

235468

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

**ENTERED  
Office of Proceedings  
February 14, 2014  
Part of  
Public Record**

---

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

---

**REPLY 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 20004  
(202) 736-8000

Michael R. Barr  
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*

February 14, 2014

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

---

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

---

**REPLY OF THE ASSOCIATION OF AMERICAN RAILROADS**

The Association of American Railroads (“AAR”) submits this Reply to 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, the Board should advise EPA 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 were to be included in an approved State Implementation Plan (“SIP”).

**INTRODUCTION**

The railroad industry takes protecting the environment seriously in California and throughout the nation. Recognizing the air quality issues in the South Coast Air Basin of California, the BNSF Railway (“BNSF”) and the Union Pacific Railroad Company (“UP”) in 1998 voluntarily agreed with the California Air Resource Board (“CARB”) to a ground-breaking fleet average target for locomotive emissions in the South Coast Air Basin, which involved the introduction of new clean locomotives into that region. As described by the state, “this fleet average requirement represents the most aggressive scrappage and replacement program of any transportation source in the [South Coast Air Basin].

. . . It would lead to an overall emission reduction of 67 percent by 2010.”<sup>1</sup> The railroads have faithfully carried out this agreement, while funding and demonstrating new technologies, including testing different idling-reduction systems and new switch engines using LNG fuel. In 2005, the railroads took their agreement with CARB to another level. They agreed to include new idling limits, install anti-idling devices on hundreds of California-based locomotives, and introduce early use of ultra-low sulfur diesel fuel, and provided CARB with data for CARB’s preparation of health risk assessments for major rail yards. And the entire industry has complied fully with the national standards for emissions from newly manufactured and remanufactured locomotives adopted by EPA in 2008 pursuant to authority under the Clean Air Act. Together, the combination of voluntary agreements and uniform federal standards have helped improve air quality in the South Coast Air Basin.

But SCAQMD has never been satisfied with these measures. For almost a decade, the railroads in California and the District have been at loggerheads over the District’s attempt to impose additional local idling regulations that target freight rail operations of Class I carriers. BNSF, UP, and the AAR challenged these local rules, adopted in 2006, to protect the important principle that local authorities are not permitted to create a patchwork of conflicting regulations with the well-intentioned goal of improving local air quality. Ultimately, the federal courts ruled that these local idling rules are preempted by ICCTA. Undeterred, the District submitted these same local rules to CARB, who in turn submitted the rules to EPA for inclusion in the state’s SIP. The District hopes that

---

<sup>1</sup> See California State Implementation Plan for Ozone, Vol. II: The Air Resources Board’s Mobile Source and Consumer Products Elements, App. B., at B-20 (Nov. 15, 1994).

once these rules are included in the SIP, the mantle of Federal law would fall on them and permit local regulation of interstate rail operations.

AAR submits that these local idling regulations are preempted by ICCTA, even if included in a SIP, because they regulate the operation of locomotives, and two federal courts have so held. Seeking to include these local regulations into a SIP does not change the analysis, as the Clean Air Act requires assurances that any regulation included in a SIP is not prohibited by Federal law. The only harmonious interpretation of both statutory provisions is that Congress never intended states to use the SIP process as a vehicle to circumvent other Federal laws, such as ICCTA.

However, if the Board determines that additional evidence or legal argument is necessary to reach a determination whether ICCTA preempts the rules at issue, it should institute a full proceeding and provide the parties an opportunity to update the factual record (which is more than seven years old) and submit additional legal arguments, as needed.

## **REGULATORY BACKGROUND**

Resolution of this preemption issue is needed to resolve EPA's apparent uncertainty and help EPA comply with the requirements of Section 110(a)(2)(E)(i) of the Clean Air Act. Under that provision, EPA must determine whether the SIP has provided "necessary assurances that the State ... is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof . . . ." *See* Petition at 5 (citing 42 U.S.C. § 7410(a)(2)(E)(i)). Thus, the provisions of ICCTA and the Clean Air Act are involved here.

**ICCTA's Preemption Provisions.** The preemption section of ICCTA, Section 10501(b), provides:

(b) The jurisdiction of the Board over –

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

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

49 U.S.C. § 10501(b) (emphasis added).

The courts have repeatedly recognized that these provisions broadly preempt state and local laws regulating transportation operations. *See, e.g., City of Auburn v. United States Government*, 154 F.3d 1025, 1031 (9th Cir. 1998), *cert. denied*, 527 U.S. 1022 (1999) (describing language of § 10521(b)(2) as “broad” and giving Board “exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines”); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996) (“[i]t is difficult to imagine a broader statement of Congress’s intent to preempt state regulatory authority.”).

Because ICCTA “vests in the Board broad jurisdiction over ‘transportation by rail carrier,’” Section 10501(b) “is intended to prevent a patchwork of local regulation from unreasonably interfering with interstate commerce.” *Grafton & Upton R.R. Co. – Petition For Declaratory Order*, 2014 STB LEXIS 12, at \*9-10 (S.T.B. served Jan. 27, 2014); *Boston & Maine Corp. & Springfield Terminal R.R. Co. – Petition For Declaratory Order*, STB Finance Docket No. 35749, slip op. at 3 (S.T.B.

served July 19, 2013); *City of Milwaukee – Petition for Declaratory Order*, 2013 STB LEXIS 100, at \*5 (S.T.B. served Mar. 20, 2013). Section 10501 preempts state and local laws that “may reasonably be said to have the effect of managing or governing rail transportation,” or, even if not preempted on their face, “have the effect of unreasonably burdening or interfering with rail transportation.” *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 252 (3d Cir. 2007); *City of Milwaukee, supra*, at \*5-8 (citations omitted).

The preemptive effect of Section 10501 extends to other federal statutes as well. *See* 49 U.S.C. § 10501(b) (remedies provided under ICCTA “are exclusive and preempt the remedies provided under Federal or State law”). However, when faced with a conflicting federal provision, Section 10501 must “be harmonized to the extent possible with other Federal statutes.” *See, e.g., Ass’n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 622 F.3d 1094, 1098 (9th Cir. 2010) (“*Ninth Circuit Decision*”); *Arizona Eastern Ry. – Construction and Operation – In Graham County, Arizona*, 2009 WL 1074759, at \*3 (S.T.B. served Apr. 6, 2009). As the Board has recognized, although federal environmental statutes are not *automatically* preempted by ICCTA, environmental statutes such as the Clean Air Act are preempted by Section 10501 if they “are being used to regulate rail operations or being applied in a discriminatory manner against railroads.” *Grafton & Upton R.R. Co., supra*, at \*15. Such statutes “may not be used simply to permit local communities to hold up or defeat” railroad activities by “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), *recon. denied*, 2001 WL 1174385, at \*2 (S.T.B. served Oct. 3, 2001) (“*Boston & Maine*”).

**The Clean Air Act.** The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, establishes “a federal-state partnership for the control of air pollution.” *Abramowitz v. EPA*,

832 F.2d 1071, 1073 (9th Cir. 1987).<sup>2</sup> The Clean Air Act gives EPA the responsibility for establishing National Ambient Air Quality Standards (“NAAQS”) for six airborne pollutants, with acceptable levels based on human health and welfare. 42 U.S.C. § 7409. States create their own SIPs to bring “nonattainment areas” into compliance with the NAAQS. *Id.* §§ 7407, 7410(a)(1). SIPs must be submitted to EPA for approval, which will be granted only if they meet certain criteria. *Id.* § 7410(a)(1)-(2).

The federal-state partnership created by the Clean Air Act does not permit states to include in their SIPs rules or standards that conflict with other Federal laws. As part of its responsibilities in reviewing SIPs submitted for approval, “[t]he EPA is charged with assuring that a state SIP complies with federal law.” *Texas v. EPA*, 690 F.3d 670, 675 (5th Cir. 2012) (citing 42 U.S.C. § 7410(k)). EPA’s duty is reflected in Section 101(a)(2)(E)(i) of the Clean Air Act, which provides that each SIP submitted to EPA for approval must:

[P]rovide ... necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (*and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof*)  
....

