



235721

ENTERED

Office of Proceedings

March 28, 2014

Part of

Public Record

March 28, 2014

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

Re: DOCKET #FD 35803, UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY SUPPLEMENTAL COMMENTS RE PETITION FOR DECLARATORY  
ORDERSOUTH COAST AQMD RULES 3501 AND 3502

Dear Ms. Brown:

The undersigned are attorneys at law, serving as counsel for the Center for Community Action & Environmental Justice (“CCA EJ”), East Yard Communities for Environmental Justice (“EYCEJ”), Natural Resources Defense Council (“NRDC”), and Sierra Club (collectively “Health Advocates”). On February 25, 2014, the Surface Transportation Board allowed for supplemental comments to be filed by March 28, 2014. In the interest of efficiency, Health Advocates have joined together to file one set of supplemental comments. Health Advocates strongly support including South Coast Air Quality Management District (“SCAQMD” or “District”) Rules 3501 and 3502 in California’s State Implementation Plan (“SIP”) under the Clean Air Act (“CAA,” or “Act”). These rules were forwarded by the District to the California Air Resources Board (“CARB,” or “Air Board”), and then on to the U.S. Environmental Protection Agency (“EPA”) for consideration. EPA forwarded the Rules to the Surface Transportation Board (“STB”) on January 24, 2014 under 5 U.S.C. § 554(e) and 49 U.S.C. § 721. Health Advocates respectfully request that the Surface Transportation Board determine that SCAQMD Rules 3501 and 3502 when incorporated in the SIP would not be preempted by the Interstate Commerce Commission Termination Act (“ICCTA”). In support this request, Health Advocates provide the following information.

## I. INTRODUCTION

A sound rail transportation system is not one that poisons people and makes them sick. Unfortunately, the American Association of Railroads, Union Pacific Railroad Company (“UP”) and Burlington Northern San Fe (“BNSF”) Railway argue that Congress intended to completely tie the hands of local jurisdictions in putting in place common sense regulations to protect their constituents. In fact, their arguments go so far as to infringe on a region and state’s ability to comply with its legally mandated duties under the Clean Air Act. These arguments should be rejected because the rail industry completely ignores longstanding STB and legal precedent to the contrary. While Health Advocates cannot deny that ICCTA places constraints on what actions local and state jurisdictions can take to control pollution from rail operations, SCAQMD Rules 3501 and 3502 fall well short of what is preempted under the ICCTA. As such, the

Surface Transportation Board (“STB”) should declare its interpretation that these regulations are not preempted by ICCTA.

## **II. OVERVIEW OF ORGANIZATIONS**

CCA EJ is a non-profit environmental health and justice organization dedicated to making communities in Riverside and San Bernardo healthy and safe. CCA EJ has worked extensively on pollution surrounding railyards in the Inland Empire, including UP’s Railyard in Mira Loma and BNSF’s Railyard in San Bernardino. CCA EJ is located at 7701 Mission Blvd. Jurupa Valley, CA 92509; P.O. Box 33124 Jurupa Valley, CA 92519, (951) 360-8451.

EYCEJ is a non-profit environmental health and justice organization dedicated to creating a safe and healthy environment for communities disproportionately suffering the negative impacts of industrial pollution in Southeast Los Angeles and the City of Commerce, California. EYCEJ has worked extensively on locomotive pollution for more than a decade. Please understand the City of Commerce literally is surrounded by 530 acres of railyards: 1) UP Commerce Railyard, 4341 East Washington Blvd., Commerce, 2) BNSF Hobart Railyard, 3770 East Washington Blvd., Commerce, 3) BNSF Mechanical Sheila Railyard, 6300 East Shelia St., Commerce and 4) BNSF Commerce Eastern Railyard, 2818 Eastern Ave., Commerce. The BNSF Hobart Railyard is the largest intermodal railyard in the United States. EYCEJ is located at 2314 S. Atlantic Blvd, Commerce, California 90040, (323) 263-2113.

