

APPENDIX A

PR 3503 COMMENT LETTER – APRIL 25, 2005

ASSOCIATION OF AMERICAN RAILROADS

CEA CALIFORNIA
ENVIRONMENTAL
ASSOCIATES

April 25, 2005

Elaine Chang
Deputy Executive Officer
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Dear Elaine,

Attached please find comments from the Association of American Railroads and their member railroads Union Pacific Railroad Company and BNSF Railway on the District's Proposed Rules 3501, 3502, 3503, and 3504. Thank you for your courtesy in extending the due date for the Railroads' comments. If you have any questions, please contact me any time.

Sincerely,

Peter Okurowski
Senior Associate

Attachment:

cc: (via email)
Peter Greenwald, SCAQMD
Susan Nakamura, SCAQMD
Michael Krause, SCAQMD
Carol Harris, UP
Lanny Schmid, UP
Mark Stehly, BNSF
LaDonna DiCamillo, BNSF
Russel Light, BNSF
Michael Rush, AAR
Kirk Marckwald, CEA
Michael Barr, Pillsbury, Winthrop, Shaw, Pittman

Comments of Association of American Railroads, Union Pacific Railroad Company and BNSF Railway on the Proposed South Coast Air Quality Management District's Rule 3501, 3502, 3503, and 3504

I. Introduction

The Association of American Railroads and its member freight railroads operating in California, Union Pacific Railroad Company and BNSF Railway ("UP and "BNSF"; collectively "the Railroads"), appreciate this initial opportunity to comment on the South Coast Air Quality Management District's (SCAQMD or the District) draft proposed Rules 3501, 3502, 3503, and 3504. The Railroads strongly support improving air quality in the South Coast Air Basin ("SCAB") and in the State of California through cost-effective emission-reduction programs and they have entered into a substantial and unmatched MOU with the State of California to bring the cleanest available locomotives into the South Coast Air Basin. However, the District's proposals may actually result in *increased* emissions and raise safety concerns. They include extraordinarily burdensome and punitive administrative requirements, and are unnecessary in light of the alternatives, including the railroads' and ARB's initiatives already underway in the SCAB area to reduce locomotive emissions.

The proposed rules are being put forth against a backdrop of continuing reductions in locomotive emissions resulting from groundbreaking federal emission standards, continuing reductions in emissions from railroad operations due to fuels and other regulations at the federal and California state levels and, in particular, the continuing and unmatched commitment by the Railroads to reduce emissions of nitrogen oxides ("NO_x") and particulate matter less than 2.5 microns (PM_{2.5}) resulting from their operations in the SCAB. The Railroads, together with the California Air Resources Board ("ARB") and U.S. Environmental Protection Agency ("EPA") remain committed to the enforceable Memorandum of Mutual Understandings and Agreements -- South Coast Locomotive Fleet Average Emissions Program, dated as of July 2, 1998 ("South Coast MOU"), which will accelerate, at a considerable cost, the introduction of the cleanest fleet of locomotives in the nation into the SCAB. In addition, the Railroads have invested millions of dollars in fuel efficient locomotives and idle reduction technologies, and are spending upwards of \$5 million to develop, with oversight by the ARB, a particulate trap or oxidation catalyst to reduce particulate emissions from older locomotives. The proposed rules can only duplicate, conflict and interfere with these initiatives.

Importantly, the proposed rules are preempted by a broad variety of established federal and state laws. For example, the proposed rules are preempted by the Clean Air Act, the California Health & Safety Code, the ICC Termination Act, federal rail safety laws, and the Commerce Clause of the U.S. Constitution. The District has not obtained confirmation that it has the authority to issue any of the proposed rules, despite repeated unsuccessful efforts at the state and federal levels. The reasons for the District's lack of success are clear: both the U.S. Congress and the California Legislature have delegated exclusive authority over locomotive and rail emissions to the federal and state agencies that can effectively and efficiently regulate in this area. For local districts like SCAQMD to enter this field would create a patchwork of inconsistent, duplicative and contradictory measures that would damage the national railroad system and interfere with interstate and foreign commerce. Notwithstanding preemption under federal law, the Railroads will address other issues presented by the proposed rules in these comments.

II. General Overview Comments

a. Comments on the Regulatory Process Used by the District for These Rules

The Railroads have actively participated in the two working group meetings and two public workshops held on this subject by District staff so far, and we continue to have discussions with District staff. On these occasions, the Railroads have explained how idling plays an integral part in their respective operations and what each Railroad has been doing, and will be doing, to reduce unnecessary idling to the maximum extent possible, particularly in the SCAB. In addition, the Railroads have conducted tours for District staff of two major South Coast facilities (BNSF's Commerce yard and UP's Colton yard) and held in-depth discussions with District staff about railroad operating practices. Future tours of railroad facilities for District staff are currently being planned, and the Railroads hope that these tours and other communications can provide the District with more information and an even better understanding of the issues.

Specifically, the Railroads have explained to District staff why idling for over 15 minutes in many cases is necessary for railroad operations. Idling is necessary, for example:

- to prevent the water in the engine from freezing in cold weather;
- to keep the air brakes operational in order to secure the train;
- while waiting at a siding for "a meet" or "a pass" with another train that is sharing the same track;
- during an initial air brake test before departing a terminal;
- in the event the train activates a hot box or dragging equipment detector and must be held pending an inspection;
- during load testing at a railroad maintenance facility;
- while waiting for a clear signal to enter or depart from a terminal;
- while waiting for an area within a yard to clear;
- in connection with switching an industry or within the rail yard; and
- while waiting for a clear signal when there is roadway work or other temporary delays.

We have discussed with District staff how new automatic start/stop technology is being installed on the existing fleet of locomotives as the devices become available. New locomotives are already equipped with this technology. With locomotive power in high demand, pulling a large number of units out of service at one time for application of the start/stop technology would lead to significant system delays and greater overall emissions. It will take several years before all locomotives in the South Coast can reasonably be retrofitted with this new technology.

Given the complexity and demands on the rail system, the Railroads request that all regulatory agencies in California work with the railroad industry on ways to reduce locomotive emissions in effective and efficient ways. In fact, for more than 10 years, the Railroads have been working cooperatively with ARB and several individual districts, cities and counties to develop significant measures to reduce air pollution from locomotives and rail operations. ARB has been able to influence federal standards for locomotives in major ways, to forge the South Coast MOU, to work with the Railroads on assessing railyard emissions, and to enter into a diesel retrofit research and development program.

Because locomotives operate throughout the state, it is appropriate for ARB to take the lead among regulatory agencies in California and for the District to play a positive role in Board activities. Thus, further study of rail yards, such as the Commerce Yards, future idling policies and agreements to retrofit locomotives with idle limiting devices should all be led by the ARB, with appropriate District and community involvement.

b. General Comments on CEQA Requirements - The District Should Prepare and Disclose its CEQA Initial Study and Prepare an EIR on this Rule Package

There is no question that CEQA applies to major rulemaking proceedings like this one and that the District must seriously apply CEQA to these proceedings:

"21001.1. The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies."

We assume that the District will not attempt to rely on any CEQA exception or CEQA "equivalent" review process for this very significant new rulemaking.

As a first step toward District compliance with CEQA, the Railroads request a full opportunity to review and comment on the initial study required under CEQA that District staff still needs to provide to the Railroads, interested agencies and the public. The State CEQA Guidelines require:

"15063. Initial Study

"(a) Following preliminary review, the Lead Agency shall conduct an Initial Study to determine if the project may have a significant effect on the environment. If the Lead Agency can determine that an EIR will clearly be required for the project, an Initial Study is not required but may still be desirable.

"(1) All phases of project planning, implementation, and operation must be considered in the Initial Study of the project. . . ."

State and District CEQA guidelines provide detailed guidance concerning the initial study required for a new District rule. The CEQA guidelines clearly require an even greater amount of scrutiny by the District in the case of an entirely new, major package or regulations that would have substantial effects on the entire goods movement system. The Railroads are looking forward to reviewing and commenting on the District's initial study when District staff is able to prepare and publish it, as required by the CEQA guidelines.

District staff will also need to prepare an EIR for this rule package. An EIR is required any time an agency "project" like this rule package may result in significant environmental impacts, like those described below:

"It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." (Ca Pub. Res. Code 21000 (g))

The novelty or difficulty of anticipating all the direct and indirect impacts of this rule package cannot excuse the District from looking hard. CEQA policy is clear:

"21001. The Legislature further finds and declares that it is the policy of the state to:

"Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment."

The specific test for a "significant Impact" triggering an EIR is:

"The criteria shall require a finding that a project may have a 'significant effect on the environment' if one or more of the following conditions exist:

- (1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
- (2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
- (3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (CA Pub. Res. Code 21083(b).)

With regard to Proposed Rules 3501 and 3502, the District is proposing that the Railroads make significant changes to their current operations in order to reduce the location and the amount of idling. In order to decrease idling, it will likely be necessary to increase in the number of shutdowns and startups. These impacts could degrade the quality of the air, result in short-term reductions while leading to long term modal shift to highway trucking, and result in cumulatively considerable impacts throughout the entire SCAB, due to the following factors at a minimum:

- Increased system delays: this would increase the number of locomotives operating in the SCAB and in that respect lead to more idling.
- Increased number of start-ups: this could lead to increased emissions on restart until the proper air/fuel mixture is achieved in the engines.
- Increased startups: this could lead to noise complaints as starting up will be louder than idling.
- Increased occurrence of failures to restart: this would increase system delays, and extra locomotives would need to be deployed to retrieve the failed units.

Furthermore, in order to decrease idling, the Railroads may be compelled to increase the number of locomotives operating in a yard, or to expand railroad yards and/or change rail yard operations, or shift work to other locations in ways that might lead to greater waiting times by trucks.

With regard to Proposed Rules 3503 and 3504, the District staff proposals contain no limitation on the extent or impact of mitigation plans, which may result in significant changes in rail operations within railyards and throughout the entire rail system. The scope of these changes could be major, and significantly increase emissions throughout the entire SCAB. For example,

- In order to reduce emissions within railyards, locomotive operations could increase on main lines or at satellite facilities even outside of the District. CEQA requires the District to evaluate all out-of-basin impacts in a full EIR and obtain the comments of all interested agencies and states within and outside the South Coast.
- In order to lower emissions at a certain location within a railyard, the yard may be redesigned in a way that decreases locomotive and truck emissions within the yard but increases emissions from trucks and ships outside the yard. The District must obtain information and input from Ports, at least, before imposing these kinds of impacts on Ports and communities around Ports.
- In order to reduce railyard emissions within rail yards located within the SCAB, it may be preferable to increase truck drayage to locations outside the district. The District's EIR must fully and credibly evaluate all impacts like this on all affected communities.
- In order to reduce railyard emissions within the SCAB, this rule package may compel Railroads to limit the amount of freight they will haul so that trucks would have to handle the increase – leading to increased emissions and congestion on highways and at the Ports. Of course, these results would completely undermine the efforts of the Ports of Los Angeles and Long Beach to reduce their overall emissions to the levels of prior baseline years. The District's EIR for this rule package must therefore include a complete evaluation of all impacts on all of the components of the POLA "No Net Increase" plan and similar plans at Long Beach and other California ports that might be affected by this District rule package.

The District's proposals are very broad and the District has not defined any limit that would mitigate or avoid the broadest and most significant impacts on the entire basin. The CEQA analysis must consider the implications that could result from such a broad proposal. The EIR must also include all cumulative impacts, as clearly required by CEQA 21083 above, including all modal shift resulting from these rules. These cumulative impacts can be regional, localized, or at the neighborhood level. Changes in locomotive operations which could increase delays may lead to delays on roadways at crossings, increased congestion due to increased truck activity, increased costs associated with moving goods, and increased truck idling outside of railyards. Of course, it is vitally important that the District also coordinate its CEQA analysis of these rules with all other initiatives related to the control of railroad emissions in California and at the national level. The District's analysis cannot just address a piece of the entire, extended "project" of addressing the control of emissions for railroads and the integrated goods movement system.

The District's EIR for this package must also analyze the relationship of this package to all other relevant District and other plans and programs. To date, the District has not analyzed how this package relates to the District's portion of the California SIP, for example. Since the adoption of this package in regulatory form could result in the termination of the 1998 ARB MOU (see

<http://www.arb.ca.gov/msprog/offroad/loco/loco.htm>), the analysis must include the environmental impacts resulting from the termination and all cumulative impacts from the termination. Similarly, the District's EIR must analyze the effect of the package on the District's toxic air contaminant program. Diversion of traffic to other modes and centers of diesel vehicular traffic will affect the existing plans under AB 2588 submitted by a variety of stationary and other sources. More broadly, this District rule package relates strongly to the current proceedings at the Ports of Los Angeles and Long Beach regarding diesel vehicles. The District's EIR must fully account for and analyze all of these relationships. Of course, the District may be able to prepare joint EIR or EIS documents that fully cover all of its programs as well as the programs of all other agencies acting in related areas.

CEQA contains particularly strong requirements for agencies to look at alternatives to proposals like the District's rail yard rule package:

"21002. The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. . . .

In particular, it is important that District's EIR analyze sufficient alternatives to the Proposed Rule package and determine whether the District's objectives underlying each rule could be better achieved, or achieved as well, using alternative approaches. Alternatives that should be considered for each rule include the emissions impact if no rule were adopted, as described below.

c. The District Must Show that its Rules are Cost Effective and Analyze Socioeconomic Impacts

Section 40440(c) of the California Health and Safety Code provides that District programs must be "efficient and cost-effective." However, the District has not attempted to quantify the potential emission reductions, if any, from its proposed rules.

Furthermore, section 40440.8 of the California Health and Safety code requires the District to perform "an assessment of the socioeconomic impacts of the adoption, amendment, or repeal" of a proposed rule. "Socioeconomic impact" includes the "range of probable costs, including costs to industry" and the "emission reduction potential of the rule or regulation." The District has not assessed the socioeconomic impacts of its proposed rules.

III. Specific Comments on Rule 3501

a. Rule 3501 Will Require Retrofits

Proposed Rule 3501 has been characterized as a recordkeeping rule, but in fact it will require the retrofitting of locomotives with idling control devices. The proposed Rule requires the Railroads to follow an approved Idling Monitoring and Recording Plan by developing specific records (as specified

by the District) and submitting these records on a weekly and annual basis. As an alternative, the proposed Rule would eliminate the recordkeeping and reporting requirements should the Railroads install idling reduction devices (as specified by the District).

The reporting requirements of the proposed rule are so punitive that the railroads will have no choice but to retrofit locomotives with idling control devices. That is the clear intent and goal of the District's proposed rule. However, the District is preempted by federal law from imposing the retrofit requirements in proposed Rule 3501.

In addition, the District has not attempted to quantify potential emission reductions from Proposed Rule 3501, which it must do under section 40440(c) of the Health and Safety Code. Of course, if the proposed Rule truly were merely a reporting and recordkeeping rule, there clearly would be no associated emissions reductions and the rule would fail to satisfy section 40440(c).

Nor has the District assessed the socioeconomic impacts of Proposed Rule 3501 as it is obligated to do under section 40440.8 of the Health and Safety Code. District staff have not provided cost or emission calculations or any analysis regarding this proposal.

b. The Contents of the Cost Effectiveness Analysis

In assessing the cost of Proposed Rule 3501 to industry, the District must consider the following:

- the total number of reporting events that will occur per day.
- the total number of hours (and cost per hour) needed to collect, consolidate, translate, and transmit the required reports to the District.
- the total number of hours needed to develop training materials.
- the total number of hours needed to educate, train, and audit UP and BNSF employees who would be involved in collecting and reporting data.
- the train delay incurred while crew members record all idling events longer than 15 minutes, and delay due to the need to obtain information from the dispatcher as to the reasons for holding the train and to coordinate to develop the required entries and the cost associated with this delay.
- The total number and cost of idling reduction devices resulting from this rule.
- The emissions reductions resulting from the reporting and retrofit components of the rule over time.

c. The District Should Prepare and Disclose its CEQA Initial Study and Prepare an EIR on this Rule Package

As referenced earlier, the Railroads request the opportunity to review and comment on the required initial study under CEQA that still needs to be provided by the District. In particular, it is important that the analysis contain an initial study of impacts from its rule, sufficient alternatives to the Proposed Rule, and a determination of whether the District's objectives (to "identify opportunities to reduce idling emissions, determine the amount of idling, and reasons for idling of locomotives and to identify and allow the AQMD to quantify emission from idling locomotives") could be better

achieved, or achieved as well, using alternative approaches. Possible alternatives that should be considered include:

- A “no action” alternative, including the emissions impact if no rule were adopted.
- Reporting requirements, which start at longer idle times – i.e., 30 minutes, 1 hour, or 2 hours.
- Reporting requirements for only a subset of locomotive activity – i.e. yard activity, road switcher activity, certain line haul activity.
- Less burdensome reporting requirements.
- An alternative providing for a research program would be developed in conjunction with the District, the community, and the Railroads to study locomotive idling at specific locations.
- Further collaborative measures dealing with idling, like the 1998 ARB MOU. This alternative would avoid the considerable legal barriers to mandatory District idling rules.
- Alternatives that include incentive programs, such as the expanded Carl Moyer program. (See http://www.aqmd.gov/tao/implementation/carl_moyer_program_2001.html and <http://www.arb.ca.gov/msprog/moyer/moyer.htm>).

