

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

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UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY – PETITION FOR )  
DECLARATORY ORDER ) **STB Docket No. FD 35803**

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**REPLY COMMENTS OF THE**  
**STATE OF CALIFORNIA AIR RESOURCES BOARD**

**RE:**  
**PETITION FOR DECLARATORY ORDER**

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Consistent with nearly twenty years of Surface Transportation Board (“STB”) orders, the controlling appellate decision in this matter provides “to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental law (such as “statewide implementation plans” [SIP] under the Clean Air Act), ICCTA generally does not preempt those regulations because it is possible to harmonize ICCTA with those federally recognized regulations.” *Association of American Railroads v. South Coast Air Quality Management District* (“AAR”), 622 F.3d 1094, 1098 (9th Cir. 2010). This Ninth Circuit decision makes clear that if the rules in this case were approved by EPA, they would have the “force and effect of federal law” and courts would therefore have the authority (and obligation) to “harmonize the District’s rules with ICCTA.” *Id.* It is, in short, binding law that SIP provisions affecting railroads, including the provisions at issue here, are subject to a harmonization analysis, rather than a preemption analysis.

Because the March 28, 2014, supplemental comments of the railroads, and of BNSF in particular, continue to incorrectly argue that the same preemption analysis used for state law nonetheless applies, the California Air Resources Board (“CARB”) respectfully submits these reply comments.

## 1. Harmonization Analysis Applies to SIP Rules

In their supplemental comments, the railroads continue to invite the STB to hold Clean Air Act rules preempted by the ICCTA; BNSF, in particular, asserts that the ICCTA *expressly* preempts federal environmental laws regulating rail operations. *See* BNSF Supp. Comments at 5-9. *AAR*, the STB's own prior rulings, and the text of the ICCTA all foreclose this argument.

In *AAR*, the Ninth Circuit drew a clear distinction between local rules that regulate railroad operations, which are preempted if they "may reasonably be said to have the effect of managing or governing rail operations," *AAR*, 622 F.3d at 1098, and federal mandates implemented *through* state and local agencies, such as SIP-approved rules, which are to be harmonized with the ICCTA, rather than preempted by it. *Id.* This ruling flows from the STB's own long line of decisions, which date back to 1996 and hold that ICCTA does not preempt the state and local government "role under ... federal statutory schemes, such as the Clean Air Act." *See King County, WA – Petition for Declaratory Order – Stampede Pass Line*, 1 STB 731, 1996 WL 545598 at \*5 (1996); *Cities of Auburn and Kent, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 2 STB 330, 1997 WL 362017 at \*4 (1997). As a result, the STB should not accept BNSF's invitation to read the ICCTA as per se preempting SIPs that regulate rail operations. Harmonization analysis is required, instead.<sup>1</sup>

The ICCTA's text provides strong support for harmonization in this context. Although BNSF maintains that the relevant ICCTA jurisdictional provision, 49 U.S.C. § 10501(b), "explicitly states that the STB has *exclusive* authority to regulate rail transportation," preempting even federal law, BNSF Supp. Comments at 7, it greatly overstates that clause. The relevant statute provides as follows:

The jurisdiction of the Board over--

- (1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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<sup>1</sup> BNSF nonetheless wrongly suggests that Section 110 of the Act "instructs that preempted state law may not be included in a SIP," *see* BNSF Supp. Comment at 5 n.1, and therefore the rules here cannot be incorporated into the federal SIP. The preemption test for state law is not relevant in SIP approval because SIPs become federal law; harmonization, not preemption, is therefore the relevant analysis. If a SIP rule can be harmonized with the ICCTA, and is otherwise legal, the state is "not prohibited by any provision of Federal or State law" from carrying it out. *See* 42 U.S.C. § 7410(a)(2)(E)(i).

