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August 31, 2005

Transmitted Electronically and by Overnight Courier

Cindy K. Tuck
Chair, California Air Resources Board
1001 I Street
P.O. Box 2815
Sacramento, CA 95812

Re: **Analysis of June 2005 ARB/Railroad Memorandum of Understanding**

Dear Ms. Tuck:

At the request of the South Coast Air Quality Management District ("District"), we have analyzed the June 2005 "ARB/Railroad Statewide Agreement: Particulate Emissions Reductions Program at California Rail Yards" ("MOU") to determine whether federal statutory preemption or constitutional limitations would prevent the Air Resources Board ("ARB") or the District from adopting regulations to achieve the goals set out in the MOU. It is our opinion that ARB and the District have the authority to adopt regulatory requirements that would achieve all of the goals of the MOU and that those regulations would neither be preempted nor constitutionally barred.

ARB has clearly articulated the rationale for its choice to proceed by way of a negotiated agreement rather than by regulation: "With respect to the 2005 MOU, ARB staff began and ended the negotiations with the perspective that railroads are largely exempt from state or local intervention under Section 209(e) of the Clean Air Act." Letter from Catherine Witherspoon to Members of the District Governing Board (June 29, 2005). It is our conclusion that neither Clean Air Act section 209(e) nor any other federal authority would preclude state and local entities from adopting and enforcing regulations that require the actions identified in the MOU or actions having the same effect. The analysis on which we base our conclusion is set forth below.

Following a summary of our conclusions,¹ Part I provides an overview of both ARB and District authority under California law to regulate railroads' air emissions, and the limits imposed on that authority by various federal statutes, including the federal Clean Air Act, 42 U.S.C. § 7401 *et seq.*, and the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 10101 *et seq.*, and by the "dormant" aspect of the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8. Part II summarizes the provisions of the MOU. Part III assesses potential federal constraints on state and local authority to adopt as regulations the provisions of the MOU.

SUMMARY OF CONCLUSIONS

- **The California Health and Safety Code provides sufficient authority to ARB and the District to adopt the provisions of the MOU as regulations.**
 - The Health and Safety Code grants both ARB and air districts broad authority to adopt regulations to control air emissions, including emissions from locomotives.² Although the statutes contain explicit limits on the means by which air districts may regulate locomotive emissions, these limits implicitly recognize the districts' authority to regulate locomotive emissions by means that are not within the statutory prohibition. ARB's authority to regulate locomotive emissions is comprehensive and is not subject to any such limitation. The Health and Safety Code also specifically authorizes ARB and the District to adopt regulations that enable them to gather data about existing emission levels.
- **ARB or District regulations to achieve the goals of the MOU would not be preempted by federal statute.**
 - The federal Clean Air Act preempts state and local regulation of emissions from new locomotives if that regulation would have real and concrete effects on the design, manufacture, or remanufacture of locomotives or locomotive engines.

¹ Although our analysis is limited to the provisions of the MOU, it should not be read to suggest that a different level or other methods of regulation of locomotive emissions would be beyond the scope of ARB or the District's statutory authority or would be preempted or otherwise barred.

² The District is an air quality management district created by the Lewis-Presley Air Quality Management Act, H&SC § 40400 *et seq.*, and has the authority granted to regional and local air districts generally, as well as the authority specifically provided in the Lewis-Presley Act. Compare, e.g., H&SC § 40440 with H&SC § 40001.

- Most of the provisions of the MOU, if adopted as regulations, would not be preempted under the express preemption provision of Clean Air Act section 209(e) as written or as interpreted by EPA, because the MOU provisions are directed at locomotive *use* and do not affect manufacturing decisions. We think it likely, however, that the provision of the MOU requiring installation of idling-control devices on locomotives in intrastate fleets (§ 1(a))³ would be preempted by section 209(e). The Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, would likely also preempt the requirement for the installation of anti-idling devices, but would not preempt other provisions of the MOU if adopted in regulatory form.
- The ICCTA has broad preemptive effect with respect to state or local economic regulation or regulations in the nature of discretionary permitting requirements. Other state or local regulations that are within the state's traditional police power to protect the environment or public health and safety and that do not interfere with interstate operations of railroads are not preempted. The provisions of the MOU do not fall within the preemptive ambit of the ICCTA.
- Although the requirement for installation of idling-control devices would likely be preempted by federal statute, the limitation on idling achieved by the device requirement could readily be achieved by a regulatory in-use performance standard limiting idling, which would not be preempted. The MOU includes such a standard (§ 1(d)).
- **ARB or District regulations to achieve the goals of the MOU would not be barred by the dormant Commerce Clause of the Constitution.**
 - None of the MOU provisions facially discriminates against interstate commerce in violation of the dormant Commerce Clause.
 - The MOU provisions' minor incidental burden on interstate commerce is not clearly disproportionate to their clear public health benefits. The provisions principally target intrastate trains and conduct within California.
 - Any potential burden on or discrimination against interstate commerce can be easily eliminated by reframing the relevant provisions in a manner that would not diminish their effectiveness.

³ All references to sections of the MOU are to section numbers in Part C of the document.

ANALYSIS

I. STATE AND LOCAL AUTHORITY TO REGULATE RAILROAD EMISSIONS

A. Statutory Authority

The California Health and Safety Code ("H&SC") provides the authority for both ARB and the District to regulate air emissions. That authority extends to the regulation of air emissions from locomotives.

