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February 10, 2014

**VIA OVERNIGHT MAIL**

Cynthia T. Brown  
Chief, Section of Administration, Office of Proceedings  
Surface Transportation Board  
395 E St., SW  
Washington, DC 20430

Re: DOCKET #35803, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REPLY TO PETITION FOR DECLARATORY ORDER  
SOUTH COAST AQMD RULES 3501 AND 3502

Dear Ms. Brown:

The undersigned in an attorney at law, serving as counsel for East Yard Communities for Environmental Justice (“EYCEJ”). EYCEJ is a non-profit environmental health and justice organization dedicated to creating a safe and healthy environment for communities disproportionately suffering the negative impacts of industrial pollution in Southeast Los Angeles and the City of Commerce. It is located at 2314 S. Atlantic Blvd, Commerce, California 90040, (323) 263-2113.

*EYCEJ writes to Reply to the referenced Petition and request that it be added to the service list for the referenced docket. It also requests the opportunity and invitation to present oral arguments, participate in conferences, appear at fact-finding hearings, and provide additional written submissions in this Docket.*

EYCEJ has been an active participant in the subject matter of this Petition, and strongly supports including locomotive idling Rules 3501 and 3502 in California’s State Implementation Plan (“SIP”) under the Clean Air Act (“CAA,” or “Act”). These Rules were forwarded by the South Coast Air Quality Management District (“SCAQMD,” or “District”) to the California Air Resources Board (“CARB,” or “Board”), and then on to the U.S. Environmental Protection Agency (“EPA”) for consideration. EPA forwarded the Rules to the Surface Transportation Board (“STB”) on January 24, 2014 under 5 U.S.C. § 554(e) and 49 U.S.C. § 721.

EYCEJ advocates for the 1,285,200 people who are exposed to excessive cancer risk on account of living near railyards in the South Coast Air Basin in Southern California.<sup>1</sup> We urge

<sup>1</sup>“Health Risk Assessment for the Four Commerce Railyards,” Report of the California Air Resources Board, Stationary Source Division (November 2007).

the STB to protect public health and welfare by finding the proposed idling Rules not preempted. The Rules are promulgated to protect public health and meet air quality standards under the federal CAA. Therefore, consistent with judicial and STB precedent, they are not preempted by Interstate Commerce Commission Termination Act. The lives of EYCEJ's community members depend on it.

This is a serious environmental justice issue. Recent, empirical academic research has concluded that "2000 Census data and GIS techniques to demonstrate significant diesel exposure disparities by race and income among residents living in close proximity to most of the 18 major freight rail yards in California where CARB has estimated high diesel cancer risks. We conclude that the location of existing or newly proposed rail yards in lower-income (working class/working poor) communities of color is a significant public health and environmental justice concern."<sup>2</sup> It is recommended with emphasis added to "require that regulatory agencies with responsibility for air pollution from rail yard facilities (including locomotives and other equipment) have *mandatory mechanisms in place* to reduce public health risks when analyses . . . show elevated cancer or other health risks from exposure to diesel exhaust or other pollutants."

EYCEJ has submitted several letters to EPA in connection with this matter. They are in the materials submitted by EPA to STB, but are also attached hereto as Exhibits A and B for official inclusion in Docket #35803.

In particular, we wish to emphasize the following to you:

#### **I. ON-GOING, EXTENDED IDLING MAKES RULES 3501 AND 3502 NECESSARY TO ADDRESS PUBLIC HEALTH AND ENVIRONMENTAL HAZARDS**

Contrary to the railroads' self-serving assertion that the problem of extended idling has been addressed, the need for implementation of the Rules is incontestable. EYCEJ members continue to regularly experience and report idling events that would be impermissible under the Rules. The following, just examples, are in Declarations attached in *Exhibit A* hereto, part of the record forwarded to you by EPA.

Maria Jauregui of 5816 Ferguson Drive, in Commerce, California relayed to EYCEJ staff that during the weekends of April 7, 14, 21 and 28, 2013, trains were parked behind her house with engines idling *all night*. She and her husband, Antonio, worry that breathing the morning air, which is "heavy" with diesel fumes, poses particular health threats for cancer survivors such as themselves. Additionally, Mrs. Jauregui informed EYCEJ that Union Pacific staff regularly leave locomotives idling and unattended for periods up to an hour during the day. Mrs. Jauregui presumes the train operators are taking lunch breaks, and believes that idling should not be permitted under those circumstances. Maria Garcia, at 5816½ Ferguson Drive in Commerce, California, confirmed the accuracy of Mrs. Jauregui's account, and reported virtually identical experiences.

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<sup>2</sup> "Global Trade, Local Impacts: Lessons from California on Health Impacts and Environmental Justice Concerns for Residents Living near Freight Rail Yards," Int. J. Environ. Res. Public Health 2014, 11(2), 1914-1941, attached hereto as *Exhibit C*.

If STB wants more evidence and first-hand accounts of idling near homes and other sensitive receptors, please let EYCEJ know. EYCEJ fervently believes that codification of SCAQMD Rules 3501 and 3502 would provide a level of certainty and enforceability on idling reduction to protect public health and meet air quality standards.

## II. JUDICIAL AND STB PRECEDENT SHOW RULES 3501 AND 3502 ARE NOT PREEMPTED

We urge STB to recognize that the Ninth Circuit decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2010) “*Ass’n of Am. R.Rs*” concerning Rules 3501 *et seq.* held that submission of the Rules to CARB, and then to EPA, for inclusion in the SIP is the appropriate and proper avenue for the District to pursue. *These Rules, adopted under federal CAA authority, are not preempted by the Interstate Commerce Commission Termination Act.* STB must reject the railroads’ arguments to the contrary.

The Ninth Circuit in *Ass’n of Am. R.Rs* held that “to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as “statewide implementation plans” under the Clean Air Act), ICCTA generally does not preempt [approved SIPs] because it is possible to harmonize the ICCTA with those federally recognized regulations.”<sup>3</sup> The Ninth Circuit further noted that “[n]othing in [the ICCTA] is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act[.]”

In fact, the American Association of Railroads’ correspondence to EPA in this Docket misleadingly ignores the February 24, 2012 District Court Order, after remand of *Ass’n of Am. R.Rs*, that allowed SCAQMD to forward Rules 3501 and 3502 on to CARB for SIP approval, expressly rejecting the railroads’ argument that this action was unlawful because of an earlier injunction concerning the Rules. This Order is included hereto in *Exhibit A*. Please review it carefully.

In that Order, District Court Judge John F. Walter lamented that the railroads were “unfortunately playing fast and loose with the Court.”<sup>4</sup> The Judge noted that efforts by the railroads to hold the SCAQMD in civil contempt for forwarding these Rules on to CARB for SIP approval were “completely disingenuous and frivolous,” and that their submissions were “misleading.”<sup>5</sup> One reason for Judge Walter’s ruling was the American Association of

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<sup>3</sup>*Ass’n of Am. R.Rs.*, 622 F.3d at 1098.

<sup>4</sup>*Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No.CV06-1416, Document 269 (C.D. Cal. Feb. 24, 2012) (Order Granting Defendants’ Motion to Vacate Order to Show Cause), at p. 4 (emphasis added) attached hereto in *Exhibit A*.

<sup>5</sup>*Id.*

Railroads' admission before the Ninth Circuit in *Ass'n of Am. R.Rs* that what the District:

“ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a harmonization question, And the answer to that is yes. That’s exactly what the statute provides for.”<sup>6</sup>

Thus, the District Court strongly rejected the railroads’ argument that *Ass'n of Am. R.Rs* prevented SIP approval, and ordered that this SIP approval process could proceed. *Exhibit A* hereto.

As a result, the *Ass'n of Am. R.Rs* litigation is not an obstacle to SIP approval. In fact, the *Ass'n of Am. R.Rs* case specifically envisions that inclusion in the SIP is the appropriate path to pursue. This was the explicit basis for the District Court’s ruling. To block this path would render the *Ass'n of Am. R.Rs* case and the February 24, 2012 District Court Order meaningless. We respectfully cannot understand how any objective analysis could come to a contrary view.

The railroads appear to suggest that the District Court and Ninth Circuit envisioned the District and ARB submitting the rules to EPA as part of a SIP revision, but that the Rules could not thereafter become part of the State’s SIP. No court would intend so such absurd result. In fact, the railroads “clearly represented” to the Ninth Circuit in *Ass'n of Am. R.Rs* that “submission of the Rules to CARB, and then to EPA, for inclusion in the SIP [is the] appropriate and proper avenue for the District to pursue.”<sup>7</sup> In sum, the Ninth Circuit’s explanation of the role of the SIP process is the key, precedential holding of *Ass'n of Am. R.Rs*.

The District and CARB, in part due to efforts by EYCEJ, are following a judicially-approved path to clean up the environment for the railyard-adjacent communities in South Los Angeles. EYCEJ requests that STB support these efforts to include the Rules in the SIP.

**Moreover, inclusion of the idling Rules in the SIP is absolutely consistent with STB’s own precedent.** The STB has noted that ICCTA does not preempt rules adopted under federal environmental statutes such as the CAA:

“[T]he Clean Air requires states to implement plans to protect and enhance air quality so as to promote the public health and welfare. See 42 U.S.C. section 7401 et seq. Rather than relegating state and local agencies to the periphery in implementing Federal law, the statutory scheme gives individual states the responsibility of developing and enforcing air quality programs that meet or exceed the national standards within their borders . . . [n]othing in King County or this decision is intended to interfere with the role of the states and local entities in implementing these federal laws.” *Cities of Auburn and Kent* (STB Finance Docket July 1, 1997) (emphasis added).

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<sup>6</sup>*Id.*

<sup>7</sup>*Id.* p 3.

Please consider EYCEJ a stakeholder and participant in this Petition. It is particularly troubled by the railroads' characterization of the benefits as being "probably zero," as it has on-the-ground factual support that the locomotive idling Rules would bring tremendous public health and welfare benefits to the communities that EYCEJ serves.

We would be happy to discuss any of these issues with the appropriate STB staff at any time. Thank you for your consideration of this Reply.

Sincerely,



Gideon Kracov, Esq. (Cal. Bar No. 179815)

Lawyer for

East Yard Communities for Environmental Justice

Exs. A-C

VERIFICATION

I, GIDEON KRACOV, verify that I have read the foregoing Reply, know the contents thereof, and that the same are true as stated to the best of my knowledge, information and belief. Further, I certify that I am qualified and authorized to file this statement. There is good ground for the document and it has not been interposed for delay.

  
\_\_\_\_\_  
Gideon Kracov

Executed on February 19, 2014

I certify that I have this day served copies of this Reply, and all Exhibits, upon all parties of record in this proceeding, by overnight delivery, from my Office in Los Angeles, CA:

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Regional Administrator  
United States EPA Region IX  
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2/10, 2014



Gideon Kracov, Esq.

**EXHIBIT A**

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January 7, 2013

**VIA E-MAIL AND CERTIFIED MAIL**

blumenfeld.jared@epa.gov

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Regional Administrator  
United States EPA Region IX  
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San Francisco, CA 94105

**Re: SUPPORT FOR APPROVAL OF SOUTH COAST AQMD RULES 3501 AND 3502  
INTO CALIFORNIA'S STATE IMPLEMENTATION PLAN**

Dear Mr. Blumenfeld:

This Office respectfully writes on behalf of East Yard Communities for Environmental Justice ("EYCEJ"). EYCEJ is an environmental health and justice organization located at 2317 Atlantic Avenue, Commerce, California 90040 that is dedicated to a safe and healthy environment for communities that disproportionately suffer the negative impacts of industrial pollution in Southeast Los Angeles County and throughout the State. In particular, EYCEJ is extremely concerned about the 1,285,200 persons exposed to excess cancer risk caused by emissions from the four Commerce, California railyards within the South Coast Air Basin.<sup>1</sup>

EYCEJ writes to request that the U.S. Environmental Protection Agency ("U.S. EPA") expeditiously approve South Coast Air Quality Management District ("SCAQMD" or "District") Rules 3501 and 3502 into California's State Implementation Plan ("SIP") under the federal Clean Air Act ("CAA" or "Act"). These Rules that address locomotive idling were forwarded by the California Air Resources Board ("CARB") to Region IX for SIP approval on or about August 30, 2012.

*The locomotive idling that is the subject of the Rules is a real and ongoing problem in the South Coast Air Basin, and we attach hereto as Exhibit A numerous declarations from community members under penalty of perjury that verify this.* The Rules, including the recordkeeping requirement in Rule 3501, will ensure that idling and emissions reductions will actually occur, and improve enforceability of those reductions.

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<sup>1</sup>"Health Risk Assessment for the Four Commerce Railyards," Report of the California Air Resources Board, Stationary Source Division (November 2007) at pp. 16-19.

U.S. EPA and the State have authority to include these Rules in the SIP. The Ninth Circuit Court of Appeals decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2010) concerning Rules 3501 *et seq.* held that submission of the Rules to CARB, and then to EPA, for inclusion in the SIP [is the] appropriate and proper avenue for the District to pursue. U.S. EPA must reject the railroads' arguments to the contrary. In fact, on February 24, 2012, the United States District Court, Central District of California issued an Order that allowed SCAQMD to forward Rules 3501 and 3502 on to CARB for SIP approval, rejecting the railroads' argument that this action was unlawful. This Order is attached hereto as *Exhibit B*.

EYCEJ therefore urges Region IX to support the CAA's policy goals of protecting public health and welfare by approving the Rules into the California SIP. The quality of life of EYCEJ's community members depends on it. *EYCEJ also requests that this letter be added to the U.S. EPA rulemaking docket for the Rules.*

**I. LOCOMOTIVE IDLING IS AN ONGOING PROBLEM IN THE SOUTH COAST AIR BASIN THAT MAKES RULES 3501 AND 3502 NECESSARY**

Contrary to the railroads' self-serving assertion that the problem of extended locomotive idling has been addressed by their voluntary agreements, *the need for implementation of the Rules is ongoing. EYCEJ members in the South Coast Air Basin continue to regularly experience and report idling events that would be subject to the Rules. We attach hereto as Exhibit A numerous affidavits from Commerce, California residents who complain about ongoing locomotive idling.* These witnesses all describe a continuing practice of idling at Union Pacific's East Yard Railyard in Commerce, California. The circumstances and pattern of the identified idling events is the same.

If U.S. EPA has *bona fide* concerns that such idling remains an issue, EYCEJ will be pleased to have community members contact you, or to arrange a "town hall" meeting with U.S. EPA personnel and the community on the idling issue.

By way of example, Maria Jauregui of 5816 Ferguson Drive, in Commerce, California reports that:

"On a semi-regular basis over the last two years, Union Pacific locomotives at the East Yard Railyard have been, and continue to be, left idling for extended periods of time, up to one hour, during which time staff/engineers leave the premises entirely, presumably for lunch or dinner breaks. I can hear the locomotives idling and see fumes emitted from the locomotive smokestacks. These cause annoyance to me and my family.

. . . Additionally, Union Pacific locomotives at the East Yard Railyard are left idling for long periods of time, often longer than 30 minutes, while staff/engineers

causally “hang out” in the yard listening to music and/or “chit chatting.” When neighbors request that the locomotive engines be turned off, the staff/engineers refuse to do so. Neighbors have refrained from making such requests in recent months because staff/engineers consistently respond to our requests by boarding the locomotive and honking of the train horn for extended periods for no apparent reason other than to retaliate against our community.” (See *Exhibit A attached hereto.*)

So too, Lourdes Beltran of 2302 Bedessen Avenue in Commerce, California declares that:

“I reside at 2302 Bedessen Avenue in Commerce, California where I have lived for over 20 years. . . .

I suffer from anxiety, which is aggravated by the consistent idling . . . (the tracks from the Union Pacific East Yard Railyard located about 100 feet from my home) . . .

I hear locomotives idling at the Union Pacific East Yard Railyard for over an hour at a time at least twice every night between the hours of 8pm and 8am. This has been consistent for years and continues today. I am alerted to the idling by prolonged noise and vibration caused by the engines . . .

I also identify strong fumes as an issue while the trains are idling.” (See *Exhibit A attached hereto.*)

*In sum, locomotive idling in the SCAQMD Air Basin is still an ongoing issue despite the railroads’ voluntary actions.* EYCEJ also wants to emphasize that polluting idling likely occurs at locations within the railyards where the public cannot serve as direct eyewitnesses. This is why the Rules are necessary.