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

The statute thus demarcates an important, but *bounded*, realm of exclusive STB jurisdiction with regard only to the “remedies provided under this part.” 49 U.S.C. § 10101(b)(1)-(2). The STB is provided with exclusive jurisdiction and corresponding remedial authority in two broad, but well-defined areas: rates, routes, services, and related issues under § 10501(b)(1), and siting and operations of tracks and facilities, under § 10501(b)(2). The statute goes on to flesh out the STB’s exclusive “remedies” in these areas: ratemaking authority, *see, e.g., id.* §§ 10701 *et seq.*, and licensing powers for facility siting and operations, *see, e.g., id.* §§ 10901 *et seq.* Notably, the ICCTA chapter entitled “operations,” Chapter 111, tracks these zones of economic regulation, focusing upon rail services, rates, and accounting issues, rather than sweeping in every conceivable sort of “operations” issue. *See generally id.* §§ 11101 *et seq.* The STB’s exclusive “operations” remedies do not explicitly include, for instance, air quality regulation.

Thus, though the “remedies provided under [the ICCTA] with respect to regulation of rail transportation,” *id.* § 10501(b), are, indeed, exclusive as to both state and federal law, that is only true *in those subject matter areas*. The jurisdiction provision does not mean that all “federal laws that seek to regulate such transportation are preempted,” as BNSF would have it. *See* BNSF Supp. Comments at 7. Instead, the statute enumerates two specific classes of regulatory remedies “provided under this part” and carves out the STB’s jurisdiction over those subject matters. Though the STB’s authority is broad, the ICCTA does not set aside all other federal regulations of railroad operations.

If such rules still potentially conflict with matters within the STB’s jurisdiction, harmonization is the path forward: other federal statute are to be “construed *in pari material*” with the ICCTA, an analysis designed to defuse any residual conflicts between competing federal mandates. *See, e.g., Tyrell v. Norfolk Southern Railway Co.*, 248 F.3d 517, 523-24 (6th Cir. 2001) (explaining, for instance, that the Federal Railroad Administration and STB are to implement their responsibilities under various federal statutes, including the ICCTA, harmoniously). The environmental context is no different: federal statutes, and resulting state-made and federally-approved rules, regulating the railroads with regard to matters outside of the STB’s particular remedies are to be harmonized, not preempted, as *AAR* directs, and as the *Stampede Pass* line of STB rulings recognize.

## 2. Careful Harmonization Is Particularly Important in the Clean Air Act Context

As *AAR* and the *Stampede Pass* cases direct, this fact-bound and careful harmonization analysis is particularly important in the SIP context. The SIP mechanism is the “heart” of Congress’s Clean Air Act mandate to translate national air quality standards into healthy air in each local jurisdiction. *Union Electric Co v. EPA*, 427 U.S. 246, 249 (1976); see also *Alaska Dep’t of Environmental Conservation v. EPA*, 540 U.S. 461, 469-71 (2004) (explaining this structure). CARB demonstrated in its earlier filings that no other federal authority can readily fulfill this critical function with regard to railroad operational emissions, and that states face potentially heavy federal penalties if the national standards are not attained – not least that their citizens’ health and welfare may suffer. See CARB Supp. Comments at 6-9. For these reasons, CARB trusts that the STB will approach this matter with great care, as it has now done for almost two decades, rather than abruptly overruling its prior cases and granting the railroads the blanket exemption from SIP rules which they appear to seek.

BNSF’s supplemental comments continue to misstate these vital Clean Air Act mandates. See BNSF Supp. Comments at 15.<sup>2</sup> BNSF relies upon a provision granting California authority to set emissions standards for non-new locomotives, 42 U.S.C. § 7543(e)(2)(A), unless one of three specified criteria can be shown to exist. BNSF takes one criterion out of context, arguing that California must show “compelling and extraordinary circumstances” as evidence that Congress somehow disfavored California SIP regulation in this area. This argument is flatly wrong.

