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VIA ELECTRONIC MAIL ONLY

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Re: South Coast AQMD has the legal authority to adopt the strongest New Railyard Indirect Source Review Rule and the legal duty to do so to reach attainment of federal air quality standards and protect public health in the South Coast Air Basin.

Dear Ms. Baird & Mr. MacMillan:

Our organizations write to urge the South Coast Air Quality Management District (SCAQMD or Air District) to develop and adopt the strongest possible New Railyard Indirect Source Review (ISR) rule, Proposed Rule (PR) 2306. We received the Draft PR 2306 late Friday evening and look forward to discussing the draft at the upcoming working group meeting and provide more in-depth comments on the draft in the days ahead. As we assess the current draft rule, we offer these preliminary comments on the Air District’s legal authority to develop the strongest possible rule.

The New Railyard ISR, along with the companion rules for existing railyards (PR 2306.1) and the Port ISR (PR 2304) together offer a tremendous opportunity for SCAQMD to drastically reduce air pollution in the South Coast Air Basin over the next decade. As detailed below, SCAQMD must regulate railyard facilities to protect the health and safety of communities pursuant to its authority the federal Clean Air Act, state law, and civil rights laws, and may do so without running afoul of federal preemption. In addition, under the federal Clean Air Act, SCAQMD must adopt the most robust measures possible to support the region and state in attaining federal air quality standards. In the context of railyard pollution, this means the rules should advance zero-emission technologies. We ask the Air District to strengthen its proposal for PR 2306 to better align with its obligation to bring the South Coast Air Basin into attainment of the federal air quality standards and provide robust safeguards for public health.

We appreciate the opportunity to submit these comments and welcome a conversation to discuss these issues further with you.

I. The Air District is right to focus the New Railyard ISR rule on getting to zero emissions and deploying the infrastructure that will help support this technology.

At the last working group meeting on PR 2306 on November 15, 2022, staff presented initial concepts for the New Railyard ISR rule. This presentation included two broad concepts for the rule that our coalition asked to include in the rulemaking: 1) a facility-specific mass emissions cap, and 2) sufficient charging infrastructure to support 100% zero-emission operations onsite.

We fully support these two concepts and are pleased to see elements of these provisions incorporated into the draft. A facility-based emissions cap is a results-oriented approach that, if done properly, will make sure new railyards produce zero or very low emissions. Moreover, an infrastructure component is essential to the success of zero emissions technology deployment in the region. We believe operators of these new railyards must play a role in facilitating this transition—especially as they plan to gain substantially from robust public financial assistance at multiple levels and are largely responsible for the region’s current emissions profile from rail. In order for these zero emissions strategies to work, facilities must be fully capable of supporting the broad deployment of zero emissions equipment and vehicles. We, therefore, strongly favor including such measures into the rule.

The key questions now are: will this rule be strong enough to tackle the Basin’s air pollution crisis? Will the rule catalyze the broad deployment of zero-emissions strategies? And, will the rule reverse the upward-trending harms to frontline communities from freight and logistics air pollution? The New Railyard ISR offers one of the best opportunities to reduce air pollution significantly coming out of the 2022 AQMP, but it must be strengthened to answer these questions in the affirmative.

II. New railyards threaten to increase pollution in communities of color. SCAQMD must enact a strong ISR to protect public health and uphold civil rights, pursuant to its state police powers and state and federal law.

A. Pollution from railyards is dangerous to human health.

Both of the proposed SCIG and Colton railyards would be sited in close proximity to residential neighborhoods, threatening to worsen public health for already overburdened communities of color. A large body of scientific literature documents the severe impacts of railyard operations on neighboring communities.¹ Among other impacts, railyards contribute to:

¹ See, e.g., Kristen N. Arthur et al., Health-Predictive Social-Environmental Stressors and Social Buffers Are Place Based: A Multilevel Example from San Bernardino Communities, *J. of Primary Care & Community Health* (2019); Rhonda Spencer-Hwang et al., *Experiences of a Rail*

diesel pollution in the air, which can lead to asthma, respiratory diseases, cardiovascular disease, cancers, premature death, and birth defects; and increasing noise and vibration, which can impact sleep, stress levels, learning and educational performance, among other developmental and health impacts.

