

**M E M O R A N D U M**

**Date:** February 8, 2007

**To:** The Commission  
(Meeting of February 15, 2007)

**From:** Patrick S. Berdge, P.U. Counsel IV

**Subject:** CPUC Comments On the Transportation Security  
Administration's NPRM—Establishing “Subject Matter”  
Preemption of State and Local Government Regulations  
Requiring Risk Assessments and Infrastructure Protection  
Programs For Rail Transportation

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**RECOMMENDATION:** The Commission should oppose the Transportation Security Administration's (“TSA's”) proposal to apply “subject matter” federal preemption under the NPRM to invalidate all state and local action to develop and implement railroad risk assessments, railroad infrastructure protection programs, and railroad homeland security inspections.

**DISCUSSION:** The TSA of the U.S. Department of Homeland Security (“DHS”), in collaboration with the U.S. Department of Transportation (“U.S.D.O.T.”) has issued a Notice of Proposed Rulemaking (“NPRM”) Docket No. TSA—2006—26514 (71 Federal Register (“FR”) 76852), applying to the entire spectrum of rail transportation in the nation.

The NPRM, “cover[s] a broad spectrum of the rail transportation sector, including freight railroad carriers, passenger railroad carriers, rail transit systems, and rail operations at certain facilities that ship or receive specified categories and quantities of hazardous materials...private rail cars that are on or connected to the general railroad system of transportation and tourist, scenic, historic, and excursion operations, whether on or off the general railroad system of transportation” and “railroad carriers that operate or provide intercity passenger train service or commuter or other short-haul railroad passenger service in a metropolitan or suburban...including public authorities operating passenger train service...passenger or freight railroad carriers

hosting the operation of passenger train service...tourist, scenic, historic, and excursion rail operators, whether operating on or off the general railroad system of transportation...private cars, including business/office cars and circus trains, on or connected to the general railroad system of transportation... and...rail transit systems, including heavy rail transit, light rail transit, automated guideway, cable car, inclined plane, funicular, and monorail systems.” (NPRM at 76853)

All these modes of rail transportation would be required, among other things, “to compile annual data on specified shipments of hazardous materials, use the data to analyze safety and security risks along rail transportation routes where those materials are transported, assess alternative routing options, and make routing decisions based on those assessments...address en route storage, delays in transit, delivery notification, and impose additional security inspection requirements for hazardous materials shipments.” (NPRM at 76853) The purpose of the proposed regulations is to “to identify and address threats to rail transportation” both passenger and freight.<sup>1</sup> “TSA has the primary federal role in enhancing security for all modes of transportation.” (NPRM at 76855)

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<sup>1</sup> “In developing this rule, TSA sought to identify and address threats to rail transportation. With respect to passenger rail, TSA recognizes that passenger railroad carriers, commuter operations, and subway systems are high consequence targets in terms of potential loss of life and economic disruption. They carry large numbers of people in a confined environment, offer the opportunity for specific populations to be targeted at particular destinations, and often have stations located below or adjacent to high profile government buildings, major office complexes, and iconic structures. Terrorist bombings since 1995 highlight the need for improved government access to, and monitoring of, transportation of passengers by rail. Terrorists have attacked the Tokyo subway system (1995); areas in and around the Moscow subway system (2000, 2001, and 2004); Madrid commuter trains (2004); the London Underground system (2005); and the train system in Mumbai (formerly known as Bombay), India (2006).

TSA also considered the threats that face freight rail transportation. Due to the open infrastructure of the rail transportation system, freight trains can be particularly vulnerable to attack. Currently, rail carriers and shippers lack positive chain of custody and control procedures for rail cars as they move through the transportation system (e.g., as entities load the rail cars at originating facilities, as carriers transport the cars over the tracks, and as entities unload the cars at receiving facilities). This can present a significant vulnerability. Whenever entities stop rail cars in transit and interchange them without appropriate security measures, their practices can create security vulnerabilities. Freight trains transporting hazardous materials are of even more concern, because an attack on those trains (e.g., through the use of improvised explosive devices (IEDs) could result in the release of hazardous materials.” (NPRM at 76854)

The President<sup>2</sup> has ordered that the Secretary of DHS to develop and implement “a strategy to identify, prioritize, and coordinate the protection of critical infrastructure and key resources, including how the Department intends to work with Federal departments and agencies, State and local governments, the private sector, and foreign countries and international organizations.” (Homeland Security Presidential Directive 7 (“HSPD-7”) at ¶ 27(a)) The Secretary in turn has issued a “National Infrastructure Protection Program” (“NIPP”) that, among other things, provides that

State, local, and tribal governments are responsible for providing or augmenting protective actions for assets, systems, and networks that are critical to the public within their jurisdiction and authority. They develop protective programs, supplement Federal guidance and expertise, [and] implement relevant Federal programs...”