## II. SIGNIFICANT BENEFITS WILL RESULT FROM INCLUDING RULES 3501 AND 3502 IN CALIFORNIA’S STATE IMPLEMENTATION PLAN

Codification of the Rules would provide a level of certainty and enforceability that our members deserve and the Act requires. The Rules, including the recordkeeping requirement in Rule 3501, will ensure that idling and emissions reductions will actually occur, and improve enforceability of those reductions. All additional reductions in toxic air emissions are meaningful for communities in the South Coast Air Basin, where the air is polluted not only by locomotives, but also related railyard operations, multiple local freeways (including a proposed freeway expansion) and industrial facilities.

Locomotive emissions alone account for 158 tons per day of NOx and 4.8 tons per day of PM in the State.<sup>2</sup> In the South Coast Air Basin, regulators recognize that “the severity of the region’s PM-2.5 problem and the attainment deadline make it necessary to further mitigate locomotive emissions in 2014.”<sup>3</sup> The railroads repeatedly emphasize their voluntary agreement to limit locomotive idling, so the Regional Administrator must ask -- why do the railroads fight these Rules so furiously?

Air toxic emissions from California railyards and locomotives also present a significant concern. Human health risk assessments for railyard communities in San Bernardino and Commerce show excess maximum cancer risk caused by local railyard operations as high as 3,300 per million.<sup>4</sup> This is far above generally accepted regulatory thresholds.<sup>5</sup> In fact, over three million Californians are exposed by railyard sources to excess cancer risk of more than ten in one million.<sup>6</sup> CARB insists that “every feasible effort” is needed to “reduce localized risk in communities adjacent” to the State’s railyards.<sup>7</sup>

The State of California has specifically identified diesel particulate matter (PM) as a toxic air contaminant, which is addressed in California’s implementation of the Act. Because of their microscopic sizes, PM 10 and PM 2.5 can penetrate deep in to the lungs, enter the bloodstream and carry with it an array of additional toxins. Health risks associated with diesel PM include increased incidence of cancer, respiratory illnesses (e.g. asthma), heart disease, and premature birth.<sup>8</sup> EYCEJ is particularly concerned that our children and seniors are especially susceptible to these health risks. Every missed school day means expanding an achievement gap that directly limits the potential for our children and communities, and indirectly limits the

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<sup>2</sup>California Air Resources Board, Recommendations to Implement Further Locomotive and Railyard Emission Reductions, September 9, 2009, p. 12, available at <http://www.arb.ca.gov/railyard/ted/ted.htm>.

<sup>3</sup>California Air Resources Board, Meeting to Consider Approval of the Proposed State Strategy for California’s State Implementation Plan -- Revised Staff Proposal, September 27, 2007, section 1 p. 4, available at [www.arb.ca.gov/planning/sip/2007sip/revcasip2007.pdf](http://www.arb.ca.gov/planning/sip/2007sip/revcasip2007.pdf).

<sup>4</sup>California Air Resources Board, Health Risk Assessment for the BNSF San Bernardino Railyard, June 11, 2008, p. 13, available at [www.arb.ca.gov/railyard/hra/hra.htm](http://www.arb.ca.gov/railyard/hra/hra.htm).

<sup>5</sup>In 1990, Congress adopted a one in one million threshold in Section 112 of the Clean Air Act, which requires the United States Environmental Protection Agency (EPA) to issue technology-based standards to reduce emissions of hazardous air pollutants and consider issuing residual risk standards if the excess cancer risk to the individual most exposed would exceed one in one million.

<sup>6</sup>See *supra* note 2 at p. 2.

<sup>7</sup>*Id.*

<sup>8</sup>“*Diesel and Health in America: The Lingering Threat*” available at <http://www.catf.us/resources/publications> (reporting that diesel emissions are responsible for heart attacks, cancer and over 20,000 premature deaths. Between now and 2030, 100,000 premature deaths could be avoided by an aggressive but feasible national program to clean up today’s dirty diesels.) (February 2005).

contributions they can make to the State and Nation.

Additionally, when adult income earners are forced to miss work on account of illness associated with PM emissions—or must stay home to care for the young or elderly in their families who become sick—avoidable economic strain falls on already economically disadvantaged families. The direct health care costs of pollution related illness impose further economic pressure on our communities and under-resourced local and State health care systems.

Any additional emissions reduction that result from implementation the idling rules will serve the primary purpose of the Clean Air Act, “to promote the public health and welfare and the productive capacity of [the] population.”<sup>9</sup> It is SCAQMD’s duty and authority, “subject to the powers and duties of [CARB]” to: i) craft rules and regulations that “provide for the prevention and abatement of air pollution episodes which[,] cause discomfort or health risks to, or damage to the property of, a significant number of person or class of persons;” and ii) “enforce all applicable provisions of state and federal law.”<sup>10</sup>

EYCEJ therefore implores U.S. EPA to endorse CARB’s SIP revision. In doing so, EPA will uphold both the environmental and environmental justice values embodied in the Act.

**III. U.S. EPA AND THE STATE HAVE AUTHORITY TO IMPOSE THESE RULES IN THE SIP, AND U.S. EPA SHOULD DISREGARD THE RAILROADS’ CONTINUED PATTERN OF “PLAYING FAST AND LOOSE” WITH THE LAW AND FACTS**

*The railroads’ September 12, 2012 letter to U.S. EPA suggests that the idling Rules cannot lawfully be included in the California SIP. This is wrong, contradicted by controlling legal authority, and the railroads’ own prior concessions.*

On February 24, 2012, the United States District Court, Central District of California issued an Order (*see* attached *Exhibit B*) that allowed SCAQMD to forward Rules 3501 and 3502 on to CARB for SIP approval, rejecting the railroads’ argument that this action was unlawful.

In that Order, the Judge John F. Walter lamented that the railroads were “unfortunately playing fast and loose with the Court.”<sup>11</sup> The Judge noted that efforts by the railroads to hold the

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<sup>9</sup>Clean Air Act of 1963, § 7401, 42 U.S.C. § 7401 (1990).

<sup>10</sup>Cal. Health & Safety Code §40001(a)-(b).

<sup>11</sup>*Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No.CV06-1416, Document 269 (C.D. Cal. Feb. 24, 2012) (Order Granting Defendants’ Motion to Vacate Order to Show Cause), at p. 4 (emphasis added) *attached hereto as Exhibit B*.

SCAQMD in civil contempt for forwarding these Rules on to CARB for SIP approval were “completely disingenuous and frivolous,” and that their submissions were “misleading.”<sup>12</sup>

We therefore caution the Regional Administrator and U.S. EPA staff to review the railroads’ submissions and legal analysis with a skeptical eye.

**A. The Ninth Circuit Held That Rules 3501 and 3502 Can, And Should, Be Included in California’s SIP**

The Ninth Circuit Court of Appeals decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2010) concerning Rules 3501 *et seq.* clearly held that submission of the Rules to CARB, and then to EPA, for inclusion in the SIP [is the] appropriate and proper avenue for the District to pursue.

In fact, the Ninth Circuit’s explanation of the role of the SIP process is the key holding of the *Association of Am. Railroads v. S. Coast Air Qual. Mgmt Dist.* While the Ninth Circuit did invalidate the Rules as presented then without SIP-approval, the case provides a clear path by which such state and local air quality rules can survive pre-emption. The opinion holds at p. 1098 that: “to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as ‘statewide implementation plans’ under the Clean Air Act), ICCTA generally does not preempt those regulations because it is possible to harmonize the ICCTA with those federally recognized regulations. *See, e.g., Bos. & Me. Corp., 2001 WL 458685*, at (‘[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act [and the federal clean water statutes].’).”

*Thus, Association of Am. Railroads v. S. Coast Air Qual. Mgmt Dist. provides a path to avoid pre-emption under the Interstate Commerce Commission Termination Act (“ICCTA”), 9 U.S.C. § 10501(b). This path is the SIP.*

This holding sets valuable precedent for air quality regulators. Pursuant to *Association of Am. Railroads v. S. Coast Air Qual. Mgmt Dist.*, 622 F.3d at 1098, the principle of harmonization will apply if the rules are submitted by California pursuant to the Clean Air Act to U.S. EPA and then approved as part of California’s SIP. “Once approved by EPA, state implementation plans have ‘the force and effect of federal law.’” That is what is occurring now in this submission to Region IX, and these Rules should be approved into the SIP.

In reality, the railroads have conceded this in other venues. Before the Ninth Circuit, the railroads stated “[t]hat’s exactly what the statute provides for.” In that venue, the railroads stated that the District:

“ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a

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<sup>12</sup>*Id.*

harmonization question, And the answer to that is yes. That's exactly what the statute provides for."<sup>13</sup>

That is why Judge Walter later forcefully rejected the railroads' arguments to the contrary (*see Exhibit B hereto.*)

*Despite this, the railroads again play "fast and loose," now arguing in their letters to Region IX that the Rules cannot be included in the SIP. Please reject this argument. Both the Ninth Circuit and District Court already have done so.*

**B. The Proposed Rules Are Not Pre-Empted By, Nor Do They Conflict With, the Federal Clean Air Act**

*Association of Am. Railroads v. S. Coast Air Qual. Mgmt Dist.* provides a clear path by which State and local governments can adopt rules to reduce rail pollution as part of their required SIP duties under the Clean Air Act. Pursuant to *Association of Am. Railroads v. S. Coast Air Qual. Mgmt Dist.*, once approved by U.S. EPA pursuant to the Act, such rules will be "harmonized" with, and not preempted by, the federal Clean Air Act or the ICCTA law. In fact, U.S. EPA has SIP-approved anti-idling regulations for diesel engines including train locomotives in other jurisdictions. These include Massachusetts Vehicle Idling Regulation 310 CMR 7.11 U(2) for diesel trains (*see attached Exhibit C.*)

We also note for the record that the SIP submission package for the Rules included detailed legal analysis on the pre-emption topic, including the SCAQMD memoranda dated November 21, 2011, March 20, 2012 and letter dated August 9, 2012. We agree with the District's analysis and do not write to reiterate all that, but please consider the following:

Section 116 of the Clean Air Act [42 U.S.C. §7416] creates a general presumption against pre-emption of rules such as those proposed, and specifically addresses the *retention* of State authority. Under this presumption, states (and their political subdivisions) are generally *not* pre-empted from adopting or enforcing rules regarding control or abatement of air pollution, or the emissions that cause such pollution.<sup>14</sup> Furthermore, Section 209(d) expressly *permits* states to craft "in-use requirements," granting states and their agents "the right otherwise to control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles."<sup>15</sup> In *Engine Mfrs. Ass'n v. EPA*, the D.C. Circuit specifically references "programs to control

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<sup>13</sup>*Id.*

<sup>14</sup>42 U.S.C. §7416. "Except as otherwise provided in sections 1857c-10(c), (e), and (f)(as in effect before August 7, 1977), 7543, 7545(c)(4) and 7573 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution ...."

<sup>15</sup>42 U.S.C. §7543(d).

extended idling of vehicles” as a typical example of “in-use requirements” *not* pre-empted by Section 209.<sup>16</sup> Here, the core mandate of the District and CARB’s SIP amendment is a 30 minute idling time-limit for certain locomotives in specific geographical areas that confront extraordinary air pollution challenges. The idling Rules are the very type of state and local regulation Congress and the courts have contemplated as protected from pre-emption.

The railroads characterize the time limit on idling as an emission standard pre-empted under Section 209(e). Such a characterization should be rejected. Section 209(e) pre-empts a State (or political subdivision) from adopting or enforcing a “*standard* or other requirement relating to the control of *emissions*.” The Supreme Court has interpreted the statutory phrase “standard relating to the control of emissions” as “denot[ing] requirements such as *numerical emission levels* with which vehicles or engines must comply.”<sup>17</sup> The Rules at issue here are plainly not an emission standard that require locomotives to meet any numerical emissions level. Rather, the Rules are an “in use” or “operational” requirement that limits engine idling time in and around communities suffering the impacts of toxic emissions in excessive amounts *from* railroad operations.

Additionally, in the unlikely event that a court found the Rules to constitute emissions standards under 209(e), rather than in-use requirements under 209(d), Section 209 specifically provides for California to apply for a waiver. If granted, the waiver would void any pre-emption and allow implementation and enforcement by the District.

Lastly, the assertion that Rule 3502 conflicts with similar federal requirements, and is therefore pre-empted, is false. The Rule applies only to: (1) unattended locomotives (which do not need comfort heating or cooling); see Rule 3502(d)(1), or, in other cases, to (2) trailing locomotives (i.e., lead locomotive); see Rule 3502(d)(2). This assures that locomotive operators will not face circumstances where they cannot comply with both the letter and spirit of the federal requirements. Because it is not impossible to comply with the federal regulation and the District regulation, there is no conflict with federal requirements. *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).

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<sup>16</sup> *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1094 (D.C. Cir. 1996).

<sup>17</sup> *Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) [emphasis not in original]; 42 U.S.C. § 7543(a).

C. **Harmonization With ICCTA Is Not A Barrier to SIP Approval**

Please do not let the railroads' ICCTA "bogyman" deter your action to clean the air -- there are many instances where ICCTA does not pre-empt environmental protection and health and safety laws.<sup>18</sup>

The SCAQMD has provided detailed and persuasive legal analysis on the ICCTA harmonization issue in its memoranda dated November 21, 2011, March 20, 2012 and letter dated August 9, 2012. In its analysis, SCAQMD cites *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252-254 (3d Cir. 2007), which holds that "[t]he touchstone [of this analysis] is whether the state regulation imposes an unreasonable burden on railroading." *Overcoming ICCTA pre-emption is far from insurmountable* -- "the substance of the regulation must not be so draconian that it prevents the railroad from carrying out its business in a sensible fashion," and "the regulation must be settled and definite enough to avoid open-ended delays." *Id.* Here, narrowly tailored Rules 3501 and 3502 easily pass these hurdles.

Also, please consider that this is not a case where ICCTA is being used to pre-empt a local law such as is the case in many ICCTA decisions cited by the railroads including *City of Auburn v. United States*, 154 F.3d 1025, 1027-1030 (9th Cir. 1998). Here, delegation under federal law is at issue -- the federal Clean Air Act. In this instance, it is far harder for the railroads to establish pre-emption. In fact, the federal Surface Transportation Board decisions interpreting the intersection of ICCTA and the federal Clean Air Act specifically have acknowledged that ICCTA should not interfere with the CAA:

"[T]he Clean Air Act requires states to implement plans to protect and enhance air quality so as to promote the public health and welfare. See 42 U.S.C. section 7401 et seq. Rather than relegating state and local agencies to the periphery in implementing Federal law, the statutory scheme gives individual states the responsibility of developing and enforcing air quality programs that meet or exceed the national standards within their borders . . . [n]othing in *King County* or this decision is intended to interfere with the role of the states and local entities in implementing these federal laws." *Cities of Auburn and Kent – Burlington Northern Railroad Co.*, STB Fin. Docket No. 33200, 197 WL 362017,

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<sup>18</sup>See *Emerson v. Kansas City Railway Co.*, 503 F.3d 1126, 1131-1132 (10th Cir. 2007) (ICCTA does not preempt tort claims); *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 255-257 (3d Cir. 2007) (court finds state solid waste regulations are "not *per se* unreasonable"); *Hi Tech Transp., LLC v. City of New Jersey*, 382 F.3d 295, 308 (3<sup>rd</sup> Cir. 2004); *Hackensack Riverkeeper v. Delaware Ostego Co.*, 450 F.Supp.2d 467, 478 (D.N.J. 2006) (Resource Conservation and Recovery Act claim not ICCTA preempted); *J.P. Rail v. New Jersey Pinelands*, 404 F.Supp.2d 636, 652 (D.N.J. 2005); *Holland v. DelRay Connecting Railroad Co.*, 311 F.Supp.2d 744, 757 (N.D.Ind. 2004) (court rejects ICCTA exclusive and primary jurisdiction arguments in Coal Industry Health Benefits Act case); *Jones v. Union Pacific Railroad Company* (2000) 79 Cal.App. 4th 1053, 1060 (nuisance locomotive noise problems not pre-empted).

at \*4 (STB July 1, 1997); *see also Boston and Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971, 2201 WL 45685, at \*5 (STB April 30, 2001).”<sup>19</sup>

#### IV. CONCLUSION

EYCEJ respectfully urges your Office to support the CAA’s policy goals of protecting public health and welfare by approving SCAQMD Rules 3501 et seq. into the California SIP.

EYCEJ is a stakeholder, and requests that it be added to all public notice and service lists concerning U.S. EPA review or approval of the California SIP revision submission of SCAQMD Rules 3501 and 3502. EYCEJ respectfully requests that this letter be added to the U.S. EPA rulemaking docket for the Rules. EYCEJ also reserves the right to provide your Office with additional information and comments.