NRDC is a national non-profit organization incorporated and headquartered in New York with over 400,000 members nationwide, and more than 78,000 members in California. NRDC has worked on air quality issues in the South Coast Air Basin for decades. NRDC has represented itself and other clients in litigation against air quality agencies for failure to comply with the mandates of the Clean Air Act. Its office in the South Coast Air Basin is located at 1314 Second Street, Santa Monica, CA 90401, (310) 434-2300.

The Sierra Club is a nationwide non-profit membership organization incorporated and headquartered in California with over 600,000 members nationwide, and almost 145,000 members in California. The Sierra Club is dedicated to exploring, enjoying, and protecting the wild places of the Earth; to practicing and promoting the responsible use of the Earth’s resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club’s concerns encompass the exploration, enjoyment and protection of the air and waters in California to keep members and their communities healthy. Sierra Club’s national headquarters are located at 85 Second St, 2<sup>nd</sup> Floor, San Francisco, CA 94105, and its office in the South Coast Air Basin is located at 714 W. Olympic Blvd., Suite 1000, Los Angeles, CA.

## **III. OVERVIEW OF LOCOMOTIVE ACTIONS TO DATE**

One thing that all parties to this effort likely agree on is that the South Coast Air Basin has significant and persisting air quality problems. And, even despite Memorandum of Understandings (“MOU”), regulations on the federal level, and other tactics to clean up rail

pollution, this pollution remains an immense obstacle to meeting clean air objectives. Thus, by agreeing to the 1998 Rail MOU and the 2005 MOU, UP and BNSF have implicitly agreed to a self-described patchwork of operational requirements given the severity of the problem in the South Coast Air Basin. They did this because even these companies recognize the immense challenge faced in the South Coast Air Basin. This longstanding recognition of the unique challenges faced by the South Coast Air Basin should be taken into account as the STB makes its determination.

#### **IV. RULES 3501 AND 3502 ARE NECESSARY TO ADDRESS PUBLIC HEALTH AND ENVIRONMENTAL HEALTH HAZARDS**

Health Advocates are concerned about the localized and regional impacts from railyard pollution throughout the South Coast Air Basin. These organizations are particularly concerned about the impacts the Union Pacific Railyard in Mira Loma, California,<sup>1</sup> the Burlington Northern Santa Fe (“BNSF”) Railyard in San Bernardino, California,<sup>2</sup> and the BNSF Commerce Railyard have on residents. The effects of these, as well as from the many other railyards in the region,<sup>3</sup> constitute a serious environmental justice issue. For years, these organizations have presented evidence to the SCAQMD, CARB, and EPA about the negative impacts of rail pollution on their members.

Several sources have identified the threat of railyard pollution on local communities, but the health risk assessments of the Air Board provide particularly important information that must be considered. The Air Board’s risk assessment for the BNSF San Bernardino Railyard revealed deeply concerning data about the devastating impacts this Railyard has on adjacent residents. In particular, the risk assessment determined that the maximally exposed individual receptor experienced a cancer risk of 2,500 in a million.<sup>4</sup> The risk assessment for the UP Mira Loma Railyard determined that the highest exposed resident experienced a cancer risk of 100 in a million.<sup>5</sup> In addition, the risk assessment for the BNSF San Bernardino Railyard estimates that approximately 339,880 people are exposed to cancer risk greater than 10 in a million from that facility.<sup>6</sup> These highly elevated cancer risks from one facility indicate the seriousness of the health and safety issues associated with residents living near railyards.

---

<sup>1</sup> “*Health Risk Assessment for the UP Mira Loma*,” Report of the California Air Resources Board Stationary Source Division, 2007 (“ML HRA”), available at [http://www.arb.ca.gov/railyard/hra/up\\_miraloma\\_hra.pdf](http://www.arb.ca.gov/railyard/hra/up_miraloma_hra.pdf).

<sup>2</sup> “*Health Risk Assessment for the BNSF Railway San Bernardino Railyard*,” Report of the California Air Resources Board, Stationary Source Division, 2007 (“SB HRA”), available at [http://www.arb.ca.gov/railyard/hra/bnsf\\_sb\\_final.pdf](http://www.arb.ca.gov/railyard/hra/bnsf_sb_final.pdf).

