

M e m o r a n d u m

Date: July 23, 2008

To: The Commission
(Meeting of July 31, 2008)

From: Pamela Loomis, Director
Office of Governmental Affairs (OGA) — Sacramento

Subject: SB 53 (Ducheny): Department of Railroads
As Amended June 19, 2008

LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: OPPOSE.

SUMMARY OF BILL:

This bill would create a new California State Agency, the Department of Railroads, within the Business, Housing and Transportation (BHT) Agency, under the California Government Code. The bill would transfer to the new department responsibility for various state railroad programs currently administered by other agencies, including the CPUC's rail safety programs.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

- The standard for railroad safety, rail transit safety, and rail crossing safety would be lessened by combining safety oversight in an agency that is also responsible for operating Amtrak, High Speed Rail, and the statewide promotion, planning, scheduling, and financing of rail infrastructure build out. The safety "gold standard" set by the CPUC, the NTSB, the NRC, and others, places safety oversight responsibilities in a separate organization that is independent and focuses solely on safety.
- State agency coordination of the planning and financing of rail infrastructure improvements may need improvement, but differing local and state perspectives on issues of local land use and issues of local funding priorities appear to be larger issues that will not be overcome by a reorganization of state agencies.
- Removing the Commission's authority to regulate rail safety requires a Constitutional amendment.

SUMMARY OF SUGGESTED AMENDMENTS:

None.

DIVISION ANALYSIS (CPSD & Legal Division):

- As written, the proposed bill would remove the CPUC’s rail crossing safety programs, but would also likely remove the CPUC’s freight and passenger railroad safety and rail transit safety programs. These programs are extensive programs with Public Utilities Code (PU Code) performance mandates and with responsibility for both state and federal rail safety regulations. These programs include formal partnerships with the Federal Railroad Administration and the Federal Transit Authority.
- Although the full range of the effect the proposed legislation would have on the Commission is unclear, it would, at least, remove the Commission’s exclusive jurisdiction over public utilities under PU Code Sections 208 and 209, and Article 12, Sections 3, 4, 9, 22, and 23 of the California Constitution, common carriers under PU Code Section 211, and Article 12, Sections 3, 4, 9, 22, and 23 of the California Constitution, railroads under PU Code Sections 229 and 230, and Article 12, Sections 3, 4, 9, 22, and 23 of the California Constitution, and highway-rail crossings under PU Code Sections 1201 et seq. It is possible that the proposed bill would remove “railroads” from the “common carrier” jurisdiction of the Commission under PU Code Section 211 and Article 12, Sections 3, 4, 9, 22, and 23 of the California Constitution.
- **The standard for railroad safety, rail transit safety, and rail crossing safety would be lessened by combining safety oversight in an agency that is also responsible for operating Amtrak, High Speed Rail, and the statewide promotion, planning, scheduling, and financing of rail infrastructure build out. The safety “gold standard” set by the CPUC, the NTSB, the NRC, and others, places safety oversight responsibilities in a separate organization that is independent and focuses solely on safety.**
 - Best practices dictate that the operations of railroads, promotional activities, and the planning, scheduling, operations, and financing be in a separate decision-making organization from safety oversight. The proposed legislation would combine these activities in a single agency.
 - The CPUC firmly believes that safety oversight functions must be separate from, but also coordinated with, these promotional activities. Rail safety oversight is the CPUC’s area of expertise and has been since 1879.
 - The CPUC firmly believes that these safety functions are best performed by a constitutionally separate agency that has adjudicative, rule-making, investigatory, and law enforcement authority. The CPUC has a well-established organizational infrastructure of administrative law judges, rules of practice and procedure, an

adjudicatory body of independent Commissioners with fixed terms, regulatory enforcement practices and staff – all integrated for a common purpose: a fact-finding, due-process dependent, and expert-staffed autonomous decision-making safety organization.

