

MOTION

Trains carrying hazardous materials pose a significant threat to the nation's security and they often run within the city limits of some of the nation's most targeted cities. Rail industry figures show that 1.7 million carloads of hazardous materials are shipped along the nation's tracks each year. About 100,000 of these carloads contain "toxic-by-inhalation" chemicals that could quickly form a devastating cloud over a city. According to the U.S. Naval Research Lab, up to 100,000 people could be killed or injured in such an attack.

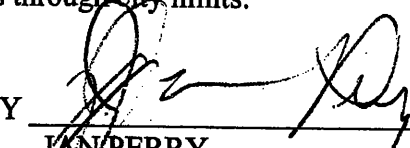
City governments should initiate local action due to an unresponsive federal government and unaccommodating railroad operators, according to Dr. Fred Millar who has provided several documents detailing the nature of this threat. Certain chemical cargoes classified as weapons of mass destruction receive little to no oversight by the federal government. The potential dangers of an attack, combined with this issue's low priority, create a significant vulnerability that could compromise national security.

In February 2005, the Washington, D.C. City Council passed a law that prohibits trains carrying hazardous materials within a 2.2-mile radius of the U.S. Capitol. The ban was challenged in court by CSX Transportation, which owns both railroad lines within this radius. Backed by the Bush administration, CSX lost the decision. Currently, the case is in a lengthy appeals process.

Several cities have introduced bills to prevent trains carrying poison gas cargoes from passing through city limits. Among them are Cleveland, Baltimore, Chicago, Boston, and Philadelphia. These bills do not directly ban shipments, but they require the shipper to obtain a permit for the most hazardous shipments and are subject to safety conditions from the city. All of the bills introduced are modeled after the bill passed by the D.C. City Council.

Certain obstacles exist to achieve this policy. Trains must be able to take alternate routes that would not unreasonably disrupt shipments. The legal precedents must also be identified. Several other cities have also introduced bills on the heels of the court's decision in Washington, D.C. However, the decision notes that it is up to Congress to ultimately legislate on this issue, and such national legislation has failed in both the House and Senate.

I THEREFORE MOVE that the City Council direct Los Angeles Fire Department (LAFD), Los Angeles Police Department (LAPD), Emergency Preparedness, Department of Transportation (DOT), Harbor, and Los Angeles World Airports (LAWA) to review the reports attached to the Council File and report to the Public Safety Committee within 30 days on the extent of the City's readiness to identify and control such poison gas cargoes through city limits.

PRESENTED BY 
JAN PERRY
Councilmember, 9th District

SECONDED BY 

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OTHER VOICES

The elephant in the living room



FRED MILLAR

The DP World-P&O flap has refocused attention on security problems in foreign and U.S. ports. While the attention is largely welcome, the most serious concerns usually are limited to the potential smuggling of nuclear weapons of mass destruction in containers from abroad.

Whose job is it to prevent "the other WMDs" from endangering urban ports—the bulk chemical weapons-of-mass-destruction cargoes that continue to travel through all major U.S. target cities, including crowded and critical urban ports?

It's not the job of the Coast Guard, whose Area Maritime Security Committees handle physical security and not the education of huge chemical WMD risks. It's not the local fire chief's job, nor is it the Department of Homeland Security's. In fact, it's no one's job, with the possible exception of the local city council members. On the contrary, the railroads and the Bush administration are mounting bitter court battles against city ordinances that mandate the rerouting of through rail and truck WMD cargoes, ordinances such as those enacted in 2005 by Washington and now introduced in major target cities (and ports), including Baltimore, Cleveland, Chicago, Boston and Philadelphia.

Not a single chemical shipper or carrier has a national policy of rerouting even the most dangerous cargoes to avoid the 37 high-threat target cities listed by the DHS. Nor does the U.S. military. No federal agency is tasked to review the secret security plans prepared on the honor system by some 41,000 hazardous

materials shippers and carriers, unlike the Coast Guard's mandated review of port security plans.

The use of bulk poison gas chemical cargoes as low-tech, accessible WMDs is clearly much easier than assembling a nuclear weapon to smuggle into a port in a container. We even label chemical cargoes for easy targeting—labeling is essential for emergency responders—and graffiti on many containers advertises how utterly porous the transport system is.

The Port of Baltimore has sensible (Coast Guard-based) safety regulations prohibiting more than 100 pounds of only one kind of hazmat cargo, explosives, from entering the port, and a special safety permit system for some hazmat cargoes that do go through. Is this a kind of rerouting regulation? A ship carrying more than 100 pounds of explosives could go to another port to unload it and then come back with the remaining cargo. Some business-as-usual shipping industry folks even complained that some Coast Guard Captains of the Port were overzealously enforcing the explosives-only regulations, and asked in a national multi-agency meeting that they be told to lighten up.

The U.S. Coast Guard regulation uses quantity-distance calculations to identify unacceptable consequences of a potential explosion that could kill perhaps 1,000 people. But the potential massive consequences of a toxic gas cloud released from bulk industrial chemicals in urban ports are far worse. A chlorine gas cloud released from just one tank car in a dense urban environment could kill 100,000 people in 30 minutes, according to the U.S. Naval Research Labs.

Such an attack could strike a grievous blow to trade; and if you think gas prices are high now, they don't compare to what they would be if an energy port were attacked.

The U.S. chemical industry often boasts that it is the biggest exporting industry in the nation. Hiring Uncle Dick with a shotgun to patrol the fence-line is not a serious security program, nor are high-tech cameras such as those 7,000 in London that did not prevent the recent transit attacks.

Rerouting the most dangerous cargoes where possible is Counterterrorism 101. The unsuspecting port city public remains vulnerable. The Association of American Railroads testified last October that the lack of adequate insurance to cover potential terrorism-related deaths and injuries means the "transport of certain hazardous materials has the potential to be a 'bet-the-business' activity for railroads." It doesn't mention that it's also "bet your Port of Seattle," "bet your Baltimore" and "bet your international trade."

By not rerouting, when possible, such ultra-hazardous cargoes to non-target ports, we are conveniently prepositioning these in our target cities for easy and devastating use by terrorists. This is the elephant in the living room of the Bush administration's homeland security program.

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MEDIA TIP SHEET -- HAZMAT SECURITY RE-ROUTING AND RAILCAR STORAGE
5 18 06 3pp Fred Millar, Ph.D. 703-979-9191 fmillar@erols.com

Al Qaeda has clearly stated two major aims: to kill more Americans (more than 3000) in the next round of attacks and to cause major economic harm. *There is no easier way of doing this, as highlighted by former top Bush Administration homeland security officials (e.g., Richard Falkenrath) recently speaking out publicly from deep concern and frustration, than releasing a deadly toxic gas cloud from a huge (easily accessible) rail tank car or tank truck in a crowded city.* Senator Joe Biden of Delaware calls the CSXT chemical cargoes traveling alongside "an open invitation to terrorists." The New York Times editors (June 10, 2005) say "any sane person" must favor re-routing around target cities.

Here's the question for officials in High Threat Target Cities: *"Are you STILL allowing to cross our city chemical cargoes which the federal government calls 'potential weapons of mass destruction', thus PRE-POSITIONING them for the benefit of the terrorists?"* The federal government has stubbornly refused to force the chemical manufacturers and truck and railroad shippers to re-route unnecessary through shipments of ultrahazardous poison gas cargoes. Major target cities are beginning to do so.

The DC Council enacted a hazmat re-routing bill (which bans a small percentage of through chemical shipments) on a 10-1 vote -- over the vigorous opposition of the chemical industry, the railroads, and the Bush Administration. Sued immediately by Bush and the railroads, DC then won in Federal District Court. The railroads and Bush Administration took DC to the Appeals Court. That process will take at least many months more, and the enforcement of the DC law is suspended meanwhile.

Legislators have now introduced similar bills in Baltimore, Cleveland, Boston, Chicago and Philadelphia. In these, the four most dangerous kinds of ultrahazardous hazmat truck or rail shipments which have an origin or destination in the city (to or from the port or chemical facilities) are not banned, but need to get a permit and are subject to safety conditions from the city.

DC Councilmembers have also introduced (not yet enacted) a model target city Omnibus Homeland Security Bill, 16-242, covering related subjects such as rail container cargoes, vulnerability assessments, chemical facilities, worker training, alert systems, etc.

Railcar storage regulation: The US DOT has promulgated federal rule HM-223, effective June 1, 2005, turning significant authority and responsibility to cities and states for safety and security of hazmat railcars stored on tracks near chemical facilities or on sidings. Industry is furious, suing US DOT. Only model so far of local regulation is post-9/11 Baltimore City Fire Dept regs on hazmat railcar storage.

Following the stunning testimony July 13, 2005 by USW petrochemical workers in the US Senate, on security problems in their facilities, the Teamsters released a survey of rail workers with similar concerns and findings.

Resources:

DC court case documents: www.oag.dc.gov

DC Councilmember Kathy Patterson, sponsor of DC re-routing law:
<http://www.dccouncil.washington.dc.us/patterson/patterson.html>

US DOT rulemaking docket for HM-223: www.dms.dot.gov Use code # 4952

Teamsters "High Alert" survey report : www.teamster.org

USW testimony re survey report: <http://hsgac.senate.gov/files/TestimonyErwin.pdf>

MEDIA TOOLKIT: WMD HAZMAT CARGOES RE-ROUTING ISSUES

1. **Basic media needs:** Iconic photo or video footage of railcars or tank trucks passing close to important target: identifiable building or institution (school, dam, etc.) Shots of tank cars with graffiti on them, of holes in railyard fences, reporters waltzing through open and unguarded gates, etc. – decisively showing lack of ability to secure the transportation systems.

2. **How to find out which and how much (annual volumes of most dangerous classifications) WMD cargoes are coming through your area:**
 - a. Call the chemical companies in your area (get a list from the Tier II data in the Local Emergency Planning Committee's most recent plan) and ask what they ship and receive and what they know about other shippers and carriers in the area. Some regional chemical associations might also be helpful. Ask each company if it has an announced policy (or a quite practice) of re-routing its WMD cargoes around target cities.
 - b. Call the Fire Dept and ask for the head of the Local Emergency Planning Committee to see if they know the volumes and worst case scenarios of the shipments (might be some info in their annual Local Emergency Plan, a public document produced pursuant to the federal Emergency Planning and Community Right-to-Know Act of 1986). Ask if any agency reviews the chemical shippers and carriers' "Security Plans" produced under federal regulation HM-232, and which local officials have seen the plans.
 - c. Stake out the rail lines and highways. Hazmat rail freight cargoes are mostly unscheduled compared to passenger transit. Take your orange book, US DOT ERG, along (see below)
 - d. Call the railroads – they have great computers and could tell you if they will.
 - e. Call local and state agencies (DOT, Homeland Security, Emergency Management) and ask if they have requested the available rail freight hazmat info for your state and area from the federal agency (Surface Transportation Board – railroad-friendly, media-unfriendly) which collects annually the One Percent Waybill Sample from the railroads, a very adequate sample of freight shipments.
 - f. For trucks, call some big local trucking firms to discuss their shipment patterns, then the State DOT and the local Fire Dept. or Local Emergency Planning Committee (LEPC). [The LEPC might have some key info on

chemical facilities and routes, but their industry and government membership is almost always focused on “not alarming the public”]. Ask if any state or local agency has done a highway hazmat “flow study” for your area recently.

3. How to find out what are the most dangerous chemical fixed facilities in your area which may be shipping WMD cargoes in and out:

- a. For objective info that does not require favors from anyone, go to the regional EPA Reading Room for the data provided under Section 112 r of the Clean Air Act Amendments of 1990. You can get the Risk Management Plans, including the downwind distances for toxic clouds from Worst Case Scenario chemical releases, for 10 of the reporting chemical facilities in any US city and for all the ones in your own area.
- b. Ask the Fire Chief or see the LEPC plan.
- c. Call the local Chemical Industry Council or CAER group.

4. How to locate the rail and highway lines that might be carrying WMD cargoes and those that are alternatives:

- a. Look at maps. Don't worry too much about rail line ownership labels, because the railroads all share their lines extensively, through thousands of “interchange agreements.” E.g., DeskMap Systems (see website) has wall maps, atlases.
- b. Get an interactive CD “Rail Road Map of North America” from Railway Station Productions, LLC. for \$25. Can show in detail rail lines and railyards, ownership and abandoned lines.
- c. Google maps of most cities show major rail lines – not sure how recent their data is.

5. Essential technical resources for the media: (and for a “terrorist toolkit”):

- a. US DOT Emergency Response Guidebook (“the Orange Book” in 21 million fire trucks from Argentina to Canada – for de-coding the placards on hazmat rail and truck vehicles. See especially “the Green pages” at the end, showing the most dangerous poison gas (“TIH”) cargoes and how far downwind they will travel in just the first 20-30 minutes of a release.
- b. Chlorine Institute Pamphlet 74, “Estimating the Area Impacted by a Chlorine Release” from all chlorine containers in commerce, see especially pp. 26-27 on the extent and concentration over time of the poison gas cloud produced by just one 90-ton chlorine tank car.
- c. American Association of Railroads/Bureau of Explosives: “Field Guide to

- Tank Car Identification”, 1992 with sketches of all tank cars and cutaway diagrams of how to operate their valves. Very convenient for terrorists.
- d. Insurance company maps of high-terrorism-risk areas in the region, color maps with areas ranked by zipcode. AIR Worldwide, Cambridge MA
 - e. Computerized dispersion videos of chemical clouds moving through some major cities: US Naval Research Labs, Washington DC. Has CT-Analyst dispersion program that has several cities, can show real-time clouds moving around buildings.

Cities may ban trains with chemicals

Posted 6/22/2006 10:34 PM ET

By Mimi Hall, USA TODAY

At least a half-dozen U.S. cities are considering a ban or limit on rail shipments of deadly chemicals in an effort to prevent terrorists from turning tank cars into weapons of mass destruction.

The restrictions would apply to rail cars carrying lethal chemicals through populated neighborhoods. Rail industry figures show that 1.7 million carloads of hazardous material are shipped along the nation's tracks each year.

"I cannot imagine an easier way for al-Qaeda to fulfill its goal than to take out a (chlorine-filled) tank car," says Fred Millar, an environmentalist who helped get a ban passed in Washington, D.C., last year, the nation's first. The rail industry is fighting the ban in court.

Among the other cities that might ban or limit shipments: Boston, Philadelphia, Pittsburgh, Chicago, Las Vegas and Buffalo.

President Bush's former deputy homeland security director, Richard Falkenrath, and Sen. Joseph Biden, D-Del., warned Congress last year of the danger posed by the rail transport of chemicals.

About 100,000 carloads of hazardous material being hauled each year contain "toxic-by-inhalation" chemicals that could quickly form a devastating cloud over a city.

According to the U.S. Naval Research Lab, 100,000 people could be killed or injured in one attack.

The rail industry opposes cities' efforts to reroute trains because longer routes increase the chance of accidents and injuries, says Peggy Wilhide of the Association of American Railroads.

In Cleveland, Councilman Matthew Zone wants rail companies to send toxic shipments through less populated neighborhoods. "There are in excess of a million people living and working less than a quarter-mile" from toxic cars, he says. "There's a lot of concern."

William Flynn of the Homeland Security Department says security assessments have been conducted along tracks in five cities.

Flynn acknowledges the measures may not stop a terrorist attack. "We can reduce risk," he says. "We can't eliminate it."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
CSX TRANSPORTATION, INC.)	
)	
Plaintiff,)	
v.)	Civ. Action No. 05-338 (EGS)
)	
ANTHONY A. WILLIAMS, et al.)	
)	
Defendants)	
_____)	

MEMORANDUM OPINION & ORDER

Plaintiff CSX Transportation Inc. ("CSXT"), a freight railroad and the exclusive rail carrier of hazardous materials through the District of Columbia, seeks to enjoin enforcement of defendant District of Columbia's Terrorism Prevention in Hazardous Materials Transportation Emergency Act ("Terrorism Prevention Act" or the "Act"). The law, which is scheduled to take effect on April 20, 2005, would prohibit rail transport of certain ultrahazardous materials within a 2.2 mile zone around the United States Capitol. Plaintiff contends that the District's legislation violates the Commerce Clause of the United States Constitution, is preempted by federal law, and violates the limited authority granted to the District of Columbia government by Congress pursuant to the Home Rule Act.

Pending before the Court are plaintiff's Motion for Summary

Judgment or in the alternative Motion for a Preliminary Injunction, as well as the United States' Motion to Enforce a related decision by the Surface Transportation Board. Upon consideration of the motions; the responses and replies thereto; the numerous additional pleadings submitted by plaintiff CSXT, defendant District of Columbia, the United States, intervenor-defendant Sierra Club, and the *amici curiae*; oral argument held in open court on March 23, 2005; an *ex parte, in camera* presentation held on April 4, 2005; and the entire record herein, the Court concludes for the following reasons that plaintiffs' motions must be **DENIED**.

I. INTRODUCTION

This case involves longstanding principles of federalism applied to one of the government's newest and most important roles--protecting our Nation from the threat of terrorism. At issue is a simple, but potentially devastating, scenario: the deliberate targeting and destruction of a railroad car containing chlorine gas or other ultrahazardous material in the heart of Washington, D.C. Like the airline highjackings of September 11, 2001, this kind of attack would exploit a familiar component of the country's infrastructure and turn it against us. The results could be catastrophic. One study estimates that an attack on a single rail tank car of chlorine traveling through Washington,

during a celebration or political event, could kill or seriously harm 100,000 people within an hour. ¹ The toxic plume resulting from such an attack could extend over 40 miles from the point of release, including a core area of about 4 miles by 14.5 miles within which exposure could be deadly. ²

The Court is not called upon to choose the best policy to protect the country from this potential nightmare--that is a matter for our elected representatives. Rather, this litigation requires an interpretation of how Congress and the Constitution have distributed authority to prescribe solutions among and between the different levels of government. Each level of government has a role to play. Congress is responsible for developing the statutory framework to address this threat; the Executive branch is responsible for implementing and carrying out the national policy; and state and local governments are responsible for exercising their traditional police powers to protect their citizens, but only up to the limits of the Constitution.

The Court recognizes that the federal government has the *ultimate* authority and responsibility to provide a safe, secure,

¹Sierra P.I. Opp. Ex. 9, Report by Dr. Jay Boris, United States Naval Research Institute (Jan. 23, 2004) (excerpt).

²Sierra P.I. Opp. Ex. 7, Chlorine Institute, Pamphlet 74 (April 1998) (excerpt).

and efficient rail transportation system in the United States and to formulate an effective and coordinated response to the threat of terrorism. See 49 U.S.C. § 20103 (authorizing the Secretary of Transportation to regulate rail safety and security); 49 U.S.C. § 5103 (authorizing the Secretary of Transportation to regulate security of hazardous materials in transit); see also *Jifry v. F.A.A.*, 370 F.3d 1174, 1183 (D.C. Cir. 2004) ("It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation.") (quoting *Hai g v. Agee*, 453 U.S. 280, 307 (1981)). Clearly, the federal government is best positioned to develop and implement measures that will protect not only the District of Columbia, but the entire Nation, and to balance the benefits of those safeguards with their corresponding costs and burdens on interstate commerce.

