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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 OF THE
STATE OF CALIFORNIA AIR RESOURCES BOARD
TO
PETITION FOR DECLARATORY ORDER

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I. Introduction

The California Air Resources Board (CARB) respectfully files this reply to the petition for a declaratory order filed by the United States Environmental Protection Agency (EPA) on January 24, 2014. (Docket # FD 35803.) The petition requests the Surface Transportation Board (STB) to address whether two locomotive idling rules adopted by California’s South Coast Air Quality Management District (South Coast), if approved by EPA into the California State Implementation Plan (SIP), would be preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 U.S.C. § 10101 et seq. CARB has a strong interest in the petition because the outcome may affect both the authority of local air districts to implement rules and regulations necessary to meet the State’s implementation plan requirements under the federal Clean Air Act,¹ and CARB’s ability to meet its own obligations to improve air quality in California.

For nearly two decades, STB decisions have recognized that state and local regulations implementing federal environmental statutes such as the Clean Air Act generally fall outside the scope of the ICCTA preemption. Neither the STB nor any federal court has ever held a federal environmental action to be preempted by the ICCTA. Instead, the STB has made clear that the railroads continue to be responsible for compliance with environmental laws, including regulatory measures required for state

¹ Pursuant to the Clean Air Act, states are required to develop and implement plans to attain and maintain air quality standards set under the Act. The requirements for state implementation plans are delineated in section 110(a)(2) of the Act. 42 U.S.C. § 7410 (a)(2).

implementation plans under the Clean Air Act. This interpretation harmonizes the mandates of the two federal statutes, ensuring that states and local jurisdictions can protect the health of their citizens while the STB continues its important work. The STB should maintain this long-standing approach in this matter. South Coast's two locomotive idling rules were developed to meet its Clean Air Act obligations and, if approved by EPA, will become federal law. As such, they fall squarely within the STB's long-standing precedent, and would not be preempted if approved.

II. CARB and the Districts are given the primary responsibility for the prevention and control of air pollution within their jurisdictions and share responsibility to fulfill the requirements of the federal Clean Air Act.

The South Coast rules at issue in this matter were developed as part of the South Coast's efforts to attain public health standards for air quality in its region. These efforts, in turn, form part of California's SIP, the collection of measures designed to protect air quality which the State, through CARB and the many state air districts, is required to develop, collate, and submit to EPA for approval into federal law. Emissions from railroad operations are a significant source of air pollution in California, and so the State and South Coast have included regulations related to these operations into this larger collection of rules.

A. California faces a unique challenge to attain and maintain federal air quality standards.

While the Clean Air Act gives the federal government the responsibility for developing air quality standards sufficient to protect public health and welfare, the states are given the primary responsibility for the prevention and control of air pollution within their jurisdictions through their SIPs. *See* 42 U.S.C. §§ 7409 & 7410. The force of Congress's mandate to the states reflects its strong emphasis on protecting public health; states are open to sanctions if they do not attain the standards, *see* 42 U.S.C. § 7509, and a heightened standard of review applies to major construction efforts in nonattainment areas, *see* 42 U.S.C. §§ 7502 & 7503. As federal standards continue to tighten, the states must work assiduously to protect their citizens.

1. Federal standards for PM2.5 and ozone are stringent.

The EPA has established health protective standards for a number of criteria pollutants, including fine particulate matter (PM2.5) and ozone – air pollution to which California's goods movement system, in general, and railroad operations, in particular, contribute significantly. EPA is also required to periodically revisit the standards to check if they are sufficiently health protective. Since scientific

studies continue to document health impacts of air pollution at progressively lower levels, air quality standards are periodically revised, becoming more stringent over time. A significant portion of California is designated as nonattainment for PM_{2.5} and ozone, and, as the standards are lowered, more areas may be designated as nonattainment.

PM_{2.5} is a significant public health threat. As EPA explains at length, *see generally* 78 Fed. Reg. 3,086 (Jan. 15, 2013), particulate matter pollution is a leading cause of asthma, respiratory disease, and heart attacks.² Unfortunately, several regions in California experience unsafe levels of this pollution, exposing the State's citizens to significant risk.

