



Fighting for Life

East Yard Communities for Environmental Justice - 2317 Atlantic Blvd. Commerce, CA. 90040

Via Electronic Submittal

September 6, 2011

Executive Officer James Goldstene
California Air Resources Board
1001 I Street, Sacramento, CA 95818

RE: Comments of July 5, 2011 Supplemental Staff Report on Proposed Actions to Further Reduce Diesel Particulate Matter at High Priority Railyards

Dear Mr. Goldstene:

We, the undersigned submit the following comments on the four proposed railyard agreement Commitments between the California Air Resources Board (“CARB”) and Union Pacific (“UP”)/Burlington Northern Santa Fe (“BNSF”) (hereafter “Commitments” or “MOU Commitments”)¹,

We previously filed a Petition for Rulemaking seeking enforceable regulations for California railyards and locomotives. On January 20, 2009, Executive Officer James Goldstene granted our Petition for Rulemaking in part, which is the genesis of CARB’s current proposal.

Since that time, two key court decisions have only strengthened the legal and statutory justification for a regulatory approach for California railyards and locomotives. These cases, *Ass’n of Am. R.R. v. S. Coast Air Quality Mgmt. Dist.*, 622 F.3d 109 (9th Cir. 2010) and *Nat’l Ass’n of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*, 627 F.3d 730 (9th Cir. 2010) show that CARB and local air districts have authority to adopt such regulations – through State Implementation Plan (“SIP”) and indirect source authority.

Despite this, CARB continues to give short shrift to a regulatory approach, consistently understating its own authority and overstating the threat of pre-emption for railyard sources, even as it is extremely aggressive in regulating other challenging mobile emission sources, whether it be mobile sources such as off-road vehicles, marine fuels and equipment, or greenhouse gas emitters. As a result, CARB now plans yet another voluntary deal with UP and BNSF.

¹ The July 5, 2011 “Supplement to the June 2010 Staff Report on Proposed Actions to Further Reduce Diesel Particulate Matter at High Priority Railyards” including proposed commitments and a functional equivalent document (“FED”) California Environmental Quality Act (“CEQA”) analysis.

After careful review of the Staff Report and the four proposed railyard Commitments, we respectfully urge CARB to reconsider the regulatory approach to adopt feasible, cost effective and non-preempted statewide regulatory measures are required under federal and State law. Communities surrounding the most toxic railyards in California need strong regulations to address the high cancer risk. CARB should approach railyard regulation from a position of strength using all authority it has instead of signing yet another voluntary contract that likely violates California's Administrative Procedures Act as an unlawful "underground regulation."

The communities exposed to unhealthful levels of diesel particulate matter would be better served by regulations that address specific high-polluting locomotives and other railyard-related equipment and operations. A regulatory approach would cover all eighteen California Class I railyards with projected similar or even higher future exposure to carcinogenic diesel particulate matter. There are a large number of non-preempted old and dirty medium horsepower and switch locomotives operating in California as well as other equipment whose emissions could be addressed by cost-effective and feasible regulations with statewide benefits.

This comment letter includes a background on the railyards' criteria and air toxic pollution problems; a description of the procedural posture of this issue; an in-depth discussion of the pre-emption and legal authority issues including the two new cases cited above; a review of the feasibility of various technical options; a discussion of the concept of "underground rulemaking"; as well as itemized specific questions and comments (including CEQA) concerning the proposed MOU Commitments and CARB's FED document.

We respectfully request a response to the comments herein. We also resubmit herewith and request a response to the prior comments dated June 23, 2010 submitted by environmental consultant Dr. Petra Pless and the comments dated September 22, 2009 submitted by SWAPE consultants.