Congress, however, has enacted a statutory framework that specifically provides authority for states, acting in partnership with the federal government, to regulate in the areas of railroad safety and hazardous material transportation *if* the federal government has not yet acted to comprehensively cover a new risk. See 49 U.S.C. § 20106; 49 U.S.C. § 5125. Thus, this case is not about whether or not the D.C. Council has *unconditional* authority to choose whether or not hazardous materials may enter the District; it clearly does not. Rather, this case presents the

much narrower and fact-specific question of whether the District of Columbia, pursuant to its traditional police powers and on a temporary basis, may prohibit the rail carriage of certain hazardous materials through the District *until* the federal government has more thoroughly addressed the threat of terrorist attack on trains and has put sufficient safeguards in place.

II. BACKGROUND

A. The Federal Statutory Framework

The transportation of hazardous materials ("hazmats") in interstate commerce is essential to the economy of the United States and the well-being of its people. Hazmats, including propane gas and chlorine, fuel our vehicles, heat and cool our homes and offices, and clean our drinking water. At the same time, the inherent physical, chemical, and nuclear properties of hazmats can present serious risks to public safety, especially while in transit. For example, a January 2005 freight train derailment in South Carolina caused a chlorine gas leak that left nine people dead, more than 200 injured, and caused about 5,400 residents to be evacuated from their homes.³ For this reason, the federal government, under the Department of Transportation

³ See *A Toxic Case in Court*, Editorial, The Washington Post, April 5, 2005, at A22 ("If there is any question about the legitimacy of the city's worries, look no farther than January's freight train derailment in South Carolina ...").

("DOT"), closely regulates the safe and secure transportation of hazmats in all modes of transportation. See the Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101-5127 ("HMTA").⁴

The federal government also has a central role in regulating the interstate railroads. The Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. §§ 10101-11908 ("ICCTA"), replaced the former Interstate Commerce Commission with the Surface Transportation Board ("STB" or the "Board"), and vested the Board with broad jurisdiction over transportation by rail carriers and the national rail network. See 49 U.S.C. § 10501. The Federal Railroad Safety Act, 49 U.S.C. §§ 20101-20153 ("FRSA"), provides an additional layer of federal authority over rail safety and security.⁵

⁴ Under the DOT's Hazardous Materials Regulations ("HMR"), 49 CFR parts 171-180, hazmats are divided into nine general classes according to their physical, chemical, and nuclear properties. These regulations are promulgated by DOT's Research and Special Programs Administration ("RSPA"). DOT estimates that 1.5 billion tons of these regulated hazmats are transported each year. The majority of hazmats move by truck (56%), while rail shipments account for only six percent of the tonnage. See 68 Fed. Reg. 34470, 33472 (June 9, 2003).

⁵ The DOT's Federal Railroad Administration ("FRA") enforces Rail Safety Regulations ("RSR") covering "all areas of rail safety" including track speed, track and roadbed conditions, track safety standards, signal systems, brake system standards, hours of service requirements for railroad employees, operating practices, drug and alcohol testing, and other rail carrier operations. See 49 C.F.R. Parts 200-268. The FRA also enforces Hazardous Materials Regulations related to rail transportation. See 49 C.F.R. Parts 171-174, 178-180.

Historically, the federal government has focused its rail safety and hazmat regulatory programs on the types of "operational" risks that are inherent in rail transportation. These risks include, for example, hazmat releases caused by the accidental collision or derailment of rail cars. However, the terrorist attacks of September 11, 2001 shocked the world and prompted a wide-ranging reassessment of the risks facing our country. With those attacks came the realization that some of the most serious threats to our safety may no longer be considered "accidents." As a result, Congress moved quickly to reorganize the government and provide regulatory agencies and law enforcement with new tools to address these new threats.

As part of this effort, Congress amended the core statutes addressing railroad safety and hazmat transportation, and provided DOT with additional authority to regulate railroad security along with its traditional focus on conventional risks. See Homeland Security Act of 2002, Pub. L. 107-296, Title XVII, §§ 1710-1711 (Nov. 25, 2002). DOT began advising industry of voluntary measures to enhance hazmat security,⁶ and issued regulations requiring shippers and carriers to develop company-specific "security plans" for the transportation of

⁶ See Advisory Notice: Enhancing the Security of Hazardous Materials in Transportation, 67 Fed. Reg. 6963 (Feb. 14, 2002).

certain hazardous materials. See Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14510 (March 25, 2003) (codified at 49 C.F.R. §§ 172.800-804) ("HM-232"). The Transportation Security Administration ("TSA"), under the auspices of the Department of Homeland Security ("DHS"), also began working with rail carriers to minimize security risks and continues to assess, develop, and implement enhanced security measures on the rail network, including measures specific to the D.C. Rail Corridor.⁷ See, e.g., Hazardous Materials: Enhancing Rail Transportation Security for Toxic Inhalation Hazard Materials, 69 Fed. Reg. 50988 (Aug. 16, 2004); see also P.I. Mem. Ex. 8, Written Testimony of Thomas Lockwood, Public Roundtable on the Progress of the District of Columbia Rail Corridor Security Initiative (Nov. 22, 2004).

These federal agencies are facing an enormous challenge, but they have made significant strides, especially in the areas of aviation and maritime security. However, it is widely

⁷The Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, directed DHS to assume responsibility for "securing the ... air, land, and sea transportation systems of the United States." 6 U.S.C. § 202(2). Acting through the TSA, the Assistant Secretary of Homeland Security is empowered, among other things, to "assess threats to transportation;" "develop policies, strategies, and plans for dealing with threats to transportation security;" "ensure the adequacy of security measures for the transportation of cargo;" and "issue, rescind and revise such regulations ... as are necessary to carry out TSA functions." 49 U.S.C. § 114(f); 6 U.S.C. § 203(2).

acknowledged that much work remains to be done. Dr. Richard A. Falkenrath, the former Deputy Homeland Security Advisor and Deputy Assistant to the President, warned Congress in January 2005 that "since 9/11 we have essentially done nothing" to reduce the inherent vulnerability of our chemical sector. See Sierra Opp. Ex. 24, Testimony of Richard A. Falkenrath, before the United States Senate Committee on Homeland Security and Governmental Affairs (Jan. 26, 2005). Dr. Falkenrath advised Congress that toxic-by-inhalation chemicals, such as chlorine gas,

are basically World War I era chemical weapons, which we move through our cities in extraordinary large quantities and quite low security. I'm sorry to say, since 9/11 we have essentially done nothing in this area and made no material reduction in the inherent security of our chemical sector. If a terrorist were to attack that sector, there is the potential for casualties on the scale or in excess of 9/11. I hope it doesn't happen, but it's just a fact that this is the case. This needs to be the next big push in critical infrastructure protection. The executive branch has the authority to regulate this area when it's being transported. It needs no new statutory authority there, just needs executive action.

Id. "This should be the highest priority," according to Dr. Falkenrath. "The other ones don't matter nearly as much. This one does." *Id.*⁸

⁸ See also Richard A. Falkenrath, *We Could All Breathe Easier*, The Washington Post, March 29, 2005, at A15 (noting that there has been "no meaningful improvement in the security of

C. The District of Columbia's Terrorism Prevention Act

It is against this backdrop that the District of Columbia acted on February 1, 2005, to "prohibit, on an emergency basis, large shipments of certain extremely hazardous materials through or near the United States Capitol in order to reduce the risk of attacks by terrorists"⁹ District Act § 1. The "Terrorism Prevention Act" restricts transportation of certain ultrahazardous materials, specifically the most dangerous toxic-by-inhalation chemicals, within a 2.2 mile radius of the U.S. Capitol (the "Capitol Exclusion Zone"). District Act § 4. Following months of hearings and public debate on the

these chemicals moving through our population centers").

⁹The February 1st Act was passed by the D.C. Council on an "emergency" basis. Under the District of Columbia Home Rule Act, "emergency" legislation is effective for 90 days and does not require Congressional oversight. Home Rule Act § 412 (D.C. Code § 1-204.12). Permanent legislation, by contrast, requires two readings and a 30-day congressional review period. *See id.* § 602(c) (D.C. Code § 1-233). On March 1, 2005, the D.C. Council approved a companion bill in "temporary" form (D.C. Bill 16-78), which provides for a 225-day extension of the Emergency Act, and which was transmitted to Congress for approval on March 22, 2005. The "Temporary Act" is substantively identical to the "Emergency Act," and both ordinances will be treated as one and the same for purposes of this suit. On April 1, 2005, the District of Columbia, through its Department of Transportation, published in the D.C. Register implementing regulations "pursuant to the authority of Section 7 of the Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005, effective February 15, 2005 (D.C. Act 16-43), or any substantially identical successor legislation...." 52 D.C. Register 3446-3454 (Apr. 1, 2005).

legislation, the D.C. Council made the following legislative findings accompanying the Act:

- A terrorist attack on a large-quantity hazardous materials shipment near the United States Capitol ("Capitol") would be expected to cause tens of thousands of deaths and a catastrophic economic impact of \$5 billion or more.
- The threat of terrorism facing D.C. residents and workers in the vicinity of the Capitol requires an urgent response that recognizes and addresses the unique status of this area in American political life and history, and the terrorism risk that results from this status.
- The federal government has not acted to prevent the terrorist threat resulting from the transportation of dangerous volumes of ultra-hazardous materials through the Capitol Exclusion Zone.
- Shippers of ultra-hazardous materials do not need to route large quantities of ultra-hazardous chemicals near the Capitol in order to ship such chemicals to their destinations, and alternative routes would substantially decrease the aggregate risk posed by terrorist attacks.
- Requiring permits for ultra-hazardous shipments from a Capitol Exclusion Zone that encompasses all points within 2.2 miles of the Capitol would impose no significant burden on interstate commerce.

District Act § 2.

CSXT operates two main rail lines through the District: a north-south main line ("I-95 Line") running along the eastern seaboard from Florida to New England, and an east-west main line ("B&O Line") running from Washington, D.C. west to Chicago and St. Louis. See P.I. Mem. at 12. Because both lines pass within the Exclusion Zone, the Act will effectively require CSXT to

utilize alternative routes for the regulated materials. ¹⁰ See P.I. Mem. at 17.

D. The Challenge

Plaintiff claims that the Terrorism Prevention Act is "protectionist legislation that, on its face, unreasonably burdens interstate commerce, interferes with the comprehensive federal regulation of the shipment of hazardous materials by rail and invites other local jurisdictions to enact copycat legislation which could, by crazy-quilt coverage, bring to a halt the interstate shipment of critically important materials throughout the United States of America." Amended Compl. ¶ 1. ¹¹

CSXT seeks a judicial declaration that the District Act (1) violates the Commerce Clause of the United States Constitution; (2) is preempted by the express preemptive provisions of the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, the federal Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5125, and the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b); and (3) is an *ultra vires*

¹⁰ The Act provides that the prohibitions may be lifted in "cases of emergency" or upon a demonstration that there is "no practical alternative route." District Act §§ 4, 5(a).

¹¹ Plaintiff is joined by *amici curiae* Norfolk Southern Railway Company, the Association of American Railroads, and the National Industrial Transportation League.

act by the D.C. Council contrary to the limited delegation of legislative authority given to the District by Congress under the Home Rule Act. Amended Compl. ¶ 17.

Plaintiff urges the Court to declare invalid and permanently enjoin the implementation and enforcement of the District Act. In the alternative, plaintiff requests the entry of a preliminary injunction to prevent the law from taking effect, pending the Court's determination of the merits of plaintiff's case. At stake, according to plaintiff, is no less than the "preservation of an interstate rail system that is essential to our overall national economy, to our public health, to our welfare and to the security of the nation." See CSXT Reply at 8.

The United States also plays a key role in this dispute. The Justice Department filed a "Statement of Interest" and participated in oral argument supporting plaintiff's legal positions and arguing that the District Act is invalid. In addition, the United States has filed a motion to enforce a declaratory order of the Surface Transportation Board ("STB" or the "Board"), which found that the District Act would "unreasonably interfere with interstate commerce" and is preempted by the ICCTA. See *CSX Transportation, Inc. - Petition for Declaratory Order* (STB Fin. Docket No. 34662, March 14, 2005) ("STB Order").

The District of Columbia is joined by intervenor-defendant Sierra Club in defending the Constitutionality of the Terrorism Prevention Act.

E. Standards of Review

1. Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In considering the motion, all evidence and the inferences to be drawn from it must be considered in a light most favorable to the non-moving party. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 579 (D.C. Cir. 1998).

Summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). However, a party opposing summary judgment must offer more than mere unsupported allegations or denials and its opposition must be supported by affidavits or other competent

evidence setting forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); *see Celotex Corp.*, 477 U.S. at 324.

2. Injunctive Relief

In considering whether to grant an application for emergency injunctive relief, a court must consider four factors: (1) whether there is a substantial likelihood that plaintiffs will succeed on the merits of their claims, (2) whether plaintiffs will suffer irreparable injury absent an injunction, (3) whether an injunction would harm the defendants or other interested parties (the balance of harms), and (4) whether the public interest would be furthered by an injunction. *See Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998) (citing *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977)). The factors "must be viewed as a continuum, with more of one factor compensating for less of another." *Bradshaw v. Veneman*, 338 F. Supp. 2d 139, 141 (D.D.C. 2004). Thus, "[i]f the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas are rather weak." *Serono Labs.*, 158 F.3d at 1318.

Finally, because interim injunctive relief is an extraordinary form of judicial relief, courts should grant such relief sparingly. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C.

Cir. 2004) ("A preliminary injunction is an extraordinary remedy that should be granted only when the party seeking relief, by a clear showing, carries the burden of persuasion."); *see also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (a preliminary injunction is "an extraordinary and drastic remedy").

III. DISCUSSION

A. Preemption

"[T]he Laws of the United States ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. Thus, "[w]here a state statute conflicts with, or frustrates, federal law, the former must give way." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663 (1993) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

Plaintiff argues that the District Act conflicts with and must "give way" to three federal statutes: the Federal Railroad Safety Act ("FRSA"), 49 U.S.C. § 20106, the federal Hazardous Materials Transportation Act ("HMTA"), 49 U.S.C. § 5125, and the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b). Each of these statutes recognizes that a uniform national program is preferable to a patchwork of state and local regulations, but they do not entirely eliminate the states' role in the national framework. Instead, each statute

includes an express preemption clause that precisely circumscribes the borders of federal and non-federal authority in the statutes' respective subject areas:

(a) **The FRSA.** Under the FRSA, states may regulate in the area of railroad safety and security "until" the federal government "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. In addition, if addressing "essentially local" hazards, the FRSA authorizes states to take "more stringent" measures as long as they are not "incompatible" with federal regulations, and do not "unreasonably burden interstate commerce." ¹² *Id.*

(b) **The HMTA.** The HMTA preempts non-federal regulation if it is (1) "not possible" to comply with that regulation and a federal regulation, or (2) the non-federal regulation presents an "obstacle" to accomplishing and carrying

¹² **49 U.S.C. § 20106**

Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force a more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order (1) is necessary to eliminate or reduce an essentially local safety or security hazard; (2) is not incompatible with a law, regulation, or order of the United States Government; and (3) does not unreasonably burden interstate commerce.

out the federal framework. 49 U.S.C. § 5125(a). The HMTA also preempts state or local requirements that are not substantively the same as federal requirements in five specified areas, including hazmat classification and packaging, the use of shipping documents, notification of unintentional releases, and design and manufacturing standards for shipping containers. ¹³

¹³ 49 U.S.C. § 5125

(a) General. --Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if--

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or
(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(b) Substantive differences.--(1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter, a regulation prescribed under this chapter, or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security, is preempted:(A) the designation, description, and classification of hazardous material. (B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material. (C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents. (D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material. (E) the design, manufacturing, fabricating, marking, maintenance, reconditioning,

See 49 U.S.C. § 5125(b).

(c) **The ICCTA.** Finally, Congress included in the ICCTA a broadly worded preemption provision providing that the jurisdiction of the STB over transportation by rail carriers, including remedies with respect to rates, practices, routes, services, and facilities of such carriers, is exclusive.¹⁴ See 49 U.S.C. § 10501(b).

In every preemption case, "the purpose of Congress is the ultimate touchstone." *Geier v. Am. Honda Motor Co.*, 166 F.3d 1236, 1237 (D.C. Cir. 1999) (quoting *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996)). This purpose can sometimes be inferred from the depth and breadth of the regulatory scheme. See, e.g., *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). However, "[i]f the statute contains an express pre-emption

repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

¹⁴ **49 U.S.C. § 10501(b)**

The jurisdiction of the Board over--
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Easterwood*, 507 U.S. at 664. Because the FRSA, HMTA, and ICCTA each contain express preemption clauses, the Court's task is relatively straightforward.¹⁵

1. FRSA Analysis

As described above, state laws relating to rail safety and security may stand until the federal government "prescribes a regulation or issues an order covering the subject matter of the State requirement." 49 U.S.C. § 20106. The word "cover" implies something more than mere planning or first steps. See *Easterwood*, 507 U.S. at 664 ("cover means 'to comprise, include, or embrace in an effective scope of treatment or

¹⁵ The parties dispute whether the District Act is entitled to the traditional presumption against preemption for state health and safety regulations. See *Geier*, 166 F.3d at 1237 ("In areas where States have exercised their historic police powers (such as the health and safety of their citizens), courts must start with a presumption against preemption, absent a 'clear and manifest purpose of Congress.'"). However, in this case no "presumptions" are necessary, either for or against preemption, because the Court need only follow the plain language of relevant preemption clauses to determine Congress' preemptive intent. See *Tyrrell v. Norfolk Southern Ry. Co.*, 248 F.3d 517, 524 (6th Cir. 2001) ("A debate over whether this type of railroad regulation is a historical function of the federal government or the States is unnecessary as the Supreme Court specifically held that a presumption against federal preemption is embodied in the savings clauses of [the FRSA]" (citing *Easterwood*, 507 U.S. at 665, 668)).

operation'") (quoting Webster's Third New International Dictionary 524 (1961)). "To prevail on the claim that the regulations have preemptive effect, [plaintiffs] must establish more than that they 'touch upon' or 'relate to' that subject matter." *Id.* Rather, "preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." *Id.*; see also *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 352 (2000).

The Supreme Court has observed that this language displays "considerable solicitude" for state law. *Easterwood*, 507 U.S. at 665; see also *United Transp. Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000) (when deciding whether state rail safety laws are preempted, "we interpret the relevant federal regulations narrowly to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not improperly disrupted in favor of the federal government"). The FRSFA also seems to preserve the longstanding and "settled principle that, in the absence of legislation by Congress, the States are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce." See *Atl. Coast Line R.R. v. State of Georgia*, 234 U.S. 280, 291 (1914) (noting that this principle "has been the law since the beginning of railroad transportation").

Following the events of September 11th, Congress amended the FRSA and the HMTA to expand their coverage to rail *security* as well as safety. See Homeland Security Act of 2002, Pub. L. 107-296, §§ 1710-1711, 116 Stat. 2319 (amending 49 U.S.C. § 5103 and 49 U.S.C. § 20103) (Nov. 25, 2002). These amendments explicitly preserved the FRSA and HMTA preemption clauses, making clear that the longstanding principles expressed by the Supreme Court in *Atlantic Coast Line Railroad* remain viable today. See *id.* (amending 49 U.S.C. § 5125 and 49 U.S.C. § 20106). After a transformative event like 9/11, the federal government must rapidly adjust and prioritize its response. Not every threat can be addressed at once. Complete preemption of state safety laws would leave the country defenseless until the federal government can discover, study, and respond to each and every risk. In contrast, the existing statutory scheme allows states to exercise their traditional police powers to protect their citizens *until* the federal government has devised a comprehensive, nationwide solution. Even then, if a particular location faces atypical risks, it can enact local safeguards as long as they are not incompatible with the federal scheme. This is cooperative federalism at its finest. Indeed, the floor debate on the bill that eventually became the FRSA (S. 1933) highlighted the legislation's "meaningful concept of creative federalism." 91 Cong. Rec. 34578 (1970) (statement of Sen. Prouty). As another

congressman noted, the legislation is a "creative compromise" which "furthers the Federal-State partnership" and "recognizes the important role which States can play in a national framework." *Id.* at 27613 (Rep. Pickle).

