

June 21, 2010

Chairman Mary Nichols and Board Members
California Air Resources Board
1001 I Street,
Sacramento, CA 95818

RE: Public Meeting to Consider Staff Recommendations for Commitments between ARB and UP and BNSF Railroads to Accelerate Further Diesel PM Emission Reductions at Four High Priority Railyards in the South Coast Air Basin; 6/24/10 Agenda Item 10-6-5

Dear Chairman Nichols and Members of the Board:

We, the undersigned environmental, environmental justice, and public health organizations, ask you **once again** to exercise your authority in protecting the public health of California communities by taking enforceable steps to reduce emissions and health risk from rail yards and locomotives. We have read and reviewed the proposed commitments between the California Air Resources Board and the railroad companies and write to express our disappointment with the minimal commitments and specificity that have been outlined.

Our main concerns are outlined as follows and community needs and recommendations are outlined at the end of the document.

- 1. *Remaining Risk is Too High:*** Despite an impressive goal to achieve an 85 percent reduction from 2005 emission levels, cancer risk are still projected to be extremely high. For example, 2020 cancer risks to communities outside of BNSF San Bernardino and UP ICTF/Dolores are estimated to be 400 per million and 120 per million, respectively, well above cancer risk.
- 2. *Limiting Agreements to four Railyards is a Missed Opportunity:*** Entering commitments with only four railyards means that the rest of the communities impacted by other major railyards throughout the state miss out on potential benefits.
- 3. *Operational Changes Are Not Included as Commitments:*** They are subject to an assessment processes, without any clear provisions to implement strategies that prove successful.
- 4. *Health Risk Reductions Are Most Important:*** Sole focus on emission reductions rather than health risk reductions is inappropriate, as proximity to emissions is a significant factor in health risks.
- 5. *Progress Is Too Slow:*** This voluntary approach has been pursued under the rationale that reductions would be achieved faster than under any regulatory route, however, significant reductions from these agreements do not occur until 2020 for four select railyards and communities around other railyards do not benefit at all.

6. ***Regulatory Backstops and Enforcement Must Be Better Defined:*** An agreement is only as strong as its backstop measure. The backstop needs more specificity in how any regulations would be adopted if the railroads violate the agreements, how stringent they would be, and what the regulatory process would look like if only one or some of the railyards fail to meet commitments.
7. ***Air Monitoring Commitments Are Vague:*** The Air Monitoring plan needs more specificity on the location of each monitoring station, how the data will be used and accessible to the public.

Background

There are eighteen large railyards in California operated by Union Pacific Corporation and BNSF Railway Company¹. While rail is viewed as a “green” alternative to trucking, rail produces more nitrous oxides (NOx) per mile than trucks and rail’s fuel benefit substantially decreases if the full door to door transport costs are considered.²

Thus, rail transport accounts for significant emissions of 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 State³.

Air toxic emissions from California railyards and locomotives also present a significant concern. In fact, more than three million Californians are exposed by railyard sources to excess lifetime cancer risk of more than ten per million.⁴ The California Air Resources Board insists that “every feasible effort” is needed to “reduce localized risk in communities adjacent” to the State’s railyards.⁵

CARB’s role

Under State law, the Board “shall adopt and implement” control measures that are “necessary, cost-effective and technologically feasible” for mobile goods movements sources including “heavyduty motor vehicles,” “utility engines” and “locomotives,” unless preempted by federal law. 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. Yet, the Board has not directly regulated

¹ California Air Resources Board, Technical Options to Achieve Additional Emissions and Risk Reductions From California Locomotives and Railyards, August 31, 2009, pp 11-13, available at www.arb.ca.gov/railyard/ted/ted.htm.

² Noël Perry, July 2009 Transportation Market Outlook, Transport Fundamentals, pp. 23-24, available at www.fhwa.dot.gov/freightplanning/talking.htm.

³ California Air Resources Board, Recommendations to Implement Further Locomotive and Railyard Emission Reductions, September 9, 2009, p. 12, available at <http://www.arb.ca.gov/railyard/ted/ted.htm>.

⁴ See *supra* note 3 at p. 2

⁵ *Id.*

California locomotives, instead favoring controversial contractual agreements with the railroads, or Memoranda of Understandings (MOUs). Thereafter, advocacy organizations filed a Petition for Rulemaking to compel Board action.

In light of the granting of the Petition for Rulemaking, several hearings including the September 25, 2009 Board hearing were held to consider recommendations to implement further locomotive and rail yard emission reductions. More than 3,000 post-cards from the public were submitted to the Board, as well as a sign-on letter from various health, environmental, and environmental justice organizations asking for a commitment to enforceable measures to reduce emissions and health risk at California's rail yards. 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 adversely affected by their emissions. It is now June and the product that staff will present to the board on June 24, 2010 falls short of what the community needs and what the board directed.⁶

In the September 2009 staff report, many regulatory measures were deemed feasible, cost-effective and likely not preempted by federal law.⁷ Greenhouse gas reduction benefits also were identified. In addition, during the hearing, Board Chairman Mary D. Nichols stated that “we want to make clear that regulation is not just something never to be discussed, but that, in fact, we are going to be developing an approach to it as part of the background of the whole program.”⁸ We continue to stand behind our recommendation to pursue regulatory measures that include locomotives, cargo-handling equipment, and risk reduction plans.