As the Legislature recently found:

“SECTION 1. The Legislature hereby finds and declares all of the following:

(a) California's urban and rural areas suffer from severe air pollution problems caused in significant part by the operation of motor vehicles, emissions from heavy-duty commercial vehicles moving goods, and the operation of off road engines and diesel-powered farm equipment. The continuation and expansion of incentive programs to reduce emissions from these sources is crucial to protecting public health and achieving health-based air quality standards in the most heavily polluted parts of California.” (Statutes of 2004, CHAPTER 707)

The District's initial study under CEQA must also include all cumulative impacts, including modal shift resulting from increased delays and/or increased cost of moving freight by rail.

IV. Specific Comments on Proposed Rule 3502

Proposed Rule 3502 would prohibit locomotive idling longer than 30 minutes, except in the case of specified exemptions. The exemptions include the locomotive being used as an emergency vehicle, diagnosis or repair by a mechanic, activity preempted by federal law, and activity approved by the Executive Officer.

Locomotive idling is an integral part of railroad operations and cannot be controlled by the District under applicable federal law. Federal law clearly preempts proposed Rule 3502.

Another problem with proposed Rule 3502 is that it could actually cause an increase in emissions, which must be addressed in the EIR. A locomotive cannot be turned on and off like an automobile. It can take fifteen to 30 minutes to shut down a locomotive and even longer to start it back up and achieve the optimal fuel-air mixture.

To illustrate, under Proposed Rule 3502, if a locomotive is waiting for a crossing to clear in a switchyard for over thirty minutes, it must shut down. However, if the crossing clears a short time later—for example, during the shutdown process—then as soon as shutdown is complete, the startup

process will begin. Because it takes some time to reach the optimal fuel-air mixture, more emissions will result as part of the startup process than would have resulted from allowing the locomotive to idle for a few more minutes while the crossing cleared. The EIR must examine and quantify all such potentially significant impacts throughout the basin.

Moreover, lost productivity as a result of the proposed rule may require the use of additional switch engines. As necessary idling time is reduced, more switch engines may be required to complete time-sensitive operations. Running additional switch engines would offset emissions reductions from the idling limitation, which is another topic that must be examined by the District's EIR.

a. The District Must Prepare a Cost Effectiveness Analysis

As part of the required cost effectiveness analysis, the Railroads request that the following scenarios be included:

- Increased system delay due to shutdown and restart – including increased labor costs as a result of such delay.
- Increased costs to roads due to modal shift.

b. The District Should Prepare and Disclose its CEQA Initial Study and prepare an EIR on this rule package.

As mentioned above, the Railroads request an opportunity to review and comment on the CEQA analysis that still needs to be provided by the District. In particular, it is important that the analysis contain sufficient alternatives to the Proposed Rule and a determination of whether the District's objectives (to "identify opportunities to reduce idling emissions, determine the amount of idling, and reasons for idling of locomotives and to identify and allow the AQMD to quantify emission from idling locomotives") could be better achieved, or achieved as well, using alternative approaches. Possible alternatives that should be considered include:

- A "no action" alternative, including the emissions impact if no rule is adopted.
- Having the shut down policy only apply when there is no engineer on or working near the locomotive.
- Exempting the lead locomotive.
- Analyzing longer idling times before idling is prohibited – such as 1 or 2 hours
- Having idling prohibitions only apply to a subset of locomotive activity – e.g., yard activity, road switcher activity, and certain linehaul activity.

V. Specific Comments on Rule 3503 and 3504

These rules are preempted under federal law. Also, the State of California, through the ARB, occupies the field pertaining to air toxic measures pertaining to mobile sources. Consequently, the District lacks the authority to impose proposed Rules 3503 and 3504.

In addition, the District has proposed that the Railroads must include all "dedicated and transient emissions sources" in its AB2588 emissions inventory. The requirement to include transient

sources (i.e. mobile sources), would apply only to railyards, and not to other sources required to submit AB2588 inventories. If these transient sources are required for railyard inventories, they should also be required for all sources submitting AB2588 inventories.

a. The ARB Has Exercised Exclusive Authority Over Toxic Air Contaminants From Similar Sources

The State of California's toxic air contaminant programs are now almost two decades old. During that time period, the ARB has exercised exclusive authority over toxic air contaminants emissions from mobile sources and local districts have concurred and respected the ARB's exclusive authority. When the California Legislature established the toxic air contaminant programs, the Legislature confirmed the ARB's exclusive authority over mobile sources. Accordingly, the ARB has exclusive statewide authority to perform the following critical "gate-keeping" functions in the California toxic air contaminant programs:

- Identify and designate toxic air contaminants (see Health & Safety Code §§ 39657, 44321).
- Establish criteria and guidelines for the evaluation of toxic air contaminant emissions and toxic air contaminant impacts on communities and for site-specific air toxics emissions inventory plans (see Health & Safety Code § 44342).
- Adopt airborne toxic control measures for all districts within the state (see Health & Safety Code §§ 39658, 39666).

No local district has the authority under the Health and Safety Code to alter or contradict the ARB's air toxics program regulations.

While the ARB has exercised its exclusive authority to issue criteria and guidelines for many categories of stationary source facilities, it has never exercised its exclusive authority to include rail yards within the "facilities" covered by the toxic air contaminant program. Nor has any district -- including the SCAQMD -- ever included, or attempted to include, rail yards within the "facilities" covered by the statewide toxic air contaminant program. By their actions in carrying out their responsibilities under the California toxic air contaminant program, the various districts have clearly and uniformly determined that rail yards are not "facilities" covered by the statewide toxic air contaminant program.

Furthermore, for nearly three decades, the California Legislature has prohibited local districts from regulating locomotives, whether they are operating in rail yards or not:

"No order, rule, or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives." (Health & Safety Code § 40702.)

b. Regarding Rule 3503 and 3504 -- The District Should Prepare and Disclose its CEQA Initial Study and Prepare an EIR.

Rule 3504 requires operators of railyards to achieve emissions targets established by the District as part of its Risk Reduction Plan. In order to achieve reductions within the yards, it is feasible

that changes will be made which could alter emissions elsewhere outside of the yard. It is important that the District consider these changes in its CEQA analysis.

The District must analyze a wide range of alternatives in its EIR for the Rule 3503/3504 part of the package, including:

- A “no action” alternative, including the emissions impact if no rules were adopted.
- An alternative imposing similar requirements on all similar sources in the Air Basin, including Ports, distribution centers and all other areas where diesel vehicles are present in similar concentrations.
- An alternative providing for a research program would be developed in conjunction with the District, the community, and the Railroads to study locomotive idling at specific locations.
- Further collaborative measures dealing with idling, like the 1998 ARB MOU. This alternative would avoid the considerable legal barriers to mandatory District idling rules.
- Alternatives that include incentive programs, such as the expanded Carl Moyer program (see http://www.agmd.gov/tao/implementation/carl_moyer_program_2001.html and <http://www.arb.ca.gov/msprog/moyer/moyer.htm>).

As the Legislature recently found:

“SECTION 1. The Legislature hereby finds and declares all of the following:

(a) California's urban and rural areas suffer from severe air pollution problems caused in significant part by the operation of motor vehicles, emissions from heavy-duty commercial vehicles moving goods, and the operation of off road engines and diesel-powered farm equipment. The continuation and expansion of incentive programs to reduce emissions from these sources is crucial to protecting public health and achieving health-based air quality standards in the most heavily polluted parts of California.” (Statutes of 2004, CHAPTER 707)

- An alternative whereby transient sources are not included in the required emissions inventory.
- An estimate of the change in AB2588 inventories from all existing sources should the same requirements for transient source emissions be included in their inventories as well.

VI. Conclusion

For the many reasons set forth above, the Railroads respectfully submit that that ARB should continue to take the lead among regulatory agencies in California with respect to the subject matter of the District's proposed rules and the District is urged to play a positive role in ARB's ongoing activities. Future study of rail yards and Railroad idling policies, as well as agreements to retrofit locomotives with idle limiting devices, should be conducted at the federal or state level, not by local districts.

APPENDIX B

PR 3503 COMMENT LETTER – SEPTEMBER 7, 2005

CALIFORNIA AIR RESOURCES BOARD



Alan C. Lloyd, Ph.D.
Agency Secretary

Air Resources Board

1001 I Street • P.O. Box 2815
Sacramento, California 95812 • www.arb.ca.gov



Arnold Schwarzenegger
Governor

September 7, 2005

Mr. Andrew Lee, Program Supervisor
Rules and Planning
South Coast Air Quality Management District
P.O. Box 4941
Diamond Bar, California 91765

Dear Mr. Lee:

Please find enclosed comments from the staff of the Air Resources Board (ARB) regarding the South Coast Air Quality Management District's (SCAQMD) proposed Rule 3503 – Emissions Inventory and Health Risk Assessment for Rail Yards. These comments reflect our experiences in developing the Union Pacific Railroad Roseville rail yard health risk assessment which was completed in October 2004. These comments are similar to verbal comments provided to SCAQMD staff in a conference call on August 19, 2005.

ARB staff believes that it is important to establish uniform, consistent statewide guidelines for preparing health risk assessments at rail yards. As you may know, ARB staff has recently begun working on the implementation of the Statewide Agreement for a Particular Emissions Reduction Program at California Rail Yards (the Agreement). As part of the Agreement, ARB staff will prepare health risk assessments for 16 major rail yards in the state. As part of that effort, ARB staff is committed to working with staff of the SCAQMD and other air districts to develop uniform statewide guidelines for performing rail yard health risk assessments.

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see our website: <http://www.arb.ca.gov>.

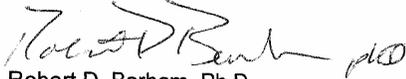
California Environmental Protection Agency

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Mr. Andrew Lee
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If you should have any questions about the attached comments, please contact me at (916) 445-0650 or Mr. Daniel E. Donohoue, Chief, Emissions Assessment Branch, at (916) 322-6023.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert D. Barham" with a stylized flourish at the end.

Robert D. Barham, Ph.D.
Assistant Chief
Stationary Source Division

Enclosures

cc: Mr. Daniel E. Donohoue, Chief
Emissions Assessment Branch

**Air Resources Board Comments on the
South Coast Air Quality Management District
Proposed Draft Rule 3503:
Emissions Inventory and Health Risk Assessment for Railyards**

Specific Comments

1. Section (b) Applicability: This section implies that all Class 1 freight, switching and terminal railroads in the District are subject to this Rule. However, the Draft Staff states that 19 rail yards would be subject to PR 3503. We recommend amending this section to be consistent with the staff report and indicate which rail yards are subject to the requirements of PR 3503.

As currently written, PR 3503 does not apply to passenger train yards. However, passenger trains traveling either through or immediately adjacent to a Class 1 rail yard can be a significant source of diesel PM emissions. The District may want emissions from passenger trains traveling through or immediately adjacent to a subject rail yard to be included in the rail yard's emissions inventory.

2. Section (c) Definitions: We recommend that the District staff consider the following changes:
 - Number (4) - DEDICATED RAILYARD EQUIPMENT: The District may wish to include in the definition the concepts that "dedicated railyard equipment" includes stationary, mobile, and portable equipment; includes routine and predictable activities; and includes equipment owned, leased, or contracted by the rail company.
 - Number (6) – IMPACT AREA: The District should be aware that for larger rail yards the impact area is likely to exceed the modeling domain. (See ARB's Roseville Railyard Study.)
 - Number (9) – MICR: The District may wish to reconsider the utility of using a MICR for complex sources like a large rail yard. We would suggest using a spatially averaged risk level instead of the MICR. (See ARB's Roseville Railyard Study.)
 - Number (13) – RAILROAD OPERATIONS: It is not clear if "through train" activity is included in railroad operations. The District may want to include the emission from passenger trains that pass through or immediately adjacent to the Class 1 rail yard in the rail yard's emissions inventory. Also, the District may want to define the term "terminal operations."
 - Number (19) – TRANSIENT RAILYARD EQUIPMENT: Transport refrigeration units (TRUs) are identified in the Railyard Emission Inventory Methodology under "other off-road equipment." The District may want to include TRUs in this definition to ensure the rail companies are aware the emissions from this source type will be inventoried.

**Air Resources Board Comments on the
South Coast Air Quality Management District
Proposed Draft Rule 3503:**

Emissions Inventory and Health Risk Assessment for Railyards

3. Section (d) Emissions Inventory: The ARB staff has the following comments and suggestions to help clarify this section of the regulation.
 - ARB staff are concerned that the proposed time frame to submit emissions inventories (6 months for the date of rule adoption for the interim inventory and 12 months from the date of rule adoption for the final inventory) is not feasible. It is our experience in completing the Roseville Study that to develop a credible emissions inventory could take the subject rail yards up to 6 months if historic data is readily available. If historical data is not readily available, it will take 12 to 18 months to collect and prepare the data. Additional time will be required to QC the data both by the railyard and the District. Moreover, to require the subject rail yards to complete emission inventoried for 19 railyards in 12 months is inconsistent with the timing provided under the Districts "Hot Spots" program. We encourage the District to amend this provision to be consistent with the timing provided under the District "Hot Spots" program.
 - The District staff may want to modify Section (d) (1)(A) to include the term "railroad operations" (amended to include "through train activities) to ensure these emissions are inventoried. Further, we suggest that the term "transport refrigeration units" be included in the list of off-road mobile sources.
 - Section (d)(1)(B) indicates that the rail yard's emissions inventory shall be based on a minimum of three months of data. ARB staff recommends using the most recent full year of data. At this time, it is unclear if historical records can be easily accessed at each rail yard. In those cases where historical records are readily available, the most recent full year of data should be used. For rail yards where historical data are not readily available, we recommend the regulation allow the District to make a case-by-case determination on the level of detail needed for the emissions inventory and the time period allowed for data collection. We believe that situations are likely to occur where extending the emission inventory data collection period will be appropriate to ensure the most accurate health risk assessment.
 - The District may want to modify Section (d)(1)(C) to cover the full time interval.
 - We recommend the District allow certain equipment or operations to not be included in the final emissions inventory if the District finds that the emissions from this activity will not significantly change the outcome of the HRA.

4. Section (e) Health Risk Assessment: The ARB staff has the following suggestion to help clarify this section.
 - Section (e)(1) ARB staff are concerned that the proposed time frame to submit a HRA (12 months from the date of Rule adoption) is not

**Air Resources Board Comments on the
South Coast Air Quality Management District
Proposed Draft Rule 3503:
Emissions Inventory and Health Risk Assessment for Railyards**

feasible. It is our experience in completing the Roseville Study that to develop a credible HRA is likely to take the subject rail yards up to 12 months following the development of the emissions inventory. To require the subject railyards to complete this task for 19 facilities within 12 months of adoption of the Rule (and at the same time as submittal of the final emissions inventory) is inconsistent with the timing provided under the Districts Hot Spots program. We encourage the District to amend this provision to be consistent with the timing provided under the District "Hot Spots" program.