1. The District

"[L]ocal and regional authorities have the primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles. The control of emissions from motor vehicles, except as otherwise provided in this division, shall be the responsibility of the State board." H&SC § 40000. To carry out this responsibility, local and regional air districts are given broad authority to adopt regulations limiting air emissions. H&SC §§ 40001, 40440, 40702, 40910. The Health and Safety Code provides specific direction to districts, in regulating emissions to attain federal and state ambient air quality standards, to "consider the full spectrum of emission sources *and focus particular attention on reducing the emissions from transportation . . . emission sources.*" H&SC § 40910 (emphasis added). The Legislature has acknowledged the special challenges facing the South Coast District in its efforts to attain air quality standards in the Los Angeles Basin and has expressed its intention to provide the District with enhanced regulatory authority to meet those challenges. H&SC § 40402.

Under the Health and Safety Code, locomotives are not "motor vehicles." Health and Safety Code section 39039 defines "motor vehicle" by reference to section 415 of the Vehicle Code. That provision defines "motor vehicle" as "a vehicle that is self-propelled," Veh. Code § 415(a), and in turn a "vehicle" is defined as "a device by which any person or property may be propelled, moved, or drawn upon a highway, *excepting a device . . . used exclusively upon stationary rails or tracks.*" Veh. Code § 670 (emphasis added). Because locomotives are not motor vehicles, control of their emissions is within the "primary responsibility" of regional and local authorities. H&SC § 40000.

Nevertheless, air districts' authority to regulate locomotives is expressly limited:

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.

H&SC § 40702. Although this provision limits air districts' authority to regulate locomotives, it implicitly confirms that districts retain authority to promulgate emission

reduction regulations for locomotives, such as performance standards, other than by "specify[ing] the design of equipment, type of construction, or particular method to be used" in reducing locomotive emissions.

We believe that the prohibition on regulations dictating the "particular method to be used" must be read as prohibiting only the specification of methods that are similar to those enumerated in the statute, *i.e.*, methods affecting the physical configuration of locomotive equipment. This follows from application of the interpretive canon *noscitur a sociis*: "a word takes meaning from the company it keeps." *People v. Drennan*, 84 Cal. App. 4th 1349, 1355 (2000). In other words, "That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994).

Section 40701(g) authorizes air districts

[t]o require any owner or operator of any air pollution emission source, except a noncommercial vehicular source, to provide (1) a description of the source, and (2) disclosure of the data necessary to estimate the emissions of pollutants for which ambient air quality standards have been adopted, or their precursor pollutants, so that the full spectrum of emission sources can be addressed equitably pursuant to Section 40910.

Section 41511 also authorizes the air districts to require emissions sources to take "such action . . . reasonable for the determination of the amount of such emission from such source." As emissions sources, locomotives are subject to these provisions.

2. ARB

The Health and Safety Code provides ARB general authority to adopt rules and regulations to carry out its duties under the Health and Safety Code, H&SC §§ 39600, 39601, and specifically grants ARB broad authority to regulate locomotive emissions. Section 43013 reads in relevant part as follows: "The state board shall, consistent with subdivision (a), *adopt standards and regulations for . . . off-road or nonvehicle engine categories, including . . . locomotives . . .*" H&SC § 43013(b) (emphasis added). The Health and Safety Code also directs ARB to "endeavor to achieve the maximum degree of emission reduction possible from vehicular *and other mobile sources* in order to accomplish the attainment of the state standards at the earliest practicable date." H&SC § 43018(a) (emphasis added). The limitation on air districts' authority to regulate locomotives contained in section 40702 does not apply to ARB.

Section 41511 also authorizes ARB, as well as air districts, to "adopt rules and regulations to require the owner or the operator of any air pollution emission source to take such action . . . reasonable for the determination of the amount of such emission from such source."

Regulations of both ARB and the districts are subject to enforcement by, among other methods, civil and criminal penalties for violations of any rule, regulation, permit, or order of ARB or the districts. H&SC § 42400 *et seq.* The amount of statutory penalties varies depending on the harm caused by the violation and the intent (or lack thereof) of the violator.

B. Preemption

A federal statute may preempt state or local regulation either explicitly or implicitly. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Where a regulation within the states' traditional police powers is at issue, however, courts narrowly construe the preemptive effect even of those federal statutes with express preemption provisions. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *see also DeBuono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) (noting "the considerable burden of overcoming 'the starting presumption that Congress does not intend to supplant state law'"). "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power." *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960). State regulation of air emissions therefore benefits from the presumption against preemption. *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1255 (9th Cir. 2000).

Both the Clean Air Act and the statutes establishing a national regulatory framework for the operation of railroads, such as the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 *et seq.*, and the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*, expressly and impliedly preempt some state and local regulation of railroads and railroad air emissions.