Indeed, studies by academics and the California Air Resources Board show that residents living in proximity to existing rail yards throughout the state face significant cancer risks and other respiratory health problems.²

Some populations are more sensitive than others to the health risks of rail yard pollution. CARB's Air Quality and Land Use Handbook identifies children, pregnant women, the elderly, and those with existing health problems as especially vulnerable to the non-cancer effects of air pollution.³ Children may also be more sensitive to cancer-causing chemicals, including diesel PM, which CARB has identified as a carcinogen.⁴

These vulnerable populations are precisely the people who SCIG and Colton would most impact. Both of these facilities would be sited within hundreds of feet of schools and residential neighborhoods that already experience elevated levels of diesel pollution. For example, a recent analysis by SCAQMD showed that cancer risk in West Long Beach is already one of the highest in the region, with data from an air monitor in close proximity to the SCIG site demonstrating a cancer risk in West Long Beach above 700 in a million, with most of the risk attributed to diesel exhaust.⁵ SCIG would exacerbate these already serious health risks for residents by adding to the diesel pollution burden. Stringent facility caps must be put in place to ensure that health risks will not be worsened. In addition, all new railyards should utilize zero-emission technologies to eliminate diesel pollution from their associated trucks, cargo handling equipment, and locomotives.

Yard Community: Life Is Hard, 77(2) J. Env't Health 8-17 (2014); Rhonda Spencer-Hwang et al., Respiratory Health Risks for Children Living Near a Major Railyard, 40(5) J. Community Health 1015-23 (2015); Rhonda Spencer-Hwang et al., Association of major California freight railyards with asthma-related pediatric emergency department hospital visits, 13 Preventive Med. Reps. 73-79 (2019),

<https://www.sciencedirect.com/science/article/pii/S2211335518302626?via%3Dihub>; Andrea Hricko et al., Global Trade, Local Impacts: Lessons from California on Health Impacts and Environmental Justice Concerns for Residents Living near Freight Rail Yards, 11(2) J. Env't Rsch. & Public Health 1914-41 (2014),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3945577/>.

² Railyard Health Risk Assessments and Mitigation Measures, Cal. Air Res. Bd., <https://ww2.arb.ca.gov/resources/documents/railyard-health-risk-assessments-and-mitigation-measures> (last visited Jan. 4, 2023) (containing links for 18 Health Risk Assessments).

³ Cal. Air Res. Bd., Air Quality and Land Use Handbook: A Community Health Perspective, ES-1 (Apr. 2005), available at <https://ww3.arb.ca.gov/ch/handbook.pdf>.

⁴ *Id.*

⁵ SCAQMD, MATES V Multiple Air Toxics Exposure Study 2-65 (Aug. 2021), <http://www.aqmd.gov/home/air-quality/air-quality-studies/health-studies/mates-v>.

B. The South Coast region remains in “extreme” and “serious” nonattainment of the NAAQS.

Moreover, as you know, our region suffers from some of the highest levels of ozone and PM2.5 in the country: the South Coast Air Basin is in “extreme” nonattainment for multiple ozone standards and “serious” nonattainment for several fine particulate matter standards.⁶ In fact, the South Coast has yet to meet any of the 1-hour or 8-hour federal ozone standards. Unfortunately, this has only gotten worse since the start of the COVID-19 pandemic. As staff are aware, in 2022 the South Coast Air Basin suffered more than 123 bad air days, where the air failed to meet the federal standards.

