

**From:** Amy Howard <ahoward@cpf.org>  
**Sent:** Friday, June 10, 2016 2:52 PM  
**To:** staff@oal.ca.gov  
**Cc:** HMBR REGS  
**Subject:** Comments - OAL File No. 2016-0609-01E: Regional Railroad Accident Preparedness and Accident Response Fund

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

**TO:** Office of Administrative Law  
**c:** Office of Emergency Services  
**RE:** OAL File No. 2016-0609-01E - Regional Railroad Accident Preparedness and Accident Response Fund

To Whom It May Concern:

The California Professional Firefighters (CPF), state council of the International Association of Fire Fighters, representing over 30,000 career firefighting and emergency medical service personnel statewide, respectfully submits the following comments in conjunction with OAL File No. 2016-0609-01E, the proposed Regional Railroad Accident Preparedness and Accident Response Fund regulations.

We appreciate this opportunity to suggest amendments, mocked-up below in bold red, to Sec. 2713 ("Training Cost Reimbursement") of the proposed regulations, which, if incorporated, would allow the Director of the Governor's Office of Emergency Services to consider reimbursing a statewide joint apprenticeship program for related training that is developed and delivered to local government fire departments. These proposed amendments will further aid in meeting the hazardous materials by rail challenges currently facing California's first responders.

2713. Training Cost Reimbursement.

Local governments **or a statewide joint apprenticeship program governed by Division 3, Chapter 4 of the California Labor Code that delivers approved training for paid occupations in the California fire service** may seek reimbursement for training in connection with Regional Railroad Accident Preparedness and Immediate Response. Reimbursable expenses may include: tuition for training; lodging in accordance with the written travel policy of the local government, but not to exceed the state government rate; reasonable and necessary costs to travel to and from the training site in accordance with the written travel policy of the local government, not to exceed the state government rate; meals and incidental expenses up to the limits set in the written travel policy for the local government, not to exceed the maximum allowed by the state government reimbursement policy; and overtime or backfill labor costs incurred for hours in which another responder directly provided backfill to cover while a participating responder attended required training. Other training expenses may be reimbursable at the director's discretion. Local governments **or a joint apprenticeship program described above** seeking reimbursement must provide all documentation, including evidence of training course(s) **developed or delivered or** completed and passed, related to and in support of the requested reimbursement.

Alternatively, if “local government” were to be defined in Section 2701 of the proposed emergency regulations to include the aforementioned description of statewide joint apprenticeship program, then Section 2713 above could instead be amended to cross-reference that “local government” definition and in doing so, capture a statewide joint apprenticeship program.

Thank you, in advance, for your consideration of our comments in this regard. Should you have any questions, please feel free to contact me directly.

**Amy Howard**, Legislative Director

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**Plescia, Jennifer@CalOES**

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**From:** Phillip C. Christensen <PCCHRIST@up.com>  
**Sent:** Monday, June 13, 2016 2:57 PM  
**To:** HMBR REGS; staff@oal.ca.gov  
**Cc:** Campbell, Thomas E.@CalOES  
**Subject:** Union Pacific Comments re Emergency Regulations OAL File # 2016-0609-01E  
**Attachments:** UPRR Comments re Emergency Regulations 6.13.16.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Attached please find Union Pacific Railroad Company's official comments to the proposed Emergency Regulations to implement Senate Bill 84.

Thank you for considering these comments.

Best Regards,

**Phillip C. Christensen**  
Union Pacific Railroad Company  
Administrative Vice President State and Local Taxes  
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Phillip C. Christensen  
Assistant Vice President State and Local Taxes  
Tax Department

June 13, 2016

**VIA CERTIFIED MAIL**  
**VIA EMAIL [HMBR.Reg@calOES.ca.gov](mailto:HMBR.Reg@calOES.ca.gov)**

Mark S. Ghilarducci  
Director  
Governor's Office of Emergency Services  
State of California  
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**VIA CERTIFIED MAIL**  
**VIA EMAIL [staff@oal.ca.gov](mailto:staff@oal.ca.gov)**

Office of Administrative Law  
State of California  
300 Capitol Mall, Suite 1250  
Sacramento, California 95814

RE: Comments Regarding Proposed Emergency Regulations  
Under Review by the Office of Administrative Law  
OAL File Number 2016-0609-01E  
Title 19, Public Safety, Division 2, California Governor's Office of Emergency Services  
Chapter 4.1 Regional Railroad Accident Preparedness and Immediate Response Fund

Dear Director Ghilarducci and Office of Administrative Law:

Union Pacific Railroad Company ("UPRR") appreciates the opportunity to provide comments regarding the proposed Emergency Regulations ("Emergency Regulations") to implement Senate Bill 84 under Title 19, Division 2, Chapter 4.1 which establishes the Regional Railroad Accident Preparedness and Immediate Response Fund ("SB 84"). UPRR reviewed the Emergency Regulations posted on the Office of Administrative Law's ("OAL") website on June 9, 2016. Please regard this letter as UPRR's official response to such Emergency Regulations; provided, however, UPRR does not waive any further comments or challenges, legal or otherwise, to the proposed Emergency Regulations or SB 84.

UPRR has previously communicated with the Governor's Office of Emergency Services ("OES") raising a number of serious concerns regarding SB 84 and its implementation. UPRR continues to strongly object to the legality of SB 84 and these Emergency Regulations, which expand the scope of SB 84 and violate both federal and state law.<sup>1</sup> UPRR urges the OES and OAL to abandon and refuse to adopt the Emergency Regulations which are preempted by numerous federal laws. UPRR's comments herein begin with a discussion of how SB 84 and the

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<sup>1</sup> Because SB 84 purports to impose a fee but actually imposes a tax not passed by a two-thirds (2/3) majority of both California legislative bodies, SB 84 violates Proposition 26 provided in the California Constitution. See Article XIII A, Section 3 of the California Constitution. This letter addresses only federal law violations because the state law violation is subject to a current lawsuit and refers to the "fee" as a tax.

