

**Testimony of  
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Assembly Natural Resources Committee and  
Joint Legislative Committee on Emergency Management**

## **Risks of Crude Oil Shipment by Rail in California**

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### **I. Introduction**

Crude-by-rail imports into California are projected to increase as much as 25-fold to 150 million barrels per year by 2016, driven in large part by increasing domestic oil production in North Dakota's Bakken region and the Canadian tar sands. A string of train derailments in North America in 2013 and 2014 has raised safety concerns about moving crude oil by rail across the country. The exponential rise in rail cars carrying crude oil and petroleum products through California communities increases the public's vulnerability to a serious accident.

The U.S. Department of Transportation (DOT) and Federal Railroad Administration (FRA) are in the process of designating new safety standards and requirements for rail tank cars, and evaluating potential new rules for the transportation of oil. California nevertheless can act now to: (i) obtain robust data on the risk factors involved in oil-by-rail accidents; (ii) advocate for more stringent federal regulations; (iii) and increase safety through new state regulations, emergency response preparation, heightened agency coordination, and community engagement.

At the panel's request, I will first give a very brief overview on the regulatory scheme governing oil by rail transportation, focusing on federal preemption of state laws and remaining state authority to regulate. Then, I will turn to recommendations.

### **II. Regulatory Scheme and Preemption Issues**

States play an important role in inspection and compliance under the federal rail safety program. The California Public Utilities Commission (CPUC) shares authority with the federal government to enforce federal rail safety requirements, and has authority to enforce state safety rules. Various additional state agencies engage in planning, emergency response, and cleanup activities applicable to oil by rail. The CPUC has also been an active participant in federal rulemaking efforts, including through the FRA's Railroad Safety Advisory Committee (RSAC).

However, the ability of states to impose new regulations on rail operations and safety is limited under federal statutes such as the Federal Railroad Safety Act ("FRSA"), ICC Termination Act ("ICCTA"), and other federal laws, including the Commerce Clause. Uniform federal regulation

ensures that comprehensive safety regulations apply in every state where railroads operate. In recognition of this, the FRSA provides that rules regulating rail safety “shall be nationally uniform to the extent practicable,” and expressly preempts state authority to adopt safety rules, save for two exceptions.

The first exception allows a state to adopt laws and regulations related to railroad safety or security if the Secretary of Transportation has not “prescribe[d] a regulation or issue[d] an order covering the subject matter of the State requirement.” (49 U.S.C. § 20106(a)(2)). In terms of the transport of crude oil by rail, the state may find that much of what it would like to do has already been covered by federal regulations and orders.

But, one concrete example of what California might do under this exception is require state oil spill contingency plans for trains transporting oil into the state, to protect state waters and public health and safety. Or, as New York has recently done, the state could advance legislation to increase fines for failure to swiftly notify state officials after an accident or derailment.

The second exception, codified at 49 USC § 20106(a), allows a state to adopt additional or more stringent laws related to railroad safety if the state regulation meets three criteria: (1) it is necessary to eliminate or reduce an “essentially local safety or security hazard;” (2) it is not incompatible with a law, regulation, or order of the United States Government; and (3) it does not unreasonably burden interstate commerce.

The California Public Utilities Commission tried to take advantage of this “local safety hazard exception” in 1991 following two high-profile train accidents: Dunsmuir and Sea Cliff. However, in a lawsuit brought against the state by the rail industry, the Ninth Circuit of the United States Court of Appeals explained that the meaning of an “essentially local safety hazard” is quite narrow, applying to issues that “are not capable of being adequately encompassed within uniform national standards.” The Ninth Circuit found that a rail site with an abnormally high derailment rate and the highest steep grade/sharp curve combination in the state did not meet this exception, stating that there was nothing essentially local about the steep grade/sharp curve combination since other states have these types of sites. This decision is binding in California. Understandably, the CPUC may not rush to apply this savings clause here.

But even with this precedent, new data on train derailments and crude-by-rail shipment may warrant the designation of local safety hazards sites in California, based on risk factors such as track curvature, history of derailments, actual and anticipated crude-by-rail traffic, and proximity of population centers, drinking water supplies, or sensitive environmental areas. But, before making such determinations—which may likely invite legal challenge from the rail industry—the CPUC would want to support such designations with up-to-date data on crude-by-rail accidents and risk factors.

This underscores the need for California agencies to have robust information from FRA and the railroads on routes and frequency, as well as data on train derailments, their causes, and risk factors specific to crude by rail transit. The State should request this data from FRA – a recommendation echoed in the June 10, 2014 Interagency Working Group Report. The CPUC needs both national data and CA-specific data in order to do its job.

