

BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 35803

ENTERED
Office of Proceedings
March 28, 2014
Part of
Public Record

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
– PETITION FOR DECLARATORY ORDER

SUPPLEMENTAL OPENING COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

Of Counsel:

Paul A. Guthrie
Melissa B. Hagan
Paul R. Hitchcock
James A. Hixon
Theodore K. Kalick
Russell J. Light
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Gayla L. Thal
Richard E. Weicher
W. James Wochner
David P. Young

G. Paul Moates
Richard E. Young
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Michael R. Barr
Mark E. Elliott
PILLSBURY WINTHROP SHAW PITTMAN LLP
725 South Figueroa Street
Los Angeles, CA 90017
(415) 983-1151

Louis P. Warchot
Michael J. Rush
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Washington, D.C. 20024
(202) 639-2502

Counsel for the Association of American Railroads

March 28, 2014

**BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 35803**

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
– PETITION FOR DECLARATORY ORDER**

**SUPPLEMENTAL OPENING COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS**

Pursuant to the Board’s Decision served February 26, 2014 in this proceeding, the Association of American Railroads (“AAR”) submits these supplemental opening comments regarding the Petition for Declaratory Order (“Petition”) filed by the United States Environmental Protection Agency, Region IX (“EPA”) on January 24, 2014. For the reasons stated herein and in the AAR’s initial comments filed February 14, 2014 in this proceeding,¹ the Board should rule that Rules 3501 and 3502 enacted by the South Coast Air Quality Management District (“SCAQMD” or “the District”) are preempted by Section 10501(b) of the ICC Termination Act (“ICCTA”), even if the rules are ultimately included in an approved State Implementation Plan (“SIP”).²

INTRODUCTION

The question presented here is whether Congress intended, through the Clean Air Act, to permit State and local authorities to create a patchwork of local

¹ See Reply of the Association of American Railroads (Feb. 14, 2014) (“AAR Initial Comments”).

² The SCAQMD suggests in its Comments that EPA, by seeking a declaratory order from the Board, has impliedly determined that the proposed SIP amendment is approvable but for the preemption issue. See Reply of the South Coast Air Quality Management District to Petition for Declaratory Order, at 4 (Feb. 14, 2014) (“SCAQMD Comments”). However, nothing in EPA’s Petition supports SCAQMD’s suggestion.

regulations regarding the idling of locomotives simply by including the otherwise unlawful local regulation in a SIP. As the AAR demonstrated in its Initial Comments, SCAQMD's local idling rules are preempted by ICCTA because they regulate railroad operations, and two federal courts have so held.

The inclusion of these rules in a SIP approved by EPA would not change this result. Congress clearly did not intend that the SIP process be used by State and local officials to circumvent ICCTA and other Federal laws. To the contrary, Section 110 of the Clean Air Act and ICCTA operate in a complementary fashion. Section 110's requirement that the State provide the necessary assurances that it is "not prohibited by any provision of Federal . . . law from carrying out" any rule proposed for inclusion in the SIP plainly anticipates preemption scenarios and instructs that preempted State law not be included in the SIP. *See* 42 U.S.C. § 7410(a)(2)(E)(i). Moreover, Congress has long treated the manufacture and use of freight locomotives as needing protection from a patchwork of local regulations. Here, the only harmonious reading of ICCTA and the Clean Air Act leads to the inevitable conclusion that Congress did not contemplate State and local officials using the SIP process to circumvent federal law.

The instant Supplemental Comments expand on observations made by the AAR in its Initial Comments in three respects. *First*, they explain why the District's local idling rules threaten to create the kind of patchwork of local regulation of railroad operations that Congress expressly sought to prevent.

Second, they explain why the district court properly concluded that the District's reliance on the Clean Air Act appeared to be pretextual: a litigation decision made after the AAR filed suit against the District. That finding – taken in conjunction with the existence of different, uniform national standards for locomotive emissions promulgated by EPA – means that the District's claims of a conflict between ICCTA and the Clean Air Act are misstated.

Third, these comments describe how existing Federal locomotive idling rules promote the National objective of clean air emissions while minimizing the burden on interstate commerce and rail network fluidity. Contrary to the suggestions of the District and the California Air Resources Board (“CARB”), there is no evidence to conclude that a determination that the District’s rules are preempted will harm air quality in the South Coast Air Basin. Indeed, in 2008 CARB observed that these regulations “*are likely to achieve little, if any, emission reductions.*”³ In fact, implementation of the rules would be counterproductive. SCAQMD’s idling requirements would burden interstate commerce and cause further rail delays in an already congested region. This, in turn, will cause shippers to shift traffic to highway transportation, which is a far less environmentally-friendly mode of freight transportation than rail.

The adverse transportation and environmental consequences would be significant even if SCAQMD constituted the only local governmental entity to promulgate idling requirements. However, if the localities in the more than 100 nonattainment areas and other areas of the Nation are permitted to follow the District’s lead and adopt their own anti-idling rules, the consequences for both the environment and the rail industry would be far worse, to the detriment of the public interest. The Board should find these rules preempted by ICCTA to avoid such results.

³ Letter from James N. Goldstene, Executive Officer, CARB, to Penny Newman, Executive Director, Center for Community Action and Environmental Justice (July 23, 2008), reprinted in *California Regulatory Notice Register*, Vol. No. 34-Z, at 1490 (Aug. 22, 2008) (emphasis added).

ARGUMENT

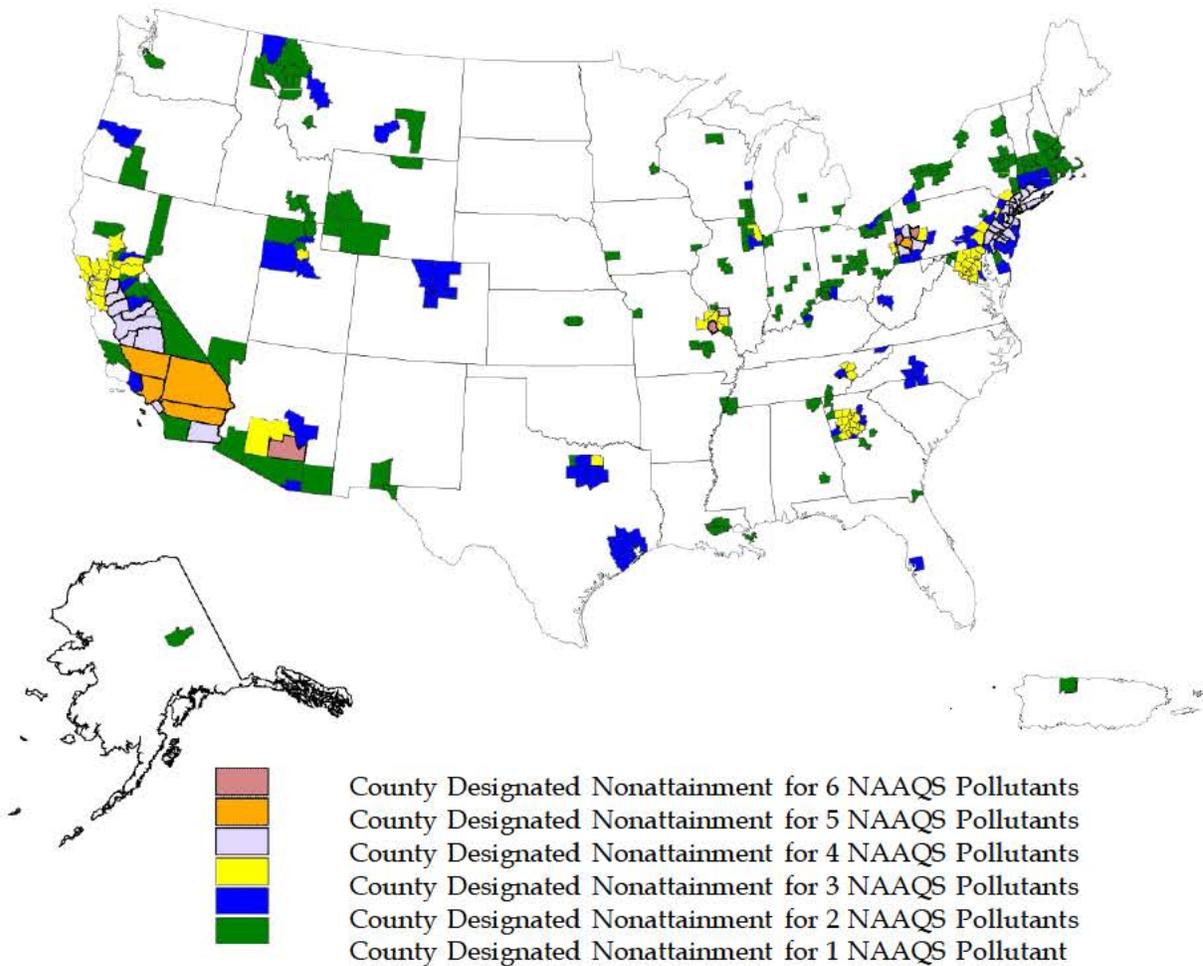
I. Locomotive Idling Rules In SIPs Would Balkanize the Interstate Rail Network With a Patchwork of Local Regulation of Rail Operations.

