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AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS' COMMENTS ON THE ASSOCIATION OF AMERICAN RAILROADS TANK CAR COMMITTEE CPC-1332, "SOLICITATION OF COMMENTS FOR APPENDIX B AND ASSOCIATED CHAPTER 1 DEFINITIONS OF AAR MANUAL OF STANDARDS AND RECOMMENDED PRACTICES (MSRP), SECTION C PART III, SPECIFICATIONS FOR TANK CARS (M-1002)"

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Comments on Proposed CPC-1332

The American Fuel & Petrochemical Manufacturers ("AFPM") welcomes the opportunity to comment on the Association of American Railroads' ("AAR") Casualty Prevention Circular 1332 ("CPC-1332") entitled, "Solicitation of Comment for Appendix B and Associated Chapter 1 Definitions of AAR Manual of Standards and Recommended Practices ("MSRP") Section C Part III, Specifications for Tank Cars ("M-1002")." On May 1, 2018, AAR issued CPC-1332 to facilitate the handling of comments on recommended modifications to AAR tank car facility certification processes via revisions to the MSRP M-1002.

AFPM submits these comments to express concern over the AAR's proposal to drastically expand the scope of the current AAR tank car facility certification process without corresponding safety benefits to support the changes or consideration of potential adverse impacts on rail shippers and the tank car maintenance industry. While some aspects of CPC-1332 are positive steps toward improving and streamlining the AAR tank car facility certification process, those improvements are far outweighed by the negative impacts of the proposal's expanded scope. Further, this expansion of scope runs counter to decades of the U.S. Department of Transportation's ("DOT" or the "Department") enforcement of the Hazardous Materials Regulations ("HMR") and AAR's implementation of the tank car facility certification program. Should AAR and/or DOT wish to expand the scope of the tank car certification process beyond those facilities currently subject to the program, they should do so through a notice-and-comment rulemaking process that fully addresses the potential regulatory impacts and considers all stakeholders' comments in an open forum.

As more fully explained below and in the attached AAR required documentation forms (Exhibit PC-1 ver.3.0), AFPM respectfully requests that AAR move forward with only the aspects of M-1002 Appendix B that streamline and improve the tank car facility certification process as it currently exists. AAR should not move forward on aspects of CPC-1332 that would expand the scope of tank car facilities subject to the tank car certification process.

I. AFPM'S SUBSTANTIAL INTEREST IN CPC-1332

AFPM is a national trade association representing nearly all U.S. refining and petrochemical manufacturing capacity. Our members produce the gasoline, diesel, and jet fuel that drive the modern economy, as well as the chemical building blocks that are used to make the millions of products that make modern life possible. To produce these essential goods, AFPM members depend on all modes of transportation, including rail, to move their products and have made significant infrastructure investments to support and improve the efficiency of the transportation system.

Under the Hazardous Materials Transportation Act and as defined in the HMR (49 CFR 179), AAR's Tank Car Committee ("TCC"), comprised of railroads, rail car owners and manufacturers, and a limited number of hazmat shippers, is authorized to review proposed changes in, or additions to, tank car specifications and make recommendations to DOT for consideration. While AFPM members lease, own, and maintain tens of thousands of rail tank cars, a multi-billion-dollar investment, AFPM is not a member of the TCC and cannot vote on CPCs or other proposals. The result is that the majority of small and mid-size refiners, including Fortune 500 companies with thousands of tank cars, are prevented from voting on TCC decisions that directly impact financial and other interests of AFPM members. Despite being unable to vote on CPCs, AFPM often provides comments on CPCs that impact our members, as is the case with CPC-1332.

Safe, reliable, and economic rail transportation is critical to our members. AFPM shares the AAR and DOT's concerns about tank car safety. We also have a shared commitment to risk-based, data-driven solutions that enhance safety. It is because of these shared interests that AFPM submits our comments concerning CPC-1332. AFPM supports efforts to revise the tank car facility certification program that would improve and streamline the process and enhance transparency. Specifically, AFPM supports administrative changes in the program, such as aligning previous disparate certification intervals and process improvements resulting from migrating to an on-line system. In addition, AFPM also supports operation changes including the revision of existing activity codes, improvements to the recertification process, and clarification of existing unclear requirements. While some of the improvements in CPC-1332 do just this, the expansion of the scope of the tank car facility certification program is neither risk-based nor data-driven.