Background on Railyard Criteria Emissions and Health Risks

There are eighteen large Class I railyards in California operated by Union Pacific Corporation and BNSF Railway Company.² While rail is viewed as a "green" alternative to trucking, rail produces more ozone-forming nitrogen oxides ("NOx") per mile than trucks and rail's fuel benefit substantially decreases if the full door-to-door transport costs are considered.³

Rail transport accounts for significant emissions of the criteria pollutants NOx and particulate matter ("PM"). Sources at California railyards include locomotives, heavy duty diesel trucks, cargo handling equipment and refrigerated units. Locomotive emissions alone account for 158 tons per day of NOx and 4.8 tons per day of PM in the State.⁴ In the South Coast Air Basin,

² California Air Resource Board, Technical Options to Achieve Additional Emissions and Risk Reductions From California Locomotives and Railyards, August 31, 2009, pp 11-13.

³ Noël Perry, July 2009 Transportation Market Outlook, Transport Fundamentals, pp. 23-24, available at www.fhwa.dot.gov/freightplanning/talking.htm.

⁴ California Air Resources Board, Recommendations to Implement Further Locomotive and Railyard Emission

regulators recognize that “the severity of the region’s PM-2.5 (particulate matter smaller or equal to 2.5 micrometers) problem and the attainment deadline make it necessary to further mitigate locomotive emissions in 2014.”⁵

Air toxics emissions from California railyards and locomotives also present a significant concern. Human health risk assessments for railyard communities in San Bernardino and Commerce show excess maximum cancer risk caused by local railyard operations as high as 3,300 per million.⁶ This is far above generally accepted regulatory thresholds.⁷ In fact, over three million Californians are exposed by railyard sources to excess cancer risk of more than ten in one million.⁸ You insist that “every feasible effort” is needed to “reduce localized risk in communities adjacent” to the State’s railyards.⁹

Procedural Posture on the Petition for Rulemaking

Under State law, CARB “shall adopt and implement” control measures that are “necessary, cost-effective and technologically feasible” for mobile good movements sources including “heavy-duty motor vehicles,” “utility engines” and “locomotives,” unless preempted by federal law.¹⁰ Moreover, the 2007 California State Implementation Plans for 8-hour ozone and PM-2.5 include future commitments to reduce pollution from California railyards and locomotives.¹¹

Yet, the Board has not directly regulated California railyards or locomotives, instead favoring controversial contractual agreements with the railroads, or Memorandum of Understandings (“MOUs”).¹² This included MOUs executed in 1998 and 2005.

Reductions, September 9, 2009, p. 12, available at <http://www.arb.ca.gov/railyard/ted/ted.htm>.

5 California Air Resources Board, Meeting to Consider Approval of the Proposed State Strategy for California's State Implementation Plan -- Revised Staff Proposal, September 27, 2007, Section 1, p. 4, available at www.arb.ca.gov/planning/sip/2007sip/revcasip2007.pdf.

6 California Air Resources Board, Health Risk Assessment for the BNSF San Bernardino Railyard, June 11, 2008, p. 13, available at www.arb.ca.gov/railyard/hra/hra.htm.

7 In 1990, Congress adopted a one in one million threshold in Section 112(f) of the Clean Air Act, which requires the United States Environmental Protection Agency (“EPA”) to issue technology-based standards to reduce emissions of hazardous air pollutants and consider issuing residual risk standards if the excess cancer risk to the individual most exposed would exceed one in one million.

8 See *supra* note 2 at p. 2 and note 4 at App 6-8.

9 *Id.*

10 California Health & Safety Code §§ 43013, 43018.

11 California Air Resources Board, Proposed Modifications to the Air Resources Board’s Proposed State Strategy for California’s 2007 State Implementation Plan That Will Achieve 30 Tons Per Day of Additional Emission Reductions in the South Coast by 2014 and 88 to 93 Tons Per Day of Emission Reductions in the San Joaquin Valley by 2017, p. 7, available at www.arb.ca.gov/planning/sip/2007sip/07-28_attachment_b.pdf.