The touchstone of any ICCTA preemption analysis must begin with Section 10501(b)'s broad and plain statement of Congress' intent to place exclusive jurisdiction over rail operations with the Board. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case") (citation omitted). Section 10501(b) provides that the Board's jurisdiction over transportation by rail carriers and numerous other types of rail operations "is exclusive," and that "[e]xcept 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.*" 49 U.S.C. § 10501(b) (emphasis added). The Board has explained that Section 10501(b) "is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce." *CSX Transp., Inc. - Petition for Declaratory Order*, 2005 WL 584026, at *9 (S.T.B. served Mar. 14, 2005). It has further observed that "[e]very court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." *Id.* at *6.

Local idling regulations are clearly preempted by Section 10501(b). As the district court stated in finding SCAQMD's rules to be preempted, "the Rules at issue in this case are *exactly the type of local regulation Congress intended to preempt* by enacting the ICCTA in order to prevent a 'patchwork' of such local regulation from interfering with interstate commerce." *Ass'n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 WL 2439499, at *8 (C.D. Cal., Apr. 30, 2007)

(emphasis added) ("*District Court Opinion*"). The patchwork of regulation, and balkanization of the national rail network, that would result if local governments follow the District's lead are graphically illustrated by the following map of the more than 100 nonattainment areas located in more than 40 States.

**Counties Designated "Nonattainment"
for Clean Air Act's National Ambient Air Quality Standards (NAAQS)⁴**



⁴ See <http://www.epa.gov/airquality/greenbk/map/mapnpoll.pdf>.

Permitting local officials in these various nonattainment areas and other jurisdictions to circumvent the prohibition against local regulation of rail activities would remove any safeguards against a patchwork of local regulations, and override ICCTA's mandate of exclusive Board rail regulation.⁵

The danger of a patchwork of local regulations is real and great. The Petition To Intervene filed by the Massachusetts Department of Environmental Protection ("MassDEP") demonstrates that other States and localities either have adopted their own locomotive idling rules, or may adopt their own rules if the Board holds that SCAQMD's rules are not preempted. MassDEP states that it has adopted a rule concerning locomotive idling which has already been incorporated into the Massachusetts SIP.⁶ Moreover, MassDEP concedes not only that the Board's preemption analysis of the District's rules "would be nearly the same if the Board was reviewing the MassDEP's locomotive idling rule," but also that "[a]ny decision in this proceeding will have repercussions in Massachusetts

⁵ See Comments of Norfolk Southern Ry. Co., at 2-4 (Feb. 14, 2014) ("NS Comments"). The map set forth above shows only the various nonattainment areas in the United States. However, nothing would prevent other localities or regions from also seeking to include idling regulations in their SIPs. For example, as Union Pacific points out in its comments, there are over 100 State and local agencies (other than the SCAQMD) throughout the United States which are charged with regulating emissions from motor vehicles and other sources. Union Pacific Railroad Company's Reply To United States Environmental Protection Agency Region IX Petition For Declaratory Order, at 11 (Feb. 14, 2014) ("UP Comments") (footnote omitted). These agencies could prescribe locomotive idling rules like those of the SCAQMD for the ostensible purpose of regulating noise levels. Such rules, however, would have the same adverse effect as anti-idling rules adopted to reduce emissions.

⁶ The MassDEP rules were adopted before the enactment of the Clean Air Act Amendments of 1990 (which added subsection (e) to Section 209, prohibiting States and political subdivisions from adopting emissions standards for new locomotives), the enactment of ICCTA in 1996, or EPA's adoption of its rules regarding locomotive idling in 2008. Furthermore, the MassDEP rules were largely superseded by the locomotive idling rules adopted by the EPA in 2008. That said, the Massachusetts rules are facially preempted by ICCTA.

and other states which have a locomotive idling rule already included in their SIPs.”⁷ Rhode Island has also adopted its own anti-idling rules.⁸

The Massachusetts and Rhode Island rules are also facially preempted by ICCTA and thus unenforceable. ICCTA does not permit such regulation of rail operations, even if the State and local rules are similar to the federal rules or are directed only at a small amount of traffic. Congress acted to prevent a patchwork of local regulation to free interstate commerce from the *collective* burden of hundreds of individual local rules seeking to interfere with and regulate rail operations.

Moreover, the differences between the MassDEP and SCAQMD rules illustrate the burden that the rail industry would bear as different localities created different rules. The MassDEP’s idling rule prohibits owners of diesel powered locomotives from causing or allowing such locomotives “to be operated in a manner such as to cause or contribute to a condition of air pollution,” and from causing or allowing the “unnecessary foreseeable idling of a diesel locomotive for a continuous period of time longer than 30 minutes.” The rule, however, exempts diesel locomotives being serviced, “provided that idling is essential to the proper repair of said locomotive and ... such idling does not cause or contribute to a condition of air pollution.”⁹ By contrast, the District’s

⁷ Petition To Intervene Filed By the Commonwealth of Massachusetts’ Department of Environmental Protection in the Petition for Declaratory Order Filed by the United States Environmental Protection Agency, at 2-3 (Feb. 14, 2014) (“MassDEP Petition”).

⁸ See, e.g., Rhode Island Air Pollution Control Regulation No. 45 – Rhode Island Diesel Engine Anti-Idling Program (effective July 19, 2007). The Rhode Island rules were approved as a revision to the Rhode Island SIP (see 73 Fed. Reg. 16203 (2008)) before EPA adopted its own idling regulations. The Rhode Island rules were not uniquely focused on locomotive emissions, and the AAR is unaware of any railroad operations that are impacted by the Rhode Island rules. That said, the Rhode Island rules are also facially preempted by ICCTA.