The original charge of the TCC Task Force (T91.2.4) was to address the tank car facility certification process, and the stated purpose of the M-1002 Appendix B re-write was to clarify and streamline the existing M-1002 Appendix B rules. However, certain proposed revisions would drastically expand the type of facilities historically subject to the program. Below are AFPM's overarching concerns with CPC-1332.

II. OVERARCHING CONCERNS RELATED TO CPC-1332

AAR has characterized CPC-1332's proposed changes to M-1002 Appendix B as a clarification, but the proposed revisions would be a significant change. These changes would be

counter to DOT enforcement of the HMR and AAR's implementation of the tank car certification program, which has historically not included tank car component facilities or their operations. These changes would expand the tank car facility certification requirements deep into the supply chain for a wide range of tank car components with no articulated safety benefit. AFPM does not believe every facility that manufactures tank car components or performs routine tank car maintenance must be subject to the AAR tank car facility certification process.[1]

A. Rationale for the Expansion of Scope

CPC-1332 expands the scope of the tank car facility certification program based on an internal DOT policy change that runs counter to historical implementation and enforcement of the program.

On September 21, 1995, the Research and Special Programs Administration (the predecessor agency to PHMSA) issued a final rule that amended the HMR to require facilities that build, repair, and ensure the structural integrity of tank cars to develop and implement a quality assurance program.[2] This action implemented the tank car facility registration program. While DOT has authority to regulate tank car component manufacturers, DOT has not yet finalized any rulemaking that would regulate tank car "component manufacturers."

Based on comments at recent TCC meetings, it is now FRA's position that the manufacturing of tank car tanks and components (*e.g.*, valves, manway covers) are all considered functions of a tank car facility and require an approved Quality Assurance Program by the AAR.[3] At the April 2018 TCC meetings FRA staff noted that this "position" was vetted by FRA and PHMSA staff. While this may be DOT's, and subsequently AAR's, current interpretation of regulatory requirements, this contradicts recent DOT enforcement and AAR implementation of the tank car facility certification program. Further, there has been no notification or documentation published to notify stakeholders (*e.g.*, rail shippers and tank car component manufacturers) of this interpretation or provide an opportunity to comment on this policy change.

It seems this regulatory interpretation is driving the expansion of the Task Force's original charge and the stated purpose of the M-1002 Appendix B re-write beyond streamlining and improving the process. DOT's interpretation, and AAR's incorporation of that interpretation in CPC-1332, has far-reaching implications. The expanded scope of the tank car facility certification process would increase tank car ownership costs, reduce the number of component suppliers (including machine shops capable of fabricating repair components), and cause delays in obtaining parts. Further, the safety benefits of these actions have not been examined.

This reinterpretation, which expands the applicability of the certification requirements, is more akin to a legislative rule that requires a regulatory change. As such, DOT must adhere to

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[1] With the cost of tank car facility certification exceeding $100,000, AAR derives significant revenue from this program and stands to benefit from an expansion of the program.

[2] *See* 60 FR 49048 "Crashworthiness Protection Requirements for Tank Cars; Detection and Repair of Cracks, Pits, Corrosion, Lining Flaws, Thermal Protection Flaws and Other Defects of Tank Car Tanks," Final Rule, published September 21, 1995, https://www.gpo.gov/fdsys/pkg/FR-1995-09-21/pdf/95-22771.pdf.

[3] *See* FRA update at April Tank Car Committee, Page 13, https://www.aar.org/wp-content/uploads/2018/04/April-2018-TCC-Main-Session-Agenda-and-Docket-FINAL.pdf.

the due process requirements of the Administrative Procedure Act ("APA") by developing tank car standards and tank car facility certification programs through notice-and-comment rulemaking to fully assess the economic impacts and safety justification for such changes.