1. Federal Clean Air Act

Section 209(e) of the federal Clean Air Act provides, "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 . . . [¶] [n]ew locomotives or new engines used in locomotives." 42 U.S.C. § 7543(e)(1). In a 1998 regulation interpreting section 209(e), EPA concluded that, in addition to preempting regulations targeting new locomotives prior to sale to end users, section 209(e) also preempted certain regulations of locomotives already "in use." 40 C.F.R. § 85.1602; 62 Fed. Reg. 6,366 (Feb. 11, 1997) (notice of proposed rulemaking); 63 Fed. Reg. 18,978 (April 16, 1998) (final rule). Specifically, EPA concluded, "Any state control that would affect how a manufacturer designs or produces new . . . locomotives or locomotive engines is preempted by section 209(e)(1)." 63 Fed. Reg. at 18,994. Conversely, section 209(e) does not bar "standards directed primarily at intrastate activities where the burden of compliance does not effectively impact manufacturers and distributors." 62 Fed. Reg. at 6,397 (emphasis

added). "The proposed [regulation's] approach is intended to address real and concrete effects, whether or not large; however, it is not intended to address speculative or trivial effects." *Id.* at 6,397 n. 26. EPA's regulation also included a non-exclusive list of state and local regulations that would be most likely to affect manufacturers' design of locomotives or engines and thus be preempted: "emission standards, mandatory fleet average standards, certification requirements, aftermarket equipment requirements, and nonfederal in-use testing requirements." 40 C.F.R. § 85.1602(c)(2).⁴

EPA has also recognized that despite the language of section 209(e), some state or local regulation of nonroad engine emissions is permissible under section 209(d). That section provides, "Nothing 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 on its face section 209(d) refers only to "motor vehicles," EPA has interpreted Section 209(d) to apply to the section 209(e) preemption of nonroad engine standards as well as the section 209(a) preemption of motor vehicle standards. 59 Fed. Reg. 36,969, 36,973 n.16 (July 20, 1994) (final rule).

The District of Columbia Circuit upheld EPA's interpretation in *Engine Manufacturers Association v. EPA*, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996) ("*EMA*"). In doing so, the *EMA* court explicitly rejected an argument that such in-use regulations could not be emissions related, noting that "the longstanding scheme of motor vehicle emissions control has always permitted the state 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." *Id.* at 1094.

2. Interstate Commerce Commission Termination Act

The ICCTA grants exclusive jurisdiction to the Surface Transportation Board ("STB"), an agency within the U.S. Department of Transportation, over the following:

- (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 rule), practices, routes, services and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side

⁴ Section 209(e)(2) also implicitly preempts some additional "nonroad" engine regulations, subject to a waiver provision for California regulations. 42 U.S.C. § 7543(e)(2). In the locomotive context, however, EPA's regulations defining the scope of preemption under section 209(e)(1) effectively encompass the preemptive effect of section 209(e)(2). Subsection (e)(2) retains force, however, for other categories of nonroad engines.

tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one state

49 U.S.C. § 10501(b). The statute also provides, "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." *Id.*

In *City of Auburn v. United States*, 154 F.3d 1025 (9th Cir. 1998), the Ninth Circuit held that the ICCTA preempts local environmental review and permitting requirements for proposed physical repairs and improvements to a railroad line (replacement of track sidings and snow sheds, tunnel improvements, communication towers). The court found that Congress intended that the ICCTA have broad preemptive effect, and it rejected the argument that because the regulation at issue was "environmental" rather than "economic," it was outside the preemptive ambit of the ICCTA. The court stated, "For if local authorities have the ability to impose 'environmental' permitting regulations on the railroad, such power will in fact amount to 'economic regulation' if the carrier is prevented from constructing, acquiring, operating, abandoning, or discontinuing a line." *Id.* at 1031. Affirming an order of the STB, the court therefore held that the city's land use permitting requirement was preempted as applied to the proposed actions of the railroad. *Id.*

Although the scope of ICCTA preemption is undoubtedly broad, *see City of Auburn v. United States, supra*, it is not limitless. In *Green Mountain Railroad Corp. v. Vermont*, 404 F.3d 638 (2d Cir. 2005), decided after and following the authority of the Ninth Circuit ruling in *City of Auburn*, the Second Circuit identified matters beyond the scope of ICCTA preemption:

not all state and local regulations are preempted [by the Termination Act]; local bodies retain certain police powers which protect public health and safety. It therefore appears that states 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.

Id. at 643 (citations and internal quotation marks omitted; alterations in original).

The Second Circuit's interpretation is consistent with the interpretation of the STB itself: "[S]tate 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.” *Borough of Riverdale Petition for Declaratory Order re the New York Susquehanna and Western Railway Corporation*, STB Finance Docket No. 33466, 1999 STB Lexis 531 at 4 (September 9, 1999) (emphasis added).⁵

California courts have also held that regulations that will not interfere with the construction of railroad facilities or operation of the railroads are not preempted by the ICCTA. *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053, 1060-61 (2000) (holding that a nuisance suit based on train idling would not be preempted by ICCTA so long as the challenged idling was non-essential, *i.e.*, “not safety related or [taken] in furtherance of [the railroad’s] operations”).