⁹ 310 CMR 7.11(2); MassDEP Petition at 2.

Rule 3502 requires railroads to limit the idling of unattended locomotives or trailing locomotives to 30 minutes or less when such idling is for one or more specified reasons (*including* queuing for maintenance, maintenance of locomotives that does not require operation of the engine, and breakdowns of trailing locomotives), unless the railroads have equipped their locomotives with anti-idling devices set at 15 minutes or less. SCAQMD Rule 3502(d)(2). And, unlike the MassDEP rules, Rule 3502 includes exemptions for locomotives used in an emergency or operating in low temperatures, and for situations when the battery charge or voltage needs to be maintained at a level sufficient to support the locomotive. *Id.*, Rule 3502(j). As more and more localities promulgated their own separate rules, the disparities in the requirements, and the burden of attempting to achieve compliance with all of these rules, would only increase.

The safety concerns raised by FRA also illustrate the risks of patchwork regulation in this area. FRA, for example, has expressed concern that the definition of “unattended locomotives” in the District’s rules may cause confusion because they are inconsistent with FRA’s definition of the same term as it is used in federal safety rules (49 C.F.R. § 232.103(n)).¹⁰ The District admits that the two definitions “may differ slightly,” but asserts that there can be no confusion because “the two definitions serve different purposes.”¹¹ But even if the two definitions “serve different purposes,” the fact remains that the definitions are different on their face.¹² Employees who work in the South Coast

¹⁰ Letter from Joseph C. Szabo, Administrator, FRA, to Jared Blumenfeld, Regional Administrator, EPA Region IX, at 1 (Sept. 27, 2013) (“FRA Letter”) (attached to EPA Petition).

¹¹ Letter from Barbara Baird, Chief Deputy Counsel, SCAQMD, to Jared Blumenfeld, Regional Administrator, EPA Region IX, at 2 (Nov. 14, 2013) (“SCAQMD Letter”).

¹² SCAQMD’s Rule 3502(c)(16) defines “unattended” as “where no crew member is on board a locomotive,” while FRA defines “unattended equipment” as “equipment left

Basin would need to be trained to understand the differences between the District's interpretation of "unattended locomotives" and that of FRA (either now or in the future should the District adopt a more narrow interpretation than FRA). The situation would become even worse if other localities were allowed to follow the District's lead. Rail employees cannot reasonably be expected to learn and follow different interpretations of what constitutes "unattended" locomotives in every jurisdiction through which a train moves, and it would impose an unreasonable burden on the railroad industry to subject it to such a patchwork of regulations.

Another of FRA's concerns is that the District's rules do not contain an exception allowing locomotives to idle whenever necessary to maintain air brake pressure—in contrast to EPA's regulations, which clearly permit a locomotive to continue to idle for that purpose.¹³ Again, locomotive operators cannot be expected to follow different interpretations as to whether a locomotive may idle to maintain air pressure for brakes in every jurisdiction through which the train moves.

FRA is similarly concerned that the District's rules may "[c]reate time delays when restarting a locomotive where it is necessary to allow the airbrake systems to re-charge after the locomotive is shut down."¹⁴ As SCAQMD admits, if an unattended locomotive is not equipped with stop/start devices, the rules would not permit it to idle for more than 30 minutes to keep the air brakes charged.¹⁵ The lack of sufficient air pressure to the air brakes creates the risk of

standing and unmanned in such a manner that the brake system of the equipment cannot be readily controlled by a qualified person." 49 C.F.R. § 232.103(n).

¹³ See FRA Letter at 1; 40 C.F.R. § 1033.115(g)(2).

¹⁴ FRA Letter at 1.

¹⁵ SCAQMD Letter at 1-2; SCAQMD Comments at 35-36. In addition, the SCAQMD rules expressly exempt locomotives from the idling restrictions *only* when ambient

disastrous consequences for human life and property, as illustrated by the July 2013 derailment of a runaway freight train of the Montreal, Maine, and Atlantic Railway in the town of Lac-Mégantic, Quebec. Keeping the brakes charged is likely to prevent such accidents. Yet, if localities are free to adopt their own idling rules, re-charging would be delayed for longer time periods in some jurisdictions than in others, and railroad employees would be required to know the maximum idling time in each and every jurisdiction through which a particular train moves.

Theoretically, railroads could attempt to comply with a patchwork of conflicting rules by installing anti-idling devices that satisfy the most stringent idling requirements.¹⁶ With current technology, anti-idling devices installed on locomotives cannot be easily changed as a train moves from one jurisdiction to another. It currently requires a substantial delay and a software change by a skilled IT technician, who would need to visit the train to make the change. So to try to comply with a patchwork of different rules, the railroads would be compelled to set anti-idling devices to an ever-shifting lowest common

temperatures of 40°F or lower are predicted for the next 24 hours in the area where the locomotive is operated. SCAQMD Rule 3502(j)(2). By contrast, EPA rules simply permit railroads to override the stop/start mechanism in order to keep the cab heated or cooled whenever such heating or cooling is necessary. *See* 40 C.F.R. § 1033.115(g)(5).

¹⁶ But even if the railroads did so, it is unlikely that they could achieve full compliance with all of the various requirements of all of the jurisdictions. For example, as illustrated by the District's rules, jurisdictions may well establish emissions limits different from one another and from those set by EPA. *Cf.* SCAQMD Rule 3502(e) (providing, in lieu of satisfying 30-minute limit or installing anti-idling device, railroad may submit, and comply with, an "emissions equivalency plan" approved by SCAQMD's Executive Officer and demonstrating that locomotives will achieve reductions in diesel particulate matter and oxides of nitrogen that are equivalent to reductions that would be achieved by complying with other requirements of Rule 3502). Alternatively, jurisdictions may adopt different definitions of what it means to "tamper" with an installed anti-idling device. And even if the railroads achieved compliance with all of these requirements, another State or locality might come along and establish yet more stringent requirements.

denominator. Such an overhaul of all locomotives would take years to complete, even if localities did not adopt more stringent rules in the interim. The anti-idling rules of the most stringent jurisdiction would therefore have an extraterritorial effect on the entire rail network, and would effectively supplant the objective of preemption – a national standard carefully constructed with system-wide considerations.

But local jurisdictions cannot force railroads to install anti-idling devices. Supreme Court precedent offers no wiggle room on this point. The Court reaffirmed recently that Congress, through such statutes as the Locomotive Inspection Act, has “manifested the intention to occupy the entire field of regulating locomotive equipment.” *Kurns v. Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1267-68 (2012) (quoting *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 611 (1926)). Yet although everyone knows that States and local officials cannot force railroads to install devices on locomotives, SCAQMD’s rules are designed for that purpose.

CARB and the District know exactly what they are doing. CARB revealed that the true purpose of these idling rules is to “hav[e] the effect of making the railroads install idling reduction devices without actually mandating the devices” as the only way the railroads can escape the burdens imposed by the “resource-intensive operational and reporting requirement.”¹⁷ That is prohibited by federal law. SCAQMD is also well aware that it lacks the authority to promulgate these rules. In a candid moment, one SCAQMD Board member confessed: “I’m fully cognizant of the fact that [SCAQMD] doesn’t have the

¹⁷ See UP Comments at 20 & n.20 (quoting CARB).

authority to regulate railroads. But we'll keep pecking at you and pecking at you until we get our way."¹⁸ That, too, is prohibited by Federal law.

