



South Coast  
Air Quality Management District

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**Via Electronic Mail**

Harold Holmes  
Manager of Engineering Evaluation Section  
SSD/Freight Transport Branch-6<sup>th</sup> Floor  
California Air Resources Board  
1001 "I" Street  
Sacramento, CA 95814

Re: SCAQMD Review of the Functional Equivalent Document for the Revised 2010  
Commitments between the ARB and UP Railroad and BNSF Railway.

Dear Mr. Holmes:

The South Coast Air Quality Management District staff ("SCAQMD") appreciates the opportunity to comment on the above-referenced project. The SCAQMD notes that the Revised 2010 Commitments ("Commitments") and the draft Functional Equivalent Document ("FED") address some of the concerns that have previously been raised by the public and our agency; however, we maintain our fundamental disagreement regarding ARB's approach with respect to this very important issue. We believe that a preferred approach is for the ARB to exercise its regulatory authority to the greatest extent feasible to achieve reductions of air emissions from railyards to meet mandatory clean air standards and reduce local health risk. We believe the recent decision by the Ninth Circuit Court of Appeals in *Association of American Railroads, et al v. South Coast Air Quality Management District, et al.* 622 F.3d 1094 (9<sup>th</sup> Cir. 2010) lays out an avenue under which the ARB could exercise greater regulatory authority. The decision allows for an opportunity to harmonize the Clean Air Act (CAA) with the Interstate Commerce Commission Termination Act (ICCTA). The SCAQMD is interested in working with the ARB in pursuing this avenue in order to achieve our critical common objective of reducing emissions from railyard sources.

1. Procedural Concerns

As an initial matter, the SCAQMD reiterates that ARB's approval process does not comport with the requirements of the California Environmental Quality Act ("CEQA"). The FED was prepared after the Commitments had been drafted *and* revised, a public hearing was held, and a resolution was adopted by the Board. The ARB had effectively committed itself to a particular course of action prior to the preparation of the FED, in conflict with CEQA's clear mandate to conduct CEQA review as early as possible in the planning process to maintain flexibility and allow environmental considerations to influence decision making. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) The improper timing of the CEQA review encourages a *post hoc* rationalization for an already approved project and contravenes CEQA's stated policies of informed decision making and public participation. (*Save Tara, supra*, 45 Cal. 4th at 136.)

We further maintain our concern that the Board has improperly delegated its responsibility to adopt the final Commitments and the FED to the executive officer. These documents, instead, should be approved by the Board. As the decision-making body of the ARB, the Board has the legal responsibility to exercise its independent judgment in reviewing the environmental consequences of this proposed project because the decision, which appears to involve a commitment to abstain from rulemaking, is one that can only be made by the Board. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)

Also, as a threshold matter, the SCAQMD questions whether a FED was appropriate for this project. Under the CEQA Guidelines, ARB may only prepare a FED for "[t]hat portion of the regulatory program of the Air Resources Board which involves the adoption, approval, amendment, or repeal of standards, rules, regulations, or plans to be used in the regulatory program for the protection and enhancement of ambient air quality in California." (CEQA Guidelines § 15251(d).) The approval of the Commitments may not be part of the regulatory program as they appear to be a commitment to abstain from taking any regulatory action.

2. Substantive Concerns

The ARB should ensure that adequate emissions reductions will be achieved through the agreement before it includes a provision agreeing to abstain from regulatory action. As you are aware, nitrogen oxide emissions must be reduced by an additional three-quarters beyond expected levels to comply with national ozone standards. Locomotives and the goods

movement system generally are a significant source of needed emissions reductions. In fact, the Supplemental Staff Report acknowledges that the three agencies are partnering to achieve the long-term objective of a “more efficient, zero- or near-zero emission freight transport system for Southern California.” (Pg, 7.) The SCAQMD is concerned that the Commitments do not go far enough to ensure that this common objective will be achieved and in fact, may detract from that goal through implications in Resolution 10-29 and the Commitments that the ARB is agreeing to abstain from taking any further regulatory action. As a result, the Commitments may limit the environmental benefits that would have been obtained through regulatory action. The apparent agreement to abstain from further regulatory action, meaning the loss of expected benefits, is an undisclosed significant impact that should have been analyzed in the FED.

