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Dear Ms. Tuck:

The South Coast Air Quality Management District ("District") has asked us to evaluate the extent to which federal law would preempt the individual provisions of the June 2005 Memorandum of Understanding ("MOU") between the California Air Resources Board ("CARB") and the participating railroads in the event that either CARB or the District were to adopt those provisions as formal regulations.¹ As discussed in greater detail below, we think it likely that the vast majority of those provisions would survive a preemption challenge even if they were adopted as regulations in exactly their present form, and the remaining provisions could be easily rephrased to avoid preemption concerns while achieving the same regulatory objectives.

First, § 209 of the Clean Air Act would pose few preemption obstacles because, among other considerations, the savings clause of § 209(d) preserves the authority of states and localities to regulate the use, operation, and movement of locomotives. Perhaps the Act could be read to preempt MOU sections 1(a) and 1(b), which require installation of anti-idling devices, if those provisions were enacted into positive law in exactly their current form. But that preemption concern could be avoided simply by recasting these provisions as a use restriction, under which railroads would be required to prevent engine idling in the same circumstances but would be permitted to use any means at their disposal to meet that mandate.

Second, we do not believe that the Interstate Commerce Commission Termination Act ("ICCTA") would preempt the MOU provisions. The ICCTA, which establishes the federal Surface Transportation Board, preempts state regulation that significantly impairs railroad

¹ This opinion letter focuses entirely on federal-law preemption issues. We have assumed, for purposes of this analysis, that the relevant California agencies have underlying state-law authority to adopt these provisions as prescriptive regulations. Also, for purposes of this analysis, we are using the term "preemption" broadly to include invalidation through inconsistency with either a federal statutory scheme or the dormant Commerce Clause of the Constitution.

operations, such as advance permitting requirements for the deployment of railroad facilities. Properly construed, however, it does not preempt self-executing and economically unintrusive rules that, like the provisions specified in the MOU, preserve the public's interest in the environmentally sound use of locomotive engines.

Third, the Locomotive Boiler Inspection Act preempts state regulation only of locomotive design and equipment. As noted, the one MOU provision that does relate to locomotive equipment, the anti-idling device requirements of MOU sections 1(a) and 1(b), can be reworded to avoid such preemption while still achieving the same anti-idling objective.

Finally, the vast majority of the MOU's provisions would survive scrutiny under the dormant Commerce Clause if enacted into law because they do not discriminate against out-of-state transactions or impose a burden on interstate commerce outweighing the public health benefits they confer. Here, too, the one provision that raises any concern — MOU section 3(b)(vii), relating to the repair of trains exhibiting excessive visible emissions — can easily be redrafted to avoid the problem.

SUMMARY OF MOU REQUIREMENTS

The MOU contains a number of "program elements" devoted to the goal of reducing air emissions in California. The substantive requirements in the MOU can be divided into several categories, some of which are more plainly "regulatory" than others:

- A minority of the program provisions affirmatively require the railroads to take action to improve air quality. These include § 1(a), (b), and (d) (idling reduction); § 2(a) (lower sulfur diesel fuel); and § 3(a) and (b) (visible emissions).
- Other provisions impose certain training and compliance requirements to assist in the goals of emissions reduction. These include § 1(f), (g), (i); § 2(f) and parts of § 2(b); and § 3(b)(viii).
- Many sections of the MOU impose review, research, reporting, or public information requirements, or provide procedures for designating certain people responsible for fulfilling these requirements. These include § 1(c), (g) and (h); § 3(c), (d), (g), (i), and (j); 4(b) and parts of § 4(a) and (d); § 5(b) and part of § 5(d); all of § 7; parts of § 8; and all of § 9.
- Others simply require the parties — and in some cases allow or require other groups, such as the air districts and community representatives — to meet and confer on relevant issues, without imposing any requirements that the railroads take any action pursuant to such meetings. These include § 3(b)(ix), (e), and (h); § 4(c) and parts of § 4(a) and (d); part of § 5(d); parts of § 8; § 10(a)(iv) and (b); and part of § 11(a).

- In addition, Element 6 simply lists possible funding sources for implementation of mitigation measures; Element 10 provides for the penalties that can result from violations of the agreement; and Element 11 provides administration and termination guidelines for the agreement.