3. Locomotive Boiler Inspection Act

The Locomotive Boiler Inspection Act (“LBIA”), 49 U.S.C. § 20701 *et seq.*, provides that a railroad may use a locomotive only if the locomotive and its “parts and appurtenances” are in proper condition and comply with the regulations and testing procedures prescribed by the Secretary of Transportation. The Supreme Court has held that these provisions occupy the field of regulation of locomotive equipment. *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 611, 613 (1926).⁶

C. Dormant Commerce Clause

The Constitution’s Commerce Clause, U.S. Const. art. I, § 8, which grants Congress the authority to regulate interstate commerce, has been interpreted to have a “dormant” aspect, prohibiting state and local governments from interfering with interstate commerce. *Maine v. Taylor*, 477 U.S. 131, 137 (1986). If a state or local regulation affirmatively discriminates either on its face or in practical effect against interstate commerce, “the burden falls on the State [or local government] 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.” *Id.* at 138. “‘Discrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys. Inc. v. Dept. of Envtl. Quality*, 511

⁵ We have found no case suggesting that the ICCTA preempts the field of all regulation of railroads, and indeed, as discussed above, courts and the STB itself have suggested several categories of state police power regulations that may legitimately be applied to railroads. *See, e.g., Green Mountain R.R. Corp.*, 404 F.3d at 643.

⁶ We do not discuss the preemptive effect of the Federal Railroad Safety Act (“FRSA”), 49 U.S.C. § 20101 *et seq.*, because that Act is clearly inapplicable to the MOU’s provisions. The FRSA preempts only regulations relating to railroad safety. *S. Pac. Transp. Co. v. Pub. Util. Comm’n*, 9 F.3d 807, 812 (9th Cir. 1993) (citing *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993)). None of the goals or requirements of the MOU is safety-related.

U.S. 93, 99 (1994). Such discriminatory regulations are “virtually *per se* invalid” under the dormant Commerce Clause. *Id.* By contrast, if the effect of a state or local locomotive regulation on interstate commerce is only incidental to an otherwise legitimate regulatory purpose, the regulation will be upheld under the dormant Commerce Clause unless the burden imposed on interstate commerce is clearly excessive in relation to the local benefits. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

II. OVERVIEW OF THE RAILROAD MOU

The “program elements” of the MOU can be divided into four categories: (1) provisions that require the railroads to take action to reduce emissions; (2) provisions that require the railroads to monitor and report emissions to ARB or provide other data to ARB; (3) provisions that require training and designation of railroad personnel to address emission problems; and (4) other non-regulatory requirements, such as requirements to “meet and confer” with ARB. The following sections summarize each of these categories.

A. Emissions Reduction

1. Idling Reduction

Installation of anti-idling devices. Section 1(a) requires the installation according to a specified schedule of “automatic idling-reduction devices” on all intrastate locomotives⁷ that are not already so equipped. Section 1(b) establishes a performance standard for the anti-idling devices, requiring that they shut down the locomotive engine after 15 minutes of non-essential idling. Section 1(e) defines essential idling.

Idling performance standards. Section 1(d) establishes an idling performance standard limiting intrastate locomotives’ non-essential idling to 60 consecutive minutes regardless of whether the locomotive has installed an anti-idling device.

2. Fuel Use

Use of lower sulfur on-highway diesel. In May 2005, ARB promulgated regulations requiring the use of on-highway diesel (which is subject to requirements for sulfur content, aromatic hydrocarbon content, and lubricity) in intrastate locomotives beginning January 1, 2007. 13 Cal. Code Regs. §§ 2281-82, 2284, 2299; 17 Cal. Code Regs. § 93116. Section 2(a) of the MOU directs railroads to “maximize” their use of lower sulfur on-highway diesel in locomotives operating in California and to ensure that,

⁷ An intrastate locomotive is a locomotive “for which at least 90 percent of its annual fuel consumption, annual hours of operation, or annual rail miles traveled occur within California,” subject to several exceptions. 13 Cal. Code Regs. § 2299(b)(5), *cited in* MOU § 1(a) n.1.

after December 31, 2006, at least 80 percent of fuel supplied to locomotives fueled in California meets the specifications for either California diesel fuel (ARB diesel) or EPA on-highway diesel.

3. Visible Emissions

Fleet average compliance with visible emission standard. Section 3(a) requires the railroads to establish a program to ensure that 99 percent of the intrastate and interstate locomotives operating within California comply with the "currently applicable visible emissions standard." Failure to meet the fleet average compliance target requires the railroads to meet and confer with ARB to identify further steps to improve compliance (§ 3(e)).

Although the MOU does not define the "currently applicable visible emissions standard," we understand it to refer to the applicable federal standard. EPA has established a three-tiered standard for locomotive emissions, with the applicable standard for any given locomotive depending on its date of manufacture or remanufacture. *See* 40 C.F.R. § 92.8(a)(2), (5) tbl. A-8; 63 Fed. Reg. at 18,981-82 & tbl. IV-3. Moreover, the MOU requires that the railroads "identify and screen" any locomotive producing visible emissions of 20 percent or greater opacity, but requires repair only for "locomotives that exceed the currently applicable visible emissions standards." MOU § 3(b)(v). Because twenty percent opacity is the most stringent of EPA's three tiers of standards, the MOU appears intended to ensure that every locomotive potentially violating the federal standard will be screened to determine whether, based on the age of its engine, it is in fact violating the standard and thus requires repair.

Repair of locomotives exceeding visible emission standard. Section 3(b)(vii) requires that locomotives operating in California that exceed visible emission standards be routed for repair within 96 hours of the discovered violation. Locomotives found to have excessive visible emissions prior to leaving the state are required to be repaired before they reenter the state.