Under the federal Clean Air Act, states are required to establish plans to meet EPA’s federal air quality standards, or National Ambient Air Quality Standards (NAAQS).⁷ Regions also must show how they will meet attainment by certain deadlines in an Air Quality Management Plan (AQMP). The state reviews the region’s AQMP and incorporates concrete measures for how it will achieve the federal standards into a comprehensive State Implementation Plan (SIP), which EPA reviews for compliance with the Clean Air Act.⁸ A Facility-Based Mobile Source Measure on Railyards has appeared in SCAQMD’s air plan since at least 2016. The agency had authority then, as it does now, to issue an ISR to address railyard pollution.

SCAQMD must show how it will attain the NAAQS, and realistically this is nearly impossible without addressing pollution from railyards. As the table below shows, railyard diesel particulate matter (DPM) emissions at existing railyards are very significant.⁹ Railyards, largely by virtue of the many vehicles they attract—including locomotives, trucks, transportation refrigeration units, and cargo handling equipment—are substantial sources of NOx and PM emissions in SCAQMD’s jurisdiction. We already have nine large railyards operating in the South Coast, including BNSF San Bernardino, BNSF Watson, BNSF Hobart, UP Colton, UP Mira Loma, UP ICTF/Dolores, UP City of Industry, UP Commerce, and UP LATC. In 2005, these nine railyards emitted 123.2 tons per year of toxic DPM.

⁶ See U.S. Environmental Protection Agency, Nonattainment Areas for Criteria Pollutants (Green Book), available at <https://www3.epa.gov/airquality/greenbook/ancl.html> (last visited January 13, 2023) (e.g., extreme nonattainment for 1979 1-hour ozone standard, extreme nonattainment for 1997, 2008, and 2015 8-hour ozone standards, serious nonattainment for the 2006 and 2012 fine particulate matter standards, and moderate nonattainment for the 1997 fine particulate matter standards).

⁷ 42 U.S.C. §§ 7407(a), 7408(a), 7410(a).

⁸ *Id.* §§ 7407(d)(1)(A), 7410(a), 7410(k)(3), 7501(2).

⁹ Los Angeles Metropolitan Authority, Railyards: A Toolkit for Goods Movement, (March 2009), http://media.metro.net/projects_studies/mcgmap/images/5-guidebook-chapter5_final.pdf.

TABLE 5-1 RAILYARD DPM EMISSIONS BY SOURCE TYPE (TONS/YEAR) AND PERCENT CONTRIBUTION, 2005									
Railyard	Locomotives		Cargo-Handling Equipment		On-Road Trucks		Off-Road Trucks and Stationary Sources		Total
	TONS/YEAR	PERCENT	TONS/YEAR	PERCENT	TONS/YEAR	PERCENT	TONS/YEAR	PERCENT	
BNSF San Bernardino ³⁸	10.6	48%	3.7	17%	4.4	20%	0.75	3%	22.0
UP Colton ³⁹	16.3	99%	NA	NA	0.2	1%	0.05	0.3%	16.5
UP City of Industry ⁴⁰	5.9	54%	2.8	26%	2.0	18%	0.3	3%	10.9
UP ICTF/ Dolores ⁴¹	9.8	41%	4.4	19%	7.5	32%	2.0	8%	23.7
UP Commerce ⁴²	4.9	40%	4.8	40%	2.0	17%	0.4	3%	12.1
UP LATC ⁴³	3.2	44%	2.7	37%	1.0	14%	0.50	7%	7.3
UP Mira Loma ⁴⁴	4.4	90%	NA	NA	0.2	4%	0.2	4%	4.9
BNSF Hobart ⁴⁵	5.9	25%	4.2	18%	10.1	42%	3.7	15.5%	23.9
BNSF Watson ⁴⁶	1.9	100%	NA	NA	<0.01	<1%	0.04	<1%	1.9

For the South Coast region to meet its obligations under the federal Clean Air Act, it must be more aggressive in addressing railyard pollution. SCAQMD has clear legal authority under the Clean Air Act to adopt a New Railyard ISR rule that goes above and beyond other regulations for trucks, transportation refrigeration units, locomotives, and cargo handling equipment.