12 More information on the MOUs is available at www.arb.ca.gov/railyard/ryagreement/ryagreement.htm.

Thereafter, the undersigned and others filed a Petition for Rulemaking to compel CARB action for California railyard and locomotive sources. In light of the granting of the Petition, in part, on January 20, 2009, several hearings, including the September 25, 2009 Board hearing were held to consider recommendations to implement further locomotive and railyard emission reductions. More than 30 organizations and 200 individuals from the state of California mobilized for the hearing to push for a regulatory approach for locomotives and railyards to protect the health of all residents who are adversely affected by their emissions.

At the September 25, 2009 hearing, a Technical Options Report and Recommendations Report were presented with many measures deemed feasible, cost-effective and likely not preempted by federal law.¹³ Greenhouse gas reduction benefits also were explained. Yet, staff proposed a voluntary “incentive only” approach that we opposed and the Board ultimately rejected. At the hearing conclusion, Board Chairman Mary D. Nichols stated that “we want to make clear that regulation is not just something never to be discussed, but that it, in fact, we are going to be developing an approach to it as part of the background of the whole program really.”¹⁴

Again, at the February 25, 2010 update hearing and then at the June 24, 2010 hearing, Staff proposed and the Board ultimately gave the Executive Office in Resolution 10-29 discretion to enter into voluntary Commitments with no new statewide regulations. Certain conditions were imposed, as discussed forth below. Resolution 10-29 was finalized thereafter and now final draft Commitments have been proposed along with a FED CEQA analysis, now released by CARB for public comment such as those submitted herein.

Recent Court Cases Show that Numerous Regulatory Measures Are Likely Not Preempted And CARB Has A Duty To Regulate

As we have emphasized to you time and again, many of the potential measures to address PM criteria emissions and cancer risk at California railyards likely are not preempted by federal law. The new *Association of Am. Railroads* and *Association of Home Builders* cases on SIP and “indirect source” authority significantly strengthen CARB’s hand. The legal climate has changed and these new cases were not considered by your Board on June 24, 2010.

More than ever, CARB therefore should approach this issue from a position of legal strength. Please we urge that you do so. The railroads can no longer use the shield of federal preemption to avoid further regulations.

The federal Clean Air Act (“CAA”) delegates regulatory responsibility to CARB for criteria pollutant and air toxic control measures. Thus, pursuant to CAA sections 110(a), 172(c) and 182(b), the SIPs¹⁵ must demonstrate attainment or include all feasible measures. CAA section

¹³ See note 4 *supra* at p. 44 and App. C.

¹⁴ California Air Resources Board, Transcript of September 25, 2009 Board Hearing, pp. 269-271, available at www.arb.ca.gov/board/meetings.htm#2009.

¹⁵ While SIP measures generally are intended to achieve National Ambient Air Quality Standards for criteria air

209(e) also gives California authority to regulate certain non-road engines and adopt “in-use” requirements. (See *Engine Mfrs. Ass’n v. U.S.E.P.A.*, 88 F.3d 1075 (D.C. Cir. 1996); Cal. Health & Saf. Code sections 39650 *et seq.* and 41701.)

Pursuant to this delegation, the Cal. Health & Saf. Code sections 36902, 40462, 40469 and 43018 confirm that CARB has authority to take “whatever” actions are “necessary, cost-effective and technologically feasible” to achieve the maximum degree of reduction possible from mobile sources. Further, CARB has an express duty pursuant to Cal. Health & Saf. Code sections 40702 and 43013 to regulate through rulemaking locomotive and railyard sources, unless preempted by federal law.

Thus, up to 150 older switcher and 400 older medium horsepower (“MHP”) locomotives and numerous site-specific railyard measures likely are not preempted by federal law. In fact, the EPA. has stated in writing that such switcher and older engine controls are not preempted and **“are subject to regulation by California and the other states.”** See 72 Fed. Reg. 15971 (April 3, 2007) (emphasis added).