---

<sup>2</sup> See also *US Magnesium, LLC v. EPA*, 690 F.3d 1157, 1159 (10th Cir. 2012) (Clean Air Act “uses a cooperative-federalism approach to regulate air quality”); *Michigan v. EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (Clean Air Act “establishes an intergovernmental partnership to regulate air quality in the United States”).

42 U.S.C. § 7410(a)(2)(E) (emphasis added). If the SIP does not meet these and other criteria, it must be disapproved. 42 U.S.C. §§ 7410(a)(2)(E), 7410(k)(1)(C).

The Clean Air Act also specifically prohibits state and local governments from regulating emissions from locomotives. Section 202 of the Act gives EPA the exclusive authority to establish emissions standards for new locomotives. 42 U.S.C. § 7521. Section 209 of the Clean Air Act “expressly preempt[s] the states from adopting standards or other requirements relating to emissions from” new locomotives; state regulation of locomotives that are not new is also barred absent a waiver from EPA. *See* 42 U.S.C. § 7543(b), (3)(1)(B); *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1081 & n.21, 1090 (D.C. Cir. 1996).

## FACTUAL BACKGROUND

**The EPA’s Regulations Governing Locomotive Idling.** Pursuant to its authority under Section 202 of the Clean Air Act, EPA has promulgated regulations that apply to new locomotives and any existing locomotives that are subject to the EPA’s remanufactured engine standards. These locomotives must be equipped with automatic engine stop/start systems that shut off the main locomotive engine(s) after 30 minutes of idling, and are capable of stopping and starting the engine at least six times a day without causing engine damage or other serious problems. 40 C.F.R. § 1033.115(g). According to the EPA, the purpose of the regulations is “to eliminate emissions from unnecessary locomotive idling.”<sup>3</sup> EPA also made clear in its regulations that states and localities are precluded from regulating this area. *See* 40 C.F.R. § 1074.12 (“States and localities are preempted from adopting or enforcing standards or other

---

<sup>3</sup> Control of Emissions of Air Pollution From Locomotive Engines and Marine Compression-Ignition Engines Less Than 30 Liters per Cylinder, 73 Fed. Reg. 37,096, 37,098-99 (June 30, 2008).

requirements relating to the control of emissions from new locomotives and new engines used in locomotives.”).

In a fact sheet describing these new rules, EPA explained that its regulatory efforts to reduce emissions from idling locomotives “focus on requiring the application of automatic idle reduction technologies to the locomotives themselves *rather than directly regulating when railroads may allow locomotives to idle.*”<sup>4</sup> EPA also noted that it has been working in collaboration with the nation’s major railroads to implement further voluntary efforts to reduce idle emissions beyond the mandated federal reductions. These efforts, EPA reported, include “efforts to reduce idling through a variety of technologies and strategies, including automatic engine stop-start systems, auxiliary power units or diesel-driven heating systems, electrical shorepower connections, and company idle-shutdown policies.”<sup>5</sup>

**The District’s Rules At Issue.** Like the EPA’s regulations, the SCAQMD’s Rules 3501 and 3502, which were promulgated by the SCAQMD in 2006, concern locomotive idling. Unlike EPA’s regulations, the District’s rules do not directly require anti-idling devices to be installed on the locomotives. Instead, the District’s rules directly regulate when railroads may allow locomotives to idle, while exempting locomotives that are equipped with specified idle reduction technology. Yet the rules are also equipment-forcing regulations because the only practical way the railroads can avoid the burdensome regulations is to install more stringent anti-idling equipment than required by EPA.

---

<sup>4</sup> EPA Office of Transportation and Air Quality, *Control of Emissions from Idling Locomotives*, EPA-420-F-08-014, at 2 (Mar. 2008, rev. Sept. 2012) (emphasis added) (“*EPA Idling Fact Sheet*”) (attached as Attachment A).

<sup>5</sup> *Id.* at 3.

Rule 3501 requires railroads to record specific, detailed information concerning idling events (such as the names of the locomotive operator and locomotive owner, the locomotive identifier, the specific location of each idling event, the date and time of the idling event onset, and the duration of each idling event). *See* Rule 3501(d). Under Rule 3501(e), railroads are required to report those idling events to the District on a weekly and an annual basis. The stated purpose of Rule 3501 “is to record idling events to identify opportunities for reducing idling emissions and to assist in quantifying idling emissions.” *See* Rule 3501(a). Rule 3502, which is designed “to minimize emissions from unnecessary idling of a locomotive” (Rule 3502(a)), requires railroads to limit idling of unattended or trailing locomotives to 30 minutes or less in certain circumstances, such as when an unattended locomotive is within the rail yard or a trailing locomotive experiences a failure or breakdown that results in a delay of more than 30 minutes. *See* Rule 3502(d). Both rules provide for a fine of up to \$75,000 per violation per locomotive per day.

Railroads are exempt from these burdensome requirements if they equip locomotives with anti-idling devices that are set at 15 minutes or less. *See* Rule 3501(c), (f), and (k). Alternatively, the railroad can use “alternative technology” by which oxides of nitrogen and diesel PM emission reductions of 85 percent or greater can be achieved and verified; or submit an “alternative compliance plan” that sets forth a schedule to equip all locomotives in their fleets with anti-idling devices or “alternative technology” by December 31, 2007 (for their intradistrict locomotive fleets) and by June 30, 2010 (for their interdistrict locomotive fleets). *See id.* These exemptions are clearly intended to compel railroads to install anti-idling devices set at 15 minutes or less – which is a more stringent requirement than the 30-minute limit set by EPA.

**The District Court and Ninth Circuit Litigation.** After Rules 3501 and 3502 were promulgated, the AAR, BNSF, and UP brought suit in federal district court, arguing that the rules are unlawful because they are preempted by ICCTA. The court held a four-day trial in December 2006, during which the parties created a detailed factual record concerning the burden on the rail industry and the environmental effects of the rules. That evidence was based on the industry's operations in California at the time of the 2006 trial.

In April 2007, the District Court issued an opinion which concluded that "the Rules are preempted in their entirety by the ICCTA" and that "plaintiffs are entitled to a permanent injunction against enforcement of the Rules by Defendants." *Ass'n of American Railroads v. South Coast Air Quality Mgmt. Dist.*, 2007 WL 2439499, at \*8 (C.D. Cal. Apr. 30, 2007) ("*District Court Opinion*") (attached to EPA petition). The court rejected the SCAQMD's argument that it was compelled by the Clean Air Act to enact the rules, because "the District does not have the authority under [California law] to regulate air contaminants from locomotives." *Id.* at \*6. The court further found that even if the District enacted the rules pursuant to its "police powers," the rules are preempted because they are not "generally applicable to all businesses," but instead "attempt[] to directly regulate rail operations" such as idling. *Id.* at \*7. Thus, the court concluded that "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." *Id.* at \*8.

On appeal, the Ninth Circuit affirmed the District Court's judgment. The Ninth Circuit found that the rules do not have the force and effect of Federal law because they had not been included in California's SIP; thus, there was no need for the court to harmonize the rules with ICCTA. *Ninth Circuit Decision*, 622 F.3d

at 1098. The court then ruled that as state law, the rules are preempted because they are “plainly” not rules of general applicability:

The rules apply exclusively and directly to railroad activity, requiring the railroads to reduce emissions and to provide, under threat of penalties, specific reports on their emissions and inventory . . . . *ICCTA preempts the District’s rules here.*

*Id.* (emphasis added).<sup>6</sup>

After the Ninth Circuit’s decision, the SCAQMD submitted Rules 3501 and 3502 to the California Air Resources Board, which in turn submitted the rules to EPA in August 2012 for approval into the California SIP. Petition at 4. EPA then filed its Petition with the Board on January 24, 2014. EPA observed that under the Clean Air Act, EPA must determine whether the rules, as submitted, comply with Section 110(a)(2)(E)(i). To determine whether the state would be prohibited by Federal law from carrying out the state’s implementation plan, EPA sought guidance from the agency addressing “whether the Rules, if approved by EPA into the SIP, would be preempted by ICCTA.” *Id.* at 5.