<sup>3</sup> Residents near rail yards in Southern California face an up to 140% increased risk of cancer from soot. See *Cancer Risk Rises for Those Near Rail Yards*, LA Times, May 5, 2007, available at <http://www.latimes.com/features/health/medicine/la-me-smog25may25,1,3647264.story>.

<sup>4</sup> SB HRA, at 13.

<sup>5</sup> ML HRA, at 62.

<sup>6</sup> SB HRA, at 61.

The risk assessments also identified significant impacts to sensitive receptors, which include schools, hospitals, day-care centers and elder care facilities. In fact, the risk assessment identified “41 sensitive receptors within a one-mile distance of the BNSF San Bernardino Railyard, including 15 schools, 19 child care centers and 7 hospitals/medical centers.”<sup>7</sup> At least one of those sensitive receptors is exposed to risk of greater than 500 in a million from the BNSF Railyard. The UP Mira Loma Railyard has approximately 2 sensitive receptors in the area exposed to a 10 in a million cancer risk or greater.<sup>8</sup> In addition to these localized impacts, there are regional impacts from railyards related to nonattainment of National Ambient Air Quality Standards (“NAAQS”).

With regard to Commerce, in 2007 the California Air Board calculated cancer risk from the four Commerce Railyards as follows:<sup>9</sup>

**Estimated Impacted Areas and Exposed Population Associated with Different Cancer Risk Levels for the Four Commerce Railyards**

Estimated Cancer Risks (chances per million)	Estimated Area (acres)	Estimated Exposed Population
10 – 25	45,000*	811,000*
26 – 50	18,000*	280,000*
51 – 100	7,800	112,000
101 - 250	3,300	64,000
251 - 500	900	13,000
501 - 1000	550	5,200
	Total 76,000**	1,285,200**

\* Approximate estimates due to the fact that part of these isopleths exceeds the air dispersion model domain.

\*\* Number may not add up due to rounding-off.

<sup>7</sup> SB HRA, at 72.

<sup>8</sup> ML HRA, at 74.

<sup>9</sup> “Health Risk Assessment for the Four Commerce Railyards,” Report of the California Air Resources Board, Stationary Source Division, 2007, at 19 (“Commerce HRA”), available at [http://www.arb.ca.gov/railyard/hra/4com\\_hra.pdf](http://www.arb.ca.gov/railyard/hra/4com_hra.pdf).

The elevated health harms from this industry in neighborhoods adjacent to railyards continues to plague neighborhoods throughout the South Coast Air Basin. Health Advocates also have first-hand knowledge of the impacts rail pollution has on residents in the region.<sup>10</sup> It is against this backdrop that Health Advocates pushed for stringent measures to protect their members from the adverse impacts of rail pollution. In fact, Health Advocates have consistently pushed for stronger regulations to control rail pollution, and the rules being reviewed by the STB represent the compromise from SCAQMD's long consultation with railroads prior to adopting the regulations.

**V. JUDICIAL AND STB PRECEDENT SHOW RULES 3501 AND 3502 ARE NOT PREEMPTED**

The STB should recognize that the Ninth Circuit decision in *Association of American Railroads v. South Coast Air Quality Management District*, 622 F.3d 1094, 1098 (9th Cir. 2010) ("*Ass'n of Am. R.Rs*") concerning Rules 3501 *et seq.* held that submission of the Rules to CARB, and then to EPA, for inclusion in the SIP is the appropriate and proper avenue for the District to pursue. *These Rules, adopted under federal CAA authority, are not preempted by the Interstate Commerce Commission Termination Act and nor do the Rules require any sort of STB approval.* STB must reject the railroads' arguments seeking to rewrite the opinion to the contrary.

The Ninth Circuit in *Ass'n of Am. R.Rs* held that "to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as "statewide implementation plans" under the Clean Air Act), ICCTA generally does not preempt [approved SIPs] because it is possible to harmonize the ICCTA with those federally recognized regulations."<sup>11</sup> The Ninth Circuit further noted that "[n]othing in [the ICCTA] is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act[.]" As a result, the *Ass'n of Am. R.Rs* litigation is not an obstacle to SIP approval. In fact, the *Ass'n of Am. R.Rs* case specifically envisions that inclusion in the SIP is the appropriate path to pursue.