BNSF argued in its September 2021 letter to SCAQMD that new railyards will replace existing capacity and reduce emissions, but the railroad has provided no evidence supporting this theory.¹⁰ Indeed, BNSF has made no commitment to shut down existing railyards or to build new railyards operating with reduced or zero emissions. Instead, we have every reason to anticipate that the proposed SCIG and Colton railyards will contribute to growing the region's throughput of cargo and pollution, which has been expanding at a breakneck pace during the uptick in e-commerce throughout the COVID-19 pandemic. Therefore, it is very important that the Air District take aggressive action to address the local and regional pollution from the indirect sources triggered by these and other future intermodal facilities.

Our concern remains that the facility emissions cap—as staff has proposed it—will not reduce emissions from the on- and off-road machines beyond what is already required under other regulations. This would be a big missed opportunity for this rule, especially in light of

¹⁰ See Letter from Allen Doyle, BNSF to Susan Nakamura, SCAQMD, Re: SCAQMD Working Group Presentation on Rule 2306 (Sept. 15, 2021), available at <http://www.aqmd.gov/docs/default-source/rule-book/Proposed-Rules/pr-2306/bnsf-comment-letter-to-scaqmd-rule-2306-presentation.pdf?sfvrsn=6>.

SCAQMD's authority to do more. The next step will be to make sure that the details for both of these concepts are defined in a way that drives indirect sources from railyards to zero emissions.

C. South Coast AQMD has authority to assertively regulate pollution from indirect sources, like railyards.

1. The Clean Air Act's indirect source review provisions support SCAQMD's authority to adopt an indirect source review rule for railyards.

SCAQMD has express authority to regulate railyards as indirect sources of air pollution under the Clean Air Act. The Clean Air Act grants broad discretion to states and, by extension the Air District, to design indirect source review programs. An "indirect source review program" is "the facility-by-facility review of indirect sources of air pollution" that would contribute to exceeding any national ambient air quality standard.¹¹ That definition expressly includes, but is not limited to, "measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution."¹²

The Clean Air Act defines an indirect source as "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution."¹³ A railyard is a facility consisting of installations such as rail lines and parking lots, which on its own does not emit pollution, but which attracts highly polluting mobile sources, including locomotives, trucks, and cargo handling equipment.¹⁴ Therefore, a railyard is an "indirect source" because it is a structure or facility that attracts mobile sources.

South Coast therefore, can require emission reductions targeting new railyard *facilities* and the mobile sources associated with the facilities. In *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*,¹⁵ the Ninth Circuit upheld an indirect source review program promulgated by the San Joaquin Valley Unified Air District to address emissions from new construction sites. The Court found that:

The Rule, after all, measures the emissions it regulates by reference to a particular development site. The "baseline" amount of emissions, and the required reduction in emissions from that baseline, are both calculated in terms of the development

¹¹ 42 U.S.C. § 7410(a)(5)(D).

¹² *Id.*

¹³ 42 U.S.C. § 7410(a)(5)(c).

¹⁴ *See, e.g., Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, 627 F.3d 730, 737 (9th Cir. 2010) (development sites constitute "indirect sources"); *S. Terminal Corp. v. E.P.A.*, 504 F.2d 646, 668 (1st Cir. 1974) ("parking structures, which themselves emit no pollutants but instead only attract vehicles which emit pollution, are not stationary sources").

¹⁵ *Nat'l Ass'n of Home Builders*, 627 F.3d at 730.

as a whole. The Rule and the emissions reductions it requires are site-based rather than engine- or vehicle-based.¹⁶

Similarly, SCAQMD has authority to place a cap on emissions from railyards as indirect sources or facilities that generate pollution from associated vehicles and contribute to nonattainment. As the Ninth Circuit found in *National Association of Home Builders*, emission reduction requirements may be placed on indirect sources—thus requiring associated vehicles to reduce their pollution—without running afoul of Clean Air Act section 209(e).¹⁷ Here, SCAQMD has authority to develop an indirect source program targeting *facility-wide reductions* from railyards. Regulations like this one do not constitute vehicle emissions standards.