- Section (e)(1)(H): This section could be problematic due to the possibility that "the impact areas that overlap" may be miles apart (see definition of impact area). We recommend that facilities be responsible only for the emissions under the control of the director of operations for the specific facility.
 - Section (e)(2): This section states that "the operator of the rail yard will follow the policies and procedures of California Office of Environmental hazard Assessment's (OEHHA) and the *Air Toxic Hot Spots Program Guidance Manual for Preparation of Risk Assessments*. Based on the discussion with District staff and review of the District guidance, it appeared that the District may require the use of HARP. It has been our experience that HARP is not capable of integrating all the sources at large rail yards. We recommend that the District allow considerable flexibility in the selection of the modeling approach and not require the use of HARP.
 - Given the time schedule in the regulation and the fact the cancer risk from Diesel PM is likely to be the risk driver for railyard, the District may wish to have the HRAs focus on diesel PM cancer risk and address more qualitatively the chronic diesel PM and multipathway impacts.
5. Section (f) Approval of the Health Risk Assessment: To ensure adequate peer review we recommend that the HRAs be submitted to ARB and OEHHA for their review and comment prior to approval by the Executive Officer of the District. Further, we suggest that the time period for review, approval, and or disapproval of the HRA by the District should be extended from 120 days to 180 days to ensure substantive comments from the reviewers.
6. Section (g) Updating Emission Inventory and HRA: This section states that an updated emissions inventory and HRA shall be submitted to the District if any one of two conditions is met. These conditions are either an increase in emissions or a change in the impact area due to changes at the Yard. Further, ARB staff questions whether requiring a revised

**Air Resources Board Comments on the
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emissions inventory and a new HRA potentially every year is a good use of limited resources for both the District and the railroads.

ARB staff suggests that this provision be modified to establish a trigger level for emissions increases that would require a revised emissions inventory and possibly a revised risk assessment. Unless there is a significant increase in emissions, we suggested requiring updated emissions inventories and revised risk assessments every three years.

APPENDIX C

PR 3503 COMMENT LETTER – SEPTEMBER 7, 2005

ASSOCIATION OF AMERICAN RAILROADS

COVER LETTER



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September 7, 2005

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Hand Delivered

Mr. Andrew Lee
Planning, Rule Development and Area Sources
South Coast AQMD
21865 Copley Drive
Diamond Bar, CA 91765

Re: Comments on Proposed Rule 3503 and Regulation XXXV

Dear Mr. Lee:

We submit these comments on behalf of the Association of American Railroads ("AAR"), Union Pacific Railroad Company and The BNSF Railway Company (collectively, the "Railroads") regarding the South Coast Air Quality Management District's (the "District") Proposed Rule 3503) and proposed Regulation XXXV.

Please note that these comments are timely submitted on September 7, 2005. However, AAR and the Railroads reserve the right to submit additional comments prior to, and provide testimony at, the hearing on this rule on October 7, 2005 before the District's Governing Board (the "Board"). We make this reservation, in part, because the detailed materials accompanying PR 3503 were not available until August, 2005 and the Railroads did not have sufficient time to complete their review of the materials. Pursuant to the mandates of California law, we request that these comments be included in the official administrative record relating to PR 3503 and Regulation XXXV.

These comments are organized in three sections. The first section consists of this transmittal letter in which we comment on several important policy issues and provide a general overview of the detailed comments contained in the second and third sections. In the second section, attached as a memorandum hereto, we address issues relating to the California Environmental Quality Act ("CEQA", California Public Resources Code § 21000 *et seq.*) and the regulatory authority of the District to adopt rules and regulations applicable to emissions from railroads, locomotives and railyards. In the third section, also attached as a memorandum hereto, we provide comments on technical issues raised by PR 3503 and the accompanying Preliminary Staff Report (August 2005).

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September 7, 2005
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AAR has a strong interest in PR 3503. AAR is a rail industry organization whose members account for more than 94 percent of freight service revenue, nearly 100 percent of intercity passenger service nation-wide and nearly all of the railyards that would be subject to PR 3503. AAR is very concerned about regulatory activities that could affect rail operations in the South Coast Air Basin. Because PR 3503 suffers from serious legal and technical flaws, and is inconsistent with and duplicative of existing California Air Resources Board ("ARB") efforts, AAR especially is concerned with PR 3503.

PR 3503 is not necessary since the most important major elements are already contained in the 2005 Statewide Rail Yard Memorandum of Understanding among ARB and the Railroads, which became effective June 30, 2005 (the "MOU"). For the major railyards in the South Coast Air Basin, both PR 3503 and the MOU will provide a Health Risk Assessment ("HRA"), an inventory of criteria pollutants and toxics, a determination of cancer and non-cancer risk levels, the inclusion of both stationary and non-stationary sources in the inventory and HRA, and notification of the public. This duplication is unnecessary and undoubtedly will lead to public confusion.

PR 3503 also contains infeasible compliance deadlines. It simply is not feasible to complete an inventory of both a criteria pollutants and toxics, and an HRA for 19 railyards within 1 year. The railroad industry and ARB, both of whom are experienced in preparing an HRA for railyards, realized that the inventory and modeling efforts were significant and therefore developed a "staggered" or tiered approach to provide an orderly roll-out of the program. Should the District proceed with PR 3503, a tiered approach must be developed, since it will not be possible to comply with the deadlines in the current draft.

As drafted, compliance with PR 3503 will require the expenditure of substantial capital and labor. The technical burden to gather an inordinate amount of data for thousands of sources within a very large geographic area will cause a disproportionate expenditure of resources for the inventory and HRAs, and will not result in emission reductions. Given that these costs will be in addition to the costs required to comply with portions of the MOU, the burden on the railroads cannot be justified. This is especially true where, as here, the ARB – the agency imbued with the expertise to address air quality issues state-wide – has agreed to develop, and underwrite the development of, a mechanism to control air emissions from railyards. The District has provided no technical basis to depart from or duplicate the ARB's efforts, and no basis to pass on costs related to the District's proposed duplication of efforts to AAR members. In fact, AAR and the Railroads dispute that any technical basis for such decisions could exist.

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Overview of Legal Comments

There are several legal deficiencies in PR 3503. The process employed by the District to promulgate PR 3503 violates CEQA. The proposed rule seeks to evade CEQA by claiming that it is exempted under an information gathering exception. The exception is not applicable because the PR 3503 is not merely about the collection of information. Instead, PR 3503 imposes a combined emission inventory, health risk assessment and public notice requirement on the Railroads.

Moreover, PR 3503, as originally promulgated by the District in March 2005, is a integral part of a larger project which additionally encompasses Rules 3501, 3502 and 3504 (all parts of Regulation XXXV). As admitted by the District, these latter rules require a Program Environmental Assessment. The District may not impermissibly piecemeal Regulation XXXV in an attempt to circumvent application of CEQA to Rule 3503.

The District's promulgation of Rule 3503, and the accompanying Regulation XXXV, exceeds the District's authority under federal and California law. The federal Clean Air Act (*See* 42 U.S.C. §§ 7401, *et seq.*) and the Interstate Commerce Commission Termination Act (*See* P.L. 104-88; 49 CFR Part 1000, *et seq.*), as well as the federal Surface Transportation Board implementing regulations (*See, e.g.,* 49 C.F.R. Part 1000 *et seq.*), the Federal Railroad Safety Act (49 U.S.C. § 20101, *et seq.*) and the Federal Railroad Administration's implementing regulations and decisions (*See, e.g.,* 49 C.F.R. Part 200 *et seq.*), also confirm that the federal government has occupied the field of railroad regulation.

Moreover, in California, with the acquiescence of the Federal Environmental Protection Agency ("EPA"), the California Legislature has provided for the California Air Resources Board ("ARB") to occupy the field of mobile source control (through its regulation of fuel content) including, if there is any statewide authority remaining, the field of railroad control. (*See* Health & Safety Code §§ 43013, 43018, 40702.) The District simply lacks the authority to promulgate PR 3503.

Overview of Technical Comments

Regarding technical deficiencies, AAR particularly objects to PR 3503 because the Proposed Rule will mislead the public by requiring the development and communication of gross overstatements of the possible public health risk posed by railroad operations. Extremely conservative emissions, modeling and health risk assumptions included in or mandated by PR 3503 relate to:

Mr. Andrew Lee
September 7, 2005
Page 4

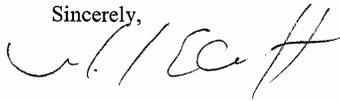
- Emissions assumptions;
- Modeling assumptions;
- The Diesel Particulate Matter (DPM) potency factor; and
- Failure to allow for presentation of Tier-2, Tier-3 and Tier-4 information, or other information generated by otherwise appropriate analysis, in the main report, instead relegating it to an appendix that the public is likely to miss or discount.

Use of such gross over-predictions as a basis for informing the public about actual health risk is extremely misleading. AAR and the Railroads support accurate and complete communication of risk, but PR 3503 falls far short of achieving such an objective.

Furthermore, PR 3503 duplicates the ARB's work state-wide. Significant ARB efforts to reduce locomotive emission impacts of railyards are underway, including implementation of the MOU and new state and federal regulations to address emissions from on- and off-road vehicles at all facilities, including rail yards.¹

For the numerous legal, technical and other issues raised and discussed herein and in the memoranda attached hereto, we respectfully request the District to withdraw PR 3503 from consideration.

Sincerely,



Mark E. Elliott

Enclosures

cc: Michael Krause, South Coast Air Quality Management District
Michael Rush, AAR
Lanny Schmidt, UP
David Young, UP
Russell Light, BNSF

¹ See generally, Air Resources Board, *Rail Yard Emission Reduction Program*
<<http://www.arb.ca.gov/railyard/railyard.htm>> (Rev. Aug. 30, 2005).

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Mark Stehly, BNSF
Kirk Marckwald, CEA
Peter Okurowski, CEA
Michael Barr, PWSP
Eric White, ARB
Michael Terris, ARB
Catherine Witherspoon, ARB

APPENDIX D

PR 3503 COMMENT LETTER – SEPTEMBER 7, 2005

ASSOCIATION OF AMERICAN RAILROADS

LEGAL AUTHORITY TO PROMULGATE PROPOSED RULE 3503

(EXHIBITS 1 THROUGH 17 AVAILABLE UPON REQUEST)



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MEMORANDUM

To: South Coast Air Quality Management District
From: Mark E. Elliott
Date: September 7, 2005
Re: Legal Authority to Promulgate Proposed Rule 3503

1. Introduction

We submit these comments on behalf of the Association of American Railroads ("AAR"), Union Pacific Railroad Company and The BNSF Railway Company (collectively, the "Railroads") regarding the South Coast Air Quality Management District's (the "District") Proposed Rule 3503 ("PR 3503" attached hereto as Exhibit 1) and proposed Regulation XXXV. We also provide comments on the Preliminary Draft Staff Report (August 2005) (the "Staff Report") and Attachments A (Railyard Emissions Inventory Methodology, Version 1.1, July 2005 ("Emission Inventory Methodology")) and B (Health Risk Assessment Guidance for Railyards and Intermodal Facilities, August 2005 ("HRA Guidance") attached hereto as Exhibit 2).

2. Background

The District annually publishes a list of all rules scheduled for consideration the following calendar year. As part of this listing process, and in preparation for the December 3, 2004 meeting of the District's Governing Board (the "Board"), in November 2004 the District published its report of anticipated rulemaking for the 2005 calendar year. (Rule and Control Measure Forecast ("Master Calendar") attached hereto as Exhibit 3.) In the Master Calendar, the District noted that, "[a]pproximately eight rules or rule amendments will be considered by the Board in 2004 as strategies to reduce air toxic emissions, **of which four will be designed to address railyard and locomotive emissions.**" (Ex. 3, p. 1 (emphasis added).) These four rules were identified as Rule 3501--Recordkeeping for Locomotive Operations, Rule 3502--Risk Assessment Requirements for Railyard Operations, Rule 3503--Idling Reductions for Locomotive Operations, and Rule 3504--Diesel Risk Reductions for Railyard Operations. (*Id.* at p. 3.)

Included with the Master Calendar was Attachment B entitled, the "Toxics Rule Activity Schedule" (the "Toxics Schedule"). The Toxics Schedule provided greater detail on the railroad regulations noting,

Proposed Rules 3501 and 3502 will establish recordkeeping requirements for locomotive operations and risk assessment requirements to quantify potential toxic risks from railyard operations. Proposed Rules 3503 and 3504 will establish idling reduction requirements to reduce diesel particulate from locomotive operations, and requirements to reduce emissions from railyard operations. (Ex. 3 at p. B-1.)

In preparation for the April 1, 2005 Board meeting, the District prepared an update to the Master Calendar. ("April Master Calendar" Attached hereto as Exhibit 4.) The April Master Calendar included a more refined description of the railroad regulations. "Regulation XXXV", as it was now called, proposed in part to,

... establish requirements for diesel locomotives and diesel sources at major railyards in the Basin. The objective of this proposed regulation is to quantify diesel particulate and the associated cancer risk that occurs from idling freight locomotives and associated diesel sources used at railyards. Specifically, this proposed regulation will establish monitoring and recordkeeping requirements for idling locomotives and submittal of an emissions inventory and health risk assessment for all diesel equipment used at major railyards. In addition, the proposed regulation will require the development and implementation of an idling minimization plan, and development and implementation of a risk reduction plan for major railyards. (Ex. 4 at p. B-1.)

In March 2005, the District gave notice of the first public workshop for Proposed Regulation XXXV. (See Exhibit 5.) The workshop was hosted on April 6, 2005 and copies of Proposed Rules 3501 through 3504 (Attached hereto as Exhibits 6 through 9, respectively) as well as Preliminary Draft Staff Reports for each proposed rule dated March 2005 (Attached hereto as Exhibits 10 through 13, respectively) were distributed to the attendees. The 2005 Preliminary Draft Staff Report for Proposed Rule 3503 provided a detailed introduction to Proposed Regulation XXXV – Railroads and Railroad Operations:

Proposed Regulation XXXV – Railroads and Railroad Operations proposes four rules focusing on monitoring and recording locomotive idling events and calculating railyard emissions and conducting risk assessment. In addition, the proposed rules seek to minimize emissions from locomotive idling and reduce cancer risk from Basin railyards. A summary of the proposed rules to address railroad operations in the District is as follows:

- PR 3501 – Recordkeeping for Locomotive Idling would require locomotive operators to record the time, date, and duration of any idling event that occurred for more than a 15 minute time period. Locomotives that are equipped with anti-



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idling devices that would be operated to limit idling to below 15 minutes would be exempt recordkeeping requirements.

Under PR 3501, the locomotive operator would be required to submit a weekly report, for all idling events that occurred over the past week and an explanation of the reason for idling. PR 3501 also requires locomotive operators to submit an annual report identifying all locomotives operated in the district and those locomotives that are equipped with anti-idling devices that are exempt from recordkeeping requirements.

- PR 3502 – Minimization of Emissions from Long Duration Idling would prohibit operators from idling for more than 30 minutes unless the locomotive is being used as an emergency vehicle, a mechanic is idling the locomotive for maintenance or diagnostic purposes, or the district could not require an action to be implemented to reduce idling below 30 minutes due to preemption by federal law. In addition, if a locomotive operator can demonstrate that equivalent emission reductions from using a control technology or alternative fuel can achieve emission reduction equivalent to limiting idling to less than 30 minutes, the operator may be allowed to idle more than 30 minutes.

- PR 3503 – Emissions Inventory and Health Risk Assessment for Railyards would require railyard operators to submit facility-wide emissions inventories of criteria and air toxic pollutants for all stationary and mobile sources within the railyard. In addition, operators of railyards would be required to submit facility-wide health risk assessment plans, including diesel PM emission inventories and health risk assessments. Plans would include emissions inventories of all onsite pollutants, documentation of emission factors used and emission calculations. In addition, data would include information to calculate cancer risk and exposure isopleths identifying surrounding areas with cancer risks greater than 10-in-one-million. Under PR 3503, railyards with cancer risks exceeding 10-in-one-million would be required to conduct public notification.