- The “gold standard” for safety oversight is such decision-making capacity, expertise, and independence. For example, the nation’s premiere accident investigation agency, the National Transportation Safety Board, was insulated from conflicts by ensuring its independence.

- The NTSB opened its doors on April 1, 1967. Although independent, it relied on the U.S. Department of Transportation (DOT) for funding and administrative support. In 1975, under the Independent Safety Board Act, all organizational ties to DOT were severed. The NTSB is not part of DOT, or affiliated with any of its modal agencies.¹ In 2003, Alexander T. Wells and Clarence C. Rodrigues, writing in the book *Commercial Aviation Safety* stated:

- “With the passage of the Independent Safety Act of 1974, Congress made the NTSB completely independent outside the DOT because “no federal agency can properly perform such functions unless it is totally separate and independent from any other ... agency of the United States”. Because the DOT is charged with both the regulation and the promotion of transportation in the United States, and accidents may suggest deficiencies in the system, the NTSB’s independence is necessary for objective oversight.”

- Furthermore, after the initial regulatory failures of the Atomic Energy Commission (AEC), the Nuclear Regulatory Commission (NRC) was created to provide regulatory independence. From the NRC’s website:

- By 1974, the AEC’s regulatory programs had come under such strong attack that Congress decided to abolish the agency. Supporters and critics of nuclear power agreed that the promotional and regulatory duties of the AEC should be assigned to different agencies. The Energy Reorganization Act of 1974 created the Nuclear Regulatory Commission; it began operations on January 19, 1975.²

- In another classic example, the underlying cause of NASA’s Challenger tragedy was determined to be the rocket booster manufacturer’s systemic conflict between trying to meet a schedule and ensuring safety. With the same decision makers responsible for both functions, when it was time to abort or complete the launch, it led to the infamous quote, “take off your engineer hats and put on your

¹ http://www.nts.gov/Abt_NTSB/history.htm

² <http://www.nrc.gov/about-nrc/history.html#aec-to-nrc>

management hats."³ Thus engineering safety issues regarding the o-ring seals were ignored in deference to contractual scheduling concerns and their financial impact. Even though the engineers advised against launching because of known problems with the o-rings, the conflicting managerial scheduling and financial concerns led the decision-makers to go ahead with the tragic launch. In response to this accident, NASA subsequently revamped its policies to provide an independent safety decision-making role.

- The new department would not be able to efficiently duplicate the CPUC's decision-making infrastructure as described above. But more importantly, the new organization would take a step backward in juxtaposing safety and promotion in within the same decision-making organization.
- **State agency coordination of the planning and financing of rail infrastructure improvements may need improvement, but differing local and state perspectives on issues of local land use and issues of local funding priorities appear to be larger issues that will not be overcome by a reorganization of state agencies.**
 - While the problem the bill is intended to address is not discussed, it is at least implied that the problem is lack of state-level coordination. Our experience is that the primary problem in statewide transportation planning is not lack of state-level coordination. While some inefficiency and ineffectiveness in planning and financing may exist at the statewide level, we note that the complexities of local land-use priorities and local financing priorities may be the larger problem for planning and development.
 - The CPUC has not developed a position about whether the operation of railroads on both the Amtrak routes and the California High Speed Rail routes should be combined into a statewide transportation planning organization. However, the CPUC believes that potential conflicts of interest in combining these two functions must be carefully scrutinized, and that a change of this scale should be examined closely to find out whether other solutions would better address the most difficult problems – those experienced at the local level.
- **Removing the Commission's authority to regulate rail safety requires a Constitutional amendment.**

Constitutional origin of the Commission

- "By direct grant from the Constitution, the Commission was empowered to prescribe uniform systems of accounts and fix rates for railroads "and other

³ Bioscopy, Roger (1988). *Ethical decisions: Morton Thiokol and the space shuttle disaster*. Address to the Student Pigwash Technology and Society Seminar Series, School of Engineering, University of California, Berkeley, March 16, 1988.

transportation companies”, examine records, hear and determine complaints, issue subpoenas, and take testimony and punish for contempt...Legislative and judicial functions have been united in a single agency” (Roderick B. Cassidy, *Public Utility Regulation in California*, Commentary to the Public Utilities Code, 1954, pp. 2-3.) Certain of the Commission’s powers are derived by direct grant from the Constitution which created it.⁴ The Legislature is without power, either by silence or by direct enactment, to modify, curtail, or abridge the constitutional grant of power.