Because the proposed rule here is a facility-wide measure that aims to reduce railyard emissions overall, it will withstand the unsupported challenges that industry might preemptively lob during or after the rulemaking process.

2. California law affirms the Air District’s authority to regulate pollution from indirect sources.

The debate over whether SCAQMD is authorized to issue ISRs has long been settled in the affirmative. With broad authority to regulate air quality under the federal Clean Air Act and state statutes, the Air District has flexibility to push for the most innovative measures that will tackle the region’s air pollution crisis. This authority is specifically delegated to the Air District in the following ways:

1. Under the federal Clean Air Act, states are authorized to include any “indirect source review program” that will help the state meet air quality standards as part of a state implementation plan.¹⁸ Railyards significantly contribute to the South Coast Air Basin’s nonattainment of ozone standards. It is critical that SCAQMD address this major source of NOx and PM pollution in order to get on track to attain the 8-hour ozone standard in 2037, and effectuate MOB-02A in the 2022 Air Quality Management Plan.¹⁹
2. California law explicitly authorizes the Air District to regulate “indirect sources” of emissions.²⁰
3. The California Health and Safety Code requires that the Air District’s air plan “provide for indirect source controls in those areas of the south coast district in which there are

¹⁶ *Id.* at 737.

¹⁷ *Id.* at 738-40.

¹⁸ 42 U.S.C. § 7410(a)(5)(A)(i); *See also, Ctr. for Cmty. Action & Env’t. Just. v. BNSF R. Co.*, 764 F.3d 1019, 1030 (9th Cir. 2014) (“The statutory and legislative histories make clear that Congress . . . intended to exclude indirect sources from federal regulation . . . [and] leave the regulation of indirect sources to the states.”).

¹⁹ SCAQMD, 2022 Air Quality Management Plan (Dec. 2, 2022), at p. 4-23, available at <http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/final-2022-aqmp/final-2022-aqmp.pdf?sfvrsn=10>.

²⁰ Cal. Health & Safety Code §§ 40440(b)(3), 40716(a)(1), 40462, 40469, 40918(a)(4).

high-level, localized concentrations of pollutants or with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin.”²¹

4. Finally, the United States Court of Appeals for the Ninth Circuit has upheld the Air District’s legal authority to promulgate facility-based indirect source rules like PR 2306. As stated above, in *National Association of Home Builders*, the Court upheld San Joaquin Valley Air Pollution Control District’s program to regulate emissions from construction sites, approving emissions reduction strategies that are site-based rather than engine- or vehicle-based.²²

In sum, the Air District is authorized to adopt a rule to reduce emissions from railyards as indirect sources within the South Coast Air Basin. None of these proposed measures equate to an emissions limit on any particular mobile source but instead would serve to enforce a facility-based emissions cap that will do the work of reducing overall air pollution in the region and address the urgent public health concerns previously mentioned.

3. The SCAQMD has a clear role in protecting public health that authorizes it to reduce air pollution from facilities.

California’s Health and Safety Code explicitly calls on the Air District to promulgate rules and regulations that will do ***all*** of the following: 1) require the use of best available control technology (BACT) for new and modified sources and the use of best available retrofit control technology (BARCT) for existing sources; 2) promote cleaner burning alternative fuels; 3) ***provide for indirect source controls*** in areas of high-level localized concentration of pollutants or for new sources that will have a significant effect on air quality in the South Coast Air Basin; and provide for transportation control measures.

This California law not only makes the SCAQMD’s mandate for ISR clear, but it also highlights the state police power conferred to the Air District to protect public health by advancing technological solutions that will actually do the job of eliminating air pollution.²³ As part of these powers, the Air District has “the power to protect the health of citizens in the state,” which includes protecting health through the prevention of air pollution.²⁴ Protecting human health from the dangers of air pollution—like the emissions known to come from railyards—fits squarely within California and the Air District’s regulatory authority.