(NIPP at p. 46)

Under the NIPP, state, local, and tribal governments shall “develop and implement a [“critical infrastructure and key resources”] (CI/KR) protection program as a component of their overarching homeland security programs.” (Id. at 2.) In fact, Secretary Chertoff states that “State, local, and tribal government security partners are required to establish CI/KR protection programs consistent with the *National Preparedness Goal*<sup>3</sup> and as a condition of eligibility for certain Federal grant programs.” (Id. at p. 8.) The NPRM’s “subject matter” preemption test would undermine these recommendations.

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<sup>2</sup> On December 17, 2003, the President issued Homeland Security Presidential Directive 7 (HSPD-7, Critical Infrastructure Identification, Prioritization, and Protection), which “establishes a national policy for Federal departments and agencies to identify and prioritize United States critical infrastructure and key resources and to protect them from terrorist attacks.” (NPRM at 76855) See also HSPD-8, ¶ (18): “The Secretary, in coordination with other appropriate Federal departments and agencies, shall establish a national program and a multi-year planning system to conduct homeland security preparedness-related exercises that reinforces identified training standards, provides for evaluation of readiness, and supports the national preparedness goal. The establishment and maintenance of the program will be conducted in maximum collaboration with State and local governments and appropriate private sector entities [emphasis added].”

<sup>3</sup> “Preparedness is a shared national responsibility...The National Preparedness Goal engages Federal, State, local, and tribal entities, their private and non-governmental partners, and the general public in a continuous cycle of activity to achieve and sustain risk-based target levels of capability to prevent, protect against, respond to, and recover from major events that require a coordinated national effort in order to minimize the impact on lives, property, and the economy...One Goal, one Nation.” *Interim National Preparedness Goal* (March 31, 2005) at p. 18. See: [http://www.ojp.usdoj.gov/odp/docs/InterimNationalPreparednessGoal\\_03-31-05\\_1.pdf](http://www.ojp.usdoj.gov/odp/docs/InterimNationalPreparednessGoal_03-31-05_1.pdf)

The NPRM proposes to use the Federal Railroad Safety Act's ("FRSA") preemption statute, 49 U.S.C § 20106, for these proposed security regulations affecting hazardous materials shipments by railroads. Title 49 C.F.R. Part 1580.107 "preempts any State law, rule, regulation, order or common law requirement covering the same subject matter." As noted in the NPRM (at 76879), "California [has] adopted the 'Local Community Rail Security Act of 2006' on October 1, 2006. The California Act requires railroads to develop and implement risk assessments<sup>4</sup> and infrastructure protection programs<sup>5</sup> in California. If the TSA is successful in its "subject matter"

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<sup>4</sup> Cal. Pub. Util. Code § 7665.2. "By July 1, 2007, every operator of rail facilities shall provide a risk assessment to the commission, the Director of Homeland Security, and the Office of Emergency Services for each rail facility in the state that is under its ownership, operation, or control. The risk assessment shall, for each rail facility, describe all of the following: (a) The location and functions of the rail facility. (b) All types of cargo that are moved through, or stored at, the rail facility. (c) Any hazardous cargo that is moved through, or stored at, the rail facility. (d) The frequency that any hazardous cargo is moved through, or stored at, the rail facility. (e) A description of the practices of the rail operator to prevent acts of sabotage, terrorism or other crimes on the rail facility. (f) All training programs that the rail operator requires for its employees at the rail facility. (g) The emergency response procedures of the rail operator to deal with acts of sabotage, terrorism, or other crimes at the rail facility. (h) The procedures of the rail operator to communicate with local and state law enforcement personnel, emergency personnel, transportation officials, and other first responders, in the event of acts of sabotage, terrorism, or other crimes at the rail facility.