Further, as we have been arguing to you all along, pre-emption under the Interstate Commerce Commission Termination Act (“ICCTA”), 9 U.S.C. § 10501(b) was severely limited by the opinion in *Association of Am. Railroads*, 622 F.3d at 109. There, while the Ninth Circuit did invalidate the South Coast District’s adopted Rules 3501 to 3503, the case provides a clear path by which such state and local air quality rules can survive ICCTA pre-emption. The opinion holds that: “to the extent that state and local agencies promulgate EPA-approved statewide plans under federal environmental laws (such as ‘statewide implementation plans’ under the Clean Air Act), ICCTA generally does not preempt those regulations because it is possible to harmonize the ICCTA with those federally recognized regulations. See, e.g., *Bos. & Me. Corp.*, 2001 WL 458685, at (‘[N]othing in section 10501(b) is intended to interfere with the role of state and local agencies in implementing Federal environmental statutes, such as the Clean Air Act [and the federal clean water statutes].’).” This holding sets valuable precedent for state and local air quality regulators. Pursuant to *Association of Am. Railroads*, the principle of harmonization will apply if the rules are submitted by California pursuant to the Clean Air Act to the federal EPA and then approved as part of California’s SIP. “Once approved by EPA, state implementation plans have ‘the force and effect of federal law.’”

The *Association of Am. Railroads* holding allowing the State to put railyard measures in its SIP is particularly compelling as U.S. E.P.A. has proposed contingency measures disapproval of California and South Coast AQMD SIPs for the 1997 annual and 24-hour PM_{2.5} national ambient air quality standard (“NAAQS”). See EPA-R09-OAR-2009-0366, 76 Fed. Reg. 41562 (July 14, 2011). Additional PM measures are required for the SIP. As discussed herein and shown by CARB’s own analysis, many such railyard and locomotive measures are reasonably available and feasible. These should be included in the SIP and will survive ICCTA pre-emption pursuant to *Association of Am. Railroads*.

In addition, CARB does not adequately address the State’s “indirect source” authority pursuant to the holding in *Association of Home Builders*, 627 F.3d at 730. This case provides a path to

pollutants, PM-10 and PM-2.5 are both criteria pollutants responsible for much of the toxic risk created by locomotive and railyard emissions in the State. Thus, a SIP measure that reduces PM from railyard sources will also reduce risk associated with air toxics emissions.

overcome the railroads' challenges based on federal CAA pre-emption. There, the Ninth Circuit upheld the San Joaquin District's Rule 9510 that requires air impact assessments and mitigation measures on equipment, or payment of a fee. The Ass'n of Home Builders, as the railroads here, argued that the rule would run afoul of federal CAA pre-emption on mobile sources. But the Ninth Circuit disagreed. Preemption under the federal CAA, 42 U.S.C. § 7543(e), does not apply because it prohibits state regulation of new equipment and the rule was an "indirect source" review program authorized under 42 U.S.C. § 7410(a)(5). The rule targeted development sites rather than construction equipment; it measured emissions by development sites as a whole. The rule therefore did not establish a standard or requirement relating to the control of emissions from construction equipment. Nor did the rule measure emissions by fleets or groups of vehicles; it measured emissions on a facility-by-facility basis as required by § 7410(a)(5)(C) and regulated mobile emissions only indirectly. All of this is directly analogous to the railyard situation.

In sum, CARB has a duty and authority under federal and State law to adopt all feasible and cost-effective regulations for these sources of criteria pollutants and air toxics emissions. CARB has a legal duty to immediately initiate a rulemaking to factually analyze and study regulations for these railyard and locomotive sources.

Many Non-Preempted Measures are Feasible and Cost-Effective

CARB's own documents¹⁶ show that many of these non-preempted measures are cost-effective and feasible. We also submit and request a response to the prior comments of June 23, 2010 of court-recognized environmental consultant Dr. Petra Pless¹⁷ and the comments dated September 22, 2009 provided by SWAPE environmental. Since CARB appears unwilling to pursue a regulatory approach, we respectfully must take this opportunity to allow the analysis and review of other alternatives, including these expert comments, that normally would be afforded during a bona fide regulatory process.

