

BEFORE THE
SURFACE TRANSPORTATION BOARD

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March 28, 2014

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY – PETITION FOR
DECLARATORY ORDER

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) **STB Docket No. FD 35803**

SUPPLEMENTAL COMMENTS OF THE
STATE OF CALIFORNIA AIR RESOURCES BOARD
RE:
PETITION FOR DECLARATORY ORDER

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The Surface Transportation Board (“STB”) has recognized that this case raises a matter of “widespread and significant public interest” warranting its thorough consideration. STB Decision Initiating Proceeding in Docket No. FD 35803 (Feb. 26, 2014). As the California state agency charged with developing and implementing the California State Implementation Plan under the federal Clean Air Act, Cal. Health & Safety Code § 39602, the California Air Resources Board (“CARB”) very much appreciates the careful process initiated by the Surface Transportation Board. This case can, and should, be decided on existing STB and federal court precedent maintaining a role for federal State Implementation Plan (“SIP”) regulation of railroad operations under the Clean Air Act in cases where those rules are necessary to comply with federal air quality standards and can be implemented in harmony with the Interstate Commerce Commission Termination Act’s (“ICCTA”) purposes. An STB order affirming this principle will help to protect both air quality and the important national interest in a high quality railroad network.

Because several of the comments of the railroads in this proceeding do not correctly characterize the nature of the SIP under federal law, CARB respectfully provides these supplemental comments to further clarify these issues for consideration by the STB.

I. The California SIP is Federal Law; Federal Harmonization Analysis Therefore Applies to Any Alleged Conflict with ICCTA.

As CARB explained in its reply to the U.S. Environmental Protection Agency (“EPA”) petition, the STB has long recognized that, in ICCTA, “Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.” *See, e.g., Borough of Riverdale Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation*, 4 STB 380, 1999 WL 715272 (1999); CARB Reply at 8-10. Because “the statutory scheme [of the Clean Air Act] gives individual states the responsibility of developing and enforcing air quality programs that meet or exceed the national standards within their borders,” the STB has repeatedly held that “[n]othing” in its decisions is “intended to interfere with the role of the states and local entities in implementing these federal laws.” *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 2 STB 330, 1997 WL 362017 at *4 (1997).¹

Accordingly, the Ninth Circuit determined the analysis to be applied to the South Coast Air Quality Management District (“South Coast”) rules at issue here is sharply different than the STB’s usual preemption analysis for state and local laws; if those rules become approved into the SIP, the rules then have “the force and effect of federal law.” *Association of American Railroads v. South Coast Air Quality Management District (“AAR”)*, 622 F.3d 1094, 1098 (9th Cir. 2010). Rules implementing federal laws are “generally ... not preempt[ed]”; instead they must be “harmonize[d]” with the ICCTA, ultimately by “*the courts.*” *Id.*, at 1097 (emphasis added). The analytic path is clear: EPA must now decide whether the rules are appropriate to approve into federal law, and if any changes in the rules are needed to harmonize them with the ICCTA. *See* 42 U.S.C. § 7410(k). The STB will advise EPA in this process. Later, with a full record containing assessments from both EPA and STB, the railroads may request judicial review; if so, it will be the court’s task to determine whether EPA has appropriately harmonized any competing statutory mandates, *see* 42 U.S.C. § 7607.

¹ Union Pacific also asserts that Locomotive Inspection Act (“LIA”) preemption may have some bearing on this case. Union Pacific Reply at 5-6. The application of the LIA is not before the STB in this matter, and so should not be considered in this rulemaking. In any event, the LIA preempts *state* law, as the Supreme Court made clear. *See Kurns v. Railroad Friction Products Corp.*, 132 S.Ct.1261, 1270 (2012); *but see id.* at 1270, 1271 (Four Justices expressing concerns with even this degree of preemption). As we discuss below, SIPs are *federal* law, meaning that the LIA and case law interpreting it in the state law preemption context does not bear on the federal law harmonization question at issue here.

Along this path, per EPA's request for a declaratory opinion, the STB can use its expertise to advise EPA on how best to harmonize the rules at issue here with ICCTA in order to fulfill the federal mandates of both that statute and the Clean Air Act. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-55 (1976). Absent a truly insuperable conflict between the rules and ICCTA's purposes, which cannot be cured by any revisions which EPA may direct South Coast to carry out, a reviewing court is unlikely to depart from the general rule that federal SIP rules are generally not preempted. *See AAR*, 622 F.3d at 1098; *Stampede Pass*, 1997 WL 362017 at *4; *see also* CARB Reply at 10-13 (discussing this test). Through this process, which is consistent with the STB's nearly twenty-year-long record of maintaining space for federal environmental rules to operate alongside ICCTA, EPA will be well placed to exercise its expert judgment on the necessity and appropriateness of federalizing South Coast's rules, *see* 42 U.S.C. § 7410(k), while being advised of any issues the STB identifies within its own area of expertise.