More detailed descriptions of the Program Elements are set out immediately below:

1. Idling Reduction

Element 1 of the MOU establishes a locomotive idling reduction program. It requires that railroads install automatic idling reduction devices on intrastate locomotives,² with specific timetables outlining the cumulative percent of unequipped locomotives that must be equipped with such devices by June 30, 2006 (35%), June 30, 2007 (70%); and June 30, 2008 (>99%). It imposes performance standards for locomotives equipped with these idling reduction devices, including a requirement that they limit nonessential idling to 15 consecutive minutes or, if that would pose an unacceptable risk of component failure, to the shortest feasible duration. Element 1 also imposes performance standards for locomotives that are not equipped with these idling reduction devices, prohibiting nonessential idling for more than 60 consecutive minutes. It also requires reporting, inspection, and development of an enforcement protocol.

2. Lower Sulfur Diesel

Element 2 of the MOU provides for early introduction of lower sulfur diesel in locomotives. The railroads agree to "maximize" the use of such fuel in intrastate locomotives and to ensure that, by the start of 2007, 80% of the fuel supplied to locomotives fueled in California meets either CARB diesel or EPA on-highway diesel fuel standards.

3. Visible Emissions

Element 3 of the MOU purports to establish a statewide program to ensure compliance with existing legal standards for visible emissions. It requires the railroads to establish and provide to CARB a visual emission reduction and repair program designed to ensure that the

² The MOU defines the term "intrastate locomotive" as having the same meaning as in 13 Cal. Code Regs. § 2299(b)(5) and 17 Cal. Code Regs. § 93117(b)(5), each of which defines "[i]ntrastate diesel-electric locomotive" as "[a] diesel-electric locomotive that operates within California for which at least 90 percent of its annual fuel consumption, annual hours of operation, or annual rail miles traveled occur within California." The definition excludes locomotives that meet EPA Tier II emission standards, primarily move freight into and out of the South Coast Air Quality Management District, and have been included as a diesel-electric locomotive operating in the South Coast Nonattainment Area in a 1998 MOU.

compliance rate for each participating railroad is at least 99% of locomotives operating in California.

4. Review of Air Emissions Impacts

Element 4 of the MOU establishes measures designed to promote expeditious review of the impact of air emissions from designated yards, imposing review, progress reporting, and meet-and-confer requirements.

5. Toxic Contaminant Assessment

Element 5 provides for an assessment of toxic air contaminants from the Designated Yards. It provides for CARB and the railroads to work together on studies and risk assessments of toxic air contaminants.

6. Mitigation Measure Funding

Element 6 lists the potential funding sources of mitigation measure components specified in the MOU, including the railroads and other industries, the Carl Moyer Program, and EPA programs including the West Coast Diesel Collaborative.

7. Locomotive Remote Sensing Pilot Program

In Element 7, in order to evaluate the feasibility of using remote-sensing technologies to identify high-emissions locomotives, the parties agree to implement a locomotive remote sensing pilot program based on the pending bill AB 1222. If the May 27, 2005 version of the bill is enacted into law, its implementation will serve as a pilot project in lieu of this element of the MOU.³ If not, the parties agree to meet by January 1, 2006 to discuss how to implement this element.

8. Expeditious Evaluation and Implementation of Mitigation Measures

Element 8 is designed to "ensure that the evaluation and implementation of feasible mitigation measures continues expeditiously." MOU at 12. It provides for study, submission of spending plans, and meetings on these issues.

³ This bill passed the state Assembly on June 1, 2005 and was voted out of a Senate Committee and sent to the Senate floor on June 27.

9. Compliance Reporting

Element 9 provides for compliance reporting, requiring joint development of mutually acceptable compliance reporting protocols; periodic joint program effectiveness reviews of all elements of the MOU; and railroad development of program effectiveness review protocols.

10. Enforcement

Element 10 establishes the enforcement mechanisms and penalties under the agreement. Violations of the MOU's provisions on idling and repair of locomotives with excessive visible emissions will be subject to a \$400 fine for the first violation of any calendar year, an \$800 fine for the second violation, and \$1,200 for the third and subsequent violations. For individual violations of other elements, CARB will inform the railroad in question of its violation and give it an opportunity to remedy the noncompliance, and if it fails to do so it will be subject to the above fines. Railroads may appeal these penalties to administrative law judges or mediators.