EYCEJ is particularly troubled by the railroads’ characterization of the benefits of these idling Rules as being “probably zero,” as we have provided on-the-ground factual support (*see Exhibit A hereto*) that limiting the time locomotives can idle in the South Coast Air Basin would bring tremendous public health and welfare benefits to our communities. Locomotive idling is a real and ongoing problem, despite the railroads’ voluntary actions. The Rules, including the recordkeeping requirement in Rule 3501, will ensure that idling and emissions reductions will actually occur, and improve enforceability of those reductions.

The railroads repeatedly emphasize their voluntary agreement to limit locomotive idling, so the Regional Administrator must question why do the railroads fight these idling Rules so furiously? One is reminded of Act III of Hamlet: the railroads “doth protest too much, methinks.”

EYCEJ also wishes to re-emphasize that the Ninth Circuit Court of Appeals decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094 (9<sup>th</sup> Cir. 2010) concerning Rules 3501 et seq. held that “submission of the Rules to CARB, and then to EPA, for inclusion in the SIP [is the] appropriate and proper avenue for the District to pursue.” U.S. EPA must reject the railroads’ arguments to the contrary. In fact, the United States District Court, Central District of California issued an Order in February 2012 that allowed SCAQMD to forward Rules 3501 and 3502 on to CARB for SIP approval, rejecting the railroads’ argument that this action was unlawful.

EYCEJ would like the opportunity to discuss the Rules and the issues raised in this comment letter with the appropriate U.S. EPA staff. My contact information is set forth on the letterhead and Angelo Logan, Co-Director of EYCEJ, can be contacted at 323-263-2113 or [alogan@eycej.org](mailto:alogan@eycej.org).

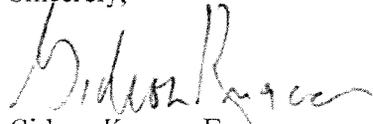
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<sup>19</sup>The United States Supreme Court has held that the Clean Air Act is not preempted by federal transportation agency laws. *See Massachusetts v. United States E.P.A.*, 549 U.S. 497, 532 (2007) (federal Department of Transportation jurisdiction does not preempt Clean Air Act greenhouse gas control efforts).

Jared Blumenfeld  
January 7, 2013  
Page 11

Thank you for your consideration of these comments.

Sincerely,



Gideon Kracov, Esq.  
Counsel for East Yard Communities for Environmental Justice

Exs. A-C

CC (via email):

Deborah Jordan  
Andy Steckel  
Deldi Reyes  
Carlin Hafiz  
James Goldstene  
Cynthia Marvin  
Ellen Peter  
Elaine Chang  
Kurt Wiese  
Barbara Baird  
Veera Tyagi  
Dan Selmi  
Kim Foy  
Penny Newman  
David Pettit  
Adrian Martinez  
Paul Cort  
Jesse Marquez  
Bahram Fazeli

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EXHIBIT A

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STATEMENT OF MARIA JAUREGUI

I, Maria Jauregui, an over 18 years of age, have personal knowledge of each fact stated herein and could and would testify competently thereto. I wish the following statement to be incorporated into the record of the U.S. Environmental Protection Agency (EPA) compiled for considering revision of California's State Implementation Plan (SIP) to include the South Coast Air Quality Management District proposed Rules 3501 and 3502:

1. I reside at 5816 Ferguson Drive in Commerce, California.

2. My husband, Antonio, and I are both survivors of cancer. Recently, Antonio has developed Parkinson's disease. My home is adjacent to the Union Pacific East Yard Railyard. I am able to see the Railyard because my home is approximately 100 feet or less from the fenceline of the Railyard, with the tracks close by.

3. On a semi-regular basis over the last two years, Union Pacific locomotives at the East Yard Railyard have been, and continue to be, left idling for extended periods of time, up to one hour, during which time staff/engineers leave the premises entirely, presumably for lunch or dinner breaks. I can hear the locomotives idling and see fumes emitted from the locomotive smokestacks. These cause annoyance to me and my family.

4. Additionally, Union Pacific locomotives at the East Yard Railyard are left idling for long periods of time, often longer than 30 minutes, while staff/engineers causally "hang out" in the yard listening to music and/or "chit chatting." When neighbors request that the locomotive

1 engines be turned off, the staff/engineers refuse to do so. Neighbors have refrained from making  
2 such requests in recent months because staff/engineers consistently respond to our requests by  
3 boarding the locomotive and honking of the train horn for extended periods for no apparent  
4 reason other than to retaliate against our community.

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6 I declare under penalty of perjury under the laws of the State of California that the  
7 foregoing is true and correct. Executed on 12-21-12, 2012, at Commerce,  
8 California.

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11 Maria Jauregui

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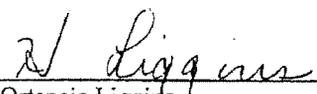
STATEMENT OF <sup>H</sup>ORTENCIA LIGGINS

I, Ortencia Liggins, an over 18 years of age, have personal knowledge of each fact stated herein and could and would testify competently thereto. I wish the following statement to be incorporated into the record of the U.S. Environmental Protection Agency (EPA) compiled for considering revision of California's State Implementation Plan (SIP) to include the South Coast Air Quality Management District proposed Rules 3501 and 3502:

1. I reside at 4576 Leonis St. in Commerce, California. My home is less than 100 feet from the Union Pacific East Yard Railyard.

2. I have observed locomotives idling at the Union Pacific East Yard Railyard for 45 minutes to one hour after midnight on a regular basis. This continues to occur. I am alerted to the idling by prolonged noise and vibration caused by the engines.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on Jan 4<sup>th</sup>, 2012, at Commerce, California.

  
H Ortencia Liggins

**EXHIBIT B**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND  
JS-6

CIVIL MINUTES -- GENERAL

Case No. **CV 06-01416-JFW (PLAx)**

Date: February 24, 2012

Title: Association of American Railroads, et al. -v- South Coast Air Quality Management District, et al.

---

**PRESENT:**

**HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE**

**Shannon Reilly**  
Courtroom Deputy

**None Present**  
Court Reporter

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

**PROCEEDINGS (IN CHAMBERS):**

**ORDER GRANTING DEFENDANTS' MOTION TO  
VACATE ORDER TO SHOW CAUSE  
[filed 1/27/2012; Docket No. 257]**

On January 27, 2012, Defendants South Coast Air Quality Management District and the Governing Board of South Coast Air Quality Management District (collectively, the "District") and Dr. Barry Wallerstein, Dr. Elaine Chang, and Barbara Baird, Esq. (collectively, the "Contempt Defendants") filed a Motion to Vacate Order to Show Cause. On February 6, 2012, Association of American Railroads, BNSF Railway Company, and Union Pacific Railroad Company (collectively "Plaintiffs") filed their Opposition. On February 13, 2012, the District and Contempt Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for February 27, 2012 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On April 30, 2007, following a bench trial, the Court issued its Findings of Facts and Conclusions of Law in this action, concluding that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, preempted the District's Rules 3501, 3502, and 3503 (collectively the "Rules"), and that the District lacked state law authority to adopt these Rules. On May 17, 2007, in accordance with the Findings of Facts and Conclusions of Law, the Court entered a Judgment and Permanent Injunction ("Permanent Injunction"), which provides in relevant part:

1. District Rule 3503, adopted by the Governing Board on October 7, 2005, and District Rules 3501 and 3502, adopted by the Governing Board on February 3, 2006, are preempted in their entirety by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*
2. Under Plaintiffs' First Cause of Action, the District, the Governing Board, and their board members, officers, agents, employees, attorneys and all others acting in concert or participation with them, are hereby permanently enjoined from implementing or enforcing any provision of Rules 3501, 3502 or 3503.

On May 30, 2007, Defendants appealed the Judgment and Permanent Injunction. On September 15, 2010, the Ninth Circuit issued a published opinion affirming this Court's Judgment and Permanent Injunction. *Ass'n of Am. Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

On November 2, 2011, the District, acting through its employees, including Executive Officer Dr. Barry Wallerstein, Deputy Executive Officer for Planning, Rule Development & Area Sources Dr. Elaine Chang, and District Counsel Barbara Baird, formally submitted Rules 3501 and 3502 to the California Air Resources Board ("CARB") and requested that CARB submit the Rules to the United States Environmental Protection Agency for its review and inclusion in California's State Implementation Plan ("SIP") under the federal Clean Air Act.

On December 7, 2011, Plaintiffs filed a Motion for an Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt or, in the Alternative, an Order of Contempt, claiming that the District and Contempt Defendants have violated and continue to violate the provisions of the Permanent Injunction, by submitting Rules 3501 and 3502 to CARB. The Court declined to enter the requested Order of Contempt, but concluded, based on the record submitted by the parties, that Plaintiffs had made the minimal required showing for the issuance of the Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt. Accordingly, the Court issued the Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt ("Order to Show Cause"), and set a briefing schedule and date for the evidentiary hearing or "trial."

On January 27, 2012, the District and Contempt Defendants, represented by new counsel, filed the pending Motion to Vacate Order to Show Cause, which included a transcript of the oral argument before the Ninth Circuit. The transcript was not presented to the Court, and therefore not considered by the Court in its decision to issue the Order to Show Cause.<sup>1</sup>

## II. DISCUSSION

After reviewing the transcript of the oral argument before the Ninth Circuit, the Court concludes that the Order to Show Cause was improvidently granted, due to the incomplete and

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<sup>1</sup>The Court finds Plaintiffs' Objection to Defendants' Filing of Certified Transcript of Oral Argument Before Ninth Circuit completely disingenuous and frivolous.

misleading record presented to the Court. Quite frankly, the Court is surprised and disappointed that Plaintiffs did not voluntarily agree to vacate the Order to Show Cause, upon reviewing the transcript of the oral argument and Plaintiffs' Motion to Vacate Order to Show Cause.

Plaintiffs' counsel, Mr. Jenkins, clearly represented to the Ninth Circuit that the District's submission of the Rules to CARB, and then to EPA, for inclusion in the SIP would be an appropriate and proper avenue for the District to pursue. Indeed, at the outset of his argument, Mr. Jenkins stated:

I'd like to start out by addressing, Judge Rymer, the point that you were making toward the end, which is, isn't what [the District] ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a harmonization question. And the answer to that is yes. That's exactly what the statute provides for.

Transcript of Oral Argument, 13:4-11.

Moreover, in response to the Ninth Circuit's questioning regarding the effect of this Court's determination that the District did not have authority to adopt the Rules, Mr. Jenkin's reaffirmed that the District's submission of the Rules to CARB would not be prohibited by the Court's determination, and in fact, would be permissible:

**Judge Graber:** You started by saying, gee, if they just get the State to put this in the State Plan and then it's fine, because they you have a . . . harmonizing -- between the Clean Air Act and ICCTA. How do they get from here to there, if your position is that they can't even get started?

**Mr. Jenkins:** They can propose a regulation, Your Honor. They can't implement it. They can propose it; CARB can adopt it; EPA can approve it. And if it's approved, that doesn't mean we still won't -- won't challenge it, because we still have this harmonization issue. But if it's approved, at least they have the harmonization argument.

*Id.* at 23:1-14.

Based on the arguments and position advanced by Plaintiffs before the Ninth Circuit, the Court concludes that Plaintiffs are judicially estopped from claiming that the District's submission of the Rules to CARB violates the provisions of the Court's Permanent Injunction in this action. As the Ninth Circuit recently stated:

Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts. Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion.

*Wagner v. Prof'l Eng'rs in California Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004) (quotations and citations omitted). "[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle" and there are no "inflexible prerequisites" for determining the applicability of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2011).

In this case, the Court concludes that Plaintiffs are unfortunately "playing fast and loose" with the Court, and allowing Plaintiffs to take a totally inconsistent position in these contempt proceedings would be fundamentally unfair and constitute a gross miscarriage of justice. Although the Court recognizes that the scope of the Permanent Injunction was never at issue before the Ninth Circuit, Plaintiffs clearly represented to the Ninth Circuit that it would be appropriate for the District to submit the Rules to CARB. And, the Ninth Circuit tacitly approved that position: "Because the District's rules have not become a part of California's EPA-approved state implementation plan, they do not have the force and effect of federal law, even if they might *in the future*." *Ass'n of Am. Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (emphasis added).

### III. CONCLUSION

For the foregoing reasons, the Motion to Vacate Order to Show Cause is **GRANTED**. The Order to Show Cause is hereby **VACATED**. Although the Court is concerned by the conduct of Plaintiffs' counsel in pursuing the Order to Show Cause after reviewing the complete transcript of the oral argument before the Ninth Circuit and Plaintiffs' Motion to Vacate Order to Show Cause, the Court declines to award sanctions.<sup>2</sup>

IT IS SO ORDERED.

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<sup>2</sup>The Court is equally concerned by the District's submission to CARB of the Memorandum of State Law Authority authored by the District's counsel, Barbara Baird. The Memorandum of State Law Authority blatantly ignored this Court's determination that the District lacked authority to adopt the Rules by stating: "[T]he District has authority under state law to adopt the rules." Declaration of Mark E. Elliott [Docket No. 227-2], Exhibit 1 at 34. It is difficult to understand how competent counsel could take that position in light of the clear ruling of this Court. In any event, the Court is confident that this misrepresentation will be raised by Plaintiffs in any further regulatory proceedings relating to this matter.

EXHIBIT C

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## AIR & CLIMATE

### 310 CMR 7.11: Massachusetts Vehicle Idling Regulation

#### 7.11: U Transportation Media

##### (1) Motor Vehicles.

(a) All motor vehicles registered in the Commonwealth shall comply with pertinent regulations of the Registry of Motor Vehicles relative to exhaust and sound emissions.

(b) No person shall cause, suffer, allow, or permit the unnecessary operation of the engine of a motor vehicle while said vehicle is stopped for a foreseeable period of time in excess of five minutes. 310 CMR 17.11 shall not apply to:

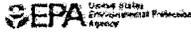
1. vehicles being serviced, provided that operation of the engine is essential to the proper repair thereof, or
2. vehicles engaged in the delivery or acceptance of goods, wares, or merchandise for which engine assisted power is necessary and substitute alternate means cannot be made available, or
3. vehicles engaged in an operation for which the engine power is necessary for an associated power need other than movement and substitute alternate power means cannot be made available provided that such operation does not cause or contribute to a condition of air pollution.

(c) 310 CMR 7.11(1)(b) is subject to the enforcement provisions specified in 310 CMR 7.52.

##### (2) Diesel Trains.

(a) No person owning or operating a diesel powered locomotive shall cause, suffer, allow, or permit said locomotive to be operated in a manner such as to cause or contribute to a condition of air pollution.

(b) No person shall cause, suffer, allow, or permit the unnecessary foreseeable idling of a diesel locomotive for a continuous period of time longer than 30 minutes. 310 CMR 7.00 shall not apply to diesel locomotives being serviced provided that idling is essential to the proper repair of said locomotive and that such idling does not cause or contribute to a condition of air pollution.



**EPA New England Topics**

Serving Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont & 10 Tribal Nations

**EPA-Approved Massachusetts Regulations**

Subpart - Massachusetts

Section \*\*\*\*\*\* Identification of plan.

(c) EPA approved regulations.

EPA Approved Massachusetts Regulations  
(As of July 9, 2010.)

You will need Adobe Acrobat to view some of the files on this page. See [EPA's PDF page](#) to learn more about PDFs, and for a link to the free Acrobat Reader.