CARB's August 2009 Technical Options report¹⁸ concludes that statewide replacement and retrofit of many older locomotives are feasible, cost-effective and likely not preempted by federal law. In particular, Options 1 (replacement of 152 Tier 0 and older switch locomotives with Tier 3 Ultra-Low Emitting Switch Locomotives), 2 (retrofit of 244 gen-set switch locomotives with NOx and PM emission controls), 5 (repower of 400 older medium horsepower locomotives with low-emitting engines), and 7 (retrofit of 400 low-emitting medium horsepower

¹⁶ See note 2 *supra*.

¹⁷ As environmental consultant Dr. Pless explains in depth in her attached June 23, 2010 report incorporated in its entirety herein:

- The proposed Commitments do not guarantee that any equipment at the four railyards would be replaced, repowered, or remanufactured if railyards experience a decrease in activity;
- CARB fails to provide data or documents to review its conclusions;
- The Commitments fail to define a methodology for future fleet inventories and emission calculations;
- CARB presents incorrect and deceptive information with respect to the effectiveness of the Commitments;
- Different and incorrect baseline data and growth rates are used repeatedly without substantial evidence; and
- The MOU Commitments do not address all railyards that would benefit the most from diesel particulate matter emission reductions.

¹⁸ See note 2 *supra*.

locomotives with NOx and PM emission controls) are deemed feasible and cost-effective.

With regard to yard cargo handling equipment, Option 11, which consists of revamping all 322 diesel yard truck equipment statewide into electric-powered yard trucks, would reduce PM and air toxics risks to the surrounding communities. If implemented, the trucks would reduce diesel particulate matter (“DPM”) and NOx emissions from yard trucks from 0.062 tons/year to zero tons/year. The successful testing at the Port of Los Angeles of electric yard trucks shows that it is technically feasible for this option to be utilized. The cost-effectiveness of this option is \$18.33 per pound (“\$/lb”) of NOx and DPM for 2010 emissions, \$29.38/lb for 2015 emissions, and \$76.90/lb for 2020 emissions.

Option 21 in CARB’s August 2009 Technical Options involves installation of an Advanced Locomotive Emission Control System (“ALECS”) near locations where locomotives are idling and would reduce PM and toxic risk to the surrounding communities. ALECS are stationary control devices (hoods) that reduce DPM emissions. ALECS hoods have been shown to reduce NOx and DPM emissions by 90% during service and idling periods at UP Roseville. An ALECS unit with 12 hoods (at UP Roseville) is estimated to cost \$25,000,000. The cost effectiveness is about \$23/lb of NOx and PM for 20 years for the UP Roseville railyard, using Carl Moyer calculations. Why does CARB continue to give short-shrift to control measures for the service and testing operations at the railyards, particularly in Commerce?

Yet, despite the cost-effectiveness conclusions for statewide regulation of these locomotive and yard equipment sources at the eighteen large Class I railyards, CARB’s MOU Commitments proposal avoid statewide regulations.

CARB’s Proposal Likely Constitutes an Unlawful “Underground Regulation”

We are very concerned that CARB wants to exercise its authority by voluntary contract instead of regulation as it is required to do under the rulemaking procedures of the California Administrative Procedures Act (“APA”), Gov. Code, § 11340 *et seq.* We also want to direct your attention to two new “underground rulemaking” cases -- *Californians for Pesticide Reform v. Department of Pesticide Regulation*, 184 Cal. App. 4th 887 (2010) and *Bollay v. Office of Administrative Law*, 193 Cal. App. 4th 103 (2011).

The APA applies to regulations. *Pacific Gas & Electric Co. v. Department of Water Resources* (2003) 112 Cal.App.4th 477, 503-504. A regulation is “every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.” (Gov. Code, § 11342.600.)

The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subs. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.8); respond in

writing to public comments (Gov. Code, §§ 11346.8, subd. (a), 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3). *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568.

Section 11340.5(a) provides “[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.”