To address this pollution, in 1997, EPA set the first PM_{2.5} standard, a daily standard of 65 ug/m³ and an annual standard of 15.0 ug/m³ with attainment in 2014. The South Coast Air Basin and the San Joaquin Valley were designated nonattainment for this standard. In 2006, EPA lowered the daily standard to 35 ug/m³, with attainment by 2019. In addition to South Coast and the San Joaquin Valley, the San Francisco Bay Area, Sacramento region, and portions of Imperial, Butte, Yuba and Sutter Counties were designated nonattainment for this standard. In 2012, EPA lowered the annual standard to 12.0 ug/m³. Designations are still in progress, with attainment required by 2025.

Ozone, too, continues to challenge parts of California. Ozone – popularly referred to as smog – is linked to a host of respiratory and cardiac ailments, *see* 73 Fed. Reg. 16,436 (Mar. 27, 2008), and plagues regions across the country.³ As with PM_{2.5}, several regions in California continue to experience unhealthy levels of ground-level ozone in their air, harming California's citizens.⁴

Over the years, the science has demonstrated that even seemingly very small concentrations of ozone are unsafe, leading EPA to regularly lower the federal standards. In 1979, EPA set a 1-hour ozone standard of 0.12 ppm. In 1997, EPA determined that an 8-hour ozone standard of 0.080 ppm was more health protective than the 1-hour ozone standard. Attainment is required by 2023. In 2008, EPA lowered the 8-hour ozone standard again to 0.075 ppm with attainment by 2032. California has 16 nonattainment areas including the South Coast, San Joaquin Valley, San Francisco Bay Area, Sacramento and San Diego. Currently, EPA is considering lowering the 8-hour ozone standard again

² *See also* U.S. EPA's fact sheet on particulate matter, available online at: <http://www.epa.gov/airquality/particulatepollution/health.html>.

³ *See also* U.S. EPA's ozone factsheet, available at: <http://www.epa.gov/airquality/ozonepollution/health.html>.

⁴ *See also* U.S. EPA's "Ground-Level Ozone Standards – Region 9 Final Designations – April 2008," at <http://www.epa.gov/ozonedesignations/2008standards/final/region9f.htm>.

within the range of 0.060 ppm to 0.070 ppm. The attainment date will be driven by when designations are final, but will likely be in the 2040 timeframe.

As these standards continue to be lowered in response to on-going scientific research, it is incumbent on CARB and the local districts to protect Californians by controlling emissions from sources of these pollutants.

2. The South Coast and San Joaquin Valley need significant emission reductions to attain the federal ozone standards in 2023 and 2032.

This obligation is particularly pressing because some parts of California are among the very most polluted regions in the country. Specifically, California is home to two of the nation's most pressing air quality challenges. The South Coast and the San Joaquin Valley are the only two areas in the country designated as in extreme nonattainment for both the federal 1-hour⁵ and 8-hour ozone standards.⁶ These same two areas also experience high levels of PM_{2.5}, with the San Joaquin Valley having the highest levels in the nation. Because of the severity of the air quality changes in these two areas, they drive the transformational change in technology, fuels, and operational controls needed to meet federal air quality standards throughout the State, with about a 90 percent reduction in oxides of nitrogen (NO_x) emissions, a precursor pollutant that must be reduced to reduce both ozone and PM_{2.5} levels throughout the State, needed by 2032.

3. Locomotives and state rail yards are a significant source of emissions.

Both ozone and PM_{2.5} pollution can be formed from the mixture of pollutants which emerge from the State's freight system, in general, and railroad operations, including locomotive emissions, in particular. Goods movement in California is a substantial source of NO_x and diesel exhaust emissions, a complex mixture of gases and fine particles, including PM_{2.5}, and other criteria pollutants, including NO_x, volatile organic compounds (VOC), carbon monoxide (CO), and oxides of sulfur (SO_x). These emissions account for approximately 45 percent of the statewide NO_x emissions and 70 percent of the statewide diesel PM emissions, which has been identified by California as a toxic air contaminant and

⁵See U.S. EPA's "Green Book," at <http://www.epa.gov/airquality/greenbook/la-scabo.html> and <http://www.epa.gov/airquality/greenbook/sanjaqo.html>.

