousands of members, many, if not most, of whom reside and do business within this Circuit. Moreover, three of the impacted Class I railroads (CSX, Norfolk Southern, and Canadian Pacific) and a number of Class II and III railroads are in this Circuit. In addition, the rail sidings, rail yards, crude- and ethanol-by-rail transloading facilities, and refineries subject to some extent by this action are in this Circuit. The public health and welfare, the environment, the economy, and the aesthetic resources of this Circuit will be harmed by this action.

4. Petitioners ask the Court to declare that the Secretary acted arbitrarily, capriciously, and contrary to law in promulgating the *Final Rule on Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains*, including, but not limited to, (1) establishing an unduly long phase-out period for tank cars that are prone to puncture, spills, and fires, thereby, presenting significant risks to communities near train accidents, in the face of the evidence in the record, the Secretary's findings of imminent hazards and extreme safety risks from the hazardous tank cars that will be left on the rails and in-use under this rule, and the Secretary's statutory and regulatory mandate to protect life, property and the environment from hazardous material on the rails; (2) backtracking from the original rulemaking proposal to hold the existing fleet to the new tank car standards by instead establishing a weaker standard for retrofits than is applicable to new tank cars (which will apply to a significant amount of the tank car fleet

shipping crude oil and ethanol for decades to come); and (3) acting arbitrarily, capriciously, contrary to the evidence, and counter to his statutory safety mandate in establishing a 40 miles-per-hour (“mph”) speed limit in only some specific urban areas, while leaving other densely populated at-risk areas in close proximity to the tracks unprotected by this speed limit. Petitioners ask the Court to remand these aspects of the rule to the Secretary to consider the proper factors and evidence and increase protection from rail accidents and catastrophes.

5. In addition, Petitioners ask the Court to declare that the Secretary acted arbitrarily, capriciously, contrary to the evidence, counter to controlling statutes, and in violation of notice and comment rulemaking requirements in abandoning the notification requirements established in Emergency Restriction/Prohibition Order DOT-OST-2014-0067 (May 7, 2014) and discussed in the proposed rulemaking, and instead promulgating a rule tied to a pre-existing regulatory scheme that was not developed to address the risks posed by trains transporting crude oil and ethanol, which will decrease the amount of information made affirmatively available to emergency responders about train routes, frequency, and emergency response measures and that will deny the public access to information that has been publicly available for nearly a year in most states and that the Secretary has found will not expose sensitive security or confidential business information. Petitioners ask the Court to vacate and remand the notification provisions in the final rule for

further notice-and-comment rulemaking consideration, in keeping with the controlling statutes and evidence, and order that the emergency order will remain in place during that rulemaking process.

Respectfully submitted this 15th day of May, 2015.

/s/ Daniel E. Estrin
DANIEL E. ESTRIN, ESQ.
Pace Environmental Litigation Clinic, Inc.
78 North Broadway
White Plains, New York 10603
(914) 422-4343 (phone)
(914) 422-4437 (fax)
destrin@law.pace.edu

Attorney for Petitioner

SEAN T. DIXON, ESQ.
Staff Attorney
Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501 x247
SDixon@Riverkeeper.org

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2015, a true and correct copy of the foregoing, and all attachments, was served by U.S. Postal Service Express (overnight) mail upon the following:

Anthony Foxx
Secretary of Transportation
US Department of Transportation
1200 New Jersey Ave, SE
Washington, DC 20590

Kathryn B. Thomson
General Counsel
Office of the General Counsel
1200 New Jersey Ave, SE
Washington, DC 20590
Kathryn.Thomson@dot.gov

Loretta E. Lynch
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Timothy P. Butters
Deputy Administrator
Pipeline and Hazardous Materials
Safety Administration
East Building, 2nd Floor
Mail Stop: E27-300
1200 New Jersey Ave., SE
Washington, DC 20590
phmsa.administrator@dot.gov

Vanessa Sutherland
Chief Counsel
Pipeline and Hazardous Materials
Safety Administration
East Building, 2nd Floor
Mail Stop: E26-105
1200 New Jersey Ave., SE
Washington, DC 20590
phmsachiefcounsel@dot.gov


RAMONA CEARLEY