Moreover, the persistent reliance on the unpublished opinion from the Judge Walters in the rail industry's papers should not serve to bolster the rail industry's arguments. Simply stated, the United States Court of Appeals for the Ninth Circuit, the court of review for Judge Walters opinions, articulated a specific course of action to be taken before harmonization could occur. The SCAQMD diligently pursued this path.

In fact, the rail industry conveniently ignores a subsequent order from Judge Walters where he lamented that the railroads were "unfortunately playing fast and loose with the Court."<sup>12</sup> The Judge noted that efforts by the railroads to hold the SCAQMD in civil contempt

---

<sup>10</sup> See Exhibit A-Declarations of Members of East Yard Communities for Environmental Justice.

<sup>11</sup> *Ass'n of Am. R.Rs.*, 622 F.3d at 1098.

<sup>12</sup> *Ass'n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, No.CV06-1416, Document 269 (C.D. Cal. Feb. 24, 2012) (Order Granting Defendants' Motion to Vacate Order to Show Cause), at 4

for forwarding these Rules on to CARB for SIP approval were “completely disingenuous and frivolous,” and that their submissions were “misleading.”<sup>13</sup> One reason for Judge Walter’s ruling was the American Association of Railroads’ admission before the Ninth Circuit in *Ass’n of Am. R.Rs* that what the District:

“ought to do here is to get CARB and EPA to approve these rules. And if they do, that becomes part of the SIP and it becomes federally enforceable and then you do have a harmonization question, and the answer to that is yes. That’s exactly what the statute provides for.”<sup>14</sup>

Thus, the District Court strongly rejected the railroads’ argument that *Ass’n of Am. R.Rs* prevented SIP approval, and ordered that this SIP approval process could proceed. The STB should equally find these thinly veiled attempts to obfuscate the underlying record unpersuasive.

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

The railroads appear to suggest that the District Court and Ninth Circuit envisioned the District and ARB submitting the rules to EPA as part of a SIP revision, but that the Rules could not thereafter become part of the State’s SIP. No court would intend so such absurd result. In fact, the railroads “clearly represented” to the Ninth Circuit in *Ass’n of Am. R.Rs* that “submission of the Rules to CARB, and then to EPA, for inclusion in the SIP [is the] appropriate and proper avenue for the District to pursue.”<sup>15</sup> In sum, the Ninth Circuit’s explanation of the role of the SIP process is the key, precedential holding of *Ass’n of Am. R.Rs*.

Finally, if STB engages in a factual inquiry about the burden of these rules, it should do so consistent with the careful analysis presented in SCAQMD’s papers.<sup>16</sup> The railroad industry has not undertaken a careful analysis of articulating exactly how these rules burden their operations. Instead, they rely on hyperbole calling these regulations overly aggressive and imputing nefarious motives on the part of the SCAQMD. The record presented by SCAQMD indicates due effort to craft appropriate regulations that do not interfere with the railroads operations. The STB requires a careful and diligent analysis that examines the exact contours of the regulations and should not simply rely on the regulated industry’s discomfort with any regulation in determining that ICCTA preempts these rules. Overall, SCAQMD Rules 3501 and 3502 require modest reporting and common-sense precautions against idling. Contrary to the railroad industry’s self-serving claims, these rules would not burden their operations.

---

(emphasis added) attached hereto in *Exhibit B*.

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

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 3.

<sup>16</sup> See SCAQMD, Reply Finance Docket 35803, at 20, Feb. 14, 2014.

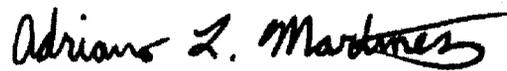
STB DOCKET #FD 35803

March 28, 2014

Page 7 of 8

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

Sincerely,

A handwritten signature in black ink that reads "Adriano L. Martinez". The signature is written in a cursive style with a long horizontal flourish at the end.