Therefore, in order for the District Act to survive, there must either be some gap in the federal framework for the District to fill, *see Tyrrell*, 248 F.3d at 525 (finding Ohio's track clearance regulation a "permissible gap filler in the federal rail safety scheme"), or the Act must respond to "essentially local" hazards without conflicting with the federal response or unreasonably burdening commerce. *See Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999) ("Under this scheme, then, state regulations can fill gaps where the Secretary has not yet regulated, and it can respond to safety concerns of a local rather than national character.").

This inquiry requires a clear distinction between federal regulations covering the inherent "operational" risks of running trains or moving hazmats, and actions focused on the deliberate targeting and destruction of hazmat rail cars by terrorists. *See United Transp. Union*, 205 F.3d at 860 ("When applying FRSA preemption, the Court eschews broad categories such as 'railroad safety,' focusing instead on the specific subject matter contained in the federal regulation."). This conceptual distinction is critical because existing transportation safety

regulations designed to protect against spills or other accidents were not designed to address the risk of terrorism.¹⁶

The federal government has recognized that "DOT's hazardous materials transportation safety program has historically focused on reducing risks related to the unintentional release of hazardous materials," and that new regulations focusing on *security* may be needed. See 68 Fed. Reg. 34472 (June 9, 2003); 69 Fed. Reg. 50988, (Aug. 16, 2004). DHS and DOT are examining and seeking comments on the "feasibility of initiating specific security enhancements" such as "obscuring the visibility of TIH [toxic-inhalation hazard] cargoes, temporary storage of TIH materials in rail tank cars, tank car integrity, and tracking and communications." See 69 Fed. Reg. at 50989. A former high-level DHS official has also publicly called on DHS and DOT to "promulgate regulations that will, over time, require chemical shippers to track the movement of all hazardous chemicals electronically; to report this data to DHS in real time; to use fingerprint-based access controls for all chemical conveyances; to adopt container signs that do not reveal the contents to most observers; to perform rigorous background checks on all employees; to strengthen the physical resilience of chemical containers; to reduce chemical loads; to ship decoy containers

¹⁶ For example, a typical railroad tank car is not currently designed to withstand an intentional attack with missiles or explosives. See 49 C.F.R. Part 179.

alongside filled containers; and to install perimeter security at loading and switching stations." See Richard A. Falkenrath, (formerly Deputy Homeland Security Advisor and Deputy Assistant to the President (2003-2004)), *We Could All Breathe Easier*, The Washington Post, March 29, 2005, at A15. These measures, according to Falkenrath, should be linked to harsh civil and criminal penalties for violators. *Id.*

Although it continues to review these options, the federal government has not yet come to an authoritative regulatory decision regarding possible security enhancements for rail shipments of toxic-inhalation materials. Plaintiff, however, alleges that the federal government and CSXT are engaging in a number of other activities to promote the secure rail transportation of hazmats through the District of Columbia. See, e.g., CSXT Reply in Support of Mot. to Enforce at 19-20.

Briefly, plaintiff submits that:

- Following September 11, 2001, the rail industry began independently assessing and voluntarily upgrading the security of the national rail network. In the spring of 2004, after consultation with the government, CSXT began voluntarily rerouting loaded cars of the regulated materials on the I-95 (north-south) line. See P.I. Mem. at 6, 43.
- On March 25, 2003, DOT published Final Rule HM-232, which requires persons who offer for transportation or transport certain highly hazardous materials, including rail carriers, to develop and implement voluntary security plans and to train appropriate employees in security measures. See 68 Fed. Reg. at 14516. The regulation requires carriers, at a minimum, to address

personnel security, unauthorized access, and en route security. *See id.* CSXT has developed its own plan pursuant to this regulation, which has been reviewed by representatives of TSA and FRA. *See* P.I. Mem. Ex. 9, Testimony of Skip Elliott, CSXT Assistant Vice President Public Safety (Nov. 22, 2004).

- TSA, with the cooperation of CSXT, recently undertook a "comprehensive vulnerability assessment" of approximately 42 miles of rail lines within the Capital Beltway. *See* P.I. Mem. Ex. 8, Testimony of Thomas Lockwood, Director of the Department of Homeland Security's Office of National Capital Region Coordination (Nov. 22, 2004) (describing the "D.C. Rail Corridor Project"). This study was followed by development of a Buffer Zone Protection Plan and a Freight Rail Hazard Analysis. *See* CSXT Ex. 47, Elliott Decl. ¶¶ 12-15. TSA and CSXT are now in the process of implementing the enhanced security measures recommended by TSA. *Id.*
- CSXT continues to consult on a regular basis with the federal government, especially in connection with major events and following specific intelligence of security threats. *See* CSXT Ex. 47, Elliott Decl. ¶¶ 17-18. CSXT will make operational changes, including rerouting if appropriate, at the specific request of the government. *Id.*

Nevertheless, because this is a facial challenge, plaintiff and the United States have elected not to rely on these measures, and have instead asked the Court to focus solely on their "purely legal" arguments and the public record. *See* CSXT Reply at 7 ("The Court need not delve into any contested factual issues in order to declare the District Act invalid and to issue a permanent injunction prohibiting implementation and enforcement of a null and void local law."); *see also* 3/23/05 Tr. at 59-61. As a "courtesy to the Court," however, the United States provided an *in camera, ex parte* presentation by two federal government

rail security experts on the afternoon of April 4, 2005. See U.S. Notice and Proffer of Additional *In Camera, Ex Parte* Testimony. The experts provided a general overview of the federal government's rail security approach and described some planned security enhancements currently under study, in development, and being implemented in and near the District of Columbia. Due to the non-specific nature of the testimony, and the fact that at this stage it remains untested, uncorroborated, and unsubstantiated, the information is of limited evidentiary significance to the Court's legal analysis at this juncture. In any event, plaintiff and the United States "continue[] to maintain that this factual information is unnecessary to the Court's decision of the legal questions presently before it." *Id.* at 2-3; see also U.S. Opp. to Mot. to Strike ("The United States' position was, and is, that the *in camera, ex parte* testimony is not relevant to the Court's decision on its preemption and Commerce Clause arguments."). ¹⁷

Plaintiff and the United States argue that HM-232--the regulation requiring rail carriers to prepare security plans--is

¹⁷ **SEALED FOOTNOTE**. [This footnote contains Sensitive Security Information, as defined by 49 C.F.R. Part 15 and 49 C.F.R. Part 1520, and the contents are sealed from the public and counsel of record for the parties, with the exception of the United States. Counsel of record for the United States may receive a copy from the Court's chambers. The United States, of course, may release the contents of this footnote at its discretion.]

a regulation that, on its face, preempts the District Act. *See* U.S. Statement at 11-12 (arguing that the March 25, 2003 regulations, "clearly cover, and indeed substantially subsume, the subject matter of secure transportation of hazardous materials, including routing"). The Court disagrees. The plain language of this rule indicates that the government intended industry-authored security plans to be a "first step" rather than a comprehensive response. *See* 68 Fed. Reg. at 14511 (informing carriers that Security Plans are the "first step in what may be a series of rulemakings to address the security of hazardous materials shipments" and noting that TSA is "developing regulations that are likely to impose additional requirements"); *see also* 68 Fed. Reg. at 14520 (noting the government's estimate that a large company will only "require about 50 hours to develop a security plan that meets the requirements of this final rule"). The government could not have intended this level of effort--roughly one busy week of work for one railroad employee--to comprehensively "cover" the crucial matter of rail hazmat security. Furthermore, there is no evidence in the record that the government has ever rejected or even conditioned the substantive elements in a carrier's plan, nor is it clear whether there are any penalties or sanctions for noncompliance. Finally, although CSXT's security plan was alluded to on multiple occasions at the March 23, 2005 hearing and the April 4, 2005 *in*

camera presentation, the plan has never been submitted to the Court for its review nor is it clear from the record what the document entails. In fact, at the March 23rd hearing no one in the courtroom--not even the attorneys for the government or CSXT--had ever seen the plan. See 3/23/05 Tr. at 58-59. The Court is left only with the federal government's representations that CSXT's plan provides for "unhindered access to its rail routes running through the District of Columbia," see U.S. Statement at 14, and CSXT's representations that it will not reroute trains unless specifically ordered to by the government.¹⁸ On this bare record, the Court cannot determine that HM-232 preempts the District Act as a matter of law.

2. HMTA Analysis

The federal government also argues that the District Act conflicts with the government's "deliberate and express decision to allow the entities it regulates to determine the specifics of hazardous materials security plans," and is therefore preempted by the HMTA. See U.S. Statement at 13-14. The viability of HM-232, according to the government, depends on the "flexibility" it provides companies in "tailoring their security plans to their

¹⁸ See 3/23/05 Tr. at 30-31. (THE COURT: "I just want a clear answer ... Unless the federal government tells you to reroute all these rail cars or unless some federal judge tells you to do it, you're not going to do it? ..." MR. NATHAN: "Yes, that is our answer.").

individual circumstances." *Id.* In *National Tank Truck Carriers v. City of New York*, the Second Circuit evaluated New York City ordinances that prohibited the transportation of hazardous gases by tank truck within the City. *See* 677 F.2d 270 (2d Cir. 1982). The Court found that the regulations were "entirely consistent with, and in furtherance of, the federal regulations and their underlying purposes, *i.e.*, to protect against risks to life and property from the transportation of hazardous materials." *Id.* at 274-75. Therefore, the Court held, the regulations "do not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ... as they plainly promote safety, which is the goal of the HMTA, while they do not overlap with any specific directives of the Secretary." *Id.* at 275.

Similarly, here, it is clearly not *impossible* for CSXT to comply with federal rail safety and hazardous materials regulations (including HM-232) and the District Act. Moreover, the District's temporary ban on the passage of ultrahazardous materials seems to further the underlying safety and security purposes of the federal regulations. *Cf. Nat'l Tank Truck Carriers*, 677 F.2d at 275. The Court is not second guessing the government's policy decision to afford carriers the flexibility to choose appropriate security measures. *See* 68 Fed. Reg. at 14515 (setting forth "general requirements for a security plan's components rather than a prescriptive list of specific items").

This is an entirely sensible way to enhance security while imposing minimal burdens on commerce. Nor is the Court criticizing CSXT's efforts to meet its obligations under the rule. The Court simply finds that the District Act does not conflict with the federal policy. Instead, the challenged law is simply a gap-filling measure that is intended to minimize the risk of terror attack while the federal government contemplates authoritative action.¹⁹

3. ICCTA Analysis

Plaintiff argues that the ICCTA precludes "all state efforts to regulate rail transportation," notwithstanding the well-established cooperative framework in the area of rail safety and security under the FRSA and HMTA, and "even where the statute in question could be characterized as an exercise of state and local police powers to protect health, safety, and the environment." See P.I. Mem. at 36-37 (citing *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998); *W.S. Cent. Ltd. v. City of Marshfield*, 160 F. Supp. 2d 1009, 1013 (W.D. Wis. 2000)).

The flaw in plaintiff's argument is that it interprets the

¹⁹ Final Rule HM-232 indicates an intent to preempt state hazardous materials transportation security requirements if compliance with both state and federal requirements is "not possible" or if the state requirement is an "obstacle" to accomplishing the purposes of the federal rule. See HM-232, 68 Fed. Reg. at 14519. This language mirrors the HMTA's express preemption clause and adds nothing new to the preemption analysis.

ICCTA in a "contextual vacuum," completely ignoring the existence of the surrounding statutory framework, including the FRSA. *Cf. Medtronic*, 518 U.S. at 484-86 (holding that an express preemption provision must be interpreted "through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law"); *City of Auburn*, 154 F.3d at 1031 (interpreting "the plain language of the ICCTA *and the statutory framework surrounding it*" (emphasis added)).²⁰ This Court cannot blindly apply the ICCTA preemption clause without also considering the purpose, structure, and application of the well-established federal-state rail safety framework under the FRSA and HMTA. *See Iowa, Chicago & Eastern R.R. Corp. v. Washington County, Iowa*, 384 F.3d 557, 561 (8th Cir. 2004) (finding that "Congress for many decades has forged a federal-state regulatory partnership to deal with problems of rail and highway safety,"

²⁰ In *City of Auburn*, the Ninth Circuit held that the ICCTA preempted a county ordinance requiring local environmental review and approval of railroad construction projects. *See City of Auburn*, 154 F.3d at 1029-31. The Court rejected the city's argument that the ICCTA only preempts *economic* regulation, finding that there is no clear line between "economic" and "environmental" regulation. *See id.* at 1031 ("if local authorities have the ability to impose 'environmental' permitting requirements on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line"). However, one can only presume that if there existed a federal law preserving an explicit sphere of state authority for railroad *environmental* laws, as the FRSA does in the area of rail safety, the *City of Auburn* case may have come out differently.

and the "ICCTA did not address these problems"); *Tyrrell*, 248 F.3d at 523 (when a state regulation "has a connection with rail safety," the FRSA, not the ICCTA, "provides the applicable standard for assessing federal preemption"); *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 444 n.18 (5th Cir. 2001) (finding that a Texas anti-blocking statute was preempted by the ICCTA, but acknowledging that a state *safety* regulation might have led to "a substantially different result" under the FRSA). In short, "the ICCTA and its legislative history contain no evidence that Congress intended for the STB to supplant FRA's authority over rail safety." *Tyrrell*, 248 F.3d at 523; *see also Boston & Maine Corp. v. STB*, 364 F.3d 318, 321 (D.C. Cir. 2004) ("primary jurisdiction over railroad safety belongs to the FRA, not the STB").

The District Act is clearly aimed at rail safety; it requires no changes to the infrastructure of the interstate railroad system, nor does it directly regulate the physical routing of trains. (CSXT trains may continue traveling through the District as long as they do not carry the banned hazmats.) Plaintiff's expansive interpretation of ICCTA preemption in this case would undermine the longstanding partnership between states and the federal government in the areas of rail safety and security, and would ignore Congress' intent as expressed through the FRSA, the HMTA, and the Homeland Security Act. *See Tyrrell*,

248 F.3d at 523 (finding that Congress "inten[ded] for the ICCTA and FRSA to be construed *in pari materia*"); *Iowa, Chicago & Eastern R.R.*, 384 F.3d at 559 (plaintiff's argument that the ICCTA preempts state rail safety law "ignores relevant federal statutes that were enacted before ICCTA, that are administered by one or more agencies other than the ICC or the STB, and that Congress left intact in enacting the ICCTA"). Accordingly, the Court finds that the ICCTA does not independently preempt the District Act.

4. The District's Status under the FRSA

Finally, plaintiff argues that even if the District Act would otherwise be a valid state law, the District of Columbia cannot take advantage of the FRSA's cooperative framework because "the plain language of Section 20106 refers only to 'states' and FRSA does not include the District of Columbia in its definition of 'state' as some federal statutes do." P.I. Mem. at 27. This argument implies that Congress intended to exclude District of Columbia residents from safeguards enjoyed by everyone else in this Nation. The Court will not ascribe such an intent to Congress. The District of Columbia is treated as a State and equal partner in this country in many fundamental situations. See, e.g., *District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100 n.9 (1953) (citing delegations of power to regulate commerce); *Milton S. Kronheim & Co., Inc., v. District of*

Columbia, 91 F.3d 193, 199-200 (D.C. Cir. 1996); *cert. denied*, 520 U.S. 1186 (1997) (treating District as a state for Commerce Clause purposes); *Huffman v. District of Columbia*, 39 A.2d 558, 560 (D.C. 1944) (describing the District's "police power" to provide for public health and welfare). Furthermore, the District is specifically designated as a State in the HMTA and in dozens of instances solely in Title 49 (Transportation) in the Code of Federal Regulations. See D.C. Opp. at 36 n.27 (citing regulations).

Plaintiff offers no explanation why Congress would have chosen to treat the District as a "state" under the HMTA, but not the FRSA. Moreover, plaintiff's construction would create a vacuum of authority in the District of Columbia--while everyone else in the country enjoys two tiers of authority over rail safety, District of Columbia residents would be left without protections until the federal government acts. A more plausible explanation for the FRSA's silence on D.C.'s status is simply that the FRSA was enacted in 1970, three years prior to the date the District was delegated the power of self-government. See District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) ("Home Rule Act"). The HMTA was enacted one year later, in 1974. ²¹

²¹ Congress passed an omnibus bill in 1970 which enacted, among other provisions, the FRSA. See Pub. L. 91-548, 84 Stat. 971. Congress enacted the HMTA in 1974 as part of a second

Thus, Congress simply did not contemplate a need to designate D.C. as a "state" at the time the FRSA was passed.

As the Supreme Court has instructed, Congress' preemptive intent

primarily is discerned from the language of the pre-emption statute and the statutory framework surrounding it. Also relevant, however, is the structure and purpose of the statute as a whole as revealed not only in the text, but through the reviewing court's reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.

Medtronic, 518 U.S. at 486 (internal quotes and citations omitted); *see also Stafford v. Briggs*, 444 U.S. 527, 535 (1980) ("it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words will be used, but will take in connection with it the whole statute ... and the objects and policy of the law") (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)). Given the objects and policy of the FRSA, it is this Court's reasoned understanding that Congress did not intend to single out District of Columbia residents for less protection than that enjoyed by the rest of the country.

B. Motions to Enforce the STB Order

The preemption issue has another twist. On Monday, March 14, 2005, following a petition from CSXT, the Surface

omnibus bill. *See* Pub. L. 93-633, 88 Stat. 2156.

Transportation Board ("STB" or the "Board")²² issued a declaratory order expressing the Board's view that the District Act "unreasonably burdens interstate commerce" and "is preempted" by section 10501(b) of the ICCTA. *CSX Transportation, Inc. - Petition for Declaratory Order* (STB Fin. Docket No. 34662, March 14, 2005) ("STB Order").²³ Although the Board noted that it "does not have the power to invalidate the D.C. Act," it nonetheless exercised its discretion to issue the order, noting that the decision "might assist the court." See STB Order at 5-6. However, plaintiff and the United States argue that the STB Order conclusively binds the judgment of this Court and requires the Court to mechanically apply the Board's reasoning to "enforce" its decision against the District of Columbia. See CSXT Mot. to Enforce at 8 (arguing that it is "indisputable that this Court

²² The ICCTA replaced the former Interstate Commerce Commission with the STB, a quasi-independent three-member body within the Department of Transportation. See 49 U.S.C. §§ 701-703; 49 U.S.C. § 10501(b). Among the Board's responsibilities are oversight of the construction, acquisition, operation, and abandonment of rail lines (49 U.S.C. §§ 10901-10907); railroad rates and services (49 U.S.C. §§ 10701-10747, 11101-11124); and rail carrier consolidations, mergers, and common control arrangements (49 U.S.C. §§ 11323-11327).