It is not and will not be questioned but that if the constitution has vested such power, it is not within the legislative power, either by its silence or by direct enactment, to modify, curtail, or abridge this constitutional grant."

Western Asps' v. Railroad Comm., (1916) 173 Cal. 802, 804, 1 A.L.R. 1455.

- o However, the Legislature may enact legislation to facilitate the exercise of those powers. “Broadly speaking, the Commission’s many and varied powers and duties relate to the fixing of rates and supervision of service, including matters involving public safety....” (Public Utility Regulation in California, supra at p. 5.)

"All railroads, canal, and other transportation companies are declared to be common carriers, and subject to legislative control. . . ." Section 23, as adopted and unchanged by the 1914 amendment, provides:

"Every private corporation, and every individual or association of individuals, owning, operating, managing, or controlling any commercial railroad, interurban railroad, street railroad, canal, pipe line, plant, or equipment, . . . within this State, for the transportation or conveyance of passengers . . . or freight of any kind, . . . either directly or indirectly, to or for the public, and every common carrier, is hereby declared to be a public utility subject to such control and regulation by the . . . Commission as may be provided by the Legislature, and every class of private corporations, individuals, or association of individuals hereafter declared by the Legislature to be public utilities shall likewise be subject to such control and regulation. The . . . Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities

⁴ For example, rates of intrastate carriers by air are subject to regulation, although the Public Utilities Act contains no specific reference to airline carriers. Such carriers are “transportation companies” under the Constitution. *People v. Western Air Lines*, (1954) 42 Cal.2d 621.

furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the . . . Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution. . . . Nothing in this section shall be construed as a limitation upon any power conferred upon the . . . Commission by any provision of this Constitution now existing or adopted concurrently herewith [emphasis added]."

People v. Western Air Lines, supra, at 636.

- Under Article 12, Section 3, of the California Constitution, “a line, plant, or system for the transportation of people or property...and common carriers” are “public utilities.” This Constitutional provision “extends, by its terms, to railroad corporations and ‘transportation companies.’ This should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint-stock companies, partnerships, or individuals, and so it has been construed by legislative enactment.” (*Moran v. Ross* (1889) 79 Cal. 159, 163.)
- A 1911 amendment to the Constitution, Article 12, Section 23, reaffirmed that “for the transportation or conveyance of passengers . . . and every common carrier, is hereby declared to be a public utility.” (Although Article 12, Section 23, was removed from the Constitution, its substance is retained in the present Constitution pursuant to Section 9 of Article XII.⁵ Under Article 12, Section 4, “The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies....”
- Further, Section 22 of Article XII of the Constitution as amended in 1911, (retained by Section 9 of Article 12 in 1974) provided the Commission with jurisdiction over railroads “and other transportation companies.”
- The Constitution provides that “[n]o provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the railroad commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the . . . commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.” (Cal. Const., Article XII, sec. 22.) This provision remained in the Constitution verbatim until the constitutional amendment of 1974 which retains the provision through Section 9 of Article XII which provides “[t]he provisions of this article restate all related provisions of the Constitution in effect

⁵ “The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.” Cal. Const., Art. 12, § 9 (Nov. 5, 1974).

immediately prior to the effective date of this amendment and make no substantive change.

The CPUC's constitutional authority includes jurisdiction over rail crossing safety.