Yet, the railroads assert the STB should depart from this settled course because, they contend, SIP rules "are a creature of state law" and so are less worthy of the harmonization analysis that applies to federal law in general. *See, e.g.*, BNSF Reply at 24; AAR Reply at 24 (same contention); UP Brief at 17 (SIP approval "merely attempt[s]" to transform rules "from state law to federal law"); NSR Brief at 6 (suggesting that SIP approval is "merely an attempt to disregard prior court findings"). According to the railroads, since the Ninth Circuit held the South Coast rules were preempted as *state* law enactments, if EPA were to incorporate these rules into federal law to fulfill *Congressional* mandates, the resulting federal laws warrant no additional consideration. They are incorrect.

The railroads' claim that essentially the same analysis applies to the South Coast rules regardless of whether they have been incorporated into the federal SIP and have the force and effect of federal law misstates the clear direction of the Ninth Circuit in *AAR*. The court explained that EPA approval does, in fact, trigger a distinct harmonization analysis for the federalized rules that does not occur for local laws that only have the force and effect of state law, 622 F.3d at 1098. The railroads' position is also flatly inconsistent with bedrock Clean Air Act law that STB has recognized in its line of rulings since *Stampede Pass*. Those cases explicitly recognize the important role of state and local decision makers in making federal environmental law.

Put simply, SIPs are at "[t]he heart" of the Clean Air Act's program "to achieve national primary ambient air quality standards . . . necessary to protect the public health." *Union Electric Co. v. EPA*, 427 U.S. 246, 250 (1976); *see also* 42 U.S.C § 7401(a) (3) (air pollution prevention is the "primary

responsibility of State and local governments”). SIPs implement the Clean Air Act by bridging the gap between national air quality standards and the local conditions in states and air districts by setting clear emissions rules for sources within each air basin that will “be necessary or appropriate” to meet the applicable requirements of the Act. 42 U.S.C. § 7410(a) (2). EPA approval is granted only after a lengthy and careful review process in which EPA carefully weighs the purposes and effects of proposed local rules before selecting those appropriate for elevation into federal law, *see* 42 U.S.C. § 7410(k), while perhaps disapproving others, *see id.* § 7410(k)(3), or calling for revisions or corrections, *see id.* § 7410(k) (5)-(6). EPA makes these judgments only after comparing the state submission against a lengthy list of Clean Air Act SIP requirements, and taking public comments. *See id.* § 7410(a)(2)(A)-(M), (5), (6). Moreover, if a state fails to submit a satisfactory SIP, it is subject to direct federal controls of its sources, *id.* § 7410(c), and to very substantial sanctions, *id.* § 7410 (m). Plans for areas in severe nonattainment with some national air standards (California has several of these areas) are subject to a range of even more stringent approval and analysis requirements which both assure that all necessary measures are taken and require EPA to carefully ensure that proposed measures will lead to compliance with federal standards. *See id.* §7502(c). Nonattainment areas also face potential loss of federal funding assistance if they are found not to conform with the national air quality standards, *id.* § 7506, and even more stringent sanctions for failure to develop adequate plans, *id.* § 7509. Thus, a final SIP provision is not merely a restated local law as the railroads argue, but the product of an extensive analytic process ultimately overseen by EPA, and conducted according to federal law, with substantial risks to the state if it fails to put forward an effective plan.

The railroads have cited to one unpublished Illinois district court case decided more than 20 years ago that appears to take a contrary view. *See* AAR Reply at 24 & BNSF Reply at 24-25 (both citing *Riverside Labs v. Illinois EPA*, 1987 WL 7836 (N.D. Ill. 1987)). That two-page decision, which does not consider the preemption issues relevant here, declined to maintain an enforcement action over violation of SIP terms in federal court, describing those issues as “essentially ones of state law,” *id.* at *2. That case is clearly distinguishable and, in any event, is contradicted by controlling federal law. Consistent with the Supreme Court’s identification of SIPs as the “heart” of the Clean Air Act program in *Union Electric*, the appellate courts have long held SIP provisions “to have the force and effect of federal law.” *AAR*, 622 F.3d at 1098 (quoting *Safe Air for Everyone v. U.S. EPA*, 488 F.3d 1088, 1091 (9th Cir. 2007)). *See also Washington Environmental Council v. Bellon*, 732 F.3d 1131, 1137 (9th Cir. 2013) (same); *Sierra Club v. U.S. EPA*, 671 F.3d 955, 959 (9th Cir. 2012) (same); *Trustees for Alaska*