Emergency Regulations violate federal law, and then addresses specific administrative concerns with the Emergency Regulations.

**A. SB 84 and these Emergency Regulations violate federal law; therefore, OES must abandon the process of adoption of such Emergency Regulations and the OAL should issue a decision disapproving the Emergency Regulations.**

***1. SB 84 and these Emergency Regulations are preempted by the federal law ICC Termination Act.***

These Emergency Regulations are preempted by the ICC Termination Act (“ICCTA”). The Surface Transportation Board has exclusive jurisdiction over all economic regulation of interstate railroad operations, including rail rates and charges.<sup>2</sup> The purpose of the ICCTA preemption provision is to protect the railroad industry from a patchwork of state regulations that would subject a railroad to a different set of rules every time it crossed a state line.<sup>3</sup> The federal courts have observed, “[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority over railroad operations.”<sup>4</sup>

No state can regulate the rates or charges a railroad collects from its customers. This kind of “economic regulation” is categorically prohibited by ICCTA.<sup>5</sup> Indeed, if other state or local officials adopt similar rate regulation—forcing railroads to collect parochial taxes or fees from rail customers to fund local programs—the industry would be burdened by a patchwork of state and local rate regulations that Congress intended to prevent.<sup>6</sup> Here, these Emergency Regulations are plainly regulating the rates and charges that a railroad collects from its customers.<sup>7</sup> But ICCTA flatly and unequivocally prohibits any state “regulation” of the rates or charges a carrier may, may not, or is forced to collect from its customers.

***2. SB 84 and these Emergency Regulations are preempted by the federal Hazardous Materials Transportation Act.***

The law as implemented in these Emergency Regulations also violates the Hazardous Materials Transportation Act (“HMTA”). Congress passed HMTA in 1975 “to replace a patchwork of state and federal laws and regulations concerning the transportation of hazardous materials, with a scheme of uniform, national regulations.”<sup>8</sup> Assuming *arguendo* SB 84 and these Emergency Regulations impose a “fee,” which UPRR adamantly disputes, under HMTA,

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<sup>2</sup> See 49 U.S.C. § 10501(b).

<sup>3</sup> See *CSX Transp., Inc.—Pet. for Decl. Order*, STB Docket No. 34662, at 11 (served Mar. 14, 2005).

<sup>4</sup> *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996).

<sup>5</sup> See, e.g., *Fayus Enters. v. BNSF Ry. Co.*, 602 F.3d 444, 451 (D.C. Cir. 2010); *Adrian & Blissfield R.R. Co. v. Vill. of Blissfield*, 550 F.3d 533, 540 (6th Cir. 2008).

<sup>6</sup> *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

<sup>7</sup> See proposed sections 2702 (forcing railroads to collect a charge from the owner of listed hazardous materials) and 2703 (forcing railroad to collect the charge from the payor of freight).

<sup>8</sup> *Chlorine Inst., Inc. v. Cal. Highway Patrol*, 29 F.3d 495, 496 (9th Cir. 1994) (quotations omitted).

states are authorized to "impose a fee related to transporting hazardous material," but only "if the fee is fair."<sup>9</sup> The U.S. Department of Transportation has determined that fairness test is derived from the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).<sup>10</sup> Here, the proposed levy fails the *Evansville* test because the fixed fee is not based on a fair approximation of the use of the state facilities and the levy is excessive in relation to the benefits conferred. Moreover, because California is exempting trucks, which are predominantly intrastate operations, from any similar fee, the state is unlawfully and unfairly discriminating against *interstate* transportation of hazardous materials, which move predominantly by rail.

**3. *The law, as implemented in these Emergency Regulations, violates the federal Railroad Revitalization and Regulatory Reform Act.***

Finally, the law, as implemented in these Emergency Regulations, violates the Railroad Revitalization and Regulatory Reform Act (the "4-R Act"), a federal law which prohibits the discriminatory taxation of Railroads.<sup>11</sup> The protection of the 4-R Act extends to taxes imposed upon entities other than railroads that nonetheless have a discriminatory effect on railroads.<sup>12</sup>

SB 84 and these Emergency Regulations impose a tax on the owners of hazardous materials when transported only by rail. This tax on hazardous material owners clearly violates the 4-R Act when imposed only on the transportation of such commodities by rail. The Emergency Regulations should be abandoned or disapproved as violative of federal law.

UPRR strongly urges the OES to abandon and the OAL to refuse to adopt the Emergency Regulations for the reasons set forth above, including the violation of numerous federal and state laws.

**B. SB 84 and these Emergency Regulations not only violate state and federal laws, but also pose serious compliance concerns.**

In addition to violating numerous federal laws, the Emergency Regulations also do not fully or adequately address UPRR's concerns regarding the administration and implementation of this new tax. UPRR will outline a number of its detailed concerns regarding implementation below, although this listing is not all-inclusive because of the short time period provided for reviewing and commenting on these draft Emergency Regulations. UPRR urges the OAL and OES to consider the administrative and practical concerns addressed by UPRR below and ensure such concerns are addressed in any regulation ultimately approved.

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<sup>9</sup> 49 U.S.C. § 5125(f)(1).

<sup>10</sup> See PD-21(R), 64 Fed. Reg. 54,474, 54,478.

<sup>11</sup> 49 U.S.C. § 11501(b)(4).

<sup>12</sup> See *ACF Indus., Inc. v. Dep't of Revenue of State of Or.*, 961 F.2d 813, 817 (9th Cir. 1992) *rev'd on other grounds*, 510 U.S. 332 (1994).

- 1. If the hazmat owner or payor of freight refuses to pay, the railroads should not be responsible for paying the new tax on their behalf.***

Under SB 84, Government Code §8574.32(b)(1)(A), states that the railroads shall collect the assessment from the owner and remit the collected amount. The railroads are solely serving as a third party collector. The Emergency Regulations do not specifically provide the railroads are serving merely in a collection capacity and are not liable if an owner or payor of freight refuses or neglects to pay the new tax. The Regulations must clearly provide railroads are only required to remit the assessment collected from moving the designated hazardous materials in a revenue transportation move. UPRR strongly urges the OAL and OES ensure any regulations include such a statement.