²³ DOT filed comments supporting CSXT's petition, as did twenty-five industry parties representing shippers and the railroads. The District of Columbia and the Sierra Club filed comments opposing CSXT's petition. See P.I. Mem. Ex. 13 (Docket, *CSX Transportation, Inc. Petition for Declaratory Order*, STB Finance Docket No. 34662 (Feb. 18, 2005)). The District of Columbia's petition for reconsideration is currently pending before the Board.

has no discretion in this matter, and may not undertake to examine the validity or correctness of the STB Order. The Court is simply required to enforce it").

The evolution of this argument is tortured to say the least. In the initial pleadings supporting plaintiff's motions, CSXT argued that the STB's ruling was not binding, but was entitled to "deference" by the Court. See CSXT Reply at 12. Two days before the March 23, 2005 hearing, however, in the last two pages of a reply brief, the United States argued for the first time that the Court lacked authority to question the STB Order and is bound to apply its reasoning to preempt the District Act. See U.S. Reply at 17-18. This argument prompted a second round of briefing which focused on the impact, on this Court, of the STB Order. CSXT adopted this position at the March 23 hearing and, a day later, amended its complaint to add a count to "enforce" the STB Order. The Amended Complaint named the United States as a statutory defendant in an attempt to satisfy the jurisdictional requirements of 29 U.S.C. § 2322. On March 30th, the United States sought to realign itself as a party plaintiff and brought its own motion to enforce the STB Order.

Defendants maintain that these motions are doomed by fatal procedural irregularities. See Sierra Opp. to Mot. to Enforce at 2 ("[N]either CSXT nor the United States provides support for the proposition that a private party without authority to enforce an

STB order can name the United States as a sham defendant--in an improperly filed amended complaint--and that the United States can then simply realign itself and act as if it had brought the suit itself."). The Court has serious reservations about the procedural irregularities identified by defendants. This case has proceeded on an extremely expedited schedule, and the burdens of responding to an entirely new argument, raised in a reply brief and only days before implementation of the District's law, has taxed the parties as well as the Court. Nevertheless, the Court will, in the interests of justice and fair consideration of the issues, accept CSXT's and the government's respective "motions to enforce" as properly filed and presented.

Plaintiff and the United States submit that this Court has no jurisdiction to second-guess the merits of the STB Order because 28 U.S.C. § 2342 (the "Hobbs Act") and 28 U.S.C. § 2321 bifurcate proceedings to *review* and proceedings to *enforce* STB orders between the courts of appeals and the district courts, respectively.²⁴ "A refusal to enforce the STB's Order," argues plaintiff, "would be tantamount to suspending, enjoining, setting

²⁴ **28 U.S.C. 2321(a)** Except as otherwise provided by an Act of Congress, a proceeding to enjoin or suspend, in whole or in part, a rule, regulation, or order of the Surface Transportation Board shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title. **(b)** The procedure in the district courts in actions to enforce, in whole or in part, any order of the Surface Transportation Board other than for payment of money or the collection of fines, penalties, and forfeitures, shall be as provided in this chapter.

aside or invalidating the STB Order" and would violate the statutes providing that any such action may only be taken by the United States Court of Appeals. CSXT Proposed Facts at 2; *see also* U.S. Reply at 17 (arguing that this Court lacks jurisdiction to decide any claim "that amounts to a collateral attack on the STB decision or that otherwise might affect an appellate court's future jurisdiction over the STB decision").

The Court disagrees. By its own admission, the STB lacks jurisdiction over legislation enacted by the District of Columbia. *See* STB Order at 5 ("the Board does not have the power to invalidate the D.C. Act"). Subtitle IV of Title 49 of the U.S. Code vests the Board with jurisdiction over transportation by "rail carriers," but it does not empower the Board to regulate municipal governments. *See* 49 U.S.C. §§ 10101 *et seq.* Accordingly, there is simply nothing in this case for the Court to "enforce."

Plaintiff argues that the Board has broad jurisdiction under the Administrative Procedure Act to issue declaratory orders to "terminate a controversy or remove uncertainty." *See* 5 U.S.C. § 554(e). However, the District of Columbia's legislative response to the threat of terrorism is not the type of "controversy" that Congress entrusted the STB to "terminate." While this Court may recognize the Board's expertise in matters related to the economic regulation of railroads, Congress could not have

intended to grant the three members of the Board veto power over the District of Columbia's--or any state or local government's--legislative judgments regarding the safety and security of its citizens.²⁵

Plaintiff's argument hinges on whether the STB Order is reviewable in the Court of Appeals. However, in order to meet the Hobbs Act's requirements for review, final agency actions must "either determine rights or obligations, or have some legal consequence." *See Intercity Transp. Co. v. United States*, 737 F.2d 103, 106 (D.C. Cir. 1984).²⁶ The STB Order does not, in and of itself, produce any legal consequences. Therefore, the Court of Appeals would arguably have no jurisdiction in an action to "enjoin or suspend" the Order pursuant to 28 U.S.C. § 2321. *See City of Miami v. Interstate Commerce Comm'n*, 669 F.2d 219 (5th Cir. Unit B 1981).

²⁵ STB's website describes the Board as "an economic regulatory agency that Congress charged with the fundamental missions of resolving railroad rate and service disputes and reviewing proposed railroad mergers." *See Overview of the STB* (<http://www.stb.dot.gov/stb/about/overview.html>).

²⁶ In *Intercity Transp. Co.*, the D.C. Circuit held that "[o]nly final Commission actions are reviewable" under the Hobbs Act. *See* 737 F.2d at 106. "Two criteria generally guide finality determinations. First, the action must represent a 'terminal, complete resolution of the case before the agency'... Second, the action must either determine rights or obligations, or have some legal consequence." *Id.* (citing *Am. Dairy of Evansville, Inc. v. Bergland*, 627 F.2d 1252, 1260 (D.C. Cir. 1980)).

In *City of Miami*, the City petitioned the Fifth Circuit for review of an ICC order declaring an ocean terminal facility owned by the Florida East Coast Railway (FEC) to be a "line of railroad" within the meaning of the former Interstate Commerce Act. See 669 F.2d at 220. The ICC issued the declaratory order at the behest of the railroad, which was trying to resist the city's condemnation of the ocean terminal for use as a public park. The Court, however, held that the ICC Order was merely an "advisory ruling" of the Commission's interpretation of the law and not a "final order" subject to appellate review:

The ICC order in the present case does not determine any 'rights or obligations,' nor do any 'legal consequences ... flow from the (ICC's) action.' The order neither permits nor prohibits abandonment of the FEC terminal. Moreover, the Commission's decision does not purport to enjoin either the FEC or the City from taking any action with respect to the subject property, nor does it have any legal effect on either party's position ... Though styled a 'declaratory order,' the Commission's action is nothing more than an advisory ruling that FEC's ocean terminal is a 'line of railroad.'

Id. at 221-22.

Similarly, here, the STB Order does not purport to enjoin the District of Columbia from taking any action and is nothing more than an advisory ruling of the Board's view that the District Act is preempted. See STB Order at 2 ("*In the Board's view*, section 10501(b) preempts the D.C. Act.") (emphasis added). Accordingly, this Court is not persuaded that the STB Order is a "final agency action" that could be challenged in the Court of

Appeals, nor is it the proper subject of an enforcement action in this Court pursuant to 28 U.S.C. § 2321(b). Therefore, plaintiff's argument that this Court's decision would somehow interfere with the Court of Appeals' jurisdiction misses the mark.

Furthermore, even if this were a properly constituted enforcement action, this Court would not be deprived of its authority, under Article III of the Constitution, to exercise its equitable authority to independently interpret the law. To decide otherwise would raise serious separation of powers concerns, as it would effectively turn an Article III court into a mere rubber-stamp for an executive branch agency's interpretation of the Constitution. *See Marbury v. Madison*, 5 U.S. 137 (1803) ("It is emphatically the province and the duty of the judicial department to say what the law is.").

The STB's sweeping legal conclusion seems to ignore the FRSA and HMTA's explicit preservation of some non-federal authority over rail safety and security and post-ICCTA cases that have held the same. *Compare* STB Order at 7 (finding that the ICCTA "does not leave room for state and local regulation of activities related to rail transportation"), *with Norfolk Southern Ry.*, 529 U.S. at 352 (finding that preemption of a state rail safety standard "will lie only if the federal regulations substantially subsume the subject matter of the relevant state law"); *see also*

Tyrrell , 248 F.3d at 522-23 (finding that an expansive interpretation of ICCTA's preemptive scope would "implicitly repeal" the FRSA's express savings clause); accord *Iowa, Chicago & Eastern R.R.* , 384 F.3d at 561. This could hardly be Congress' intent. See *Blanchette v. Connecticut Gen. Ins. Corp.* , 419 U.S. 102, 133-34 (1974) (observing the familiar canon of construction that "repeals by implication are disfavored").

The Board also seems to engraft a "reasonableness" inquiry (which does not appear in the text of the ICCTA) into the STB Order's analysis of state legislative actions under section 10501(b). See STB Order at 9 (states may maintain some traditional regulation "so long as no unreasonable burden is imposed on a railroad"); *id.* at 10 (states cannot take actions that would "unreasonably burden interstate commerce"). It is unclear how the Board reached its conclusion that the District Act "would unreasonably interfere with interstate commerce," see *id.* at 11, especially given the fact that the Order was entirely devoid of any factual findings. See *id.* at 6 (expressly acknowledging that "we do not make any factual findings"). In fact, the Board apparently declined the District's request for an opportunity to conduct discovery, as authorized by 49 C.F.R. § 1114.21(a), on the District Act's purported impact on interstate commerce. See D.C. Opp. to Mot. to Enforce at 8-9.

Finally, the STB Order appears to be directly at odds with

positions the Board has taken in other cases. See *Illinois, Chicago & Eastern R.R.*, 384 F.3d at 560 (describing the position "urged by" the STB as amici that "the FRSA, not ICCTA, determines whether a state law relating to rail safety is preempted"); *Tyrrell*, 248 F.3d at 521 (noting that appellant's concern about the district court's broad interpretation of ICCTA preemption is "shared by the United States and the STB"); see also *Sierra Opp. to Mot. to Enforce* at 15 (citing previous STB decisions). The Board's apparent departure in this case from prior interpretations of ICCTA's preemptive scope is in tension with the familiar principle that "reasoned decisionmaking requires an agency to explain changes of policy from past decisions." *Continental Air Lines, Inc. v. CAB*, 551 F.2d 1293, 1303 (D.C. Cir. 1977); see also *Baltimore & Annapolis R.R. v. Washington Metro. Area Transit Comm'n*, 642 F.2d 1365, 1370 (D.C. Cir. 1980).

Plaintiff's theory that this Court must stamp the STB Order with its judicial *imprimatur*, no matter how clearly erroneous the Board's legal analysis, offends the very essence of the Court as an instrument of justice. In upholding a district court's refusal to "enforce" an administrative order it deemed improper, the Tenth Circuit wisely observed that

[i]t is true the inferior Federal courts are creatures of statute but, nevertheless, historically, they are possessed with the inherent equitable powers of common law courts. If they are ever stripped of judicial discretion in equitable proceedings they will be

relegated to the standing of mere administrative enforcement agencies.

United States v. Brown, 331 F.2d 362, 365 (10th Cir. 1964); see also Louis L. Jaffe, *The Judicial Enforcement of Administrative Orders*, 76 Harv. L. Rev. 865, 869 (1963) ("A court should rarely be required--nor should it be thought that there is any intention to require it--to participate actively in the enforcement of a judgment which it finds offensive."). By enacting the Hobbs Act, Congress did not intend to strip the district courts of their inherent equitable authority, nor did Congress intend to allow plaintiffs to avoid judicial determination of constitutional claims simply by petitioning an administrative agency for a "declaratory order."²⁷

²⁷ The cases cited by CSXT and the United States involve very different factual circumstances and do not support plaintiff's argument. Unlike *Port of Boston Marine Terminal Ass'n v. Rederi akti bolaget Transatlantic*, 400 U.S. 62 (1970), *FCC v. ITT World Communications, Inc.*, 466 U.S. 463 (1984), and *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, 394 F.3d 568 (8th Cir. 2004), this case does not involve a party attempting to evade the required statutory review procedures by collaterally attacking a final agency order in an improper forum. Instead, CSXT --the party *benefitted* by the STB Order--has engaged the jurisdiction of this Court. *United States v. Ruzicka*, 329 U.S. 287 (1946), and *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) ("TRAC"), are similarly distinguishable. *Ruzicka* involved a fact-dependent analysis of a specialized administrative framework regulating the handling and pricing of milk. Even though the Court found it would be "disruptive" to allow milk pricing orders to be open for independent adjudication in a suit for enforcement, the Court was "not called upon to decide what powers inhere in a court of equity, exercising due judicial discretion, even in a suit ... for enforcement of an order." See *Ruzicka*, 329 U.S. at 295. In *TRAC*, plaintiffs sought a writ of mandamus to compel an FCC

C. Dormant Commerce Clause

Although phrased as a positive grant of power to Congress, the Supreme Court has long interpreted in the Commerce Clause a "negative aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994); see *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537 (1949) (Jackson, J.) ("The principle that our economic unit is the Nation ... has as its corollary that the states are not separable economic units.").

Plaintiff argues that the District Act violates this so-called "dormant" aspect of the Commerce Clause "by erecting a protectionist wall around itself" and "isolat[ing] itself in the stream of interstate commerce from a problem shared by all." See P.I. Mem. at 21-22 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978)). According to plaintiff, a judicial endorsement of the District Act could engender scores of copycat

decision on the legality of certain telephone overcharges. The Court held that "where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review in the Court of Appeals." See *TRAC*, 750 F.2d at 75. The Court is not persuaded that *TRAC* is relevant where, as here, a plaintiff is seeking to enforce an agency order in a district court pursuant to 28 U.S.C. § 2321. In any event, *TRAC* clearly has no application where the agency's order is not the kind of "final action" that is the proper subject for appellate review.

bans in other jurisdictions, eventually causing rail traffic of essential hazardous materials to "grind to a halt." See P.I. Mem. at 3-4.

Although there is no uniform dormant Commerce Clause "test," the Supreme Court has generally applied a form of strict scrutiny to overtly protectionist state laws, and a more lenient balancing test to facially neutral laws that only "incidentally" burden interstate commerce. Compare *City of Philadelphia*, 437 U.S. at 624 ("where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected"), with *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (finding that evenhanded regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits").

However, the cases "have eschewed formalism for a sensitive case-by-case analysis of purposes and effects." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994). In all cases, the court's essential duty is to root out economic protectionism by "determin[ing] whether the statute under attack ... will in its practical operation work discrimination against interstate commerce." *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940); see also *City of Philadelphia*, 437 U.S. at 624 (the "crucial inquiry" is whether the challenged law "is basically a protectionist measure, or whether it can fairly be viewed as a

law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental"). Thus, the touchstone for purposes of the Commerce Clause is not whether the state law imposes burdens on interstate commerce *per se*, but whether it burdens commerce *for the state's own economic advantage*. See *H. P. Hood & Sons*, 336 U.S. at 533 ("This distinction between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.").

There is a long history of dormant Commerce Clause cases involving state efforts to limit the inflow of solid or hazardous wastes. For example,

- In *City of Philadelphia*, the Court struck down a New Jersey law that banned imports of out-of-state waste while keeping the state's landfills open to in-state waste generators. See 437 U.S. at 619.
- In *Chem. Waste Mgmt., Inc. v. Hunt*, the Court struck down Alabama's hazardous waste disposal fee that applied only to wastes generated outside the state. See 504 U.S. 334, 336-37 (1992).

- In *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, the Court struck down a Michigan law prohibiting private landfill operators from accepting solid waste originating outside the county in which their facilities operate. See 504 U.S. 353, 355 (1992).

These decisions were influenced by the Court's understanding that "the evil of protectionism can reside in legislative means as well as legislative ends." *City of Philadelphia*, 437 U.S. at 626. Thus, New Jersey's ban on out-of-state waste was invalid even though the state claimed its ultimate aim was to protect the state's environment. *Id.* However, a close examination of the "waste" cases makes clear that the principle of "non-discrimination" is paramount, not blind judicial annulment of all state laws that regulate, or impose burdens on, interstate commerce. In each case, the invalid state law targeted only interstate sources of waste, while allowing in-state sources to remain unregulated. As noted by Justice Stevens in his discussion of the *City of Philadelphia* case:

New Jersey has every right to protect its residents' pocketbooks as well as their environment. And it may be assumed as well that New Jersey may pursue those ends by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected. But whatever New Jersey's ultimate purpose, it may not be accompanied by discriminating against articles of commerce coming from outside that State unless there is some reason, apart

from their origin, to treat them differently.’
Fort Gratiot, 504 U.S. at 360 (quoting *City of Philadelphia*, 437 U.S. at 626-27).

The importance of this non-discrimination principle is further highlighted by the Court’s comparison, in *City of Philadelphia*, of New Jersey’s ban on out-of-state waste with traditional state quarantine laws, which have consistently been upheld even though “directed against out-of-state commerce.” See 437 U.S. at 628. The distinction, according to the Court, is that quarantine laws, “did not discriminate against interstate commerce as such, but simply prevented traffic in noxious articles, whatever their origin.” *Id.* at 629. New Jersey, on the other hand, made no claim that the regulated waste was “inherently harmful” or that its “very movement” endangered health. Rather, the state law created an artificial distinction between out-of-state and domestic waste in an obvious effort to “impose[] on out-of-state commercial interests the full burden of conserving the State’s remaining landfill space.” See *id.* at 628-629.

Plaintiff argues that the depression-era case of *Edwards v. California*, 314 U.S. 160 (1941) is “most analogous” to the instant case. See CSXT Reply at 32. In *Edwards*, the Supreme Court struck down a California law that prohibited the “bringing into the State any indigent person who is not a resident of the

State." See 314 U.S. at 166. Although the Court acknowledged the "staggering" problems of "health, morals, and especially finance" caused by the huge influx of migrants into California, it held that the statute "must fail under any known test of the validity of State interference with interstate commerce." *Id.* at 167. The Court did not articulate the precise grounds for invalidating the statute, but it was clearly influenced by Justice Cardozo's famous observation that the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.'" *Id.* at 167 (quoting *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). In any event, California's ill-fated attempt to close its borders to the poor was clearly motivated, at least in part, by economic protectionism. The law "discriminated" between people based solely on their state of origin. The resident poor were allowed to remain and share in the state's bounty while outsiders were permanently excluded. See *City of Philadelphia*, 437 U.S. at 627 (characterizing *Edwards* as an attempt to "preserve the State's *financial* resources by fencing out indigent immigrants") (emphasis added); accord *Chem. Waste Mgmt.*, 504 U.S. at 341.

In this case, unlike all of the other dormant Commerce Clause cases cited by plaintiff and known to this Court, there is

no discernable economic rationale for the District Act. Unlike New Jersey's protectionist ban on out-of-state waste, the District Act treats *all* classified hazardous waste the same, recognizing that the "very movement" of such waste endangers health, not its state of origin. *Cf. City of Philadelphia*, 437 U.S. at 629; *Chem. Waste Mgmt.*, 504 U.S. at 343. Furthermore, no in-state industry is benefitted at the expense of out-of-state interests nor are there efforts to "suppress or mitigate the consequences of competition between the states." *Cf. Baldwin*, 294 U.S. at 522; *West Lynn Creamery*, 512 U.S. at 205. Nor has any party, at any stage of this litigation, articulated any possible motivation on the part of the D.C. Council other than a sincere concern about the effects of a terrorist attack on the citizens of and visitors to the District of Columbia. While the Terrorism Prevention Act may impose some incidental burdens on interstate commerce, it creates no artificial distinctions or suspect classifications--in short, it does not "discriminate" against commerce. *See Nat'l Tank Truck Carriers*, 677 F.2d at 273 (finding that New York's hazardous gas routing requirements "plainly do not have economic protectionism as their objective" because they are "directed at a legitimate local concern for public safety" and they "apply even-handedly both to intrastate and interstate commerce"). Thus, the District Act bears none of the hallmarks of protectionism that have traditionally raised

Commerce Clause concerns.