- The safety of rail crossings is an area of statewide concern and under the exclusive control of the Commission.⁶ "[T]he subject of abolishing...grade crossings by the physical closing thereof is germane to the regulation of a railroad corporation performing state-wide or more than local service; that "the Railroad Commission has been vested with such power of regulation and control by the Constitution and by Section 43 (b) of the Public Utilities Act [emphasis added]...." (*City of San Mateo v. Railroad Com.* (1937) 9 Cal.2d 1, 6.)

The CPUC's constitutional authority includes jurisdiction over rail transit safety.

- Public transit guideway systems are "common carriers" under PU Code Section 211. Common carriers are "public utilities" under PU Code Section 216. "Under the Code public utilities are required to furnish such...facilities as are necessary to promote the safety, health, comfort, and convenience of patrons, employees, and the public. (PU Code Section 451.)...The Commission shall determine the character of facilities necessary to meet public requirements (PU Code Section 730), may require changes or additions in plant and equipment, joint use of facilities, installation of safety devices, and may fix reasonable standards, practices, measurements, or service. (PU Code Section 761-772.)" (Public Utility Regulation in California, supra at p. 11.)

PROGRAM BACKGROUND:

- The CPUC's rail crossing, railroad operations and rail transit safety programs are held in high regard across the nation, and are looked to as models to emulate. The Commission has been the state's expert in rail safety since the late 1800's when it was the Railroad Commission.
- Current law provides that the planning, financing, and operation of the California High Speed Rail system are the purview of the California High Speed Rail Authority.

⁶ *Northwestern Pac. R.R. Co. v. Superior Court*, (1949) 34 Cal.2d 454, 458, and *City of San Mateo v. Railroad Com.* (1937) 9 Cal.2d 1, 9-10. See also: "Under [PU Code sections] 1201 and 1202 authorization is required for the creation of any grade crossing of a railroad and any public road or street. The Commission has exclusive power to prescribe terms of installation, use, and protection of crossings; to relocate or abolish crossings by physical closing; to require a separation of grades, and to apportion costs between railroads, the state, and political subdivisions [footnote omitted]." (Public Utility Regulation in California, supra at p. 15.)

- Current law also provides that the Caltrans Division of Rail will operate the trains on the Amtrak routes in California including the Capitol Corridor, Cal train, Altamont Commuter Express, and Coaster. Caltrans is tasked with developing a comprehensive rail passenger system, preparing a rail passenger development plan, and working with local and regional entities in developing a comprehensive balanced transportation freight and passenger planning and policy. Caltrans also coordinates and assists various public and private transportation entities in strengthening and developing the operation of a balanced and integrated set of transportation facilities and services, maximizing the efficient and effective use of available funds, and coordinating transportation research projects of statewide interest.

LEGISLATIVE HISTORY:

None.

FISCAL IMPACT:

The PU Code funds the CPUC’s freight and passenger railroad safety program activities through its jurisdiction over public utilities by imposing user fees on the railroads - independent of the state’s General Fund. This bill would require shifting the funding source to the General Fund. The costs to be shifted from the CPUC to the proposed Department of Rail include:

▪ Freight/passenger safety programs	\$ 5,088,000
▪ Rail transit safety programs	\$ 2,988,000
▪ Rail crossing safety programs	<u>\$ 3,354,000</u>
Total	\$11,430,000

STATUS:

This bill is set to be heard by the Assembly Transportation Committee on August 4, 2008.

SUPPORT/OPPOSITION:

Unknown.

STAFF CONTACTS:

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Date: July 18, 2008

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Part 5.1 (commencing with Section 14460) is added to Division 3 of Title 2 of the Government Code , to read:

PART 5.1. DEPARTMENT OF RAILROADS

CHAPTER 1. GENERAL

14460. There is within the Business, Transportation and Housing Agency a Department of Railroads. An undersecretary of the agency shall be assigned to give attention to rail matters.