- 2. In addition to the definition of the "25 Most Hazardous Material Commodities" provided in §2702(b), UPRR formally requests the respective Standard Transportation Commodity Code(s) ("STCC") which correspond with each of the 25 listed commodities be utilized instead of the United Nations four-digit identification number.***

The listing of the "25 Most Hazardous Material Commodities" provided §2702(b) of the Emergency Regulations does not provide sufficient detail for railroads and owners to understand which commodities are subject to assessment under SB 84. UPRR formally requests utilization of the respective STCC(s) which corresponds to each listed commodity. STCC is a seven digit numeric code(s) representing various commodity groupings commonly used in the railroad industry. These code(s) are used on customer bills and should limit possible owner disputes pursuant to §§ 2711 and 2712 regarding whether the transportation move is subject to SB 84.

- 3. Section 2702(c) of the Emergency Regulations must be deleted in its entirety to remove unnecessary confusion in identification of the hazmat commodities subject to the tax.***

Section 2702(c) of the Emergency Regulations requires the railroads to collect the tax if a hazmat commodity is transported under a "generic code upon having actual or constructive knowledge that the hazardous material commodity being transported is on the identified [list.]" This Section must be deleted in its entirety because the UPRR is unclear as to what the Emergency Regulations mean by "generic code." As provided above, UPRR strongly urges the inclusion of STCC in identification of hazmat commodities subject to the tax. By introducing the concept of "generic code," identification of commodities subject to the tax becomes unnecessarily complex. Utilization of STCC for identification of commodities subject to the tax provides the clearest guidance to the railroad collectors and eases the administrative burden of both OES and owners and/or payors of freight when resolving disputes concerning the applicability of the tax. For the reasons set forth herein, Section 2702(c) should be deleted in its entirety.

- 4. The definition of "railcar" shall clarify intermodal cargo containers and trailers are not subject to SB 84.***

It is important for the railroads and owners to clearly understand what is included in the definition of "railcar" and, therefore; what is subject to assessment. UPRR recommends that the

Emergency Regulations address this ambiguity by clarifying the definition of "railcar" pursuant to Government Code §8574.30(i) to specifically exclude Intermodal Cargo Containers and trailers. As a matter of fairness, Intermodal Cargo Containers and trailers should not be taxed under one mode of transportation (*i.e.*, rail) and not the other (*i.e.*, truck). Further, clarity as to what is subject to the assessment is critical for railroads and owners to comply with this new law.

- 5. To ensure the hazmat material owner or payor of freight is not taxed twice for further transporting the same hazardous materials with multiple railroads, the tax should only be collected by the first line haul carrier or short line initiating the revenue transportation move.***

Section 8574.32(b)(5) of SB 84 provides that an owner that has paid the tax "shall not be assessed any additional [tax] under this section for further transporting the same hazardous materials in the same rail cars on a different railroad within the state." The Emergency Regulations should specifically address this and provide the railroads with certainty regarding collection. Specifically, §2705 should be revised to provide that only the first line haul carrier or short line railroad initiating the transportation move shall be responsible for collection of the tax. This language provides clear guidance on which railroad has collection responsibility for a revenue transportation move involving multiple rail carriers.

- 6. The Emergency Regulations fail to adequately address implementation of the maximum collection amount.***

Section 2707 of the Emergency Regulations is completely unworkable and needs to be redrafted in its entirety. It is clear that SB 84 imposes a hard cap of \$20,000,000 (reducing to \$10,000,000 in later years) as the maximum amount of tax OES can receive annually from owners and/or payors of freight. The Emergency Regulations cannot state that OES "may" provide refunds. OES has an affirmative duty to grant refunds to owners and/or payors of freight who have paid the tax in excess of the maximum cap. OES must work directly with the hazmat owners and/or payors of freight to provide these refunds as only OES and Board of Equalization have the information necessary to know when the cap has been met. It is still unclear to UPRR how OES will determine which owners and/or payors of freight are entitled to refunds (*i.e.*, will the Board of Equalization prescribe the necessary forms to file such that OES knows who is entitled to a refund and when). UPRR urges the OES to address the numerous concerns with the refund process and the lack of detail provided in §2707 of the Emergency Regulations.

- 7. Section 2708, "Administrative Cost Reimbursement," fails to fully address all concerns relating to railroad compensation for its collection efforts.***

Additional guidance is needed in §2708 regarding the five percent (5%) administrative fee railroads are entitled to for their collection efforts. SB 84 specifically provides that the railroads are entitled to collect an amount "not to exceed 5 percent of the fee collected." The language is clear under the statute that the railroads may retain up to 5% of the assessment. UPRR formally requests deletion of existing §2708 and replace it with language consistent with SB 84.

For the reasons set forth herein, the Emergency Regulations must not be adopted by the OAL because they are illegal and lack the necessary guidance to practically impose such a tax. As stated previously, UPRR's comments contained herein are not all-inclusive, but intended to provide OAL with critical information as to why these Emergency Regulations should not be adopted. Additional time, as provided in the normal regulatory process, is required to sufficiently evaluate and address the numerous compliance issues associated with creating and implementing this new and novel tax. Further, UPRR reserves the right to make additional comments and UPRR does not waive any rights with respect to further challenge available through the judicial processes.

Thank you for your consideration of our request to formally abandon or disapprove of the Emergency Regulations.