⁶U.S. EPA's "Ground-Level Ozone Standards – Region 9 Final Designations – April 2008," at <http://www.epa.gov/ozonedesignations/2008standards/final/region9f.htm>.

the component of black carbon that is a powerful short-lived climate pollutant. Locomotives and rail yards, as part of goods movement, are a significant source of diesel exhaust.

There are 18 major railyards operated by Union Pacific Railroad (UP) and BNSF Railway (BNSF) in California that together generated an estimated 210 tons per year of diesel PM in 2005. Ten of the major railyards in California are located in the South Coast Air Basin, with four identified as “high-priority” railyards that generate up to 75 percent of intermodal container lift activity for off-dock railyards statewide. These four high-priority railyards also have some of the highest railyard diesel PM and associated cancer risks in the state.

About two thirds of the UP and BNSF trains that operate within the state operate in the South Coast region on any given day. CARB expects traffic to continue to increase; if it does so at historical rates, it will ramp up approximately 3 percent per year. CARB estimates that locomotives will contribute approximately 22 tons per day of NOx in the South Coast Air Basin in 2023, making it the fifth largest generator of mobile source NOx emissions. While it is anticipated that railroad-related operations will contribute approximately 6 percent of all mobile source NOx emissions in 2015, its contribution grows to almost 10 percent in both the 2023 and 2035 timeframe. In addition, by 2035, while it is estimated that NOx emissions from other land-based mobile sources in the South Coast Air Basin will be reduced by 50 percent due to existing rules, emissions from railroad-related operations will be reduced by only 20 percent absent any additional controls.

Future NOx reductions from railroad-related operations will be critical for California to meet future air quality attainment deadlines. Yet, while railroad-related operations are important sources of emissions that must be controlled to meet the State’s air quality goals, these sources have not been regulated to the extent that most other sources in California have been. As CARB and the air districts work to meet increasingly strict federal air quality standards, addressing these emissions will be an important part of the discussion.

B. Under the Clean Air Act, states adopt and submit SIPs to attain and maintain federal air quality standards.

The South Coast rules are before EPA for approval into California’s SIP. California’s SIP is the State’s primary tool for demonstrating the State will meet federal air quality standards. Each SIP collects a series of regulatory measures – many of which apply to particular industrial sections or processes – to implement, maintain, and enforce compliance with the national standards. *See* 42 U.S.C.,

§ 7410.⁷ States submit SIPs to EPA, which then reviews these submittals to ensure they meet the Clean Air Act's requirements, and then approves or disapproves them. *See id.* §§ 7410(a) & (k). Once approved by EPA, the regulations contained within SIPs become federal law. *See, e.g., Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007).

California develops its SIP through a comprehensive air pollution control program in which the State and the local air districts share responsibility to fulfill the requirements of the Clean Air Act. *See generally* Cal. Health & Saf. Code, § 39000, et seq. CARB is designated the air pollution control agency for all purposes set forth in federal law and is responsible for the preparation of the California SIP required by the Clean Air Act. *See* Cal. Health & Saf. Code, § 39602; 42 U.S.C., § 7410(a). The local air districts are granted the primary responsibility for control of all nonvehicular sources, while CARB generally focuses specifically on vehicle emissions, fuels, and statewide climate change issues. *See* Cal. Health & Saf. Code, §§ 39002, 40000. To carry out their duties, the local districts are given broad authority to adopt and enforce rules and regulations to achieve and maintain the state and federal air quality standards in all areas affected by emission sources under their jurisdiction. Cal. Health & Saf. Code, § 40001. CARB is charged with coordinating the activities of the local air districts and to review and adopt elements of the California SIP that local districts adopt. Cal. Health & Saf. Code, §§ 39602, 41650-41652.