Furthermore, the Commitments contain a provision (referred to as a “poison pill”) allowing the railroads to withdraw from the Commitments if another public agency requires UP or BNSF to take action that is “identical or substantially similar” to the Commitments. (Pg. B-16; C-16; D-16; E-17.) Without a clear understanding of the limitation of this term, it appears to serve as a disincentive to other public agencies to attempt to regulate the railyards- whether to reduce risk from diesel PM or in an effort to reduce NOx- irrespective of the fact that NOx is not being controlled through the Commitments and that no other agency is a party to this agreement. Without further actions to reduce NOx emissions, the ability of the South Coast Air Basin to comply with the Air Quality Management Plan (“AQMP”) and achieve reductions needed to meet Ambient Air Quality Standards, is severely compromised. This too is an undisclosed significant impact that should have been analyzed in the FED. Since it was not, the SCAQMD asks that this provision be stricken from the Commitments.

It appears to be the ARB’s position that the Commitments will achieve greater reductions in diesel particulate matter than would be achieved through regulatory action. However, there is no evidence in the FED, let alone substantial evidence, to support this statement. The Commitments are responsible for 12.5 tons per year of additional diesel PM reductions by 2020, or between an additional 8-33<sup>1</sup>% reduction per railyard beyond existing regulations. Meanwhile, Alternatives B, C, and D, which are complementary rulemakings, could cumulatively result in reductions of up to 26 tons per year. (Pg. F-7 through F-9.) Thus it appears the alternatives would result in greater emissions reductions than the Commitments.

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<sup>1</sup> The constant reference to an 85% reduction from 2005 levels is inaccurate because it is attributable primarily to existing regulations and not the Commitments themselves.

Also, if the railroads were to renege on their obligations under the Commitments, the ARB would take regulatory action that is similar to Alternatives B and D, consider taking further action to pursue federal legislative activity to expand ARB authority over locomotives, and petition the U.S. EPA to strengthen their existing federal regulations. (Pg. B-11; C-11; D-11; E-12.) If successful, these measures would have the potential to further increase reductions in diesel PM and may even increase the potential to reduce emissions of other pollutants. Thus, the SCAQMD questions the statement in the FED that the Commitments would achieve a greater reduction in diesel PM than regulatory action.

The FED also contains the following deficiencies:

1. The FED provides only a qualitative analysis of the indirect impacts of implementing the Commitments by claiming that a more detailed analysis is infeasible. This is not true. Even though this requires programmatic level analyses, a quantitative analysis could be provided by developing potential scenarios and evaluating the worst-case scenario based on reasonable assumptions. This methodology would be possible in analyzing the impacts of this project because the available compliance options are limited. For instance, Appendix A identifies that reductions in health risks could occur through further control of locomotive emissions, Cargo Handling Equipment, Heavy Duty Truck Emissions, Transport Refrigeration Unit Emissions, and Stationary Compression Ignition Engine and Maintenance of Way Equipment Emissions. (Pg. A-10 through A-16.) The public further identified that health risks could be reduced through relocation of certain railyard activities away from sensitive receptors. Reasonable assumptions can be made with such a finite source of emission categories to allow for a quantitative analysis of the project's true potential for environmental impacts.
2. The analysis of the environmental impacts associated with the 2010 Commitments relies on updated emissions and health risk estimates as explained in Appendix A – Updated Diesel PM Emission and Health Risk Estimates. However, little or no information is provided or referenced to verify and validate staff's analysis and the updates to the inventory and health risk estimates.

For example, the most significant change, as identified by staff, is the updated load factor used for the cargo handling equipment. Originally at 70%, it is reduced to 20% based on "manufacturer data and actual operation hour data from cargo handling equipment at UP ICTF/Delores Railyards and BNSF Hobart Railyard." It is not clear what manufacturer data is used and how operational hour data is related to the load

factor determination. It is critical for the reviewer that the manufacturer and operational hour data, as well as how the information was analyzed by staff, is provided to allow the reviewer to determine the basis for the conclusions.

Another example relates to how the new Health Risk Assessments (“HRA”) estimates were derived for each of the railyards as shown in Tables A10 – A20. Were the new health risks determined simply by multiplying the previous estimates by the ratio of the new emissions to the previous estimates? This would assume the source locations contained in the original analysis remained the same, which would need additional justification. Or were more sophisticated methods used in determining the new estimates? This lack of detail and reference to information and data is repeated throughout the Appendix.

It is unclear if the HRA calculations are using a ‘floating baseline’ or a ‘static baseline.’ In other words, for a risk value presented for 2020 emissions, does the HRA assume the locomotive and truck fleet is static at 2020 for 70 years, or does it assume the fleet turns over through time?