- PR 3504 – Risk Reduction from Diesel Related Operations at Railyards would require operators of railyards with cancer risks exceeding 25-in-one-million, as determined pursuant to PR 3503, to submit for AQMD approval risk reduction plans describing strategies to be used to reduce emissions to achieve cancer risks of 25-in-one-million or less. Annual progress reports would be required summarizing progress made toward implementing risk reduction plans. In addition, railyard operators would be required to develop community air emissions action plans to facilitate coordination with the communities surrounding railyards. Fence line air emissions monitoring programs would also be required for facilities with approved health risk assessments showing risks



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greater than 100 in a million or hazard indices of 5.0. Rail operators would be exempt from implementing any risk reduction measures that AQMD could not require due to preemption by federal law, provided the factual basis for the claim of federal preemption is submitted to the AQMD. (Ex. 12, pp. 1-1 to 1-2.)

As presented by the District, both in its written materials as well as at the April 2005 workshop, Regulation XXXV was a cohesive regulatory project with far-reaching impacts on railroad operations and significant environmental impacts. This cohesive relationship between the rules was recognized by the District in its discussion of the CEQA impact on the proposed regulation:

In accordance with the California Environmental Quality Act (CEQA), the AQMD, as the Lead Agency, has reviewed the proposed locomotive and railyard rules, which includes proposed Rules 3501, 3502, 3503 and 3504. Consistent with CEQA Guidelines §15168(a), the AQMD has decided to prepare a Program Environmental Assessment (PEA) for the proposed locomotive and railyard rules since the proposed project is: (1) a series of actions that are related geographically; (2) logical parts in chain of contemplated actions; (3) connected with the issuance of rules/regulations, which is a continuing program; and/or (4) carried out with the same authorizing statutory or regulatory authority having generally similar environmental effects which can be mitigated in similar ways. Therefore, pursuant to state CEQA Guidelines §15252, AQMD staff will prepare a Draft PEA which will analyze the potential adverse environmental impacts from the proposed project. (Ex. 12, pp. 3-2.)

Following the April 2005 workshop, the District apparently re-assessed its rule-making calendar and subsequently elected to present only PR 3503 for hearing before the Board in October 2005.¹ District staff further represented in public meetings on August 23 and 30, 2005 that Proposed Rules 3501 and 3502 will be presented for hearing in December 2005. Proposed Rule 3504 has reportedly been taken off calendar so that District Staff may "work" on it. District staff, however, reported at the August 23, 2005 public meeting that Rule 3504 would be promulgated in the not-to-distant future.

In conjunction with this change of schedule, in August 2005 the District issued a revised Proposed Rule 3503. (See Ex. 1.) The District also issued an updated Preliminary Draft Staff Report (See Ex. 2). As noted above, the August 2005 Staff Report was significantly revised and now contains several detailed appendices and attachments relating to compliance with PR 3503.

¹ During this same period, the Board passed a resolution concerning the MOU (discussed below). On July 8, 2005 the Board directed staff to continue developing Regulation XXXV, "related to railroad idling and rail operations risk assessment and reduction with the goal of Board consideration this Fall", thus demonstrating that both the Board and District staff intend to promulgate all of the accompanying rules, not merely PR 3503.



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In addition to providing more substance on the rule, the August 2005 Staff Report significantly deviates from the District's original CEQA analysis. Rather than undergoing a Program Environmental Assessment as proposed in the March 2005 Staff Report (*See Ex. 12*), the District now concludes that PR 3503 is entirely exempt from CEQA:

The SCAQMD initially proposed four railyard rules as a project for adoption by the Board but has now closely considered whether the contents of the four rules are so intimately related that joint consideration is necessary. Based on that evaluation, staff determined that PR 3503 should be proposed separately. The requirements of PR 3503 are independent of the other railroad rules, and PR 3503 serves information-gathering and information-disseminating purposes that are quite distinct from the purposes and requirements of each of the other proposed rules. PR 3503 will serve those independent, information-related purposes whether or not any other rules are adopted. Furthermore, separate consideration of PR 3503 will increase the public's ability to consider in depth the types of information that would enhance public knowledge of risks inherent in railyard emissions. Accordingly, the staff will propose that the Board adopt PR 3503 regardless of whether it adopts any other railroad rules.

Under the California Environmental Quality Act (CEQA), the SCAQMD is the Lead Agency and has reviewed Proposed Rule (PR) 3503 pursuant to CEQA Guidelines §15002(k)(1). PR 3503 is an information-gathering and information-disseminating rule that requires railroads to develop an emissions inventory and health risk assessment to estimate cancer risk, chronic and acute hazard indices, as well as cancer burden caused by emissions at railyards. In addition, PR 3503 also requires public notification if the approved health risk assessment exceeds a certain risk threshold level.

Information gathered by this rule may or may not be used in future rulemaking that has not been approved adopted or funded. Accordingly, this proposed rule is exempt from CEQA pursuant to the categorical exemption for information collection. CEQA Guidelines §15306 exempts information-gathering either for its own sake or as part of a study leading to future action which the agency has not yet taken. Further, the proposed project will consist of basic data collection, research and resource evaluation activities and will not result in a serious or major disturbance to an environmental resource.

Implementing PR 3503 will have no significant adverse environmental impacts. Since the requirements are administrative in nature, it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, and thus, the project is also exempt from the requirements of CEQA pursuant to state CEQA Guidelines §15061(b)(3).



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Since PR 3503 is an information-gathering and information-disseminating rule, it is not expected to generate any adverse environmental impacts. Nor is it expected to cause cumulative impacts in conjunction with other projects that may occur concurrently with or subsequent to the proposed project (CEQA Guidelines §15065(a)(3)). Where, as here, a proposed project has no environmental impacts whatsoever, it does not contribute to any cumulative impact, and cumulative impacts created by other projects need not be discussed. In the case of PR 3503, the proposed project's contribution to a potentially significant cumulative impact cannot be cumulatively considerable and, thus, is not significant (CEQA Guidelines §15065(a)(3)).

A Notice of Exemption has been prepared pursuant to CEQA Guidelines §15062 - Notice of Exemption. The Notice of Exemption will be filed with the county clerks of Los Angeles, Orange, Riverside and San Bernardino counties immediately following the adoption of the proposed project. (Ex. 2, pp. 3-3 to 3-4.)

Beyond the foregoing statement, the District has provided no explanation why Regulation XXXV no longer constitutes a single regulatory proposal or why PR 3503 is independent of the other proposed rules.

3. CEQA Compliance

The District's exemption of PR 3503 from CEQA and its conclusion that the rule may be segregated from the rest of Regulation XXXV directly violates California law. Under CEQA, all agencies of State government that regulate activities affecting the quality of the environment must give major consideration to avoiding injury to the public health and welfare. According to guidelines published by the California Resources Agency, a decision to approve and implement a regulation is an "approval" under the regulations published by the Resources Agency to interpret CEQA insofar as the decision "commits the agency to a definite course of action." (14 C.C.R. § 15352.)

Projects carried out by state agencies are subject to the same level of review as that of private projects that are reviewed by public agencies. (Public Resources Code § 21001.1.) CEQA contains an exemption for certain regulatory programs of state agencies that have been certified by the Resources Agency as meeting the overall requirements of CEQA without having to comply with some of the specific requirements. These agencies are known as "certified agencies" and the environmental documents they prepare are referred to as "functional equivalent" documents. The District is a certified agency and therefore must adhere to its Rule 110 which controls the District's rule adoption procedures under CEQA. Rule 110(c) specifically mandates staff reports to include a description of the proposed action, an assessment of anticipated significant long- or short-term adverse and beneficial environmental impacts



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provisions of CEQA. (Public Resources Code §21080(b)(10) and 21084(a).) As noted above, PR 3503 goes far beyond information gathering for the purpose of carrying out a duty imposed on the District. California courts have ruled that in determining whether a project meets the requirements of a categorical exemption the exemption must be narrowly construed. (*Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 842.) Furthermore, strict construction of the exemptions serves the purpose of ensuring that categorical exemptions are interpreted in a manner affording the greatest environmental protection within the reasonable scope of their statutory language. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966.)

Courts have previously rejected claimed categorical exemptions from CEQA for environmental protection measures when the decision-making agency “cannot say with certainty ‘there is no possibility that the activity in question may have a significant effect on the environment.’” (*Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.*, 9 Cal. App. 4th 644, 658 (1992), citing 14 CCR § 15061(b)(3), disapproved on another ground in *Western States Petroleum Assn. v. Superior Court*, 9 Cal. 4th 559, 570 and fn. 2 (1995); see also *Wildlife Alive v. Sherman Chickering*, 18 Cal. 3d 190, 206 (1976) (“where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper”).) Furthermore, the CEQA Guidelines preclude application of categorical exemptions to situations where “the cumulative impact of successive projects of the same type in the same place, over time is significant.” (14 CCR § 15300.2(b).)

The District is also incorrect in its assertion that PR 3503 is “merely administrative in nature” and “it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment” and thus the rule is further exempted under CEQA Guidelines §15061(b)(3). (Staff Report, Ex. 2, p. 3-4.) As will be explained in more detail below, this conclusion is incorrect because (1) the District is not considering the whole “project” in its analysis and (2) its analysis fails to fully evaluate the potential for a direct or indirect change in the environment.

Under CEQA Guidelines § 15061 (14 CCR § 15061), a lead agency must first determine whether an activity is a project under CEQA before it may evaluate applicable exemptions. The definition of “project” in the regulations includes the “whole of an action” undertaken, supported, or authorized by a public agency that may cause either a direct “or a reasonably foreseeable indirect physical change in the environment.” (Public Resources Code § 21065; 14 CCR § 15378(a).) The District cannot simply pre-suppose that PR 3503 will have no significant effect; rather it must evaluate reasonably foreseeable impacts on the environment which may stem from the passage of the rule and its counterparts, PR 3501 and 3502. An example, as discussed below, would be modal shifts in freight transportation and the resulting impacts on the environment.



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In light of CEQA's conservative judicial mandate, it is improper for the District to conclude that a rule requiring the preparation of health risk assessments and public notice is "basic data collection" and "merely administrative in nature" and therefore entitled to a CEQA exemption.

B. Insufficient Definition of the Project and "Piecemealing"

The District inadequately defines PR 3503, exclusive of Regulation XXXV and the accompanying rules, as the "project." This piecemealing of the railroad rules is not permitted under CEQA. California's courts have repeatedly held that "an accurate, stable and finite project description is the *sin qua non* of an informative and legally sufficient [CEQA document]." (*County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 193 (1977).) PR 3503 and the August 2005 Staff Report improperly seek to ignore the history of Regulation XXXV and the interrelationship between these rules. As noted above in the Background section, when this rule was first publicized in March 2005, it was part of a single regulation comprising Rules 3501 through 3504. These rules were intended to collectively regulate the railroad operations and emissions in the South Coast Air Basin:

Proposed Regulation XXXV – Railroads and Railroad Operations proposes four rules focusing on monitoring and recording locomotive idling events and calculating railyard emissions and conducting risk assessment. In addition, the proposed rules seek to minimize emissions from locomotive idling and reduce cancer risk from Basin railyards. (Ex. 12, p. 1-1.)

It was only recently that the District chose to defer promulgation of Rules 3501 and 3502 until December 2005 and put off Rule 3504 until, likely, calendar year 2006. Yet the District's decision to sequentially pass the four parts of Regulation XXXV does not mean that it can ignore those additional rules, and the associated environmental impacts associated, in analyzing PR 3503 for CEQA purposes. The District explains its rationale for segregating PR 3503 with the statement that:

The SCAQMD initially proposed four railyard rules as a project for adoption by the Board but has now closely considered whether the contents of the four rules are so intimately related that joint consideration is necessary. Based on that evaluation, staff determined that PR 3503 should be proposed separately. The requirements of PR 3503 are independent of the other railroad rules, and PR 3503 serves information-gathering and information-disseminating purposes that are quite distinct from the purposes and requirements of each of the other proposed rules. (Staff Report, Ex. 2, p. 3-3.)

However, the mere fact that PR 3503 may be voted upon first does not mean that the "project" required for evaluation under CEQA can be segmented as well.



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CEQA does not allow this type of piecemeal review of environmental impacts. Rather it requires a thorough and complete analysis, at the earliest possible time, so that a CEQA document can serve as an informational and planning document which alerts decision makers and the public to environmental impacts and allows for the development of mitigation measures that can be imposed and alternatives that can be considered. The project analyzed by the District must include all key components, notwithstanding the characterization by the District that PR 3503 is "independent" of the other rules and will be passed whether or not any other rules are adopted or the fact that a more detailed environmental review would occur at some point in the future. The mere fact that District staff admit that Rules 3501 and 3502 will likely be considered before the Board in December 2005, and a Program Environmental Assessment will be prepared to support them, establishes that the same level of CEQA review must start at this time with PR 3503.

California law firmly establishes that the definition of "project" must be broad to maximize protection of the environment. CEQA requires that environmental considerations must not be concealed by separately focusing on isolated parts, overlooking the cumulative effect of the whole action. (*See Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.) A public agency may not divide what was one project into individual subprojects to avoid responsibility for considering the environmental impact of the project as a whole. (*Orinda Association v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171.) The State CEQA Guidelines provide that, "[t]he lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect." (14 CCR § 15003(h) (emphasis added)). The Guidelines further provide that, "Where individual projects are, or a phased project is, to be undertaken and where the total undertaking comprises a project with significant environmental effect, the lead agency shall prepare a single program EIR for the ultimate project. . . ." (14 CCR § 15165.) As stated in the seminal California Supreme Court case *Bozung v. LAFCO*, 13 Cal. 3d at 283-84, CEQA mandates that "environmental considerations do not become submerged by chopping a large project into many little ones"

Any claim by the District of the unforeseeability of the passage of the additional railroad regulations is refuted by the statements of staff and the current time line for Board review. In *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.*, 47 Cal. 3d 376 (1988), the California Supreme Court rejected the Regents' claim that its EIR need not analyze the anticipated but unapproved future use and expansion of a medical research facility. (*Id.* at 397.) Despite the Regents' claimed lack of precise plans, the Court held that there was "telling evidence" that at the time the Regents prepared the EIR, they "had either made decisions or formulated reasonably definite proposals as to future uses of the building." (*Id.* at 398.) "The fact that precision may not be possible . . . does not mean that no analysis is required. Drafting an EIR involves some degree of forecasting. While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (*Ibid.*)

Moreover, regardless of the specific impact of PR 3503, the District must also analyze the impact of the originally proposed Rule 3504 (as well as Rules 3501 and 3502) which has been



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consistently (until now) defined as the counterpart to PR 3503. The uncertainty of the date and exact form of Rule 3504 does not prevent this analysis, or allow for its deferral, since it is a reasonably foreseeable event which will have, at a minimum, indirect physical changes to the environment. This is also true for the analysis of Rule 3501 and 3502 which the District has conceded will be subject to a future environmental assessment under District guidelines. In *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District*, 202 Cal. App. 3d 1136, 1143 (1988), an open space district sought to defer CEQA review of its remediation and management of surplus federal property until after it had acquired the property. In treating the acquisition as exempt, the lead agency described the project in terms of the transfer of title rather than the acquisition of property which would be subject to a remediation plan due to its contaminated state. The court rejected this approach, explaining that, “[a]n accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity. . . . A project is the ‘whole of the action, which has a potential for resulting in a physical change in the environment, directly or ultimately,’ including ‘the activity which is begin approved and which may be subject to several discretionary approvals by governmental agencies. . . . Project is given a broad interpretation in order to maximize protection for the environment.” (*Id.* at 1143.)

C. Need for a Thorough Environmental Assessment

The preparation, public review, and final agency approval of an environmental impact report, or its functional equivalent, is central to the accomplishment of CEQA’s objectives. The heart of an EIR or equivalent document is the agency’s analysis of the possible impacts of the action it is considering, the agency’s analysis of alternatives, and the agency’s response to public comments. The “cumulative effects” of related past, present, and future actions must be considered as part of this analysis. (14 CCR § 15355.)

Regulation XXXV and its rules, including PR 3503, constitute a very diverse and substantial collection of “discretionary activities proposed to be carried out or approved by” the District and thus are subject to CEQA review. CEQA review will be a critical part of Regulation XXXV and PR 3503 going forward. Only a full EIR, or in this case its functional equivalent, prepared through the District’s well-tested CEQA process, will adequately inform governmental decision-makers and the public about the potential, significant environmental effects of the proposed activities.