Emissions controls from railroad operations may be required as part of these State and local mandates, upon approval by EPA. Specifically, California law assigns California's air districts "primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles," for which CARB has primary authority. Cal. Health & Saf. Code § 40000.⁸ Both CARB and the districts have a role addressing railroad emissions, CARB under a specific authorization to address these emissions, *see* Cal. Health & Saf. Code § 43013(b), and the districts under their general air pollution

⁷ In other words, though each SIP is designed to meet a general mandate to achieve and maintain compliance with federal ambient air quality standards, this mandate means that state and local authorities must identify important sources of air pollution from particular industries and sources which threaten compliance, and regulate accordingly. *See generally* 42 U.S.C. § 7410. Thus, SIPs typically are based upon a range of industry- or source-specific regulations which are components of the general plan and which, cumulatively, achieve compliance.

⁸ Locomotives are not considered "motor vehicles," meaning that the districts have a responsibility for their emissions as part of the general grant of authority to the districts. *See* Cal. Health & Saf. Code § 39059 & Cal. Vehicle Code § 670 (defining vehicles as excluding those "used exclusively upon stationary rails or tracks").

authority.⁹ Such regulations may be incorporated into federal law through state implementation plans, *see* 42 U.S.C. § 7410.¹⁰

South Coast, as a local air district, is responsible for adopting the SIP for its region and for periodic revisions to that SIP to achieve and maintain air quality standards. Cal. Health & Saf. Code, §§ 40460-40463. The South Coast has determined that the regulations at issue here are an important part of its strategy for meeting these standards.

The question before the STB is whether these rules, if approved by EPA into the SIP and have the force and effect of federal law, will be preempted by the ICCTA. As discussed next, the ICCTA's core purpose is not offended by separate, federally-required environmental regulations submitted into the California SIP.

III. District and CARB regulations implementing the federal Clean Air Act are not preempted by ICCTA.

Over the nearly two decades since the ICCTA was enacted, the STB and numerous federal courts have been clear that federal Clean Air Act regulations, including those found in SIPs, are not preempted by the ICCTA. Indeed, to our knowledge, neither the STB nor any court has *ever* ruled a federal environmental requirement of any kind to be preempted. This history is consistent with controlling precedent directing the STB, like other federal tribunals, to harmonize federal law requirements with each other, giving maximum effect to all of Congress's commands, rather than waiving some of those directives. The STB should follow its common practice here and confirm that California and its local air districts can meet their Clean Air Act obligations to protect public health and welfare by enacting reasonable rules to govern serious railroad emissions issues.

⁹ We note that the districts are barred from setting certain equipment design specifications for locomotives, though that bar is not relevant to operational standards like those in South Coast's rules. *See* Cal. Health & Saf. Code § 40702.

¹⁰ Congress has also explicitly authorized California to set emissions standards for non-new locomotives upon U.S. EPA approval. *See* 42 U.S.C. § 7543(e)(2). "Congress recognized that California was already the 'lead[er] in the establishment of standards for regulation of . . . pollutant emissions' [from such sources] at a time when the federal government had yet to promulgate any regulations of its own." *Engineer Manufacturers' Association v. EPA*, 88 F.3d 1075, 1079 (D.C. Cir. 1996) (citing *Motor Equipment Manufacturers Association v. EPA* 627 F.2d 1095, 1109 (D.C. Cir. 1979)); S.Rep. No. 192, 89th Cong., 1st Sess. 5 (1965), U.S. Code Cong. & Admin. News 1965, p. 983. This EPA authorization process, though indicative of Congress's intention that air pollution from railroads be controlled through several different Clean Air Act mechanisms, is not directly relevant here for two reasons. First, most fundamentally, the rules at issue will be part of a *federally*-approved SIP, and are not the separate state standards to which the 209(e) authorization process applies. Secondly, the EPA authorization process applies to equipment design standards, unlike South Coast's operational rules, *see, e.g.*, 10 C.F.R. § 1074.12 (defining scope of the waiver requirement)). 63 Fed. Reg. 18,978, 18,994 (Apr. 16, 1998) (discussing the requirement).

A. The STB should follow the decades-long consensus of former STB decision and the courts that regulatory measures implementing Clean Air Act SIPs are generally not preempted by the ICCTA.