The Supreme Court has not hesitated to strike down ostensible state "health & safety" laws masking protectionist motives. See *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 686 (1981) (striking down Iowa's ban on trucks longer than 60 feet because the asserted safety benefits were "illusory"); accord *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) (striking down a Washington State act because, in the words of Justice Brandeis, "[i]ts primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition"). However, if the state is truly motivated by health and safety concerns, the Court "will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Kassel*, 450 U.S. at 670 (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 449 (1978) (Blackmun, J., concurring)). The D.C. Circuit has followed this approach. Where a state statute is nondiscriminatory and advances legitimate safety concerns, the Court of Appeals has held that the dormant Commerce Clause inquiry is at an end. See *Electrolert Corp. v. Barry*, 737 F.2d 110, 113 (D.C. Cir. 1984).²⁸

²⁸ In *Electrolert*, the Court found that the District's ban on radar detectors was "nonprotectionist in nature and is based on nonillusory safety benefits." 737 F.2d at 113. Therefore, the Court was able to uphold the Act without performing any "fine balancing test" nor inquiring closely into the government's factual assumptions. *Id.*

Because the District Act does not "discriminate" against interstate commerce, nor does any party claim its safety benefits are "illusory," it comes before the Court in the "strongest possible posture." *See Electrolert*, 737 F.2d at 113. It is one thing to use the dormant Commerce Clause to root out "protectionist" motives in the guise of state health and safety regulations. It is quite another for a court to use the dormant Commerce Clause to sit in judgment of a legislative body's balancing of benefits and burdens when that elected body acts in good faith to protect its citizens. The Court will decline the invitation to second-guess the legislative judgment of the D.C. Council by deciding that the District Act "unreasonably" burdens commerce.

D. District of Columbia Home Rule Act

The Constitution vests in Congress the authority to "exercise exclusive Legislation in all Cases whatsoever, over ... the Seat of the Government of the United States." U.S. Const., Art. I, § 8, cl. 17. In 1973, however, Congress enacted the Home Rule Act, granting the District government limited legislative powers, while retaining its ultimate authority over the District of Columbia. *See* Home Rule Act (D.C. Code § 1-201.02).

Plaintiff argues that the Terrorism Prevention Act is invalid because it violates one of the explicit limitations Congress placed on the Council's legislative authority, that is:

"[t]he Council shall have no authority to ... [e]nact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively to the District." Home Rule Act § 602(a)(3) (D.C. Code § 1-206.02). Plaintiff thus contends that because the District Act impacts the flow of interstate commerce and is not a "purely local" matter restricted to the District's boundaries, the Act exceeds this limitation. See P.I. Mem. at 38.

The cases cited by Plaintiff do not support this argument. While the courts in *District of Columbia v. Greater Washington Cent. Labor Council*, 442 A.2d 110 (D.C. 1982), and *Techworld Dev. Corp. v. D.C. Pres. League*, 648 F. Supp. 106 (D.D.C. 1986), discuss in general terms the Congressional intent in passing the Home Rule Act to delegate authority to the D.C. government over local, as opposed to national, matters, both courts read the limitations on the D.C. Council's authority more narrowly than Plaintiff suggests. See *Techworld*, 648 F. Supp. at 114-15 ("The functions reserved to the federal level would be those related to federal operations in the District, and to property held and used by the federal government for conduct of its administrative, judicial, and legislative operations; and for the monuments pertaining to the nation's past.") (quoting *Greater Washington Cent. Labor Council*, 442 A.2d at 116 (quoting legislative

history)).

In the *Greater Washington* case, the District of Columbia Court of Appeals concluded that the D.C. Council had not exceeded its authority when it passed the District of Columbia Workers' Compensation Act despite the fact that Congress had passed - prior to enacting the Home Rule Act - a compensation law extending federal workers' compensation protections to private sector employees in the District of Columbia. See 442 A.2d at 113. Similarly, in *Techworld*, this Court concluded that the D.C. Council did not violate its authority under the Home Rule Act when it closed a street and transferred title to a developer, despite the fact that title to one of the streets had been held by the United States government. See 648 F. Supp. at 113.

In *McConnell v. United States*, on the other hand, the D.C. Court of Appeals did conclude that the D.C. Council violated the limitations in the Home Rule Act when it enacted legislation that directly conflicted with and effectively repealed a federal law. 537 A.2d 211, 213-14 (D.C. 1988). In *McConnell*, the D.C. legislature passed the Uniform Controlled Substances Act ("UCSA") with mandatory-minimum prison terms for certain offenses. *Id.* As a result of UCSA, the trial court determined that Mr. McConnell, a second-time offender, was not eligible at sentencing for treatment as an addict, although that option was historically available to sentencing judges under the federal Narcotic Addicts

Rehabilitation Act ("NARA"). *Id.* at 213. Because of this direct conflict, the court concluded that the District's law was invalid. *Id.* at 214. The *McConnell* case, however, is not instructive for present purposes because the Terrorism Prevention Act does not directly conflict with or repeal any federal law. Indeed, if there were a law on point the District's law would be preempted, as discussed above.

Finally, though not cited by the parties, the case of *Am. Council of Life Ins. v. District of Columbia*, 645 F. Supp. 84 (D.D.C. 1986), is on point. In 1986, the D.C. government enacted the Prohibition of Discrimination in the Provision of Insurance Act, prohibiting insurers from discriminating on the basis of a positive AIDS or AIDS-related screening test or from denying benefits as a result of an individual developing AIDS. *Id.* at 85. The American Council of Life Insurance moved for summary judgment and a preliminary injunction, claiming that because the law would regulate insurance activities beyond the District of Columbia, it violated Section 602(a)(3) of the Home Rule Act's limitation prohibiting the D.C. Council from enacting legislation "whose application is not restricted exclusively to the District'", the same limitation at issue in the instant case. *Id.* at 88. Insurers argued that the legislation would lead to large premium increases for policy holders and that the law would "subject out-of-state insurers doing business in the District of

Columbia to penalties if the companies discriminate against individuals exposed to AIDS." *Id.* at 85, 88.

Finding that the legislative history of the District's anti-discrimination in insurance law clearly indicated that the "statute would only apply when the company was doing business in the District of Columbia," this Court upheld the District's law and granted summary judgment for the District. *Id.* at 89. See also *Diamond v. District of Columbia*, 618 F. Supp. 519 (D.D.C. 1984), *rev'd on other grounds*, 792 F.2d 179 (D.C. Cir. 1986) (upholding a District of Columbia law that required auto-insurance companies doing business in the District to provide out-of-state liability coverage against a challenge that the law violated the Home Rule Act's prohibition on District legislation that would apply beyond the District).

These cases demonstrate that there is a distinction, for Home Rule Act purposes, between the incidental effects of local regulation and direct regulation of external conduct. Like the laws at issue in *Am. Council* and *Diamond*, the Terrorism Prevention Act is clearly intended only to apply within the boundaries of the District of Columbia. The law does not run afoul of the Home Rule Act's requirement that the application of D.C. laws be restricted to the District simply because it may have financial implications for plaintiff beyond the District.

IV. ANALYSIS

A. Summary Judgment

Plaintiff argues that this is a very simple case. Only the federal government--not the District of Columbia or any other state or local government--has the authority to regulate the transport of hazardous materials by rail in interstate commerce. See P.I. Mem. at 2. The Terrorism Prevention Act, argues plaintiff, is facially invalid because it usurps this exclusive federal role. Because CSXT contends that this case presents a "purely legal question," it has not presented nor relied upon evidence of specific measures taken by the federal government to address the threat of terrorism. Indeed, plaintiff argues that the District Act would be invalid even if the federal government were doing nothing to address the threat. ²⁹

However, the foregoing discussion and analysis demonstrates that this case is hardly simple. The relevant statutory framework does not simply eliminate all state jurisdiction over rail safety and security, but rather preserves a limited sphere of state authority, in partnership with the federal government. When viewed in this light, it becomes clear that this case is fraught with genuine issues of material fact. The key legal

²⁹ See 3/23/05 Tr. at 60-61 (THE COURT: "If the federal government said, we're not doing anything and we'll get around to it whenever we can, the city council, in the legitimate exercise of its police power, would not have the authority to protect its citizens?" MR. NATHAN: "That is correct.").

issues include, for example, whether or not the federal government has "substantially subsumed" the subject of rail terrorism or whether the District Act is an "obstacle" to federal objectives. *See supra* Part III(A). However, plaintiff has failed to introduce evidence at this point to enable the Court to make these determinations as a matter of law. In other words, the record is devoid of the factual predicate that would support the ruling of law sought by plaintiff. Accordingly, the Court must **DENY** plaintiff's Motion for Summary Judgment.

B. Preliminary Injunction

The Court next considers plaintiff's request for preliminary injunctive relief. This requires an analysis of four traditional equitable factors. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

1. Likelihood of Success

Plaintiff's legal arguments are not trivial. The relevant federal statutes express a preference for uniform federal regulation in the areas of rail safety and hazardous materials transportation. *See* 49 U.S.C. § 20106; 49 U.S.C. § 5125. They also provide the federal government with ultimate authority to choose the most appropriate policies to enhance railroad security. *See* 49 U.S.C. § 114. Because the federal government has ultimate authority, the District Act may be preempted even in

the unlikely event that the federal government decides not to take affirmative measures to enhance the security of trains in the District. *See Arkansas Elec. Coop. Corp. v. Arkansas Public Comm'n*, 461 U.S. 375, 384 (1983) ("a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision to regulate"). However, before the Court can reach that conclusion, or any other decision on the merits, it needs to consider competent evidence that the federal government has thoroughly studied the issue and come to a definitive and authoritative regulatory *decision*.

Plaintiff is requesting the extraordinary relief of a preliminary injunction. Thus, the burden is on plaintiff to demonstrate that the balance of equities are in its favor. *See Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2004). However, as previously stated, plaintiff has elected not to produce evidence of the disputed material facts critical to the legal issues in this case. In short, it is impossible to determine whether the federal government has done enough to "substantially subsume" the subject because plaintiff has failed to provide the Court with the detailed factual predicate to support such a showing. Without more information, the Court cannot say at this time that plaintiff is likely to succeed on the merits of its

claims.

The Court takes very seriously the sensitive nature of the government's measures to disrupt terrorist activities. The effectiveness of many of these measures depends on their continued secrecy. However, there are means available, including protective orders and other appropriate measures, for plaintiff to attempt to meet its burden of proof and to share sensitive information with appropriate representatives of the other parties without compromising national security interests. Much of the critical information in this case is Sensitive Security Information ("SSI"), as defined by 49 C.F.R. Part 15 and 49 C.F.R. Part 1520. *See also* 49 U.S.C. § 40119(b) and 49 U.S.C. § 114(s). SSI is not "classified" *per se*, but rather is protected at the discretion of the Assistant Secretary for TSA and the Secretary of Transportation if, in their judgement, disclosure would be "detrimental to the security of transportation." *See* 49 C.F.R. §§ 15.5(a)(3) & 1520.5(a)(3). The regulations restrict disclosure of SSI to those persons with a "need to know" the information. *See* 49 C.F.R. §§ 1520.7, 1520.11. CSXT has been granted access to SSI so that it may work with the government to "implement critical security measures." *See* U.S. Reply at 11 n.14. In addition, the United States has acknowledged that "[a]s a partner in the federal government's efforts to protect the District of Columbia rail corridor from terrorist attacks, the

District of Columbia also has a 'need to know' certain SSI." U.S. Resp. to Mot. to Compel at 2. Therefore, when discovery moves forward in this case, "the United States will assist the parties in that discovery to ensure that SSI is protected in a manner that is as minimally disruptive to the litigation as possible." U.S. Reply at 11 n.14. At this juncture, the United States has informed the Court that it is CSXT's burden to submit information to the United States in order for the government to determine whether it may be shared with the District. See U.S. Resp. to Mot. to Compel at 2. "Once it does, both TSA and DOT will review the submitted information in detail, will identify SSI therein, and will determine what, if any, of that information may be shared with the District Defendants and/or Defendant-Intervenor Sierra Club." *Id.* Before this critical next step, the Court will not blindly interfere with the actions of the District of Columbia to safeguard its citizens from a catastrophe.

2. Irreparable Harm

CSXT claims that it will be required to reroute thousands of rail cars over substantially longer routes if the District Act is allowed to take effect. Plaintiff argues that this rerouting would impose operational and financial burdens on the railroad and increased delay and uncertainty in the supply chain. See P.I. Mem. at 5-6. There are significant factual disputes as to

the number of railcars the District Act would affect and the resulting burden on CSXT. According to the Amended Complaint, the law could affect 11,400 of CSXT's cars per year, out of approximately 7,000,000 total carloads of freight and about 500,000 carloads of hazardous materials. See Am. Compl. ¶¶ 12, 80. This represents 0.16% of CSXT's total national rail traffic and 2.3% of its total national hazmat traffic. Based on this projection, CSXT estimates an additional \$2 to \$3 million in direct costs per year if the District Act were to take effect on a permanent basis. See CSXT Proposed Facts ¶ 6; P.I. Mem. Ex. 1, Gibson Dep. at 21-24. Defendants, on the other hand, estimate that the Act will require the rerouting of just 2,313 cars annually, which represents just 0.03% of CSXT's annual traffic. See Sierra Proposed Facts ¶ 6; D.C. Proposed Facts ¶ 5 (basing calculations on CSXT's verified interrogatory responses).

At this preliminary stage of the proceedings, it is impossible to resolve this factual dispute. Regardless of which estimates are more accurate, however, these injuries appear to be chiefly economic and administrative in nature, and do not represent the magnitude of "irreparable harm" that would justify an emergency injunction in this case. See *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (finding that recoverable economic loss constitutes "irreparable harm" only where the loss threatens the very existence of the movant's business); see also

Sampson v. Murray, 415 U.S. 61, 90 (1974) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.")

CSXT acknowledges that these financial and logistical burdens are not of primary significance. The "primary harm," according to plaintiff, is the District Act's "unlawful interference with the comprehensive system of federal regulation and oversight" and the "disruptive effect" of potential copycat bans in other communities. See CSXT Proposed Facts ¶¶ 1-2. The Court understands CSXT's concerns, but these assertions are more properly addressed under the "public interest" prong of this Circuit's balancing test. In sum, the evidence demonstrates that the direct effects of the District Act will not result in burdens on CSXT that would rise to the level of "irreparable harm."

3. Balance of Harms

Balanced against CSXT's asserted harms is the uncontested and basically unquantifiable risk of a major terrorist attack resulting in mass casualties. A July 2004 study by the Homeland Security Council estimated that an attack on a chlorine gas facility in an urban area could result in 17,500 deaths, 10,000 severe injuries, and 100,000 hospitalizations. See Sierra Opp. Ex. 10, Planning Scenarios: Executive Summaries Created for Use in National, Federal, State and Local Homeland Security

Preparedness Initiatives, The Homeland Security Council, July 2004, Scenario 8. A recent United States Naval Research Institute study found that an attack on a chlorine railcar, during a political event or celebration on the National Mall, could kill or seriously injure up to 100,000 people in the first half an hour. See Sierra Opp. Ex. 9, Report by Dr. Jay Boris, United States Naval Research Institute (Jan. 23, 2004).

In *National Tank Truck Carriers*, plaintiff shipping companies argued that New York City's rerouting regulations might increase shipping costs, delay deliveries, and burden commerce. See 677 F.2d at 273. The Second Circuit accepted plaintiffs' representations, but found that "these inconveniences are not unconstitutionally disproportionate when balanced against the public interest in avoiding a catastrophic accident in a densely populated urban area." *Id.* at 274. This Court agrees. CSXT argues that it has been "more than three years after the attacks of September 11, 2001," and there is no reason to believe there is an imminent emergency. See P.I. Mem. at 6. The Court sincerely hopes plaintiff is right, but it is unwilling to take that gamble. It would be irresponsible, at best, for the Court to enjoin the District Act, potentially placing tens of thousands of lives at risk, before plaintiff has satisfied its burden of at least producing competent evidence demonstrating its entitlement to relief on the merits.

4. Public Interest

The District of Columbia argues that the public interest in this case overwhelmingly mandates denial of the motion, even if CSXT were able to show a prospect of success on the merits or irreparable injury. D.C. Opp. at 42. The District's argument, however, is countered by the United States' prediction that "[t]he D.C. Act would negatively affect the United States' interests in national security, public safety, public health, and a strong economy." U.S. Statement at 8. The Court appreciates and has not taken lightly the United States' position and its special role in this case and in setting policy to protect the Nation. However, the government's assessment appears to be based on some faulty assumptions.

First, the government claims that "the D.C. Act would have the effect of increasing the aggregate risk associated with the transportation of hazardous materials" and would "shift that increased risk to other parts of the country." See U.S. Statement at 9. However, this reasoning conflates the risk of rail accidents with the risk of terrorism. The government's prediction of increased aggregate risk flows from its conclusion that "[t]he risks associated with the transportation of hazardous materials correspond to the amount of time in transit." See *id.* at 8. Despite this bald assertion (supported only by a citation to a 1998 FRA Track Safety study that clearly did not contemplate

the risks of rail terrorism), the government does not address defendants' persuasive arguments that any assessment of the risk of terrorism must take into account both the *probability* of an attack and its likely *consequences*. See Sierra P.I. Opp. Ex 6 ¶ 16 (Millar Decl.). In the specific circumstances of this case, these factors are significantly influenced by the characteristics of the route, such as the population density of the neighborhoods abutting the rail lines and the attractiveness of the "target" for terrorists. See Sierra Opp. Ex. 3 ¶ 14 (Glickman Decl.). This means that the fight against terrorism is not a "zero-sum game." By routing trains out of high-risk areas and through lower risk areas, the government would not be simply "shifting the risk," but would actually be reducing the aggregate risk faced by the population as a whole. See D.C. Opp. Ex. 2 ¶ 15 (Shuman Decl.) (the risk of terrorist attack "moves only with the location ... and not with the hazmat"); Sierra Opp. Ex. 5 ¶ 16 (Koopman Decl.) (rerouting to pass through locations lacking high-value terrorist targets "would almost certainly decrease the aggregate social risk"); Sierra Opp. Ex. 6 ¶ 39 (Millar Decl.) (rerouting around high threat areas "substantially reduces the aggregate risk").

Although the District of Columbia is not alone in confronting the threat of terrorism, it cannot seriously be contested that the District faces disproportionate risks.

"Because of its status as home to all three branches of the Federal government, as well as numerous Federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance, the Washington, D.C., Metropolitan Area continues to be an obvious high priority target for terrorists." Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 70 Fed. Reg. 7150, 7152-53 (Feb. 10, 2005). Washington, D.C. was already targeted once on September 11, 2001, and residents and visitors to the District--including motorists delayed by new security checkpoints on Capitol Hill or airline passengers required to remain in their seats within 30 minutes of Reagan National Airport--are constantly reminded of the continuing threat and the need for special security precautions in Washington, D.C.