Based on the very substantial and diverse impacts of the measures in Regulation XXXV, the initial draft of the CEQA section in the March 2005 Staff Report correctly concluded that it would be appropriate to prepare a “Program Environmental Assessment (PEA) for the proposed locomotive and railyard rules since the proposed project is: (1) a series of actions that are related geographically; (2) logical parts in [a] chain of contemplated actions; (3) connected with the issuance of rules/regulations, which is a continuing program; and/or (4) carried out with the same authorizing statutory or regulatory authority having generally similar environmental effects



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which can be mitigated in similar ways.” (Ex. 12, p. 3-2). The AAR and Railroads agree that it is appropriate for District staff to prepare a Draft PEA which will “analyze the potential adverse environmental impacts from the proposed project.” (*Ibid.*) We further note that staff should consider all potential adverse environmental impacts from this rulemaking such as, but not limited to, the significant impacts that would result from a substantial modal shift from rail to on-highway trucking, which may occur if the Rules 3501-3503, and certainly 3504, are adopted or implemented.

The proposed measures will have “potentially significant impacts” upon several environmental factors, including but not limited to, air quality, land use/planning, transportation/traffic, utilities/service systems and noise. (See CEQA Guidelines, 14 CCR § 15000, et seq., Appendix G.) If the lead agency determines there is substantial evidence in the record that the project may have a significant effect on the environment, as it should in this instance, the lead agency shall prepare an EIR (*Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988 (emphasis added)).

As the Railroads and the AAR have repeatedly explained to the District, proposed District measures to reduce locomotive and associated railyard emissions will have potentially drastic impacts on California’s environment and beyond. In the introduction to the August 2005 Staff Report, the District asserts that rail operations are a large source of diesel particulate matter emissions and criteria pollutants (NOx, VOC, Co and SOx) in the South Coast Air Basin. (Ex. 2, p. 1-1). According to the District, the 2003 Air Quality Management Plan estimates emissions of locomotive particulate matter less than 10 microns to be 1.01 tons per day and emissions of particulate matter less than 2.5 microns to be 0.93 tons per day. (*Ibid.*) However, despite these emission levels, the District must concede that the railroad emissions levels are well below those of heavy duty diesel trucks.

Numerous studies have evaluated the affect of regulation of emissions from locomotives and the resulting impact of shifting freight transport to truck operations. All of these studies, whether by governmental agency or private parties, have concluded that rail operations account for lower emissions of criteria and toxic pollutants and generate fewer emissions per ton mile of freight. For example, numerous parties agree that, on a per ton mile basis, rail is a significantly less polluting means of freight transport than truck.

The same comparison can be made for overall contribution of emissions to the South Coast Air Basin’s criteria and toxic air contaminant inventories. For estimated periods between 1987 and 2010, trains were expected to contribute approximately 2% of the NOx inventory and 0.7% of the PM 2.5 inventory. (Association of American Railroads, *Overview of Rail Issues*, August 12, 2005, slide 7, attached hereto as Exhibit 14.) Conversely, diesel trucks are expected to contribute 21% of the NOx inventory and 2.4% of the PM 2.5 inventory. (*Ibid.*)



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These comparisons are expected to remain accurate into the foreseeable future. In addressing the No Net Increase proposal in the Port of Los Angeles, the Pacific Merchant Shipping Association estimated that PM 2.5 from diesel engines in 2030 will come primarily from marine sources. (Garrett, T.L., *Maritime Growth, a Sustainable Future*, July 29, 2005, Slide 9, Ex. 15) Mr. Garrett further reported that locomotives will be a dramatically lower source of emissions, even below that of truck traffic. (*Ibid.*)

Agreement with the foregoing conclusions comes from both sides of the ideological fence. In its August 2004 report entitled "Harbor Pollution," the Natural Resources Defense Council ("NRDC") echoed the foregoing statements. (Bailey, Diane, et al., *Harbor Pollution, Strategies to Cleanup U.S. Ports*, August 2004 (attached hereto as Exhibit 16.)) The NRDC included a comparison of "Rail Versus Road" and posed the question of whether freight should be shipped via rail or by road. NRDC concluded that to minimize emissions, fuel consumption, cost, accidents, and traffic congestion, the better answer was rail. (*Id.* at 52.) In a study jointly commissioned by the Environmental Protection Agency, the Federal Railroad Administration and the Federal Highway Administration found that transferring freight from today's average truck fleet to rail would reduce NOx, CO, PM10 and VOC emissions and that pollution reductions can be realized at even greater rates in the future as more freight is transferred to rail. (*Ibid.*)

In light of the significant environmental benefits from freight transport via rail, it is necessary in any environmental analysis to evaluate the impact of any rule or regulation which will result in modal shift from rail to road.² Any regulation, such as Rules 3501 to 3504, which may cause the removal of a train from the tracks will result in the freight being transported aboard a long-haul diesel truck. Given that one double stack train could equal up to 280 diesel trucks, this would result in significant environmental impacts. (Exhibit 14, *supra*, at Slide 14.) Even the Federal Environmental Protection Agency is cognizant of the potential environmental impacts of a modal shift for freight transportation. In its December 1997 Regulatory Announcement for regulations implementing section 209(e) of the Clean Air Act (discussed below), EPA notes that its preemptive regulation of locomotives is beneficial to the environment because without preemption, "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 patchwork state and local regulations. (For example, transportation by rail causes about one-third of the pollution as transport by truck per ton-mile of freight.)" (Regulatory Announcement,

² As the Railroads have previously expressed to the District, promulgation of PR 3503 and Regulation XXXV are in direct conflict with the MOU (discussed below). As a result of this regulation, the Railroads have the right to terminate the MOU. Such termination would result in elimination of the 1998 fleet average agreement, thereby increasing emissions from locomotive operations throughout the State of California. This impact from the promulgation of these rules must be taken into consideration in the District's CEQA review.



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EPA Office of Mobile Sources, EPA420-F-97-050, December 1997, attached hereto as Exhibit 17.)

Modal shifts of this nature will have widespread direct and indirect effects that must be evaluated under CEQA. Reference to the CEQA checklist (CEQA Guidelines, Appendix G) to identify environmental factors potentially affected by regulations which alter railroad operations reveals numerous potential impacts which require evaluation. First and foremost, as noted above, the impact on air quality must be evaluated. However, numerous additional factors also must be considered. These factors include an evaluation of aesthetics; biological resources; hazards and hazardous materials; land use and planning; noise; transportation and traffic; and population and housing. Any dramatic increase in truck traffic over rail traffic could adversely affect the environment under all of these categories and in potentially many more locations than rail traffic as increased truck traffic spreads out across numerous interstate and intrastate highways. As a result, the physical impacts of trucking operations from emissions, to hazardous materials spills, to noise, to traffic, to aesthetics, etc. are compounded dramatically over rail operations. All of these issues must be addressed under a robust environmental analysis in order to comply with CEQA.

CEQA requires that the District complete an Environmental Assessment for any project that gives rise to a fair argument that significant environmental impacts may result. An EIR must be prepared whenever substantial evidence in the record supports a fair argument that significant impacts may occur. (Public Resources Code § 21080; *Laurel Heights Improvement Assoc. v. Regents of the Univ. of Calif.*, 6 Cal. 4th 1112, 1123 (1993).) The "fair argument" standard creates a low threshold for requiring preparation of an EIR. (*Citizens Action to Serve All Students v. Thornley*, 222 Cal.App.3d 748 (1990).) The District may issue a negative declaration only if "[there is no substantial evidence before the agency that the project may have a significant effect on the environment." (Public Resources Code § 21080(c)(1); *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307, 1318 (1992); *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 75 (1975); *Quail Botanical Gardens v. City of Encinitas*, 29 Cal.App.4th 1597 (1994).) An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. *Sierra Club v. County of Sonoma*, 6 Cal.App.4th 1307, 1318 (1992).) Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR, even though it may also be presented with other substantial evidence that the project will be not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 86).

As discussed above, the District's materials for Regulation XXXV, as well as the materials submitted with these comments, contain credible evidence of the potential impacts related to air quality, biological resources, aesthetics, transportation, noise, hazards and hazardous materials to name a few. Due to substantial evidence of the complete project's potentially significant impacts, preparation of an Environmental Assessment is required before the Board can act upon PR 3503.



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4. **Regulatory Authority**

A. **Federal and California Exclusive Authority**

Federal and California exclusive authority precludes regulation of locomotives by the District. The District improperly ignores federal and state regulation of railroads under the Federal Clean Air Act and the Interstate Commerce Commission Termination Act (*See* P.L. 104-88; 49 CFR Part 1000, et seq. “ICCTA”) and the existing ARB/Railroad Statewide Agreement – Particulate Emissions Reduction Program at California Rail Yards (June 2005) (the “MOU”). Instead, the District unjustifiably, argues that PR 3503 does not (1) control the design or production of locomotives and locomotive engines and (2) does not regulate activities that would further rail operations. Both of the contentions are wrong.

i. **Federal Clean Air Act**

The Federal Clean Air Act, Section 209(e)(1) provides in pertinent part,

“(1) Prohibition on certain State standards

“No State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from ...

“(B) New locomotives or new engines used in locomotives.” 42 U.S.C. § 7543(e)(1) (emphasis added).”

The District is a “political subdivision” of California covered by this prohibition. Each of the District staff’s proposed rail yard rules would constitute “any standard or other requirement” prohibited by Clean Air Act section 209(e). If the Board approves the staff’s proposed rules, the Board would “adopt” prohibited standards or requirements.

The term “standard or other requirement” is very broad. As the District noted in its legal brief filed in the United States Supreme Court in the *Engine Manufacturers Association* case, Clean Air Act section 209(e)—which applies to locomotives—is even broader than the federal preemption provision in Clean Air Act section 209(a)—which applies to the South Coast District’s fleet regulations recently found to be preempted by the United States Supreme Court:

“... Section 209(e), applicable only to certain ‘nonroad vehicles [including new locomotives],’ preempts any state or local ‘standard *or other requirement* relating to the control of emissions’ of those vehicles. 42 U.S.C. § 7543(e) (emphasis added). The omission of similar language in the parallel provision of section 209(a) establishes, at a minimum, that at least some state or local requirements ‘relating to the control of emissions’ of the on-road vehicles at issue here are *not* ‘standards.’” (Brief for Respondent South Coast Air Quality Management



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District at 18, *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004) (No. 02-1343)). (Emphasis added in District brief).

The United States Supreme Court did not accept the District's constrained reading of the fleet preemption provision in section 209(a) (*See Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004)) and recent district court rulings do not change that analysis. It is even more unlikely to accept any constrained reading of locomotive preemption in section 209(e).

Apart from the scope of the word "standard," the United States Supreme Court also held that the District's fleet rules were preempted as a District "attempt to enforce" emission standards. The EPA's federal standards applicable to locomotives include standards applicable to freshly manufactured locomotives and also include retrofit standards applicable to remanufactured locomotives, some of which are older than the South Coast District. The equipment covered by the federal locomotive regulatory program far exceeds the types of equipment covered even by California's most aggressive motor vehicle standards. In addition, the EPA locomotive regulations include requirements such as initial locomotive and engine testing, smoke measurement, anti-tampering, in-use maintenance, labeling, recordkeeping, in-use inspection, defect reporting, treatment of confidential information, in-use testing, national security provisions and an entire Subpart on "Requirements Applicable to Owners and Operators of Locomotives and Locomotive Engines" (*See* 40 CFR Part 92, Subpart K) that expressly applies to "railroads." (40 CFR § 92.1001.) Any District rule regulating emissions from locomotives at rail yards or elsewhere would certainly and impermissibly conflict with, interfere with, contradict or duplicate the EPA regulatory program in ways that would be more intrusive than the District fleet rules overturned by the Supreme Court.

Since each and every District rail yard proposal aims directly or indirectly to control emissions from locomotives and related operations, or to attempt to enforce locomotive emission controls, they would be within the very broad scope of the preemption established by the United States Congress in Section 209(e) of the federal Clean Air Act.

Last year, the ARB Chairman explained how a District "mitigation fee" relating to the control of locomotive emissions would be preempted by the federal Clean Air Act:

"... the mitigation fees in SB 1397 would be inconsistent with section 209(e)(1). Since the fees have a nexus with the emissions caused by the railroads' locomotives, the fees themselves would relate to the control of emissions, a preempted area for state and local regulation. The mitigation fees would also function as a surrogate for direct emission controls and, therefore, would relate to the control of emissions, again, a preempted area for state and local regulation." (Letter from Alan C. Lloyd, Ph.D., Chairman, Air Resources Board, to



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Dr. William A. Burke, Chairman, South Coast Air Quality Management District, p. 2 (July 28, 2004). See also, "AQMD's Legal Authority" at <http://www.aqmd.gov/legal/legalaut.html>.

Because every one of the District's proposed rules, including PR 3503, has a nexus to locomotive emissions, they are, as explained by the ARB Chairman, preempted under federal law.

ii. **ICC Termination Act**

The Interstate Commerce Commission Termination Act (see P.L. 104-88; 49 CFR Part 1000, et seq.) provides that the jurisdiction of the federal authorities 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).) As one court observed, it "is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations." (*CSX Transportation, Inc. v. Georgia Public Service Comm'n*, 944 F.Supp. 1573, 1581 (N.D.Ga. 1996).) Indeed, the courts have interpreted the ICCTA as extending to environmental regulation. In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), cert. denied, 527 U.S. 1022 (1999), it was asserted that section 10501(b) addressed economic but not environmental regulation. However, the U.S. Court of Appeals for the Ninth Circuit disagreed finding that there is nothing in the case law that supports the city's argument that, through the ICCTA, Congress only intended preemption of economic regulation of the railroads, rather environmental regulation was included. (*Id.* at 1030, 1031.)

The Surface Transportation Board ("STB") has explained that under section 10501(b), "state and local permitting or pre-clearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce by giving the local body the ability to deny the carrier the right to construct facilities or conduct operations." (*Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA*, STB Fin. Dkt. No. 33971 (served May 1, 2001).) The STB also has explained that section 10501(b) is not,



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intended to interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations or unreasonably burden interstate commerce.

...But simply invoking Federal environmental statutes does not overcome section 10501(b). Rather, where section 10501(b) and a Federal environmental statute are both involved, the Federal statutes need to be harmonized. The severity of the likely environmental impacts should be weighed against the severity of the transportation impacts of compliance to determine whether, and how, the various Federal statutes can be accommodated. This is a case-specific and fact-specific determination.

(Joint Petition for Declaratory Order - Boston and Maine Corporation and Town of Ayer, MA, STB Fin. Dkt. No. 33971 (served October 5, 2001).) Thus, in the *Ayer* dispute, a federal district court upheld the Board's finding that a town's efforts to regulate a proposed intermodal facility were preempted even though the town purported to base its actions, in part, on the Clean Water Act and the Safe Drinking Water Act, because the Acts were "being used merely as a pretext." (*Boston and Maine Corp. v. Town of Ayer*, 191 F. Supp.2d 257 (D.Mass. 2002), citing *Joint Petition for Declaratory Order - Boston and Maine Corp.* at 23, 24 (May decision).

In several cases, subsection 10501(b) has been applied to potential restrictions on railroad operating practices. In *Rushing v. Kansas City Southern Rwy.*, 194 F. Supp.2d 493 (S.D.Miss. 2001), plaintiffs sought damages and injunctive relief for an alleged nuisance created by trains switching, brakes screeching, and locomotive horns blowing. The court held that subsection 10501(b) preempts state common law to the extent it would regulate the manner in which a railroad conducts its operations. In *CSX Transportation, Inc., v. City of Plymouth*, 92 F. Supp.2d 643 (E.D.Mich. 2000), aff'd, 283 F.3d 812 (6th Cir. 2002), the court ruled that a state law restricting the amount of time a railroad could block a crossing could be viewed as requiring the railroad to make capital improvements to avoid violations, such as upgrading its track and relocating its yards. Hence, the court held the state law was preempted by the ICCTA. Similarly, in *City of Seattle v. Burlington Northern R.R.*, 41 P.3d 1169 (Wash. 2002), the court held that a city could not restrict the blocking of crossings because "Congress gave the ICCTA broad preemptive power to enable uniform regulation of interstate rail operations, which include regulation over rail car switching activities."