It is black letter law that “when two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective.” *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154-55 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). That interpretive rule gains additional force where, as here, one statute, the Clean Air Act, precedes the other, here the ICCTA, because courts (and agencies) are not to presume that later-enacted statutes repeal or conflict with earlier enactments. *See, e.g., National Association of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007). The ICCTA does not conflict with, but rather reinforces, the Clean Air Act’s emphasis on protecting public health by declaring a national policy to “operate transportation facilities and equipment without detriment to the public health and safety.” 49 U.S.C. § 10101 (8).

Accordingly, within a year of the ICCTA’s enactment in 1995, the STB made clear that the ICCTA did not preempt state and local governments’ “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). This role is a very significant one because the Clean Air Act identifies pollution control as “primary responsibility of States and local governments,” fulfilled chiefly through the SIP process. 42 U.S.C. § 7401(a)(3). The STB amplified that foundational statement a year later, holding, in terms that speak directly to this matter, that there are “significant roles for state and local agencies under various federal statutes, including environmental statutes,” and the ICCTA does not preempt these actions:

For example, the Clean Air Act requires states to implement plans to protect and enhance air quality so as to promote the public health and welfare....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 ... Nothing 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, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line, 2 STB 330, 1997 WL 362017 at *4 (1997).

Following those seminal cases, the STB has consistently maintained that “Congress did not intend to preempt federal environmental statutes such as the Clean Air Act and the Clean Water Act.” *See, e.g., Borough of Riverdale Petition for Declaratory Order – The New York Susquehanna and Western Railway Corporation*, 4 STB 380, 1999 WL 715272 (1999). Because “state and local agencies

[are charged with] implementing Federal environmental statutes,” their regulations are also generally immune from preemption (perhaps, at worst, with some limited, never-applied, limitations, discussed below). *Friends of the Aquifer et al.*, STB Finance Docket No. 33966, 2001 WL 928949 (2001). The STB, in fact, has rejected invitations to preempt federal laws, rather than harmonize the ICCTA with them, as “overbroad and unworkable.” *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 584026 at * 8 (2005). The STB reaffirmed this decades-old approach just weeks ago. *Grafton & Upton Railroad Company – Petition for Declaratory Order*, Docket No. FD 35779, 2014 WL 292443 at *5 (January 27, 2014).¹¹

The federal courts have been equally clear that Clean Air Act plans readily coexist with ICCTA requirements. In the case that led to this petition, the Ninth Circuit held that South Coast’s rules generally would not be preempted if those rules were part of South Coast’s “EPA-approved statewide plans under federal environmental laws.” *Association of American Railroads et al. v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9th Cir. 2010). Now that South Coast has followed the Court’s directions and submitted its plans for approval, the matter should be settled against preemption.

Further supporting that outcome, other courts have repeatedly affirmed “a harmonious reading of the [STB]’s exclusive jurisdiction and the ability of entities – including state and local governments –” to implement federal environmental laws. *United States v. St. Mary’s Railway West, LLC*, - F. Supp. 2d -, 2013 WL 6798560 at *5 (S.D. Ga. 2013); *see also id.* (collecting cases demonstrating that “[n]umerous Article III courts have also found no conflict between [the ICCTA and federal environmental statutes]”).

Thus, the question EPA poses to the STB is answered by decades of governing and persuasive authority. Once rules have been approved into SIPs and have become federal law, they should not be deemed preempted by the ICCTA. Neither the STB, nor any court of which we are aware, has ever

¹¹ *See also, e.g., Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer, MA*, STB Finance Docket no. 33971, 2001 WL 458685 at *5 (2001) “[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.”); *The New York City Economic Development Corp. – Petition for Declaratory Order*, STB Finance Docket No. 34429 (2004) (recognizing that a rail project was also “subject to federal environmental laws, such as the Clean Air Act”); *CSX Transportation, Inc. – Petition for Declaratory Order*, STB Finance Docket No. 34662, 2005 WL 584026 at * 8 n. 11 (2005) (“Congress did not intend to preempt federal environmental statutes such as the Clean Air Act... even though those statutory schemes are implemented in part by the states”).

ruled otherwise. The vital purposes of both statutes can be implemented harmoniously. *See American Railroads*, 622 F.3d at 1097 (“[C]ourts must strive to harmonize the two laws, giving effect to both laws if possible.”) The STB should not unsettle this decades-long consensus here.