This attempt to regulate the rail industry and force the adoption of more stringent anti-idling devices on locomotives threatens to balkanize the interstate rail network with a patchwork of local regulation of rail operation. For the reasons set forth in its initial comments, AAR urges the Board to find these burdensome local rules that regulate rail operations facially preempted and unenforceable, whether or not included in an approved SIP.

II. The District Is Using The Clean Air Act As a Pretext To Justify Unlawful Local Regulation of Rail Operations.

The Board has held that federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act are generally outside the scope of Section 10501(b) preemption, "*unless the federal environmental laws are being used to regulate rail operations or being applied in a discriminatory manner against railroads.*" *Grafton & Upton R.R. Co. - Petition For Declaratory Order*, 2014 STB LEXIS 12, at *15 (S.T.B. served Jan. 27, 2014) (emphasis added). Indeed, the district court found that the rules were preempted precisely because they "directly regulate rail operations such as idling." *District Court Opinion*, 2007 WL 2439499, at *7. The Ninth Circuit similarly found that the rules were preempted because they "may reasonably be said to have the effect of managing or governing rail transportation." *Ass'n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) ("*Ninth Circuit Opinion*") (citation omitted). Thus, two federal courts have already determined that

¹⁸ See BNSF Railway Company's Reply to United States Environmental Protection Agency's Petition for Declaratory Order, at 10 (Feb. 14, 2014) ("*BNSF Comments*") (quoting Board hearing transcript).

SCAQMD's regulations are being used to directly regulate railroad operations and railroad transportation.

The Board has further observed that the federal environmental laws "may not be used simply to permit local communities to hold up or defeat" railroad activities "through the guise of saying they are enforcing" such statutes. *Joint Petition For Declaratory Order – Boston & Maine Corp. & Town of Ayer, MA*, 2001 WL 458685, at *6 (S.T.B. served May 1, 2001) ("*Boston & Maine*"), *recon. denied*, 2001 WL 1174385, at *2 (S.T.B. served Oct. 3, 2001). But that is exactly what SCAQMD is doing: seeking to regulate rail operations under the guise of saying that its regulations are needed for SCAQMD to comply with the Clean Air Act.

There can be no doubt here that SCAQMD's belated reliance on the Clean Air Act is a pretext. *First*, the district court, having examined the full record, pointedly concluded that "it appears that [SCAQMD's] decision to invoke the CAA was 'pretextual' – a litigation decision made [by SCAQMD] after Plaintiffs filed suit against the District," because "the [Clean Air Act] was never mentioned as part of the [District's] proceedings which led to the adoption of the Rules." *District Court Decision* at *6 n.6. There is no basis for the Board to question the court's conclusion. To the contrary, the totality of the evidence fully supports the district court's finding that SCAQMD did not promulgate its rules to comply with the Clean Air Act, but rather to regulate railroads and ensure that all locomotives entering the South Coast Basin are equipped with anti-idling devices set to SCAQMD's own specifications.

Second, nothing in the Clean Air Act requires these idling rules. The EPA has already adopted national rules for locomotive emissions. Neither the Clean Air Act nor EPA has required that localities adopt different rules – especially rules that conflict with a federal statute (ICCTA) expressly intended to protect rail operations and interstate commerce by preempting other laws. To the

contrary, Section 110 of the Clean Air Act anticipates the possibility of preemption by requiring States to provide assurances that the State is not prohibited by Federal law from carrying out its SIP. 42 U.S.C. § 7410(a)(2)(E)(ii). Indeed, in promoting a broad federal preemption of local regulations of locomotives, EPA reasoned that “a patchwork of state and local regulations would be inefficient, and could hinder EPA’s ability to implement a uniform national control program.” EPA Office of Mobile Sources, *Federal Preemption of State and Local Control of Locomotives*, EPA420-F-97-050, at 3 (Dec. 1997) (attached as Attachment B to AAR Initial Comments). As EPA stated further “[s]ince EPA has established such a strong federal program, *there is little that any state could do to further reduce locomotive emissions.*” *Id.* (emphasis added).

Third, the pretextual nature of SCAQMD’s claim is shown by its consistent disregard for the procedures mandated by Federal and California law for rules that are intended for inclusion in a SIP. *See* Rubenstein Aff. ¶¶ 14-25. For example:

- *The rules were adopted for another reason.* From the time SCAQMD first publicly proposed the idling rules in 2004 until their submittal to CARB for SIP approval in 2011, SCAQMD’s public notices never indicated that the Rules were intended to be proposed for eventual SIP approval. Instead, SCAQMD consistently stated that the rules were developed pursuant to its authority to adopt local rules regulating toxic air contaminants (“TACs”). *Id.* ¶¶ 8, 18-19. Only during the district court litigation did SCAQMD assert – for the first time – that Rules 3501 and 3502 were necessary to meet its obligations under the Clean Air Act.¹⁹

¹⁹ *See* Defendant’s Post-Trial Brief at 3, *AAR v. SCAQMD*, No. CV 06-01416-JFW(PLAx) (C.D. Cal.) (“the uncontested evidence is that the District adopted the Rules as part of its effort to attain the federal ambient air quality standards, as mandated by the Clean Air Act”); Defendant’s Trial Brief at 8-9, in same (“the current air quality plan contains a so-called ‘black box’ set of regulations calling for the development of new control measures beyond those specifically identified. The challenged Rules are part of this new effort”).

- *SCAQMD did not represent that the rules are necessary in order to promote attainment of the National Ambient Air Quality Standards (“NAAQS”) or State air quality ambient standards.* California law requires that prior to adopting any rule claimed to reduce criteria pollutants, SCAQMD must determine that the rule will promote the attainment of the NAAQS or State ambient air quality standards. SCAQMD, however, failed to assert or document that the rules would promote such attainment in any significant way. *Id.* ¶ 20.
- *SCAQMD missed the deadline for including its rules in the SIP by 5.5 years.* Although SCAQMD is required by EPA regulations and California law to submit District-approved rules to CARB for inclusion in the SIP within 60 days of promulgation, and only if the rules are necessary to attain compliance with the NAAQS or implement the Clean Air Act, SCAQMD did not submit the idling rules to CARB for SIP approval for more than *five and one-half years* after they were adopted in 2006 (*i.e.*, after the decisions of the district court and Ninth Circuit). *See id.* ¶ 18.

SCAQMD does not discuss the short-cut approach that it took to create the rules, and effectively asks the Board to ignore its failure to follow required legal procedures for SIP submittals. These irregularities, however, are totally inconsistent with SCAQMD’s claim that it adopted the rules to meet the National Ambient Air Quality Standards requirements of the Clean Air Act. Had that been the case, it would have complied with those procedures.

Finally, the pretextual nature of the District’s reliance on the Clean Air Act is evidenced by its failure to perform the type of scientific air quality studies that would normally accompany a regulation needed to meet the minimum requirements of the Act. As discussed below, there is no basis in the SCAQMD or CARB administrative record to reliably support the assertion that the rules would be effective in protecting human health, either at the time the rules were adopted or at present. The data on which the District relied were totally outdated by the time it submitted the rules to CARB, even though EPA requires that proposed SIP provisions be based on current and accurate emissions and air quality information. *Rubenstein Aff.* ¶¶ 23-25; 40 C.F.R. Part 51, App. V, § 2.2(c).