One court has held that a locality's attempt to restrict idling was preempted under subsection 10501(b). In *Village of Ridgefield Park v. New York, Susquehanna & Western Rwy.*, 750 A.2d 57, 67 (N.J. 2000), the locality sought to enjoin an alleged nuisance created by noise and air pollution from a railroad maintenance facility, with idling locomotives specifically identified as a source. The court held it could not "adjudicate common law nuisance claims against the Railroad because to do so would infringe on the STB's exclusive jurisdiction over the location and operations of railroad facilities." (*See Jones v. Union Pacific Railroad*, 79 Cal. App.4th



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1053, 94 Cal.Rptr.2d 661 (Cal. Ct. App. 2000) (nuisance claim against Union Pacific for allegedly causing needless train noise and engine fumes preempted unless plaintiffs could show that railroad's activities were conducted solely to harass plaintiffs, not for the purpose of facilitating railroad operations).

In light of the foregoing decisions, and despite the District's misplaced reliance on the decision of *Jones, infra*, 79 Cal.App.4th, the federal authorities have preempted the field of regulation under the ICCTA. Reliance on the *Jones* decision does not alter this fact because *Jones* concluded that the subject act did not interfere with the interstate rail operations. However, the District's proposed Regulation XXXV, including PR 3503, will interfere with operations. The pervasive program planned by the District will significantly impact railyard operations resulting in adverse impacts on interstate rail operations as well as upon the environment.

iii. California Air Toxics Program

Under the California air toxics programs, the ARB identifies toxic air contaminants (Health & Safety Code §§ 39657, 44321); establishes modeling methods; prepares the regulatory needs reports that trigger regulations by districts (Health & Safety Code § 39665); adopts uniform criteria and guidelines binding on all covered facilities and the districts (Health & Safety Code § 44342); adopts airborne toxic control measures for the districts (Health & Safety Code § 39666); and supervises the entire program (Health & Safety Code §§ 39650). The District must recognize the extraordinary authority of the ARB regarding toxic air contaminants. (See "AQMD's Legal Authority" at <http://www.aqmd.gov/legal/legalaut.html>). The California Legislature has clearly determined that the state's toxic air contaminant program should be uniform throughout the state—more uniform than any other program affecting stationary sources.

Of course, the ARB itself retains full and exclusive authority over toxic air contaminants emitted by mobile sources. The ARB's mobile source regulations expressly take toxic air contaminants into account on a statewide basis. Moreover, the California Legislature expressly included the regulation of locomotives within the exclusive authority of ARB (to the extent allowed by Federal law) (*see* Health & Safety Code § 43018(d)). As discussed above, for nearly four decades, the districts—including the District and its predecessors—have been precluded from regulating locomotives:

"No order, rule, or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives." (Health & Safety Code § 40702; *see also Western Oil & Gas Association v. Orange County Air Pollution Control District*, 14 Cal. 3d. 411 (1975); 1975 Cal. Stat., ch. 957, § 34).



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In vesting the exercise its statewide control over toxic air contaminants emitted by mobile sources with the ARB, California's Legislature noted the following:

"39002. Local and regional authorities have the primary responsibility for control of air pollution from all sources other than vehicular sources. The control of vehicular sources, except as otherwise provided in this division, **shall be the responsibility of the State Air Resources Board.** . . ." (emphasis added).

"43000. The Legislature finds and declares as follows:

"(c) The state has a responsibility to establish uniform procedures for compliance with standards which control or eliminate those air pollutants [from motor vehicles]."

"43018.

"(b) . . . The state board also shall take action to achieve the maximum feasible reductions in particulates, . . . and toxic air contaminants from vehicular sources."

The ARB has uniformly and exclusively exercised these authorities for almost four decades, as confirmed in the *Western Oil & Gas Association* case cited above and by the Legislature in 1975 and ever since. The District does not have the authority under the Health and Safety Code to alter or contract the ARB's air toxics program regulations.

iv. Memorandum of Understanding and Corporate Policy

On June 30, 2005, the Railroads and ARB entered into the MOU for purposes of pollution reduction and protection of public health while seeking to promote the state's economy and quality of life through the efficient and safe delivery of goods between California's ports, railyards and borders. The MOU requires:

- A statewide idling-reduction program to eliminate all non-essential idling through the use of automatic shut-down devices and operational changes.
- Maximum use of stated or federal law low sulfur diesel in locomotives fueled in California, six years earlier than required by EPA regulations.
- A statewide visible emissions reduction and repair program to ensure the incidence of smoking locomotive to less than 1% and ensure timely repairs.



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- Detailed evaluation of advanced control measures that could reduce diesel particulate emissions up to 90% from uncontrolled levels from applicable locomotives.
- Assessment of remote sensing technology to identify high emitting locomotives.
- Community and air district involvement in the preparation of risk assessments, ARB enforcement of MOU provisions, and the evaluation and development of further measures.
- Enforcement provisions and financial penalties for noncompliance with the MOU.

The ARB elected to enter into the MOU as the preferred approach for a state-level emission control strategy for railroads. The MOU allows the ARB to achieve immediate air quality benefits despite the constraints of federal preemption. The 2005 MOU supplements the groundbreaking MOU which the Class I railroads voluntarily entered into in 1998 relating to the turnover of locomotive fleets in the South Coast air basin.³ The 1998 MOU remains in effect today and is the single most aggressive retirement program for any mobile source in the County.

In addition to the immediate environmental benefits of the 2005 MOU, the ARB acknowledges that the Clean Air Act has sweeping language protecting railroads and interstate commerce from state interference. Moreover, as admitted by the ARB, state imposed air quality controls cannot extend to regulation of locomotive engines themselves. The ARB's acknowledgement of the limitations on its legal authority over locomotives contrasted with the exceptional environmental benefits arising from the MOU serve to document the efficacy of this form of informal, forward-thinking contractual regulation.

In addition to the foregoing, numerous AAR members currently adhere to corporate policies limiting locomotive idling. The primary purpose of these policies is to reduce emissions. A question therefore arises as to why unnecessary regulations must be imposed upon companies without regard to the environmental impacts of the regulations and the impact on railroad operations.

Finally, several other federal programs limit state regulation of railroads. The Federal Railroad Safety Act (codified at 49 U.S.C. § 20101, et seq.) and the Federal Railroad Administration's implementing regulations and decisions (see, e.g., 49 C.F.R. Part 200 et seq.), and the federal Surface Transportation Board implementing regulations (see, e.g., 49 C.F.R. Part 1000 et seq.)

³ The federal EPA supported the 1998 MOU describing it as a "unique, voluntary railroad fleet average program to achieve additional NOx reductions for the South Coast nonattainment area." (63 Fed. Reg. 73, 18979, fn.1 (April 16, 1998).)



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and decisions and nearly 100 years of reported federal court cases also confirm that the federal government has occupied the field of railroad regulation.

B. The District Cites Insufficient and Inaccurate Authority for PR 3503

The District's recitation of legal authority for the promulgation of PR 3503, as well as Regulation XXXV and the rest of the related rules, lacks authority and largely relies on a twisted interpretation of existing law. Proposed Rule 3503 and the rest of Regulation XXXV duplicate, contradict and/or conflict with the foregoing federal and state air quality programs; conflict with or contradict matters of statewide concern; and interfere with goods movement and interstate commerce. In the face of these legal hurdles, the District presents a series of often unrelated legal rationale to support its promulgation of the railroad program. The District pieces together support for PR 3503 and Regulation XXXV by claiming that it may regulate locomotives under Health & Safety Code § 43013, regulate indirect sources under Health & Safety Code § 40716(a), require information gathering under Health & Safety Code § 41511, and regulate nuisances under Health & Safety Code § 41700. While the Railroads concede that the District has authority to regulate certain sources of emissions under these codes, that authority does not extend to locomotives.

i. Health & Safety Code § 43013

The District incorrectly concludes that it may regulate the Railroads under Health & Safety Code § 43013. Under California's clean air statutes, the Board has exclusive authority to regulate motor vehicle fuel specifications which includes the regulation of light, heavy and medium duty motor vehicles -- essentially a codification of the court decision in *Western Oil & Gas Assn. v. Orange County Air Pollution Control District* (1975) 14 Cal.3d 411. (Health & Safety Code § 43013(a)-(b).) However, the Health & Safety Code went beyond prior court decisions and further provided the Board the authority to regulate, "off-road or nonvehicle engine categories including, but not limited to, . . . construction equipment, farm equipment, utility engines, **locomotives**, and, to the extent permitted by federal law, marine vessels." (Health & Safety Code § 43013(b) [emphasis added].)

Relying on a non-authoritative comment from Manaster & Selmi, *California Environmental Law and Land Use Practice*, § 41.06(2), the District incorrectly jumps to the conclusion that Section 43013 permits **joint** regulation of non-vehicular sources, such as locomotives, because the section does not **expressly** provide exclusive jurisdiction to the Board and because Division 26 of the Health & Safety Code typically authorizes regional authorities to regulate nonvehicular sources of emissions. This leap of faith is short-sighted and unsupported. As explained above, locomotives, unlike other nonvehicular and stationary sources, are exclusively regulated under other provisions of the code (i.e., Health & Safety Code § 40702) and federal law, irrespective of



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the commentary of Manaster & Selmi. Due to this exclusive jurisdiction, the District has no authority under section 43013 to regulate locomotive emissions.

ii. **Health & Safety Code §§ 40716**

Health & Safety Code § 40716(a)(1) similarly provides no support for PR 3503. Section 40716 (a)(1) directs a district to adopt regulations to reduce emissions from indirect or area-wide sources. But, as must be conceded by the District, Section 40716 does **not** give it the authority to directly regulate locomotives, rather its only authority under this provision is to “encourage or require the use of measures which reduce the number or length of vehicle trips” (*Id.* at (a)(2)). The District may not, as implied, issue wholesale regulations to “reduce or mitigate emissions.” Nothing in this provision vests the District with authority to directly regulate operations of locomotives and other aspects of railyards not already directly within District authority.

iii. **Health & Safety Code 40702**

The District improperly relies on treatise commentary to interpret Health & Safety Code § 40702. Manaster & Selmi’s comments⁴, but no other binding authority, are used by the District to misinterpret the straight-forward language of Health & Safety Code § 40702. Section 40702 provides, in pertinent part, that,

No order, rule or regulation of any district shall, however, specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives.

The District argues that, since PR 3503 does not provide a specific “method” for reduction of locomotive emissions nor a design or construction requirement, it (as well as Regulation XXXV) is not preempted by the statute. This statement is wrong for two reasons. First, the District misinterprets Section 40702 and Regulation XXXV clearly imposes a method of emission reduction upon the Railroads.

The District’s reading of section 40702 is grammatically flawed. Under the District’s interpretation, the phrase “particular method to be used in reducing the release of air contaminants,” is not read independently of the “design of equipment” and “type of construction.” Instead, the District claims it qualifies the two “methods” identified in the code (e.g. design and construction). No grammatical explanation is given for the District’s decision to

⁴ See Staff Report, Ex. 2, p. 1-6 citing Manaster & Selmi, *supra*, 41.06(2) n. 11.



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ignore the commas between these clauses. Rather, the District cites to inapplicable case law and a weak Maxim of Jurisprudence as its sole precedent for its interpretation.

The proper interpretation of Section 40702 includes recognizing the separation of “design”, “construction” and “method” by commas. This separation makes each clause a separate, independent condition of the statute. In other words, “method” is to be read independently and not as merely qualifying the prior clauses of the statute.

In the absence of legal precedent, courts embrace the “ordinary meaning” of laws. It is a general rule of statutory construction that courts must give a statutory provision “a reasonable and common sense interpretation consistent with the apparent purpose of the statute which will result in wise policy rather than mischief or absurdity.” (*DeYoung v. San Diego* (1983) 147 Cal.App.3d 11, 17.) Because the legislature intended Section 40702 to preclude District regulation of contaminant emissions from locomotives, it would be “absurd” to assume that the limitation only extended to “design” and “construction”, but that the District is otherwise free to regulate locomotives.

Moreover, the common meaning of “method” reveals a significant breadth of uses which serve to limit the District’s more limited interpretation of the word. Webster’s Seventh New Collegiate Dictionary gives an expansive definition for “method.” In part it provides that “method” is a “procedure or process for attaining an object.” Using Webster’s definition, section 40702 therefore precludes the District from imposing any “procedure or process” for “reducing the release of air contaminants from railroad locomotives.” Any District method to accomplish the objective of emission reduction, whether by idling restrictions or otherwise, is therefore prohibited under section 40702.

The fact that PR 3503 is tied to idling restrictions is, as discussed above, because PR 3503 is merely part of a larger project which must be properly considered in context. PR 3503 is designed to collect information regarding the risks presented by locomotives and railyards so that risk management principles, including anti-idling requirements and risk reduction requirements, can be applied to the rail industry in the South Coast air basin. Review of the District’s March 2005 Staff Report (Ex. 12) reveals the District’s misapplication of this statute. In the 2005 Staff Report, the District incorrectly argues that an idling limit is not a method of reducing the release of air contaminants from a locomotive. The Railroads disagree. As explained above, under the proper interpretation of the statute, reduced idling for the purpose of reducing emissions is clearly a prohibited “method” of reducing emissions.

iv. Health & Safety Code § 41511

The District cannot rely upon its authority to collect emissions information to promulgate PR 3503. As explained above, this statute has no regulatory or judicial interpretations. Therefore, as with Section 40702, interpretation of the statute will be evaluated by its plain meaning.



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(*DeYoung, supra* (1983) 147 Cal.App.3d 11, 17.) A simple reading of the statute explains its scope – the District may adopt rules to require owners/operators to determine the amount of emissions from their stationary sources. Furthermore, the requirement of the health risk assessments and public notice are clearly not authorized by the statute.

v. **Health & Safety Code § 41700**

The District does not have the authority under Health & Safety Code § 41700 to promulgate PR 3503 and Regulation XXXV. Section 41700 provides,

Excepts as otherwise provided in Section 41706, no person shall discharge from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance, or annoyance to any considerable number of persons or the public, or which endanger the comfort, repose, health, or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to businesses or property.

The statute is prohibitive in nature and is not, by itself, a source of authority for promulgating new proscriptive rules. Initially, as noted under Section 40702, the District may not regulate locomotive emissions, so the District is prohibited from using Section 41700 to regulate what it is otherwise prohibited from regulating. Further the District may not regulate a “nuisance” until the “nuisance” exists. There is no current evidence in the record that any of the railyards subject to PR 3503 and Regulation XXXV is a current nuisance or may cause injury to the public.

Finally, the District’s own practices bear out that Section 41700 cannot independently support PR 3503. For example, a district is not permitted to issue a permit for a new stationary source unless the source complies with all the applicable provisions of Division 26 of the Health & Safety Code. (*See* Health & Safety Code § 42301(b).) This requirement, only when coupled with Section 41700’s prohibition on emissions that endanger public health, authorizes the practice followed by many air districts of requiring health risk assessments for toxic substances emitted from proposed new stationary sources. (*See Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control District* (1989) 49 Cal.3d. 408 [conclusion that Sections 42300 were primary code provisions supporting air district regulation of toxic air contaminants].) Because the District cannot, in this instance, fall back on its authority to regulate permits for new stationary sources, Section 41700, independently, is not sufficient authority to require health risk assessments such as required under PR 3503.

As the Railroads have previously explained to the District, a proper interpretation of California and federal law reveals that the District has no authority to regulate rail commerce, whether at a railyard or otherwise.