To be sure, the "operational" risks of moving hazmats by railcar, as opposed to the risk of terrorist attack, do move with the railcar rather than the location of the rails. Therefore, there may be some added incremental risks absorbed by communities along rerouted lines. However, plaintiff has not made this crucial distinction and has provided no evidence suggesting that, in the aggregate, these additional operational risks will outweigh the reduction in the risk of terrorist attack. Defendants, however, have noted statistics from the Association

of American Railroads that "99.9968% of Carloads are accident free," and CSXT's representations that out of half a million shipments of hazardous materials by CSXT in 2003, there were only seven accidental releases--resulting in no injuries. See Sierra Proposed Facts ¶ 21 (citing CSXT discovery documents). Given these statistics, and without additional evidence, plaintiff's argument that the Terrorism Prevention Act will increase aggregate risks is without a solid foundation in fact. See Sierra Opp. Ex. 3 ¶ 18 (Glickman Decl.) (finding CSXT's prediction that rerouting trains around the District would increase aggregate risk is "not substantiated by the process of risk assessment").

Further, plaintiffs argue that an injunction will caution other jurisdictions against passing copycat bans that could impede the flow of essential goods to the public and "prove disastrous to our national transportation system." P.I. Mem. at 7. CSXT is not the first railroad company to make this kind of argument. In 1914, the Atlantic Coast Line Railroad implored the Supreme Court to find Georgia's new law requiring electric headlights an "unwarrantable interference with interstate commerce." "If Georgia may prescribe an electric headlight," lamented the railroad, "other states through which the road runs may require headlights of a different sort ... which would delay and inconvenience interstate traffic." See *Atl. Coast Line R.R.*,

234 U.S. at 292. The Supreme Court, however, declined to invalidate the state safety regulation, holding that

[i]f there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,--if there appears to be need of [rules] which will govern the entire interstate road, irrespective of state boundaries,--there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway.

Id.

Here, also, there is a "simple remedy." If, and when, the Court is presented with competent evidence demonstrating plaintiff's entitlement to federal preemption, a basis will exist to vacate the District Act. In other words, even if defendants are ultimately successful on the merits, the District Act will stand only so long as there is a gap in federal coverage. Furthermore, the District of Columbia is somewhat unique because of its status as a "state" for the purposes of preemption analysis. A favorable decision for the District of Columbia here would not necessarily support copycat *municipal* ordinances. See *CSX Transp. v. City of Plymouth*, 86 F.3d 626, 628 (6th Cir. 1996) (finding that the FRSA's preemption clause exceptions do not apply to municipal ordinances). This understanding of the

District's unique status and the temporary nature of the District Act undermines plaintiff's dire predictions of a gridlocked national rail transportation system.

In view of the significant disputed facts critical to the Court's resolution of the legal issues in this case, and because the balance of equities favors the safety and security of the residents of and visitors to the District of Columbia, the Court will **DENY** plaintiff's motions while the Court considers the merits of plaintiff's challenge on an expedited basis.

V. CONCLUSION

September 11, 2001 forced this nation to quickly adapt to new risks and new priorities, all competing for immediate attention. To the extent that a common theme can be discerned from the voluminous submissions in this case, it is that all parties believe that it is in everyone's best interests to have one consistent and comprehensive federal policy addressing the risks of terrorism on our interstate rail system. This Court agrees.

Until the federal government has formulated a comprehensive response, however, the law preserves a limited role for states to act to protect public safety and security. This multilayered approach upholds this Nation's federalist tradition and recognizes that our safety and security in this new age will require a team effort and close coordination between the federal

government, state governments, and the private sector. ³⁰

Unfortunately, instead of working together, the parties in this case are mired in litigation. It is unfortunate that the time, energy, and expense that could have been spent making this city safer will instead be expended in litigation. ³¹

Nevertheless, having been presented with this interesting, novel and complex case, this Court will decide it. The Court will keep the big picture in mind--no party disputes the fact that a terrorist attack on a train carrying hazardous materials is a real threat that could cost tens of thousands of lives and billions of dollars in costs and damages. See CSXT Reply at 2 ("We do not minimize the potential risks of terrorist acts against railroad cars carrying hazardous materials."). The Court must also be mindful of the January 2005 sworn congressional testimony of Richard Falkenrath, the former Deputy Homeland

³⁰ *The National Strategy for the Physical Protection of Critical Infrastructure and Key Assets*, signed by President Bush in February 2003 ("National Strategy"), makes clear that the federal government cannot shoulder the entire burden alone. It provides that protection of our critical infrastructure is a "shared responsibility," and "[t]he 50 states, 4 territories and 87,000 local jurisdictions that comprise this Nation have an important and unique role to play." National Strategy at 19; see CSXT Rep. to Enforce at 21.

³¹ The Court, recognizing that "all the parties in this case are essentially on the same team," proposed a temporary cooling off period to enable the parties to make a serious effort at resolving this litigation with the assistance of the Court. See 4/5/05 Tr. at 6-9. However, the proposal did not persuade either CSXT or the United States to even discuss any framework for a possible settlement. See 4/7/05 Tr. at 9.

Security Advisor to the President, that the federal government has "essentially done nothing" in the area. *See supra* Part II(A); Sierra Opp. Ex. 24. CSXT's legal arguments are not without force, and, should plaintiff produce competent evidence of the federal government's response, the Court may ultimately find that the District Act is preempted. However, against the acknowledged risks that are present in this case, CSXT offers at this time only vague predictions of increased costs and logistical burdens. *See supra* Part IV(B)(2). These burdens pale in comparison to the potential devastation predicted to occur in the event of a terrorist attack on a railcar transporting hazmats in the Nation's Capital. Given these competing interests, the balance of equities clearly favors the District of Columbia and its residents. This Court will not grant the extraordinary judicial remedy of a preliminary injunction without the benefit of competent evidence to inform the Court's legal analysis, especially when an injunction could expose the District of Columbia, its citizens, and visitors to an unknown and potentially catastrophic risk.

ORDER

Accordingly, it is by the Court hereby

ORDERED that plaintiff's Motion for Summary Judgment is **DENIED WITHOUT PREJUDICE** to reconsideration upon the completion of discovery; and it is

FURTHER ORDERED that plaintiff's Motion for Preliminary Injunction is **DENIED**; and it is

FURTHER ORDERED that plaintiff's Supplemental Motion for Enforcement of the March 14, 2005 STB Order is **DENIED**; and it is

FURTHER ORDERED that the United States' Motion for Enforcement of the March 14, 2005 STB Order is **DENIED**; and it is

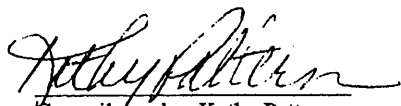
FURTHER ORDERED, in anticipation of the filing of any Motion to Stay Enforcement of the Court's Order, that the Motions are **DENIED**; and it is

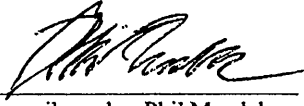
FURTHER ORDERED that the parties shall file joint recommendations for further proceedings in this case, or, if unable to agree on joint recommendations, their individual recommendations, by no later than **April 22, 2005 at 12:00 noon**; and it is

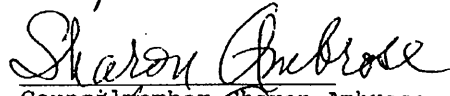
FURTHER ORDERED that a status conference to discuss further proceedings in this case is scheduled for **April 25, 2005 at 10:00 a.m.** in Courtroom One.

IT IS SO ORDERED.

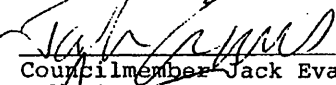
Signed: **Emmet G. Sullivan**
United States District Judge
April 18, 2005

1 
2 Councilmember Kathy Patterson

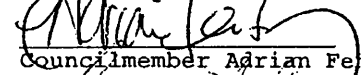

Councilmember Phil Mendelson

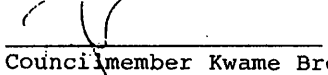
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4 
5 Councilmember Sharon Ambrose

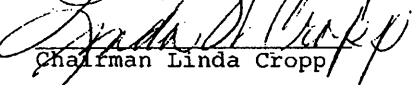

Councilmember Jim Graham

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9 Councilmember Jack Evans


Councilmember Marion Barry

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12 Councilmember Adrian Fenty


Councilmember Kwame Brown

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15 Chairman Linda Cropp

16
17 A BILL

18
19 _____
20
21 IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

22
23 _____
24
25 To prohibit large shipments of certain extremely hazardous materials near the United
26 States Capitol in order to reduce the risk of attacks by terrorists; to allow for the
27 issuance of permits authorizing such shipments in special cases; and to require the
28 Mayor to issue regulations to implement the provisions of this act.

29
30
31 BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA,

32 That this act may be cited as the "Terrorism Prevention in Hazardous Materials
33 Transportation Act of 2005."

34 Sec. 2. Findings.

35 The Council of the District of Columbia finds that:

1 (1) A terrorist attack on a large-quantity hazardous material shipment near the
2 United States Capitol ("Capitol") would be expected to cause tens of thousands of deaths
3 and a catastrophic economic impact of \$5 billion or more.

4 (2) The threat of terrorism facing District of Columbia residents and workers in
5 the vicinity of the Capitol requires an urgent response that recognizes and addresses the
6 unique status of this area in American politics and history, and the risk of terrorism that
7 results from this status.

8 (3) The federal government has not acted to prevent the terrorist threat resulting
9 from the transportation of dangerous quantities of ultra-hazardous materials near the
10 Capitol.

11 (4) Shippers of ultra-hazardous materials do not need to route large quantities of
12 ultra-hazardous chemicals near the Capitol in order to ship these chemicals to their
13 destinations, and alternative routes would substantially decrease the aggregate risk posed
14 by terrorist attacks.

15 (5) Requiring permits for ultra-hazardous shipments from a Capitol Exclusion
16 Zone that encompasses all points within 2.2 miles of the Capitol would impose no
17 significant burden on interstate commerce.

18 Sec. 3. Definitions.

19 For the purposes of this act, the term:

20 (1) "Emergency" means an unanticipated, temporary situation that threatens the
21 immediate safety of individuals or property, as determined by the District of Columbia
22 Department of Transportation.

1 (2) "Capitol Exclusion Zone" means all points within 2.2 miles of the U.S.
2 Capitol Building, provided that the Capitol Exclusion Zone shall not extend beyond the
3 geographic boundaries of the District of Columbia.

4 (3) "Person" means an individual or a commercial entity.

5 (4) "Practical alternative route" means a route (1) which lies entirely outside the
6 Capitol Exclusion Zone and (2) whose use would not make shipment of the materials in
7 question cost-prohibitive.

8 Sec. 4. Except in cases of emergency, it shall be illegal in the District of
9 Columbia, without a permit, to:

10 (a) transport any of the following:

11 (1) Explosives of Class 1, Division 1.1, or Class 1, Division 1.2, as
12 designated in 49 CFR Section 173.2, in a quantity greater than 500 kg.;

13 (2) Flammable gasses of Class 2, Division 2.1, as designated in 49 CFR
14 Section 173.2, in a quantity greater than 10,000 liters;

15 (3) Poisonous gasses of Class 2, Division 2.3, as designated in 49 CFR
16 Section 173.2, in a quantity greater than 500 liters, and belonging to Hazard Zones A or B
17 as defined in 49 C.F.R. 173.116; and

18 (4) Poisonous materials, other than gasses, of Class 6, Division 6.1, in a
19 quantity greater than 1,000 kg., and belonging to Hazard Zones A or B as defined in 49
20 C.F.R. 173.133; or

21 (b) operate a vehicle or move a rail car which:

1 (1) is capable of containing explosives of Class 1, Division 1.1, or Class 1,
2 Division 1.2, as designated in 49 CFR Section 173.2, in a quantity greater than 500 kg,
3 and has exterior placarding or other markings indicating that it contains such materials;

4 (2) is capable of containing flammable gasses of Class 2, Division 2.1, as
5 designated in 49 CFR Section 173.2, in a quantity greater than 10,000 liters, and has
6 exterior placarding or other markings indicating that it contains such materials;

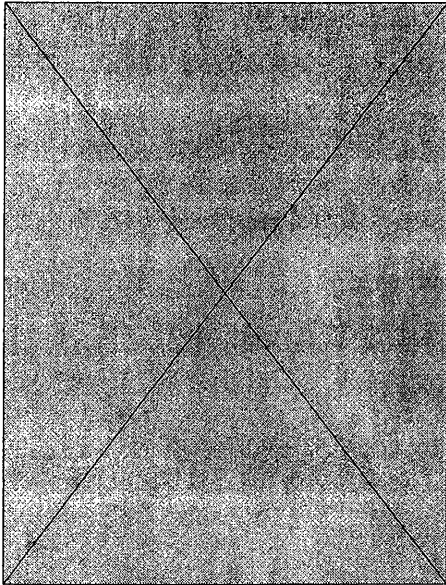
7 (3) is capable of containing poisonous gasses of Class 2, Division 2.3, as
8 designated in 49 CFR Section 173.2, in a quantity greater than 500 liters, and belonging
9 to Hazard Zones A or B as defined in 49 C.F.R. 173.116, and has exterior placarding or
10 other markings indicating that it contains such materials; or

11 (4) is capable of containing poisonous materials, other than gasses, of
12 Class 6, Division 6.1, in a quantity greater than 1,000 kg., and belonging to Hazard Zones
13 A or B as defined in 49 C.F.R. 173.133, and has exterior placarding or other markings
14 indicating that it contains such materials.

15 Sec. 5. Permits.

16 (a) The District of Columbia Department of Transportation may issue permits
17 authorizing the transportation of materials listed in section 3 upon a demonstration that
18 there is no practical alternative route. A permit may require adoption of safety measures,
19 including but not limited to time-of-day restrictions.

20 (b) The District of Columbia Department of Transportation may collect fees for
21 the permits in accordance with the rules issued under section 6.



lected pursuant to this section shall not exceed the cost of
ng this act.

no violates section 3 or rules issued under section 6 shall be
ot to exceed:

0 for a first offense; or



1 Sec. 9. Effective date.

2 This act shall take effect following approval by the Mayor (or in the event of veto
3 by the Mayor, action by the Council to override the veto), a 30-day period of
4 Congressional review as provided in section 602(c)(1) of the District of Columbia Home
5 Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-
6 206.02(c)(1)), and publication in the District of Columbia Register.

[washingtonpost.com](http://www.washingtonpost.com)

We Could Breathe Easier

The government must increase the security of toxic chemicals in transit.

By Richard A. Falkenrath Tuesday, March 29, 2005; Page A15

The basic strategy al Qaeda used on Sept. 11, 2001, was to strike a common, poorly secured commercial system in a way that would cause catastrophic secondary effects. The terrorists did a better job of identifying the vulnerability associated with fully fueled commercial airliners than the government did -- and they exploited this vulnerability to terrible effect. Now, because of the work of the Transportation Security Administration, commercial aircraft in the United States are all but impossible to hijack. But the terrorist is an adaptive enemy. One central question in homeland security is whether terrorists will again locate a catastrophic civilian vulnerability before the government gets around to addressing it.

There are an infinite number of potential targets in America that, if attacked, could result in hundreds of civilian casualties. The number of potential targets that could result in *thousands* of civilian casualties is, however, finite and knowable. In the federal government, the Department of Homeland Security is responsible for identifying these potentially catastrophic targets, analyzing their security schemes and taking action if the security arrangements are deficient. It is in general a bad idea to call attention to America's most serious civilian vulnerabilities. Government officials should never do so and should not be asked to. Private citizens should do so with care, and only when the government fails to act.

Of the all the various remaining civilian vulnerabilities, one stands alone as uniquely deadly, pervasive and susceptible to terrorist attack: industrial chemicals that are toxic when inhaled, such as chlorine, ammonia, phosgene, methyl bromide, and hydrochloric and various other acids. These chemicals, several of which are identical to those used as weapons on the Western Front during World War I, are routinely shipped through and stored near population centers in vast quantities, in many cases with no security whatsoever.

A cleverly designed terrorist attack against such a chemical target would be no more difficult to perpetrate than were the Sept. 11 attacks. The loss of life could easily equal that which occurred on Sept. 11 -- and might even exceed it. I am aware of no other category of potential terrorist targets that presents as great a danger as toxic industrial chemicals. The federal government has the authority to regulate the security of chemicals as they are being transported on roads, railways and waterways. With only one minor exception, the administration has not exercised this authority in any substantial way since Sept. 11. There has been no meaningful improvement in the security of these chemicals moving through our population centers.

In a desperate step, the D.C. council recently voted to ban hazardous material shipments through downtown Washington. This ordinance is clearly good for Washington, but it is bad for the other parts of the country that will absorb the diverted chemical loads.

Furthermore, its economic burden falls principally on CSX Corp., the company that owns the two rail lines through downtown Washington. CSX is suing to block implementation of the ordinance. The federal government is supporting CSX's effort, an awkward position for a security-conscious administration that has so far failed to mandate a systematic, nationwide reduction in the vulnerability of this sector.

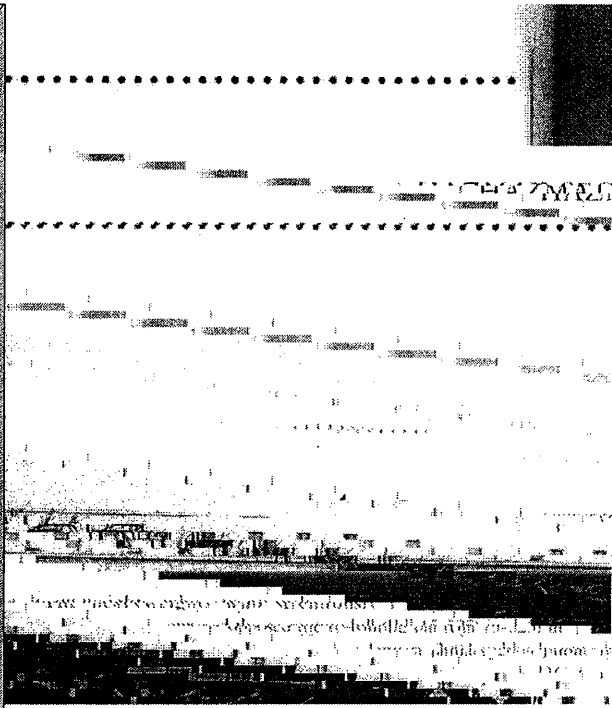
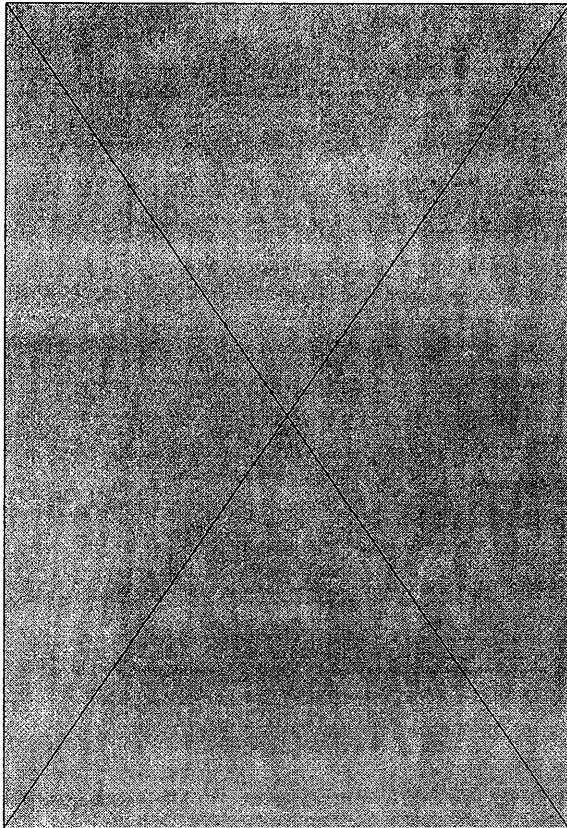
The administration can and should act immediately to enhance the security of toxic chemicals in transit nationwide; no new legislation is required. Specifically, the departments of Homeland Security and Transportation should promulgate regulations that will, over time, require chemical shippers to track the movement of all hazardous chemicals electronically; to report this data to DHS in real time; to use fingerprint-based access controls for all chemical conveyances; to adopt container signs that do not reveal the contents to most observers; to perform rigorous background checks on all employees; to strengthen the physical resilience of chemical containers; to reduce chemical loads; to ship decoy containers alongside filled containers; and to install perimeter security at loading and switching stations. Violators should suffer harsh civil and criminal penalties.