---

<sup>6</sup> The particular issue before the Board – whether harmonization would be appropriate or possible if the local idling regulations were included in a SIP – was neither briefed in the case nor decided by the Ninth Circuit.

## ARGUMENT

### I. ICCTA PROHIBITS THE DISTRICT FROM ENFORCING THESE IDLING REGULATIONS, EVEN AS PART OF AN APPROVED SIP.

EPA's petition presents an issue of first impression for the Board. SCAQMD seeks to impose idling regulations of locomotive operations. But two federal courts have already found these idling regulations preempted by ICCTA. They reasoned, correctly, that these regulations were exactly the type of local regulation Congress intended to be preempted to prevent a patchwork of similar local regulations from interfering with interstate commerce. The question presented is whether Congress intended, through the Clean Air Act, to permit state and local authorities to create the same patchwork of local regulations simply by including the otherwise unlawful local regulation in a SIP.

Here, the only harmonious reading of the 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. To the contrary, as EPA noted in its Petition, the Clean Air Act speaks directly to this issue. It requires the proponent of the SIP to provide assurances that the proposed SIP is not prohibited by State or Federal law. 42 U.S.C. § 7410(a)(2)(E)(i). Moreover, Congress has long treated the construction and use of freight locomotives as needing protection from a patchwork of local regulations. Locomotive safety and operations are regulated by the Federal Railroad Administration ("FRA"); locomotive emissions by EPA; all other locomotive and train practices are within the jurisdiction of the STB. Congress left little room for state and local regulation of this critical component of the interstate rail network.

## 1. The Plain Language Of ICCTA Preempts SCAQMD's Regulations.

Congress's assertion of federal authority over the railroad industry has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981); *accord, Deford v. Soo Line R.R. Co.*, 867 F.2d 1080, 1088-91 (8th Cir. 1989) (ICA so pervasively occupies the field of railroad governance that it completely preempts state law claims). In 1996, with ICCTA, Congress *broadened* the federal regulatory scheme and scope of that federal preemption. The express preemption clause in Section 10501(b) provides that the jurisdiction of the Board over transportation by rail carriers "is exclusive." The federal courts have observed that "[t]he language of the statute could not be more precise, and it is beyond peradventure that regulation of [] train operations ... is under the exclusive jurisdiction of the STB . . . ." *Friberg v. Kansas City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001). It is indeed "difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *CSX Transp.*, 944 F. Supp. at 1581.

The touchstone of any ICCTA preemption analysis must therefore begin with this broad and plain statement of Congress' intent to place exclusive jurisdiction with the Board. 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 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.<sup>7</sup>

The District Court and Ninth Circuit correctly held that these idling regulations fall within the broad and sweeping preemption provision in ICCTA. The District Court held a 4-day trial, during which the railroads submitted testimony of the heavy burden these local rules would place on their operations and on interstate commerce. After considering all the evidence and arguments presented, the District Court held the local regulations were preempted by ICCTA. It reasoned that the District was attempting to "directly regulate rail operations" and, like the STB, noted that federal courts around the country have "consistently held that the enforcement of any law which would result in the imposition of regulations on the way the railroad company operates its trains is preempted by the ICCTA." *District Court Opinion* at \*7. Similarly, although the Ninth Circuit left open the possibility that the result *might* be different if the regulations were part of an approved SIP, it held that "[t]he rules apply

---

<sup>7</sup> Examples include: *Friberg*, 267 F.3d at 443 (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter); *City of Auburn*, 154 F.3d at 1029-31 (state and local environmental and land use regulation preempted); *Wisconsin Cent. Ltd. v. City of Marshfield*, 160 F. Supp.2d 1009, 1014 (W.D. Wis. 2000) (attempt to use a state's general eminent domain law to condemn an actively used railroad passing track preempted); *Dakota, Minn. & E. R.R. Corp. v. South Dakota*, 236 F. Supp.2d 989, 1005-08 (D. S.D. 2002), *aff'd on other grounds*, 362 F.3d 512 (8th Cir. 2004) (revisions to state's eminent domain law preempted where revisions added new burdensome qualifying requirements to the railroad eminent domain power that would have the effect of state "regulation" of railroads); *Soo Line R.R. Co. v. City of Minneapolis*, 38 F. Supp.2d 1096, 1098 (D. Minn. 1998) (local permitting regulation regarding the demolition of railroad buildings preempted); *Cedarapids, Inc. v. Chicago, Cent. & Pac. R.R. Co.*, 265 F. Supp.2d 1005, 1013-14 (N.D. Iowa 2003) (ICCTA preemption applies broadly to operations on both main line and auxiliary spur and industrial track); *Norfolk S. Ry. Co. v. City of Austell*, No. 1:97-cv-1018-RLV, 1997 U.S. Dist. LEXIS 17236 (N.D. Ga. Aug. 18, 1997) (local zoning and land use regulations preempted); *Village of Ridgefield Park v. N.Y., Susquehanna & W. Ry. Corp.*, 750 A.2d 57 (N.J. 2000) (local regulation of rail operations under local nuisance law preempted).

exclusively and directly to railroad activity, requiring the railroads to reduce emissions and to provide, under threat of penalties, specific reports on their emissions and inventory . . . . *ICCTA preempts the District's rules here.*" *Ninth Circuit Decision*, 622 F.3d at 1098 (emphasis added).

Preemption was the proper finding. The South Coast Air Basin is an area of extreme congestion of rail traffic. Given the level of congestion, even relatively small delays in rail transportation can have a profound impact and, if not addressed quickly, can resonate across the country. And it can hardly be debated that Rule 3502's idling restrictions will introduce more delays into this congested region. Because it takes 5-10 minutes to shut down a single locomotive, in order to avoid violating the local idling regulations (and exposing the railroad to local penalties), crews would need to start powering down locomotives before the 30-minute deadline. It also can take 20 minutes or more to then restart a locomotive, adding further delay. Moreover, the railroads use a number of distributed power trains in this region, which involve a configuration in which the locomotives are interspersed within the train and controlled by radio signals. The local idling rules would require these locomotives to be manually shut down, and then go through an elaborate re-linking process to restart. (They cannot be shut down or restarted by radio signal.). Locomotives delayed in sidings or yards will consume scarce rail capacity in this region. The delays would ripple to other trains and reduce the average network speeds and fluidity of the network. The net effect would limit locomotive availability, increase crew times on duty, and delay equipment and freight from reaching customers.<sup>8</sup> So whether local regulations

---

<sup>8</sup> BNSF and UP will elaborate on the potential operating impacts of this rule – and provide a summary of the testimony already submitted to the District Court – in separately submitted comments in this proceeding. Norfolk Southern Railway will describe the potential national impact should other localities adopt similar regulations directed at locomotive operations.

are directed at idling trains, trains blocking crossings, trains emitting too much noise, or railcars being used as storage, ICCTA preempts such state and local regulations because Congress concluded that our national rail network cannot function properly if local authorities are allowed to regulate railroad operations.

The recordkeeping and reporting requirements are also burdensome. To begin to accurately capture potentially idling events, it would be necessary to track and record every time a locomotive or train comes to a stop. Locomotives stop hundreds of times a day in the Basin, and the train may be operated by a train crew, a maintenance employee, switch crew, or yard hostler. The operator would need to record every stop – at the time it occurs and identify the location of the locomotive – because the operator rarely knows exactly how long the locomotive will be stopped. The burden of tracking, recording, and reporting these events will be at a minimum distracting to operators, and dangerous in circumstances where the operator is already performing required safety checks.