B. Lack of Adequate Assessment of Impacts

CPC-1332 does not adequately consider economic impacts or provide sufficient safety justification for the expanded scope of the tank car facility certification program.

While the AAR's Safety & Operations Department Committee Handbook, which governs the operation of AAR Committees, includes requirements for committees to conduct cost-benefit analysis (over certain thresholds), the TCC is the only committee explicitly excluded from such requirements. This is particularly troubling as the TCC is a committee in which the railroads do not own the assets the committee oversees. Effectively, this means AAR's committee must consider economic impacts when it directly affects their members but does not when the cost is burdened by rail shippers. Further, the TCC does not abide by the APA, which requires consideration of cost and benefits. This has led to actions that have been implemented without proper balancing of the safety benefits and cost considerations, as appears to be the case with CPC-1332. This is particularly concerning given the wide-ranging impacts of CPC-1332's proposed changes and the likelihood that rail shippers would shoulder the burden of a significant share of these costs.

During the Task Force meetings leading up to the publication of CPC-1332, AAR barred Task Force members from discussing supply chain and economic impacts even in the most broad and generic terms. The resulting Task Force proposal was therefore completely devoid of any consideration of these potential economic impacts. Further, during the CPC-1332 comment process, AAR instructed stakeholders to limit their comments to related safety issues.

CPC-1332 would have a potentially significant economic impact on rail shippers and could reshape the rail component supplier market. Given the considerable cost of the tank car facility certification process and the diverse businesses tank car component suppliers support outside of the rail industry, it is possible that some suppliers would choose to cease offering products to the railway supply industry rather than pursue an AAR-certified tank car facility program. A reduction in component suppliers would have safety and operational implications if parts are not widely or readily available for use and replacement. A decrease in supply could result in increased prices for parts. Fewer suppliers in the tank car component business could also stifle innovation as suppliers may be less likely to invest in the development of new products if there is limited competition. Finally, reducing the availability of components and parts means increased delays for repair and requalification times, thereby resulting in increased downtime while shippers wait for their equipment.

Regarding safety benefits, the TCC has not provided a sufficient safety justification for expanding the scope of tank car facility certification process to tank car component suppliers. While some types of operations may warrant a need for tank car facility certification, AAR has not presented objective safety data supporting its proposal to expand the scope of tank car facility certification. Although FRA presented enforcement data at TCC meetings, this is an

incomplete analysis upon which to base such a significant regulatory change. Moreover, there was no formal vetting of this information and no root cause analysis to suggest these data indicate a need for an expansion of the AAR tank car facility certification program. In fact, in recent years, most rail safety issues that have been addressed through Rail-worthiness Directives were related to tank car facilities already certified through the AAR process.

Despite not currently being required to have a tank car facility certification, many tank car component suppliers have robust International Standards Organization-based quality systems already in place. Requiring tank car component suppliers to create a separate AAR-specific system to meet facility certification requirements creates redundancy without clear additional safety benefit.

Expanding the scope of facilities (*e.g.,* tank car tank and service equipment component manufacturers) that require AAR-approved tank car facility certification would create a more complex program. The current tank car facility program, including AAR's quality assurance program, already includes accountability for certified facilities to verify that their Original Equipment Manufacturers and subcontractors are providing quality equipment or work compliant with AAR standards and DOT regulations. The revised provisions, as written, would not only potentially limit the availability of equipment in the supply chain but also create redundancies in the program that are not necessary or justified by an identified safety benefit.

C. Adverse Effects on Tank Car Facility Certification Program

CPC-1332 expands a tank car facility certification program that is already resource-constrained and overburdened.

There are significant deficiencies with the existing tank car facility certification process in terms of communication, timely delivery of audit results, and effective integration of the Tank Car and Quality Committee aspects of this work. We do not believe it is an appropriate solution to significantly expand the scope of the tank car facility certification process (for potentially lower risk operations) before addressing these deficiencies. Unfortunately, CPC-1332 as proposed would expand the scope of tank car facilities subject to certification and thus require more facility certifications further down the supply chain.