To be deemed a regulation subject to the APA, an agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. *Pacific Gas & Electric*, 112 Cal.App.4th at 504. To be deemed a regulation subject to the APA, an administrative policy must “implement, interpret, or make specific the law enforced or administered by [the agency] or . . . govern [the agency’s] procedure.” Gov. Code, § 11342(g); *Tidewater*, 14 Cal.4th at 571.

In *Californians for Pesticide Reform*, the Court invalidated DPR’s prioritization policy as an constitutes an underground regulation, 184 Cal. App. 4th 887. “Because the enforcement of a pesticide prioritization process, *regardless of whether it is enforced formally or informally*, will have a broad and long-term application, we conclude the policy was intended as a rule of general application.” (emphasis added). This is the case here.

In *Bollay*, 194 Cal.App.4th 103, homeowners successfully challenged a determination by the Office of Administrative Law finding valid a policy adopted by the State Lands Commission regarding tidelands. The policy was an unlawful “underground regulation” “The policy is not the only legally tenable interpretation of law, whether that law be constitutional, statutory, or decisional law. It does not simply reiterate the law; it departs from and embellishes upon that law.” The same is true here.

The Commitments proposal meets this test for an “underground rulemaking” without proper APA procedures. The MOUs apply generally to the class of the four high-risk railyards (San Bernardino, BNSF Hobart, UP Commerce, and UP ICTF) and to both Class I carriers – BNSF and UP. Moreover, the MOU Commitments implement the law enforced by CARB and govern its procedure with regard to these railyards. If an agency adopts a regulation without complying with the APA requirements it is deemed an “underground regulation” We are concerned that because the Commitments are an underground regulation without APA compliance, they cannot be enforced.

Specific Procedural Questions and Concerns, Including CEQA, About the Proposed MOU Commitments

In addition to the legal and policy concerns expressed above, we would request consideration and response to the following specific questions and concerns about the proposed

MOU Commitments:

1. **A technical support document** should be provided to explain the various emissions and risk reduction calculations in the FED. Can we see a technical support document, particularly for the emissions inventories, emission reduction factors and risk reduction calculations in Tables A-5 to A-20. Pursuant to CEQA Guidelines §§ 15147-15150, all information relied on by the agency should be made available to the public.
2. **The project description and objectives are faulty under CEQA.** Pursuant to 14 Cal. Code Regs. § 15124(b), a project description should include the underlying purpose of the project to allow a selection of alternatives and study of impacts. All foreseeable components of the project should be described. *Laurel Heights Improvement Ass'n v. Regents* (1988) 47 Cal.3d 376. So too, all technical and economic characteristics must be described. 14 Cal. Code Regs. § 15124(b). Here, the description and objectives are faulty because they do not account for the statewide impacts of foregoing regulations, including locations such as Oakland or Barstow where regulation of non-preempted locomotives or an "indirect source" rule would have environmental benefits. The project description should include and describe the poison pill. The impact and alternatives analysis should be Statewide and consider the impacts of the poison pill which forbids Statewide regulation, as well as how the regulation alternative would impact air quality at the other 14 classification railyards. By describing the project and its objectives as applying to the four yards only, CARB ignores the reality that this project will (because of the poison pill) prevent regulation or activities at yards throughout the State. As such, the subsequent analysis of alternatives and impacts does not adequately consider the Statewide air quality impacts caused by taking this approach, as opposed to a Statewide regulation that would benefit the other 14 yards. In particular, the June 23, 2010 analysis of Dr. Petra Pless submitted herewith concludes that there is a reasonable possibility that the proposed Commitments would result in significant increases of criteria pollutant emissions at other railyards throughout the State. Yet, the FED document does not meaningfully address this.
3. **When is a functional equivalent document, FED, allowed for ARB?** Is it allowed under CEQA Guidelines § 15125 in this circumstance with no rulemaking?
4. **Are the proposed MOU Commitments going back to the CARB Board?** Some believe that the highest decision-making body (*ie*, the CARB Board) has the duty to prepare and approve the CEQA findings for the project. *Vedanta v. California Quartet* (2000) 84 Cal.App.4th 517, 527, *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200, *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779.
5. **What about the Barstow and Oakland railyards - will there be commitments there?** This issue was discussed at the February 25, 2010 Board hearing. These are high-risk rail yards as well and a regulatory approach including regulations for all non-preempted locomotives or an "indirect source" rule would have clear benefits at these yards. They must not be forgotten and we request that a plan be outlined to decrease cancer risk from all Class 1 railyards.