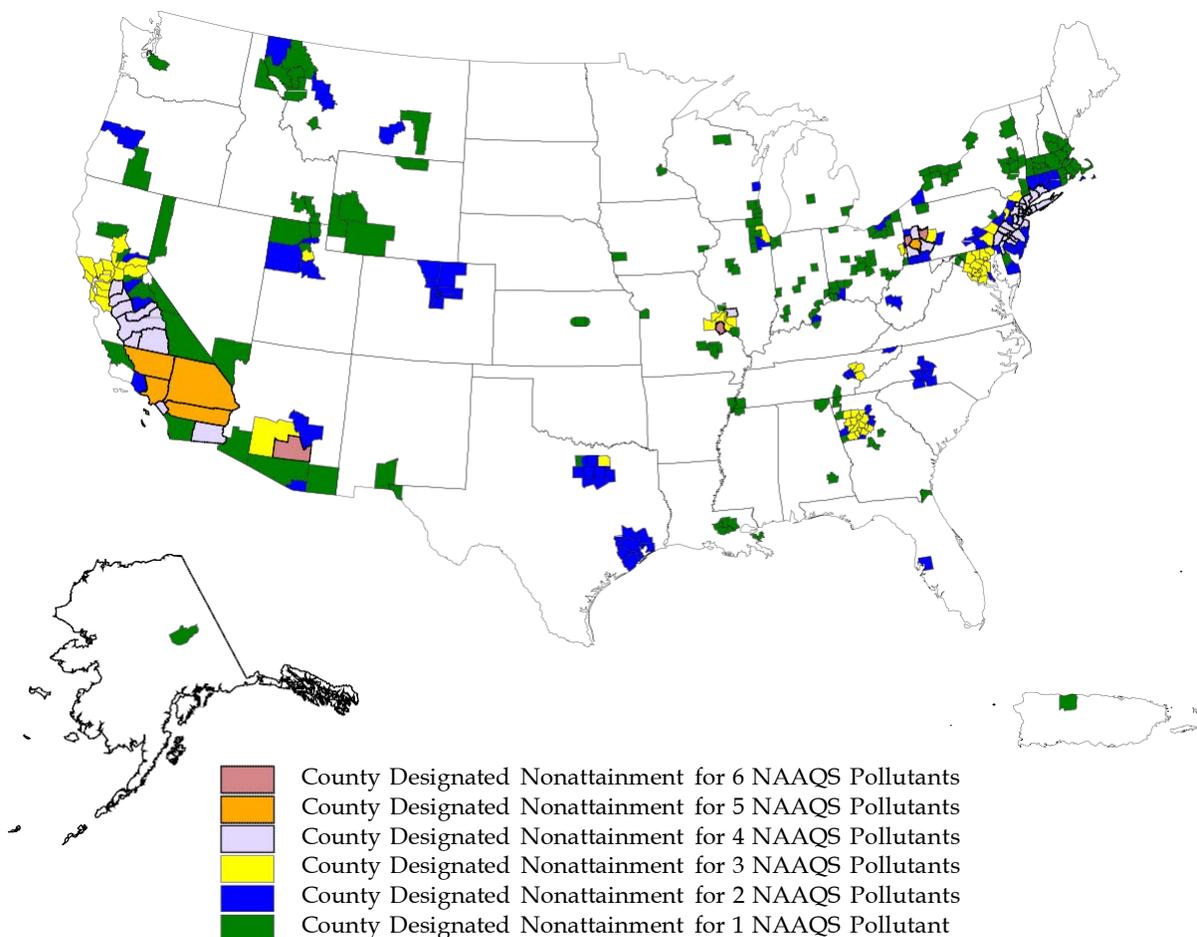
These kinds of local rules that directly regulate interstate rail operations must be preempted to avoid a patchwork of local regulations. There are more than 100 nonattainment areas through the United States, located in more than 40 states.<sup>9</sup> As depicted below, if local counties in these nonattainment areas follow the District’s lead, and seek to supplement the uniform national rules adopted by EPA, the risk of balkanization of the national rail network would pose a grave risk to the rail industry.

---

<sup>9</sup> The list of non-attainment counties is available on EPA’s website. EPA, *Currently Designated Nonattainment Areas for All Criteria Pollutants*, <http://www.epa.gov/airquality/greenbk/ancl3.html> (last visited Feb. 12, 2014).

## Counties Designated "Nonattainment"

for Clean Air Act's National Ambient Air Quality Standards (NAAQS)<sup>10</sup>



The burden (extensive) and outcome (preemption) do not change if these idling rules are included in a SIP. 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.*,

<sup>10</sup> See <http://www.epa.gov/airquality/greenbk/map/mapnpoll.pdf>.

*supra*, at \*15 (citing *Ninth Circuit Decision*, 622 F.3d at 1098) (emphasis added). Here, SCAQMD is plainly seeking to use the federal environmental laws to regulate rail operations on a local level. Moreover, the Board has 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. *Boston & Maine, supra*, at \*6. That, however, is precisely what SCAQMD is doing here.<sup>11</sup>

This case confirms the Board’s concern that local governments not use the federal environmental laws as a guise to regulate rail operations. After the local idling regulations were struck down, SCAQMD did nothing but repackage these regulations and present them to CARB, which in turn forwarded them to EPA for inclusion in the state’s SIP. The District did not modify the regulations in any respect to make them less burdensome on the industry; it failed to address the District Court’s finding that it lacked the authority under state law to promulgate these regulations; it failed to seek a waiver from the EPA for rules related to locomotive emissions; and it failed to update the stale environmental information it had used to justify the local rules in the first place. It just sent the same rules to the EPA in the hopes that the concept of “harmonizing” Federal laws would throw open the door for local regulation of rail operations.

EPA was understandably nonplussed at being asked to approve local regulations that two federal courts have found prohibited by Federal law. Instead, it sought guidance from the agency which administers ICCTA. Under the rulings of the Board and the federal courts, the broad and sweeping language

---

<sup>11</sup> In fact, the District Court found that the SCAQMD’s reliance on the Clean Air Act appeared to be “‘pretextual’ – a litigation decision made after Plaintiffs filed suit against the District,” because “the [Clean Air Act] was never mentioned as part of the [SCAQMD] proceedings which led to the adoption of the Rules.” *District Court Decision* at \*6 n.6.

in Section 10501(b) would plainly prohibit the SCAQMD from enforcing these local idling regulations. And as discussed below, there is no evidence that Congress intended to permit the creation of this kind of patchwork of local regulations simply by including the regulation in a SIP.

## **2. The Clean Air Act Prevents States From Including Regulations In A SIP That Are Prohibited By State Or Federal Law.**

There are several provisions of the Clean Air Act relevant to the issue before the Board; however, the Board need not engage in a complex process of statutory construction. The relevant provisions are clear on their face. In any issue of statutory construction or interpretation, the court or agency must “begin by analyzing the statutory language.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010); *see also CSX Transp., Inc. v. Alabama Dep’t of Revenue*, 131 S.Ct. 1101, 1107 (2011) (“We begin, as in any case of statutory interpretation, with the language of the statute”). Thus, “[t]o reconcile ... two seemingly conflicting statutes, we start, as always, with the text.” *In the Matter of Tarby*, 2012 WL 1390201, at \*3 (Bankr. D. N.J. Apr. 20, 2012) (*citing CSX Transp., supra*). The Board must “make every effort to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, so long as doing so does not deprive one or the other of its essential meaning.” *Wilderness Soc’y v. Morton*, 479 F.2d 842, 881 (D.C. Cir. 1973); *Myers v. Hollister*, 226 F.2d 346, 348 (D.C. Cir. 1955) (same).