State Citation	Title / Subject	State Effective Date	EPA Approval Date	Explanations
<a href="#">310 CMR 8.04 (PDF)</a> (1 pp, 105K)	Standards	07/25/1990	10/04/2002 67 FR 62184	Adopted PM10 as the criteria pollutant for particulates.
<a href="#">310 CMR 7.00 (PDF)</a> (38 pp, 199K)	Definitions.	11/15/1993	02/01/1995	
		05/11/1994	60 FR 6027	
		07/30/1993	10/15/1996 61 FR 53628	
		02/17/1993	09/03/1999 64 FR 48297	
		07/30/1996	04/11/2000 65 FR 19323	
		01/11/1995	04/11/2000	
		03/29/1995	65 FR 19323	
		07/25/1995	12/18/2000	
	08/09/2000	65 FR 79974		
	09/11/2000			
	07/25/1990	10/04/2002 67 FR 62184		
	12/01/2006	07/31/2008 73 FR 44654	Addition of the term, "Boston Metropolitan Planning Organization." [See: Electronic Docket Number EPA-R01-OAR-2006-1018 at <a href="http://www.regulations.gov">www.regulations.gov</a> ]	
<a href="#">310 CMR 7.00 Appendix A (PDF)</a> (23 pp, 223K)	Emission Offsets and Nonattainment Review.	07/15/94 and 04/14/95	10/27/2000 65 FR 64360	Approving 1990 CAAA revisions and general NSR permit requirements.
<a href="#">310 CMR 7.00 Appendix B (PDF)</a> (19 pp, 93K)	Emission Banking, Trading and Averaging.	02/09/1994 03/29/1995	08/08/1996 61 FR 41335	Except 310 CMR 7.00 Appendix B(3)(e)5.h.
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (2 pp, 109K)	Regulation 1 General Regulations to Prevent Air Pollution.	01/27/1972	05/31/1972 37 FR 10841	
<a href="#">Regulations for Prevention And/or Abatement of Air Pollution Episode and Air Pollution Incident Emergencies (PDF)</a> (2 pp, 109K)	Regulation 1 Introduction.	08/28/1972	10/28/1972 37 FR 23055	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (15 pp, 126K)	Regulation 2 Plans Approval and Emission Limitations.	02/01/1978	03/15/1979 44 FR 15703	Regulation 2 is now known as 310 CMR 7.02.
<a href="#">Regulations for Prevention And/or Abatement of Air Pollution Episode and Air Pollution Incident Emergencies (PDF)</a> (2 pp, 109K)	Regulation 2 Definitions.	08/28/1972	10/28/1972 37 FR 23055	

<a href="#">310 CMR 7.02 (PDF)</a> (4 pp, 113K)	Plans Approval and Emission Limitations.	06/06/1994	04/05/1995 60 FR 17226	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (19 pp, 93K)	Regulation 3 Nuclear Energy Utilization Facilities.	06/01/1972	10/28/1972 37 FR 23085	
<a href="#">310 CMR 7.03 (PDF)</a> (1 pg, 105K)	Plan Application Exemption Construction Requirements. Paint Spray Booths 310 CMR 7.03(13)	02/17/1993	09/03/1999 64 FR 48297	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (19 pp, 93K)	Regulation 4 Fossil Fuel Utilization Facilities.	01/27/1972	10/28/1972 37 FR 23085	Regulation 4 is now known as 310 CMR 7.04
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (2 pp, 106K)	Regulation 5 Fuels	08/31/1978	03/07/1979 44 FR 12421	Regulation 5 is now known as 310 CMR 7.05.  Portions of Regulation 5 have been replaced with the approval of 310 CMR 7.05
<a href="#">310 CMR 7.05 (PDF)</a> (12 pp, 130K)	Fuels All Districts	02/11/1988	11/25/1988 51 FR 42563	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (2 pp, 107K)	Regulation 6 Visible Emissions.	08/28/1972	10/28/1972 37 FR 23085	Regulation 6 is now known as 310 CMR 7.06
<a href="#">310 CMR 7.07 (PDF)</a> (3 pp, 111K)	Open Burning.	09/28/1979	06/17/1980 45 FR 40987	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (2 pp, 157K)	Regulation 8 Incinerators.	08/28/1972	10/28/1972 37 FR 23085	Regulation 8 is now known as 310 CMR 7.08
<a href="#">310 CMR 7.08 (PDF)</a> (19 pp, 232K)	Incinerators, Municipal Waste Combustors 310 CMR 7.08(2).	01/11/1999	09/02/1999 64 FR 48095	
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (1 pg, 105K)	Regulation 9 Dust and Odor.	12/09/1977	09/29/1978 43 FR 44841	Regulation 9 is now known as 310 CMR 7.09
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (1 pg, 105K)	Regulation 10 Noise.	06/01/1972	10/28/1972 37 FR 23085	Regulation 10 is now known as 310 CMR 7.10.
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (2 pp, 107K)	Regulation 11 Transportation Media.	06/01/1972	10/28/1972 37 FR 23085	Regulation 11 is now known as 310 CMR 7.11. This regulation restricts idling.
<a href="#">310 CMR 7.12 (PDF)</a> (2 pp, 106)	Inspection Certificate, Record Keeping and Reporting.	06/28/1990 09/30/1992 07/15/1994	03/21/1996 61 FR 11558	The 06/28/1990 and 09/30/1992 submittals deal with the permitting process. The 07/15/1994 submittal develops 7.12 to comply with emission statement requirements.
<a href="#">Regulations for the Control of Air Pollution (PDF)</a> (19 pp, 93K)	Regulation 13 Stack Testing.	06/01/1972	10/28/1972 37 FR 23085	Regulation 13 is now known as 310 CMR 7.13
<a href="#">310 CMR 7.14 (PDF)</a> (1 pg, 105K)	Monitoring Devices and Reports	11/21/1998 01/15/1987	03/10/89 54 FR 10147	
<a href="#">Regulations for Prevention And/or Abatement of Air Pollution Episode and Air Pollution Incident Emergencies</a>	Regulation 15, Asbestos	08/28/1972	10/28/1972 37 FR 23085	Regulation 15 is now known as 310 CMR 7.15
<a href="#">310 CMR 7.16 (PDF)</a> (7 pp, 120K)	Reduction of Single-Occupant Commuter Vehicle Use.	12/31/1978 05/16/1979	09/16/1980 45 FR 61293	
<a href="#">310 CMR 7.17 (PDF)</a> (2 pp, 107K)	Conversions to Coal	01/22/1982	06/09/82 47 FR 25007	
<a href="#">310 CMR 7.18 (PDF)</a> (63 pp, 267K)	Volatile and Halogenated Organic Compounds	10/07/1999	10/04/2002 67 FR 62179	
<a href="#">310 CMR 7.19 (PDF)</a> (28 pp, 222K)	Reasonably Available Control Technology (RACT) for Sources of Oxides of Nitrogen (NOx)	11/19/1999	12/27/2000 65 FR 81743	
<a href="#">310 CMR 7.34 (PDF)</a> (36 pp, 192K)	Organic Material Storage and Distribution.	08/09/2000 09/11/2000	12/18/2000 65 FR 78974	

**EXHIBIT B**

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November 8, 2013

**VIA E-MAIL AND U.S. MAIL**

blumenfeld.jared@epa.gov

Jared Blumenfeld  
Regional Administrator  
United States EPA Region IX  
75 Hawthorne Street  
San Francisco, CA 94105

Re: **SUPPORT FOR APPROVAL OF SOUTH COAST AQMD RULES 3501 AND 3502  
INTO CALIFORNIA'S STATE IMPLEMENTATION PLAN**

Dear Mr. Blumenfeld:

This Office respectfully writes on behalf of East Yard Communities for Environmental Justice (“EYCEJ”) with regard to the referenced matter. Let this letter follow up on our January 7, 2013 letter to you on this topic, and specifically respond to the latest October 1, 2013 letter from the American Association of Railroads. Let this also reiterate our request to meet with you to discuss these Rules.

EYCEJ is an environmental health and justice organization located at 2317 Atlantic Avenue, Commerce, California 90040 that is dedicated to a safe and healthy environment for communities that disproportionately suffer the negative impacts of industrial pollution in Southeast Los Angeles County and throughout the State. In particular, EYCEJ is extremely concerned about the 1,285,200 persons exposed to excess cancer risk caused by emissions from the four Commerce, California railyards within the South Coast Air Basin.<sup>1</sup>

EYCEJ writes to reiterate that the U.S. Environmental Protection Agency (“U.S. EPA”) should expeditiously approve South Coast Air Quality Management District (“SCAQMD” or “District”) Rules 3501 and 3502 into California’s State Implementation Plan (“SIP”) under the federal Clean Air Act (“CAA” or “Act”). These Rules that address locomotive idling were forwarded by the California Air Resources Board (“CARB”) to Region IX for SIP approval on or about August 30, 2012.

<sup>1</sup>“Health Risk Assessment for the Four Commerce Railyards,” Report of the California Air Resources Board, Stationary Source Division (November 2007) at pp. 16-19.



EYCEJ explained in its January 7, 2013 letter to you that the locomotive idling that is the subject of the Rules is a real and ongoing problem in the South Coast Air Basin, and the letter attached several declarations from community members under penalty of perjury that verified this. We explained that the Rules, including the recordkeeping requirement in Rule 3501, will ensure that idling and emissions reductions will actually occur, and improve enforceability of those reductions.

We write now to respond to two issues raised in the October 1, 2013 letter from the American Association of Railroads.

First, with regard to the American Association of Railroads' argument concerning CAA Section 110(a)(2)(E), and the effect of prior litigation over the Rules, we urge U.S. EPA to recognize that the Ninth Circuit decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9<sup>th</sup> Cir. 2010) concerning Rules 3501 *et seq.* held that submission of the Rules to CARB, and then to EPA, for inclusion in the SIP is the appropriate and proper avenue for the District to pursue. U.S. EPA must reject the railroads' arguments to the contrary.

*In fact, the American Association of Railroads' October 1, 2013 letter again misleadingly ignores the February 24, 2012 District Court Order that allowed SCAQMD to forward Rules 3501 and 3502 on to CARB for SIP approval, expressly rejecting the railroads' argument that this action was unlawful because of an earlier injunction concerning the Rules.* This Order is attached hereto as *Exhibit A*. Please review it carefully.

In that Order, District Court Judge John F. Walter lamented that the railroads were "unfortunately playing fast and loose with the Court."<sup>2</sup> The Judge noted that efforts by the railroads to hold the SCAQMD in civil contempt for forwarding these Rules on to CARB for SIP approval were "completely disingenuous and frivolous," and that their submissions were "misleading."<sup>3</sup> One reason for Judge Walter's ruling was the American Association of Railroads' admission before the Ninth Circuit that what the District:

"ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a harmonization question, And the answer to that is yes. That's exactly what the statute provides for."<sup>4</sup>

Thus, the District Court strongly rejected the railroads' argument that the injunction prevented SIP approval, and ordered that this SIP approval process could proceed. *Exhibit A hereto*. As a result, Section 110(a)(2)(E), and the *Association of American Railroads v. South*

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<sup>2</sup>*Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No.CV06-1416, Document 269 (C.D. Cal. Feb. 24, 2012) (Order Granting Defendants' Motion to Vacate Order to Show Cause), at p. 4 (emphasis added) *attached hereto as Exhibit A*.

<sup>3</sup>*Id.*

<sup>4</sup>*Id.*

Thus, the District Court strongly rejected the railroads' argument that the injunction prevented SIP approval, and ordered that this SIP approval process could proceed. *Exhibit A hereto*. As a result, Section 110(a)(2)(E), and the *Association of American Railroads v. South Coast Air Quality Management District* litigation are not an obstacle to SIP approval. In fact, the *Association of American Railroads v. South Coast Air Quality Management District* case specifically envisions that inclusion in the SIP is the appropriate path to pursue. This was the explicit basis for the District Court's ruling. To block this path would render the *Association of American Railroads v. South Coast Air Quality Management District* case and the February 24, 2012 District Court Order meaningless. We respectfully cannot understand how Region IX, or its counsel, could come to a contrary view.

Second, the American Association of Railroads' October 1, 2013 letter includes a cursory September 27, 2013 letter, barely over a page long, from the Federal Railroad Administration ("FRA") concerning Rules 3501 and 3502. This letter should be given very little weight. As a preliminary matter, the SCAQMD has confirmed that the FRA, and its staff, did not contact or discuss the matter with SCAQMD beforehand. This is unfortunate conduct by a federal agency that is charged with evenhanded application of its mandate. Thus, its letter is of negligible value as it is based on, at best, an incomplete view of the matter. We encourage FRA to speak with the District, and are informed that the District is confident that it has, and can, resolve any FRA concerns.

In addition, please be informed that the actions of the FRA are given very narrow preemptive effect in this area. Here, the FRA has not, and cannot, cite to any of its regulations that address criteria air pollutant standards, or locomotive idling limits that protect air quality. *In fact, FRA regulations are silent with respect to idling rules to limit air emissions from locomotives, and FRA's September 27, 2013 letter expressly concedes this.*

In this circumstance, FRA and the Federal Railway Safety Act ("FRSA") plainly do not preempt Rules 3501 and 3502. The FRSA has an express savings clause, and FRSA preemption applies only in very narrow situations. FRSA or FRA rules that merely "touch upon" or "relate to" the subject matter *do not preempt*, rather preemption lies only if the subject matter is "subsumed" by FRSA or FRA rules "covering" the issue. This is a very restrictive, narrowly interpreted standard for preemption that cannot be met here since FRA's letter specifically admits that it "does not have regulations specifically covering the subject matter." See *MD Mall Associates v. CSX* 715 F.3d 479, 493 (3d Cir. 2013) (no FRSA preemption of stormwater discharge regulations); *New Orleans & Gulf Railway Co. v. Marinovich Barrois* 533 F.3d 321, 337 (5<sup>th</sup> Cir. 2008) (no FRSA preemption of railroad crossing matter); *Tufariello v. Long Island Railroad* 458 F.3d 80, 86 (2d Cir. 2006) (hearing loss claim not preempted by FRSA regulations); *Shanklin v. Norfolk Southern* 369 F.3d 978, 988 (6<sup>th</sup> Cir. 2004) (state law vegetation growth claim not FRSA preempted); *Stozyk v. Norfolk Southern* 358 F.3d 268, 273 (3d Cir. 2004) (lawsuit concerning poor visibility at railroad crossing not preempted); *South Pac. v. Pub. Util. Com'n.* 9 F.3d 807, 813 (9<sup>th</sup> Cir. 1993) (regulation of train whistles not preempted by FRA); *Southern Pac. v. Pub. Util. Com'n.* 647 F.Supp. 1220, 1222 (N.D.Cal. 1986), aff'd 820 F.2d 1111 (9<sup>th</sup> Cir. 1987) (state regulations on minimum distances between freight cars not FRSA

preempted).<sup>5</sup>

For these reasons, EYCEJ respectfully urges Region IX to support the CAA's policy goals of protecting public health and welfare by approving SCAQMD Rules 3501 et seq. into the California SIP. These Rules have been with Region IX for over fourteen (14) months. Please act now.

EYCEJ respectfully would like the opportunity to discuss the Rules and the issues raised in this comment letter with Region IX, and its Administrator. My contact information is set forth on the letterhead and Angelo Logan, Director of EYCEJ, can be contacted at 323-263-2113 or [alogan@eycej.org](mailto:alogan@eycej.org). EYCEJ also reserves the right to provide your Office with additional information and comments.

Thank you for your consideration of these comments.

Sincerely,



Gideon Kracov, Esq.  
Counsel for East Yard Communities for Environmental Justice

Ex. A

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<sup>5</sup> The same narrow, restrictive scope of preemption also applies to the Locomotive Inspection Act. *Union Pacific v. Cal. P.U.C.* 346 F.3d 851, 869 (9<sup>th</sup> Cir. 2003).

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EXHIBIT A

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND  
JS-6

CIVIL MINUTES -- GENERAL

Case No. **CV 06-01416-JFW (PLAx)**

Date: February 24, 2012

Title: Association of American Railroads, et al. -v- South Coast Air Quality Management District, et al.

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**PRESENT:**

**HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE**

**Shannon Reilly**  
Courtroom Deputy

**None Present**  
Court Reporter

**ATTORNEYS PRESENT FOR PLAINTIFFS:**

None

**ATTORNEYS PRESENT FOR DEFENDANTS:**

None

**PROCEEDINGS (IN CHAMBERS):**

**ORDER GRANTING DEFENDANTS' MOTION TO  
VACATE ORDER TO SHOW CAUSE  
[filed 1/27/2012; Docket No. 257]**

On January 27, 2012, Defendants South Coast Air Quality Management District and the Governing Board of South Coast Air Quality Management District (collectively, the "District") and Dr. Barry Wallerstein, Dr. Elaine Chang, and Barbara Baird, Esq. (collectively, the "Contempt Defendants") filed a Motion to Vacate Order to Show Cause. On February 6, 2012, Association of American Railroads, BNSF Railway Company, and Union Pacific Railroad Company (collectively "Plaintiffs") filed their Opposition. On February 13, 2012, the District and Contempt Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for February 27, 2012 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

**I. PROCEDURAL AND FACTUAL BACKGROUND**

On April 30, 2007, following a bench trial, the Court issued its Findings of Facts and Conclusions of Law in this action, concluding that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, preempted the District's Rules 3501, 3502, and 3503 (collectively the "Rules"), and that the District lacked state law authority to adopt these Rules. On May 17, 2007, in accordance with the Findings of Facts and Conclusions of Law, the Court entered a Judgment and Permanent Injunction ("Permanent Injunction"), which provides in relevant part:

1. District Rule 3503, adopted by the Governing Board on October 7, 2005, and District Rules 3501 and 3502, adopted by the Governing Board on February 3, 2006, are preempted in their entirety by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*
2. Under Plaintiffs' First Cause of Action, the District, the Governing Board, and their board members, officers, agents, employees, attorneys and all others acting in concert or participation with them, are hereby permanently enjoined from implementing or enforcing any provision of Rules 3501, 3502 or 3503.