B. Even if a federal SIP regulation could ever be preempted by the ICCTA, these regulations should not be judged on standards developed for state or local laws in a federal preemption analysis.

Some, but not all, STB decisions suggest that some federal regulations may still be preempted by the ICCTA if they are “being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.” *Friends of the Aquifer*, 2001 WL 928949 at *4;¹² *but see, e.g., Stampede Pass*, 1997 WL 362017 at *4 (holding that nothing in the STB’s rulings “is intended to interfere with the role of the states and local entities in implementing these federal laws”). This caveat, which has appeared only inconsistently in the STB’s decisions, has never been applied in practice, and at least one federal court decision, *St. Mary’s Railway*, raised serious questions about whether it should be applied at all. The STB should reject any invitation to unsettle the careful balance it has struck between the Clean Air Act and its own responsibilities by wading into this uncertain terrain.

As *St. Mary’s Railway* points out, there is not “one case limiting federal action” under the ICCTA. *St. Mary’s Railway*, - F. Supp. 2d -, 2013 WL 6798560 at *7As a result, the STB has no indication that such limitations would be appropriate, or could be upheld if challenged. Moreover, as *St. Mary’s Railways* also discusses, the “undue burden” test appears to have been developed from cases limiting *state* law actions under Dormant Commerce Clause and similar doctrines, but “[t]he focus on [burdens] to interstate commerce” in the putative test “is inapposite to the federal government, as an effect on interstate commerce enables rather than limits the federal government’s ability to act.” *Id.*

¹² In its most recent decision, *Grafton*, the STB used a new formulation, stating there is no preemption “unless the federal environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads.” 2014 WL 292443 at *5. Although this language is different from that used in other recent STB decisions, we understand *Grafton* to simply use different language to express the same concerns about unreasonable burdens and discriminatory actions articulated in earlier cases, without offering a substantively different test. After all, both *Grafton* itself, and the STB’s prior rulings all indicate that some rules which “regulate rail operations” are perfectly permissible. The decision does not indicate it is changing the law and should be read accordingly.

There has been no change in the governing federal case law between *Grafton* and earlier STB decisions. Indeed, though *Grafton* cites the Ninth Circuit’s ruling in *American Railroads* after offering its new language, the Ninth Circuit itself issued no such holding, instead affirming that ICCTA “generally does not preempt” SIPs under the Clean Air Act, without offering any further qualifications. Moreover, *Grafton* also favorably cites *St. Mary’s Railway*, *see* 2014 WL 292443 at *5, which expresses considerable doubt that any preemption test for federal laws is appropriate. We therefore do not believe that the STB should understand this alternate language in *Grafton*, which, in any event, is dicta that did not determine the outcome of the petition, as a change in its precedent.

State and local jurisdictions acting pursuant to federal law should not be judged on standards developed for judging conflicts between state and federal laws. In short, since it is unclear whether any additional preemption analysis is appropriate after a rule has been approved in to a SIP, the STB need not wade into this unsettled territory.

Moreover, even if *some* test did apply to federal regulations, logically it cannot be the same relatively strict test applied to state regulations to determine if it conflicts with the ICCTA. As *American Railroads* discusses at length, and demonstrated by nearly twenty years of STB decisions differentiating between state and federal enactments, state actions implementing federal environmental laws must receive far more solicitude than state or local laws receive in a federal preemption analysis. As a matter of law, the charge to the STB and the courts is to “harmonize” *federal* statutory mandates, *American Railroads*, 622 F.3d at 1097, while *state* laws may be flatly preempted if they unreasonably burden railroad operations.¹³ Although the STB has used similar language to describe its proposed test for both federal and state law preemption, in practice, it should grant considerable solicitude to federal SIP rules.¹⁴ If SIP provisions can ever be preempted by the ICCTA, the conflict between those regulations and the ICCTA’s purposes would have to be very sharp indeed to overcome this strong presumption against preemption.¹⁵