A handwritten signature in black ink, appearing to read "Phillip C. Anderson". The signature is written in a cursive, flowing style with some loops and flourishes.

cc: Thomas Campbell  
John Mervin  
Wes Lujan

**Plescia, Jennifer@CalOES**

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**From:** Vincent, C Alec <C.Vincent@bnsf.com>  
**Sent:** Monday, June 13, 2016 3:13 PM  
**To:** HMBR REGS  
**Cc:** staff@oal.ca.gov; Hussain, Munsoor  
**Subject:** BNSF Railway - Response to Proposed Emergency Regulations with respect to SB 84  
**Attachments:** BNSF Railway Response - Proposed Emergency Regulations SB84.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Flagged

Dear Ms. Plescia:

Please see attached comments submitted on behalf of BNSF Railway Company.

Respectfully,

Alec Vincent  
Assistant Vice President – Taxes  
BNSF Railway Company



**Alec Vincent**  
Assistant Vice President - Tax  
Tax Department

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June 13, 2016

Via E-mail: [HMBR.Reg@CalOES.ca.gov](mailto:HMBR.Reg@CalOES.ca.gov); [staff@oal.ca.gov](mailto:staff@oal.ca.gov)  
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Reference Attorney  
Office of Administrative Law  
State of California  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814-4339

Re: Proposed emergency regulations with respect to SB 84: Regional Railroad Accident Preparedness and Immediate Response Statute

To whom it may concern,

BNSF Railway ("BNSF") appreciates the opportunity to offer comments to the Governor's Office of Emergency Services ("OES") and the Office of Administrative Law ("OAL") on the proposed emergency regulations with respect to the Regional Railroad Accident Preparedness and Immediate Response Statute that was enacted on June 24, 2015 as part of Senate Bill 84 (the "SB 84").

BNSF submits these comments to the proposed regulations without prejudice to its position that the entire regulatory scheme enacted by the state of California is preempted by federal law. The Interstate Commerce Commission Termination Act of 1995 (ICCTA) is the most recent Congressional restatement of the longstanding federal law regarding interstate railroads. ICCTA expressly preempts state regulation of rail transportation with respect to rail rates, classifications, rules and practices. 49 U.S.C. § 10501(b). "[T]he core of ICCTA preemption is 'economic regulation,' which we take to refer to regulation of the relationship before us here, that of shippers and carriers." *Fayus v. BNSF*, 602 F.3d 444, 451 (D.C. Cir. 2010); *Griffieon v. Cedar Rapids and Iowa City Ry. Co.*, 785 F.3d 1182, 1195 (8th Cir. 2015) ("The primary focus of the ICCTA's substantive provisions is regulation of competition, rates, licensing, finance, and the economic relationships between shippers and carriers."). Because the charges sought to be assessed by SB 84 clearly effect the economic relationship between railroads and shippers and increases the costs of rail transportation as compared to other modes of transportation, it is preempted by federal law. Notwithstanding this clear preemptive effect of federal law, BNSF submits these comments. However, BNSF does not in any way waive but in fact seeks to preserve its right to challenge SB 84 and the accompanying regulations as preempted by federal laws such as ICCTA, the Federal Rail Safety Act of 1971 or the Railroad Revitalization and Recovery Act of 1976. Further, BNSF does not

in any way waive its right to challenge SB 84 and the accompanying regulations under any other legal basis.

In addition to the comments set forth below, we would like to note that we do not currently have in place the billing and collection computer systems necessary to perform the reporting and collection responsibilities required under SB 84. For this reason, any implementation timeline under consideration should take into account the effort it will take the rail carriers to create the needed systems once guidance is received from the final regulations.

**1. Section 2701 should provide a definition to the phrase “designated to transport hazardous material commodities” as used in Section 8574.30(i) of the Government Code.**

We recommend that the proposed regulations define the phrase “designated to transport hazardous material commodities” contained in Section 8574.30(i) of the Government Code to be applicable to hazmat transported in revenue service by rail cars that are placarded pursuant to the existing federal placarding regulations (49 C.F.R, Part 172, Subpart F). The federal regulations provide extensive rules on the placarding of hazardous materials that are transported by rail or otherwise. These regulations are well understood and complied with by the transportation industry and would provide a practical administrative standard for determining whether a rail car contains hazardous material that is subject to SB 84.

To interpret the statute otherwise would have unintended results, but may ultimately prove to be unworkable.

**2. Section 2702(b) should provide corresponding Standard Transportation Commodity Codes (STCC) for each of the hazmat commodities.**

We recommend the United Nations four-digit identification numbers (UN numbers) set forth in Section 2702(b) be replaced with the STCC(s) that correspond with each hazmat commodity included in the top 25 hazmat list. STCCs are seven digit numeric codes representing various commodity groupings used in the railroad industry. STCCs are used on customer bills, not UN numbers. As a result, the use of STCCs in identified hazmat subject to the hazmat assessment should limit possible disputes with the payor of freight as to whether the transportation move is subject to the hazmat assessment.

**3. Section 2702(c) sets forth rules with respect to a “generic code” that are unworkable.**

The provision in Section 2702(c) requires railroads to collect an assessment for hazmat that is transported under a “generic code” and relies on the standard of “actual or constructive knowledge”. This provision uses terms that are ultimately unworkable because they do not provide clear guidance to the railroads on what their responsibilities are under the proposed regulations. The railroads should only be required to collect the hazmat assessment from freight that can be clearly and reasonably identified as part of the top 25 hazmat, as we have proposed with respect Section 2702(b) on identifying hazmat by reference to STCCs. Accordingly, Section 2702(c) of the proposed regulations should be deleted.

**4. Section 2703(a) should clarify when the railroads must collect the hazmat assessment from the payor of freight.**

We recommend that the first sentence of Section 2703(a), which requires the railroads to collect the hazmat assessment from the payor of freight, be revised as follows:

If the owner does not have a contractual relationship with the railroad for the transportation of a hazardous material commodity, the railroad must collect the fee from the payor of freight.

Without the revision above, it will be unclear as to whether the railroads will be required to collect the hazmat assessment from the payor of freight.

**5. Section 2703(e) should clarify the definition of a “shipper”.**

We recommend the definition of “shipper” set forth in Section 2703(e) be revised as follows:

“Shipper” means the person who contracts with or is the payor of freight with respect to a railroad for the transportation of a hazardous material commodity.