B. Monitoring, Reporting, and Data Gathering

The MOU includes a variety of provisions requiring the railroads to perform monitoring and inspections (§ 3(b)), keep records of monitoring results and report them to ARB (§ 3(c), (d)), submit data about their locomotive fleets to ARB (§ 1(c)), and establish processes for rail yard neighbors to report excessive idling or visible emissions (§§ 1(h), 3(j)). These provisions do not require the railroads to take action to reduce emissions, but several may serve as precursors to emission reduction actions.

The MOU also requires the railroads to evaluate existing emissions at rail yards to determine the feasibility of mitigation measures to reduce emission impacts on adjacent communities and report the results to ARB (§ 4) and to provide ARB with data regarding

emissions at rail yards to support ARB's preparation of a health risk assessment for affected communities (§ 5). The MOU provides that in the event pending legislation establishing a locomotive remote sensing program is not enacted, ARB and the railroads will implement remote sensing pilot program modeled after the proposed legislation, AB 1222 (§ 7).

C. Training and Designation of Railroad Personnel

The MOU requires the railroads to provide training to railroad personnel and to designate personnel for specified tasks. The railroads must train personnel to reduce non-essential idling as required by the MOU (§ 1(f)) and to identify and report locomotives violating visible emission standards (§ 3(b)(viii), (f)). The railroads must designate "idling reduction program coordinators" (§ 1(g)), "visible emission evaluators" (§ 3(f)), and "visible emission inspection and repair program coordinators" (§ 3(i)).

D. Enforcement

The MOU specifies penalties for violations of the substantive program elements (§ 10). It authorizes appeal of an enforcement proceeding (§ 10(a)(iii)). Penalties are waived if noncompliance was caused by "unforeseen and/or uncontrollable circumstances" (§ 10(b)(iv)). The MOU does not incorporate and is not enforceable under provisions of the Health and Safety Code applicable to regulatory enforcement nor does it authorize such traditional enforcement mechanisms as civil actions or administrative compliance orders.

E. Non-regulatory Provisions

The remaining provisions of the MOU are not directed at emission reductions and cannot be characterized as "regulatory" in the ordinary sense of the word. For instance, a variety of provisions mandate that the railroads "meet and confer" with ARB in an attempt to reach further agreement (§§ 3(e), (h), 4(c), (d), 5(d), 7-9). Section 6 identifies potential sources of money to fund the measures required by the MOU. Other provisions establish requirements for ARB rather than the railroads (§§ 1(i), 5(a), (c)). Section 11 governs construction of the MOU and release of the railroads from the MOU's requirements in the event that state or local agencies attempt to enforce competing requirements against the railroads.

III. ARB AND DISTRICT AUTHORITY TO ADOPT THE PROVISIONS OF THE MOU AS REGULATORY REQUIREMENTS

In this Section, we evaluate whether the provisions of the MOU, if adopted as regulatory requirements, would exceed ARB or District statutory authority, would be preempted by federal statute, or would run afoul of the dormant Commerce Clause. To the extent that questions may exist about the enforceability of a provision, we suggest

enforceable alternatives that would not raise such questions and would achieve the same or substantially the same results.

A. Authority Under the Health and Safety Code

We believe that ARB or the District or both have adequate authority under the Health and Safety Code to implement as regulations all of the terms of the MOU. ARB clearly has that authority, pursuant to H&SC section 43013. The District's authority is limited by section 40702, but most of the provisions of the MOU fall within the District's regulatory authority notwithstanding the limits contained in section 40702.

We think it is unlikely that the District has the authority to require installation of idling-reduction devices (§ 1(a)) on intrastate locomotives, as such a requirement arguably would be either a specification of "the design of equipment" or "particular method to be used" in reducing emissions. See H&SC § 40702. The general grant of authority to ARB in section 43013, however, is not subject to the limitations of section 40702, and provides ample authority to ARB to adopt such a requirement.

The limitation of non-essential idling to no more than 60 minutes (§ 1(d)) clearly falls within ARB's section 43013 authority. Furthermore, because this requirement is properly characterized in the MOU as a performance standard, see MOU § 1(d) ("Performance Standards for Locomotives Not Equipped With Idling-Reduction Devices"), the District could adopt it as a regulation within its authority as limited by section 40702.

The on-highway diesel provision (§ 2) is also within ARB's section 43013 authority. Indeed, ARB has already adopted rules to require intrastate locomotives to use on-highway diesel. 13 Cal. Code Regs. §§ 2281-82, 2284, 2299; 17 Cal. Code Regs. § 93116. Although section 40702 might be read to bar the District from imposing a fuel specification requirement as a "particular method to be used in reducing the release of air contaminants from railroad locomotives," we think the better reading of the section would allow such a requirement because it does not affect the physical configuration of locomotives.⁸ As discussed above in Section I.A.1, the canon of *noscitur a sociis* suggests that the "particular method" referred to in section 40702 is limited to methods related to the physical design or construction of locomotives.

The repair provisions of the visible emission reduction and repair element of the MOU (§ 3) are within the statutory authority of both ARB and the District. That element would not require the District or ARB to set visible emission standards, but rather would

⁸ The mandate to "maximize" use of on-highway fuel would likely also be within the District's authority. It can be characterized as a performance standard (if it is a standard at all) because it allows railroads to decide what constitutes "maximization" and how best to achieve it.

require repair only where the federal standards have not been achieved. *See supra* Section II.A.3. The plenary grant of authority to ARB in section 43013 provides it with the requisite authority to adopt, in regulatory form, the provisions of this element. Similarly, the District has authority under section 40001 to "enforce all applicable provisions of state and federal law." Section 40702 would not bar such a requirement because rather than specifying the configuration of locomotive equipment, it requires that existing equipment be repaired to operate as it was designed and built.