For repeated individual violations, railroads are subject to larger penalties: up to \$10,000 for more than 30 days of noncompliance, up to \$20,000 per month after 60 days of noncompliance, up to \$40,000 per month after more than 180 days of noncompliance. Such penalties are waived, however, if the noncompliance in question is the result of "unforeseen and/or uncontrollable circumstances." Once CARB makes a determination that a railroad has failed to meet the standards that would subject it to these penalties, it must provide notice to the railroad and meet and confer with it regarding this determination within 30 days. If they do not reach agreement, they will submit their respective positions to an administrative appeals panel.

11. Administration

Element 11 provides for the administration of the MOU. It states that in the event of a dispute, the disputing parties will meet and confer. If they do not reach agreement, they submit their respective positions to an administrative appeals panel, which determines whether a fine should be levied. Any party dissatisfied with the outcome of this process can seek de novo review of the dispute in any competent court in California. Element 11 also confirms that the MOU constitutes all understandings and agreements between the parties and supercedes all other such agreements with respect to the subject matter of the program elements. Under part (c), the parties also agree that if *any* local or state federal agency proposes to adopt any requirement addressing the goals of any program element, the railroads may elect in their sole discretion to be released from the obligations of the program element(s) in question.

DISCUSSION

The courts have established three general types of preemption: "(1) express preemption—where Congress explicitly defines the extent to which its enactments preempt state law; (2) field preemption—where state law attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy; and (3) conflict preemption—where it is impossible to comply

with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149 (9th Cir. 2000) (internal quotation marks omitted). No matter what the label, any preemption inquiry ultimately rests on a question of congressional intent: if Congress intended to preempt a category of state and local laws, then such laws are preempted; if there was no such purpose, the laws will stand. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

I. Clean Air Act

Section 209(e)(1) of the Clean Air Act provides that “[n]o State or any political subdivision thereof shall adopt or attempt to enforce any standard or other requirement relating to the control of emissions from,” among other enumerated sources, “[n]ew locomotives or new engines used in locomotives.” 42 U.S.C. § 7543(e)(1)(B). The EPA interprets this provision broadly to encompass not just state and local regulations that target new locomotives before sale to end users, but also those that require the installation of “aftermarket” equipment when such requirements “would affect how a manufacturer designs or produces new . . . locomotives or locomotive engines.” EPA, Final Rulemaking, Emission Standards for Locomotives and Locomotive Engines, 63 Fed. Reg. 18,978, 18,994 (Apr. 16, 1998); *see* 40 C.F.R. § 85.1602. A companion provision, section 209(e)(2), has been further construed to preempt any emissions requirements for off-road vehicles or engines not listed in section 209(e)(1), except that section 209(e)(2) authorizes California to impose these requirements on such vehicles so long as it obtains EPA approval.

At the same time, Congress limited the scope of these otherwise sweeping preemption provisions by providing, in section 209(d), that “[n]othing in this part shall preclude or deny to any State or political subdivision thereof the right otherwise to control, regulate, or restrict the *use, operation, or movement* of registered or licensed motor vehicles.” 42 U.S.C. § 7543(d) (emphasis added). Although section 209(d) explicitly refers only to “motor vehicles,” a category that does not extend to locomotives, the EPA has determined, and the D.C. Circuit has upheld its determination, that section 209(d) also carves out the same exception to section 209(e)’s preemption of nonroad vehicles and engines. *See* EPA, Final Rule, Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards, 59 Fed. Reg. 36,969, 36,973-74 & n.16 (July 20, 1994), *aff’d in relevant part*, *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996). The D.C. Circuit further observed, in language that anticipates a key preemption issue here, that the Clean Air Act “has always permitted the states to adopt in-use regulations—such as carpool lanes, restrictions on car use in downtown areas, and *programs to control extended idling of vehicles*—that are expressly intended to control emissions.” 88 F.3d at 1094 (emphasis added).