Three features of the Clean Air Act demonstrate that SCAQMD cannot seek to regulate rail operations simply by including the local regulation in a SIP. *First*, as the EPA noted in its petition, the Clean Air Act requires the states to provide assurances that the state “is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof . . . .”

42 U.S.C. § 7410(a)(2)(E)(i). This provision, on its face, indicates that: (a) Congress did not intend for local governments to override Federal law simply by including the provision in a SIP and seeking approval from EPA; and, therefore, (b) the “not prohibited” language of Section 7410(a) requires an assurance that the state is not *currently* prohibited (*i.e.*, at the time the SIP is submitted for approval by the EPA) by Federal or State law from implementing its SIP.

Faced with the rulings of two federal courts that the local idling rules are prohibited by Federal law, EPA understandably raised this issue with SCAQMD. In response, SCAQMD claimed that EPA’s “crabbed interpretation” was unreasonable and would lead to absurd results. “The logic,” SCAQMD wrote, “is that Section 110(a)(2)(e) prohibits EPA from approving a rule into the SIP because that rule had been held to be preempted. But this logic is circular, for the rule was held preempted only because it was not yet approved into the SIP.”<sup>12</sup>

But it is SCAQMD’s interpretation of this provision (not EPA’s) that is unreasonable. The language of Section 7410(a)(2)(E) (“is not prohibited”) makes clear that its focus is on the present, rather than on the situation that exists after the SIP is approved.<sup>13</sup> If there is any ambiguity in this provision, EPA regulations make plain that the state’s plan must show that the legal authorities required by

---

<sup>12</sup> See Letter from Barbara Baird, Chief Deputy Counsel, SCAQMD, to Jared Blumenfeld, Regional Administrator, EPA Region 9, at 5 (Aug. 7, 2013) (“EPA’s crabbed interpretation of Section 110(a)(2)(E) would deprive the SCAQMD of its prerogative and opportunity to have the rules harmonized with the purposes of ICCTA . . . .”) (attached to EPA petition).

<sup>13</sup> When it enacted the “not prohibited by” language in the Clean Air Act Amendments of 1990, Congress made clear that the focus of Section 7401(a)(2)(E) is on the present. The language was contained in the reported House version of the bill (which the Senate accepted), and the House committee report states that under Section 7401(a)(2)(E), “The SIP must provide assurances that the State . . . *has* adequate personnel, funding, and authority to carry out the SIP.” H.R. Rep. No. 101-490, at 218 (1990) (emphasis added).

the Clean Air Act “are available to the State at the time of submission of the plan.” 40 C.F.R. § 51.231(b).

In its letter to EPA, the District seems to concede that local regulations that are facially preempted, without any inquiry into the burden on interstate commerce, cannot be included in a SIP. *See* Letter from Barbara Baird to Jared Blumenfeld, *supra*, at 10-11. The Board has found two broad categories of state and local actions preempted regardless of the context or the rationale for the action: “(1) any permit requirement that could be used to deny the railroad the ability to conduct its operations or to proceed with activities the Board has authorized, and 2) any attempted regulation of a matter directly regulated by the Board, such as a state statute dictating when a train can traverse a road crossing, or a state or local regulation determining how a railroad’s traffic should be routed.” *New England Transrail, LLC – Construction, Acquisition, and Operation Exemption – In Wilmington & Woburn, MA*, STB Finance Docket No. 34797, at 8-9 (STB served July 10, 2007). The District then claimed its regulations did not fall into either category. The District is wrong; the regulations fall into the second category. The District Court took evidence on the burden on interstate commerce. But the District Court ultimately found these regulations preempted because they reflected an “attempt[] to directly regulate rail operations” and thus were “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.” *District Court Opinion* at \*7-8.

In short, the most logical meaning of Section 7410(a)(2)(E) is that Congress meant what it said; the state must provide assurances that it *is not prohibited* by *any* state or Federal law from carrying out the regulations proposed for the SIP. And here, that is plainly not the case, as there remains a valid federal injunction

against the District from enforcing these local idling regulations. *District Court Opinion* at \*8.

*Second*, the Clean Air Act's provisions regarding regulation of locomotive emissions provide further support that Congress intended a very limited role for states in this arena. Under Section 209(e)(1) of the Clean Air Act, states (and political subdivisions) are not permitted to apply "any standard or other requirement relating to the control of emissions" from locomotives. 42 U.S.C. § 7543(a), (e). For new locomotives, no waiver from this provision is available and the states therefore have no role in regulating emissions from these new locomotives; those regulations must come from EPA.<sup>14</sup> For locomotives not considered new, California may seek a waiver from Section 209(e)(1). But before it may impose local standards or other requirements related to the control of emissions from these locomotives through the waiver process, the state must show that the local regulations are needed "to meet compelling and extraordinary conditions." 42 U.S.C. § 7543(e)(2)(A)(ii). California has not sought a waiver or presented any evidence of compelling and extraordinary conditions.<sup>15</sup> And absent "extraordinary conditions," Section 209(e)(1) provides

---

<sup>14</sup> The scope of the preemption provisions on standards or other requirements relating to the control of emissions from new locomotives and locomotive engines extends for 133 percent of the useful life of the new locomotive. *See* 40 C.F.R. § 1074.12.

<sup>15</sup> SCAQMD maintains that this Federal provision does not prohibit it from adopting these idling regulations, *citing Engine Mfrs. Ass'n*, 88 F.3d at 1094. AAR does not share this broad reading of that case for three reasons. *First*, the court in *Engine Mfrs. Ass'n* was addressing nonroad engine preemption *other than locomotives*. EPA had expressly chosen not to address locomotives in the final rules under review. As such, the case is not controlling on preemption of regulations directed at locomotives. *Second*, the example of in-use "idling" regulations as potentially lawful was plainly dicta. As the Supreme Court has cautioned, "[i]n the last analysis, we think the dicta of [a prior case] to be an unreliable, if not an unintelligible, guide: that opinion had no cause to address, and did not carefully consider, the [] question before us today." *Heck v. Humphrey*, 512 U.S. 477, 482 (1994). *Third*, the reference to idling restrictions in *Engine Mfrs. Ass'n* occurred before EPA adopted its own national idling standards for locomotives. The promulgation of a

compelling evidence that Congress intended idling regulations to control locomotive emissions to be uniform federal rules, not a patchwork of local regulations.<sup>16</sup>

*Third*, the Clean Air Act is not a grant of federal authority to the states to enforce their SIPs; the source of that authority must be State law. That feature of the Clean Air Act is reflected in Section 101(a)(2)(E)(i), which requires that a SIP “provide ... necessary assurances that the State ... will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan.” 42 U.S.C. § 7410(a)(2)(E)(i) (emphasis added).

Accordingly, the Office of General Counsel of the EPA concluded in 1988 that the enforcement authority in Section 113(b) of the Clean Air Act – which authorizes the EPA to bring a civil action in federal court against violators of SIPs, New Source Performance Standards (“NSPSs”), and National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) – is not delegable to the states because the Clean Air Act contemplates that states have their own enforcement authority under State law: “Congress emphasized that a state ‘would be expected to have or obtain’ adequate enforcement authority under state law to enforce [SIPs], NSPSs, and NESHAPs.”<sup>17</sup> *See also Southeastern Oakland Cnty. Res. Recovery Auth.*

---

national idling standard by EPA implicates Section 209 and whether localized idling standards and requirements are preempted.

<sup>16</sup> The Board should not interpret EPA’s question to the Board as assuming that SCAQMD’s rules would result in any significant emissions reductions or that the rules are consistent with EPA standards. In fact, the emissions standards would not provide any significant environmental benefit and conflict with EPA’s own emissions regulations.

<sup>17</sup> Office of General Counsel, *EPA’s Delegation of Its Authority Under Clean Air Act § 113(b) to Enforce New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants*, 1988 WL 252387 (E.P.A.G.C.), at \*3-4 (Mar. 24, 1988) (citing S. Rep. No. 1196, 91st Cong., 2d Sess. at 21 (1970)).

