CALIFORNIA RAILROAD INDUSTRY

March 15, 2016

Senator Loni Hancock
Room 2082
State Capitol
Sacramento, California 95814

SUBJECT: **SB 1277, SB 1278, SB 1279, SB 1280 - Notice of Opposition**
Restrictions on Coal Exports and Imports in California

Dear Senator Hancock:

The California Railroad Industry must respectfully oppose your bill package that would restrict coal exports and imports in California. The railroads understand your interest in the proposed Oakland Port project in your district. However, SB 1277, SB 1278, SB 1279, and SB 1280 would prevent the import, export, storage and transportation of a legal commodity statewide.

Under federal regulation, freight railroads are considered "common carriers". This means we must accept all reasonable requests to transport commodities as long as they are packaged and handed off to us in accordance with U.S. Department of Transportation Regulations. As a result, the bills appear to impermissibly collide with a number of overriding federal statutes and international treaty obligations, are subject to virtually certain court challenge, and may raise international trade concerns.

Additionally, a number of commuter agencies use freight rail infrastructure to carry passengers across the state. By applying these requirements to "any portion of a project relating to the shipment of coal" or related to approval of "a project affecting the shipment of commodities through a port facility", these measures could also eliminate the ability of public transit agencies to invest public funds on freight railroad rights of way to improve passenger rail operations.

For these reasons, the California Railroad Industry respectfully opposes all four measures. The railroads' specific concerns with each of the four bills are as follows:

AB 1277 – PROHIBITS THE SHIPMENT OF COAL TO OR THROUGH A PROPOSED FACILITY IN THE PORT OF OAKLAND IF FUNDED IN PART BY STATE MONIES

SB 1277's provisions reach far beyond the bounds of California's regulatory authority in a number of different areas:

- ICCTA: The Interstate Commerce Commission Termination Act of 1995 (ICCTA), broadly preempts state laws that interfere with or discriminate against federal rail operations even if the rail carrier is not the direct target of the regulation. SB 1277 does precisely what ICCTA is designed to prevent: the bill limits delivery by rail of a lawful commodity to a warehousing and storage facility.
- Shipping Act: The Shipping Act of 1984 prohibits "marine terminal operators" from discriminating against common carriers with respect to the provision of terminal services. SB 1277 requires the Port of Oakland, a recognized marine terminal operator, to discriminate against shippers of coal.
- Treaties: The bill places an impermissible restriction on the export of coal in conflict with export provisions found in multiple treaties to which the United States is a party and that

have been ratified by the U.S. Senate. Under Article VI of the U.S. Constitution, such treaties are accorded supremacy vis-à-vis other sources of law.

- Commerce Clause: The bill discriminates against interstate and foreign commerce by restricting the flow of coal through a California port, and by restricting legal commodities shipped into a public port from other states that need access to that port.
- Retroactive Restrictions on Projects Receiving State Monies: By imposing unique restrictions on a project that has received even a partial amount of state funding **after** the project has been approved and/or completed, the bill sets a precedent that such projects may be subject to ever-changing requirements in perpetuity and after the fact.
- Findings: The findings in the bill related to the transport of coal by rail are not grounded in fact. For instance, there are covers and stabilization agents that eliminate coal dust over long trips.

SB 1278 – REQUIRES EIR FOR ANY PROJECT RELATED TO COAL SHIPMENT THROUGH THE PORT OF OAKLAND

SB 1278 sets up a damaging CEQA precedent and, like SB 1277, exceeds the authority of the state:

- Prolonged CEQA Permitting Based on Commodity: The bill effectively revokes the CEQA minor alteration exemption for a certain class of projects (those relating to the shipment of coal), and requires a full EIR. The current bill language requires this level of environmental review even for minor modifications to a previously approved project that could otherwise be carried out under a supplemental Negative Declaration or might even be exempt from CEQA. This sets a precedent that could be expanded to other project types and would greatly extend the already lengthy CEQA permitting process thus increasing regulatory uncertainty and promoting delay.
- Broad Definition: There is no definition of "any project related to coal shipment", which could be broadly applied across the state to a variety of goods movement projects.
- ICCTA: Federal courts have held that a state requiring a rail project under federal jurisdiction to undergo an environmental review that could prevent a rail carrier from constructing, acquiring, operating, abandoning, or discontinuing a line are tantamount to economic regulation and are preempted.
- Shipping Act: In practice, this bill may require the Port of Oakland to discriminate against shippers of coal in violation of the Shipping Act's antidiscrimination provision.
- Uniform Application of Law Required by Treaties: This bill applies California environmental law differently based on which commodity is being exported. However, the United States has an obligation under the World Trade Organization agreement to apply laws ***uniformly*** across categories of export commodities.
- Commerce Clause: This bill discriminates against foreign and interstate commerce by effectively imposing a unique burden on the shipment of coal through a California port.
- Public Transit Impacts: A number of commuter agencies use freight rail infrastructure to carry passengers across the state. By applying these requirements to "any portion of a project relating to the shipment of coal" this measure could eliminate the ability of public transit agencies to invest public funds on freight railroad rights of way to improve passenger rail operations.
- Indirect Requirements Still Subject to Challenge: The bill's indirect regulatory efforts are not immune from legal scrutiny.