As the passage quoted above confirms, section 209(d) would preserve against preemption the vast majority of MOU provisions if they were enacted into state or local law or regulation. For example, MOU section 1(d) requires railroads to exert their best efforts to limit all non-essential idling and prohibits non-essential idling for more than 60 minutes. This is precisely the

type of operational regulation that section 209(d) is designed to save. The same is true of MOU section 2, the on-highway diesel requirement, which merely mandates what type of fuel such locomotives must use while inside California, and to our knowledge requires no changes in engine design. *See, e.g.*, EPA, Notice of Proposed Rulemaking, Waiver of Preemption to California for Nonroad Engine and Vehicle Standards, 56 Fed. Reg. 45,866, 45,867 (Sept. 6, 1991) ("states will be able to adopt regulations such as fuel quality specifications"). MOU section 3, which addresses visible emissions, likewise ensures that railroads comply with *pre-existing federal standards* for visual emissions, not with any independent state law requirement.⁴ Although the MOU requires in-use testing for compliance with federal standards, it specifies no non-federal testing protocol and thus permits the use of the federal test protocol established in a 1998 EPA rulemaking. *See* 63 Fed. Reg. at 18,993-94 (declining to preempt such testing requirements). The accompanying repair rules (§ 3(b)(vii)) similarly ensure only that locomotives operate as they were designed and manufactured under federal specifications. Finally, with one exception, the other MOU requirements, such as the various reporting, testing, and consultation requirements, present no independent preemption issues.⁵

The only MOU requirement that, if adopted as regulation in its current form, could raise significant preemption issues under the Clean Air Act is the obligation of railroads under MOU sections 1(a) and 1(b) to install devices that automatically shut engines off after fifteen consecutive minutes of idling (or whatever longer period might be necessary to protect particular engines against excessive component failures). These devices might qualify as the type of "aftermarket" equipment included within the preemptive scope of section 209(e)(1) as interpreted by EPA. That concern, however, could be easily avoided simply by revising the rule to require railroads to limit their idling to the same extent using any effective means, including reliance on manual shut-down. So adjusted, the rule — which would embody a slightly more rigorous version of the "best efforts" requirement of MOU section 1(d) — would fall squarely within the scope of the savings clause of section 209(d) for state-level restrictions on the "use" and "operation" of railroad engines.

⁴ MOU section 3 refers to "[t]he currently applicable visible emissions standard." MOU § 3(b)(vi). Our understanding is that CARB has advised the District that the MOU refers to the applicable federal standards. *See, e.g.*, 40 C.F.R. §§ 51.165-.166, 92.8(a)(2), (5) tbl. A8-1. The relevant MOU requirements are thus designed either to enforce those federal standards directly or, in the case of MOU § 3(b)(v), to identify circumstances in which railroads should investigate whether they are violating those federal standards.

⁵ MOU section 7 implements the same remote-sensing technology (used to identify high-emissions locomotives) contemplated in pending state legislation (AB 1222). This program element would therefore be preempted only if the state bill currently under consideration would also be preempted. And it likely would not be: it subjects railroads to no design requirements of any kind, and simply requires them to reimburse the state for part of the cost of the remote-sensing program.

II. Interstate Commerce Commission Termination Act

Enacted in 1995, the ICCTA creates the Surface Transportation Board ("STB") and grants it exclusive and preemptive jurisdiction 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." 49 U.S.C. § 10,501(b). The ICCTA defines "transportation" broadly to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." *Id.* § 10,102(9).

This preemption provision focuses primarily on state and local laws regulating the deployment of tracks and other railroad facilities. The provision should have no application to environmental requirements of the type contained in the MOU. It is true that, in *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit found that Congress intended a "broad reading" of the ICCTA's preemption provision and that classifying a regulation as "environmental" does not, of itself, shield the regulation from preemption. *Id.* at 1030-31. But it does not follow from *City of Auburn* that Congress intended to preempt every state or local regulation that has some effect on railroads, no matter how economically insignificant. Indeed, in that case, the Ninth Circuit upheld a preemption ruling of the STB that itself made clear that the ICCTA does *not* preempt state-level environmental requirements that, like these, pose no unreasonable burden on interstate commerce.

