The Federal hazmat law contains express preemption provisions relevant to this proceeding. As amended by Section 1711(b) of the Homeland Security Act of 2002 (Pub. L. 107–296, 116 Stat. 2319), 49 U.S.C. 5125(a) provides that a requirement of a State, political subdivision of a State, or Indian tribe is preempted—unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under section 5125(e)—if (1) complying with the non-Federal requirement and the Federal requirement is not possible; or (2) the non-Federal requirement, as applied and enforced, is an obstacle to accomplishing and carrying out the Federal requirement.

Additionally, subsection (b)(1) of 49 U.S.C. 5125 provides that a non-Federal requirement concerning any of five subjects is preempted when the non-Federal requirement is not ''substantively the same as'' a provision of Federal hazardous material transportation law, a regulation prescribed under that law, or a hazardous materials security regulation or directive issued by the Department of Homeland Security.[7] The ''designation, description, and classification of hazardous material'' is a subject area covered under this authority. 49 U.S.C. 5125(b)(1)(A). To be ''substantively the same,'' the non-Federal requirement must conform ''in every significant respect to the Federal requirement. Editorial and other similar *de minimis* changes are permitted.'' 49 CFR 107.202(d).

The preemption provisions in 49 U.S.C. 5125 reflect Congress's long-standing view that a single body of uniform Federal regulations promotes safety (including security) in the transportation of hazardous materials. Some forty years ago, when considering the Hazardous Materials Transportation Act, the Senate Commerce Committee ''endorse[d] the principle of preemption in order to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation.'' S. Rep. No. 1192, 93rd Cong. 2nd Sess. 37 (1974). A United States Court of Appeals has found uniformity was the ''linchpin'' in the design of the Federal laws governing the transportation of hazardous materials.[8]

The current HMR requirements for the classification of unrefined petroleum-based products include proper classification, determination of an appropriate packing group, and selection of a proper shipping name. The HMR contain detailed rules that guide an offeror through each of these steps to ensure proper classification of hazardous materials. Moreover, for unrefined petroleum-based products, such as crude oil, additional requirements were implemented pursuant to a public notice and comment rulemaking proceeding.[9] These Federal requirements for classification of these types of materials do not mandate specific sampling and testing of vapor pressure, nor do they classify hazardous liquids based on vapor pressure. Moreover, there is no current Federal requirement to pre-treat or condition crude oil to meet a vapor pressure standard before it is offered for transportation.

Because the HMR does not designate, describe, or classify unrefined petroleum-based products differently based on vapor pressure, any non-Federal law setting a vapor pressure limit for such materials is likely preempted by 49 U.S.C. 5125(b)(1)(A). Indeed, PHMSA has affirmatively decided in this proceeding that a national vapor pressure limit is not necessary or appropriate, thereby confirming that non-Federal laws setting vapor pressure limits are likely not ''substantively the same'' as Federal law.[10] Such non-Federal laws may also be ''handling'' regulations preempted by 49 U.S.C. 5125(b)(1)(B), and may also be preempted under 49 U.S.C. 5125(a)(2) as obstacles to accomplishing and carrying out Federal law.

A person directly affected by a non-Federal requirement may apply to PHMSA for a determination that the requirement is preempted by 49 U.S.C. 5125. *See* 49 U.S.C. 5125(d); 49 CFR 107.203–107.213. PHMSA is currently considering a preemption application filed by North Dakota and Montana with respect to Washington's vapor pressure limit, and will consider any application filed with respect to other non-Federal vapor pressure limits.

Issued in Washington, DC, on May 11, 2020, under authority delegated in 49 CFR part 1.97.

Howard R. Elliott,

Administrator, Pipeline and Hazardous Materials Safety Administration.

[FR Doc. 2020–10377 Filed 5–19–20; 8:45 am]

BILLING CODE 4910–60–P

General of New York, California, Illinois, Maine, Maryland, & Washington, Document Id: PHMSA–2016–0077–0074. In addition, the Attorneys General of New York, California, Maryland, and New Jersey submitted comments against preemption in a proceeding involving Washington's law. *See* Docket No. PHMSA–2019–0149.

[7] Unless the non-Federal requirement is authorized by another Federal law or DOT grants a waiver of preemption under section 5125(e).

[8] *Colorado Pub. Util. Comm'n* v. *Harmon,* 951 F.2d 1571, 1575 (10th Cir. 1991).

[9] Hazardous Materials: Enhanced Tank Car Standards and Operational Controls for High-Hazard Flammable Trains, 80 FR 26643 (May 8, 2015).