6. **The Table 1 (and for example Tables A-16, A-17 for Commerce) 2010 MICR numbers are just % estimates and are misleading.** No new risk assessment was done. These are just pro-rata % reductions from purported emissions reduction calculations. This is not an “apples to apples” comparison and should be clarified.
7. **The MOU Commitments sections 12 and 13 “poison pill” should be deleted and at a minimum should expressly prevent backsliding from the 1998 and 2005 MOUs.** Dr. Telles introduced and the Board voted for removal of the existing “poison pills” and prohibition on a new “poison pill.” If and when these MOU Commitments are signed, backsliding from the 1998 and 2005 MOUs should be off the table forever. Resolution 10-29 also makes this clear. This language must affirmatively appear in the letter contracts signed by the railroads to be enforceable.
8. **The third-party auditor language must appear in the letter contracts signed by railroads to be enforceable.** Mayor Loveridge introduced and the Board voted for a third-party auditor to review the documents submitted pursuant to the letter contracts. The independent monitor is essential and must be included in the Commitments. Will the monitor review the new 2005 baselines and 2010 reduction numbers? Also, the railroads must acknowledge in the Commitments that an independent third-party will have access to and review the railroads’ information and data. Yet, the Commitments do not mention the independent monitor. They must.
9. **Do the emissions reduction percentages for the MOU Commitments also include any expansions?** For example, if SCIG or Hobart are expanded, the MOU Commitments should make clear in writing that the required 2015 and 2020 emissions reduction percentages still apply.
10. **If and when the MOU Commitments are approved by the CARB, there should be time deadline by which the railroads must execute the Commitments, ie, 15 days.** This cannot be allowed the drag on.
11. **An “indirect source” rule along the lines of SJAPCD Rule 9510 should be evaluated as an alternative.** Such as rule was upheld in *Association of Home Builders*, 627 F.3d at 730. CEQA requires a reasonable range of alternatives [14 Cal. Code Regs. § 15126.6(a)] and the Alternative D evaluated in the FED is not the same, robust measure that an “indirect source” rule could and should be. This would treat the railyards as they are – magnet sources that attract a host of mobile emissions. It would a true shame if the poison pill in the MOU Commitments prevents local agencies from envisioning and adopting such an “indirect source” rule for railyards.
12. **MOU Commitments section 11 should be strengthened to prevent backsliding of any dirtier equipment to the other railyards, not just pre-Tier 0 locomotives.** As noted above, the June 23, 2010 analysis of Dr. Petra Pless submitted herewith concluded that there is a reasonable possibility that the proposed Commitments would result in significant increases of criteria pollutant emissions at other railyards throughout the State.
13. **Are organizations third party beneficiaries too under MOU Commitments section 10?** Resolution 10-29 gives the public the right to enforce all CARB commitments through a writ of mandate. The Chair explained at the hearing that this

is an “expedited” and enhanced right” to hold “feet to the fire.” The MOU Commitments should allow organizations, including the undersigned, the right to pursue mandamus.