The STB's reasoning in its decision under review in *City of Auburn* is instructive and likely to be controlling.⁶ According to the Board, "[a] key element in the preemption doctrine is

⁶ "As the agency authorized by Congress to administer the Termination Act, the Transportation Board is uniquely qualified to determine whether state law should be preempted by the Termination Act." *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638, 642 (2d Cir. 2005); *see also Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997) ("An agency's interpretation of the preemptive effect of its regulations is entitled to deference where Congress has delegated authority to the agency, the agency's interpretation is not contrary to a statute, and agency expertise is important to determining preemption."). Also, because (under the "Hobbs Act," 28 U.S.C. § 2342) Congress gave the courts of appeals exclusive jurisdiction to review the validity of STB orders on direct appeal, private parties may not collaterally challenge the STB's legal conclusions in other proceedings to which the STB is not a party. *See, e.g., Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 228 (5th Cir. 2005); *see generally U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999). As a result, the STB's interpretation of the limits of federal preemption under the ICCTA may well be binding

the notion that only 'unreasonable' burdens, i.e., those that 'conflict with' Federal regulation, 'interfere with' Federal authority, or 'unreasonably burden' interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law." *Cities of Auburn & Kent, Wash. — Petition for Declaratory Order — Burlington Northern Railroad Company — Stampede Pass Line*, 1997 WL 362017, at *5 (S.T.B. 1997).⁷ For example, the STB explained, a "railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden on, or interfere with, interstate commerce. Therefore, such requirements are not preempted." *Id.* at *6.⁸

Although the STB has determined that some state-level environmental regulations are preempted, those regulations have tended to involve rules, such as permitting requirements, that

on any court that hears a preemption challenge to requirements of the type contained in the MOU.

⁷ See also *Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12, 16 (1st Cir. 2003) ("[T]he STB found state and local regulation to be permissible where it does not interfere with interstate rail operations, and localities retain certain police powers to protect public health and safety." (internal quotation marks omitted)); *id.* at 16-17 (characterizing the STB as having declared that "Section 10501(b) should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes"); *Florida E. Coast Ry. Co. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001) ("Reliance on the presumption against pre-emption limits 'congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.'" (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997))).

⁸ See also *Village of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp.*, 750 A.2d 57, 64 (N.J. 2000) (discussing this STB ruling); *Boston & Maine Corp. & Town of Ayer, Mass. — Joint Petition for Declaratory Order*, 2001 WL 458685, at *7 (S.T.B. 2001) ("Like any citizen or business, railroads have some responsibility to work with communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety, and to assume responsibility if they act negligently."); *Borough of Riverdale — Petition for Declaratory Order — The New York Susquehanna & W. Railway Corp.*, 1999 WL 715272, at *6 (S.T.B. 1999) ("state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety"); *id.* at *4 ("state or local regulation is permissible where it does not interfere with interstate rail operations, and . . . localities retain certain police powers to protect public health and safety").

placed broad discretion in the hands of public officials to stop railroads literally in their tracks.⁹ The Second Circuit has cited that feature as a key precondition to preemption under the ICCTA:

[S]tates and towns may exercise traditional police powers over the development of railroad property, at least to the extent that the regulations protect public health and safety, are settled and defined, can be obeyed with reasonable certainty, entail no extended or open-ended delays, and can be approved (or rejected) without the exercise of discretion on subjective questions. Electrical, plumbing and fire codes, *direct environmental regulations enacted for the protection of the public health and safety*, and other generally applicable, non-discriminatory regulations and permit requirements would seem to withstand preemption.

Green Mountain R.R. Corp. v. State of Vermont, 404 F.3d 638, 643 (2d Cir. 2005) (emphasis added), *petition for cert. filed*, 74 U.S.L.W. 3050 (U.S. Jul. 13, 2005) (No. 05-89).¹⁰ There is thus some consensus in the case law that, despite the broad preemption language of the ICCTA, states and localities may adopt environmental regulations that do not rely on open-ended discretion, at least so long as they also do not substantially interfere with the business of railroad operations.¹¹

⁹ See, e.g., *Riverdale*, 1999 WL 715272, at *6 (“[T]o the extent that they set up legal processes that could frustrate or defeat railroad operations, state or local laws that would impose a local permitting or environmental process as a prerequisite to the railroad’s maintenance, use, or upgrading of its facilities are preempted because they would, of necessity, impinge upon the federal regulation of interstate commerce.”); *Cities of Auburn & Kent, Wash.*, 1997 WL 362017, at *5 (“[A] state or local permitting process implies the power to deny authorization, which could frustrate the activity that is subject to federal control. If [a railroad] were unable to undertake the projects, or if its ability to commence projects to maintain and upgrade its facilities were substantially delayed pending resolution of a state or local permitting or environmental process, its ability to carry rail traffic . . . could be greatly inhibited, if not foreclosed.”).