The monitoring, reporting, and recordkeeping requirements also fall within both ARB and the District's general rulemaking authority, *e.g.*, H&SC §§ 40001, 40440, 43013. More specifically, they are authorized by the provisions that authorize data collection regulations, H&SC sections 40701 and 41511. The training requirements are also authorized by the general grant of rulemaking authority in sections 40001, 40440, and 43013. The support for the agencies' authority is particularly strong where the training or designation facilitates compliance with an emission regulation or other performance standard.

If, as we conclude, the underlying MOU elements could be adopted as regulations, enforcement of those regulations would be pursuant to the applicable provisions of the Health and Safety Code. *E.g.*, H&SC § 42400, 42450, 42451.

B. Preemption

We also conclude that the provisions of the MOU, or substantially equivalent provisions, if adopted as regulations, would not be preempted either by the Clean Air Act or the federal statutory regime applicable to the design and operation of railroads.

1. Clean Air Act Section 209(e)

Idling reduction requirements. The requirement that idling reduction devices be installed on intrastate locomotives appears to be an "aftermarket equipment requirement" expressly preempted under section 209(e) and 40 C.F.R. § 85.1602(c)(2). We therefore conclude that it would likely be found to be preempted.

One might nonetheless argue that it is not the kind of "aftermarket equipment" EPA intended to be included within the preemptive ambit of section 209(e) because it would not affect manufacturers' incentives in designing or remanufacturing locomotives or engines. *See* 62 Fed. Reg. at 6,397 (concluding that section 209(e) does not bar "standards directed primarily at intrastate activities where the burden of compliance does not effectively impact manufacturers and distributors"). Assuming that installation would require no other modifications to the locomotive or its engine, it would not encourage manufacturers to change their design. The fact that use of the device is limited to periods of non-essential idling suggests that it would not interfere with the normal operations of the locomotive and therefore would not require redesign. (§ 1(e) (providing

exception to idling limits for essential idling).) Moreover, the MOU states that “[a]ll new locomotives purchased by the railroads that are used in interstate service come from the manufacturer already equipped with automatic shutdown devices.” (§ 1(a) n.1.) As a result, an idling reduction device retrofit requirement will be unlikely to cause manufacturers to take any actions they are not already taking to install the device on new locomotives.

Finally, the requirement is limited to intrastate locomotives, which significantly undercuts the primary justification for preemption under section 209: the burden of local regulation on interstate commerce.⁹ See *EMA*, 88 F.3d at 1083 (discussing *Allway Taxi Inc. v. City of New York*, 340 F. Supp. 1120 (S.D.N.Y.), *aff’d*, 468 F.2d 624 (2d Cir. 1972)) (noting that use and operation requirements would impose little burden on interstate commerce); 62 Fed. Reg. at 6,396-97.

Regardless of whether an idling control device requirement would be preempted, ARB or the District could achieve the same result by promulgating a performance standard limiting idling time without specifying how the railroads achieve that standard (*i.e.*, by installation of a device or otherwise).

Section 1(d) of the MOU establishes such an idling performance standard. This standard requires railroads to exert their best efforts to limit all non-essential idling and prohibits non-essential idling that lasts longer than sixty minutes. Such a standard is highly unlikely to require manufacturers to change locomotive or engine design. Instead of requiring installation of a device, it merely provides a standard for operation of an existing, unaltered locomotive, and as noted above, new locomotives are presently being built with anti-idling devices (§ 1(a) n.1). Because the standard applies only to non-essential idling, it should not affect the normal operation of the locomotive.

Significantly, as is the case with the requirement of the installation of anti-idling devices, the idling limitation is limited to intrastate locomotives, so that it avoids the burdens on interstate commerce that Congress sought to avoid in enacting section 209.

Further, the performance standard can also be considered a legitimate use regulation authorized by section 209(d) of the Clean Air Act. As noted *supra*, EPA has interpreted section 209(d) to apply to locomotive regulation as well as to motor vehicle

⁹ EPA’s determination that section 209(e) preempts “aftermarket equipment” requirements is predicated on the Agency’s determination that the reference in section 209(e)(1) to new locomotives includes in-use locomotives for up to 133 percent of their useful lives. 40 C.F.R. § 85.1603(c)(2). To the extent that EPA’s interpretation of the word “new” conflicts with the statute, its conclusion that aftermarket equipment requirements are preempted would also be suspect in some cases. We nevertheless base our analysis on EPA’s interpretation of section 209(e).

regulation. In upholding that interpretation, the *EMA* court explicitly rejected an argument that use regulations could not be emissions related, noting that “the longstanding scheme of motor vehicle emissions control has always permitted the state 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.” *EMA*, 88 F.3d at 1094 (emphasis added). An idling reduction performance standard falls within the traditional category of use regulations described in *EMA*.

On-highway diesel requirement. Assuming that diesel formulation does not affect manufacturers’ design and remanufacture of locomotives/engines, a regulation specifying diesel fuel content is a legitimate regulation of locomotive *use* and is not preempted by section 209(e). Indeed, in its notice of proposed rulemaking for its 1994 regulation defining the scope of preemption of nonroad engine regulations generally, EPA concluded that “fuel quality specifications” would be legitimate use requirements not preempted by section 209(e). *See id.* at 1082 (quoting 56 Fed. Reg. 45,866, 45,867 (1991)).