The Board must stand vigilant against attempts by local authorities to regulate rail operations under the guise of other federal laws. The SCAQMD's rules are directed at locomotive idling. But the next in a parade of horrors may be State or local regulations directed at the blocking of streets, the construction of facilities, excessive train noise or vibrations, or any other train operation that the local authorities want changed or ended. If SCAQMD is not stopped here, the Board should not underestimate the creativity by which other local authorities will also use Federal environmental laws as a pretext to adopt regulations of rail operations that would otherwise be preempted by ICCTA. Allowing such pretextual arguments to justify local regulation of rail operations would conflict with the express directive of Congress that regulation of railroad activities must be centralized at the federal level. *See City of Auburn v. United States Gov't*, 154 F.3d 1025, 1029 (9th Cir. 1998) ("Congress and the courts have long recognized a need to regulate rail operations at the federal level").

III. National EPA Locomotive Idling Regulations Better Protect the Environment While Minimizing the Burden on Interstate Commerce.

EPA has recognized the need for a strong centralized federal role in regulating locomotive emissions, citing the "unique features of locomotives and railroads." EPA Office of Mobile Sources, *Federal Preemption of State and Local Control of Locomotives*, EPA420-F-97-050, at 2 (Dec. 1997) (attached as Attachment B to AAR Initial Comments). EPA explained that "[g]iven the inherent interstate nature of the railroad industry, ... a strong federal program that addresses manufacturing, remanufacturing and in-use compliance best achieves the necessary emissions reductions." *Id.* at 3. As noted above, EPA reasoned that "a patchwork of state and local regulations would be inefficient, and could hinder EPA's ability to implement a uniform national control program." *Id.* And EPA

observed that “[s]ince EPA has established such a strong federal program, *there is little that any state could do to further reduce locomotive emissions.*” *Id.* (emphasis added).

As EPA’s statements indicate, uniform federal rules better protect air quality while reducing the burden on the rail network. National rules are already in place to protect air quality. EPA has promulgated specific rules governing locomotive idling, including the requirement that all new locomotives (including re-manufactured locomotives) be equipped with automatic engine stop/start systems. *See* 40 C.F.R. § 1033.115(g). As a result of these federal rules, there is no regulatory “gap” for State and local regulation to fill. Any purported incremental benefits from further local regulation designed to further reduce locomotive emissions must therefore be considered against this backdrop of existing EPA national regulations.

Furthermore, uniform national rules regarding locomotive idling minimize the safety concerns that FRA has raised regarding the District’s rules (*see* FRA Letter at 1), because EPA adopted its rules only after FRA had an opportunity to be consulted and comment on them. By contrast, given its limited resources, FRA could not fully monitor, let alone comment on, rules that might be proposed in each of the 100 non-attainment areas, or the thousands of other localities that might decide to adopt similar rules. In such circumstances, it is almost inevitable that some of the rules promulgated by these jurisdictions would raise the very “safety and operational considerations” that FRA has raised with respect to SCAQMD’s rules.

The type of localized idling rules adopted by SCAQMD would impose substantial burdens on the railroads and on interstate commerce. *First*, the rules would cause substantial delays. It would take considerable time to shut down and restart locomotives, particularly in trains with distributed power. These

delays would directly impact trains with locomotives that must be shut down, and the delays on these trains' movements would cascade throughout the rail system. Railroad capacity would be reduced, trains would be delayed, and the customers who depend on rail service to move or receive their freight would be adversely affected. The disruption in rail traffic would likely cause many customers to use motor carriers instead, which would only increase air pollution and congestion on highways.

Second, rules like those adopted by SCAQMD would create significant safety risks for both trains and railroad employees. Shutting down locomotives causes air pressure to "bleed" from the braking system. In a "heavy grade" area such as some locations within the SCAQMD, if air brake pressure fell below safe levels, there would be a risk of a runaway train. Moreover, employees would be at risk of injury in manually setting hand brakes when the lead locomotive is shut down, and when they must walk the entire length of the train and back to shut down a distributed power train.²⁰

Third, localized idling rules would cause a reduction in rail productivity. The recordkeeping requirements of SCAQMD's rules would have the effect of substantially decreasing available yard crew time per day. Crew productivity would also decrease while train crews waited for the delayed trains to move. Many crews would exceed their maximum hours of service, further degrading crew productivity and the efficiency of rail operations.²¹

In contrast to these burdens, there is no reliable evidence that SCAQMD's rules would have any environmental benefits. Rubenstein Aff. ¶¶ 7-13.²²

²⁰ BNSF Comments at 11; UP Comments at 23-24.

²¹ BNSF Comments at 11; UP Comments at 25-26.

²² In a letter that it submitted to EPA in January 2013, the East Yard Communities for Environmental Justice ("EYCEJ") made the bald assertion that the SCAQMD's rules "will ensure that idling and emissions reductions will *actually* occur, and improve

Although SCAQMD contended that the rules would result in emission reduction benefits, its estimates of those benefits are greatly overstated. For example:

- The SIP submission from CARB claims that the rules will result in PM emission reductions of 0.03 tons per day – which is infinitesimal compared to other SCAQMD control measures submitted for SIP approval. Rubenstein Aff. ¶ 8.²³
- The estimated 0.03 ton/day figure is based on data that were already 15 years old when the estimate was made. *Id.* ¶ 9.
- The estimated emission reductions from Rule 3502 were based on stale data that date back to 2000 and are unrepresentative of the types of locomotives and activities SCAQMD was seeking to regulate in 2006. *Id.* ¶ 10.
- SCAQMD’s claims do not consider the emission reduction benefits of the 1998 and 2005 railroad agreements with CARB or EPA’s national locomotive emission standards. *Id.* ¶ 11.

In short, any of the reductions that SCAQMD predicts will occur from adoption of the rules are very tiny and, in any case, already have been achieved as a result of, *inter alia*, EPA’s rules and the railroads’ purchases of new locomotives.

Rubenstein Aff. ¶¶ 11-13.

Significantly, CARB itself recognized in 2008 that the rules will have little environmental benefit. In denying a petition for rulemaking that requested, *inter*

enforceability of those reductions.” Letter from Gideon Kracov, counsel for East Yard Communities for Environmental Justice, to Jared Blumenfeld, Regional Administrator, EPA Region IX, at 1, 3 (Jan. 7, 2013) (included as attachment to EPA’s Petition) (emphasis in original). However, EYCEJ provided no evidence to support that assertion; instead, it submitted only affidavits from California residents complaining about locomotive idling. *Id.*, Attachment A. Nonetheless, SCAQMD points to the EYCEJ letter as providing “evidence” of excess emissions from locomotive idling. *See* SCAQMD Comments at 9.

²³ For example, the SCAQMD Staff Report supporting the adoption of Rule 1157 --a 2003 control measure for particulate matter greater than 10 microns (“PM10”) – projected reductions of 18 tons per day, which is 600 times the SCAQMD’s claim of 0.03 tons per day for Rules 3501 and 3502. Rubenstein Aff. ¶ 8 n.2.

alia, that CARB adopt the SCAQMD's rules, CARB stated: "Still other requested regulations *are likely to achieve little, if any, emission reductions*. These measures include the proposed 30-minute idling requirements of South Coast Air Quality Management District's Rule 3502."²⁴ If (as appears to be the case) CARB has had a change of heart, it has neither explained what would amount to a complete reversal of its position nor presented any new evidence (and there is none) that the District's rules will achieve any significant emission reductions given the national federal rules already adopted by EPA.