On May 30, 2007, Defendants appealed the Judgment and Permanent Injunction. On September 15, 2010, the Ninth Circuit issued a published opinion affirming this Court's Judgment and Permanent Injunction. *Ass'n of Am. Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094 (9th Cir. 2010).

On November 2, 2011, the District, acting through its employees, including Executive Officer Dr. Barry Wallerstein, Deputy Executive Officer for Planning, Rule Development & Area Sources Dr. Elaine Chang, and District Counsel Barbara Baird, formally submitted Rules 3501 and 3502 to the California Air Resources Board ("CARB") and requested that CARB submit the Rules to the United States Environmental Protection Agency for its review and inclusion in California's State Implementation Plan ("SIP") under the federal Clean Air Act.

On December 7, 2011, Plaintiffs filed a Motion for an Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt or, in the Alternative, an Order of Contempt, claiming that the District and Contempt Defendants have violated and continue to violate the provisions of the Permanent Injunction, by submitting Rules 3501 and 3502 to CARB. The Court declined to enter the requested Order of Contempt, but concluded, based on the record submitted by the parties, that Plaintiffs had made the minimal required showing for the issuance of the Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt. Accordingly, the Court issued the Order to Show Cause Why South Coast Air Quality Management District and its Employees Should Not Be Held in Civil Contempt ("Order to Show Cause"), and set a briefing schedule and date for the evidentiary hearing or "trial."

On January 27, 2012, the District and Contempt Defendants, represented by new counsel, filed the pending Motion to Vacate Order to Show Cause, which included a transcript of the oral argument before the Ninth Circuit. The transcript was not presented to the Court, and therefore not considered by the Court in its decision to issue the Order to Show Cause.<sup>1</sup>

## II. DISCUSSION

After reviewing the transcript of the oral argument before the Ninth Circuit, the Court concludes that the Order to Show Cause was improvidently granted, due to the incomplete and

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<sup>1</sup>The Court finds Plaintiffs' Objection to Defendants' Filing of Certified Transcript of Oral Argument Before Ninth Circuit completely disingenuous and frivolous.

misleading record presented to the Court. Quite frankly, the Court is surprised and disappointed that Plaintiffs did not voluntarily agree to vacate the Order to Show Cause, upon reviewing the transcript of the oral argument and Plaintiffs' Motion to Vacate Order to Show Cause.

Plaintiffs' counsel, Mr. Jenkins, clearly represented to the Ninth Circuit that the District's submission of the Rules to CARB, and then to EPA, for inclusion in the SIP would be an appropriate and proper avenue for the District to pursue. Indeed, at the outset of his argument, Mr. Jenkins stated:

I'd like to start out by addressing, Judge Rymer, the point that you were making toward the end, which is, isn't what [the District] ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a harmonization question. And the answer to that is yes. That's exactly what the statute provides for.

Transcript of Oral Argument, 13:4-11.

Moreover, in response to the Ninth Circuit's questioning regarding the effect of this Court's determination that the District did not have authority to adopt the Rules, Mr. Jenkin's reaffirmed that the District's submission of the Rules to CARB would not be prohibited by the Court's determination, and in fact, would be permissible:

**Judge Graber:** You started by saying, gee, if they just get the State to put this in the State Plan and then it's fine, because they you have a . . . harmonizing -- between the Clean Air Act and ICCTA. How do they get from here to there, if your position is that they can't even get started?

**Mr. Jenkins:** They can propose a regulation, Your Honor. They can't implement it. They can propose it; CARB can adopt it; EPA can approve it. And if it's approved, that doesn't mean we still won't -- won't challenge it, because we still have this harmonization issue. But if it's approved, at least they have the harmonization argument.

*Id.* at 23:1-14.

Based on the arguments and position advanced by Plaintiffs before the Ninth Circuit, the Court concludes that Plaintiffs are judicially estopped from claiming that the District's submission of the Rules to CARB violates the provisions of the Court's Permanent Injunction in this action. As the Ninth Circuit recently stated:

Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts. Judicial estoppel applies to a party's stated position whether it is an expression of intention, a statement of fact, or a legal assertion.

*Wagner v. Prof'l Eng'rs in California Gov't*, 354 F.3d 1036, 1044 (9th Cir. 2004) (quotations and citations omitted). "[T]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle" and there are no "inflexible prerequisites" for determining the applicability of judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2011).

In this case, the Court concludes that Plaintiffs are unfortunately "playing fast and loose" with the Court, and allowing Plaintiffs to take a totally inconsistent position in these contempt proceedings would be fundamentally unfair and constitute a gross miscarriage of justice. Although the Court recognizes that the scope of the Permanent Injunction was never at issue before the Ninth Circuit, Plaintiffs clearly represented to the Ninth Circuit that it would be appropriate for the District to submit the Rules to CARB. And, the Ninth Circuit tacitly approved that position: "Because the District's rules have not become a part of California's EPA-approved state implementation plan, they do not have the force and effect of federal law, even if they might *in the future*." *Ass'n of Am. Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (emphasis added).

### III. CONCLUSION

For the foregoing reasons, the Motion to Vacate Order to Show Cause is **GRANTED**. The Order to Show Cause is hereby **VACATED**. Although the Court is concerned by the conduct of Plaintiffs' counsel in pursuing the Order to Show Cause after reviewing the complete transcript of the oral argument before the Ninth Circuit and Plaintiffs' Motion to Vacate Order to Show Cause, the Court declines to award sanctions.<sup>2</sup>

IT IS SO ORDERED.

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<sup>2</sup>The Court is equally concerned by the District's submission to CARB of the Memorandum of State Law Authority authored by the District's counsel, Barbara Baird. The Memorandum of State Law Authority blatantly ignored this Court's determination that the District lacked authority to adopt the Rules by stating: "[T]he District has authority under state law to adopt the rules." Declaration of Mark E. Elliott [Docket No. 227-2], Exhibit 1 at 34. It is difficult to understand how competent counsel could take that position in light of the clear ruling of this Court. In any event, the Court is confident that this misrepresentation will be raised by Plaintiffs in any further regulatory proceedings relating to this matter.

**EXHIBIT C**

Article

## Global Trade, Local Impacts: Lessons from California on Health Impacts and Environmental Justice Concerns for Residents Living near Freight Rail Yards

Andrea Hricko <sup>1,\*</sup>, Glovioell Rowland <sup>1</sup>, Sandrah Eckel <sup>1</sup>, Angelo Logan <sup>2</sup>, Maryam Taher <sup>3</sup>  
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**Abstract:** Global trade has increased nearly 100-fold since 1950, according to the World Trade Organization. Today, major changes in trade are occurring with the advent of mega-ships that can transport thousands more containers than cargo ships now in use. Because global trade is expected to increase dramatically, the railroad industry—in the U.S. alone—has invested more than \$5 billion a year over the past decade to expand rail yards and enhance rail routes to transport goods from ports to retail destinations. This article describes cancer risks for residents living in close proximity to rail yards with emissions of diesel particulate matter pollution from locomotives, trucks and yard equipment. The article examines the demographics (income, race/ethnicity) of populations living in the highest estimated cancer risk zones near 18 major rail yards in California, concluding that the majority are over-represented by either lower-income or minority residents (or both). The authors also describe a review of the news media and environmental impact reports to determine if rail yards are still being constructed or expanded in close

proximity to homes and schools or in working class/working poor communities of color. The paper suggests policy efforts that might provide more public health protection and result in more “environmentally just” siting of rail yards. The authors conclude that diesel pollution from rail yards, which creates significant diesel cancer risks for those living near the facilities, is an often overlooked public health, health disparities and environmental justice issue in the U.S. The conclusions are relevant to other countries where international trade is increasing and large new intermodal rail facilities are being considered.

**Keywords:** air pollution; diesel exhaust; environmental health; environmental justice; exposure; health disparities; international trade; land use; particulate matter; race/ethnicity; rail

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## Abbreviations

BNSF: BNSF Railway Company, formerly Burlington Northern Santa Fe Railway  
CA: California  
CARB: California Air Resources Board  
CSX: CSX Corporation  
DPM: diesel particulate matter  
EJ: environmental justice  
HRA: Health Risk Assessment  
IARC: International Agency for Research on Cancer  
ICTF: intermodal container transfer facility  
UP: Union Pacific Railroad  
U.S.: United States

## 1. Introduction

In the U.S., major freight railroads are making record investments in infrastructure, with more than a dozen new rail yard facilities built or proposed during the past few years across the country in anticipation of increased international trade [1]. Part of the railroads’ impetus in these investments is the Panama Canal expansion, expected to be completed in 2015, which will allow the world’s largest container ships, for the first time, to pass through the Canal. Many ports are expanding their operations or even dredging their harbors so that they can be competitive in attracting the larger ships, especially from Asia, once the new locks on the Canal are finished [2]. In response, the largest freight railroad companies are building or expanding major rail facilities both near ports and further inland to handle the transfer of containers filled with goods, made mostly in China and other Asian countries, between one mode of transportation (e.g., trucks) to another (e.g., trains)—a process referred to as “intermodal” rail [3]. Ports and rail operations are expanding in other countries, as well, in anticipation of mega-container ships and increased trade potential [4].

Intermodal rail facilities employ significant amounts of diesel-fueled equipment, including line-haul (cross-country) locomotives, switch engines (which stay in the rail yards), cranes, and yard equipment. After arriving from Asia on ships, containers most often are trucked by heavy-duty diesel trucks emitting diesel particulate matter or moved by trains with diesel-fueled locomotives to their destinations. Concerns about the health effects of exposure to diesel exhaust emissions have been raised for decades [5]. In 2002, the U.S. Environmental Protection Agency (EPA) diesel assessment stated that “long-term (*i.e.*, chronic) inhalation exposure is likely to pose a lung cancer hazard to humans, as well as damage the lung in other ways depending on exposure [6]”. In 2012, the International Agency for Research on Cancer, part of the World Health Organization, went further by classifying diesel engine exhaust as “carcinogenic to humans (Group 1), based on sufficient evidence that exposure is associated with an increased risk for lung cancer [7]”. A recent study estimated that 6% of all lung cancer deaths in the U.S. and United Kingdom are related to diesel exhaust exposure, including in the workplace and general population [8].

Some rail yards in the U.S. were built decades (or even a century) ago; others were built more recently or within the past 30 years. Today, many residents live in close proximity to many of these older yards, raising concerns about exposure to traffic-related air pollution, including from diesel-fueled trucks hauling containers in and out of rail yards. A recent study in the southeastern United States found that rail yard emissions led to increases of particulate matter and black carbon (as a marker for diesel emissions) [9]. A study of a rail yard in northern California found emissions of particulates, sulfur dioxide, metals and polycyclic aromatic hydrocarbons [10]. Meanwhile, the body of research evidence is growing that shows adverse health effects from living or going to school in close proximity to traffic-related air pollution. These include effects such as reduced lung function in exposed children [11], increased asthma prevalence and incidence [12–14]; effects in pregnant women [15] and their offspring (*e.g.*, premature births [16]); harmful effects in adults and the elderly including possibly cognitive decline [17] and heart attacks [18]; and more.

Because of such studies and concerns raised by residents and community groups, the California Air Resources Board (CARB) has developed guidelines for siting new residences, schools, day care centers, playgrounds, and medical facilities (*i.e.*, sensitive receptors) near certain types of operations, including highways and rail yards, among others. The guidelines state the following about rail yards:

*“We recommend doing everything possible to avoid locating sensitive receptors within the highest risk zones at ports and rail yards... Avoid siting new sensitive land uses within 1,000 feet of a major service and maintenance rail yard. Within one mile of a rail yard, consider possible siting limitations and mitigation approaches [19].”*

The CARB guidelines operate in only one “direction” when land use decisions are made. They suggest how far away schools and other “sensitive receptors” (*e.g.*, facilities for children, the elderly and the ill) should be located from ports/rail yards/highways. But they do not make recommendations for land use decisions that would site new highway, port or rail facilities near these same types of sensitive land uses, such as schools. The guidelines specify that one should avoid siting a school near a rail yard, but are silent on whether it is acceptable to site a rail yard in close proximity to a school, with CARB deferring to local government authorities on that issue. Thus, railroads are able to claim that the CARB guidelines do not pertain to them when siting new intermodal facilities in California.

Community-based groups and residents in California have been calling for stricter regulations on locomotive and rail yard pollution for nearly 10 years [20]. Although California has been more active than other states in trying to reduce diesel exhaust from rail yards, in that state only *voluntary* agreements have been negotiated between the freight railroads and CARB to reduce diesel particulate matter pollution [21], with CARB arguing that Federal laws protect the railroads from state regulations. Language in a 2005 agreement required CARB to produce a HRA for each of the 18 major rail yards in the state, based on emissions inventories provided by the major freight railroads. In CA, these railroads include only BNSF and UP, which are the two largest freight railroads in the country. CARB completed the last of the rail yard HRAs in 2008 [22].

The state's largest rail yards are located in southern California, and these have been the focus of significant attention by residents, environmental and community organizations and a community-academic collaborative called THE Impact Project [23,24], all calling for a reduction in diesel emissions to protect public health [25]. Some of the community-based groups in southern California have held educational rallies to inform others about the diesel cancer risks [26] and have called for stricter regulation of diesel locomotives and for rules on rail yard emissions [27]. Members of these groups express concern about disproportionate impacts and "environmental justice" (EJ), which the U.S. Environmental Protection Agency defines as:

*"... the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies [28]."*

Many investigators have conducted EJ research, examining whether specific groups are more highly exposed to pollution when compared to other racial/ethnic/income groups [29–31]. Some studies in California have looked at environmental justice and air toxics [32]; EJ and drinking water contamination [33]; and the disproportionate presence of liquor stores in certain neighborhoods [34].

This is the first published study, to our knowledge, to assess issues of race and income near California's 18 major rail yards and to determine if residents are correct about their perceived claims of disproportionate impacts for lower-income and minority residents living near the facilities. The authors review the HRAs for the state's 18 major rail yards and analyze the demographics of residents living near them, which were not examined by CARB staff, in order to assess potential racial and economic disparities. Ten years ago, an analysis was commissioned by the U.S. Environmental Protection Agency (EPA) to support its locomotive engine rule. That analysis investigated the populations living in close proximity to a representative sample of 37 U.S. rail yards, including three yards in California [35].

We also review news media and trade journal articles to determine whether environmental justice and disproportionate impacts, as well as proximity to homes and schools, are considerations in the siting of new rail yard facilities around the country, and we offer some alternatives for what might constitute "environmentally just" siting.

Overall, our objectives in this paper are to:

- Describe the number of California residents who live in the zones of highest diesel cancer risk near existing rail yards in the state and determine if there are racial/ethnic and income disparities among them;

- Determine through a review of the news media and trade journals whether new or expanding rail yards are taking into consideration the proximity of schools and homes to the newly proposed sites, as well as the potential for disproportionate impacts; and
- Offer insights into what makes an intermodal rail yard unique in terms of industrial facilities and what types of considerations are needed to help ensure that rail yard siting or expansion takes community, public health and environmental justice concerns into account.

## **2. Background Information from the California Air Resources Board Health Risk Assessments**

Between 2005–2008, the California Air Resources Board (CARB) published a Health Risk Assessment (HRA) for each of the 18 major rail yards in California (CA) [36], using guidance from the California Office of Health Hazard Evaluation and Assessment (OEHHA) [37,38]. These HRAs looked at diesel particulate emissions from locomotives, cranes and yard equipment within the rail yard boundaries and also onsite and offsite emissions from heavy duty diesel-powered trucks that take containers to and from the rail yards.