<sup>5</sup> Cal. Pub. Util. Code § 7665.4. (a) By January 1, 2008, every rail operator shall develop and implement an infrastructure protection program to protect rail infrastructure in the state from acts of sabotage, terrorism, or other crimes. (b) (1) The infrastructure protection program shall address the security of all critical infrastructure. (2) The infrastructure protection program shall provide training to all employees of the rail operator performing work at a rail facility on how to recognize, prevent, and respond to acts of sabotage, terrorism, or other crimes. (c) (1) All employees of a contractor or subcontractor of a rail operator, and any other person performing work at a rail facility that is not the employee of the rail operator, shall receive training equivalent to that received by employees of the rail operator pursuant to paragraph (2) of subdivision (b), within a reasonable period of time. The commission, in consultation with the Director of Homeland Security, may adopt reasonable rules or orders to implement this requirement. (2) All employees of a contractor or subcontractor of a rail operator, and any other person performing work at a rail facility that is not the employee of the rail operator, shall undergo an equivalent evaluation of their background, skills, and fitness as the rail operator implements for its employees pursuant to its infrastructure protection plan. The commission, in consultation with the Director of Homeland Security, may adopt reasonable rules or orders to implement this requirement. (d) Each rail operator in the state shall provide to the commission, the Director of Homeland Security, and the Office of Emergency Services a copy of its infrastructure protection program. Notwithstanding Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code, the commission, the Director of Homeland Security, and the Office of Emergency Services shall keep this information confidential. (e) The infrastructure protection program shall be updated by the rail operator at least once every year, and the updated plan shall be submitted to the commission, the Director of Homeland Security, and the Office of Emergency Services. (f) The commission, in consultation with the Office of Emergency Services, shall review the infrastructure protection program submitted by a rail operator, may conduct inspections to facilitate the review, and may order a rail operator to improve, modify, or change its program to

preemption of risk assessments and infrastructure protection programs, the “Local Community Rail Security Act of 2006”, to a large extent, will be voided.

It is not necessary to invalidate this new California Act. As the NPRM states, it is focused on the transportation of hazardous materials by rail.<sup>6</sup> The transportation of hazardous materials is regulated under the Hazardous Materials Transportation Act (HMTA), 49 USC § 5101 et seq. (NPRM at 76856) That statute provides a different form of federal preemption, the “substantially the same” requirement that would preserve the “Local Community Rail Security Act of 2006”. Under 49 USC § 5125,

a requirement of a State, political subdivision of a State, or Indian tribe is preempted if-- (1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter [49 USCS §§ 5101 et seq.], a regulation prescribed under this chapter [49 USCS §§ 5101 et seq.], or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security is not possible; or (2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter [49 USCS §§ 5101 et seq.], a regulation prescribed under this chapter [49 USCS §§ 5101 et seq.], or a hazardous materials transportation security regulation or directive issued by the Secretary of Homeland Security.

(49 USC § 5125.)

Since California’s “Local Community Rail Security Act of 2006” is designed to be both consistent with, and complimentary to, the directives of the President and the Secretary of DHS, the Act does not run afoul of the provisions of the NPRM with respect to risk assessments, infrastructure protection programs, or hazardous materials transportation by rail.

Furthermore, without an explicit Congressional intent demonstrating the terms and extent of federal preemption, no preemption exists; the States have the power to establish and enforce risk assessments and infrastructure protection programs under their well-accepted “police powers”. The U.S. Supreme Court in *CSX Transp. v. Easterwood*, 507 U.S. 658, 661 (1993), noted that the historic police powers of the States to regulate train safety should not be superseded unless that is the clear and manifest purpose of Congress. (*Easterwood*, 507 U.S. at 665, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).)

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comply with the requirements of this article. (g) The commission may fine a rail operator for failure to comply with the requirements of this section or an order of the commission pursuant to this section.

<sup>6</sup> “TSA is taking a risk-based approach by focusing on shipments of certain hazardous materials at this time.” (NPRM at 76854)

TSA's NPRM relies on the States to oversee homeland security for local transit agencies but defines transit to include passenger railroad transportation. However, TSA fails to adequately explain the basis for this distinction or for excluding the States, local governments, tribal governments, and private industry from regulating the security of freight railroads.

**CONCLUSION:** The Commission should oppose TSA's "subject matter" preemption under the NPRM because it is contrary to the announced policy of the Director of DHS as recommended in the *National Preparedness Goal* and the NIPP. "Subject matter" preemption would invalidate the California "Local Community Rail Security Act of 2006". Additionally, application of "subject matter" preemption under 49 USC § 20106 would damage, hinder, and prevent the development and implementation of national homeland security generally, and risk assessments and infrastructure protection programs as they specifically apply to railroad transportation in California.

PSB:abh