As advocates have been saying for decades, public health must be at the center of every rule. In fact, the agency is not only authorized, but ***required*** to pass strong rules that directly address these urgent public health concerns. Incremental approaches that offer unjustified regulatory offramps to polluting industries do not suffice. The Air District is right to focus on a

²¹ Cal. Health & Safety Code § 40440.

²² *Nat’l Ass’n of Home Builders*, 627 F.3d at 737.

²³ It has been noted, for example, the authority to set technological standards such as BARCT serves as “a technology-forcing standard designed to compel the development of technologies to meet public health goals.” See, *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 465.

²⁴ *Exxon Mobil Corp. v. E.P.A.*, 217 F.3d 1246, 1255 (9th Cir. 2000).

facility-wide cap for new railyard facilities and, given the public health imperative, we urge staff to push for zero emissions at these yet-to-be-built magnets for indirect sources.

4. South Coast AQMD has additional obligations under California and federal civil rights statutes and regulations to adopt a strong New Railyard ISR that protects disproportionately impacted communities.

In addition to the authority described above, SCAQMD can also rely on its civil rights obligations to set standards that will address the disproportionate impacts on communities in the South Coast Air Basin by race, color, national origin, age, physical disability, medical conditions, and other protected categories. Railyards in California disproportionately harm communities of color, children, the elderly, and those with existing health issues. A 2014 study found significant disparities in diesel exposure by race and income for communities living near major existing railyards in California, and further concluded that existing and proposed railyards would disproportionately harm the health of low-income communities of color.²⁵ Moreover, children are more sensitive to cancer-causing toxins, such as diesel PM, and are more likely to experience an asthma-related ER visit if they live closer to a major railyard.²⁶

Given these disparities based on race, age, disability, and other protected categories, SCAQMD has the authority to take affirmative action to address these disparate harms. We urge the Air District to explore ways in which PR 2306 can offer additional protections when indirect sources are known to create greater harm to vulnerable communities. This could include additional measures required to ensure that acute impacts are addressed through steps that will prioritize getting to zero emissions sooner in these areas.

California Government Code Section 11135 states that “[n]o person in the State of California shall, on the basis of [a protected category], be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.” Implementing regulations further specify that agencies are prohibited from “utiliz[ing] criteria or methods of administration that . . . have the purpose **or effect** of defeating or substantially impairing the accomplishment of the objectives of the recipient’s program with respect to a person of a particular ethnic group identification, religion, age, sex, color, or with a physical or mental

²⁵ Andrea Hricko, et al., Global Trade, Local Impacts: Lessons from California on Health Impacts and Environmental Justice Concerns for Residents Living near Freight Rail Yards. *Int. J. Environ. Res. Public Health* 2014, 11, 1914-1941, available at <https://www.mdpi.com/1660-4601/11/2/1914>.

²⁶ Cal. Air Res. Bd., Air Quality and Land Use Handbook: A Community Health Perspective, at ES-1 (Apr. 2005), available at <http://www.aqmd.gov/docs/default-source/ceqa/handbook/california-air-resources-board-air-quality-and-land-use-handbook-a-community-health-perspective.pdf>; R. Spencer-Hwang et al., Association of Major California Freight Railyards with Asthma-related Pediatric Emergency Department Hospital Visits, 13 *Preventive Medicine Reps.* 73, 76 (2019), available at <https://pubmed.ncbi.nlm.nih.gov/30533348/>.

disability.”²⁷ Thus, the Air District’s rules, like PR 2306, must do the work of protecting the frontline communities that have historically borne the brunt of air pollution caused by industrial activities like railyards. Anything less than the most robust and protective rule possible will fail to offer the full protection of air quality regulations and continue to disproportionately subject low-income, communities of color, immigrant communities, and other protected classes to high levels of air pollution.

a. The Air District must act under Title VI.