The Supreme Court has repeatedly held that since neither the courts nor agencies are “at liberty to pick and choose among congressional enactments,” *Morton*, 417 U.S. at 550, federal statutes are not to be held in conflict with each other unless “there is a positive repugnancy between them” or they “cannot mutually coexist.” *Radzanower*, 426 U.S. at 155. Preemption turns upon discerning a “clear and manifest” intent to repeal, *Morton*, 417 U.S. at 550, which may be demonstrated by a conflict between statutes’ “basic purpose[s],” *see Radzanower*, 426 U.S. at 155. Even where some conflict is present, the

¹³ Though even this inquiry is fact-intensive and even many state laws may not be preempted upon careful review. *See, e.g., New York Susquehanna and Western Railway Corporation v. Jackson*, 500 F.3d 238 (3rd Cir. 2007) (conducting such an inquiry and concluding that state regulations including substantial fines and operations restrictions were not *per se* preempted).

¹⁴ Particularly so because preemption is disfavored even with regard to state laws when those laws are based upon traditional police powers intended to protect citizens. *See, e.g., Florida East Coal Railway Company v. City of West Palm Beach*, 266 F.3d 1324, 1337 (11th Cir.2001). The Clean Air Act builds upon this traditional “primary responsibility of States and local governments,” 42 U.S.C. § 7401(a)(3), and federalizes some of the resulting regulations. Thus, the STB should regard efforts to preempt Clean Air Act SIP regulations based on this local police power with particular skepticism.

¹⁵ Any such analysis should not be based on hypothetical rules and regulations but rather on those rules and regulations that have been formally adopted and submitted for approval into a SIP. This would allow for full development and consideration of the facts and potential impacts from implementing the adopted rule or regulation.

necessary harmonization should vary the statutory requirements only by the “minimum extent necessary.” *Id.* Thus, “[i]f an apparent conflicts exists between ICCTA and a *federal* law, then the courts [and the STB] must strive to harmonize the two laws, giving effect to both laws if possible. *Association of American Railroads*, 622 F.3d at 1097.

The ICCTA and the Clean Air Act work harmoniously with each other. Initially, the core focuses of each statute – the ICCTA’s on consolidating economic regulation of railroads in the STB, and the Clean Air Act’s on air quality protection, including through state and local efforts to build federal SIPs – are plainly not “repugnant” to each other, as the STB’s own rulings specifically state. *See Stampede Pass Line*, 2 STB 330, 1997 WL 362017 at *4.¹⁶ In fact, the statutes share a common purpose of ensuring that railroad operations are conducted safely and public health and welfare are protected. *See* 42 U.S.C. § 7401 (Clean Air Act public health purposes); 49 U.S.C. § 10101(8) (ICCTA emphasis on public health and safety). If Clean Air Act rules were preempted by the ICCTA, protecting the public health and welfare would prove far more difficult because the STB’s own authorities, which center on rate and route setting, *see, e.g.* 49 U.S.C. §§ 10701-10709, and on facility construction, *see, e.g.*, 49 U.S.C. §§ 10901 *et seq.*, do not contain clear direction to the STB to also comprehensively regulate railroad emissions. This demonstrates that the authority vested in states and local entities to do so under the Clean Air Act continues unabated. Although the STB considers environmental matters in its decisions, these largely inform siting considerations and associated compliance with the National Environmental Policy Act, not substantive environmental standards for rail operations. *See generally* 49 C.F.R. Pt. 1105. Thus, the statute and the STB’s regulations give no indication that the STB is charged with setting air pollution standards for the railroads, or that the STB’s preemptive authority over other

¹⁶ Appellate cases on *state* law preemption under the ICCTA reinforce this understanding of the statute’s purposes as fundamentally harmonious with public health protection mandates. *See, e.g., Association of American Railroads* (noting that “the ICCTA reflects the focus of legislative attention on removing *direct* economic regulation by the *States*, as opposed to the incidental effects that inhere in the exercise of traditionally local police powers such as zoning”) (quoting *Florida East Coast Railways*, 266 F.3d at 1337 (emphasis in original)).