*v. City of Madison Heights*, 5 F.3d 166, 169 (6th Cir. 1993) (“nowhere does the [Clean Air Act] affirmatively grant local governments the independent power to regulate air pollution”); *Riverside Labs., Inc. v. Illinois EPA*, 1987 WL 7836, at \*2 (N.D. Ill. 1987) (explaining that while a local rule may be folded into the federally approved SIP, the rule “retains its character as state law. As such, claims based on the scope and application of the SIP are essentially ones of state law, and do not arise out of federal law.”).<sup>18</sup>

Indeed, EPA itself has observed that its own authority under the Clean Air Act to regulate locomotive idling is unclear. EPA has noted that the Clean Air Act does not give EPA unlimited ability to regulate locomotives. “Section 213(a)(5) and related provisions provide EPA the authority to establish emission standards for newly manufactured and remanufactured locomotives, as well as to prohibit railroads or anyone else from tampering with emission controls. For locomotives not yet required to use the idle reduction technologies, *the Clean Air Act provisions do not appear to provide EPA with particular authority to prevent railroads from allowing them to idle.*” *EPA Idling Fact Sheet* at 2 (emphasis added). Thus, EPA explained, “EPA’s regulatory efforts to reduce emissions from idling locomotives focus on requiring the application of automatic idle reduction technologies to the locomotives themselves rather than directly regulating when railroads may allow locomotives to idle.” *Id.* If Congress chose not to give this authority to EPA, it clearly did not grant this authority to the District; the source of its authority must instead flow from State law.

---

<sup>18</sup> Here, it is undeniable that the District lacks authority to adopt the Rules under state law because, as the District Court held, Section 40702 of the California Health & Safety Code clearly prohibits local air districts from specifying the “particular method to be used in reducing the release of air contaminants from railroad locomotives.” *District Court Opinion* at \*6.

In sum, the Clean Air Act can be read in harmony with the broad and sweeping prohibition in ICCTA on local regulation of rail operations. The Clean Air Act reflected congressional dissatisfaction with the progress of existing air pollution programs and a determination to “tak(e) a stick to the States,” to guarantee the prompt attainment and maintenance of specified air quality standards. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). The Supreme Court explained that “the heart of the Amendments [to the Clean Air Act] is the requirement that each State formulate, subject to EPA approval, an implementation plan designed to achieve national primary ambient air quality standards [] necessary to protect the public health. . . .” *Id.* Each state is given wide discretion in formulating its plan, and EPA’s role is to approve the plan so long as it is not contrary to the minimum federal standards set forth in the Clean Air Act. *Id.* But the Act provides no evidence that Congress intended – when it “took a stick to the states” – to permit them to trample over other Federal laws and, in this case, to intrude into the operation of railroad activities, which Congress declared the exclusive province of the STB.

### **3. Congress Plainly Intended To Avoid A Patchwork Of State And Local Regulations Of Locomotives.**

ICCTA and the Clean Air Act can be read in harmony to prohibit state and local regulation of rail operations. This interpretation is buttressed further by the broader framework of all congressional statements regarding the regulation of locomotives used in interstate commerce. With each Act, Congress reiterates a common theme: regulation of locomotives is centralized at the federal, not state or local, level. Jurisdiction over locomotives in rail transportation operations is centralized at the STB; regulation of locomotive safety is centralized at the FRA; and any standards or other requirements relating to the control of emissions

from rail locomotives is centralized at the EPA. Even perfecting a lien on a locomotive is centralized at the STB. 49 U.S.C. § 11301. In other words, while federal authority over the railroad industry has been recognized as “among the most pervasive and comprehensive of federal regulatory schemes,” when it comes to regulation of locomotives, the federal role is at its apex.<sup>19</sup>

It is clear why Congress prohibited a patchwork of local regulations (whether governing operations, safety, or emissions) of locomotives used in interstate commerce. Local regulations directed at the construction, use, and maintenance of locomotives would inevitably burden interstate commerce and harm the Nation’s prosperity. Railroads cannot operate efficiently if each locality through which they operate can impose a different set of operating rules on their locomotives. The fluidity of the network depends on uniform safety, operating, and emission rules; locomotives rarely stay confined within a particular locality. And as the Board is well aware, seemingly simple operating problems that arise in one part of the country can quickly ripple outward and have a broader effect on the entire interstate rail network.<sup>20</sup>

---

<sup>19</sup> Indeed, the Supreme Court reaffirmed recently that Congress 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)). In that decision, the Supreme Court rejected a narrower scope of the preemptive effect of the Locomotive Inspection Act proposed by the federal government, which would have preserved a role for states in regulating locomotive equipment where FRA had not promulgated specific regulations. The Court concluded that when Congress passed the Federal Railway Safety Act of 1970, it left intact the extraordinarily broad preemptive effect announced in 1926.

<sup>20</sup> This danger is far from speculative or hypothetical. As the Board well knows, the risks are real as evidenced, for example, by UP’s experience in the late 1990s when a yard in Houston became badly congested. The effects reverberated throughout UP’s system and the rest of the national rail system. It took months for the system to recover from that event.

Moreover, localized regulation of locomotives can raise significant safety issues. FRA wrote a letter to EPA expressing concern that the District's local idling regulations have the potential, amongst other things, to "increase the length of time that equipment is removed from a source of compressed air, which can negatively impact the integrity and operation of the brake system on a vehicle or train."<sup>21</sup> Because Congress charged FRA with protecting the safe operation of locomotives, its concerns must be given substantial weight. Indeed, we need not elaborate on the tragic results that can occur should the integrity of a train's brake system be compromised.

Finally, the "unique features of locomotives and railroads" has also been recognized by EPA as requiring a strong centralized federal role. 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). EPA explained 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." *Id.* at 3. It 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.* And in promoting a broad 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." *Id.*

In sum, resolution of the issue presented by EPA is clear given the broad and sweeping language of ICCTA, the required showing in the Clean Air Act

---

<sup>21</sup> Letter from Joseph C. Szabo, EPA Administrator, to Jared Blumenfeld, Regional Administrator, EPA Region 9 (dated Sept. 27, 2013) (attached to EPA Petition).

that a SIP is not prohibited by State or Federal law, and the centralized federal scheme in regulating locomotives. Congress did not give states or localities the authority to override its decision to centralize regulation of locomotive operations at the federal level. Without a clear grant of authority in the Clean Air Act (and there is none) and without seeking a waiver from EPA (which the District has not sought), the plain congressional directive in ICCTA must prevail.

Accordingly, AAR respectfully urges the Board to hold that the state would be prohibited by ICCTA from implementing these local idling rules, even if approved by EPA as part of the state's SIP.

**II. IF THE BOARD CANNOT FIND THE DISTRICT'S RULES PREEMPTED AS A MATTER OF LAW ON THE EXISTING RECORD, IT SHOULD INSTITUTE A PROCEEDING.**

EPA requested expedited handling of this petition, citing a statutory deadline of February 28, 2014 for EPA to take action on the SCAQMD idling rules. *See* Petition at 2. Given the unique circumstances of this case, AAR believes that the Board can rule on the question presented in an expedited fashion as urged by EPA. Ordinarily, the Board might need a lengthy proceeding to explore the burden on the industry that these rules would impose. But in this case, federal courts have addressed and resolved the usual case-by-case analysis needed to determine if these local idling regulations are prohibited by ICCTA. And as discussed above, the AAR submits that Congress did not intend to permit local authorities to circumvent its pronouncement in ICCTA – and regulate rail operations – by seeking to include those local regulations in a SIP.

However, if the Board should feel it needs more, it should institute a proceeding. If the Board opens a proceeding, AAR would present further evidence showing that the local idling rules will burden interstate rail operations, with dubious environmental benefits given the continuous introduction of new

locomotives in the region with idling devices installed as required by uniform federal EPA rules. An evidentiary proceeding would also provide the Board the opportunity to address FRA's safety concerns with the District's local idling regulations and to consider the national impact of the precedent set here as other regions in non-attainment areas inevitably tried to follow SCAQMD's example.