v. Fink, 17 F.3d 1209, 1211 n.3 (9th Cir. 1994) (same); *Friends of the Earth v. Carey*, 535 F.2d 165, 169 (2nd Cir. 1976) (“a plan, once adopted by a state and approved by the EPA, becomes controlling and must be carried out by the state,” consistent with “Congress’s overriding objective”); *Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3rd Cir. 2013) (“Once a SIP is approved, its requirements become federal law”) (internal quotations omitted); *North Carolina ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291, 299 (4th Cir. 2010) (requirements of an approved SIP are “federal law”); *Sierra Club v. Korleski*, 681 F.3d 342, 343 (6th Cir. 2012) (“If EPA approves a state’s proposal, then the SIP is added to the Code of Federal regulations and becomes federal law”); *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir. 1994) (“the state implementation plan has the force and effect of federal law”); *Sierra Club v. Administrator*, 496 F.3d 1182, 1186 (11th Cir. 2007) (SIP has “the force and effect of federal law”). The question is settled.

For these reasons, the fact that South Coast’s rules were held to be preempted as a matter of *state* law conflict with ICCTA does not at all settle the question whether these rules are preempted if they become federal law.² Developing and promulgating SIP provisions as federal law is not a pretextual attempt to “do indirectly what [a state] could not directly achieve,” as the railroads assert. *See, e.g.* BNSF Reply at 3. Instead, EPA will only approve the South Coast rules if it determines, after an independent and careful review, that they serve the purposes Congress set out in the Clean Air Act (and may, of course, require revisions in order to better avoid any ICCTA-related conflicts). If EPA determines that the South Coast rules do serve to guarantee attainment with federal air quality standards necessary to protect public health, those rules will be worthy of substantial deference under the federal harmonization analysis which *AAR* mandates.

² To be sure, the South Coast rules could not be incorporated into the SIP if South Coast were not authorized to promulgate them under state law, independent of any ICCTA issues. Although the railroads make much of a district court ruling that California air districts lack authority to issue rules bearing on railroad operations, that part of the ruling was not upheld by the Ninth Circuit (which instead advised that South Coast might well submit its rules to EPA for SIP consideration). In any event, the railroads misunderstand California state law, which grants the districts general authority to regulate mobile sources, including railroads, within certain limits, as CARB explained in its initial Reply to EPA’s Petition and also found in its Executive Order forwarding the rules to EPA. *See* CARB Reply at 6-7 & nn. 8 & 9; CARB Executive Order S-12-007 (August 29, 2012). Moreover, this issue is not before the STB, which has been asked only to advise EPA whether the rules, if approved into federal law, will likely be preempted. Thus, this objection is not relevant here.

II. SIPs Can Play An Important – But Not Unbounded -- Role in Controlling Railroad Emissions

The STB's longstanding holding that ICCTA does not preempt state and local governments' "role under ... federal statutory schemes, such as the Clean Air Act" reflects the importance of joint state/federal efforts in adopting emission reduction measures and achieving national ambient air standards within the larger federal statutory scheme of regulating railroads. *See King County, WA – Petition for Declaratory Order – Stampede Pass Line* 1 STB 731, 1996 WL 545598 at *5 (1996). Although such regulations should and do take careful account of ICCTA concerns (as CARB itself has advised in the past), they may well be needed to provide critical public health protections in some instances. Circumstances where such rules are necessary likely will not be frequent, and careful EPA scrutiny as part of the harmonization analysis will further reduce their likelihood. In fact, the STB's years-long affirmation that SIPs will not be preempted has not resulted in a proliferation of balkanizing SIP provisions, as the railroads predict. Rather, it has resulted in a grand total of two railroad-specific federal SIP rules: one existing SIP provision (approved before the ICCTA was promulgated, in Massachusetts, *see* 310 CMR 7.11(2), and remaining on the books) and this current proposal.³ Nonetheless, when SIP rules are needed to protect the public health and welfare, they play a vital role in the larger federal structure. Past CARB comments relied upon by the railroads are not to the contrary.