Title VI of the Civil Rights Act of 1964 similarly prohibits discrimination on the basis of race, color, or national origin by any program or activity that received federal financial assistance.²⁸ Federal regulations implementing Title VI developed by both the U.S. Environmental Protection Agency and the Department of Transportation require agencies to take affirmative actions to remove or overcome the effects of discrimination.²⁹ Here, the Air District has a duty to address past harms with a strong rule that ensures new railyards are zero emissions.

b. The Air District also plays a vital role in protecting environmental justice communities from further harm.

By enacting AB 617 (Garcia) to address air pollution impacts in environmental justice communities, the legislature authorized CARB and the air districts to do everything in their power to ensure communities hardest hit by air pollution were made a priority for intervention, remediation, and the deployment of the most advanced emissions reduction strategies.³⁰ The law sets up a community-driven process to develop pollution reduction plans in designated communities and offers an opportunity to measure progress over time to ensure the most aggressive strategies are meeting the emissions reduction needs in communities.

This state-level mandate to further protect and prioritize environmental justice communities in its programs presents a unique opportunity to strengthen rules that will deliver additional emissions reductions in communities hardest hit by railyards, warehouses and the ports. With AB 617 communities already established in areas near Colton (San Bernardino/Muscoy) and in the communities surrounding the SCIG project (Wilmington/West Long Beach/Carson), the Air District can use data gathered to set strong mandates to avoid adding even greater cumulative pollution burdens to already disproportionately impacted areas.

III. SCAQMD should not delay implementation of the New Railyard ISR.

A. The New Railyard ISR is consistent with federal laws.

Contrary to claims made by the Association of American Railroads, SCAQMD has the authority to regulate rail pollution through the Railyard ISR rule. As mentioned above, doing so is in accordance with federal law. Moreover, the proposed rule, as currently conceptualized,

²⁷ Cal. Code. Regs. tit. 2, § 11154.

²⁸ 42 U.S.C. § 2000d.

²⁹ 49 C.F.R. § 21.5(b)(7) (Department of Transportation); 40 C.F.R. § 7.35(a)(7) (Environmental Protection Agency).

³⁰ Cal. Health & Safety Code § 44391.2 (b)(1), (c)(1).

would not be preempted by federal or state law. “[A] local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted options.”³¹ The New Railyard ISR proposal would offer options to reduce facility-wide emissions to zero and repair the disproportionate health impact of railyard activities on the surrounding communities.

This rule can and will be designed to not conflict with any other federal laws, including Clean Air Act Section 209(e)(1), the Interstate Commerce Commission Termination Act (ICCTA), and the Supremacy Clause in the U.S. Constitution. Section 209(e)(1) provides that a state shall not “adopt or attempt to enforce any standard or other requirement relating to the control of emissions from . . . [n]ew locomotives or new engines used in locomotives.”³² To show preemption, an opponent of the proposed rule would have to show that it is a standard that “relat[es] to the control of emissions from new motor vehicles or new motor vehicle engines.”³³ That is not the case with the proposed New Railyard ISR.

Here, the Air District is not even suggesting setting an emission standard for newly-manufactured and remanufactured locomotives in this rule. Rather, rule concepts thus far have focused on a diverse array of strategies that will help clamp down on emissions from indirect sources facility-wide. In the case of PR 2306, there may be unique options for new railyards that are otherwise not available for existing railyards. Having two separate rules for railyards may create even greater flexibility to meet emissions reduction targets. But this targeted approach does not result in an emissions rule or even a mandate on purchasing specific equipment at a railyard. Both rules should be focused on improving air quality for surrounding communities within a set timeframe.

Moreover, ICCTA provides that the Surface Transportation Board has exclusive jurisdiction over the economic regulation of railroad operations, but still allows local and state agencies to adopt regulations affecting rail operations if they do not discriminate against railroad operation. The facility emissions cap, as proposed in this rule, is not an attempt to manage or govern railroad operations—it is indifferent as to how the cap is attained. This approach is therefore not preempted by ICCTA.

Because of the critical need for health benefits and emission reductions from railyard facilities, staff should pursue the strongest rule possible that will result in the greatest environmental benefits feasible. The region’s urgent environmental and public health concerns require the Air District to do so. A strong rule that taps into the Air District’s existing authority to address these concerns as a public health and environmental imperative, will also put it in a strong position to prevail against any preemption challenges.