Simply requiring more facilities to undergo certification does not address an identified or articulated safety issue. In fact, expanding the scope of tank car facilities subject to certification, without corresponding increase in resources and staff, may hinder the implementation of improvements designed to streamline the current process. Expanding the scope of tank car facilities is likely to lead to less frequent communication between AAR and tank car facilities due to decreased bandwidth. Further, this expansion could result in extended delays in delivery of audit results and diluted oversight of higher risk tank car facilities.

The proposed revisions to the tank car facility certification process raise serious questions about the impact on cars already in service. While CPC-1332 cites an effective date of January 1, 2019, it is unclear how AAR plans to implementation these changes and certify what is likely to be a considerable number of facilities. AAR must clearly define the effective date and an

implementation timeline of CPC-1332 should the changes be adopted given the large impacts to rail shippers and the tank car maintenance industry.

AFPM supports improving the existing tank car facility certification program through CPC-1332. Any potential expansion of the scope of the program should be addressed only after those improvements are made and there is an industry-wide discussion on the issue, in the form of notice-and-comment rulemaking, supported by a full accounting of costs, other impacts, and safety benefits.

D. Rail Shipper's Petition for Rulemaking

On August 12, 2016, AFPM and other trade associations representing rail shippers[4] petitioned PHMSA to initiate a rulemaking related to the role of AAR's TCC in development of tank car standards.[5] Specifically, this petition asked PHMSA to prohibit any person (*e.g.*, AAR's TCC) from requiring compliance with tank car standards different from the HMR. DOT has yet to respond to this petition for rulemaking. Given recent comments from DOT officials implying DOT would soon respond to the petition and actions taken by the AAR at the April 2018 TCC meeting, we believe DOT should respond to the petition and open a rulemaking docket on this issue. In light of this, AFPM urges the AAR TCC to table those provisions in CPC-1332 that expand the scope of the tank car facility certification.

Under the Hazardous Materials Transportation Act and as defined in the HMR, and referenced in the AAR TCC charter, the TCC is authorized to review proposed changes in, or additions to, specifications and make recommendations to DOT for consideration. While DOT recognizes the role played by the TCC, relevant statutes and legislative history make clear that Congress intended DOT to be the sole body to create uniform national standards for the transport of hazardous materials, including for tank cars and facilities that build and maintain tank cars.

Even though rail shippers own or lease the transportation assets the TCC decisions impact, representatives from rail shippers make up only a small portion of TCC voting members. In fact, the TCC charter states that votes cannot take place unless there is a railroad majority present. Given this organizational structure, railroads control the TCC's actions and have exercised their majority position to require compliance with tank car requirements that deviate from PHMSA standards without the concurrence of other stakeholders.

AAR's delegation of authority (by way of the TCC) from DOT is premised on bringing together expertise from rail carriers, car builders, and tank car users for a meaningful dialogue to make recommendations to develop and modify industry standards. While the TCC does bring together such expertise, the debates at recent TCC meetings disregard many opinions and expertise in favor of advancing the railroad participants' interests. Specifically, regardless of the

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[4] The following organizations submitted this petition: the American Chemistry Council, the American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chlorine Institute, the National Association of Chemical Distributors, the National Industrial Transportation League, the Society of Chemical Manufacturers and Affiliates, the Sulphur Institute, the U.S. Clay Producers Traffic Association, Inc., and the Fertilizer Institute.

[5] *See* Docket No. PHMSA-2016-0093, "Petition to Amend Tank Car Standards," submitted August 12, 2016, https://www.regulations.gov/document?D=PHMSA-2016-0093-0001.

debate and input presented in the public forum, the railroads use their voting majority to advance their desired outcome, often to the detriment of the rail shippers.

The discussion related to the tank car facility certification program at the April 2018 TCC meeting is illustrative of such unilateral decision making. In fact, despite considerable discussion at the public session during the meeting, strong vocal opposition, and a formal dissenting opinion from Task Force members,[6] the TCC, led by the railroad majority, pushed this proposal through at the April meeting, resulting in the publication of CPC-1332. If any one industry ignores the lack of consensus among the other stakeholders and makes a unilateral decision, as was the case with CPC-1332, that usurps the DOT's authority as the regulator. Such actions seriously undermine the ability of the TCC to continue its essential, collaborative work and calls into question the legitimacy of the current TCC voting structure.