**6. Section 2704 should provide that the hazmat assessment does not apply to intermodal containers and trailers.**

We recommend that Section 2704 be revised to exclude intermodal containers and trailers from the hazmat assessment. Intermodal containers and trailers typically carry a wide variety of goods for multiple owners, some of which may contain a *de minimis* amount of hazmat. For example, a single intermodal container or trailer being transported to a big box retailer may contain items like apparel, pool cleaner, AA batteries and plasma televisions, some of which may contain *de minimis* amounts of hazmat. The transportation of these types of items were clearly not intended to be covered by SB 84. The imposition of the hazmat assessment also raises administrative issues which appear insurmountable. In particular, it is unclear how the railroads are to collect the hazmat assessment where multiple intermodal containers or trailers are transported on a single rail car for which there may be multiple payors of freight (and owners).

**7. Section 2705 should provide guidance as to which railroad must collect and remit the hazmat assessment where more than one railroad transports the same loaded rail car of hazardous material.**

Section 8574.32(b)(5) of the Government Code provides that an owner that has paid the assessment will not be assessed any additional amounts for further transporting the same hazardous materials in the same rail cars on a different railroad within the state. This provision indicates that the collection of the hazmat assessment is to occur only one time for each loaded rail car with hazmat, and multiple assessments should not apply to a loaded rail car that is switched/exchanged to another railroad in the State. For the purpose of providing a practical administrative standard in achieving this goal, we recommend that Section 2705 state that (1) only the first railroad to transport loaded rail cars that originate in California be required to collect the hazmat assessment and (2) only the railroad transporting a loaded rail car with hazmat at the time it enters California from outside the State be required to collect the hazmat assessment.

**8. Section 2706(a) should make clear that railroads are only required to remit hazmat assessments to the State to the extent they have collected amounts from the payor of freight, shipper, owner, etc.**

We strongly urge the OES to revise Section 2706 to make clear that the railroads are only required to remit hazmat assessments to the State to the extent that the railroads have collected the hazmat assessment from the payor of freight, shipper, owner, using commercially reasonable efforts to collect the amounts. As such, we recommend that Section 2706 be revised as follows:

The person registered with the board must remit, to the extent collected from the payor of freight, shipper, consignee, consignor or owner using commercially reasonable efforts, a fee of \$45 to the board per loaded rail car containing any quantity of the hazardous materials commodities set forth in Section 2702(b) which is transported in revenue service by rail in California.

The language proposed above is consistent with the literal language of SB 84 as well as the intent of SB 84, which is to impose an assessment on the owner of hazmat that is transported by rail in California, not the railroads transporting the hazmat.

Section 8574.32(b)(1) of the Government Code states that "the fee shall be imposed on a person owning hazardous material at the time that hazardous material is transported by loaded rail car." Section 8574.32(b)(4)(A) of the Government Code goes on to state that the hazmat owner is liable for the assessment until it has been paid to the OES, except where the hazmat owner has remitted the hazmat assessment to the railroad. In addition, Section 8574.32(b)(3) of the Government Code states that hazmat assessments collected from the hazmat owner that are not remitted to the OES are deemed a debt owed to the State by the person required to collect and remit the assessment (i.e., the railroad). These statutory provisions together make clear that SB 84 imposes the assessment on the owners of the hazmat that is transported by rail in California, not the railroads transporting the hazmat. The role of the railroads under SB 84 is to merely satisfy certain reporting and collection obligations. Accordingly, the railroads should not be expected to remit amounts to the State that it has not yet collected from the owners of the hazmat.

**9. Section 2706 should be revised to provide the railroads with relief from liability under SB 84 and the Fee Collection Procedures Law where good-faith efforts to collect the hazmat assessment.**

We recommend that the proposed regulations provide the railroads with an explicit safe harbor from any liability under SB 84 and the Fee Collection Procedures Law of the Revenue and Taxation Code where the railroad exercises good faith efforts in complying with the reporting obligations under SB 84 and its accompanying regulations and collecting the hazmat assessment from the payors of freight when required under SB 84 and its accompanying regulations.

There may be circumstances where the railroad transporting hazmat within California is unable to collect the assessment from the payor of freight. For example, if the payor of freight rebuts the presumption that it is the owner of the hazmat, the railroad may be unable to collect the hazmat assessment from the owner of the hazmat. The railroad may not know who the owner of the hazmat is nor have any direct business or contractual relationship with the owner of the hazmat. The railroad's business relationship is with the payor of freight. Whereas California has the sovereign power of the State over the hazmat owner, BNSF does not. It would be unprecedented, to our knowledge, to require the remitter (i.e., the railroads) to collect an assessment on behalf of the State from a party with whom the remitter is not directly engaged in a transaction. In this case, the railroads are only engaged in a transaction with the payor of freight, which may or may not be the owner of the hazmat.

Similarly, the railroad would be unable to collect the hazmat assessment where the payor of freight defaults on the payment of its freight bills (as a result of bankruptcy or otherwise).

In these, and other similar cases, the railroads should not be liable for remitting the hazmat assessment to the OES where the railroads are themselves unable to collect the hazmat assessment. As discussed in more detail in (8) above, the purpose of SB 84 is to impose an assessment on the owner of hazmat that is transported by rail in California, not the railroads. The role of the railroads under SB 84 is to merely satisfy certain reporting and collection obligations.

**10. Section 2706(e) should provide the railroads with sufficient notice of a change in rate of the hazmat assessment.**

We recommend that public notice of any change in rate of the hazmat assessment be provided at least 60 days prior to the effective date of the updated rate. We will require sufficient time to notify our customers of the updated rate as well as update our internal systems.