Visible emission requirements. The visible emission reduction program element would not be preempted. The MOU does not establish a visible emission standard, but rather requires steps to ensure compliance with the current federal standard (§ 3(b)). *See supra* Section II.A.3. The repair requirements are clearly use requirements designed to ensure only that locomotives are operating as they were designed and manufactured. As such, they should not affect design and manufacturing decisions.

Because the MOU’s visible emission inspection requirement appears to require compliance with federal visible emission standards, the requirement would be preempted only if it required testing according to a state-specified testing methodology. EPA’s 1998 rule interpreting section 209(e) expressly includes “nonfederal in-use testing requirements” as a category of preempted state and local regulation. 40 C.F.R. § 85.1603(c)(2). The notice of proposed rulemaking and preamble to the final rule both emphasize that only “non-federal in-use emissions testing programs” would be preempted. *See* 63 Fed. Reg. at 18,993-94; 62 Fed. Reg. at 6,398-99. By contrast, in-use testing for compliance with federal standards according to the federal test protocol established in the 1998 rulemaking, *see* 40 C.F.R. § 92.101 *et seq.*, would not be preempted. The MOU does not specify the test protocol to be used in determining whether a locomotive meets the applicable visible emission standard.

Enforcement. Enforcement of a standard or requirement stands or falls with the standard or requirement itself. *See* 42 U.S.C. § 7543(e)(1) (prohibiting a “State or any political subdivision thereof [from] adopt[ing] or attempt[ing] to enforce any standard or other requirement” (emphasis added)). Insofar as the substantive program elements are not preempted, enforcement of those elements also would not be preempted.

Other program elements. None of the other program elements, such as the monitoring, data reporting, and training requirements, can be plausibly characterized as a "standard or other requirement relating to the control of emissions" from new locomotives. 42 U.S.C. § 7543(e)(1). They therefore are not preempted by section 209(e).

2. ICCTA

As we have set out above, although the scope of ICCTA preemption is broad, *City of Auburn*, 154 F.3d at 1029, it does not extend to a broad range of regulations that are within the states' traditional police power to protect the public health and safety, do not entail discretionary permitting, and do not interfere with interstate commerce. *Green Mountain R.R. Corp.*, 404 F.3d at 643.

If adopted as regulatory requirements, the MOU's program elements would not be preempted by the ICCTA. Nothing in the MOU involves the sort of "pre-clearance" regulation, such as discretionary permitting requirements, that have been held to fall within the ICCTA's preemptive ambit. Rather, the MOU program elements constitute "direct environmental regulations enacted for the protection of the public health and safety" that regulate the use of locomotives.

Furthermore, none of the program elements would appear to interfere with railroad operations. The locomotive idling-reduction program requires locomotives to reduce only non-essential idling (§ 1). *See Jones*, 79 Cal. App. 4th at 1060-61 (holding the ICCTA does not preclude regulation—in that case judicial regulation—of idling that is not necessary for railroad operations). Moreover, the idling reduction performance standard gives the railroads latitude in deciding how they will reduce locomotive idling (§ 1(d)).

Requiring locomotives to refuel with CARB or EPA on-highway diesel while in California likewise does not appear to interfere with railroad operations, as there does not appear to be any evidence, for example, that the requisite fuel is incompatible with existing fueling facilities or unavailable due to inadequate supplies. The visible emission repair program element gives the railroads considerable flexibility in deciding when and how to repair locomotives with excessive visible emissions: locomotives operating within California are given 96 hours and locomotives leaving California are given as long as they are outside the state (§ 3(b)(vii)).

The enforcement and penalty provisions only impose reasonable penalties and "meet and confer" requirements on violators of the substantive provisions of the MOU. Such enforcement provisions would not prohibit the railroads from continuing to operate even if they were found in violation. As noted above, if the substantive program elements of the MOU were adopted as regulations, they would be subject to the enforcement provisions of the Health and Safety Code. Given that the underlying

substantive regulations would not be preempted, their enforcement also would not be preempted. The remaining program elements, such as the monitoring, data reporting, and training requirements, impose no restrictions whatsoever on the railroads' operations.

3. LBIA

Subject to one likely exception, the LBIA also would not preempt regulations mandating the actions set out in the MOU, because although they may affect the use or operation of locomotives, they do not mandate or prohibit the installation or use of locomotive equipment. *See Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n*, 346 F.3d 851, 869 (9th Cir. 2003) (noting that the LBIA "occup[ies] the field of locomotive equipment, but not locomotive use"); *S. Pac. Transp. Co.*, 9 F.3d at 811 ("Because the . . . law neither limits nor expands the type of equipment with which locomotives are required to be equipped, it neither interferes with the goals of the LBIA nor substantially interferes with its implementation.").