### *2.1. Diesel Emissions at 18 California Rail Yards*

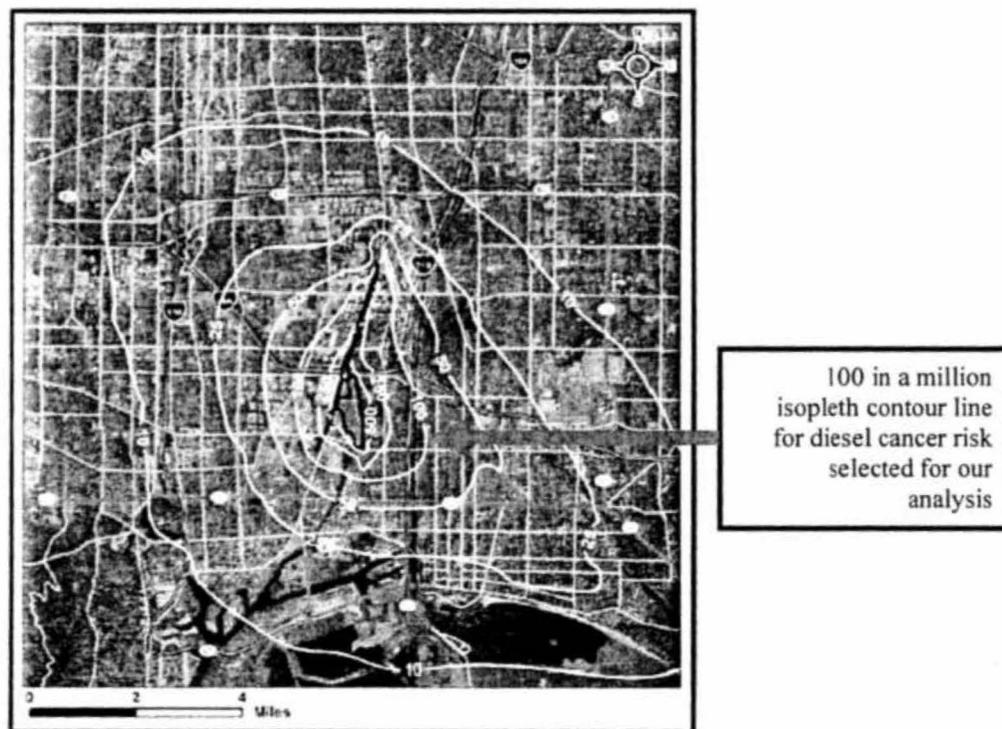
The CARB HRAs evaluated (through modeling efforts) the potential health risks associated with diesel particulate matter (DPM) emissions to those living nearby the rail yards, considering “the rail yard property emissions from locomotives, on-road heavy-duty trucks, cargo handling equipment, and off-road equipment used to move bulk cargo; also evaluated were mobile and stationary sources with significant emissions within a one-mile distance of the rail yard”. The estimates were based on 2005 emissions. Emissions from each individual yard ranged from a low of 1.7 annual tons to a high of 27.9 annual tons (Table 1, adapted from CARB HRA) [39]. CARB noted that residents of Commerce, CA, which has a population of 13,000, face particularly serious impacts because there are four rail yards located in that single community, with combined DPM emissions totaling more than 40 tons per year. Because of this, CARB decided to do a separate HRA for these four combined yards [40].

Both the railroad companies and the California Air Resources Board state that there has been a significant reduction in diesel particulate emissions at these four yards since the voluntary agreement and the HRAs were released in 2007–2008 [41]. In January 2014 CARB announced that it had decided to start using a different approach to try to obtain emission reductions at rail yards by no longer pursuing voluntary agreements with the railroad companies but instead developing a “Sustainable Freight Transport Initiative that will outline the needs and steps to transform California’s freight transport system to one that is more efficient and sustainable,” one that will “move goods more efficiently and with zero/near-zero emissions... and support healthy, livable communities” [42].

## 2.2. CARB's Development of Isopleths (Contour Lines or Zones) for Diesel Cancer Risk around the Rail Yards

CARB developed isopleths for diesel cancer risk around the 18 rail yards. The agency defined an isopleth as a “line drawn on a map through all points of equal value of some measurable quantity; in this case, cancer risk”. That complicated statement translates, in this case, as a “contour line” or “zone” that delineates the estimated average potential cancer risk near the rail yard property boundaries, assuming a 70-year exposure [37,38]. Using one rail yard, the Union Pacific Intermodal Container Transfer Facility (UP ICTF), as an example, we show below the isopleths developed by CARB for the estimated average potential cancer risk of 100 chances per million in close proximity to the rail yard property boundaries [43], Figure 1. The risks decrease the further away from the rail yard one lives (with wind patterns taken into consideration). For example, as seen in Figure 1, residents who live three miles away from the rail yard are primarily within the 10 in a million to 25 in a million cancer risk zones or isopleths.

**Figure 1.** Estimated potential cancer risks (chances per million) associated with diesel particulate matter emissions at the Union Pacific Intermodal Container Transfer Facility (UP ICTF) in Wilmington, CA \*.



\* Reproduced with permission of the California Air Resources Board.

**Table 1.** Tons of annual diesel particulate matter emissions from the 18 rail yards in California by source of emissions, from Health Risk Assessments published by CARB during 2005–2008, listed in descending order by total emissions estimated in 2005 <sup>a</sup>.

Rail Yard	Locomotives	Cargo Handling Equipment	On-Road Trucks	Other (Off-Road Equipment, Transport Refrigeration Units, Stationary Sources, etc.)	Total (Tons)
<b>Commerce: 4 yards combined</b>	13.6	9.4	13.2	5.5	41.8
BNSF Barstow <sup>a</sup>	27.1	0.03	0.04	0.75	27.9
UP Roseville	25.1	N/A	N/A	N/A	25.1
BNSF Hobart <sup>b</sup>	5.9	4.2	10.1	3.7	23.9
UP ICTF/Dolores	9.8	4.4	7.5	2.0	23.7
BNSF San Bernardino	10.6	3.7	4.4	3.4	22.0
UP Colton	16.3	N/A	0.2	0.05	16.5
UP Commerce <sup>b</sup>	4.9	4.8	2.0	0.4	12.1
UP Oakland	3.9	2.0	1.9	3.4	11.2
UP City of Industry	5.9	2.8	2.0	0.3	10.9
UP LATC	3.2	2.7	1.0	0.5	7.3
UP Stockton	6.5	N/A	0.2	0.2	6.9
UP Mira Loma	4.4	N/A	0.2	0.2	4.9
BNSF Richmond	3.3	0.3	0.5	0.6	4.7
BNSF Stockton	3.6	N/A	N/A	0.02	3.6
BNSF Commerce Eastern <sup>b</sup>	0.6	0.4	1.1	1.0	3.1
BNSF Sheila <sup>b</sup>	2.2	N/A	N/A	0.4	2.7
BNSF Watson	1.9	N/A	<0.01	0.04	1.9
BNSF San Diego	1.6	N/A	0.007	0.04	1.7

<sup>a</sup> Please note that this does not necessarily mean that the residents near these yards have the highest cancer risk of the 18 yards, because other yards may have residents living in closer proximity or have wind patterns that blow emissions into their communities. For example, the BNSF Barstow rail yard has the highest annual emissions, but the BNSF San Bernardino yard has the highest diesel cancer risk for nearby residents. <sup>b</sup> Railyards with this notation are located in the City of Commerce.

### 2.3. Exposed Populations (and Their Estimated Cancer Risks) near the Four Highest Priority Rail Yards in California

Based on its Health Risk Assessment analyses, the California Air Resources Board calculated the number of persons exposed at different diesel cancer risk levels at each of the 18 rail yards. From the 18 yards, CARB identified four with particularly high estimated diesel cancer health risks, as seen in Table 2 [44]. Table 2 shows the number of residents estimated to be exposed to certain levels of risk within the described zones of diesel cancer risk (isopleths) at these four yards. In addition, based on the HRAs, CARB identified residents of the City of Commerce as heavily impacted by diesel emissions and cancer risk because Commerce has four rail yards within its boundaries [40], so the combined four yards are also shown in the Table. All of these rail yards are in southern California and serve the Ports of Los Angeles (L.A.) and Long Beach, the largest ports in the U.S. Note the large

number of individuals exposed to greater than 500 in one million risk in both San Bernardino [39] and Wilmington [43]. Of all rail yards, the BNSF San Bernardino had the highest population exposure to rail yard emissions, due to significant emissions and the large number of residents living nearby. At this yard, CARB found that 3,780 residents had an estimated cancer risk averaging 980 chances per million, meaning that if residents near the yard were exposed to diesel emissions at that level for a 70-year lifetime, 500 in a million would be expected to develop cancer [39]. Table 2 also shows the estimated diesel cancer risk for residents near the four combined yards in the City of Commerce, where an estimated 5,200 residents have a potential cancer risk averaging 690 in a million [40].

#### 2.4. Proximity of Homes and Schools to the Top Four Highest Priority Rail Yards in California

For its HRAs, the California Air Resources Board used GoogleMaps to determine whether homes, parks and/or schools were in close proximity to the 18 rail yards. The text below describes the “sensitive receptors” (homes, schools, hospitals) that CARB described as being near the four rail yards in California with the highest levels of diesel cancer risk and population exposed.

*UP Commerce Rail Yard:* Within two miles of this yard, there are 27 sensitive receptors, including 19 schools, four child care centers and four hospitals. Four of these sensitive receptors are within the 100 in a million cancer risk range. Homes are adjacent to the rail yard fence, and an elementary school is located less than two blocks away [45].

*BNSF Hobart Yard, Commerce:* CARB looked at sensitive receptors within a two-mile distance of the yard and found 28, including eight schools, 12 child care centers and eight hospitals. Within the 100 in a million cancer risk range, there were 19 sensitive receptors identified [46].

*UP ICTF, Wilmington:* The UP ICTF is just 400 feet away from a middle school and homes that are located in west Long Beach, CA. There are seven sensitive receptors in the 100 in a million cancer risk range and 20 sensitive receptors all located within one mile of the rail yard [43].

*BNSF San Bernardino:* Homes are located directly across the street from this yard. Within a one-mile distance of the yard, there are 41 sensitive receptors, including seven hospitals/medical centers, 19 childcare centers and 15 schools. When considering a 100 in a million cancer risk range, there are 19 sensitive receptors [39].

**Table 2.** Estimated exposed populations associated with different cancer risk levels (assuming a 70 year exposure) near the most impacted rail yards in California, listed in order by the highest number of residents exposed to a cancer risk of greater than 500 in one million \*.

Rail Yard	Estimated Population Exposed to Cancer Risk of Greater than 100	Estimated Population Exposed to Cancer Risk of Greater than 500
	Chances in a Million	Chances in a Million
4 yards in Commerce combined	82,000	5,200
BNSF, San Bernardino	39,580	3,780
UP ICTF, Wilmington	33,540	1,200
BNSF Hobart, Commerce	48,200	100
UP, Commerce	12,000	100

\* Data compiled from individual California Air Resources Board’s Health Risk Assessments.

### 3. Study Methods

As published, the HRAs contained no analysis of demographic information about residents living in the vicinity of the rail yards. We employed Geographic Information Systems (GIS) to study the demographics of residents facing high calculated diesel cancer risks in close proximity to the 18 rail yards, and we compared them to demographics of the entire county in which the residents live. To accomplish this, we examined each HRA's estimates of population exposure, as well as cancer risk isopleths (contours) showing areas where residents are at greater risk of exposure to diesel particulate emissions (DPM) and diesel cancer risk as calculated by CARB. For cancer impacts, CARB plotted total risk isopleths for facilities in the HRAs at potential cancer risk intervals of 1, 10, 25, 50, 100, 250, 500, *etc.* in a million. We selected the 100 in a million risk as our definition of impacted nearby residents, because most (but not all) rail yards had residents living within that risk isopleth. At higher risk levels (250 or 500 in a million), some rail yards had few residents within the isopleths. In doing this, we were able to have consistent risk levels to compare across most of the 18 rail yards. Figure 1 shows an example of an isopleth (contour) from an HRA. Using the isopleths and maps in the HRAs, which we digitized, we focused on the race/ethnicity and annual incomes of residents within isopleths that had high cancer risks (which we defined as "100 or more chances in a million") and compared them to the same variables within the county of residence. We retrieved and analyzed data from the 2000 census at the census block group level to look at race, ethnicity and income levels, in an effort to determine if there were diesel cancer risk disparities and environmental justice concerns at any of the 18 major rail yards in California. Where needed (*i.e.*, when isopleths crossed two or more counties), we apportioned the results between two counties. Finally, we extracted and used the estimates provided by Ethington and colleagues [47] for these same characteristics for the Intermodal Container Transfer Facility and Dolores Railyard in 1980 for our case study, which involves a rail facility proposed in 1982 [48], built in 1986, and proposed for expansion in 2005. Ethington *et al.* used the 1970–1980–1990 correspondence tables published by the California Department of Finance in 1996 [47] to reassign the census variables from the first two censuses to 1990 Census units, and we then used spatial analysis tools inside ArcGIS™ (ESRI, Redlands, California, USA) to assign these totals to 2000 Census units.

Using a two-sided Pearson's chi-square test, we tested whether the proportion of non-white residents in a given risk isopleth was equal to the proportion of non-white residents in the county in which the rail yard was located ("population proportion"). White was defined as non-Hispanic white. To further understand racial/ethnic differences, we calculated the proportion of African-American (non-Hispanic Black or African American) and the proportion of Hispanic residents in an isopleth and graphically compared these values (along with their 95% confidence intervals) to the corresponding population proportions. Next, we used a two-sided Pearson's chi-square test to test whether the proportion of low income households (<\$30,000/year) in each isopleth was equal to the population proportions. We plotted these estimated proportions by rail yard, along with their 95% confidence intervals. For 16 of the 18 rail yards, we used 100 in a million risk isopleths. No demographic data was available in the 100 in a million risk isopleth for UP Roseville and UP Mira Loma, likely due to the small number of residents in these small isopleths. Instead, we used a 50 in a million risk isopleths for these rail yards.

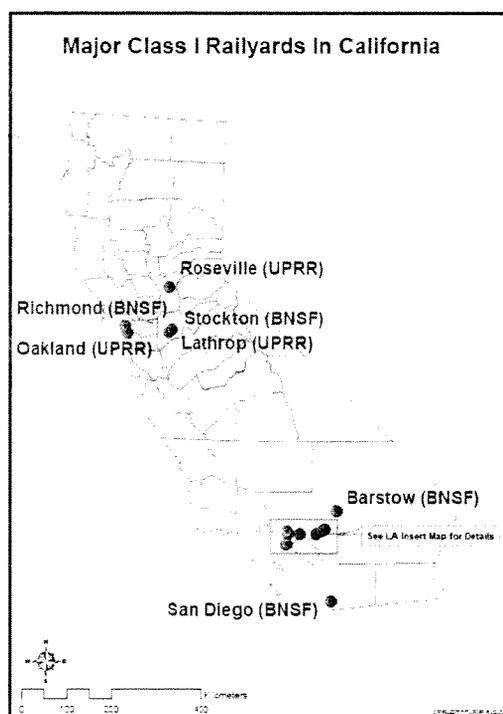
Many of these 18 rail yards were sited decades ago, so it is difficult to determine whether the existing rail yards were built first or if the community might have settled there before the yard was built. One of the rail yards, the Union Pacific ICTF, was proposed in 1982 [48] and opened in 1986, so we were able to examine the demographics around that yard using Census data for 1980. In 2005, Union Pacific announced that it wanted to expand its existing ICTF [49], so we also examined more recent demographics using 2000 Census data.

Finally, we conducted a review of the news media and key industry trade journals from 2009 to the present to identify new intermodal rail facilities proposed to be built or recently constructed in the U.S. We reviewed the articles to determine if any of the rail facilities that were recently built or proposed to be built are sited in close proximity to homes and schools or adjacent to neighborhoods that are lower-income and minority.

#### 4. Study Site

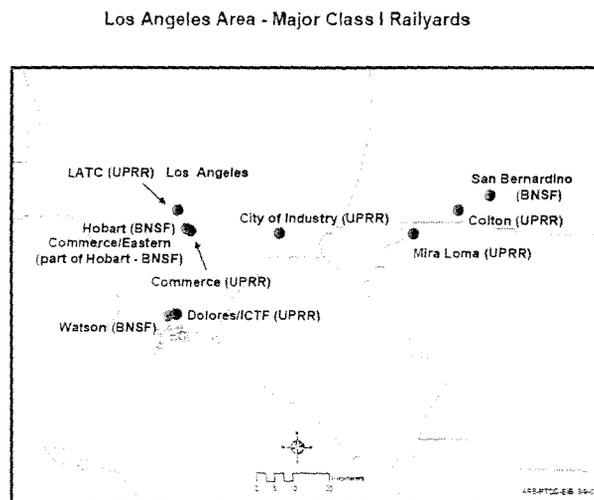
Our primary study site was California, with a focus on southern California. Figure 2 shows the location of the 18 major rail yards in California, for which CARB conducted HRAs. Figure 3 shows an inset map for rail yards in the Los Angeles area [36].

**Figure 2.** Map\* showing locations of the 18 rail yards in California for which CARB conducted HRAs.



\* Reproduced with permission of the California Air Resources Board.

**Figure 3.** Map\* showing locations of the rail yards in the Los Angeles area of California for which CARB conducted HRAs.



\* Reproduced with permission of the California Air Resources Board.