Though the railroads suggest that they must be regulated predominantly by uniform federal rules, they ignore the environmental gaps that SIPs are designed to fill under the Clean Air Act under certain circumstances in the national regulatory scheme. *See* AAR Reply at 24-25, UP Reply at 4-11. Of course national uniformity is a core concern in managing the rail system, as the ICCTA provides. But SIPs are part of this national system and provide an important fine-tuning function when necessary to protect the public. Although national air quality standards, including EPA's own rules, do much to control emissions, local problems in specific areas can persist and cause serious health issues without the additional focused regulation for those regions. As the Supreme Court explained in *Union Electric*, SIPs are an important means to achieve this end. *See, e.g.*, 427 U.S. at 250. In the railroad context, this point is particularly clear. EPA sets national emission standards for new locomotives and locomotive engines, 42 U.S.C. § 7547(a)(5), and California may, with EPA's permission set its own standards (which other

³ The count might inch up to three if a Rhode Island SIP rule barring unnecessary idling by nonroad engines in some circumstances were construed to cover locomotives. *See* 73 Fed. Reg. 16, 203 (Mar. 27, 2008). EPA approved that rule in a "direct final" action without taking comments, indicating that it viewed it as uncontroversially appropriate as an air pollution control measure.

states may adopt) for non-new locomotives and locomotive engines that are not expressly preempted, *id.* § 7543(e)(1) and (2).⁴ But neither the EPA standards nor the California standards under those sections of the Clean Air Act focus primarily upon operational matters, as opposed to equipment specifications, even though operations can be an important emissions source. Such “in-use” operational regulations are instead left to the states. *See Engine Manufacturers Association v. U.S. EPA*, 88 F.3d 1075, 1090-91, 1094-94 (D.C. Cir. 1996); *see also* “Final Rule, Emission Standards for Locomotives and Locomotive Engines,” 63 Fed. Reg. 18978, 18993-44 (focal point is whether a state or local rule affects the design and manufacture of the locomotive or locomotive engine) and EPA’s “Regulatory Announcement, Federal Preemption of State and Local Control of Locomotives” December 1997, a copy of which has been submitted into the docket, as Attachment B to Reply of Association of American Railroads, February 14, 2014 (“The regulations prohibit state and local governments from adopting or enforcing any controls that significantly affect a locomotive manufacturer’s or remanufacturer’s design.”). Any operational control measures adopted by a state or local governmental agency would be incorporated in SIPs only as appropriate or necessary. Where such rules are necessary to achieve critical public health goals, and can be implemented harmoniously with ICCTA, they play a role no other regulatory measure can easily replicate – as the STB’s *Stampede Pass* ruling and its progeny recognize.

Thus, SIP rules only come to the fore when the larger national regulatory machinery is insufficient to achieve or maintain compliance with national ambient air quality standards in particular areas. Only then would EPA, conducting the ICCTA harmonization analysis and weighing any railroad burdens against Clean Air Act mandates, likely deem operational railroad rules “necessary or appropriate” to meet Clean Air Act requirements, *see* 42 U.S.C. § 7410(a)(2)(A), and approve them into the SIP. Moreover, EPA is free to require SIP revisions, or to approve SIPs conditionally pending modifications in order to better harmonize any proposed rules. *See* 42 U.S.C. § 7410(k)(3)-(6). And even then, reviewing courts will be closely attentive to the balance between the ICCTA’s mandates and those of the Clean Air Act. Measures that tread even somewhat significantly on core ICCTA concerns are unlikely to move forward unless they address a concomitantly serious public health threat which cannot otherwise reasonably be managed.

⁴ The railroads’ filings discuss some issues concerning the interpretation of sections 209 and 213 and other Clean Air Act provisions. These issues are, of course, not before the STB; the EPA will consider them in its larger SIP approval process.

Thus, there is no real risk of tumbling down the slippery slope into a world of widely varying and numerous state SIP rules regulating rail operations which the railroads warn against. *See, e.g.*, NSR Reply at 6-7. As we note above, CARB is aware of only two railroad-specific idling restrictions in, or proposed to be in, SIPs anywhere in the country – those proposed by South Coast and those in effect in Massachusetts. Future rules, if any, will have to be justified on the same careful Clean Air Act grounds, with an equally careful look towards ICCTA’s mandates. If more rules are proposed, they will move forward, under harmonization analysis, only if necessary to effectuate Congress’s purposes, and only after careful review to address potential burdens to the railroads.