¹⁰ In contrast, the Second Circuit held, the ICCTA preempted the Vermont permitting requirements at issue in that case because of the patently discretionary nature of the permitting process: “the railroad is restrained from development until a permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.” *Id.* at 643. The Ninth Circuit has likewise invalidated state and local permitting laws regarding railroad operations. See *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998).

¹¹ See, e.g., *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053 (2000) (holding that the ICCTA did not necessarily preclude state-law remedies for the conduct of a railroad that was alleged to have sounded train horns and parked idling trains near the plaintiffs’ homes for long periods of time, and engaged in other harassing conduct because, the court reasoned, that

Here, nothing in the MOU sets up the kind of permitting system found objectionable in either *City of Auburn* or *Green Mountain*. The substantive requirements of the MOU are instead analogous to the type of prescriptive water-quality regulations that the STB has deemed permissible. See *Cities of Auburn & Kent, Wash.*, 1997 WL 362017 at *6. They also do not substantially interfere with the regulated parties' ability to "operate [the] railroad business safely and efficiently." *Jones*, 79 Cal. App. 4th at 1060. For example, the parties crafting the MOU took special pains to emphasize that the time limits on idling apply only where the idling in question is *not* essential for safety or operational purposes. Similarly, the low-sulfur diesel compliance requirements in MOU section 2 that apply to interstate locomotive fleets would also likely survive preemption scrutiny under the ICCTA insofar as these fuel guidelines do not substantially interfere with railroad operations. And, as discussed above, the visible emissions repair program mandated in MOU section 3 merely ensures compliance with existing federal visible emissions standards. In *Cities of Auburn and Kent*, the STB expressly determined that the ICCTA does not preempt state programs designed to ensure compliance with federal air quality standards. 1997 WL 362017, at *4.

Along the same lines, the testing, inspection, and meet-and-confer provisions of the MOU are exactly the type of reasonable police power measures that, as the STB has found, the ICCTA does not preempt:

[A] certain degree of pragmatism on the part of communities and cooperation on the part of railroads is necessary to reach reasonable solutions to state and local concerns that do not unreasonably interfere with interstate commerce. Examples of solutions that appear to us to be reasonable include conditions requiring railroads to (1) share their plans with the community, when they are undertaking

conduct may not even have been "in furtherance of Union Pacific's railroad operations"); *Florida E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1332-37 (11th Cir. 2001) (holding that the operation of an aggregate business by non-railroad company on railroad property was not rail transportation and thus not preempted); *Native Village of Eklutna v. Alaska R.R. Corp.*, 87 P.3d 41, 57 (Alaska 2004) (holding that a railroad's operation of a gravel quarry was not integrally related to rail operations); *In re Appeal of Vermont Ry.*, 769 A.2d 648, 654-55 (2000) (holding that local regulatory constraints on truck operations do not interfere with railway operations); *State of Oklahoma v. Burlington N. & Santa Fe Ry.*, 24 P.3d 368, 371-372 (Okla. 2000) (local order that railroad repair three-tenths of mile of fence did not have any impact on the railroad's interstate operations and thus was not preempted); *Town of Milford, Mass. — Pet. for Declaratory Order*, 2004 WL 1802301, at *3 (S.T.B. 2004) (holding that the operation of a steel fabrication business by non-railroad on railroad property is not rail transportation.); *Hi Tech Trans, LLC, — Pet. for Declaratory Order*, , 2003 WL 21952136, at *3-5 (S.T.B. 2003) (operation of transload facility by non-railroad, not under the auspices of a railroad, not rail transportation.).

an activity for which another entity would require a permit; . . . (4) provide representatives to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns; and (5) submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin.

Town of Ayer, 2001 WL 458685, at *7 (footnotes and paragraph break omitted), *aff'd*, *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass. 2002).