Thus, though some environmental state or local law regulations have been preempted where they functionally asserted veto authority over the federal railway siting decisions reserved to the STB, more general environmental requirements have not been, reflecting a judicial consensus that both purposes can be realized without offending the ICCTA. *Compare City of Auburn v. U.S.*, 154 F.3d 1025, 1030 (9th Cir. 1998) (holding local environmental review which could allow authorities to veto project preempted) *with Florida East Coast Railways*, 266 F.3d at 1338 (holding local zoning not preempted); *New York Susquehanna*, 500 F.3d at 252 (holding transloading safety regulations not *per se* preempted and explaining that while local environmental rules *may* be preempted, the Act’s focus on “deregulation of the railroad industry” should guide the analysis). If even state and local requirements can avoid preemption based on this purpose-based analysis, then a holding that the *federal* requirements of the Clean Air Act cannot be harmonized with the ICCTA would require a very strong showing of fundamental conflicts between these two congressional mandates.

areas is intended to, or could, exempt railroad operations from the substantive environmental standards of other federal laws.¹⁷ Were the STB to hold otherwise, it would create a unique and unjustifiable gap in the Clean Air Act, functionally waiving otherwise generally applicable pollution requirements as they apply to operations under its jurisdiction. It would be odd to suppose that Congress intended to remove Clean Air Act authority to control this pollution without vesting the STB with a specific mandate (and commensurate resources) to address these serious issues. The better reading of the statute is the one the STB has long adopted: That pollution control regulations may fall upon the railroads, as they do upon all other industries, under the generally applicable terms of the Clean Air Act.

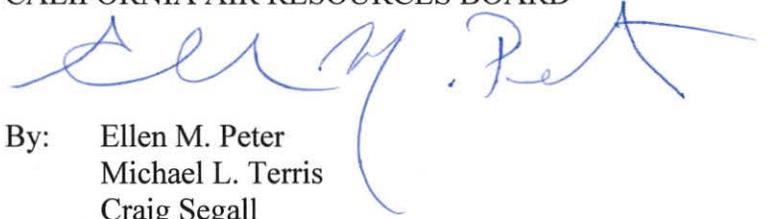
IV. Conclusion

Clean Air Act regulatory efforts and the ICCTA have co-existed without conflict since the ICCTA was enacted. Due to the STB's careful efforts to harmonize the important purposes of these two statutes, including recognizing the difficult tasks the Clean Air Act has set for state and local authorities, the public has benefitted from both improved railroad regulation and cleaner air, consistent with the purposes of both laws. The STB ought not to upset that well-settled balance here. The Ninth Circuit already indicated that local rules would generally not be preempted if approved into a SIP, and the STB's own decisions confirm this. Moreover, as discussed above, control of emissions from railroad-related operations will be critical for California to meet future air quality attainment deadlines and protect the public health and welfare of its citizens consistent with the Clean Air Act. Thus, the STB should inform EPA that the ICCTA does not present a barrier in this matter so that EPA may move forward in determining the merits of these rules for approval into the SIP under the CAA.

¹⁷ Indeed, where the STB is charged with regulating specific environmentally-sensitive facilities, such as waste transloading areas, the ICCTA is particularly careful to make clear that operators must also comply with other federal and state requirements "respecting the prevention and abatement of pollution." 49 U.S.C. § 10908(a). Congress consistently took care to ensure that federal environmental laws would continue to apply to railroad activities.

Respectfully submitted,

CALIFORNIA AIR RESOURCES BOARD



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Filed: February 14, 2014

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CERTIFICATE OF SERVICE

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

I, Jack Wursten, hereby certify that I have this day, February 14, 2014, caused to be served by first class mail, postage prepaid, a copy of CARB's Reply to United States Environmental Protection Agency Petition for Declaratory Order; South Coast AQMD Rules 3501 and 3502 in the above referenced proceeding to all parties of record in the docket as listed below.

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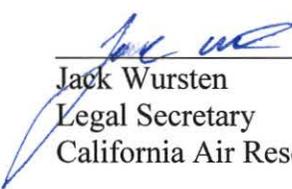
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I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 14, 2014



Jack Wursten
Legal Secretary
California Air Resources Board