If the Board concludes that it needs more evidence, it should be aware that Section 110(k) of the Clean Air Act provides no consequences if EPA defers action on this SIP submittal until February 28, 2014 or after.<sup>22</sup> In particular, the Clean Air Act does not provide that this SIP submittal is automatically approved or disapproved on February 28, 2014.<sup>23</sup> EPA has taken its time, and may continue to take its time, in order to evaluate this submission carefully, consistently with its own SIP review practices.

---

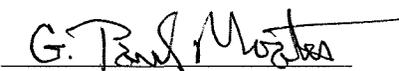
<sup>22</sup> Affected parties may file an action in federal district court to seek an order that EPA take action. However, such a suit cannot be brought until and unless such a party provides EPA a 60-day notice under Section 304(b) of the Clean Air Act. In this case, no party could file such a notice until February 28, 2014 or later. Even if such litigation is brought, EPA frequently resolves such cases by entering a consent decree providing a stipulated schedule to take final action on the SIP submittal – allowing for substantial additional time for EPA to take final action. *See, e.g., Nat. Res. Def. Council, Inc. v. EPA*, No. CV-10-6029-MMM-AGR, at 4 (C.D. Cal. Dec. 13, 2010) (although state plan was originally received by EPA in November 2007 and original deadline for EPA action was November 2008, stipulated schedule in consent decree set final deadline of September 2011 and December 2011 for final action).

<sup>23</sup> EPA routinely allows this 12-month period to lapse, taking the time it needs to consider SIP submittals. For example, revisions to SCAQMD Rule 218 and new Rule 218.1, governing the requirements for continuous emission monitoring throughout SCAQMD, were submitted to EPA in July 1999, but EPA did not act until June 8, 2010 – nearly 11 years after the state's original submittal. 75 Fed. Reg. 32293 (June 8, 2010). As another example, EPA did not act on SCAQMD's Rule 403 regulating fugitive particulate matter from man-made sources throughout the entire South Coast Air Basin until nearly two and half years later. 73 Fed. Reg. 12639 (Mar. 10, 2008). The SCAQMD did not institute litigation against EPA in either instance.

## CONCLUSION

For the reasons set forth above, the STB should resolve the cloud of uncertainty surrounding the lawfulness of these regulations and declare that the local idling rules proposed by SCAQMD – which have already been found preempted by ICCTA – would remain preempted even if in an approved SIP.

Respectfully submitted,



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

G. Paul Moates  
Richard E. Young  
SIDLEY AUSTIN, LLP  
1501 K Street, N.W.  
Washington, DC 20004  
(202) 736-8000

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

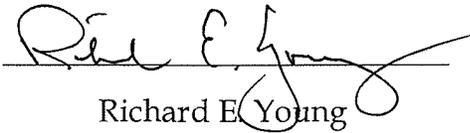
Louis P. Warchot  
Michael J. Rush  
Timothy J. Strafford  
Association of American Railroads  
425 Third Street, S.W.  
Washington, D.C. 20024  
(202) 639-2502

*Counsel for the Association of American Railroads*

February 14, 2014

**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of February, 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

# **Attachment A**

## Control of Emissions from Idling Locomotives

**I**n 2008, The U.S. Environmental Protection Agency (EPA) adopted new more stringent emissions standards and mandated the application of idle-emission controls on newly manufactured and remanufactured locomotives. This fact sheet provides technical background on the issue of locomotive idling and describes what EPA is doing to reduce emissions from this source.

### Why do railroads allow locomotives to idle?

During normal railroad operations, locomotives sometimes must wait for freight cars to be switched and/or picked up, for another train to clear track on which the locomotive is to proceed, or for mechanical service. Historically, locomotives have been left idling while they are waiting. In some cases, there are practical or safety reasons why locomotives need to be left idling. In other cases, locomotive operators might simply idle the engines due to custom, habit, or misunderstandings about diesel engines. As we describe in this fact sheet, EPA is working to address all of these causes.

The reasons why current locomotives may need to be left idling can be technological or related to worker and passenger needs. First, diesel engines can be difficult to start in extremely cold temperatures, especially larger diesel engines such as those used in locomotives. Also, locomotive engines are typically designed to use water without antifreeze because water is more efficient at cooling the engine. However, the water can freeze in cold weather and crack the engine block. As a result, shutting locomotives off in cold weather has historically been avoided as much as possible.

Locomotive engines may also need to idle in order to maintain critical functions such as air pressure for the braking and starting systems and battery charge. Maintaining air pressure for braking is especially important since it can directly affect safety. Finally, in some cases, locomotives will idle to supply air-conditioning or heat to its crew and/or passengers, in part to comply with regulations and contractual requirements related to working conditions for the crew. (Note that the requirements related to working conditions are not regulated by EPA).

## What is EPA doing to control idle emissions from locomotives?

EPA is working hard to reduce emissions from locomotives, both while they are pulling freight and while they are idling. However, the Clean Air Act does not give EPA unlimited ability to regulate locomotives. Section 213(a)(5) and related provisions provide EPA the authority to establish emission standards for newly manufactured and remanufactured locomotives, as well as to prohibit railroads or anyone else from tampering with emission controls. For locomotives not yet required to use the idle reduction technologies, the Clean Air Act provisions do not appear to provide EPA with particular authority to prevent railroads from allowing them to idle. Thus, as described below, EPA's regulatory efforts to reduce emissions from idling locomotives focus on requiring the application of automatic idle reduction technologies to the locomotives themselves rather than directly regulating when railroads may allow locomotives to idle.

EPA's 2008 rulemaking represents an important step in its efforts to reduce emissions from idling locomotives, which began in 1998, when EPA finalized emission standards for locomotives that provided significant emission reductions for all types of operation. Those initial standards went into effect in 2000. In addition to applying to all newly manufactured locomotives, the standards also require most existing locomotives be retrofitted with emissions controls when they are remanufactured. (This generally happens every five to 15 years, depending on the locomotive). These retrofit requirements have already begun reducing emissions from existing locomotives. Note that by requiring overall reductions in emissions, the requirements have led to locomotive exhaust being cleaner when a locomotive is idling, and will continue to make them even cleaner in the future.

In our 2008 rulemaking we adopted new requirements to further reduce emissions from idling locomotives by requiring technology that reduces the amount of time a locomotive spends idling and applying tighter emission standards to new locomotives generally. EPA is requiring that all newly manufactured and nearly all remanufactured locomotives be equipped with idle reduction technology that will automatically shut locomotives down if they are left idling unnecessarily. While such devices cannot eliminate all idling, they can reduce most unnecessary idling. These automatic controls offer more opportunities for a locomotive to be shut down by monitoring multiple critical system parameters to determine when it is safe to shut down a locomotive, relieving crews that may not have the manpower to monitor all of these parameters. In the field, these devices have proven themselves to be safe, reliable and extremely cost effective by providing reduced fuel consumption that can pay for the equipment in short order. We believe the cost savings associated with these devices will provide significant incentives for railroads to fully utilize this equipment.

Our regulations also include a rigorous emission testing program to make sure locomotives comply with our emission standards for their operational life. Our complete program will reduce NO<sub>x</sub>, HC, and PM emissions by about 90 percent. These standards will also significantly reduce smoke emissions and exhaust odors.

In designing this locomotive emission-control program, we established several provisions to ensure that emissions are reduced at all operating conditions, including while idling. First, we require that most locomotives comply with the emission standards over two different duty cycles: a high-power cycle that represents cross-country operation and a low-power cycle that

represents freightyard operation. To comply with these requirements, locomotive manufacturers need to reduce emissions for all power levels from idle to full power. We also require railroads to improve their maintenance practices so that when locomotives are idling, their emissions are kept as low as would be expected from a brand new locomotive. Finally, we require that malfunctioning idle reduction equipment be repaired in a timely manner.