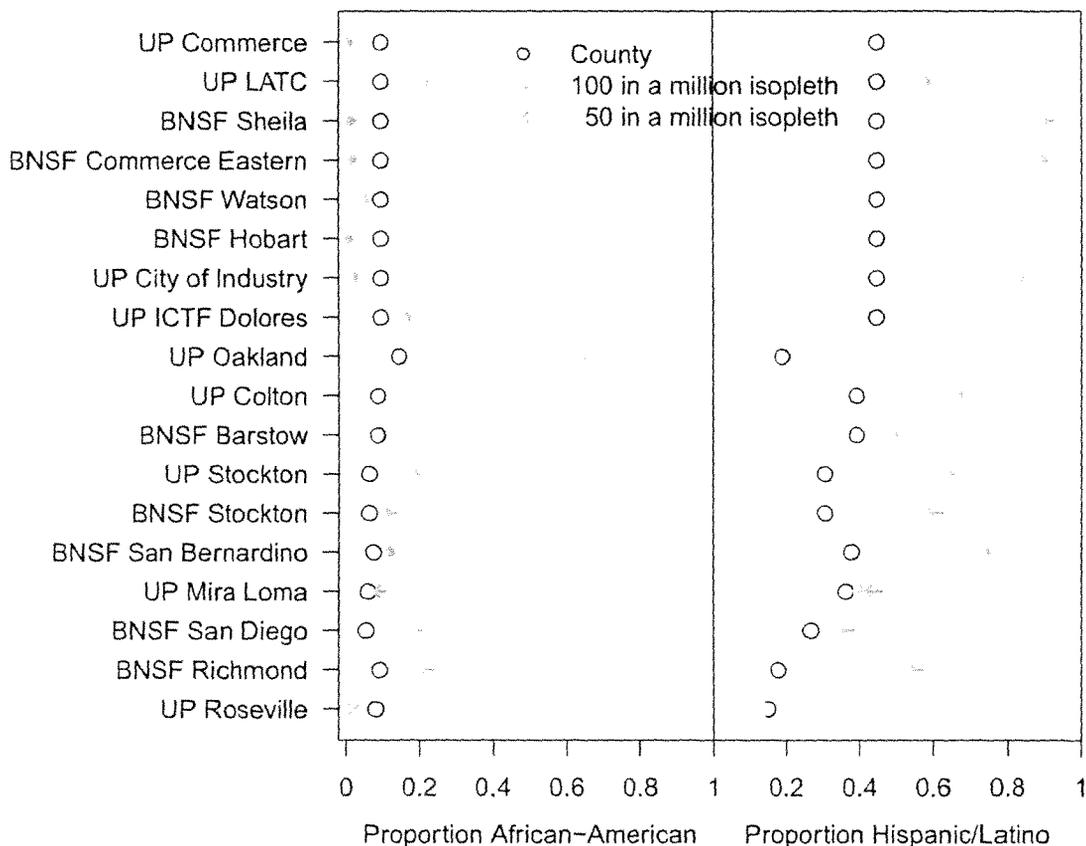
## 5. Results

At just the three highest priority rail yards in CA coupled with the four combined rail yards in Commerce, more than 167,000 residents had an estimated diesel cancer risk of greater than 100 in a million, Table 2. With regard to race/ethnicity, 17 of the 18 yards had a statistically significantly *higher* percentage of non-white residents in the high risk cancer isopleths near the rail yard than the population percentage in the respective county ( $p < 0.0001$ ). Of these, 16 had demographic data for the 100 in a million isopleth risk zone and one (UP Mira Loma) only for the 50 in a million isopleth risk zone. For UP Roseville, using a 50 in a million risk isopleth, the percentage of non-white residents was statistically significantly *lower* than the population percentage in the County (23% vs. 38%,  $p < 0.0001$ ).

Our analysis found that the percentage of Latino residents in close proximity to a rail yard was generally much higher than the corresponding population percentage in the respective county, while the pattern was less consistent for African-American residents, Figure 4. For several rail yards (e.g., BNSF Hobart) the percentage Latino in the 100 in a million risk isopleth was extremely high (BNSF Hobart: 97%), resulting in a percentage African-American in the risk isopleth that was lower than the population percentage African American in the county (BNSF Hobart: percentage in the 100 in a million risk isopleth was 0.3% while population percentage in the county was 9.4%). For UP Oakland, the percentage Latino in the 100 in a million risk isopleth was similar to the population percentage (100 in a million risk isopleth: 19%, county: 19%), but the percentage African-American in close proximity was strikingly higher than the population percentage in the respective county (100 in a million risk isopleth: 64%, county: 14%). For UP Roseville, the percentages Latino and African-American were lower in close proximity to the rail yard than the corresponding population percentages (50 in a million risk isopleth: 12%, county: 14%; and 50 in a million risk isopleth: 2%, county: 8%,

respectively). See Table S1 for County population percentages non-white and Table S2 for demographic details and 95% confidence intervals.

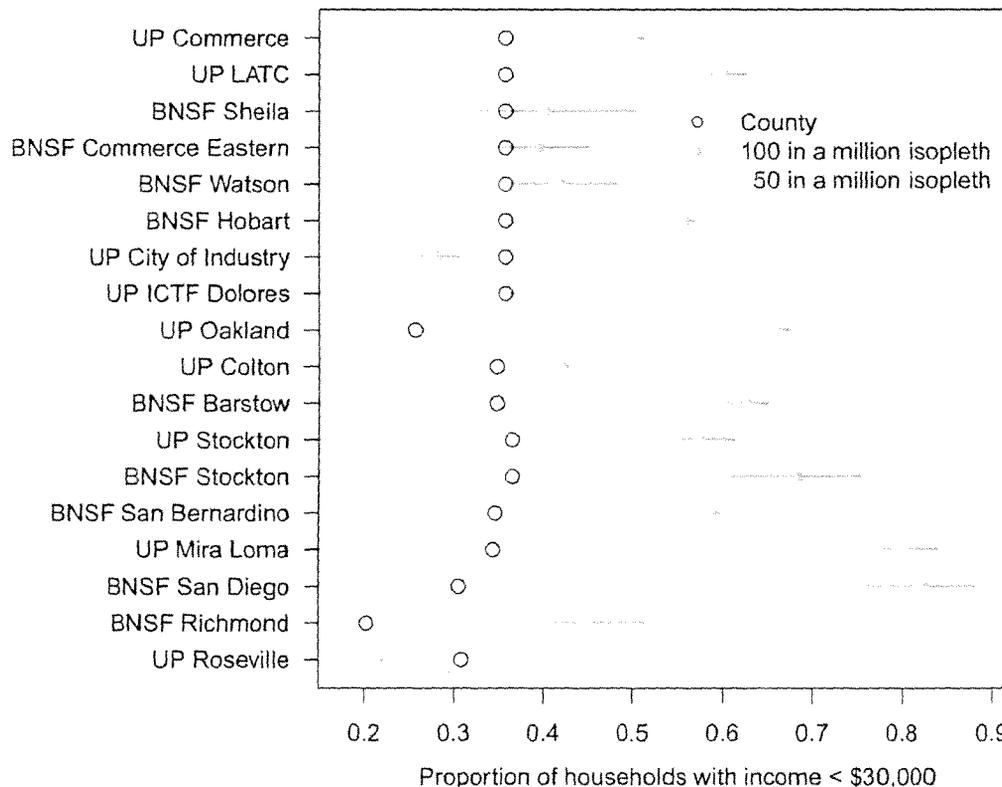
**Figure 4.** Estimated proportion<sup>1</sup> of African American or Hispanic/Latino<sup>2</sup> residents living in close proximity to rail yards, where proximity is defined by a 50 in a million risk isopleth or 100 in a million risk isopleth, compared to the corresponding population proportions in the county in which the rail yard is located, Table S1. The rail yards are listed in decreasing order of population percentage non-white in the County,<sup>3</sup> Table S2.



<sup>1</sup> Point estimates are plotted along with 95% confidence intervals, though for most isopleths the sample size is large enough that the confidence intervals are very narrow and not visible at this scale. <sup>2</sup> We use Latino and Hispanic interchangeably in this paper. <sup>3</sup> UP ICTF is the only rail yard in the state that also has a high percentage of Asian/Asian Pacific Islanders in the nearby population, compared to the percentages in the county, which is not reflected in this figure.

With regard to income, as shown in Figure 5, the estimated percentage of low income households in the 100 in a million risk isopleth was higher than the population percentage of the county for 14 of the 16 rail yards ( $p < 0.0001$  for the 11 rail yards where the 95% confidence intervals did not overlap with the population proportion,  $p = 0.04$  for BNSF Watson,  $p = 0.15$  for BNSF Commerce Eastern, and  $p = 0.37$  for BNSF Sheila). For example, near UP Mira Loma (based on 50 in a million risk isopleth), the percentage of low income households in close proximity to the rail yard was 81% vs. 34% in the county; near UP Oakland the percentage of low income households in close proximity to the rail yard was 66% vs. 26% in the county. Only two rail yards (UP City of Industry and UP Roseville) had a smaller proportion of low income households in close proximity to the rail yards than in the County as a whole (statistically significantly lower,  $p < 0.0001$ ).

**Figure 5.** Estimated proportion<sup>1</sup> of low income households (<\$30,000/year) living in close proximity to rail yards, where proximity is defined by a 50 in a million risk isopleth or 100 in a million risk isopleth, compared to the corresponding population proportions for the county in which the rail yard is located, with the rail yards listed in decreasing order of population proportion non-white in the County.

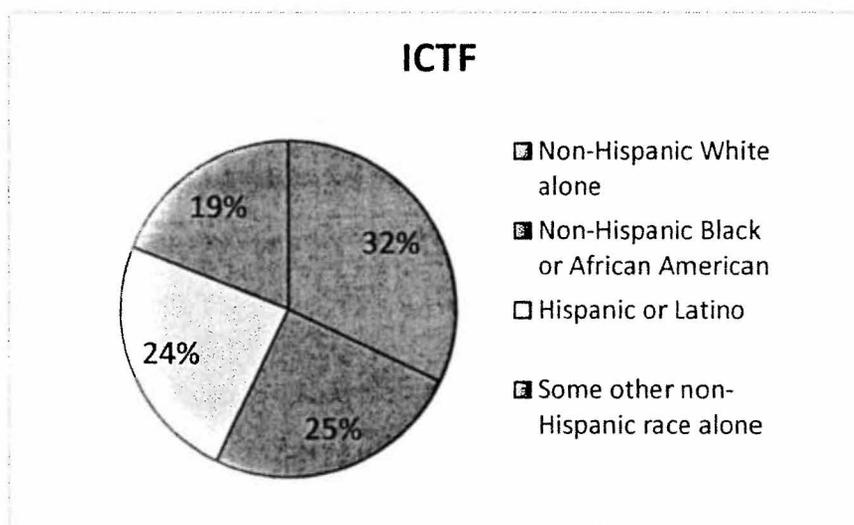


<sup>1</sup> Point estimates are plotted along with 95% confidence intervals. though for most isopleths the sample size is large enough that the confidence intervals are very narrow and not visible at this scale.

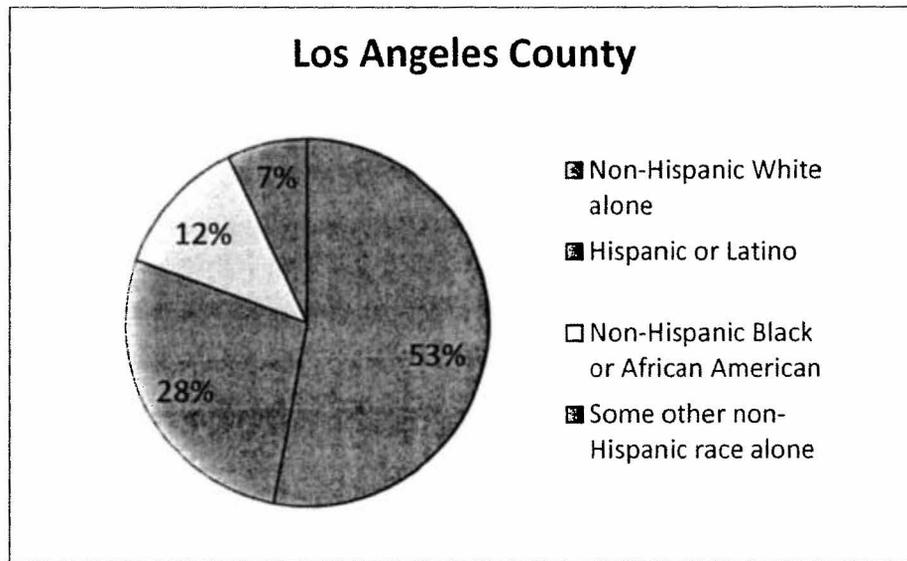
### 5.1. Which Came First, Siting of the Rail Yards or the Lower-Income Minority Populations Living in the Area? A Brief Case Study

Site selected for the Union Pacific ICTF in the 1980s. Many of the California rail yards were sited decades ago, making it difficult to determine whether the existing rail yards were built first or if the community might have settled there before the yard was built. One California rail yard, however, the UP ICTF, was approved and constructed within the past 30 years [49], so we conducted a demographic analysis of the population near that yard based on the 1980 census. Our results show that the nearby residents at the time the facility was debated and then approved were predominantly lower-income and minority, Figure 6. The figure shows that the estimated population percentage near the proposed UP ICTF based on 1980 Census data was only 32% White, while the White population percentage in Los Angeles County at that time was 53%, Figure 7. To look at it another way, at the time the rail yard project was approved, 68% of the nearby population was minority compared to 47% in the County as a whole. In addition, Figure 6 shows that the population percentage for African-Americans in the 1980 census was 25% near the proposed UP ICTF, higher than the percentage of African-Americans (12%) in Los Angeles County, Figure 7.

**Figure 6.** Demographics of the population in west Long Beach in close proximity to the ICTF rail yard, 1980 Census data<sup>a,b</sup>.



<sup>a</sup> Race/ethnicity percentages listed in decreasing order. Demographics by race/ethnicity listed in order of highest percentage. <sup>b</sup> We used the 100 in a million diesel cancer risk isopleths for this calculation. The footprint of the ICTF has not changed since 1980, so to be consistent with our other analyses we considered “in close proximity” to the ICTF to be residents living within the current ICTF 100 in a million isopleth.

**Figure 7.** Demographics of the population in Los Angeles County, 1980 Census data.

In Figures 6 and 7 there are large differences between the area near the proposed UP ICTF and the County in the demographic category called “some other non-Hispanic race alone” from the 1980 census. Because the census at the time did not differentiate among Asians and Pacific Islanders, the large number of Filipino, Thai, Samoan, Tongan and other Asian Pacific Islanders living in west Long Beach in 1980 were combined into this generic category.

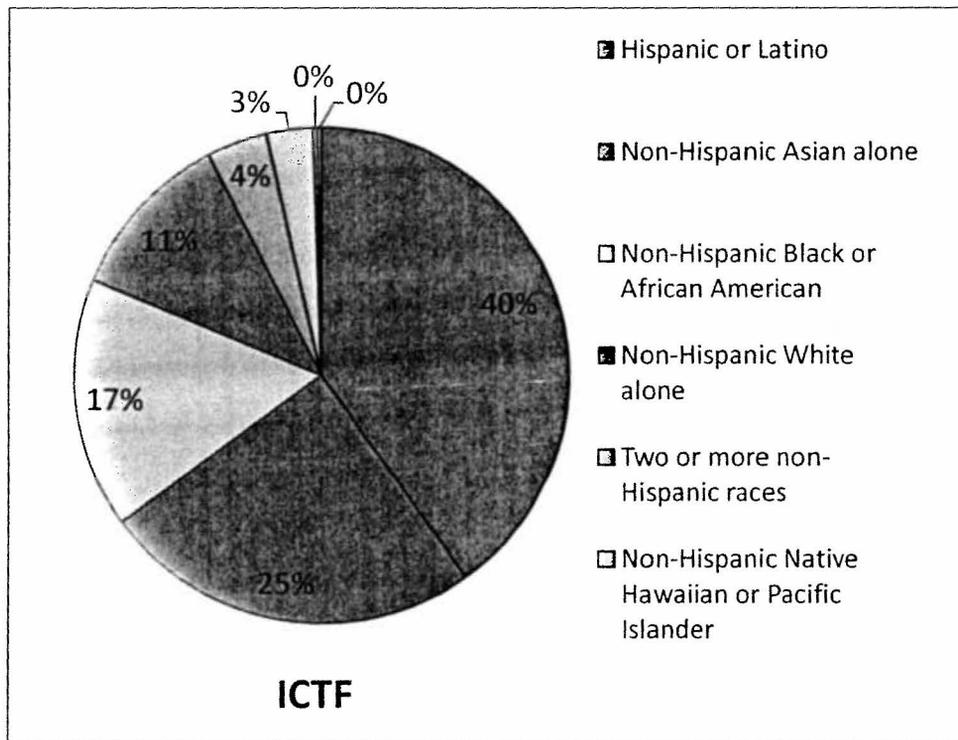
The analyses showed that median income in the area of west Long Beach near the proposed UP ICTF, according to the 1980 Census, was \$8,616 while the median income for Los Angeles County residents as a whole was more than twice this amount, \$19,486. Thus, when the ICTF was built in 1986, the nearby community was also significantly lower-income than Los Angeles County as a whole.