**11. Section 2707 should provide that the Board of Equalization ("BOE") will refund amounts collected in excess of the collection caps to the applicable payor.**

Section 2707 states that the BOE will refund any amounts collected in excess of the collection caps to the railroads. The regulations further provide that the railroads or hazmat owners must request refunds from the BOE for amounts collected in excess of the collection caps. Neither the railroads nor the hazmat owners will know the total amounts collected by the BOE nor the order in which the amounts are collected. For this reason, it is not possible for the railroads (or the hazmat owners) to know whether anyone is entitled to a refund for amounts collected by the BOE in excess of the collection caps. Only the BOE will have the information necessary to make this determination. Accordingly, Section 2707 should be revised to provide that the BOE, upon its own determination, will refund directly to the applicable payor (for example, payors of freight) any amounts collected in excess of the collection caps.

**12. Section 2708 should permit the railroads to retain up to 5% from the hazmat assessments collected pursuant to SB 84.**

Section 2708 is inconsistent with Section 8574.32(b)(4)(B) of the Government Code which states that the railroad "shall be entitled to collect an amount not to exceed 5 percent of the fee collected pursuant to this section to offset the administrative cost to collect the fee." Based on this statutory provision, it is clear that the railroads may retain up to 5% from the hazmat assessment, and the railroads remit the remainder of the hazmat assessment (i.e., 95%) to the BOE. This approach is consistent with the manner in which other assessments are collected on behalf of the State, for example, the California Tire Fee Law and Covered Electronic Waste Recycling Fee Law authorize a retail seller to retain 1.5% and 3% of the assessment, respectively, as reimbursement for collection costs.

Accordingly, we recommend that Section 2708 be revised as follows:

Up to five (5) percent of the fee collected under Section 2706 of this chapter may be retained by the railroad to offset administrative costs.

**13. Section 2709 should provide further guidance on the process that will govern exemptions granted by the OES.**

Section 2709 provides that an owner may request an exemption from the hazmat assessment where it meets certain criteria, as determined by the OES. However, Section 2709 does not provide guidance

as to whether the payor of freight, shipper, owner, etc. may request the exemption. The proposed regulations also do not address when and how the railroads will be notified of the exemption and what specific transportation of hazmat will be covered by the exemption. We recommend that the proposed regulations provide additional guidance that addresses these issues.

**14. Section 2710 should be revised to limit the burden imposed on the railroad with respect to in-kind contributions.**

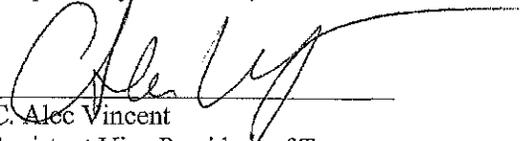
As discussed in our comment to Section 2707, the refund process for in-kind contributions should be between the BOE and the applicable payor of freight, shipper, owner, etc. The railroads should not be used as a middleman for the refund process. As such, Section 2710 should be revised to remove the required statement from the applicable railroad that the hazmat assessment was paid to the BOE and it will not seek a refund of the hazmat assessment.

**15. Section 2712 should explicitly state that the BOE decides any issues regarding the rebuttable presumption.**

Section 2712 is unclear as to which party is responsible for deciding any issues regarding the rebuttable presumption. We recommend the proposed regulations explicitly provide that the BOE is responsible for deciding any issues regarding the rebuttable presumption. This approach is consistent with the BOE's Legislative Bill Analysis of SB 84 that said "The BOE will decide any issues regarding the rebuttable presumption of hazardous material ownership." To the extent a shipper, consignor or consignee is due a refund with respect to collected hazmat assessments, the BOE should refund the amounts collected to the payor of freight, shipper, consignor or consignee.

Thank you in advance for considering our comments.

Respectfully submitted,

  
C. Alec Vincent  
Assistant Vice President of Tax  
BNSF Railway

**Plescia, Jennifer@CalOES**

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**From:** Sloan, Jeffrey <Jeffrey\_Sloan@americanchemistry.com>  
**Sent:** Tuesday, June 14, 2016 2:44 PM  
**To:** HMBR REGS  
**Cc:** Shestek, Tim  
**Subject:** Regional Railroad Accident Preparedness and Accident Response Fund  
**Attachments:** ACC Comments - California Hazmat Fee Regs.docx

Ms. Plescia,

Attached are comments from the American Chemistry Council on proposed OES regulations to implement the Regional Railroad Accident Preparedness and Accident Response Fund.

If you have any questions, please contact me or Tim Shestek (916-448-2581/[tim\\_shestek@americanchemistry.com](mailto:tim_shestek@americanchemistry.com)).

Thank you.

Jeff

*Jeffrey Sloan* | American Chemistry Council  
Senior Director, Regulatory & Technical Affairs  
[jeffrey\\_sloan@americanchemistry.com](mailto:jeffrey_sloan@americanchemistry.com)  
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**Comments of the American Chemistry Council**  
On  
California Governor's Office of Emergency Services  
Regional Railroad Accident Preparedness and Accident Response Fund

The American Chemistry Council (ACC) is pleased to provide comments to the Office of Emergency Services on its emergency regulations to implement the Regional Railroad Accident Preparedness and Accident Response Fund. ACC represents the leading companies in the business of chemistry. Our members apply the science of chemistry to provide innovative products and services that make people's lives better, healthier and safer.

The chemical industry is one of the largest customers of the U.S. freight rail system. ACC is committed to the safe transportation of our products and our member companies devote significant resources toward rail safety initiatives and emergency response training. By working with railroads and the federal government and local communities, we have been able to help reduce the number of hazmat incidents and their impacts.

The following comments address specific aspects of the emergency regulations.

The Advisory Committee Should Be Provided More Time to Review Key Provisions

ACC commends OES for convening the Regional Railroad Accident Preparedness & Immediate Response Fund Advisory Committee. However, we are disappointed that OES issued the emergency regulations before the Committee had an appropriate opportunity to provide input on the development of these regulations. In particular, the Committee did not have sufficient time to advise OES on the final list of hazardous commodities. In addition, the subcommittee on in-kind contributions held only one brief call. We believe the Committee's expertise could have addressed some of the issues highlighted in these comments before the regulations were issued.