The provision of the MOU that, if adopted as a regulation, would likely be preempted is the requirement that railroads install automatic idling-reduction devices on all intrastate locomotives based in California that are not already so equipped (§ 1(a)).¹⁰ Because this requirement addresses locomotive equipment, it would likely be preempted by the LBIA. Nevertheless, the same result, *viz.*, elimination of non-essential locomotive idling, could be achieved with an idling performance standard that requires railroads to limit locomotive idling to a certain length of time, or requires them simply to eliminate non-essential idling, where "non-essential idling" is clearly defined. Indeed, the MOU provides such a performance standard for locomotives not equipped with idling reduction devices (§ 1(d)), and defines "essential idling" (§ 1(e)). This standard, unlike a mandate to install a specific device, would not be preempted by the LBIA. *See Union Pac. R.R.*, 346 F.3d at 869; *S. Pac. Transp. Co.*, 9 F.3d at 811.

C. Dormant Commerce Clause

Finally, we do not believe that any of the program elements of the MOU would be barred by the dormant Commerce Clause. In any event, any question about those elements could certainly be resolved by slight modification of the element's requirements.

None of the program elements in the MOU discriminates against interstate commerce, either facially or in effect. No program element requires locomotives from outside of California to comply with any requirements not imposed on in-state locomotives. The idling reduction program affects only *intrastate* locomotives and thus exempts all locomotives that travel outside of California (§ 1). Similarly, the on-highway

¹⁰ As noted previously, we believe that this requirement is likely preempted under the Clean Air Act as well. *See supra* Section III.B.1.

diesel requirement applies to all locomotives when fueled in California (§ 2), but does not affect their refueling outside of the state.

The only program element that could possibly be construed to discriminate against out-of-state economic interests is found in section 3(b)(vii) of the Visible Emission Reduction and Repair Program. This program element requires locomotives operating in California that exceed visible emission standards to be repaired within 96 hours or, if the locomotive's route causes it to leave the state within that period, to be repaired before it returns to the state. We are doubtful that this would be found to discriminate against out-of-state interests. The same federal visible emissions standards are applied to all locomotives, and the same response is required of all locomotives regardless of whether they are purely intrastate, have just entered California from out-of-state, or are just leaving the state: the locomotive must be routed into a repair facility and repaired expeditiously. Moreover, since locomotives leaving the state can be repaired at any time prior to returning to the state, they will in many cases have more flexibility in conducting the necessary repairs than locomotives that remain within the state, which must be repaired within 96 hours.

In any event, the repair requirement could easily be modified to avoid even the appearance of discrimination without substantially undermining its purpose. The requirement could provide that locomotives that leave California after being found to have excess visible emissions shall be routed for repair within 96 hours after returning to the state. With such a modification, the regulation on its face and in effect would treat intrastate and interstate locomotives identically.

Nor do the facially neutral MOU program elements disproportionately burden interstate commerce. In contrast to discriminatory regulations, "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Sys.*, 511 U.S. at 99 (internal quotation marks omitted) (citing *Pike*, 397 U.S. at 142). For a regulation to violate this balancing test, "the burdens of the statute must so outweigh the putative benefits as to make the statute unreasonable or irrational." *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1992).

The MOU provisions satisfy this test. The visible emission repair program would appear to have incidental effects on interstate commerce as trains operating in California would need to be diverted temporarily from planned routes—including interstate routes—for repair.¹¹ Any such burden would, however, be minimal, as the MOU gives railroads broad flexibility in deciding when to divert a locomotive for repair. This minimal burden

¹¹ None of the other provisions of the MOU has any appreciable effect on interstate commerce. For example, the on-highway fuel provision (§ 2) applies only to 80 percent of the fueling occurring in California, and the idling-reduction provisions apply only to

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does not appear disproportionate to the public health benefits of requiring the repair of smoking locomotives that fail to meet nationwide emission standards.¹²

Likewise, the MOU program element requiring fueling with on-highway diesel fuel (§ 2) does not appear to impermissibly burden interstate commerce. As noted previously, we are not aware of any evidence that the railroads will have any more difficulty fueling locomotives with on-highway diesel as required by the MOU than they would fueling with ordinary diesel. Absent that evidence, and absent a showing that the burden of complying with the fueling requirement outweighs the significant public health benefits of the use of on-highway fuel, the on-highway diesel requirement would not run afoul of the dormant Commerce Clause.

A regulation with extra-territorial effect may also violate the dormant Commerce Clause. *See Union Pac. R.R.*, 346 F.3d at 872. The MOU has no such effect. Although the visible emissions program requires repair of locomotives out of state in some cases, it does so to enforce a national standard, not a California standard. It therefore does not raise the specter of multiple, conflicting state standards. *See id.* at 871. In any event, any appearance of extraterritorial effect can be eliminated with a slight modification of the regulation, such as that suggested above, under which no out of state repairs are required.

Very truly yours,

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cc: [see next page]

the intrastate locomotive fleets and even then only to non-essential idling, which should avoid impacts to locomotive operation in California and beyond (§ 1).

¹² Nondiscriminatory regulations have also been held invalid under the dormant Commerce Clause "where the asserted benefits of the statute are in fact illusory or relate to goals that evidence an impermissible favoritism of in-state industry over out-of-state industry." *Alaska Airlines, Inc.*, 951 F.2d at 983; *see also, e.g., S. Pac. Co. v. Arizona*, 325 U.S. 761, 775 (1945) (regulation had no reasonable relation to safety and in fact made train operation more dangerous); *Union Pac. R.R. Co.*, 346 F.3d at 871-72 (state agency did not contend that state standards were safer but only easier to apply). We think it clear that the public health justification for locomotive emission regulation is not a mere pretext for protectionism.

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