Finally, if there were any doubt about the scope of the ICCTA's preemption clause, it should be resolved in favor of a sensibly narrow interpretation that harmonizes that statute with the corresponding scheme developed under the Clean Air Act. As discussed, the Clean Air Act and the EPA's implementing regulations—promulgated in 1994, the year before Congress enacted the ICCTA—grant states and localities a critical role in regulating the “use” of locomotive engines to reduce harmful emissions. Under standard principles of statutory interpretation, the ICCTA should be construed to avoid undermining that federally recognized state and local role. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

III. Locomotive Boiler Inspection Act

The final federal statute that might raise preemption issues is the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.* (“Boiler Act”). The Boiler Act provides that the “parts and appurtenances” on locomotives must be in proper condition according to federal regulations set forth by the Department of Transportation. In 1926, the Supreme Court held that “state legislation [regulating locomotive equipment] is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field.” *Napier v. Atlantic Coast Line R.R. Co.*, 272 U.S. 605, 613 (1926). The Court further held that the “field” occupied by the Act is the regulation of locomotive equipment generally rather than the more specific class of regulations designed to promote railroad safety. *Id.* at 612; *see also Lorincie v. S.E. Penn. Transp. Auth.*, 34 F. Supp. 2d 929, 931 (E.D. Pa. 1998) (discussing *Napier*'s scope and holding).

Here, as a general matter, even the MOU provisions that impose performance requirements do not mandate that railroads include (or exclude) any specific type of equipment in order to meet those requirements. As the Ninth Circuit explained in *Southern Pacific Transportation Co. v. Public Utility Commission of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993): “The Supreme Court's decision in *Napier* describes the [Boiler Act] as regulating the ‘design, the construction and the material’ of every part of the locomotive, but does not mention the *use* of locomotive parts.” *Id.* at 811 (emphasis added; quoting *Napier*, 272 U.S. at 611). Thus, the Court held that the Boiler Act did not preempt an Oregon scheme restricting the sounding of

locomotive whistles, because that restriction “neither limits nor expands the type of equipment with which locomotives are required to be equipped.” *Id.*¹²

With one possible exception, neither does any provision of the MOU. The possible exception is Element 1(a) of the MOU, which might be preempted if enacted into law because it prescribes the installation of particular locomotive equipment (the anti-idling device). As discussed above, however, that program element could be modified to avoid similar preemption problems under the Clean Air Act simply by rephrasing it as an explicit use restriction. So modified, the provision could pose no serious risk of preemption under the Boiler Act either.

IV. Dormant Commerce Clause

To challenge a state or local requirement under the “dormant” aspect of the Commerce Clause, a party must show that the requirement “penalizes interstate commerce, and does so without sufficient economic justification.” *National Audubon Soc’y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir.), *amended on denial of reh’g en banc*, 312 F.3d 416 (2002); *see generally Oklahoma Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995). For these purposes, the Supreme Court “has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions.” *Maine v. Taylor*, 477 U.S. 131, 138 (1986). In the first category, statutes that only incidentally burden interstate commerce without affirmatively discriminating against interstate transactions “violate the Commerce Clause only if the burdens they impose on interstate trade are ‘clearly excessive in relation to the putative local benefits.’” *Taylor*, 477 U.S. at 138 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)); *see also Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1224 (9th Cir. 2003); *National Audubon Soc’y*, 307 F.3d at 857 (quoting *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir.1991)). In the second category, “once a state law is shown to discriminate against interstate commerce ‘either on its face or in practical effect,’ the burden falls on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.” *Taylor*, 477 U.S. at 138 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

If adopted as regulations, the MOU requirements, with one conceivable and easily remedied exception (discussed below), would fall plainly into the first category of non-discriminatory state regulations. They would thus be subject only to relaxed scrutiny to ensure

¹² Similarly, in *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851, 869 (9th Cir. 2003), the Ninth Circuit upheld against Boiler Act preemption challenge a state regulation requiring railroads to follow internal operating regulations regarding the number or order of locomotives used on trains. The court said that “[w]e have interpreted this mandate as occupying the field of locomotive equipment, but not locomotive use.” *Id.* at 869.

that they promote valid state objectives without unduly burdening interstate commerce. And they would easily withstand such scrutiny.