The Regulations Must Ensure that a Single Shipment Is Not Assessed Multiple Fees

A single carload of hazmat may be handled by multiple rail carriers in California. As drafted, the regulations do not exclude the fee from being assessed each time the railcar is transferred to a different carrier. To ensure that shippers are not unfairly charged multiple fees, ACC proposes the following change to Section 2702(a):

The railroad first handling the hazardous material within the State of California, which includes short line or regional railroads, must collect a fee on any portion of the railcar excluding residue that contains any of the identified hazardous material commodities set forth in subsection (b) of this section regardless of classification or name.”

### Comments on Listed Hazardous Materials Commodities

ACC offers the following comments on the list of twenty-five hazardous materials commodities in Section 2702(b).

- The process and criteria for developing the list of commodities subject to the fee lacks transparency. In particular, it is unclear how shipment volumes and other factors were applied to arrive at the twenty-five commodities listed.
- The fee should apply only to listed commodities in Packing Groups I and II. A hazardous material's Packing Group reflects the level of hazard posed by a commodity during transportation and determines the mark required on the packaging. Packing group III designates "Low Hazard." Fees on such commodities are not warranted.
- Environmentally Hazardous Substances, liquid, N.O.S. (UN3082) should be removed from the list. As group, UN3082 is all Packing Group III material and is a low hazard risk compared to other commodities.
- Section 2702(b) should be further refined to identify commodities that have special ER training or equipment needs, and include these over "typical response" commodities shipped in similar volumes.

### Additional Guidance Is Needed on In-Kind Contributions Provided by Trade Associations

ACC supports the proposed process for an owner to request a refund for an in-kind contribution made during the preceding calendar year. However, OES should provide additional guidance on in-kind contributions, particularly emergency response training provided by trade associations or other groups of companies.

TRANSCAER® (Transportation Community Awareness and Emergency Response) is a voluntary national outreach effort that focuses on assisting communities to prepare for and to respond to a possible hazardous material transportation incident. TRANSCAER programs include classroom and hands-on training for emergency responders. Some of these training programs are focused on specific hazmat commodities listed in Section 2702(b). The regulations should specifically allow for an association that sponsors such a training program in California to request a refund for the portion of contribution provided by the association, and have that refund applied proportionally to all shippers of that product.

### OES Should Consider Revisions to More Fairly Address Fees Collected in Excess of the Cap

As drafted, the regulations could result in certain companies or a single industry paying a larger portion of the fees based solely on the timing of their shipments. Under Section 2706(c), once the fund reaches the maximum limit, the fee reverts to \$0 for the remainder of the year. This raises concerns related to seasonality for shipments of certain commodities, and creates an inappropriate incentive for companies to delay shipments in the hope that the fee will no longer apply. As an alternative, OES should consider collecting fees over the entire calendar year. The

balance of fees collected above the cap would then be refunded on a prorated basis to the shippers based upon volume and/or fees paid during the prior calendar year.

OES Should Clarify that the Railroad Is Responsible for Remitting the Fee to the Board

Section 2706(a) states, "The person registered with the board must remit, on behalf of the owner, a fee of \$45.00 to the board..." There is no further explanation of who should be registered with the board. However, since Section 2702(a) requires the *railroad* to collect a fee from the owner of the listed hazmat commodity, OES should clarify that it is the *railroad* that must then remit the fee to the board.

**From:** Backlund, Dale (D) <DJBacklund@dow.com>  
**Sent:** Tuesday, June 14, 2016 4:11 PM  
**To:** HMBR REGS; Poss, Sarah@CalOES; Holland, Emily@CalOES  
**Subject:** Comments on the Regional Railroad Accident Preparedness and Immediate Response Fund

Sarah and Emily,

Thank you for the opportunity to provide input and comments on the Regional Railroad Accident Preparedness and Immediate Response Fund draft regulations issued by the California Office of Emergency Services (OES). I'm providing my comments both as a member of OES's Industry Advisory Committee and as a representative of the Dow Chemical Company ("Dow"). Dow is fully committed to transportation safety and security advancements, and the reduction of risk to people and the environment. We support continuous improvement within a performance and risk based framework that includes tank car design along with full consideration of operational, routing, and infrastructure improvements to prevent train accidents, the hazards and potential consequences of the material being shipped, and the ability to effectively respond to incidents. Dow supports and is actively engaged in the industry's TRANSCAER® and CHEMTREC® programs to provide the training, support, and information necessary for effective and timely response to incidents in transportation.

I have my comments divided into three categories (Major, Moderate, and Administrative) to help convey priority and concerns.

Major:

1) The Regulations Must Ensure that a Single Shipment Is Not Assessed Multiple Fees

A single carload of hazmat may be handled by multiple rail carriers in California. As drafted, the regulations do not exclude the fee from being assessed each time the railcar is transferred to a different carrier. To ensure that shippers are not unfairly charged multiple fees, Dow Chemical proposes the following change to Section 2702(a):

The railroad first handling the hazardous material within the State of California, which includes short line or regional railroads, must collect a fee on any portion of the railcar excluding residue that contains any of the identified hazardous material commodities set forth in subsection (b) of this section regardless of classification or name.

2) For Section 2702 (b), Dow Chemical proposes that OES develop their Top 25 Hazardous Materials list using the following logic:

- a. Begin with toxic and flammable gases, and liquid hazardous materials with a PG I or II designation, shipped in tank cars only. These are the types of materials that may result in more serious consequences should a release occur during a derailment. Incidents involving hazardous materials during intermodal rail transport are isolated and generally would not require special emergency response training; we suggest that the fee only be assessed only on loaded tank cars.
- b. Obtain volume data for each of these commodities – being sure not to double count shipments due to railroad hand-offs – and rank by volume shipped in or through California.
- c. If necessary to further refine the list, work with industry to identify commodities that have special ER training or equipment needs, and include these over "typical response" commodities of equivalent volume.