Attachments

APPENDIX E

PR 3503 COMMENT LETTER – SEPTEMBER 7, 2005

ASSOCIATION OF AMERICAN RAILROADS

TECHNICAL DEFICIENCIES IN PROPOSED RULE 3503

(EXHIBITS 1 THROUGH 4 AVAILABLE UPON REQUEST)



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MEMORANDUM

To: South Coast Air Quality Management District
From: Michael J. Steel
Date: September 7, 2005
Re: Technical Deficiencies in Proposed Rule 3503

We submit these comments on behalf of the Association of American Railroads (“AAR”), Union Pacific Railroad Company and The BNSF Railway Company (collectively, the “Railroads”) regarding technical and other issues raised by the South Coast Air Quality Management District’s Proposed Rule 3503 (“PR 3503” or “Proposed Rule”) and proposed Regulation XXXV. These comments also address the Preliminary Draft Staff Report (August 2005) (the “Staff Report”), and Attachments A (Railyard Emissions Inventory Methodology, Version 1.1, July 2005 (the “Emission Inventory Methodology”)) and B (Health Risk Assessment Guidance for Railyards and Intermodal Facilities, August 2005 (“HRA Guidance”)). Substantial substantive input provided by Michael L. Lakin, Ph.D., D.A.B.T.; Robert G. Ireson, Ph.D.; and Gary S. Rubenstein has been incorporated into these comments. The resumes of Dr. Lakin, Dr. Ireson and Mr. Rubenstein are attached as Exhibits 1, 2 and 3, respectively.

1. Implementation of Proposed Rule 3503 Would Not Achieve Its Stated Purposes in a Scientifically Supportable Manner.

One of the stated objectives of PR 3503 is “to notify the public regarding... health risks” associated with criteria pollutant and toxic emissions from railyards. PR 3503(a). In order for this public notification to be beneficial, it must be technically accurate, provide an understanding of the accuracy of the information and the underlying data and it must be useful to the public. With respect to this objective, the proposed rule is deficient in three particular aspects:

- The data and assumptions required to be used to derive the emissions inventories and HRAs are highly uncertain;
- The methodology required by PR 3503 to be employed for both the emissions inventories and the HRAs relies on highly uncertain assumptions that, in some cases, are known to be inaccurate; and
- The manner in which the results of the HRAs are required to be reported omits or censors relevant information.



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The consequence of these deficiencies is that adoption, implementation and enforcement of PR 3503, as proposed, would require the creation and intentional dissemination of grossly inaccurate information to the public, while simultaneously omitting relevant information from communication to the same audience. Public misperception and confusion – an outcome inconsistent with the Proposed Rule’s objectives – likely will result.

2. Technical Deficiencies in Defined Terms Render Proposed Rule 3503 Fundamentally Defective.

Many of the definitions in PR 3503 suffer from technical deficiencies. At a conceptual level, we note that the HRAs derive theoretical estimates of potential exposure and corresponding health risks for hypothetical receptors and populations, not for actual persons or populations. Several of the definitions set forth in PR 3503 should be modified to reflect this, including the definitions of “health risk assessment” [PR 3503(c)(5)], “impact area” [PR 3503(c)(6)], “public notification level” [PR 3503(c)(11)], “total acute hazard index” [PR 3503(c)(16)], and others. Other technical deficiencies are specific to the definitions of “Maximum Individual Cancer Risk,” “Railyard” and “Toxic Air Contaminant.”

PR 3503’s proposed definition of Maximum Individual Cancer Risk (MICR) in Section (c)(9) suffers from technical flaws. For example, due to the conservative assumptions incorporated in the Tier-1 AB 2588 methodology mandated under PR 3503, MICR estimates based on a Tier-1 HRA incorrectly and definitively will result in substantial and intentional overestimates of exposure and corresponding health risks for real people living near the railyards.¹ Questionable Tier-1 assumptions include the following: a) current emission rates for each source included in HRA will remain constant over the next 70 years despite the source being replaced over the 70-year period with equipment having lower emission rates;² and b) the Maximum Exposed Individual Resident (MEIR) is present at a single fixed location 24 hours each day, 350 days each year for 70 years. Thus, using the Tier-1 methodology required by PR 3503 typically will result in employing high-end values for each of the myriad of assumptions that are used to derive emissions estimates that compose the emissions inventory. Multiplying a number of high-end values results in estimates that are not reasonably representative of actual conditions. This results in use of intentionally overestimated emissions data as the foundation for the HRA. Therefore, the inflated MICR value would, by design, be inaccurate and unrepresentative of the potential exposure and corresponding actual cancer risk for any real person or actual population.

¹ Health & Safety Code §§ 39660 *et seq.* (Air Toxics Hot Spots Program).

² This assumption is inconsistent with the terms of the 1998 South Coast Locomotive Fleet Average Emissions Program contained in the July 2, 1998 Memorandum of Mutual Understandings and Agreements. This agreement (attached as Exhibit 4) requires emission reductions over time that should be reflected in any realistic assessment of railyard emissions impacts.



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Other than alleged consistency with the AB 2588 program, neither PR 3503 nor the Staff Report offer adequate justification for the use of this theoretical estimate for a hypothetical receptor as the primary criterion for triggering derivation of cancer burden estimates and public notification. PR 3503 should be revised to provide railyards the flexibility to use more realistic and representative data to derive estimates of potential health risks triggering additional actions.

Proposed Rule 3503's definition of "railyard" in Section (c)(14) is overly broad and vague. As proposed, the definition could be read to encompass all of AAR members' activities along entire systems, or to include railroad activities on a much smaller scale than those associated with passenger railyards. The District should carefully tailor, and provide technical support for, its definition of "railyard" or limit to the railyards identified in the Staff Report.

Proposed Rule 3503's definition of a Toxic Air Contaminant (TAC) in Section (c)(18) as being "an air pollutant which may cause or contribute to an increase in mortality or serious illness, or which may pose a present or potential hazard to human health" is overly broad. From a technical perspective, only those chemicals listed in Appendix A-I of the OEHHA Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments which exceed specific thresholds for inclusion in the HRA should be considered "air toxic contaminants" for the purpose of PR 3503. The District has provided no basis for the potential to deviate from the OEHHA list.

3. Technical Flaws Mar the Emissions Inventory Provisions of Proposed Rule 3503.

Proposed Rule 3503 would require submittal of an Interim Railyard Emissions Inventory Report that covers stationary as well as on- and off-road mobile sources, and discussion of the time interval to be represented by the inventory. PR 3503(d)(1). Although the rule language is vague on this issue, District staff indicated during the August 30, 2005 workshop that the interim inventory report does not, in fact, require the presentation of emissions data. Rather, it must identify the sources to be inventoried and a proposed time period (within the two years prior to the date of adoption of PR 3503) from which representative activity data will be collected. By failing to clearly indicate those insignificant activities that can be excluded from the inventory, PR 3503 will require extensive resources to identify all sources of criteria or TACs, no matter how small. This approach does not make sense from a technical perspective, and is inconsistent with the process established for AB 2588 analyses, which include clearly specified *de minimis* levels for assessment.

We also question how, with even a modicum of scientific certainty, a railyard could predict the number and duration of transient railyard equipment, such as delivery trucks or other third party vehicles, to a given a facility. Taking this one step further, railyards cannot be expected, technically speaking, to presage the emission rate for each such third party vehicle. Again, the requirement to include these vehicles in the proposed emissions inventories exceeds the requirements established by the District for stationary sources of toxic air pollutants.



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The Staff Report notes (at 2-2) that the Interim Railyard Emissions Inventory Report must include all emissions

[f]or dedicated railyard equipment, annual criteria pollutant and TAC emissions based on throughput data specific to the source. This data is for a time period representing at least 50 percent of the time interval to be addressed in the emissions inventory.

The District's own Rule 1402 already provides thresholds for toxic air contaminants. The purpose of identifying thresholds deemed by the District to be *de minimis* is to preserve limited economic resources on the part of those subject to the regulation when preparing the inventory, as well as District staff time in reviewing the inventory by including only the emissions of sufficient quantities likely to substantially contribute to potential health risks. Consequently, applying the same thresholds identified in Rule 1402 to Class I railyards would serve the same purpose – prevention of unnecessary expenditure of limited economic and human resources by the railroads and the District. No technical basis to depart from the Rule 1402 scheme in the PR 3503 context has been provided.

4. Technical Deficiencies in the Proposed Emission Inventory Methodology are a Fatal Flaw.

The proposed Emission Inventory Methodology is technically unsound and scientifically unsupported. Certain fundamental information is lacking. For example, the Methodology does not include a sampling frequency for transient activities (e.g., one week per month for 12 months); forecasts of future emission rates and activity levels; treatment of employee and visitor vehicles; and *de minimis* reporting levels for activities, sources, emission rates, *et cetera*. This and other basic information must be included in any scientifically supportable inventory plan.

5. The Proposed Health Risk Assessment Provisions Suffer from Technical Shortcomings.

Proposed Rule 3503 would require Class I freight operations to submit an HRA on the railyard-wide TAC emissions inventory “on or before (12 months after date of adoption).” PR 3503(e)(1). However, for any resulting HRA to be scientifically supportable, there first should be an HRA plan that identifies all of the modeling assumptions and data sources, of which the emissions inventory is just one, as well as the objectives of the HRA, including acceptable limits of uncertainty, accuracy, and reliability. Because the HRAs that would be created under PR 3503, as proposed, would be based on incomplete, uncertain, and possibly inaccurate information, they would not be technically sound.

Risk assessments that would be drafted under PR 3503, as proposed, would include an assessment of risks “based on an exposure duration of 70 years for residents and students and 40 years for workers, including appropriate multipathway factors.” PR 3503(e)(1)(G). These



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assumptions should be, but are not, consistent with OEHHA guidelines. The District has provided no scientific basis to support departure from existing guidelines.

Given that the HRA is merely informational, the information communicated should be accurate and representative. One of the many lessons learned in the Roseville Rail Yard Study³ was that graphical representations of impacts, such as through the use of isopleths, lend an aura of precision to the HRA for a complex source that is unsupported by the underlying data. To the extent that isopleths are used to represent HRA results, they should accurately reflect the uncertainty in the results due to uncertainties in the underlying assumptions. This concern is especially serious in the context of PR 3503.

Risk assessment guidance documents from the National Academy of Sciences, EPA and the State of California (e.g., OEHHA Hot Spots Risk Assessment Guidance Manual) stress the importance of uncertainty analysis in HRAs prepared for regulatory purposes. Explicit identification and discussion of uncertainty is particularly important for risk assessments prepared in support of risk communication with the public. The need for uncertainty analysis, including evaluation of comparative risks, is acknowledged explicitly in the risk assessment report prepared by the ARB for the Roseville Rail Yard. In contrast to these widely accepted and practiced principles, PR 3503 limits uncertainty evaluations to prescribed Tier-2, Tier-3 and Tier-4 evaluations and then only allows the results to be presented in an appendix to the report. This treatment of uncertainty contradicts direction and guidance from the National Academy of Science, EPA and the State of California, which do not simply allow uncertainty analysis but emphasize the point that such analysis is an essential component of regulatory risk assessment. In addition to contradicting risk assessment guidance from these agencies and organizations, the District's proposed restrictions on uncertainty analysis appear to be an attempt to hide information, an act that is inconsistent with a program that purports to have public risk communication as a primary goal.

Uncertainty and questionable reliability of the input data leads to questionable and uncertain output data, including results of proposed air dispersion modeling and HRAs. Combining the input data, model output, and exposure assumptions into a single point estimate at different locations produces exposure isopleths that are highly uncertain, inaccurate and unrepresentative for an ordinary person residing at a location within a particular isopleth. For example, potential exposure estimates are derived for the hypothetical residential receptor who lives at a single location near the facility for 70 consecutive years, is present outdoors, always at home 24 hours per day 350 days per year and inhales air at a constant rate 302 liters per kg per day (Staff Report

³ The ARB conducted a health risk assessment of airborne particulate matter emissions from diesel-fueled locomotives at the Union Pacific Railroad Company's J.R. Davis Yard located in Roseville, California. Results of the evaluation are presented in the October 14, 2004 Roseville Rail Yard Study. See ARB, *Roseville Rail Yard Study* <<http://www.arb.ca.gov/diesel/documents/rrstudy.htm>> (Updated Oct. 15, 2004).



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Appendix B, p. B-24). Review of modeling results for the Roseville Rail Yard Study showed that several areas of predicted high concentrations were in fact modeling artifacts arising from simplifying assumptions regarding source locations necessitated by the size and complexity of the yard's operations, and were not representative of likely off-site concentrations. Given the uncertainty, intentional inaccuracy and unrepresentativeness of exposure isopleths will result in the communication of misleading information to the public.⁴

Proposed Rule 3503 would require railyard operators to "report the aggregate risk in the areas of overlap" in the event that "the impact areas of two or more railyards operated by a single operator overlap." PR 3503(e)(1)(H). However, PR 3503 neither defines nor otherwise explains the term "overlap." Without an established common understanding of key terms like "overlap," the District cannot assure uniformity of application.

Proposed Rule 3503 would require railyard operators to "follow the policies and procedures of the California Office of Environmental Health Hazard Assessment's (OEHHA)." PR 3503(e)(2). However, contrary to the District's assertion (Staff Report at 3-5) that PR 3503 "is in harmony with and not in conflict with or contradictory to, existing statutes, court decisions or state or federal regulations," certain provisions of PR 3503 conflict with the OEHHA guidelines. Proposed Rule 3503 provides no guidance for navigating such instances of inconsistency and, in fact, would expose railyard operators to liability for following the OEHHA guidelines to the extent the guidelines conflict with the Proposed Rule. PR 3503(j). In addition to the risk assessment assumption example identified above, another instance of conflict with OEHHA guidelines is the prohibition of including the results of more refined Tier-2 to Tier-4 HRAs in the Executive Summary or main narrative. As prescribed in the Staff Report on pages B-9 and B-10, with emphasis added:

Tier-2, Tier-3, and Tier-4 evaluations may be prepared but *must be included in an appendix* of the HRA. The results of the Tier-2, Tier-3, and/or Tier-4 evaluations *must not be included in the Executive Summary or main body of the HRA.*

The OEHHA guidelines state that "Results of other exposure assumptions or tier evaluations can be presented [in the Executive Summary], but must be clearly labeled" (OEHHA, August 2003, p. 9-5).

Furthermore, the OEHHA guidelines permit presentation of refined Tier-2 to Tier-4 information in the Risk Characterization section of the HRA report:

⁴ This concern about communicating inaccurate, unrepresentative information to the public specifically is recognized in the AB 2588 guidance document: "[I]f a facility is notifying the public regarding cancer risk, it is useful information for a person who has resided in his current residence for less than 70 years to know that his or her cancer risk is less than the 70 year risk." Further, "[t]his type of analysis [Tier-3 and Tier-4] gives a complete picture of population risk."



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if persons preparing the HRA would like to present additional information (i.e., exposure duration adjustments or the inclusions of risk characterizations using Tier-2 through Tier-4 exposure data), then this information should be presented in separate, clearly titled, sections, tables, and text. (OEHHA, August 2003, pp. 9-10 and 9-11).⁵

In contrast, PR 3503 does not allow for presentation of refined information in the main report. Instead, PR 3503 relegates any information resulting from Tier-2 to Tier-4, or other appropriate evaluation, to an appendix that the public is likely to miss. The HRA Guidance provides (at B-9-10) as follows:

All HRAs prepared for the SCAQMD must include a Tier-1 evaluation, which is defined by OEHHA as a point estimate using standard assumptions. All SCAQMD risk management decisions are based on the Tier-1 risk assessment. Tier-2, Tier-3, and Tier-4 evaluations may be prepared but must be included in an appendix of the HRA. The results of the Tier-2, Tier-3, and/or Tier-4 evaluations must not be included in the Executive Summary or main body of the HRA.

No technical basis supports this arbitrary decision to limit the bases of District risk management decisions to Tier-1 assessments. As discussed herein, Tier-1 assumptions and analyses are highly uncertain, and designed to be inaccurate. The District at least should explain why it proposes to prohibit inclusion of the Tier-2 to Tier-4 information, which is more likely to be accurate and representative, in both the Executive Summary and the body of the HRA report.

Also regarding the District's HRA Guidance, AAR notes that OEHHA guidelines allow for the presentation of residential cancer risk using shorter exposure durations than the "70-year exposure" assumed in the Staff Report (at B-10). The District provides no scientific basis for restricting the presentation of estimates of potential health risks for exposure durations of less than 70 years.