## **When will these mandatory emission reductions occur?**

Emission standards and other requirements began reducing idle emissions as early as 2000. However, because it is common for locomotives to remain in service for as long as 50 years, the number of new ultralow-emission locomotives in a railroad's fleet will be small during the start of this program. Therefore, we have designed other parts of our program to achieve more immediate reductions, such as the requirement that older locomotives be retrofitted with emission controls when they are remanufactured and provisions that require the use of automatic engine-shutdown features. Even so, it may take several years before these regulatory improvements approach full effectiveness as the fleet turns over from older locomotives to new less polluting locomotives.

## **What are railroads doing to control idle emissions from locomotives?**

EPA has been working with the nation's major railroads to implement voluntary efforts to reduce idle emissions beyond the mandated reductions. All Class I railroads have joined the SmartWay Transport Program: CSX Transportation, Norfolk Southern, Canadian National Railway, BNSF Railway Co., Canadian Pacific Railway, Kansas City Southern Railway, and Union Pacific Railroad Co. As part of their SmartWay commitment, each railroad has submitted action plans describing the steps they are taking to significantly reduce carbon dioxide, NO<sub>x</sub>, and PM emissions, and to conserve considerable amounts of diesel fuel. Every Class I railroad action plan includes efforts to reduce idling through a variety of technologies and strategies, including automatic engine stop-start systems, auxiliary power units or diesel-driven heating systems, electrical shorepower connections, and company idle-shutdown policies.

## **What can I do about locomotives idling in my neighborhood?**

You should first contact the local railroad facility and ask about its operating practices, including the shutdown policy. If they are unable to help you, you might want to contact the corporate headquarters. Addresses and phone numbers for the major railroads are listed below.

BNSF Railway  
2650 Lou Menk Dr.  
Fort Worth, TX 76131-830  
800-795-2673

CN (includes Canadian National Railway and its U.S. operating subsidiaries, including Grand Trunk Western, Illinois Central and Wisconsin Central).  
935 de La Gauchetier St. W.  
Montreal, Quebec H3B2M9  
Canada  
888-888-5909

Canadian Pacific Railway (Includes  
SOO lines)  
501 Marquette Ave.  
Minneapolis, MN 55402  
1-800-776-7912

CSX Transportation  
500 Water St.  
Jacksonville, FL 32202  
904-359-3100

Kansas City Southern Railway Company  
PO Box 219335  
Kansas City, MO 64121-9335  
816-983-1303

Norfolk Southern Corp.  
3 Commercial Pl.  
Norfolk, VA 23510-2191  
757-629-2600

Union Pacific Railroad  
1400 Douglas St.  
Omaha, NE 68179  
888-877-7267

### **For More Information About EPA's Locomotive Control Program**

You can access documents related to our regulation of locomotives on EPA's Office of Transportation and Air Quality Web site at:

[www.epa.gov/otaq/locomotv.htm](http://www.epa.gov/otaq/locomotv.htm)

Documents related to EPA's voluntary idle-reduction programs are available at:

[www.epa.gov/smartway/idling.htm](http://www.epa.gov/smartway/idling.htm)

For further information, please contact us at:

#### **Contact for Regulatory Programs**

Assessment and Standards Division  
U.S. EPA  
2000 Traverwood Drive  
Ann Arbor, MI 48105  
734-214-4636  
[asinfo@epa.gov](mailto:asinfo@epa.gov)

#### **Contact for Voluntary Programs**

SmartWay Transport Partnership  
U.S. EPA  
2000 Traverwood Drive  
Ann Arbor, MI 48105  
734-214-4767  
[smartway\\_transport@epa.gov](mailto:smartway_transport@epa.gov)

# **Attachment B**



# Regulatory Announcement

---

## Federal Preemption of State and Local Control of Locomotives

*The Environmental Protection Agency (EPA) has established regulations to implement section 209(e) of the Clean Air Act (CAA), which prohibits certain state and local controls for locomotives. These regulations were developed in conjunction with new emission standards for locomotives and locomotive engines, which were established under section 213 of the CAA.*

### Clean Air Act Preemption Requirements

In section 209(e) of the CAA, Congress preempted state and local governments from adopting or enforcing “any standard or other requirement relating to the control of emissions from ...new locomotives or new engines used in locomotives.” (Given the nature of locomotive remanufacturing, EPA is defining “new locomotives and new engines used in locomotives” to include existing locomotives when they are remanufactured.) EPA has established regulations that implement this preemption consistent with Congressional intent to prevent unreasonable burdens on interstate commerce.

### Prohibited Controls

The regulations prohibit state and local governments from adopting or enforcing any controls that significantly affect a locomotive manufacturer’s or remanufacturer’s design. EPA also is defining by

regulation a period during which state and local governments are explicitly prohibited from adopting three categories of controls that EPA has determined would affect a manufacturer's or remanufacturer's design: 1) emission standards (and related requirements); 2) non-federal in-use testing programs; and 3) emission control retrofit requirements. This period is equivalent to 1.33 times useful life, where useful life is the average period during which a locomotive is operated before it is remanufactured (typically about 6 years). Locomotives are also required to be in compliance with the federal emission standards throughout the useful life.

## **Comparison to Other Mobile Sources**

The preemption regulations are based on the same principles applied to other mobile sources. Most significantly, this preemption is based on a U.S. District Court decision (*Allway Taxi Inc. v. City of New York*)<sup>1</sup> that stated that state controls on emissions of non-new motor vehicles are preempted by the Clean Air Act if those controls have an effect on manufacturers of new motor vehicles. Since the Clean Air Act preemption provisions for nonroad vehicles and engines are similar to those for motor vehicles, EPA has consistently applied this principle to other nonroad sources, although the application of this principle varies somewhat from industry to industry. These regulations for locomotives do differ significantly from previous regulations dealing with preemption in that they include a codification of the principle outlined in the Allway court case (i.e., the explicit preemption period for certain types of controls). This was done to provide more certainty to all parties involved, and because unique features of locomotives and railroads made it appropriate.

## **Environmental Impacts of Preemption**

The preemption regulations will not have any adverse impacts on the environment because of EPA's aggressive control program that is designed to achieve the maximum possible environmental benefits. EPA has established emission standards that will apply both when a locomotive or locomotive engine is originally manufactured and each time that it is remanufactured. The new standards will achieve a two-third reduction in oxides of nitrogen emissions. Standards were also adopted that will ultimately reduce locomotive hydrocarbon and particulate emissions in half. EPA has established an extensive compliance program, including

in-use testing, to ensure that the projected emission reductions are achieved. Without preemption, on the other hand, there is more of a potential for some shift of freight traffic to more polluting forms of transportation that could occur if the costs of rail transportation increased significantly due to a patchwork of state and local regulations. (For example, transport by rail causes about one-third of the pollution as transport by truck per ton-mile of freight.)

## **Benefits of a Strong Federal Program**

Given 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. This is especially true since many state governments lack the resources to control emissions from locomotives. Since EPA has established such a strong federal program, there is little that any state could do to further reduce locomotive emissions. Also, a patchwork of state and local regulations would be inefficient, and could hinder EPA's ability to implement a uniform national control program.

## **For More Information**

The final rule and other documents on locomotives are available electronically from the EPA Internet server at:

<http://www.epa.gov/OMSWWW/locomotv.htm>

Document information is also available by contacting Russ Banush at:

U.S. Environmental Protection Agency  
2565 Plymouth Road  
Ann Arbor, MI 48105  
(734) 668-4333

<sup>1</sup> *Allway Taxi, Inc. v. City of New York*, 340 F.Supp.1120 (S.D.N.Y.), aff'd 468 F.2d. 624 (2d. Cir. 1972).