Notwithstanding these recommendations, and focusing on the list included in the draft recommendations, we recommend that Environmentally Hazardous Substances, liquid, N.O.S. (UN3082) be removed from the proposed Top 25 hazardous materials list. As group, UN3082 is all Packing Group III material and is a low hazard compared to other commodities on the Top 100 list supplied to the Advisory Committee. See below for suggestions for additions to the Top 25 list that would be more appropriate.

Moderate:

- 3) The Regulations Should Provide Additional Guidance on In-Kind Contributions Provided by Trade Associations  
Dow Chemical supports the proposed process to request a refund for an in-kind contribution made during the preceding calendar year. However, OES should provide additional guidance for contributions, particularly emergency response training, provided by trade associations or other groups of companies. Often, trade or product associations will conduct product specific training to local emergency responders. While this training is offered through the actual trade or product association, the member companies and other associated companies provide considerable financing, sweat equity, equipment, training materials, etc. – and actually conduct the training or make it possible. As such, the companies significantly contributing to these events on-site or behind the scenes should have mechanism to be reimbursed for the training that is provided.
- 4) Section 2702 (b) modifications to proposed hazardous materials list (see comments above for guidance on creating the top 25 list)
  - a. Ammonium hydroxide: Add UN numbers 2073 and 3318 to this commodity. These are different solution strengths of ammonium hydroxide.
  - b. Corrosive liquid, basic, inorganic. Delete 2672, 2073 and 3318. These are ammonium hydroxide UN numbers and should be included with ammonium hydroxide.
  - c. Nitric acid. Add UN number 2032 for fuming nitric acid.
  - d. Sulfuric acid: Add UN number 1831. This is for fuming sulfuric acid (oleum).

Administrative:

- 5) OES Should Clarify that the Railroad Is Responsible for Remitting the Fee to the Board  
Section 2706(a) states, "The person registered with the board must remit, on behalf of the owner, a fee of \$45.00 to the board..." There is no further explanation of who should be registered with the board. However, since Section 2702(a) requires the *railroad* to collect a fee from the owner of the listed hazmat commodity, OES should clarify that it is the *railroad* that must then remit the fee to the board.
- 6) "The board" is used throughout the regulation, but the board is not defined. Is it the Board of Equalization, and if so, define it.
- 7) Consider revising the fees collected in excess of the cap in Section 2706 (c).  
To eliminate concerns over one industry paying a larger portion of the fees in the first part of the year due to seasonality demands, consider collecting fees over the entire calendar year. The balance of fees collected above the cap can be refunded on a prorated basis to the shippers based upon volume and/or fees paid during the prior calendar year.
- 8) Establish a reporting governance process and schedule  
For transparency and full disclosure, publicly report both on fees collected and dispersed as part of this program, including administrative costs.

As a member of the Advisory Committee, I understand the deadline under which the Office of Emergency Services was working; however, I feel that the industry partners on the Advisory Committee did not have adequate input into the process. I have two pointed examples where the process broke down. At the Advisory Committee meeting on May 17<sup>th</sup>, the action item was to have OES submit to the industry partners a Top 100 list of hazardous materials on which we could provide comments to create a better list that more adequately reflects the top hazardous materials of concern in transit within the State. The industry partners received this list on May 23<sup>rd</sup>. On June 1<sup>st</sup> (just a few working days later), Cal OES

had already drafted and circulated proposed regulations, including a revised Top 25 list, prior to receiving any input from the Advisory Committee. Clearly, adequate time was not provided for industry to gather input from stakeholders and provide meaningful feedback. The second example is the subcommittee on In Kind Contributions. This subcommittee met once on May 20<sup>th</sup> for 45 minutes. A second meeting was to have occurred on June 9<sup>th</sup>, but was never scheduled. Proposed language on In Kind Contributions was already included in the draft regulations even prior to the planned meeting date.

It is unclear why OES has handled this regulation under emergency rulemaking procedures. The regulation is designed to collect fees for emergency planning and preparedness, not to respond to a critical safety defect which requires immediate action. The normal rulemaking process would have afforded more time for the Advisory Committee to have completed the task it was assigned.

Again, thank you for the opportunity to provide comments on the draft regulations for the Regional Railroad Accident Preparedness and Immediate Response Fund. If you have any questions, do not hesitate to contact me.

## **Dale Backlund**

---

The Dow Chemical Company  
Regulatory Affairs Leader  
Pittsburg, CA  
(925) 432-5508

**From:** Backlund, Dale (D) <DJBacklund@dow.com>  
**Sent:** Tuesday, June 14, 2016 4:18 PM  
**To:** staff@oal.ca.gov; HMBR REGS  
**Subject:** Comments on the Regional Railroad Accident Preparedness and Immediate Response Fund

Office of Administrative Law,

Below are comments I provided to Cal OES on the proposed regulations regarding Regional Railroad Accident Preparedness and Immediate Response Fund.

Thank you for the opportunity to provide input and comments on the Regional Railroad Accident Preparedness and Immediate Response Fund draft regulations issued by the California Office of Emergency Services (OES). I'm providing my comments both as a member of OES's Industry Advisory Committee and as a representative of the Dow Chemical Company ("Dow"). Dow is fully committed to transportation safety and security advancements, and the reduction of risk to people and the environment. We support continuous improvement within a performance and risk based framework that includes tank car design along with full consideration of operational, routing, and infrastructure improvements to prevent train accidents, the hazards and potential consequences of the material being shipped, and the ability to effectively respond to incidents. Dow supports and is actively engaged in the industry's TRANSCAER® and CHEMTREC® programs to provide the training, support, and information necessary for effective and timely response to incidents in transportation.

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Again, thank you for the opportunity to provide comments on the draft regulations for the Regional Railroad Accident Preparedness and Immediate Response Fund. If you have any questions, do not hesitate to contact me.

## **Dale Backlund**

---

The Dow Chemical Company  
Regulatory Affairs Leader  
Pittsburg, CA  
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