14460.1. (a) The department is under the control of an executive officer known as the Director of Railroads. The director is appointed by the Governor, subject to confirmation by the Senate, and holds office at the pleasure of the Governor. The annual salary of the director shall be the same as provided for the Director of Transportation pursuant to Chapter 6 (commencing with Section 11550) of Part 1. The director shall perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the department, except as otherwise expressly provided by law.

(b) There shall be within the department the position of Deputy Director of Railroads. The deputy director is appointed by the Governor, upon recommendation of the director, and shall serve at the pleasure of the director. The annual salary shall be fixed by the director in accordance with law. The deputy director shall have the duties that may be assigned to him or her by the director and shall be responsible to the director for the performance of those duties.

(c) As used in this part, the following terms shall have the following meanings:

- (1) "Department" means the Department of Railroads.
- (2) "Director" means the Director of Railroads.
- (3) "Secretary" means the Secretary of Business, Transportation and Housing.

14460.2. For the purpose of administration, the director shall organize the department with the approval of the Governor and the secretary.

14460.3. The department may expend funds appropriated for the administration of laws and programs under the jurisdiction of the department. The expenditure of those funds shall be made in accordance with law in carrying out the work for which the appropriations were made.

CHAPTER 2. POWERS AND DUTIES

14461. (a) The department shall be responsible for all of the following programs:

- (1) The intercity rail program (Sections 14031.6, 14031.7, 14031.8, and 14034 to 14040, inclusive).
- (2) The High-Speed Rail Program (Division 19.5 (commencing with Section 185000) of the Public Utilities Code).
- (3) The rail goods movement program (Article 9 (commencing with

Section 7700) of Chapter 1 of Division 4 of the Public Utilities Code) and the rail portion of the goods movement programs currently administered by the Department of Transportation's Office of Goods Movement and the Business, Transportation and Housing Agency.

(4) The rail-highway grade crossing and rail-highway grade separation programs (Chapter 6 (commencing with Section 1201) and Chapter 6.5 (commencing with Section 1231) of Part 1 of Division 1 of the Public Utilities Code, and Sections 190, 191, and 191.5 of, and Chapter 10 (commencing with Section 2450) of Division 3 of, the Streets and Highways Code).

(5) Coordination of regional transportation planning efforts throughout the state relative to rail transportation.

(b) Notwithstanding any other provision of law, the department shall succeed to and be vested with all of the duties, powers, purposes, and responsibilities with respect to the programs identified in subdivision (a). Any reference to the Department of Transportation or the Public Utilities Commission with respect to those programs shall be deemed to refer to the department, unless the context otherwise requires.

(c) The director and the Director of Transportation shall convene a joint task force for the purpose of resolving issues between their two departments relative to overlapping jurisdiction.

14462. (a) The department shall be responsible for developing a proposed budget. Any reference to budgetary duties of the Department of Transportation or the Public Utilities Commission relative to a funding source that supports programs that have been transferred to the department pursuant to Section 14461 shall refer to the department. The Department of Transportation or the Public Utilities Commission shall cooperate with the department to ensure a smooth transition. The Department of Transportation shall further cooperate with the department relative to the programming process for transportation funds that may be allocated to transportation projects under the jurisdiction of either department, including, but not limited to, interregional transportation program funds governed by Section 14526 of this code and paragraph (1) of subdivision (a) of Section 164 of the Streets and Highways Code. Funds allocated under subdivision (f) of Section 99315 of the Public Utilities Code shall be allocated to the department consistent with the department's responsibilities.

(b) The department shall succeed to the responsibilities of the Department of Transportation with respect to general obligation bond funds made available for rail purposes under the Passenger Rail and Clean Air Bond Act of 1990 (Part 11.5 (commencing with Section 99600) of the Public Utilities Code), the Clean Air and Transportation Improvement Act of 1990 (Chapter 17 (commencing with Section 2700) of Division 3 of the Streets and Highways Code), and the Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006 (Chapter 12.49 (commencing with Section 8879.20) and Chapter 12.491 (commencing with Section 8879.50) of Division 1 of Title 2 of this code.