But the federal government does not have authority to regulate the security measures inside chemical plants and storage facilities. President Bush has twice called on Congress to pass legislation granting the Department of Homeland Security this authority. The 108th Congress declined to do so. It is often alleged -- incorrectly -- that lobbying by the chemical industry was behind Congress's inaction. The real reasons had to do with the full agendas of the committees involved; the administration's competing legislative priorities; and the obscure, esoteric and theoretical nature of the issue.

The voluntary security enhancements many of the larger chemical firms have implemented -- in some cases with assistance from the Department of Homeland Security -- are a step in the right direction but are insufficient. Congress should promptly grant powerful authority to regulate chemical-plant security to that department as the president has requested.

There is no silver bullet to improving the security of chemicals that are toxic when inhaled. A layered, nationwide approach is required. It is right and proper for the government to require industries to take on the security costs of their activities. The immediate cost of these regulations would be borne by the chemical industry. Over time, costs would be passed on to consumers, and the market would adjust to a new, more socially responsible equilibrium. The real losers would be al Qaeda and its successors.

The writer was deputy homeland security adviser to President Bush until May 2004. He is now a visiting fellow at the Brookings Institution and senior director of the Civitas Group, an advisory and investment services firm serving the homeland and national security markets.



HAZMAT SECURITY

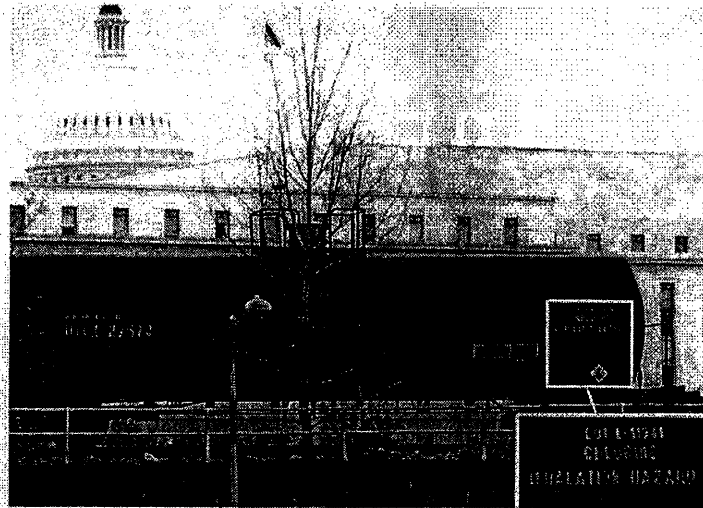
comparative terrorism risk of the alternative westerly route that bypasses Washington DC.

The heavyweights who strenuously opposed the re-routing bill (Bill 15-525) in a January 2004 public hearing before the DC Council included the entire US chemical shipper industry, the railroad industry and the Bush Administration. Trucking associations stood aside from the fray, saying their member firms already routed their hazmat cargoes around DC on the I-495 Beltway.

The exception, however, again proved the rule. The railroads did assure the DC Council that when official events – such as the President's State of the Union address – make the US capital city an even more attractive terrorist target, they 'voluntarily' hold back their most dangerous hazmat cargoes for some hours, presumably in some nearby railyard. This back-handed admission of serious terrorist risks from hazmat cargoes, which the railroads can unilaterally impose or take away, temporarily, only irritated the DC Council members, who pointed out that all DC residents remain at risk every day and night.

The railroads argued half-heartedly that even a minor amount of mandated re-routing in the DC region would be terribly disruptive to commerce, but their testimony centered on their fears that other target cities would no doubt also seek to protect themselves from the most dangerous and unnecessary hazmat risks. The US hazmat industry strategy is to maintain a national united front, perhaps believing that if no shipper or carrier admits that re-routing is necessary to prevent terrorism, then everyone can be safe from future claims of reckless endangerment.

National media coverage of the hazmat routing issue in the US has included television and newspaper stories in Boston, Los Angeles, St. Louis, and Washington DC, as well as a front-page *Wall Street Journal* story vividly documenting how easily a graffiti artist can get access to the chemical tank cars and rail tunnels. DC Council members have held up their ordinance temporarily, pending a study by



the Department of Homeland Security (DHS) which is due soon.

International perspective

As far as the situation in other countries is concerned, conversations with experts and government staff suggests that there is most likely no terrorism-related hazmat re-routing in the UK nor in Europe. The UK Department for Transport's 2004 Consolidated Guidance for the Security of Dangerous Goods by Road, for example, is a 'non-prescriptive' document which never mentions routing. The UN's Model Regulations, which come into effect in 2005, state only that Security Plans 'shall comprise at least ... clear statements of risk reduction measures, including ... operating practices (e.g., choice of routes where known), ... proximity to vulnerable infrastructure etc.'

There may be some long-established historical patterns in some EC nations of avoiding cities with the most dangerous hazmat shipments, but in the UK, for example, the rail system has long run through the central London rail hubs with even the most dangerous nuclear waste shipments. So far, EC and private sources have indicated no knowledge of systematic re-routing in their countries to reduce the risks of hazmat shipments.

Hazmat dangers are foreseeable

However, an attack using hazmat cargo is increasingly foreseeable, at least in the US context, as federal regulatory agencies and Congressional committees have publicly grappled both with the enormous potential damage and with ways to forestall and respond to successful attacks. Federal

regulators have outlined for the record how high the stakes are, and how the potential costs of foreseeable attacks can be estimated. A successful attack using explosive or toxic gas hazmat cargoes, which the Federal documents call 'potential weapons of mass destruction', could cause significant deaths and injuries. It could also deny an important asset such as a port or bridge or rail line to other cargo and cause billions in losses according to the US Department of Transportation's (DOT) 2002 cost-benefit study in RSPA Docket HM-232.

The final federal security plan regulation (promulgated on 25 March 2003) requires hazmat shippers and carriers to assume significant terrorism-related responsibilities. An estimated 41,000 entities must create their own security plans based on their own assessments of threat and vulnerability, and provide appropriate security training for employees handling hazmat.

In the port security situation, however, the US Coast Guard is mandated to review every vessel and port facility security plan for adequacy. No federal agency is tasked to do so in the hazmat truck and rail contexts. As the US General Accounting Office (GAO) has indicated, there is no agreed-upon national standard for assessing the adequacy of the rail security situation, and no clear way to do such an assessment. Shippers and carriers are operating with significant uncertainties as to the adequacy of their counter-terrorism measures.

The history of DOT's security plan rule-making itself provides the clearest indication of how stubbornly shippers and carriers resist any move towards any public sector attention

HAZMAT SECURITY

on re-routing for terrorism prevention. Although 'routing' was mentioned in the DOT notice of proposed rulemaking, as a (merely) suggested measure for improving 'en route security' of hazmat's cargoes, subsequent industry pressure prompted the Bush Administration to completely omit the word 'routing' from the final regulation. It would seem a thin reed to lean on, however, if shipper and carrier firms rely on this politically-driven omission to conclude that they need not seriously consider re-routing of their own most dangerous hazmat cargoes when possible.

After the Madrid bombings on 11 March, the US Congress has finally rushed to upgrade rail security, which was badly underfunded compared to airline and port security, and committees have drafted billion-dollar bills to this end (see *Cargo Security International*, April, page 8). Frustrated by the lack of the long-promised DHS national threat and vulnerability analysis, Senators reacted by pitching money at rail tunnel and infrastructure improvements. A Congressional bill on mandatory hazmat re-routing has been proposed, but with little chance of passage.

On 21 June, Congressional Democrats held a National Day of Action on Rail Security, charging that Bush Administration inaction had left US target cities 'shockingly vulnerable' to terrorist attacks (see page 21). In the New York City press conference, the photo of a chlorine tank car near the Capitol was prominently displayed for the cameras. The transportation unions participated and raised demands for more security training; more adequate staffing for 'eyes and ears' to prevent attacks; more attention to rail and trucks alongside airplanes and port security; and more federal help in improving infrastructure and in deploying technologies such as camera detection and bomb-sniffing dogs.

Also relevant to the legally 'foreseeable' nature of hazmat terrorism in target cities is the large number of publicly available hazmat resources for terrorists. Originally produced by responsible industry associations and governments as vital aids to emergency responders and transportation workers, these resources include:

- the respected US DOT Emergency Response Guidebook (23 million placed in every fire truck from Argentina to Canada and now on the Internet); with information on placards, United Nations (UN) codes, release impacts, and even downwind distances for the most dangerous toxic gases

- AAR Field Guide to Rail Car Identification: with diagrams of chemical car shapes, and cutaway diagrams showing how the valves work

- the Chlorine Institute's Pamphlet 74: Estimating the Area Impacted by a Chlorine Release, with worst case release scenarios for all chlorine containers in commerce

- federally-mandated Risk Management Plans for 15,000 US facilities; rail tank car releases are often modeled as the worst case for a given site

- Federal Motor Carrier Safety Administration (FMCSA) has a list on its website of state-approved hazmat truck routes

It is far too late for secrecy alone to be an effective anti-terrorism measure. Nevertheless, US railroads have been advocating a rather desperate plan for reducing terrorism risks, as an alternative to any serious re-routing; namely, removing the hazmat placards from the most dangerous railcars. The International Associations of Firefighters and of Fire Chiefs have vigorously opposed this idea, and so far it has not gained much support.

In the post-Madrid climate, passenger rail security officials whose operations often share tracks with rail freight trains are increasingly concerned about the unnecessary risks of hazmat cargoes in their densely-crowded commuter corridors. At their urging, the US DHS Office of Domestic Preparedness has added the scenario of a toxic cloud release from a chlorine rail tank car for future commuter rail emergency response exercises. Coincidentally, a recent railcar hazmat release in Boston closed the nearby commuter station for six hours, at a time when pre-Democratic Convention security efforts are peaking.

The DHS technically shares jurisdiction with

the DOT on hazmat regulation. The DHS has hired some 55,000 airport screeners, but only 24 staffers for the whole truck and rail sector. In the DC situation, the DHS is expected to produce a first-of-a-kind metropolitan area rail security vulnerability study. But it is expected that it will be 'a Chinese menu of security options and costs of each'. It is also expected that it will abstain from recommending a re-routing policy as the most effective option.

Lacking any sensible federal initiative on routing, local action seems necessary. And in the US hazardous materials legal context, if the federal government has not regulated on a specific topic, cities and states are free to do so. When told by opponents of their proposed DC bill that it would be federally preempted, DC Council members pointed out that there are no laws, nor court cases that limit what cities or states can reasonably do in protecting themselves from hazmat terrorism.

And as Nick Sansom underscored in 'Stay Covered' (see *Cargo Security International*, June, page 16): 'Following an act of terrorism, the likelihood of third party claims is very high... governed by so-called tortious law. Generally unlimited liability applies in these cases and financial compensation awards can be very large.'

If I might take large liberties here to excerpt and then extrapolate some of Sansom's compliance-oriented advice: 'The existence of a known terrorist threat... [and of available route alternatives that eliminate the worst risks of target city routing] mean that 'the traditional defences... [involving negligence] may be invalidated if reasonable security measures have not been taken.'

The key legal question seems to be: what does 'reasonable' mean? Given the increasingly visible controversies and public information on hazmat cargo risks, how much longer after 9/11 does 'good business practice' include unnecessarily and knowingly putting thousands of ill-informed citizens in target cities at risk of hazmat terrorism?

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Cargo Security International article 2 Draft 3 2222 words 6 23 06**INTRODUCTION**

US port authorities and private port contractors – mostly on their own, with governments largely missing in action – struggle to prevent if possible a devastating terrorist attack on a major urban port that could kill tens of thousands and cripple US and international trade. A huge but largely unnoticed flow through critical US target city ports of “Certain Dangerous Cargoes”, in US Coast Guard terminology, including industrial poison gases, still provide arguably the easiest way for terrorists to achieve their stated goals of killing more Americans the next time around and striking an economic blow at the US. The US Department of Transportation calls these chemical cargoes “potential Weapons of Mass Destruction”, and says the potential risks of a transportation release include “thousands of fatalities” and that “Direct costs could easily total ... billions.”

Corporate liability for avoidable terrorist attacks continues to raise serious concern in Congress and for the insurance industry, but has not resulted so far in the most needed significant security improvements. For example, US industry sources can point out no example of ongoing company- or region-specific hazmat re-routing (with the minor exception of CSXT’s media-forced re-routing of some rail hazmat cargoes through Washington DC, away from the “photo-op line” four blocks from the US Capitol). Initial conversations indicate in addition that no WMD hazmat re-routing so far has been implemented in Canada, Britain or Europe.

Highest concerns for port security almost always focus on potential smuggling of nuclear “weapons of mass destruction” (WMDs) devices in standardized cargo containers from abroad. Former US Coast Guardsman Stephen E. Flynn concludes from the London attacks that the most likely future terrorist attacks will aim at economic disruption rather than mass killing, and his post-9/11 essays have eloquently described ongoing serious port security vulnerabilities.

But if mass killing remains a key goal, former Bush Administration top official Richard Falkenrath has suggested that non-nuclear WMD weapons, toxic industrial chemicals, pose the greatest vulnerability: *“Of the all the various remaining civilian vulnerabilities, one stands alone as uniquely deadly, pervasive and susceptible to terrorist attack: industrial chemicals that are toxic when inhaled, such as chlorine, ammonia, phosgene, methyl bromide, and hydrochloric and various other acids. These chemicals, several of which are identical to those used as weapons on the Western Front during World War I, are routinely shipped through and stored near population centers in vast quantities, in many cases with no security ... [N]o other category of potential terrorist targets presents as great a danger as toxic industrial chemicals.*

The federal government has the authority to regulate ... [but] has not ... in any substantial way since Sept. 11. There has been no meaningful improvement in the security of these chemicals moving through our population centers.”

"We Could Breathe Easier: The government must increase the security of toxic chemicals in transport", Washington Post op ed, 3/29/05

Currently, the mandate of the US Coast Guard is apparently for only physical security, not safety or security chemical risk reduction. Their Area Maritime Security Committees have no mandate to check if the toxic gas cloud worst case scenario "vulnerable zones" around dangerous facilities are being reduced or not. Nor is the USCG in the business of re-routing the most dangerous toxic cargoes.

In the absence of serious corporate or federal risk reduction action on surface transportation of toxics, five major target cities (also ports) have in recent months joined Washington DC in trying to protect themselves, introducing local city council ordinances to mandate re-routing of the four most dangerous kinds of rail and truck hazmat WMD through cargoes. In several other major cities (including St. Louis, Miami, Atlanta, Sacramento, Cincinnati, Memphis), TV investigative reporters are airing multiple stories on the unresolved issue, with reporters freely strolling into railyards, e.g., and interviewing worried safety officials and rail workers on the obvious near-total lack of rail security.

The scope of the hazmat cargo problem in US ports. A recent Congressional Research Service report outlines the enormous totals of (maritime-related) hazmat flows through US ports [August 26, 2005 "Marine Security of Hazardous Chemical Cargoes", available on web at <http://www.ncseonline.org/NLE/CRSreports/05aug/RL33048.pdf>]

Deprived of adequate information on results, CRS diplomatically hints strongly that post-9/11 port-related counter-terrorism efforts and accountability for billions in spending may not be adequate : "The effectiveness of these [US Coast Guard counter-terrorism] measures is regarded as an open issue" and questions even the evaluation of these measures, lacking USCG "performance measures to define what these activities are intended to achieve and measure progress towards these goals."

The report states "over 100,000 marine shipments (54 million tons) of chemicals potentially capable of causing mass casualties (injuries or death) among the general public passed through US waters in 2003" (latest figures available)...The top 30 ports handled 95% of this hazardous chemical tonnage. Most marine shipments of hazardous chemicals are much larger than such shipments on land...[and not regulated like similar amounts at chemical plants]. [Huge hazmat barge shipments are a key concern for New Orleans officials, for example]

The US ports totals include 9.5 million tons of poisonous gases -- the highest concern for many -- and 27.1 million tons of flammable gases. The report takes care not to identify the most vulnerable ports, nor the chemical totals through any given port. But it does

identify the top 30 ports handling the most dangerous cargoes.

Federal agencies have been "conducting risk assessments on 50 of the most hazardous chemicals stored at or shipped in bulk through US ports.. [but this is not] public information." The word "re-routing" **does not even appear** in the CRS report.

The report drily suggests that a significant lack of risk information ("limited vulnerability and consequence information") also contributes to a grievous lack of local port emergency preparedness: "Because of the hazardous cargo terrorism risk, it may be judged to be prudent for emergency and medical authorities near potentially affected waterways to develop specific prospective measures to deal [with] releases of chemical cargoes most relevant to their region."

The catastrophic potentials are real. Using bulk poison gas chemical cargoes passing through our ports as low-tech, accessible WMDs is clearly much easier than assembling a nuclear weapon for smuggling into port in a freight container. Chemical cargoes are clearly placarded as if for easy targeting – such placarding is essential for emergency responders. Moreover, graffiti on many tank cars advertise daily to all how utterly porous the transportation system is.

The crowded urban Port of Baltimore has sensible safety regulations prohibiting more than 100 pounds of only one kind of hazmat cargo, high explosives, from entering the port, and a special safety permit system for some hazmat cargoes that do go through. The US Coast Guard regulation uses quantity/distance calculations to identify unacceptable consequences of a potential explosion that a terrorist could use to kill perhaps 1000 people.

But the potential massive consequences of a toxic gas cloud release from the bulk industrial chemicals in urban ports are far worse, yet lack similar regulations. A chlorine gas cloud from just one tank car, according to the US Naval Research Labs, can kill 100,000 in ½ hour in a dense urban environment. The Chlorine Institute's indispensable Pamphlet 74 shows the gas cloud can travel across a port city at a lethal level fully 14.8 miles from the point of release. Either kind of attack could also paralyze and strike a grievous economic blow to trade; a mass-casualty energy port attack could send world energy prices skyrocketing.

The unchanged industry posture on WMD cargoes.

The US chemical shippers often tout their record as the biggest export-trade earning industry. They have battled fiercely in recent Congressional debates -- on how to improve facility security only, not hazmat transportation – to limit new federal regulations to facilities' physical security measures only, and especially to exclude any

new federal or state government power to force the use of inherently safer technologies.