### III. Recommendations for State Action

In light of this mounting threat, California can take some immediate actions to increase safety:

- **First, the state should be commended for passing a budget that extends the 6.5-cent/barrel fee on oil entering the state by any means – including rail – to be used for oil spill prevention and preparation.** This is a common sense measure in light of projections that 25% of California’s oil imports in 2016 will come by rail.
  - The state could also consider imposing a new fee to equip and train local fire departments and first responders, as Minnesota has just done.
- **Second, the state should make track and railcar inspection a very high priority.** The Governor’s new budget separately includes funds to hire seven more rail safety inspectors for the California Public Utilities Commission. Inspection of track and railcars is vital, as derailments are the most common type of train accident in the United States. Common causes of derailments are: broken rails or welds; track geometry problems; broken car wheels; car bearing issues; and track obstructions or buckled track. ([Liu, et. al. 2012](#)).
  - The CPUC has requested funding to hire 7 new inspectors. It should clarify why 7 new inspectors is a necessary and sufficient number.
  - **The state should ensure that we have enough CPUC inspectors to accommodate the projected rise in oil by rail traffic each year.** If 7 new inspectors are needed right now; we will likely need many more by 2016.
- **Third, CPUC should conduct an analysis of the specific risks that crude-by-rail poses to the State. The CPUC should identify the highest-risk areas of track and the specific measures that it can take to increase safety.**
  - **The legislature should consider requiring an annual report from the CPUC on this issue.** Voluntary agreements with the railroads may also be an import outgrowth of this state-specific analysis. Simply put, we need to study this issue further, and we need data that can inform where and how to direct additional resources.
  - The legislature could also consider requiring information sharing among the relevant state agencies, including CPUC, OES, OSPR, Cal EPA, and more.
- **Fourth, the CPUC should monitor the railroad’s compliance with eight new voluntary measures that the railroads agreed to implement with DOT this year.** These measures include the railroad’s own increased inspection of track along crude oil routes, use of end-of-train braking systems on all oil trains, and lowering train speed in federally-designated “high-threat-urban-areas.”
- **Fifth, the state should establish a system to convey railroad shipment information to local emergency personnel so that they are adequately prepared to respond in case**

**of emergency.** The state should ensure that local emergency response personnel are well trained to deal with a crude by rail accident, and can readily identify the contents of any shipment. Training and information sharing with local emergency response personnel should be paid for by the industry, using a fee or assessment.

- **Sixth, the state should press for access to daily information on oil shipments in California – beyond the weekly shipment information now required under the Dept. of Transportation’s recent order.** And, the state should ensure that local first responders can access this information immediately in the event of an accident.
- **Seventh, the state should directly advocate for more stringent federal regulations. Legislative pronouncements, as well as the CPUC’s robust participation through RSAC are necessary to secure better federal standards.** California joins others states such as New York in advocating for more stringent railcar design standards; mandatory placards on railcars identifying Bakken crude oil; and other federal regulations governing rail safety, such as expediting Positive Train Control and Electronically-Controlled Pneumatic brakes on all trains carrying crude oil.
- **Eighth, the CPUC and OES should work directly with the Class I railroads in California to implement voluntary measures such as additional safety enhancements, and providing more information to inspectors and affected local communities.** The railroads should be responsible partners in the effort to keep California safe, and do whatever they can to increase safety and prevent accidents.

#### **IV. Local Criteria and Permitting Processes for New Offloading Facilities**

Statewide, there is a patchwork of local permitting agencies responsible for land use, air, water, and other local safety and environmental issues that may be relevant to proposed new offloading sites, or expansion of existing sites. Local air quality districts, cities, and regional agencies all have jurisdiction over aspects of offloading site expansion. Local government and permitting agencies can deny land use and other permits for refineries and offloading facilities if they find safety risks or improper environmental mitigation under statutes like the California Environmental Quality Act (CEQA).

Yet, agency personnel across the state may have varying levels of expertise in oil and rail issues, and may apply permitting criteria inconsistently. As such, the state should consider issuing guidance to local permitting agencies on the necessary permits and requirements for offloading facility or refinery expansion. It could also provide guidance on CEQA review and the public comment and participation process, especially relevant to environmental justice communities that may be located near offloading sites or refineries.

Finally, the state can encourage railroads, offloading sites and refineries to work directly with potentially affected communities to disclose as much information as possible about shipments, safety measures, and how community members can voice concerns and participate in the process to make their communities safer.

Thank you for turning your attention to this important issue.