[10] This notice of withdrawal also provides a basis for what courts have referred to as ''negative'' or ''null'' preemption. *See Norfolk & W.R. Co.* v. *Pub. Utils. Comm.,* 926 F.2d 567, 570 (6th Cir. 1991) (''the United States Supreme Court has recognized a form of negative preemption when a federal agency has determined that no regulation is appropriate.'') (citing *Ray* v. *Atlantic Richfield Co.,* 435 U.S. 151, 178 (1978)).

SURFACE TRANSPORTATION BOARD

49 CFR Part 1201

[Docket No. EP 763]

Montana Rail Link, Inc.—Petition for Rulemaking—Classification of Carriers

On February 14, 2020, Montana Rail Link, Inc. (MRL), filed a petition for rulemaking to amend the Board's rail carrier classification regulation set forth at 49 CFR part 1201, General Instructions section 1–1(a), which describes the revenue thresholds for the classes of carriers for the purposes of accounting and reporting.[1] Currently, Class I carriers have annual operating revenues of $489,935,956 or more, Class II carriers have annual operating revenues of less than $489,935,956 and more than $39,194,876, and Class III carriers have annual operating revenues of $39,194,876 or less, all when adjusted for inflation. 49 CFR pt. 1201, General Instructions section 1–1(a) (setting thresholds unadjusted for inflation); *Indexing the Annual Operating Revenues of R.R.s.,* EP 748 (STB served June 14, 2019) (calculating revenue deflator factor and publishing thresholds adjusted for inflation based on 2018 data).[2]

MRL requests that the Board increase the above revenue threshold for Class I carriers to $900 million. (Pet. 1.) In support of its request, MRL contends that it continues to be a regional railroad operationally and economically but may exceed the Class I revenue threshold within two years. (*Id.*) Citing principles drawn from the Interstate Commerce Commission's 1992 rulemaking in which the revenue thresholds were last

[1] The revenue thresholds for each class of carrier are adjusted annually for inflation and published on the Board's website.

[2] ''The railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows: Current Year's Revenues × (1991 Average Index/Current Year's Average Index).'' 49 CFR pt. 1201, Note A.

raised,[3] MRL asks that the Board address ''whether a regional carrier such as MRL should be treated as a Class I carrier, taking into account (1) the financial and operational differences between MRL and existing Class I carriers, and (2) the cost-benefit analysis of imposing Class I requirements on MRL.'' (*Id.* at 12.) From an operational standpoint, MRL states that it is clearly differentiated from a typical Class I carrier because of its heavy dependence on a single Class I railroad and because approximately 95% of its mainline track is located in Montana. (*Id.* at 5–6.) From a financial standpoint, MRL also notes, among other things, that the average operating revenue for Class I railroads in 2018 was more than 27 times MRL's total revenue for that year and that the operating revenue for the smallest Class I railroad was about 3.5 times the total revenue of MRL. (*Id.* at 8). Because of its operational and financial characteristics, MRL contends that there would be no offsetting benefit from imposing the cost of Class I reporting requirements on MRL. (*Id.* at 12.) MRL submitted eight letters of support with its petition.[4] No replies to MRL's petition were received.

The Board will open a rulemaking proceeding to consider MRL's petition and consider issues related to the Class I carrier revenue threshold determination. The Board invites comment about whether it should amend 49 CFR part 1201, General Instructions section 1–1(a), to increase the revenue threshold for Class I carriers, and, if so, whether $900 million or another amount would be appropriate.

Any interested stakeholders may file comments regarding potentially amending 49 CFR part 1201, General Instructions section 1–1(a), to increase the revenue threshold for Class I carriers by June 15, 2020. If any comments are filed, replies will be due by July 6, 2020.

List of Subjects in 49 CFR Part 1201

Railroad, Uniform System of Accounts.

It is ordered:

1. MRL's petition to initiate a rulemaking proceeding is granted, as discussed above.

2. Comments are due by June 15, 2020; replies are due by July 6, 2020.

3. This decision will be published in the **Federal Register**.

4. This decision is effective on the date of service.

Decided: May 13, 2020.

By the Board, Board Members Begeman, Fuchs, and Oberman.

Tammy Lowery,

Clearance Clerk.

[FR Doc. 2020–10764 Filed 5–19–20; 8:45 am]

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[3] Pet. at 1–2 (citing *Mont. Rail Link, Inc. & Wis. Cent. Ltd., Joint Pet. for Rulemaking with Respect to 49 CFR part 1201,* 8 I.C.C.2d 625 (1992)).

[4] Letters of support were included from the Montana Contractors' Association, Montana Agricultural Business Association, Montana Grain Elevator Association, Montana Petroleum Association, Inc., Montana Taxpayers Association, Montana Chamber of Commerce, Treasure State Resources Association, and Montana Wood Products Association.