The chemical shippers and carriers have bitterly opposed government re-routing mandates, largely because of their corporate imperative to avoid any governmental "re-regulation" at all and because of railroads' economic and legal issues involving their "captive shippers". The railroads have asked instead that Congress grant them a government bailout, like the ultrahazardous nuclear power industry's Price-Anderson Act catastrophic radioactive release indemnification, for railroads carrying ultrahazardous cargoes, limiting their "liability for carrying out this public service."

In recent Congress testimony on rail security (June 13, 2006) the railroads and their Congressional allies backhandedly acknowledged the huge terrorism risks of rail transport of poison gas cargoes through target cities, mainly because they highlighted the resulting liability and insurance problems. Despite these risks, however, they assert target cities should not protect themselves by re-routing – this should be a federal role only, if at all.

Ed Hamberger, CEO of the Association of American Railroads, outlined for Congress the "ruinous liability" and "untenable" high insurance costs railroads face with hazmat transportation, predicted total insurance unavailability in near future for the "multi-billion dollar risks associated with highly-hazardous shipments", and asked the Congress to provide one or more federal bailouts. Lamenting that US railroads have a statutory "common carrier obligation" to carry unwillingly most dangerous hazmat cargoes, Hamberger also cited widespread discussion of target cities' re-routing to protect themselves, and opposed this.

Most dramatic, the insurance industry testimony from AON Risk Services' James Beardsley highlighted the substantial "contraction" of the catastrophe insurance market because of the industry's sober assessment of the huge risks in hazmat railcar routing through major cities (no specific mention of the port insurance parallels). "Over the last 10 years freight railroads have sustained several catastrophic liability losses" costing \$600 million against only \$300 million paid in premiums. "As a result ... several insurance companies have ceased writing railroad insurance."

"The recent bombings in both London and Madrid have focused underwriters' attention to the terrorism threat as it relates to the rail industry... Any further terrorist event on a transit passenger or freight could have a disastrous impact...[on future insurance coverage]": an additional contraction and a spike in price. Insurance companies would likely raise the railroads' deductibles from the current \$25 million to \$50 million. "Underwriters focus on the hauling of hazardous materials because they have been the proximate cause of many of the largest rail industry losses to date... Terrorism and hazardous chemical data must be looked at in conjunction with each other... These are the two major areas of concern..."

Ways forward on WMD cargo risk reduction: public involvement and re-routing.

After the Bhopal (Union Carbide) disaster in 1984 became the worldwide icon for an urban toxic gas disaster, Congress enacted two major national Right-To-Know laws that aimed to provide the public with chemical risk information to underlie chemical release risk reduction and emergency preparedness. The key federally-directed risk information would be chemical release Worst Case Scenarios, shown in graphic plume maps and Vulnerable Zones that can be seen to overlay neighborhoods and workplaces, and whose reduction can show progress in disaster prevention.

But the federal right to know laws have not worked as Congress intended. Local officials and industry "stakeholders" (e.g., Local Emergency Planning Committees and more recently Area Maritime Security Committees) deliberately find ways to keep the public in the dark on chemical risks. The result: there is no real Right to Know, no measuring progress, and no accountability of private or public officials for serious reduction of even the gravest homeland security risks.

A well-informed public could be expected to push for significant terrorism risk reduction and for an active government oversight that is accountable on progress. Rail and highway re-routing around major target cities, for example, is feasible and sensible in most cases.

Alternative port choices are also feasible. Sunny Point NC, e.g., has in the recent past reportedly offered its port services (for a fee) for explosives shipments otherwise going through more densely populated urban ports, perhaps for shippers looking to avoid huge insurance costs. Several US ports on both coasts have in years past rejected controversial foreign-origin nuclear waste shipments, thereby forcing re-routing of these cargoes to other ports (e.g., Newport News VA). Some observers have suggested use of military ports (Kings Bay GA) or other more secure ports for the most dangerous cargoes.

Re-routing WMD cargoes where possible is elementary Counter-Terrorism 101 prevention, like building the levees to protect New Orleans. But giving up cargo to another entity, even to reduce significant homeland security risks, conflicts with the ingrained culture of both port authorities and railroads.

The so-far unsuspecting port city public (and shipping industry corporation stockholders) remain unknowingly vulnerable. The Association of American Railroads in 2005-2006 has now twice testified in Congress that lack of adequate catastrophe insurance means the "transport of certain hazardous materials has the potential to be a 'bet the business' activity for railroads". They don't mention it's also "bet your Port of Seattle", "bet your Houston", and "bet your international trade".

Not sensibly and aggressively re-routing, when possible, ultrahazardous cargoes to non-target ports means we are conveniently **pre-positioning** these in our target cities for easy and devastating use by the terrorists of al Qaeda or any of its apparently proliferating, decentralized "homegrown" imitator groups such as the one recently arrested in Miami. This is the elephant in the living room of the Bush Administration's homeland security policy.

[bio]

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Seasoned public interest and environmental safety advocate, technical and policy analyst and lobbyist, trade union strategic researcher and educator, based in Washington, D.C., with skills, technical expertise and national, local and international contacts in a wide range of issues and strategies. Recognized international analyst in nuclear waste storage and transportation and industrial chemical use, transportation and accident prevention, emergency planning and homeland security. Consultant to the major U.S. chemical and oil worker unions, environmental groups, and governmental bodies including the District of Columbia Council. Accomplishments have covered a wide range:

- Analyzed safety problems and advocated national and grassroots action strategies on chemical hazard assessment, emergency planning, accident prevention, and public access to information. Educated citizens, workers and public officials in scores of petrochemical communities on generic industrial safety issues and on existing risk documents such as worst-case accident scenarios. Advocated many specific safety improvement activities by companies and governments.
- Conceived, initiated and with allies advocated successfully for new legislation enacting a major new federal regulatory program on prevention of chemical accidents: The Clean Air Act Amendments of 1990 impact an estimated 20,000 U.S. chemical and oil facilities and provide an estimated \$3 billion of worker safety training and new risk documents for workers, government officials and the public.
- Raised nationally and in major target cities after 9/11 the issue of urban transportation of ultrahazardous cargoes that provide attractive targets for terrorists. Wrote and lobbied for national legislation and local ordinances, testified in city council hearings, brought in supporting materials from experts, assisted with court cases, made community presentations, wrote a national overview piece, wrote op eds and was frequently cited in the media.

2003-present Director, Target Cities Re-Routing Project, Friends of the Earth, Washington, D.C.

Initiated foundation-funded project to reduce safety and terrorism risks in transportation of ultrahazardous industrial chemical cargoes through High Threat Target Cities, with beginning focus in the Nation's Capital. Analyzed issues and regulations and advocated successfully for

enactment of local DC Council Bill 15-525 banning the most dangerous cargoes; did technical, legal and regulatory analysis for fact sheets, Council testimony and Powerpoint slides; led alliance of union locals, tourist industry, emergency room physicians, environmentalists and public health associations in promoting the bill; did outreach and community presentations to LEPCs, Council of Governments, George Washington University occupational health forum, and media shows. Met with major stakeholders such as chemical shippers, city agencies, and railroads. Analyzed the issues and initiated introduction of re-routing ordinances in other target cities, including Cleveland, Baltimore, Boston and Chicago.

2004-2005 Consultant, International Brotherhood of Teamsters Rail Conference, Washington, D.C.

Analyzed rail safety, transportation security, and Liquefied Natural Gas facility security issues for the Research and Strategic Initiatives departments.

2001-2002 Consultant, Bio-Terrorism Technology, Public Technology Inc., Washington, D.C.

Analyzed availability of emerging technologies from federal laboratories for detection and decontamination of biological agents for use by local officials in a terrorism context. Analyzed technical and testing data, provided summaries, wrote comparisons of the technologies and recommendations for an ongoing system of third-party assessment and user needs surveys that could help local officials wisely spend public funds on new capabilities.

2000-2001 Research Director, Roofers International Union, Washington, D.C.

In the service of an organizing campaign with residential construction workers in the Southwest U.S., did strategic corporate analysis on major homebuilder corporations. Wrote homebuilder corporate profiles and White Paper on worker justice issues. Advocated strategies on sprawl, retirees and healthcare, and networked with union retiree groups, Interfaith Councils, AFL-CIO and other allies. Did web analysis and advocacy for the campaign website, campaign leaflets, etc.

1999-2000 Director of Environmental and Public Safety Policy, Center for Y2K and Society, Washington, D.C.

Analyzed and publicized the potentially catastrophic systemic safety risks that Y2K posed to major national infrastructures such as petrochemical, water supply and food industries, to at-risk communities and to democratic decision-making. Wrote technical and policy analyses and policy and action-oriented recommendations content for Center's website. Advocated safety improvements in national and local forums and in weekly conference calls with allies.

1995-1997 D.C. Coordinator, Nuclear Waste Citizens Coalition, Washington, D.C.

Coordinated the work of a coalition of national and regional groups, from both commercial nuclear power plant communities and nuclear weapons site communities. Analyzed issues of centralized interim storage and transportation of irradiated fuel. Did technical research and

organized and led Congressional advocacy, convened meetings of member groups, and wrote weekly fact sheets, analyses and recommendation on the issue.

1994-2002 Consultant, nuclear waste and chemical accident prevention policies

Clients included Public Technology Inc., Oil Chemical and Atomic Workers International Union, United Steelworkers of America, International Chemical Workers Union, Operating Engineers International Union, Friends of the Earth/England and Wales, National Environmental Law Center, Environmental Working Group, Labor Ministry of Brazil, Greenpeace International. Provided analysis for curriculum and delivered content at chemical accident prevention training programs, advocated for safety improvements at conferences on chemical accident prevention policy and programs, advocated for worker and citizen action implementing the new US chemical accident prevention laws.

1989-1994 Director of the Toxics Project, Friends of the Earth, Washington, D.C.

Responsible for analysis, policy development, lobbying and advocacy in chemical accident prevention, risk assessment, air toxics emissions, right-to-know issues, hazardous materials transportation and multinational corporate accountability.

- Built ad hoc partnerships of activists, workers, state and local officials and media contacts in chemical communities and provided technical and strategy analysis and recommendations. Founded and initially steered the Working Group on Community Right-To-Know, comprised of national and local environmental groups and labor unions. Wrote and published foundation-funded "The Community Plume" publication with analyses and fact sheets, to recommend strong roles for federally-mandated Local Emergency Planning Committees.
- As a safety analyst and policy expert, addressed international conferences on chemical accident prevention. Served as environmental advocate with the U.S. government delegations and developed recommendations for safety improvement in conferences with industry and government participants in London, Manchester, Stockholm, Berlin, Boston, Milan, Goa and Ahmedabad (India), and Tokyo.
- Worked with the environmental and labor coalition that in 1991-94 lobbied OSHA and EPA, advocating regulations to implement the Clean Air Act Amendments of 1990. Provided analysis and recommendations for testimony in Congressional hearings and wrote technical comments on proposed regulations.
- As an OSHA grant-funded consultant to the three major U.S. petrochemical labor unions, trained groups of workers in several cities on chemical accident risks and accident prevention. Advocated in Congress for two major unions for new worker safety training funds.
- *International advocacy:* gave invited presentations on chemical accident prevention and

community right-to-know policy and legislation to government and industry officials, universities and citizens groups in Brazil, Canada, Lithuania, Latvia, Bulgaria, Mexico, India, Vietnam, Thailand, Germany, Argentina, and Australia.

1979-1988 Director of the Nuclear and Hazardous Materials Transportation Project at the Environmental Policy Institute, Washington, D.C.

Spearheaded environmentalist efforts, educated the public and advocated for safety improvement by the government and corporations on issues of nuclear and hazardous materials storage and transportation.

Worked with Capitol Hill, several regulatory agencies, national trade associations, national media, environmental NGOs, labor unions, petrochemical industry, investor groups, and funders to develop recommendations in testimony before several House and Senate committees.

1978-1979 Research consultant, Ohio Public Interest Campaign.

Working under a federal grant, researched and wrote final evaluation of a four-year project on plant closings in Ohio.

1972-1978 Assistant Professor of Sociology, George Mason University, Fairfax, Virginia.

Taught political sociology, social problems, sociology of war and peace, social theory.

PUBLICATIONS

* "New Strategies to Protect America: Putting Rail Security on the Right Track", a paper in the Critical Infrastructure Security Series, published by the Center for American Progress, 2005.

* "The Terrorism Prevention and Safety in Hazardous Materials Transportation Act of 2004", DC Bill 15-525, enacted in February 2005. Upheld in Federal District Court, it has been the model for similar re-routing bills in Baltimore, Cleveland, Boston and Chicago.

* "Hell Might Come on Wheels," op-ed piece in "Close To Home" section, Washington Post, February 16, 2003, on the terrorism and hazardous materials transportation issue.

* Articles with recommendations for school boards on terrorism and hazardous materials issues, "School Board Journal", 2003.

* "Don't Harm the Most Vulnerable", a White Paper on Residential Construction in the Southwest, Roofers Local 135, Phoenix AZ, July 2000

* "Y2K and the Environment: The Challenge

for Local Officials", published by Public Technology Incorporated, 1999.

* "Winning the Right-To-Know", in The Environmental Forum, December, 1992

* "The Community Plume", a foundation-funded publication that Friends of the Earth sent to 4100 Local Emergency Planning Committees in the U.S., 1988-91.

* Op-Ed piece, New York Times Business Section, "Braking the Slide in Chemical Safety", May 1986

* "Regulations on the Routing of Irradiated Fuel," a chapter in The Urban Transport of Irradiated Fuel (Macmillan Press, 1984)

* "Hazardous Materials Transportation", a series of three articles for International Fire Chief magazine, 1981.

EDUCATION

B.A. in Philosophy from Notre Dame University (1966)

M.A. and Ph.D. in Sociology from Case Western Reserve University (1975).

Ordinance No.

AN EMERGENCY ORDINANCE

To supplement the Codified Ordinances by enacting new Section 394.071 thereof relating to transporting certain hazardous materials by rail car through the City.

By: Council members Zone and Westbrook

WHEREAS, this ordinance constitutes an emergency measure providing for the usual daily operation of a municipal department; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF CLEVELAND:

Section 1. That the Codified Ordinances of Cleveland, Ohio, 1976, are hereby supplemented by enacting new Section 394.071 thereof, to read as follows:

Section 394.071 Transporting Hazardous Materials by Rail Car Prohibited

(a) Findings.

This Council finds and declares the following. That, every year in the United States, there are derailments of trains with hazardous cargo requiring major evacuations. This Council finds that the volume of rail traffic per day on Cleveland's Lakefront Rail Line is over 50 trains, approximately 80% of which carry hazardous materials. That Cleveland's Lakefront Rail Line goes through heavily populated areas on the east and west sides of the City, and through the northern rim of downtown Cleveland along the lakefront, within one block of buildings and museums all of which attract thousands of people. That the release and/or ignition of several types of the most commonly shipped hazardous cargo on the Lakefront Rail Line, could result in a toxic cloud that could spread for several miles or could result in a spill of toxic material into Lake Erie. This Council further finds that, depending on the material released, time of day and weather, the recommended distance for initial isolation and evacuation in the event of a hazardous cargo release in a serious railroad incident extends from a few hundred feet to several miles, potentially requiring the evacuation or shelter-in-place of many thousands of people in downtown Cleveland or other heavily populated areas along the Lakefront Rail Line. Any evacuation could be hampered by the inability to evacuate to the north, where Lake Erie and the Lakefront Rail Line are located. This Council finds that the proximity of the Lakefront Rail Line to a heavily congested city area on one side, and to Lake Erie on the other, poses a uniquely local security and safety hazard, making it incumbent upon this Council to reduce the risk of exposure to hazardous materials to both citizens of the City and to this City's greatest natural resource, Lake Erie.

This Council finds that the Cuyahoga County Local Emergency Planning Committee has recommended an alternate rail route that traverses less populated sections of the Cleveland metropolitan area and would dramatically reduce the consequences of a potential accidental release. This Council further finds that said alternate rail route would require minimal capital expenditures on the part of the rail road companies. This Council finds that said alternate rail route more closely follows the mandatory routes for the through shipment of hazardous materials by highway as ordered by the Public Utilities Commission of Ohio.

Therefore, in light of its findings, in order to preserve and protect the general health, safety, security and welfare of the citizens of the City of Cleveland and of Cuyahoga County, and to reduce an essentially local safety and security hazard, this Council finds that it is necessary to prohibit large shipments of certain hazardous materials by rail through downtown Cleveland and along the Cleveland Lakefront Rail Line.

(b) Definitions.

(1) "Emergency" means an unanticipated, temporary situation that threatens the immediate safety of individuals or property, as determined by the Fire Chief.

(2) "Hazmat Exclusion Route" means all points along the following rail route: along the Norfolk Cleveland Rail Line beginning at the intersection of East 93rd Street and Broadway Avenue, then proceeding north along the Norfolk Cleveland Rail Line to the Lakefront Rail Line, then proceeding west along the Lakefront Rail Line and ending at the point where the Lakefront Rail Line intersects and exits the city limits of the City of Cleveland.

(3) "Person" means any individual or any partnership, firm, association, corporation, or other entity of any kind.

(4) "Practical Alternative Route" means a route that lies entirely outside the Hazmat Exclusion Route.

(5) "Through-shipment" means any shipment which passes along the Hazmat Exclusion Route unless that shipment's point of origin or ultimate destination is along the Hazmat Exclusion Route.

(c) Except in cases of emergency, no person may make through-shipments by rail car of any of the following hazardous materials on the Hazmat Exclusion Route without a permit issued pursuant to division (d) of this section:

(1) explosives of Class 1, Division 1, or Class 1, Division 1.2 as designated in 49 CFR Section 173.2, in a quantity greater than 500 kilograms;

(2) flammable gasses of Class 2, Division 2.1, as designated in 49 CFR Section 173.2, in a quantity greater than 1000 liters;

(3) poisonous gasses of Class 2, Division 2.3, as designated in 49 CFR Section 173.2, in a quantity greater than 500 liters and belonging to Hazard Routes A or B as defined in 49 CFR 173.116; and

(4) poisonous materials, other than gasses, of Class 6 Division 6.1, in a quantity greater than 1000 kilograms and belonging to Hazard Routes A or B as defined in 49 CFR 173.133.

(d) The Fire Chief may issue a permit to authorize a through-shipment by rail car of materials listed in division (c) of this section upon demonstration that there is no practical alternative route. The Fire Chief may condition the permit on the adoption of safety measures, including, but not limited to time-of-day restrictions. The cost of said permit shall be determined by the Fire Chief and shall not exceed the cost of implementing and enforcing this section. The Fire Chief shall promulgate rules and regulations to implement and enforce the provisions of this section.

Section 2. That this ordinance is hereby declared to be an emergency measure and, provided it receives the affirmative vote of two-thirds of all the members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise, it shall take effect and be in force from and after the earliest period allowed by law.

5-9-05
MZ:rns

Ordinance No.

REPORT

after second Reading

Councilmember Zone

AN EMERGENCY ORDINANCE

To supplement the Codified Ordinances by enacting new Section 394.071 thereof relating to transporting certain hazardous materials by rail car through the City.

READ FIRST TIME

and referred to

REPORTS

by the council
2004

CITY CLERK

READ SECOND TIME

by the council
2004

CITY CLERK

READ THIRD TIME
by the council

2004

PRESIDENT

CITY CLERK

APPROVED

MAYOR



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Published in the City Record

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