³¹ *Metro. Taxicab Bd. of Trade v. City of New York*, 633 F. Supp. 2d 83, 95-96 (S.D.N.Y. 2009), *aff’d*, 615 F.3d 152 (2d Cir. 2010).

³² 42 U.S.C. § 7543(e)(1).

³³ *Id.* §7543(a).

B. The Air District should implement this rule immediately upon adoption.

The Air District should implement this rule immediately upon adoption, which is currently expected for October 2023. There is no reason to delay implementation. The Air District has a clear mandate to promulgate this rule under its state police power authority, and it is required to act to protect public health and improve conditions for South Coast residents. Once the SCAQMD Board adopts the final rule, it should be implemented immediately. The law does not require the Air District to forego implementation until EPA officially reviews the rule. Doing so would cause the Air District to miss a significant opportunity to immediately work on getting to zero emissions at new railyards already planned—and worse—fail to more adequately protect adjacent communities from harmful emissions.

IV. We urge SCAQMD to adopt a stronger New Railyard ISR rule that requires all new railyards to have zero NOx emissions.

SCAQMD must craft a strong railyard ISR that will curtail emissions from new facilities and fulfill the Air District's obligations to protect public health and to attain and maintain air quality standards under the Clean Air Act. The Air District must work backward from these mandates and devise emissions caps that will adequately solve these local problems. While we support SCAQMD's proposal to require zero emission infrastructure and ensure that CARB regulations are equitably implemented in the region, these provisions may not go far enough to achieve the emissions reductions needed from these facilities. Instead, the Air District should focus on setting stringent facility emissions caps to achieve ambient air quality standards locally and protect public health from the threat of new diesel and other pollution. In addition, given the severe nonattainment issues facing the region and that building new railyard facilities would exacerbate these issues, the fact that two new proposed railyards would be sited in close proximity to schools and already overburdened communities of color, and the availability of zero-emission alternatives, the Air District should set a facility cap of zero NOx emissions for every new railyard.

We reiterate the suggestions enumerated in our September 13, 2022 letter, herein enclosed. In summary, we request that the rule be strengthened to require the following:

1. Set a facility emissions cap at zero NOx and diesel PM emissions for every new railyard.
2. Require facilities that fail to meet their emissions caps to put funds into a Spending Account that can be used to only purchase zero-emissions equipment.
3. Apply incentive funds in a targeted way to support zero-emission use only for operators facing unique challenges.
4. Require enhanced monitoring around facilities, including at sensitive receptors.
5. Deploy pollution reduction strategies in ways that will not just go with what is already required, but truly address the unique local challenges by more aggressively targeting emissions impacting the region.

6. Commit the Air District to push lead agencies for new railyard projects in the South Coast to build zero-emissions facilities.
7. Require zero-emissions strategies at the construction phase of new railyards.
8. Encourage early adoption of best practices for facilities to quickly transition to zero emissions.

We will more thoroughly review provisions already incorporated into the draft such as requiring zero-emissions charging infrastructure and components that will encourage early action on zero-emissions and hope to offer our analysis very soon. In the interim, we ask that the provisions outlined above be incorporated into the rule.

V. Conclusion

The South Coast Air Basin faces significant challenges when it comes to air pollution with the region in severe and extreme nonattainment for several federal and state standards. This presents significant regulatory peril for the region—but more importantly—the health of residents is at stake, especially for communities near proposed new railyards. SCAQMD has state and federal authority to issue the strongest possible indirect source rule for railyards—and it cannot afford to hold back from using that authority to address one of the largest emissions sources in the region. If we have any hope of meeting standards and reducing current health threats, the Air District must use every lever it has to reduce air pollution on an expedited timetable.

We look forward to continuing to work with you to ensure that public health is better protected and that we move the region closer to a zero-emissions future we so desperately need.

Sincerely,

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