SB 1279 – PROHIBITS THE CALIFORNIA TRANSPORTATION COMMISSION FROM ALLOCATING ANY PUBLIC FUNDS FOR ANY PROJECT AT A PORT FACILITY THAT IS LOCATED NEAR A DISADVANTAGED COMMUNITY AND THAT EXPORTS COAL FROM THIS STATE

Continued National and International Conflicts: This bill applies to every port in California. Since the purpose of this bill is quite clearly to restrict coal exports statewide, it appears to violate U.S.

treaty obligations because the contemplated funding restriction is a discriminatory, and therefore, impermissible, restriction on the export of only certain commodities. It also appears to violate the Commerce Clause because it has the purpose or effect of limiting international and/or interstate commerce.

SB 1280 – RETROACTIVELY REQUIRES PROJECTS THAT RECEIVE STATE TRADE CORRIDOR IMPROVEMENT FUNDS TO EITHER PROHIBIT COAL SHIPMENTS THROUGH THE PORT FACILITY, OR FULLY MITIGATE UNDER CEQA THE GHG EMISSIONS FROM THE COMBUSTION OF COAL SHIPPED THROUGH THE PORT FACILITY

This bill, for projects receiving state funds, imposes state-mandated CEQA mitigation requirements that are designed to prohibit approval of a specific type of project. The mitigation would apply to both new and existing projects. This is a major precedent, allowing the state to prejudge mitigation and set up projects for lengthy lawsuits under CEQA. Once again, this bill also sets up the state for potential numerous legal challenges.

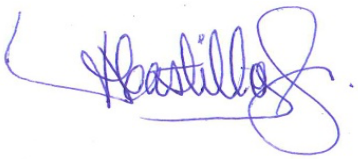
- 100% Mitigation: The bill requires mitigation of 100% of coal combustion emissions, as determined by CARB, even if some of those emissions are insignificant under CEQA review and thresholds of significance. It also requires mitigation of ultimate downstream coal combustion emissions.
- Retroactive Requirements on Projects Receiving State Funds: As with SB 1277, by imposing unique restrictions on a project that has received even a partial amount of state funding **before or after** the project has been approved and/or completed, the bill would set a precedent that such projects may be subject to ever-changing requirements in perpetuity.
- ICCTA: By imposing one of two environmentally based restrictions on the transportation of coal by rail – either an outright ban or complete mitigation – such a state regulation impinges on exclusive federal jurisdiction in this area.
- Shipping Act: The restrictions in the bill could force a marine terminal operator to deny services to shippers of coal, in violation of the Shipping Act's anti-discrimination provision. Or, it could result in discrimination if the cost of mitigation were passed on to the coal shippers.
- Treaties: In effect, this bill would result in complete elimination of coal shipments – an impermissible restriction on exports -- and result in the non-uniform application of laws with respect to the export of commodities.
- Commerce Clause: The purpose of the bill is clearly to restrict the flow of coal in international and interstate commerce and is thus discriminatory. Importantly, to the extent the bill requires mitigation for coal combusted ***outside of California,*** it would also be an impermissible effort by the state to regulate activity beyond its borders.
- Impact on Commuter Rail: A number of commuter agencies use freight rail infrastructure to carry passengers across the state. By applying these requirements related to approval of "a project affecting the shipment of commodities through a port facility", this measure could eliminate the ability of public transit agencies to invest public funds on freight railroad rights of way to improve passenger rail operations.

This package of bills, although originating from a single district project, will have broad, sweeping impacts that exceed both the authority of the Port of Oakland development and the authority of the State of California. Further, the bills prohibit federally regulated railroads from delivering legal cargo, interfere with railroads' common carrier obligations under federal law, and indirectly burden public investments on private freight rail corridors that benefit commuter passengers and their safety. Rather than the state attempting to regulate specific commodities that would run afoul of national and international requirements and treaties, the existing agreement between the city and the developer of the Bulk and Oversized Terminal at the Port of Oakland, should guide the facility approval. We respectfully request that these measures be abandoned in favor of that local, lawful, and diligent process.

If you have any questions, please contact the governmental affairs representatives of the railroads listed below.

Sincerely,

Don Maddy - BNSF Railway Company
209.460.6228



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cc: Members of the Senate Transportation & Housing and Environmental Quality Committees
The Governor's Office
The Republican Caucus