First of all, it is far from clear that that section of the Clean Air Act has any bearing on the SIP at issue here, because it addresses equipment standards, rather than state plans prepared to meet ambient air quality standards. Moreover, even if the provision is relevant, Congress’s decision to allow California to set emission standards and other requirements related to the control of emissions for non-new locomotives is strong evidence that California may regulate railroad emissions if necessary. Despite BNSF’s suggestion that California may regulate only in “extraordinary” circumstances, EPA has long recognized that the “compelling and extraordinary circumstances” at issue are California’s serious air quality problems, “particularly [in] the South Coast and San Joaquin valley air basins” due to “unique geographical and climatic conditions, and the tremendous growth of California’s on- and off-road vehicle population.” See, e.g., 74 Fed. Reg. 32,744, 32,759-63 (July 8, 2009) (affirming

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<sup>2</sup> EPA has, properly, made clear that these Clean Air Act matters are not before the STB. See Comments of EPA filed March 21, 2014. We still respond to BNSF’s mischaracterization of them because BNSF purports to rely on these provisions as part of its argument about the ICCTA harmonization issues before the STB.

California's regulatory authority under this section). These circumstances persist, and have justified multiple EPA approvals reaffirming California's regulatory need and authority over the years. *See id.* EPA has been clear that Congress "quite intentionally restricted and limited EPA's review of California standards" in order to "provide the broadest possible discretion to California in selecting the best means to protect the health of its citizens and the public welfare," *Id.* Further, while BNSF asserts that California must "satisfy [a] test" to regulate," BNSF Supp. Comments at 15, the D.C. Circuit has held conclusively that Congress put the burden on the parties *challenging* California's authority to show that California's compelling and extraordinary need to address air pollution does *not* warrant regulation. *Motor and Equipment Manufacturer's Association, Inc. v. EPA*, 627 F.2d 1095, 1121-23 (D.C. Cir.1979); *see also* 74 Fed. Reg. at 32,763.

In short, with regard to SIPs in general, and railroad rules in particular, the Clean Air Act grants state authority to comply with its mandates, with particular authority granted to California, in light of its compelling and difficult air pollution problems. These authorities, and the public health threats they are designed to combat, underline why the blanket preemption the railroads seek would be inappropriate.

This is not to say that harmonization may not still be required. Certainly, some SIP rules may still require adjustment to avoid causing undue burdens to rail operations. As EPA (and, ultimately, the courts) consider those questions they will weigh the benefits SIP rules achieve against any burdens the STB identifies in consultation with EPA, and may, for instance, consider ways to modify the rules in order to reduce those burdens. The STB can best aid in that task by providing the environmental regulator its considered judgment on the railroad burden term in that equation. But it is EPA, and the courts, which must ultimately conduct this analysis because the final SIP approval decision rests with EPA.

### **3. Conclusion**

The STB has an important role to play advising EPA in this matter. Filling this role, the STB should provide its expert advice on likely effects of the rules at issue on railroad rates and economic operations, and other such matters in its jurisdiction, but it should reject the railroads' invitations to overreach and greatly disrupt a working federal structure for air quality regulation. *AAR* directs the STB to adhere to its long-held view that harmonization analysis – which can take railroad burdens and emissions benefits into account -- is warranted here. CARB respectfully requests that the STB work

with EPA to help bring that harmonization task to a successful conclusion, fulfilling the mandates of both the ICCTA and the Clean Air Act.

Respectfully submitted,

CALIFORNIA AIR RESOURCES BOARD



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**CERTIFICATE OF SERVICE**

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

I, Evelyn Anderson, hereby certify that I have this day, April 14, 2014, caused to be served by first class mail, postage prepaid, a copy of "Reply Comments of the State of California Air Resources Board Re: Petition for Declaratory Order" in the above referenced proceeding to all parties of record in the docket as listed below.

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

Dated: April 14, 2014

A handwritten signature in blue ink, appearing to read "E. Anderson", written over a horizontal line.

Evelyn Anderson  
Executive Secretary  
California Air Resources Board