14. **Please insert a public hearing in MOU Commitments section 12 prior to any amendments of the MOU Commitments.** If the MOU Commitments are amended in any significant way, there should be prior public notice and comment, and potentially Board approval.
15. **There should be a date certain and geographic proximity specified for installation of PM monitors.** These should be installed now or within three months of execution of the MOU Commitments and within 100 yards of the fenceline of all four priority railyards. The monitors should test for PM, carbon black and specific TACs.
16. **The MOU Commitments should in writing prohibit the use of non-preempted locomotives at the four high priority yards.** The documents indicate that no such equipment is “routinely” present and at pages A-10 and A-11, the CARB gives credit to the Commitments for upgrading pre Tier-0 engines, even though there is no such specific requirement in the Commitments. Instead, it should forbid use of these locomotives under all circumstances, whether routine, <25% or otherwise. This could be obtained by a regulation and the CARB and community should settle for no less.
17. **CARB should tie review of mitigation plans to data from the HRAs.** Currently, there is no linkage between the results of the HRAs and concrete and specific measures in the mitigation plans to address and target the results of the HRAs. The MOU Commitments section 5(e)-(f) should tie CARB and the independent auditor’s review of the mitigation plans and HRAs together to ensure that specific measures to reduce risk and evaluated and proposed.
18. **Why is Commerce Eastern included in Table A-6?** We are unsure why this include in the table.
19. **How did cargo growth increase but cancer risk decrease at the Commerce railyards?** Figure 2 depicts this. Also Table A-17 shows large decreases in switcher emissions. This must be better explained with supporting data that the public can review.
20. **Are reductions for the drayage truck/cargo rule accurate?** For example, Table A-15 claims 75% reduction in truck emissions from 2005. As the recent history and the Ports of Los Angeles and Long Beach has shown, certain drayage truck drivers are often unable to keep their trucks maintained properly. A badly-maintained new truck can become a dirty truck within a year. Thus, assuming that new, clean CARB-compliant trucks will remain clean may be unwarranted.
21. **Will Commerce meet its December 31, 2011 50% deadline? According to Table A-17, line haul and service and testing emissions are increasing at Commerce.** This must be better explained with supporting data that the public can review.
22. **What is ARB’s view of rail electrification?** This is only cursorily discussed in the

Executive Summary. This must be better explained with supporting data that the public can review.

23. **Verification of equipment and inventories is key and CARB should state its intent to verify and means of verification in the MOU Commitments.** MOU Commitments section 2 references emissions inventories. Movement of equipment from one yard to another will skew the emissions inventories and alter the analysis required by the MOU Commitments. For example, Table A-5 note f shows that equipment can be shifted. It is our view that the analysis of capacity Hobart, for example, should only include Hobart equipment, not BNSF Commerce equipment. The Commitments should include clear language explaining exactly how and when CARB will verify the emissions inventories and report this data to the public.
24. **On Table A-7, and page A-14, why are such low settings used for switch and testing emissions?** Table A-7 with emissions factors is essential to CARB's entire analysis. It needs more explanation. Where do these factors come from? Our understanding is that notch 1 and 2 are used only some of the time in the railyards and that higher notches may be used, especially during service and testing. The narrative on page A-11 makes this clear. A technical support document with underlying data is essential, including specific on notch settings for service and testing.
25. **Can public notice be provided of the identities of the Appeals panel?** Pursuant to MOU Commitments section 9.e.1., an appeals panel will be selected. This process must be transparent.

Conclusion

Neighboring railyard communities have experienced first-hand the harmful impacts of the emissions emanating from UP and BNSF railyards and we cannot continue to delay this regulatory process. The communities exposed to unhealthful levels of diesel particulate matter would be better served by regulations that address specific high-polluting locomotives and other equipment and operations. You have the authority to this.

The entire record pertaining to the Petition for Rulemaking including the Petition, written and oral record of all 2009 and 2010 hearings and submissions on this topic including our letters of February 25, 2009, September 23, 2009, February 23, 2010 and June 23, 2010 for the public meetings, and all public comments are hereby incorporated by this reference.

We thank you in advance for considering these requests and look forward to working with you and your Staff on a plan that will truly achieve strong health-protective measures for California communities.

Sincerely,



Angelo Logan
Director, East Yard Communities for Environmental Justice

Attachs.