While an update to M-1002 Appendix B is needed, the TCC vastly expanded the scope of facilities that would require tank car facility certification and did so unilaterally without fully considering meaningful comments from stakeholders. The TCC failed to consider the severe impacts the changes would have on rail shippers and tank car facilities. Further, AAR's process for filing comments on CPC-1332, which requires submission using a burdensome and limiting form, precludes stakeholders from making any remarks on the merits of the proposal, requires a separate form for each section edit, and limits comments to simply edits of existing text.

The actions of the TCC related to CPC-1332 are just the most recent, in a series of examples,[7] as to why DOT needs to take a considered review of the TCC and its processes. We acknowledge the tremendous value and expertise the TCC brings to the table; however, the current TCC is flawed and is not representative of all rail stakeholders. While there are a variety of ways to successfully resolve this issue, responding to the rail shippers' petition and opening a rulemaking docket would allow for an open and transparent discussion on TCC reform.

III. SECTION BY SECTION COMMENTS ON CPC-1332

While this document details overarching concerns with the tank car committee process during the deliberation on CPC-1332, AFPM has also put forth recommended revisions per AAR's "Exhibit PC-1 ver.3.0" form (see attached files).

IV. PROPOSED PATH FORWARD

AFPM supports efforts to revise the tank car certification program that would improve and streamline the process and enhance transparency. While many of the improvements in CPC-

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[6] *See* https://www.aar.org/wp-content/uploads/2018/04/Appendix-B-Task-Force-Dissenting-Report-and-Appeal-3.28.18.pdf.

[7] In 2015, The TCC proposed tank car top fitting protection that PHMSA had expressly declined to adopt as the costs far outweighed the benefits. That same year, the TCC proposed to require all single tank cars transporting Class 3 materials to meet DOT-117 standards, not just those on high-hazard flammable trains as required by DOT. In addition, the ARR through TCC has attempted to make unilateral changes to the Toxic by Inhalation pressure car fleet. These proposals put the interchange requirements in direct conflict with DOT requirements that were fully considered during the rulemaking process.

1332 do just this, the proposed expanded scope of the tank car facility certification program is not risk-based or data-driven. AFPM recommends the AAR TCC proceed as follows:

- **Implement Revisions that Clarify and Streamline the Tank Car Facility Certification Process –** AFPM proposes the TCC move forward on the elements of CPC-1332 that improve administrative processes and existing requirements.[8]
- **Remove Elements that Expand the Scope of Tank Car Facility Certification –** AFPM proposes the TCC strike all elements of CPC-1332 related to the expansion of the scope of tank car facility certification. Should DOT and AAR wish to move forward with the proposed expansion of tank car facility certification, this should be done through notice-and-comment rulemaking per the APA.
- **DOT Should Open a Rulemaking Docket to Reform the TCC –** AFPM believes DOT should respond to the shipper's petition and open a rulemaking docket to begin the process of reforming the TCC, clearly defining the relationship between DOT and AAR's TCC. Opening a rulemaking docket would provide an open and transparent discussion on TCC reform. The TCC's recent actions on CPC-1332 and in other cases clearly demonstrate the need for change in the TCC operating and decision-making practices.

V. CONCLUSION

AFPM thanks the TCC for its time and for its consideration of a more streamlined approach, as outlined above, to achieve the desired safety benefits we seek as an industry. We share the AAR and DOT's commitment to tank car safety. We look forward to the opportunity to work together on this and other rail safety issues. Please contact me at (202) 457-0480 or rbenedict@afpm.org if you wish to discuss these issues further.

Sincerely,

Rob Benedict
Director, Transportation and Infrastructure

[8] For example, AFPM supports administrative changes in the program, such as aligning previous disparate certification intervals and process improvements resulting from migrating to an on-line system. In addition, AFPM also supports operation changes including the revision of existing activity codes, improvements to the recertification process, and clarification of existing unclear requirements.