---

Adriano L. Martinez, Esq., Earthjustice (Cal. Bar No. 237152)

Attorney for

Center for Community Action and Environmental Justice, East Yard Communities for  
Environmental Justice, Natural Resources Defense Council, and  
Sierra Club

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

Attorney for

East Yard Communities for Environmental Justice

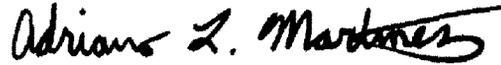
STB DOCKET #FD 35803

March 28, 2014

Page 8 of 8

VERIFICATION

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

A handwritten signature in black ink that reads "Adriano L. Martinez". The signature is written in a cursive style with a prominent horizontal line at the end.

---

Adriano L. Martinez

Executed on March 28, 2014

# EXHIBIT A

The following includes information collected by staff at East Yard Communities for Environmental Justice regarding impacts and idling of locomotives in the South Coast Air Basin in the month of March, 2014.

1. Maria Garcia
  - 15 years Resident of East LA.
  - 4133 1/3 Downey Rd., East LA, CA 90022
  - Activity Experienced: Horns, shaking the foundation of her home and windows.
  - Time Frame: All day. 12am-3pm hears activity and idling for more that 1hr at a time.
  - Impacts: Difficulty breathing, wakes her up at night, allergies, and asthma.
  
2. Maria Tafoya
  - 5 year Resident of Commerce.
  - 2200 Ransom St., Commerce, CA 90040
  - Time Frame: Hears the train movement all day/ 7 days a week. Has experienced idling from 12am-3am for more than 30 min at a time.
  - Activity: Trains drop cargo and the ground/windows shake. Alarms heard. Moving Cranes.
  - Impacts: Foundation of homes are cracking. Asthma. Breathing problems. Interrupting her sleep at night.
  - Before- weekends wouldn't have activity. Now weekends are full with train activity.
  
3. Javier Hernandez
  - 10 years resident of Commerce.
  - 6350 Emil Ave., Commerce, CA 90040
  - Time Frame: Hears activity from 5pm – 8pm and 12pm – 6am .
  - Activity: Noises – Horn Gage and Slauson Ave. and noise from the trains
  - Impacts: wakes him up and has difficulty sleeping, Diesel Smoke and dust. 24 hrs Smell of the train. 2/3 blocks away from his home.
  
4. Evangelina Mejia
  - 11 year resident of Commerce.
  - 5120 Aster Ave. Commerce, CA 90040
  - Time Frame: 12am-5am experience idling for 30 min to 1hr at a time.
  - Activities : Crane movements. Horns, dropping of containers
  - Impacts: Windows shake, Smell from Diesel coming out of the trains, Dust, Walls cracking from outside, Throat infections, ear pains, ear infection
  
5. Rosalva Sotelo
  - 13 year resident of Commerce.
  - 5018 Jardine St. Commerce, CA 90040
  - Time Frame: 10pm-11:30pm experience idling for more than 20 min at a time.

- Activity: Container drops, horns, movement, engines
- Impacts: Windows vibrate and foundation of the house cracks, Lots of dust coming off the trains, Diesel Smoke

# EXHIBIT B

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND  
JS-6

CIVIL MINUTES -- GENERAL

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

Date: February 24, 2012

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

---

**PRESENT:**

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

**Shannon Reilly  
Courtroom Deputy**

**None Present  
Court Reporter**

**ATTORNEYS PRESENT FOR PLAINTIFFS:**  
None

**ATTORNEYS PRESENT FOR DEFENDANTS:**  
None

**PROCEEDINGS (IN CHAMBERS):** **ORDER GRANTING DEFENDANTS' MOTION TO VACATE ORDER TO SHOW CAUSE**  
[filed 1/27/2012; Docket No. 257]

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

**I. PROCEDURAL AND FACTUAL BACKGROUND**

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

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

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

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

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

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

## II. DISCUSSION

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

---

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

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

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

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

Transcript of Oral Argument, 13:4-11.

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

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

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

*Id.* at 23:1-14.

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

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

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

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

### III. CONCLUSION

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

IT IS SO ORDERED.

---

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