Because the emissions estimates are the foundation of the assessment of the environmental impacts of the proposed Commitments, AQMD staff believes that additional information must be provided to allow for a complete review of the staff’s modifications. At a minimum, it is necessary to provide all information and data from the railroads and industry used in the ARB’s staff’s analysis as well as detailed information explaining how the information was derived and used by staff to modify the emissions and health risk estimates.

3. The FED does not evaluate a reasonable range of alternatives. CEQA requires that an agency select a range of alternatives that are designed to substantially lessen significant environmental impacts while obtaining most project objectives. However, the FED notes that, “Alternatives A and B would *not satisfy the project objective at all* (no further reductions in diesel PM at the four priority railyards).” (Pg. F-6) The FED also notes that, “Alternatives C and D ... would involve operational changes that share the same potential environmental impacts with the proposed project, without significantly reducing those impacts.” (*Id.*) Thus, the selection of alternatives does not comport with CEQA.
4. When the FED discusses the number of locomotives ARB staff considers non-preempted and pre-tier 0 locomotives that could be captured by an ARB regulation, it

notes that there are 80 such locomotives operated on a regular basis throughout the state by UP and BNSF. (Pg. F-78.) However, it provides no context for the significance of this number. For example, it does not explain the percentage of the total locomotives operating in the State that is accounted for by these 80 locomotives.

5. The FED states that it is unlikely that UP would shift significant levels of activity to other yards in an attempt to meet the declining emission caps under the Commitments. Rather than simply assuming it's unlikely and failing to account for the impacts of UP's decision to shift significant levels of activity to other yards, the FED should prohibit such activity or analyze the impacts of such a shift occurring.
6. The FED limits its analysis to PM10. It fails to analyze the impact of the project and the alternatives on other pollutants, such as NOx. This should be a factor that is discussed in the determination of the project scope and the alternatives analysis.
7. While it is the responsibility of the ARB to analyze the potential for environmental impacts in the first instance, the public and the SCAQMD have identified areas of potentially significant impacts that should be analyzed. Specifically, the Port of Los Angeles and Port of Long Beach ("Ports") have taken great strides to reduce diesel particulate matter emissions from port-related sources. The Ports have set a goal of at least 95% Tier 4 locomotives entering the Ports by 2020. The proposed ARB Commitments, which do not require 95% Tier 4 locomotives, have the potential to undermine the Ports' efforts, thereby increasing locomotive emissions over the no project alternative. This effect must be analyzed.
8. The Commitments target reductions of tons per year of diesel particulate matter at the railyards, rather than reductions in health risk. Therefore, risk reductions achieved through the Commitments could be less than stated in the FED.
9. The Commitments contain a provision stating that both UP and BNSF will participate in demonstration programs through 2015 to identify locomotive technologies that meet or exceed Tier 4 levels. (Pg. 2 of each set of Commitments.) There is no commitment to implement these technologies after 2015, meaning there is no further commitment to reduce NOx.

Unrelated to the FED, the SCAQMD is concerned that Section 10 of the Commitments states that, following a notice and opportunity to cure period, the intended beneficiaries (residents

living within two miles of the railyards) may file a mandamus action in the Superior Court of California, County of Sacramento. The SCAQMD is not certain on what basis the ARB is purporting to have the authority to limit the venue. However, since the four railyards concerned by the Commitments are located within the South Coast Basin, this limitation serves as a deterrent to a beneficiary wishing to bring a mandamus action to compel compliance with the Commitments by increasing the barriers to litigation. Moreover, Section 10 does not expressly authorize SCAQMD or other air districts to bring an action. Thus, the SCAQMD asks that this reference be stricken from the Commitments or modified to eliminate the limitations.

### 3. Conclusion

In summary, SCAQMD urges the ARB to exercise its full regulatory authority to secure more meaningful emissions reductions from the railroads to achieve reductions of diesel particulate matter as well as other pollutants, especially NOx. We have previously identified specific conditions with demonstrated effectiveness that should be mandated for the railyards, including: a higher degree of deployment of Tier 4 locomotives; the use of electrified cargo handling equipment such as wide-span gantry cranes and electric power for transport refrigeration units; use of advanced emissions capture systems such as the "hood" technology that was demonstrated at the Roseville railyard; moving railyard operations, such as maintenance and truck gates, away from sensitive residential development; and establishing a target of acceptable risk by a set deadline. We believe that achievement of these goals is best achieved through direct regulatory action. Further, the SCAQMD would actively support the ARB with seeking federal action and/or additional state authority and welcome the opportunity to work jointly with you to achieve this common objective.

Sincerely,



Barry R. Wallerstein, D.Env.  
Executive Officer