Far from helping the environment, allowing SCAQMD and other localities to promulgate their own local idling rules would have the perverse effect of causing substantial environmental harm. A patchwork of conflicting locomotive idling regulations would create operating inefficiencies in the rail network. Railroads would be required to devote substantial time and expense to installing new stop/start devices (or modifying existing devices each time a locomotive enters or leaves California), tracking and recording every time a locomotive or train comes to a stop (which occurs hundreds of times a day in the Basin alone), and reporting these events to the local jurisdiction. Even assuming *arguendo* that the railroads were able to meet all of the various regulations of the States and localities where their trains operate, a plethora of different anti-idling requirements would, as described above, cause increased air pollution due to the constant idling and delays of trains and the diversion of traffic to motor carriers.

For these reasons, the Board should find that the SCAQMD's idling regulations are preempted by ICCTA given the strong, centralized federal

²⁴ Letter from James N. Goldstene, Executive Officer, CARB, to Penny Newman, Executive Director, Center for Community Action and Environmental Justice (July 23, 2008), reprinted in *California Regulatory Notice Register*, Vol. No. 34-Z, at 1490 (Aug. 22, 2008) (emphasis added).

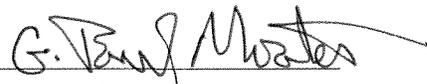
regulation of locomotives and railroads already in place.²⁵ Like the EPA, the Board should find that the “unique features of locomotives and railroads” require regulation on a uniform national basis and the preemption of local regulation of railroad operations, even if the State includes those regulations as part of its SIP. EPA, the federal agency charged with administering the Clean Air Act, concluded that “[g]iven the inherent interstate nature of the railroad industry, EPA believes that a strong federal program that addresses manufacturing, remanufacturing and in-use compliance best achieves the necessary emissions reductions.” EPA Office of Mobile Sources, *Federal Preemption of State and Local Control of Locomotives*, EPA420-F-97-050, at 3 (Dec. 1997). The AAR wholeheartedly concurs, and urges the Board to do so as well.

²⁵ It bears repeating that a finding that the District’s rules are preempted even if included in a SIP will not leave locomotive emissions unregulated. EPA has issued specific regulations regarding them. Furthermore, if (as SCAQMD has stated) the rules are designed to address toxic air contaminants (“TACs”), EPA is empowered by the Clean Air Act to set emission standards for TACs as hazardous air pollutants. *See* 42 U.S.C. § 7412.

CONCLUSION

For the reasons set forth above and in the AAR's Initial Comments, the STB should declare that the local idling rules proposed by SCAQMD – which have already been found to be preempted by ICCTA – would remain preempted even if incorporated into an approved SIP.

Respectfully submitted,



G. Paul Moates
Richard E. Young
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Of Counsel:

Paul A. Guthrie
Melissa B. Hagan
Paul R. Hitchcock
James A Hixon
Theodore K. Kalick
Russell Light
Roger P. Nober
David C. Reeves
Louise A. Rinn
John M. Scheib
Peter J. Shudtz
Gayla L. Thal
Richard E. Weicher
W. James Wochner
David P. Young

Michael R. Barr
Mark E. Elliott
PILLSBURY WINTHROP SHAW PITTMAN LLP
725 South Figueroa Street
Los Angeles, CA 90017
(415) 983-1151

Louis P. Warchot
Michael J. Rush
Timothy J. Strafford
Association of American Railroads
425 Third Street, S.W.
Washington, D.C. 20024
(202) 639-2502

Counsel for the Association of American Railroads

March 28, 2014

Attachment
Affidavit of Gary Rubenstein

BEFORE THE
SURFACE TRANSPORTATION BOARD
Finance Docket No. 35803
United States Environmental Agency – Petition for Declaratory Order
AFFIDAVIT OF GARY RUBENSTEIN
IN SUPPORT OF
SUPPLEMENTAL COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS

I, GARY RUBENSTEIN, make the following declaration:

I am over the age of 18 years, of sound mind, and competent to testify in this matter. I make this affidavit of my own personal knowledge and/or belief. If called to testify to the same, I would and could competently do so.

I. Background and Expertise

1. I am a Senior Partner in the firm of Sierra Research, an air quality consulting firm located in Sacramento, California. I have worked extensively (both as a government employee and as an independent consultant) on the development of rules for inclusion in California's State Implementation Plan ("SIP"). The SIP is the statewide plan for each area of the State to achieve the federal national ambient air quality standards ("NAAQS") and is required by the federal Clean Air Act ("CAA"). I have reviewed relevant portions of the administrative record of the development of South Coast Air Quality Management District ("SCAQMD") Rules 3501 and 3502 (the "Rules"), as well as the record for the submission of the Rules to the California Air Resources Board ("CARB") for possible incorporation into the SIP. I further reviewed CARB's submission of the proposed Rules to the United States Environmental Protection Agency, Region IX ("EPA"). I have also reviewed the SCAQMD and CARB Replies to the Petition for Declaratory Order before the Surface Transportation Board ("STB").

2. This affidavit is submitted in support of the Association of American Railroads' ("AAR") Supplemental Comments on the Petition for Declaratory Order filed with the STB by EPA Region IX.

3. As a founding partner of Sierra Research since 1981, I have an extensive background in the air pollution control field in California and in other jurisdictions. My experience includes all aspects of air quality planning, strategy development and analysis; emission inventory development, air quality impact analysis (including dispersion modeling), emission control system design and evaluation; and mobile source emission control design and evaluation. Other work I have conducted or supervised during my career has included

preparation of air quality management plans (“AQMP”) in California; preparation and review of emission inventories and control strategies for such plans; and preparation of screening health risk assessments and supporting analyses for various types of projects. I have had lead responsibility for the development, review and assessment of control strategies for on-road and off-road motor vehicles and other mobile sources, including marine vessels and locomotives; and risk assessments and mitigation measures for a wide range of mobile sources, specifically including locomotive activities on main lines and in rail yards.

4. Prior to co-founding Sierra, I spent eight years with CARB, joining the staff as a junior mechanical engineer and leaving as Deputy Executive Officer responsible for the technical direction of all CARB activities. My responsibilities as Deputy Executive Officer included policy management and oversight of the technical work of CARB divisions employing over two hundred (200) professional engineers and specialists. In addition, I was responsible for final review of technical reports and correspondence prepared by all CARB divisions prior to publication, including regional air quality plans. My review of these documents was focused on ensuring both their technical accuracy, and their legal and regulatory compliance. My responsibilities as Deputy Executive Officer included policy-level negotiations with officials from other government agencies and private industry regarding technical, legal, and legislative issues before the Board, and representing CARB in public meetings and hearings before the California State Legislature, the U.S. Environmental Protection Agency, and numerous local government agencies (including local air pollution control districts) on a broad range of technical and policy issues. I also have substantial experience with the state law requirements pertaining to promulgation of district regulations for inclusion in the SIP.