In summary, at the time that the Ports of Los Angeles and Long Beach—and the railroad (at the time, Southern Pacific, today Union Pacific)—made the site selection for the ICTF, the demographic data were clear that the rail yard facility would be constructed adjacent to a working class/working poor community of color. The community was established in the location before the UP ICTF was built.

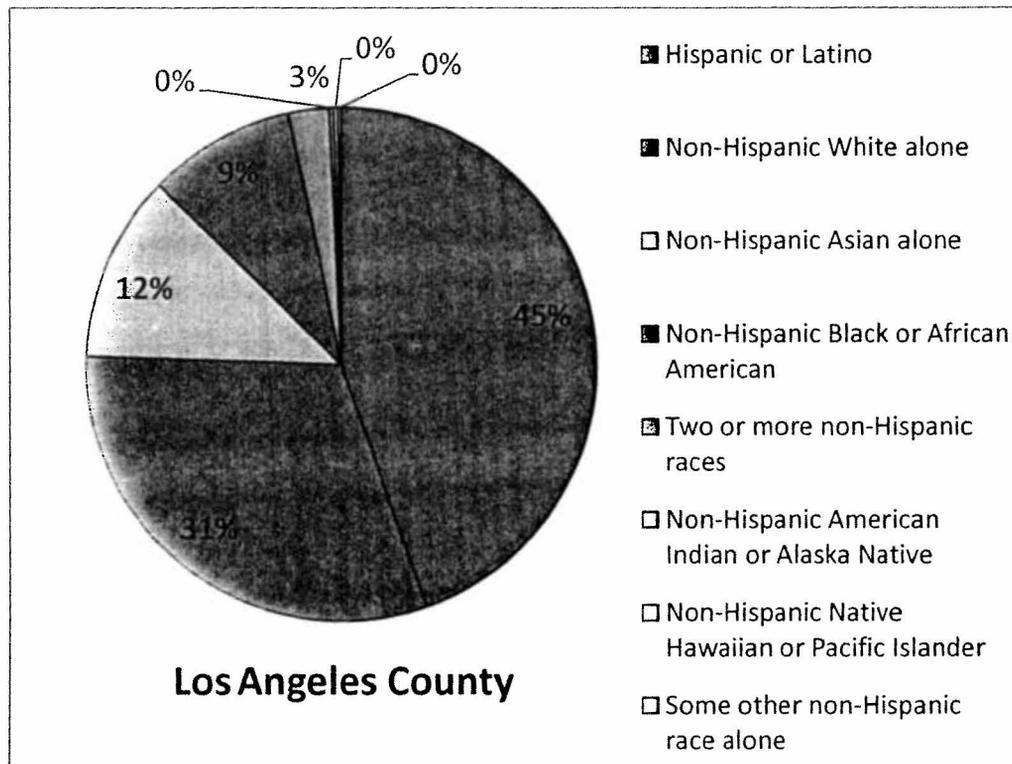
Issues of race and income of nearby residents were not mentioned in comments and letters submitted when the environmental impact reports were being prepared, but some residents of a nearby mobile home park (which still exists) raised concerns about future air pollution from the rail yard. The Final Environmental Impact Report (EIR) in 1986 concluded that: “Air quality impacts of the ICTF on adjacent residential areas are anticipated to be insignificant [48]”. Just 22 years later, CARB estimated that the UP ICTF was one of the four most polluting rail yards in the State of California, creating an estimated diesel cancer risk of greater than 100 in a million for more than 33,540 nearby residents, Table 2.

*Proposed UP ICTF expansion, 2005.* In 2005 Union Pacific announced that it wanted to expand the ICTF [49]. By that time, the population demographics had changed somewhat both near the ICTF and in Los Angeles County, but remained predominantly people of color, when compared to the County of Los Angeles as a whole (Figures 8 and 9). In the 2000 census, only 11% of the residents living near the rail yard were White compared to 31% of Los Angeles County residents. In other words, the population around the ICTF when Union Pacific proposed to expand its rail yard in 2005, was 89% minority, compared to 69% of the County as a whole. The Union Pacific ICTF also has a significantly higher percentage of Asian Pacific Islanders near the yard, compared to the County as a whole (compare Figures 8 and 9). For the area near the proposed UP ICTF, Asians/Asian Pacific Islanders comprised 28% of the nearby population in 2000, compared to 12% for the County.

**Figure 8.** Demographics of the population in west Long Beach in close proximity to the ICTF rail yard, 2000 Census data and in Los Angeles County as a whole at the time that the railroad announced that it wanted to double its capacity; 2000 census data.



**Figure 9.** Demographics of the population in Los Angeles County at the time that Union Pacific announced it wanted to expand the UP ICTF rail yard, 2000 census data.



A decision has not yet been made on expansion of the UP ICTF expansion project. The possible expansion is still being discussed by a Joint Powers Authority of the Ports of Los Angeles and Long Beach and is in the early environmental review process [49].

### 5.2. Construction of New Intermodal Facilities in the U.S. and Health/Environmental Concerns Raised by Residents

By reviewing the news media and industry trade journals, we identified multiple new intermodal rail facilities proposed to be built or recently constructed in the U.S. We looked at examples from the four largest Class I freight railroads in the country: Union Pacific (UP) (case study above); BNSF; CSX; and Norfolk Southern (NS). We discovered that siting rail yards close to homes and schools (a public health concern) or in lower-income minority communities (a public health and EJ concern) is not an historic artifact that ended decades ago; it is continuing today at some, although not all, new or proposed rail yards. Some examples where residents have raised questions about siting decisions, in addition to the UP ICTF already described, include:

- A proposed BNSF intermodal facility in Wilmington, CA (part of the City of Los Angeles) that would be located within 1,000 feet of schools, a daycare center and a housing complex and that would bring in thousands of trucks a day to the yard, which is four miles from the local ports; emissions and truck traffic would again impact the lower-income minority community of west

Long Beach. The project, called the Southern California International Gateway (BNSF SCIG) was proposed in 2005 and had several iterations of an environmental impact report (EIR) between then and its final EIR in 2013 [50]. The location of this proposed rail yard is immediately south of the UP ICTF. Community residents and others raised public health and environmental justice concerns about building another rail yard in the same vicinity as the ICTF and in close proximity to homes and schools [51,52], urging that the rail yard be sited on-dock at the industrial ports rather than adjacent to a residential community. The Long Beach Unified School District [53] and others, including public health experts, also raised concerns about both of the proposed rail yards and their proximity to schools. Although BNSF Railway argues that the new rail yard would reduce regional pollution [54], an environmental report issued by the Port of Los Angeles on the project, under the California Environmental Quality Act (CEQA) stated that the impacts of localized air pollution from the rail yard:

*“... would fall disproportionately on minority and low-income populations because the census block groups adjacent to the point of impact (the eastern edge of the Project site) constitute minority populations, and ... all or parts of [the adjacent] census tracts ... constitute low-income populations [55].”*

In 2013 the BNSF SCIG was approved by the Port of Los Angeles Harbor Commissioners and the City of Los Angeles [56]; there are multiple lawsuits against the project [57,58]. The new rail yard, if constructed, would be the second BNSF intermodal facility within 20 miles of the Ports of L.A. and Long Beach. BNSF’s Hobart Yard, Figure 10, located in Commerce, is the largest intermodal rail facility in the U.S.

**Figure 10.** BNSF Hobart Yard, Commerce, CA with downtown Los Angeles in the background. Photo courtesy of Angelo Logan.

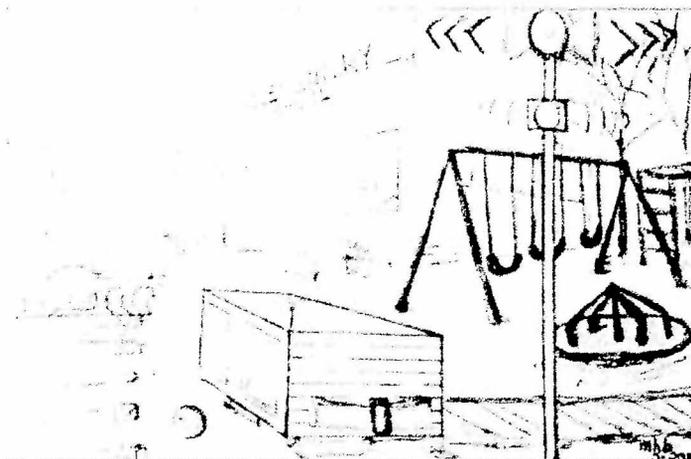


Selected other rail yard proposals or recently completed projects are described below:

- A Norfolk Southern (NS) rail yard newly constructed in Alabama that is immediately adjacent to an elementary school [59];
- A NS rail yard that is expanding by buying homes near its yard in a Chicago community called Englewood, home to mostly African-Americans [60];
- A CSX rail yard proposed in Baltimore, Maryland, that is estimated to bring 30–40 future trucks a day through a residential community [61]; and

- A NS rail yard proposed in a small town in Tennessee in close proximity to an elementary school, which prompted the following sketch, Figure 11, in a local newspaper as an indication of residents' concerns [62].

**Figure 11.** Sketch by Marihelen Ballard, Strawberry Plains, Tennessee, of a school in close proximity to a freight train traveling to a rail yard; reprinted with permission of the Jefferson County Post in New Market TN.



The health concerns of residents near intermodal rail facilities are not limited to the U.S. In New South Wales, Australia, residents have raised concerns and protested plans to build a large intermodal rail facility at Moorebank to serve Port Botany (Figure 12). Port Botany is the second largest port in Australia, located 12 miles south of Sydney, with Moorebank being 22 miles southwest of Sydney. Residents in nearby Liverpool say they are concerned about truck traffic congestion, diesel emissions and noise that may come with the new intermodal rail yard [63].

**Figure 12.** Australian residents in Liverpool protest proposal to build a freight terminal in nearby Moorebank, New South Wales (NSW).

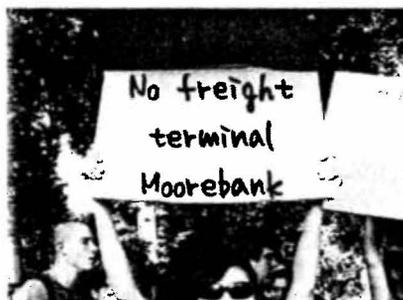


Photo courtesy of Jim McGoldrick, Liverpool, Australia.

## 6. Discussion and Conclusions

Analyses by the California Air Resources Board, as estimated in the Rail Yard Health Risk Assessments, demonstrate that living in close proximity to rail yards with high levels of diesel exhaust

emissions conveys a higher risk of cancer from diesel exhaust exposure than living a greater distance away from the source of pollution. The analyses allowed CARB to estimate differences in health risks among the rail yards, by drawing isopleths at various distances away from the yards to indicate differing risk levels. Besides distance, the isopleths took into account the direction and speed of the wind. Through that work, CARB was able to identify a number of yards in California that present particularly high diesel cancer risks for nearby residents. CARB also identified the City of Commerce as having seriously impacted residents, with four rail yards in one small community. We conclude that the siting of rail yards near sensitive receptors is a significant public health concern.

Our research utilized the CARB isopleths, 2000 Census data and GIS techniques to demonstrate significant diesel exposure disparities by race and income among residents living in close proximity to most of the 18 major freight rail yards in California where CARB has estimated high diesel cancer risks. We conclude that the location of existing or newly proposed rail yards in lower-income (working class/working poor) communities of color is a significant public health and environmental justice concern.

The analysis commissioned by EPA to support its locomotive engine rule investigated the populations living in close proximity to a representative sample of 37 U.S. rail yards, including three yards in California [64]. The EPA study found a large number of rail yards around the country with disproportionate impacts from diesel particulate matter at rail yards. For example, the EPA analysis states that “in Chicago the population living adjacent to the Barr Rail Yard, which has the greatest exposure to diesel emissions from that yard, is 97 percent African American, while the general metropolitan area of Chicago is only 18 percent African American [65].

Rail yards were also a topic of discussion by the Goods Movement Work Group (Work Group) for U.S. EPA’s National Environmental Justice Advisory Committee (NEJAC), which issued a report in 2009 [66]. The Work Group report concluded that “environmental pollution from the movement of freight is becoming a major public health concern at the national, regional and community levels,” and its report cited a U.S. EPA Inspector General’s report on the need to reduce air pollution for populations living near large diesel emission sources such as major roadways, rail yards, and ports, which are likely to experience greater diesel exhaust exposure levels than the overall U.S. population, exposing them to greater health risk [67].

In addition, Health Impact Assessments (HIAs) are a relatively new public health tool to assess impacts of proposed projects or policies [68]. The first HIA of an intermodal rail facility was recently published by the National Center for Healthy Housing; it examined the potential impacts of an expanded CSX rail facility to be constructed near the Port of Baltimore [69].

## **7. Recommendations**

To protect residents, school children and EJ communities from environmental health impacts related to rail yards, we offer six policy recommendations for consideration:

1. Research. Conduct more epidemiologic research on the health and community impacts of rail yard facilities on nearby communities, additional exposure assessment studies, and evaluation of zero emission technologies for locomotives, trucks and rail yard equipment.

2. Best practices. Encourage the U.S. EPA to develop a best practices database for how to reduce air pollution at rail yards, including the availability of alternative technologies such as electric trucks and electric cranes, as recommended in the NEJAC Working Group report [66].
3. Siting and land use.
  - a. Whenever feasible, site rail yards servicing marine ports “on-dock” (that is, right at the marine terminals) in order to make the yards as efficient as possible and minimize the use of diesel-fueled drayage trucks.
  - b. Require minimum distances between rail yards and schools/homes and other sensitive receptors when choosing sites for new or expanded rail yards, taking into account CARB and other land use guidelines [19].
4. Environmental justice considerations.
  - a. Require that newly proposed rail yard facilities comply with Environmental Justice (EJ) Executive Orders and the EJ requirements of the U.S. Department of Transportation, U.S. Environmental Protection Agency and any state EJ directives, as relevant [70].
  - b. Discontinue to site rail yards in lower income, minority communities in favor of more suitable locations, including on-dock rail and purely industrial locations, in order to protect public health and uphold environmental justice principles.
5. Environmental reviews.
  - a. Require full Environmental Impact Statements under federal law or full reviews under state law, rather than simple Environmental Assessments when evaluating the impacts of major intermodal rail facilities.
  - b. Consider conducting Health Impact Assessments of any new rail yard facilities that are within one mile of homes and schools.
  - c. Require that all environmental reviews include a comparative demographic analysis (including race/ethnicity/income/educational attainment levels) of the neighborhoods within one mile of a proposed rail yard and the city/county as a whole and that the results of this analysis be included in the environmental statement or report.
  - d. Require that any environmental reviews of rail yard proposals include accurate forecasts for future truck and locomotive volumes; accurate assessments of projected emissions from trucks, locomotives and yard equipment; accurate assumptions in modeling of the near-roadway air pollution exposures; and an evaluation of alternative technologies; and that new projects adhere to what was promised in the environmental review reports.
6. Regulatory agencies.
  - a. Require that regulatory agencies with responsibility for air pollution from rail yard facilities (including locomotives and other equipment) have *mandatory* mechanisms in place to reduce public health risks when analyses or HRAs show elevated cancer or other health risks from exposure to diesel exhaust or other pollutants.
  - b. Update EPA’s assessment of diesel exhaust exposure’s health effects to reflect IARC’s designation of diesel exhaust as a “human carcinogen”.

Other promising policies and solutions that can be considered to reduce air pollution emissions from rail yards are described in a report by THE Impact Project, including (1) strengthening federal

regulation of locomotives, with a goal toward zero-emission technologies; (2) seeking federal authority to allow additional state and local authority to address air pollution from rail yards; (3) allowing rail yards to be regulated as stationary sources so that local air regulators have the ability to demand emission reductions and idling control; and (4) requiring that the equipment used at rail yards use the maximum achievable air pollution control technology to reduce diesel emissions [71].

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### Conflicts of Interest

The authors declare no conflicts of interest.

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