In light of the careful review given to federal SIP provisions, and their important but focused role for compliance with federal law, the railroads’ substantial reliance on past CARB legal counsel statements from 2005 concerning then-purely *local* proposed rules is misplaced. *See, e.g.*, UP Reply at 18-19 (citing CARB counsel’s “June 2005 CARB/Railroad Statewide Agreement on Particulate Emissions from Rail Yards, Public Comments Raising Legal Issues and Agency Responses, October 24, 2005”). That response to comments was drafted by CARB counsel in direct response to arguments critical of CARB’s decision to enter into a 2005 MOU with the railroads seeking voluntary emission reductions, rather than adopting direct state-level regulations of railroad operations. To state the obvious, in 2005, SIP-approved rules were not being considered by CARB. In defending the 2005 MOU, which CARB staff at the time believed was the most prudent approach to achieving immediate and significant emission reductions, rather than engaging in a rulemaking and likely litigation, the 2005 response focused exclusively on the alternatives of *state and local* regulations, not federal rules, and the chances those local rules would prevail in the courts if challenged. The concerns that the response expressed about federal preemption of local rules are consistent with STB rulings and court rulings at that time – and proved to be well-founded given the *AAR* decision. However, the document does not speak to the role of future *federalized* SIP rules, which have undergone careful section 110 review by EPA and which are needed to achieve attainment with ambient air quality standards under the Clean Air Act.

In short, though CARB’s 2005 document wrestles with real state law preemption challenges, the issue has shifted substantially consistent with the federal gap-filling function SIPs are intended to fulfill. Eight years after CARB’s legal comments, despite the imposition of substantial additional air quality controls on a variety of diesel sources and after the 2005 MOU, air quality continues to challenge regions of California, including South Coast, and federal air quality standards are likely to be tightened

further. Since 2005, the Ninth Circuit has also reaffirmed the bedrock principle that SIPs are federal law, in *Safe Air for Everyone*, among other cases, and the Ninth Circuit specifically applied this holding to South Coast's rules in *AAR*, directing that a harmonization analysis would apply to those rules if incorporated into the SIP. As a result, the harmonization question before EPA, on which the STB has been asked to advise with regard to ICCTA preemption, is whether the rules as submitted to EPA do not raise preemption issues or if additional modifications are necessary to harmonize those rules with ICCTA's separate mandates. EPA will conduct this review with the STB's views included in that record; judicial review may follow.

This process is designed to carefully determine whether gaps in the existing federal statutory scheme sufficiently endanger compliance with public health standards as to justify additional federal Clean Air Act rules in a nonattainment area. That process, or one much like it, will generally apply to SIP proposals. Given this careful review process, which is characteristic of EPA, railroad operational rules have very rarely made their way into SIPs, but, when they do, it will be because experts within EPA have determined that they are necessary to comply with federal law. In those instances, as the STB has long wisely recognized in its *Stampede Pass* line of decisions, ICCTA preemption will generally not apply because of the pressing need to comply with the coequal federal health and welfare mandates of the Clean Air Act. As a further safeguard, even in that circumstance, EPA can take steps to require revisions to the proposed SIP provisions to ensure that the purposes of both federal statutes are harmonized, in light of the relevant public health needs and any burdens on the rail system (informed by STB on that point, as appropriate). Federal courts conducting the final harmonization analysis will further police this boundary, foreclosing any possibility that SIP-based railroad operations rules will proliferate haphazardly. The process uses multiple layers of review in order to successfully put important air pollution protections in place in areas where they are federally required, without unduly impairing rail network operations. The STB should not disturb that framework here.

III. Conclusion

CARB recognizes STB's important role in overseeing national rail operations. CARB also appreciates STB's continuing concern with federal environmental mandates, and the role states and local air districts play in implementing those mandates as they relate to railroad air pollution emissions. The long-standing balance STB has struck is a good one – focusing skeptical scrutiny on purely local

measures bearing on railroad operations, while leaving room for the relatively few federally-required measures which have successfully run the gauntlet to achieve SIP approval by EPA. CARB respectfully recommends that the STB maintain that course here, while advising EPA as to any harmonization needs it should consider in the SIP approval process as conducts its own independent review of South Coast's proposal.

Filed: March 28, 2014.

Respectfully submitted,

CALIFORNIA AIR RESOURCES BOARD



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CERTIFICATE OF SERVICE

**STB Docket No. FD35803, United States Environmental Protection Agency Petition for
Declaratory Order; South Coast AQMD Rules 3501 and 3502.**

I, Jack Wursten, hereby certify that I have this day, March 28, 2014, caused to be served by first class mail, postage prepaid, a copy of "Supplemental Comments of the State of California Air Resources Board Re: Petition for Declaratory Order" in the above referenced proceeding to all parties of record in the docket as listed below.

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 28, 2014



Jack Wursten
Legal Secretary
California Air Resources Board