5. One specific aspect of my experience with CARB was the development of state regulations and review of locally adopted regulations relating to various air emission sources, including the development of regulations regarding all aspects of mobile source pollution control. This work involved, in appropriate cases, the submission of such regulations to EPA for approval into the SIP. As such, it was also my responsibility to evaluate federal emission control

regulations and applicable California and federal legislation to assure compliance with all applicable requirements. As a result of this experience, as well as my over 30 years in private practice, I have significant expertise in the AQMD, CARB and federal air emission rule and regulatory processes, particularly for mobile sources such as those at the heart of this matter.

6. I have served as a technical expert witness before numerous state and local regulatory agencies, and have also served as a technical expert on behalf of the California Attorney General and Alaska Department of Law.

II. The SCAQMD's Estimates of Emissions Reductions are Inaccurate and Unreliable, and Fail to Show Any Cognizable NAAQS Impact or Health Risk Reduction

7. In their submissions to the STB, SCAQMD and CARB claim that the Idling Rules are required to reduce NAAQS pollutants and toxic air contaminants ("TACs") for the protection of human health. There is no basis in the SCAQMD or CARB administrative record to reliably support the assertion that, either at the time of submission to EPA, or at present, the Rules would be effective in demonstrably reducing emissions. Moreover, the benefits estimated by SCAQMD and CARB for the Rules are not credible and grossly overstate even the theoretical benefits that would be provided. Indeed, given the passage of time and superseding regulatory and other activities that independently served to reduce locomotive emissions, SCAQMD's 2006 calculations of the potential emission reduction benefits from the Rules grossly overstate the potential for real-world emission reductions (if any) from the implementation of the Rules. In the absence of demonstrable emission reductions, the agencies cannot validly claim a health benefit from the proposed SIP amendment. Four key facts illustrate the deficiency of SCAQMD's and CARB's analysis.

8. First, the SIP submission from CARB claims that the Rules will result in PM emission reductions of 0.03 tons per day. *See* SIP Submission, Rule Evaluation Form, at 1.¹ Compared to other SCAQMD PM control measures submitted for SIP approval in the 2003 AQMP timeframe, this number is so small that it is not technically credible that the Rules were somehow “necessary” to achieve the PM NAAQS.² Rather, as discussed further below, the Rules were clearly intended to address TACs.

9. Second, the estimated 0.03 ton/day number is purportedly derived from an estimate of freight locomotive idling emissions taken from the 2003 AQMP. However, the Final Staff Report for Proposed Rule (“PR”) 3502 indicates that while the 2003 AQMP did estimate total PM emissions from freight locomotives, the portion of these emissions allocated to idling was based on a 1991 report prepared for CARB. *See* PR3502 Final Report at 3-4. Thus, SCAQMD applied a 15-year-old emission allocation in estimating 2006 locomotive idling emissions, without acknowledging or explaining the inherent unreliability of such dated allocation figures.

10. Third, the estimated PM emissions reductions from Rule 3502 were based on a control efficiency from a 2004 CARB study, which itself was based on locomotive characteristics and activities in a single Northern California rail yard in 2000. These data were not only stale, but also unrepresentative of the types of locomotives and activities SCAQMD was seeking to regulate in Southern California in 2006.

11. Fourth, SCAQMD’s 2006 rule adoption findings do not consider the emission reduction benefits of the 1998 and 2005 CARB/Railroad Agreements or EPA’s Locomotive Emission Standards. SCAQMD estimated the fraction of locomotives already equipped with

¹ The documents I reference in this affidavit are not attached as exhibits hereto. However, I would be happy to make those documents available upon request of the Surface Transportation Board.

² By way of comparison, the SCAQMD Staff Report supporting the adoption of just one 2003 AQMP control measure for PM₁₀ – Rule 1157 (PM10 Emission Reductions from Aggregate and Related Activities) – projected reductions of 18 tons per day – 600 times the overstated claim of 0.03 tons per day for the Rules. January 7, 2005 SCAQMD Board Meeting, Agenda Item No. 25 at 5.

anti-idling devices based on data at the time of rule adoption, in February 2006. *See* PR3502 Final Report at 3-4; *see also* SIP Submission Rule Evaluation Form at 1. However, the 2005 Agreement required the installation of anti-idling devices on 99% of all intrastate locomotives based in California by June 30, 2008. The railroads have met these commitments. *See* Rail Comments on ARB Functional Equivalent Document Prepared for 2010 Commitments, Sept. 2011, at 10. In addition, the introduction of newer model locomotives into the interstate fleet, and the retrofit of anti-idling devices to older interstate locomotives, further increases the fraction of locomotives operating in California equipped with the technology the District intended to encourage.³ In fact, at present, over 90% of all locomotives owned by the two Class I railroads and operating in California are equipped with anti-idling devices.⁴ The emission reductions associated with idling achieved by the implementation of this technology have occurred without the Rules being in effect and, based on the calculation methodology applied by SCAQMD in its SIP submission, would render even more insignificant (i.e., even less than 0.03 tons per day) any remaining emission reductions attributable to the Rules.

12. At the time of submission of the Rules to EPA in 2012, any theoretical reductions estimated to result from adoption of the Rules likely had already been achieved as a result of EPA rulemakings, the 1998 and 2005 Agreements, and railroad purchases of new locomotives. These additional rulemakings, Agreements and purchases occurred well after the 1991, 2000 and 2005 studies upon which the District's emission reduction estimates were based. Consequently, both CARB and SCAQMD were well aware – or should have been aware – that the emission reduction estimates submitted to EPA with the Rules grossly overstated the actual potential benefits of the Rules.

³ It is worth noting that in its calculation of benefits for the Rule, the District assumed zero benefits for the Rules for locomotives equipped with anti-idling devices. *See* SIP Submission Rule Evaluation Form at 1.

⁴ Personal communication, Union Pacific Railroad, BNSF Railway Company, March 25, 2014. Excludes “foreign locomotives” (i.e., locomotives owned by other railroads but operated by UPRR or BNSF).

13. Despite CARB's access to data and involvement in events discussed above, CARB's SIP submission in 2012 ignores these intervening emission reductions and proposes a SIP reduction estimate based upon grossly inaccurate data. There is no valid basis for CARB or SCAQMD to contend that the Rules will reduce emissions to the extent posited in their papers, nor can they validly claim a demonstrable health benefit based on Rule implementation.

III. The Clean Air Act Was Used as a Pretext and the Idling Rules Were Not Adopted with Required SIP Procedures.

14. California law imposes a number of specific requirements on SCAQMD and CARB pertaining to rule and SIP development.

15. From the beginning of their development through to the Rules' final approval by the SCAQMD Governing Board, SCAQMD ignored the legal procedures applicable to rules intended for inclusion in the California SIP.

16. An AQMP is the state-mandated mechanism by which control measures, developed to specifically to meet the standards of the CAA, are aggregated for inclusion in the SIP and form the basis for later local air district rulemaking. Cal. Health & Safety Code §§ 39602, 40402(e), 40460(d). The SIP "shall only include those provisions necessary to meet the requirements of the Clean Air Act." *See* Cal. Health & Safety Code §40460(d). (emphasis added)

17. In its 2003 AQMP SCAQMD did not include any control measure relating to control of locomotive idling emissions, nor were any locomotive emission control measures added to SCAQMD's 2007 or 2012 AQMP. Indeed, SCAQMD's November 2011 submission of the Idling Rules to CARB specifically stated that the rules were not required by the AQMP. *See* SIP Submission Rule Evaluation Form at 1 ("Rules 3501 and 3502 do not implement any control measures of the 2003 AQMP").⁵

⁵ Furthermore, the Final Socioeconomic Report prepared by SCAQMD to support adoption of the Rules also explicitly states "PR 3501 and 3502 are not part of 2003 AQMP control measures." Final Socioeconomic Report for Proposed Rule 3501 [] and Proposed Rule 3502 [], January 2006, at 9.