14463. The California Transportation Commission shall continue to be responsible for the programming of transportation capital projects pursuant to Chapter 2 (commencing with Section 14520) of Part 5.3.

14464. The High-Speed Rail Authority shall be a division of the department. The executive director of the authority shall report to the director. The budget for the authority shall be developed by the

board of the authority in cooperation with the director.

~~SECTION 1.— This act shall be known and may be cited as the California State Highway Asset Management Program Act.~~

~~SEC. 2.— The Legislature finds and declares that it is the objective of California to have a state highway system, including, but not limited to, bridges and other highway structures, that is in a condition of good repair, without chuckholes, surface deformation, or other symptoms of distressed pavement. The Legislature further finds and declares both of the following:~~

~~(a) A continuously maintained highway system reduces the life cycle cost of the system, extends the useful life of the system, and allows motorists to enjoy smoother and safer travel experiences.~~

~~(b) Annual reports from the Department of Transportation on the quality of the state highway system provide a means to communicate the condition of the system to the Legislature and the public.~~

~~SEC. 3.— Section 14526.7 is added to the Government Code, to read:~~

~~14526.7. (a) The department shall calculate all of the following performance measures for the purpose evaluating and rating the overall quality of the state highway system:~~

~~(1) The percentage of state highway lane miles with pavement smoothness, measured according to the International Roughness Index (IRI), that is in each of the following categories:~~

~~(A) "Good," which means an IRI of less than 94 inches per mile.~~

~~(B) "Fair," which means an IRI between 95 and 119 inches per mile.~~

~~(C) "Mediocre," which means an IRI between 120 and 170 inches per mile.~~

~~(D) "Poor," which means an IRI greater than 170 inches per mile.~~

~~(2) The percentage of state highway lane miles with a structural condition that is in each of the following categories:~~

~~(A) "Excellent" or "good," which means there are either no defects or a few defects that require only routine maintenance.~~

~~(B) "Fair," which means that both of the following apply:~~

~~(i) The pavement condition requires preventive maintenance.~~

~~(ii) Maintaining the pavement condition is a capital preventive maintenance project.~~

~~(C) "Poor," which means the pavement condition requires rehabilitation of roadway segments.~~

~~(D) "Very poor," which means the pavement condition requires reconstruction of roadway segments.~~

~~(3) The Bridge Health Index (BHI) of bridges in the state highway system. The department shall determine, based on the BHI, whether the structural integrity of a bridge is excellent, fair, requiring preventive maintenance, or requiring replacement, and shall, in the first report submitted pursuant to subdivision (c), define each of those categories.~~

~~(b) The department shall develop additional performance measures to determine the integrity of the physical infrastructure of the state highway system. In developing these measures, the department shall consult with all of the following:~~

~~(1) The commission.~~

~~(2) Regional transportation agencies.~~

~~(3) County transportation commissions.~~

~~—(4) The Institute of Transportation Studies at the University of California.~~

~~—(5) Departments of transportation from other states.~~

~~—(6) The Federal Highway Administration.~~

~~—(c) The department shall report annually, by no later than March 31, to the Assembly Committee on Transportation and the Senate Committee on Transportation and Housing. The report shall also be posted on the department's Web site and shall do both of the following:~~

~~—(1) Demonstrate how resource, staffing, and programming decisions utilized the performance measures required by this section and how those decisions impact the overall condition of the state highway system.~~

~~—(2) Report on all of the following:~~

~~—(A) The department's activities and findings under this section.~~

~~—(B) The physical condition of the state highway system.~~

~~—(C) The department's activities to improve the state highway system and the cost of those activities, including the total cost and the cost per land mile of highway.~~

~~—(D) The life cycle cost of investments made to improve the performance measures required by this section.~~

_____ CORRECTIONS

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