THE CALIFORNIA RAILROAD INDUSTRY

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Air Resources Board
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Clerk of the Board
Air Resources Board
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December 15, 2010

Re: Comments of The California Railroad Industry on the Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulations and Mandatory Reporting Rule

Dear Dr. Kennedy and Clerk of the Board:

This letter provides the comments of BNSF Railway Company and Union Pacific Railroad Company ("the Railroads") on the "Proposed California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulations," adding Article 5 (§§ 95800 et seq.) to Title 17 of the California Code of Regulations ("the Cap-and-Trade Rule" or "the Rule"), as well as the proposed "Amendment to the Regulation for Mandatory Reporting of Greenhouse Gas Emissions (Title 17, §§ 95100 et seq.) ("the MRR"). The Railroads appreciate the opportunity to comment on the Rule and the MRR, as well as the Air Resources Board's consideration of these comments.

As proposed, the Cap-and-Trade Rule would, beginning in 2015, regulate transportation fuels by requiring "suppliers" of certain fuels, including diesel fuel, to purchase compliance instruments (i.e., allowances or offsets) in order to meet the "cap" on greenhouse gas ("GHG") emissions imposed by the Rule. The Railroads understand that, for purposes of diesel fuel, the MRR and Cap-and-Trade Rule are modeled on the reporting requirements of the Board of Equalization ("BOE"). While this approach may have been logical from the standpoint of streamlining existing reporting practices, ARB's decision to rely on the existing BOE reporting forms for defining the first point of supply unwisely places differing compliance burdens on the major transportation companies depending on the method through which they receive fuel from their suppliers, and thus would inhibit the competitiveness of some companies as compared to others within the same market. The fuel producers and fuel importers are the first supplier of fuel for both bulk and non-bulk transfers. Therefore, the fuel producers and fuel importers are the best source of information for purposes of reporting and compliance with AB 32, and it is illogical and overly-complicated to have different points of compliance based strictly on whether the fuels are transferred via the bulk or non-bulk system.

The Railroads submit these comments because, as proposed, the MRR and the Cap-and-Trade Rule create potential inequities for and amongst major fuel consumers in California by treating bulk and non-bulk transfers of fuel differently for purposes of reporting and compliance. Whereas non-bulk transfers will generally be reported by, and the compliance obligation will rest with, upstream fuel producers and fuel importers, the reporting and compliance obligation for bulk transfers is pushed downstream to multiple and various fueling facilities that might qualify as "terminals" under the Rule.

As currently drafted, the Railroads could be determined to be "suppliers" of diesel fuel, and therefore "covered entities," under the proposed Cap-and-Trade Rule. This would mean that the Railroads would be required to acquire compliance instruments in order to supply diesel fuel to locomotives in California. By limiting the number of compliance instruments available to all covered entities in a given year, the Cap-and-Trade Rule would impose a *de facto* regulation on the Railroad's ability to supply diesel fuel to locomotives in California, notwithstanding the preemptive effect of the federal Interstate Commerce Commission Termination Act of 1995 ("ICCTA").[1] The Railroads and Air Resources Board have long recognized this federal preemption of state and local authority to regulate railroads, and should continue to do so when implementing the MRR and Cap-and-Trade Rule.

The Railroads urge that further study of this issue is necessary and warranted to address concerns that many major fuel consumers are unaware that the reporting and compliance obligations under AB 32 have been pushed "downstream" away from the fuel producers and fuel importers. To address this significant issue, the Railroads request and recommend that, in the event the Board elects to approve the Cap-and-Trade Rule, the Executive Officer be authorized and directed to meet with interested stakeholders concerning this issue in order to gather the necessary facts and data, and to amend the regulations in a manner consistent with AB 32.

We look forward to continuing to work cooperatively with ARB staff. Please contact me at 415-421-4213 x 12, or Sarah Weldon at 415-421-4213 x 34 if you have any questions.

Sincerely yours,

Kirk Marckwald
On Behalf of the Association of American Railroads, BNSF Railway, and Union Pacific Railroad

[1] The ICCTA's preemption of state and local regulations that impose an unreasonable burden on the railroad industry has been upheld in multiple court decisions. *See City of Auburn v United States Government* (154 F.3d 1025, 1029-31 (9th Cir. 1998) ("Congress intended to preempt a wide range of state and local regulation of rail activity"); *Association of American Railroads v South Coast Air Quality Management District* (9th Cir. 2010) 622 F.3d 1094 ("[the] ICCTA preempts those [local and state] rules unless they are rules of general applicability that do not unreasonably burden railroad activity").