18. From the time SCAQMD first publicly proposed the Idling Rules in October 2004, to their adoption in February 2006, through to their submittal to CARB for SIP approval in November 2011, SCAQMD's public notices never indicated that the Rules were intended to implement the AQMP or to be proposed for eventual SIP approval.

19. Instead, SCAQMD consistently noted that the Rules were developed pursuant to the SCAQMD's claimed authority to adopt local rules regulating TACs. *See* SCAQMD Rule and Control Measure Forecasts, Oct. 1, 2004 through Jan. 6, 2006 (Rules always designated as "toxics" rules (*i.e.*, "adoption and implementation of programmatic as well as source-specific toxic-related rules"), and never as "AQMP" rules (*i.e.*, "adoption and implementation of AQMP control measures")). In this particular instance, the Rules were targeting Diesel particulate matter, a component of Diesel exhaust that has been designated by CARB (but not by EPA) as a TAC for purposes of state law.

20. Prior to adopting any rule claimed to reduce criteria pollutants, SCAQMD must determine that the rule will promote the attainment of the NAAQS or state ambient air quality standards. Cal. Health & Safety Code § 40001(a), (c). The administrative record shows SCAQMD failed to assert or document that the Rules would promote attainment of the state standards or NAAQS in any significant way – and, in fact, admitted that Rule 3501 would not result in any foreseeable emissions reductions at all. *See*, SCAQMD Final Rule 3501 Staff Report, p. 3-2. Any marginal reduction in pollutants subject to NAAQS was merely incidental to SCAQMD's primary intent to regulate Diesel particulate matter as a TAC – an area of regulation outside of the CAA and not appropriate for inclusion in a SIP.

21. While CARB and local districts may seek to regulate TAC emissions via rules, such rules generally are not appropriate for inclusion in the SIP because they are not designed to achieve and maintain the NAAQS or otherwise implement the CAA. *See* Health & Safety Code § 40460(d). (SIP "shall only include those provisions necessary to meet the requirements of the Clean Air Act") (emphasis added). Further, the administrative process for TAC-related rule development differs from that required for regulations intended to be included in the SIP. The

federal government does not adopt or enforce TAC rules as measures to achieve the NAAQS, as in the context of a SIP, but rather enforces its own federal air toxic rules developed pursuant to a completely different regulatory scheme authorized by Section 112 of the CAA.

22. The difference in regulatory treatment between rules proposed for inclusion in the SIP, and rules that are not intended to be in the SIP (such as the Rules at issue in this proceeding), is readily apparent. For example, unlike other SCAQMD Board resolutions adopted in the 2005-06 timeframe to enact or amend rules to reduce criteria pollutants for inclusion in the AQMP, SCAQMD Resolution 06-6 adopting the Rules made no reference to the AQMP or SIP in justifying the need for adoption of the Rules.⁶ CARB, in turn, failed to discharge its own legal obligation to ensure all SIP submittals meet applicable requirements under state and federal law before forwarding them to EPA for approval. The Rules were outside SCAQMD's legal authority to enforce, lacked any documentation that they were necessary to meet the NAAQS, were consistently noticed as local TAC rules, were determined by two federal courts to be in conflict with federal law, and were subject to an ongoing permanent injunction. These facts plainly required CARB to reject the Rules for SIP submittal. *See* 42 U.S.C. §7410(a)(2)(E)(i) (state must provide EPA necessary assurances that the implementing agency has adequate authority under state law to implement the proposed SIP rule and that the agency is not prohibited from implementing the SIP rule by federal or state law); Cal. Health & Safety Code § 39602 (only rules "necessary to meet the requirements of the Clean Air Act" may be forwarded to EPA for approval).

⁶ In contrast, the SCAQMD Board Resolution adopting Rule 1157 (PM10 from Aggregate and Related Operations), for example, cited the Board's determination that "... a need exists to adopt the Proposed Rule 1157... to partially implement Control Measure BCM-08 of the 2003 AQMP." *See*, Resolution 05-1, South Coast Air Quality Management District, January 7, 2005. Also in contrast with SCAQMD Board Resolution 06-6, the SCAQMD Board resolution amending Rule 1113 (Architectural Coatings) to increase emission reductions, stated: "the adoption of (the proposed amendments to Rule 1113) is necessary for achieving the federal and state standards for ozone and for implementing the AQMP". *See*, Resolution 06-21, South Coast Air Quality Management District, June 9, 2006.

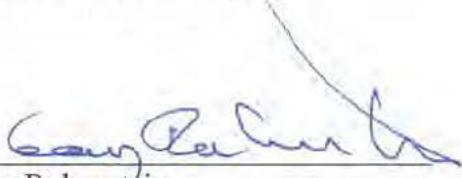
23. The proposed SIP revisions also must contain and take into account current and accurate emissions and air quality information. 40 C.F.R. Part 51, App. V, § 2.2(c). SCAQMD relied upon a 2003 locomotive emissions inventory prepared for the 2003 AQMP; characteristics of a 2005 locomotive fleet (in which only 47% of the locomotives were equipped with idle reduction devices); 2000 idle activity data from a Health Risk Assessment for a railroad facility in the Sacramento area; and data from a 1991 study to estimate the fraction of total rail yard emissions attributable to idling locomotives. These data are significantly outdated (up to 20 years old at the time of submittal of the Rules to EPA) and unrepresentative of modern, cleaner locomotive fleets operating in the District by the time the Rules were submitted to CARB in November 2011 for SIP approval, or to EPA in August 2012.

24. Section 2.2(c) of Appendix V to 40 C.F.R. Part 51 requires that a SIP submission quantify the changes in allowable emissions from the affected sources and estimate the changes in current emissions as the result of the SIP revision. In the case of Rule 3501, no reductions in emissions were estimated; as a result, the requirements of 40 C.F.R. 51 Appendix V, Section 2.2(c) were not met for that rule. And while emission reduction estimates were included in the SIP submittal with respect to Rule 3502, these estimates were far from adequate and were largely inaccurate at the time of submittal, as discussed above.

25. On August 30, 2012, CARB forwarded the SCAQMD's Rules package to EPA as a proposed revision to the California SIP. Because of their numerous substantive and procedural deficiencies, including those discussed above, the Rules do not meet a number of criteria for SIP submissions, as codified at 40 C.F.R. Part 51, Appendix V. Thus, the Idling Rules fail to meet EPA's requirements for approvable SIP submissions.

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

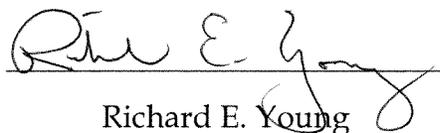
Executed on March 27, 2014.



Gary Rubenstein

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2014, I have served true and correct copies of the foregoing by First Class Mail or more expeditious means on all parties of record in this proceeding.


Richard E. Young