In particular, all MOU elements are reasonably designed to contribute to the improvement of air quality in California, and the lion's share of substantive MOU requirements relate only to "intrastate" railroads or apply to railroads only when they are passing through California. First, MOU section 1(a) requires the railroads to install anti-idling devices only on "intrastate locomotives based in California." This provision thus has only a minimal effect on interstate commerce because, by definition, it applies only to trains with less than 10% of their operations outside California. *See* n.2, *supra*. The idling time limits in § 1(b) and § 1(d) would have even less of an impact, as they require that trains keep their nonessential idling time below 15 and 60 minutes, respectively, *when in California only*. Similarly, the low-sulfur diesel requirement of MOU section 2 does not impose any requirements at all on trains while they are outside the state; and, again, we are aware of no respect in which the in-state fueling requirement would necessitate changes in existing locomotive design.

These requirements are thus a world apart from those invalidated in *Union Pacific Railroad Co. v. California Public Utilities Commission*, 346 F.3d 851 (9th Cir. 2003). In that case, the Ninth Circuit struck down some (though not all) state regulations concerning train "configuration" (or "make up"): i.e., the number and placement of cars within a train to ensure stability. As the court observed, "if California can require the Railroads to develop and to implement performance-based [configuration] standards, so can every other state, and there is no guarantee that the standards will be similar." *Id.* at 871. Moreover, because trains cannot feasibly be *reconfigured* as they travel across state lines, "[t]he effect of such a patch-work regulatory scheme would be immense." *Id.* Just as important, the state had conceded that imposing its new configuration rules on the railroads, as compared to merely enforcing the railroads' existing (self-imposed) rules, would present only administrative advantages, not any improvement in train safety. *Id.* at 871-72. And the court concluded that "[t]he interest in easing the administrative burden of applying the Railroads' more technical rules pales in comparison to the burden of requiring potentially conflicting state standards." *Id.* at 872. Here, in contrast, the substantive MOU requirements unquestionably promote the state's core interest in clean air, and they are narrowly tailored to minimize any burden on interstate commerce.

The only MOU provision that, if adopted as regulation, could conceivably raise concerns under the dormant Commerce Clause is section 3(b)(vii), part of the program element relating to the reduction of visible emissions. Section 3(b)(vii) mandates, in relevant part, that a statewide visual emissions reduction and repair program include:

[p]rovisions for routing locomotives operating in California with excessive visible emissions to the nearest Participating Railroad's repair facility within 96 hours. If travel along its scheduled route will take a locomotive with excessive visible emissions out of the state, it is the intent of the Participating Railroads to repair the locomotive expeditiously, and commit that in no event shall the locomotive reenter California without appropriate testing and repairs having been made.

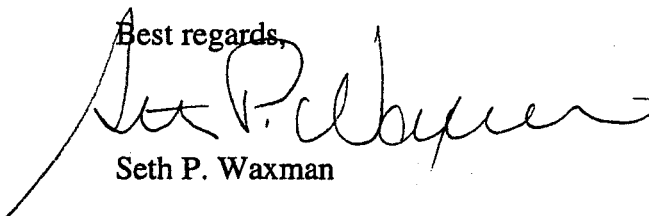
In operation, this provision might be alleged to impose more stringent requirements on interstate than on intrastate transportation. Trains with excessive visual emissions must be taken to a repair facility within 96 hours if they remain in California, but if a train with excessive emissions leaves California with a plan to return, it must not only be taken to a repair facility, but must actually be repaired before it returns to California, even if it returns less than 96 hours after the excessive visible emissions are first detected.

On the other hand, the repair program mandated in section 3(b) is designed merely to ensure that railroads comply with existing uniform federal guidelines, whether the trains in question travel interstate or intrastate. In addition, the lack of a time limit for repairs on trains that leave the state is a double-edged sword, in some cases placing *less* of a burden on such trains than is placed on intrastate trains. After all, if a train with excessive emissions leaves California and is scheduled to stay outside the state for *more* than 96 hours before returning, then it has more time to repair its equipment than its intrastate counterparts do. In all events, minor changes to the language of section 3(b)(vii) would easily eliminate any Commerce Clause concern while preserving the essential objective of MOU section 3. For example, the wording could be changed to require that locomotives be taken to repair facilities if they exhibit excessive visible emissions within 96 hours (consecutive or nonconsecutive) *in California*.

CONCLUSION

The vast majority of MOU requirements would very likely withstand any preemption challenge even if they were adopted verbatim into positive law. Any preemption concern about the few remaining provisions could be mitigated simply by rephrasing them to achieve the same regulatory objectives through slightly different means.

Best regards,



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