6. The Proposed Health Risk Assessment Methodology is Scientifically Unsound.

Proposed Rule 3503 requires HRAs to be based on assumptions that are scientifically unsupported, as well as inconsistent with assumptions used in the Roseville Rail Yard Study. Furthermore, for technical reasons, the method proposed in PR 3503 to derive quantitative

⁵ The AB 2588 risk assessment guidance (not directly applicable here but obviously relied upon by the District) was changed *specifically* to incorporate the Tier 2-4 approaches. According to the AB 2588 risk assessment guidance: "The Air Toxics 'Hot Spots' Act was amended to require that the Office of Environmental Health Hazard Assessment (OEHHA) develop risk assessment guidelines for the Air Toxics 'Hot Spots' program. The amendment specifically requires OEHHA to develop a 'likelihood of risks' approach to health risk assessment; OEHHA has, therefore, developed a stochastic, or probabilistic, approach to exposure assessment to fulfill this requirement." (citations omitted).



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estimates of potential cancer risk for populations exposed to diesel engine exhaust is inappropriate. The proposed reporting format set forth in the HRA guidance also is problematic from a technical perspective. For these reasons, the proposed HRA Guidance is technically unsound and scientifically unsupportable.

Proposed Rule 3503 requires that HRAs be based on scientifically unsupportable assumptions. For example, certain sources are mischaracterized in the HRA Guidance (at B-3) as “stationary sources” when, in fact, they properly should be treated as volume sources. Further, the HRA Guidance requires the use of ISCST3. However, ISCST3 is not the most appropriate model for all yards. In particular, for sources located close to complex terrain, or sources where building downwash may be a significant factor, models such as CTSCREEN, CTDM, ISC-PRIME, or AERMOD-PRIME may be more appropriate.

HRA Guidance regarding model selection also is scientifically unsupportable. The HRA Guidance improperly implies (at B-4) that ARB’s Hotspots Analysis and Reporting Program (HARP) only can be used in conjunction with the U.S. Environmental Protection Agency’s air quality dispersion model, Industrial Source Complex – Short Term, Version 3 (known as “ISCST3”) to conduct exposure assessments. In fact, HARP can be used with dispersion models other than ISCST3. In contrast, the State has issued guidance regarding the various types of air dispersion models available, and which are appropriate for use under given circumstances. Thus, any determination of the model that is most appropriate for use under circumstances specific to the facilities to be address by PR 3503 should have scientific support, be consistent with State guidance, and be based on site-specific factors.

Meteorological data presented in the HRA Guidance cannot be supported scientifically for PR 3503 purposes. Such data are from 1981, and are designed to represent a meteorologically severe single year. These data are not appropriate for risk assessments in which the potential exposure is estimated for a 70-year period. As a technical matter, it is inappropriate to assume severe meteorological conditions for a single year will recur for 69 successive years. The District has provided no technical basis to support its proposed use of such a meteorologically severe assumption.

Assumptions proposed by the District as a basis for PR 3503 HRAs are inconsistent with assumptions used by ARB in the Roseville Rail Yard Study, and the District has provided no technical reason for the inconsistencies. Given that there are questions as to the overall reliability of the Roseville Rail Yard Study, to ignore what can be learned from prior experience is an invitation for more error. ARB analysis in the Roseville Rail Yard Study recognizes the substantial uncertainties inherent in analyses of sources as complex as railyards. The importance of an uncertainty analysis and the need to practice good risk communication principles were recognized, for example, in the risk assessment report prepared pursuant to the Roseville Rail Yard Study.



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To address these uncertainties, the report presents ranges of results, and adopts methods to explain uncertainties in order to avoid presenting grossly unrealistic and misleading estimates of potential impacts. The District should explain why it is proposing not to use the methodology for reporting risk that was adopted in the Roseville Rail Yard Study, to use a variety of techniques to present its estimates of the ranges of potential risk not limited or constrained by Tier-2, Tier-3, and Tier-4 evaluations, and to characterize the uncertainty of the analysis in the report. In contrast, use of the District's AB 2588 form as proposed in PR 3503⁶ will create the misperception that reported results are more accurate, and of greater precision, than actually would be the case, and thereby mislead the public about the accuracy of the underlying data.

Another reason why, from a technical perspective, the HRA Guidance is technically unsound and scientifically unsupported relates to estimates of potential cancer risk. Proposed Rule 3503 requires estimates of potential cancer risk to be based upon the conservative cancer potency factor (CPF) of 1.1 (mg/kg-day)⁻¹ (Staff Report, Appendix B, p. B-24). Technically speaking, it is inappropriate to use this value to derive quantitative estimates of potential cancer risk for populations exposed to diesel engine exhaust due to the limitations of the data upon which it is based.

Both the United States Environmental Protection Agency (EPA) and Health Effects Institute (HEI) have determined that it is not possible to confidently derive a quantitative estimate of the carcinogenic potency or unit risk factor for diesel engine exhaust.⁷ Each body independently reached this conclusion, and both found that the available data is inadequate for this purpose. Both concluded that the absence of such a cancer potency estimate for diesel exhaust limits the ability to quantify, with confidence, the potential impact of the hazard on exposed populations. Despite limitations in the data, EPA estimated a qualitative range of possible estimates of the cancer potency of diesel exhaust that includes a lower end of the range annotated by EPA (at 8-17) as follows: "zero risk cannot be ruled out." (emphasis added). AAR agrees with both EPA and HEI that it is not possible to quantify with confidence the potential cancer risk to populations exposed to diesel engine exhaust, and, therefore, that it is inappropriate to require such estimates be made as precisely as described in PR 3503.

Again, the goal of PR 3503 HRAs should be to communicate accurate and useful information to the public. Therefore, the HRAs should contain a fair, balanced and accurate description of

⁶ See HRA Guidance (at B 12): "The reporting format for the HRA must follow the detailed outline presented in Appendix A. A completed Health Risk Assessment Summary must be included in the executive summary of all health risk assessments submitted to the SCAQMD; a sample of the form can be downloaded from the SCAQMD's AB 2588 website."

⁷ United States Environmental Protection Agency (National Center for Environmental Assessment Office of Research and Development), *Health Assessment Document for Diesel Engine Exhaust*, EPA/600/8-90/057F (May 2002); Health Effects Institute, *Diesel Emissions and Lung Cancer: Epidemiology and Quantitative Risk Assessment, A Special Report of the Institute's Diesel Epidemiology Expert Panel* (June 1999).



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EPA's and HEI's findings. This description would address the ability to derive quantitative estimates cancer risk with confidence, the uncertainty associated with such estimates, and the limitations in the data upon which the OEHHA CPF is based. Completely omitting any discussion or reference to the findings and opinions by other reputable and qualified bodies that are inconsistent with that of the District and OEHHA is inappropriate from a technical as well as risk communication perspective. Further, omitting discussion of the quality of the underlying data as well as the findings of other authoritative and respected scientists will result in the same misunderstanding that would occur if the information were incorrectly presented in the first instance.

7. Technical Flaws Debilitate Proposed Provisions relating to Updating Emissions Inventories and Health Risk Assessments.

Proposed Rule 3503(g)(1) and (g)(2) would require annual updates. However, the District has provided no technical basis to require updates so frequently. In our view, no scientific basis exists to require them without adequate, scientifically-supported demonstration that emission increases exceed *de minimis* levels. At an absolute minimum, HRAs should not be required to be updated on a schedule more frequent than the four-year interval emission inventory updates.

8. Proposed Public Notification Requirements are Scientifically Unsupported and Technically Unsupportable.

Proposed Rule Section (h)(1) would require railyard operators to provide notification, and subsequent annual notification updates, to the public within 60 days of approval of an HRA that shows an exceedance of the proposed Public Notification Level. However, Proposition 65 already requires notification of the public in the event that cancer risk for listed carcinogens exceed 10-in-one-million (1.0×10^{-5}) or $1/1000^{\text{th}}$ of the No Observed Effect Level for listed reproductive toxicants. The District provides no technical or other basis for the duplication of this effort. Furthermore, the notification level required by PR 3503 is substantially lower than that provided for in District Rule 1402, which requires notification if the MICR exceeds 25-in-one-million, or if the acute or chronic hazard index exceeds 3.0 for any single target organ system. The District provides no technical or other basis for imposing a more stringent public notification requirement on railyards relative to industrial facilities.

Proposed Rule section (h)(3) would require public notification meetings. In contrast, public meetings are required under District Rule 1402 only if cancer risk exceeds one hundred per million (100×10^{-6}). The District provides no scientific or other basis to depart from the Rule 1402 threshold here.

APPENDIX F

PR 3503 COMMENT LETTER – SEPTEMBER 28, 2005

PACIFIC HARBOR LINE



PACIFIC HARBOR LINE

September 28, 2005

Elaine Chang
Deputy Executive Director
SCAQMD
21865 E. Copley Dr.
Diamond Bar, CA 91765

Re: Proposed Rule 3503

Dear Ms. Chang:

Thank you for the opportunity to meet with you and your staff on September 27, 2005 to discuss Proposed Rule ("PR") 3503. During that meeting, we respectfully requested that you consider an exemption for Pacific Harbor Line, Inc. ("PHL") from the requirements of this new rule. This letter follows up on and further documents our request and the reasons we are seeking an exemption.

Background on PHL

PHL is the operator of a railroad jointly owned by the Ports of Long Beach and Los Angeles. It owns sixty-nine miles of track, exclusively within the area of the two ports. PHL currently operates twenty-one locomotives; however, all these locomotives will be replaced over the next two years by a fleet of sixteen Tier 2 and additional "Tier 3" locomotives, making PHL's the cleanest locomotive fleet in Southern California.

PHL's Water Street railyard contains 7.5 miles of track, or 11% of PHL's total trackage. This yard is much smaller than nearly every other yard being considered for regulation under PR3503.

PHL operates no ancillary, emissions-producing equipment, apart from a few company-owned automobiles and two pieces of track machinery which are used only a few hours per month (only a fraction of this use is within the Water Street railyard). PHL does not own or operate any cargo loading or unloading equipment. PHL's operation of non-locomotive, emission-producing equipment is *de minimis* by any measure. For these reasons, and because it does not attract mobile sources of emissions, the Water Street railyard cannot be considered an indirect source of emissions.

PHL's Water Street railyard is approximately one-half mile from the nearest residence, and more distant yet from any elementary or high schools.

PHL's Commitment to Air Quality Improvement

PHL is committed to environmental improvement. It is replacing its entire fleet of locomotives with Tier 2 and Tier 3 locomotives (in part with Carl Moyer funding from the District), and converting its current fleet of pre-Tier locomotives to emulsified fuel. It has been using CARB-specification fuel exclusively for the past several years.

PHL will likely be involved in additional technical air quality programs at the District's request. It is testing a Green Goat hybrid locomotive and an LNG locomotive for the Ports, and will also be testing a diesel oxidation catalyst.

These efforts demonstrate PHL's commitment to reducing emissions, even beyond current requirements.

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PHL Seeks an Exclusion from PR3503 Based on the Cost of Compliance

As currently drafted, PR3503 applies to four railroads: Union Pacific, Burlington Northern Santa Fe (both Class I railroads handling freight with revenues greater than \$200 million), Los Angeles Junction Railroad (a wholly owned subsidiary of BNSF) and PHL. Because of its size and relatively small revenues, PR 3503 has a far greater impact on PHL than it does on the Class I railroads or their subsidiaries.

The Staff Report for PR3503 estimates compliance costs as including the following:

Preparation of an emission inventory and health risk assessment	\$50,000
Updating the emission inventory and HRA every two years	50,000
Public notification and meeting (cost per year, two notices)	234,000
AQMD fees	5,000
Total estimated yearly cost.....	\$270,000

PHL has estimated annual revenues of \$16 million, far less than the \$11.5 billion average for the Class I railroads. As a result, the \$270,000 yearly expense associated with compliance weighs heavily on PHL.

Estimated annual revenues of PHL	\$16,000,000
Average annual revenue of each Class I railroad	11,550,000,000
PHL's compliance cost as a percentage of revenues	1.7%
Average Class I railroad estimated compliance cost (compliance cost of \$2.13 million per year)	
As a percentage of revenues	0.018%

As the above data reveal, PR3503 will have an enormous impact on PHL, draining almost two cents of every dollar of revenue PHL takes in. By comparison, the impact on the Class I railroads is estimated at two-tenths of each dollar of revenue.

PHL's Emissions Are below Threshold Levels Set by the District for Rule Applicability

With only twenty-one locomotives and no other significant sources of emissions, PHL's emissions are only a fraction of the emissions from the Class I railroads. PHL's emissions are also a fraction of the emissions from passenger railroads, which are excluded from PR3503 based on data that shows they contribute less than ten percent of NOx and PM emissions from rail operations. (For comparison purposes, Metrolink operates thirty-eight locomotives.)

The 2003 Air Quality Management Plan ("AQMP") states that particulate matter ("PM") emissions from rail operations are 1.01 tons for PM10 and 0.93 tons for PM2.5 for a total of 1.94 tons per day. The AQMP also states that oxides of nitrogen ("NOx") emissions from rail operations are 36.52 tons per day.

The following chart compares overall railroad emissions with the 10% threshold level set by the District in excluding passenger railroads from PR3503 and PHL's emissions.

Total Railroad Emissions (tons per day)	Passenger Railroad Exemption Level: 10% (tons per day)	PHL's Estimated Emission (tons per day)
1.94 (PM 10 and PM 2.5)	0.19 PM	0.02 PM
36.52 (NOx)	3.62 NOx	0.94 NOx

Regarding PHL's estimated emissions, a recent study by the Port of Los Angeles has estimated locomotive emissions (largely from PHL's operations, and excluding the Port of Long Beach) at 0.01 tons per day PM and 0.47 tons per day NOx. (The AQMD participated in this study of emissions.) Doubling these totals to provide an

estimate of emissions from both the Port of Long Beach and Port of Los Angeles reveals PHL's estimated PM emissions at 0.02 tons per day and NOx emissions at 0.94 tons per day.

PHL's estimated emissions of PM are 90 percent less than the significance threshold set for the combined passenger railroads. PHL's estimated NOx emissions are 75 percent lower than the significance threshold set for the combined passenger railroads. There is no meaningful distinction between passenger railroads and PHL based on the sources of emissions. If anything, passenger railroads have greater indirect sources of emissions based on the mobile sources people use to get to passenger stations.

Fairness dictates that a railroad that emits at a level 75 percent less than an identical source that is exempt *based on its emissions* should also be exempt.

PHL's PR3503 Exclusions

PHL recommends that rule applicability be limited to Class I railroads and their subsidiaries. This would recognize the greater resources available to Class I railroads, the greater scope of their operations, and potential impacts they may have on the community. This approach to applicability would exclude passenger railroads and PHL.

Alternatively, exclusion language could be based on any of the following criteria:

- Non-Class I railroads should be excluded.
- Railroads operating fewer than fifty locomotives within the District should be exempt from the requirements of this rule. (This would continue to exclude Metrolink; it is unclear how this would affect Amtrak.)

Other Factors

The Port of LA has declared its intention to relocate the Water Street railyard in its entirety to a new, as yet to be determined, location. This will likely take place within two years. Such a port project will likely be preceded by a full environmental review, which presumably will measure the health risk impacts of the new facility. It makes little sense to require PHL to undertake an expensive emissions inventory and health risk assessment of locomotives it will soon replace at a location it will soon be forced to abandon.

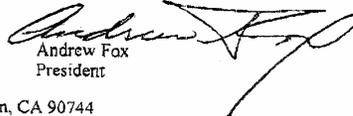
Conclusion

Given its size and resources, PR3503 represents a major impediment in the operation of PHL. PHL's only significant source of emissions is locomotives. It is not subject to District regulation as an indirect source. Apart from measuring emissions from locomotives (which the Port in conjunction with the District has already done), or notifying residents of the dangers of diesel emissions from the Water Street railyard (which PHL has already done via its Prop 65 warnings), no further purpose is served by making this rule applicable to PHL. Again, PHL is already voluntarily undertaking any and all reasonable mitigation measures that could be expected of it notwithstanding the applicability of the rule.

We seek this exemption because of the disparate financial impact this rule will have on a railroad the size of PHL, because of the *de minimis* nature of the emissions from PHL's entire operation and particularly from its Water Street railyard, and because passenger railroads are exempt and PHL's emissions are but a fraction of passenger-related emissions.

Thank you for the opportunity to present this information to you. We regret that we are attempting to address this important issue very late in the rule making process. Please understand that, with but five management employees, there are few resources to devote to the rule development process. Please contact me if you have any questions.

Sincerely,


Andrew Fox
President

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