CARB Board direction

We were pleased with the Board's decision in September to direct staff to return with an implementation plan that went beyond an incentive and locomotive-only approach to include the following:

1. Develop a rule requiring the railroads to create and implement a risk reduction plan for each of the high risk rail yards, with direction that the first such plan be for the BNSF San Bernardino rail yard, that would include measures not otherwise preempted by federal law.
2. Develop a rule requiring the greatest achievable emission reductions from sources operating at high-risk rail yards, including electrifying gantry cranes, yard hostlers, trucks and other equipment.
3. In developing the above two rules, CARB staff shall consider the use of local air districts' authority to enact an indirect source rule to reduce emissions and risk around rail yards.
4. Develop a medium horsepower and switcher locomotive strategy, including the use of incentive funds and a regulatory element, for reducing emissions and risk reduction.

⁶ California Air Resources Board. Proposed Actions to Further Reduce Diesel Particulate Matter at High Priority California Railyards. June 2010. Available at <http://www.arb.ca.gov/railyard/commitments/staffreport061510.pdf>

⁷ See note 3 *supra* at p. 44 and App. C.

⁸ California Air Resources Board, Transcript of September 25, 2009 Board Hearing, pp. 269-271, available at www.arb.ca.gov/board/meetings.htm#2009

In response to this directive, CARB staff initiated negotiations with the railroads in the form of commitment letters. The proposed commitments fail to meet the board's direction in various aspects, including (1) they did not include any rule requiring the railroads to create and implement a risk reduction plan for each of the high risk rail yards and (2) they do not require the greatest achievable emission reductions possible from all railyard sources. In addition, measures to reduce oxides of nitrogen and particulate matter at California's rail yards should be crafted to maximize greenhouse gas reductions while achieving the greatest public health benefits as quickly as possible. Accounting for greenhouse gas reductions will help identify the lowest-emission solutions available and provides an opportunity for additional sources of incentive funding. For example, electrification of yard hostlers rather than repowering them with diesel engines can eliminate diesel emissions and provide greenhouse gas emission reductions as well.

Commitment letters between the CARB and the railroads

After careful review of the four proposed railyard commitments between the California Air Resources Board and the railroad companies and the revised staff report, we are extremely disappointed with the level of health protections provided to the surrounding communities. This agreement only achieves an additional 7-17 % emissions reduction (depending on the yard) at the four high risk railyards identified by ARB over a 10 year span. The extremely high cancer risk for people living in close proximity to the railyards is the primary reason why ARB is involved in this negotiation with the railroads, yet this health risk is not specifically discussed in the commitment letter.

The board directed staff to pursue site-specific measures to reduce cancer risk and emissions from the highest risk railyards because it would give a relief to communities around the yards faster. In truth, the new MOU "letters" are not very site-specific and there is nothing special about these agreements that cannot be implemented in railyards across the state. The commitments themselves are weak as communities do not receive a decrease in emissions from this new MOU until after 2015. Furthermore, the 14 other major railyard communities across the state may suffer collateral damage, as the dirtier locomotives are transferred out of the covered four yards. Proposed expansions in and around the major railyards (e.g. the development of an intermodal rail terminal at the Port of Oakland) threatens to further exacerbate this impact by increasing the daily volume of locomotives passing through the railyards. Communities would receive a greater benefit by doing a statewide regulation for all non-preempted locomotives, cargo handling equipment, operational measures and risk reduction audit plan.

The proposed approach relies heavily on public funds rather than the railroads own investments. There are better uses for those funds that communities can benefit from directly and no analysis was shown as to whether there will now be less funding for other programs such as early compliance with the truck regulation. No rigorous analysis of alternatives to this approach vs. regulatory approach with data to back up findings was provided. In fact, the 37 options document had already identified various approaches to further reduce emissions at railyards that included emission reduction and cost-effectiveness, but was not used as a tool in this agreement.⁹

⁹ See *supra* note 1

Community Needs

California communities have been asking ARB to do everything in their power to regulate the railyards, equipment, and locomotives in the State. The residents around these toxic facilities deserve no less than the railyards to take responsibility for the years of exposure and risk they have put these residents through. There are currently no regulatory health risk limits for railyards. To put it into perspective, the U.S. Environmental Protection Agency has set a baseline goal of no more than a 1 in a million excess lifetime cancer risk for the cleanup of Superfund sites. South Coast Air Quality Management District rules generally limit risk from stationary sources such as refineries and power plants to below 25 in a million, and new stationary sources are not issued a permit unless they document a risk less than 10 in a million.

We agree that emission reductions should serve as the fundamental basis for protecting rail yard communities. We must, however, object to the arbitrary decision ARB stands ready to make by focusing on emission-based goals while foregoing risk reduction requirements that would demand much deeper cuts in rail yard emissions. It seems senseless for ARB to rely so heavily upon risk assessment and then fail to establish a health protective risk-based standard for rail yards. Many of our organizations have questioned the continued reliance upon risk-based regulatory approaches. We do not seek to limit risk – we seek to eliminate it. Risk assessments don't work when we have unanswered questions about emissions, toxicity, exposure pathways, and cumulative impacts. When it comes to the worst railyards, huge emission inventories and the close proximity of residences overcome these limitations. Now, in one of the few cases where we would expect risk-based approaches to protect impacted communities, ARB staff proposes to turn their back on risk-based emission reduction standards.

Unfortunately, railyard related activity is having negative impacts on air quality and public health for communities across the state. Adjacent communities, primarily consisting of large populations of low-income minority residents, bear the disproportionate burden of such activities. A monitoring program for emissions at rail yards needs to be developed not only to include monitoring for regulated pollutants, but also for elemental carbon, PAHs, and ultrafine particles (as the Ports of L.A. and Long Beach are doing).

To protect the health of the community, ARB needs to

- ***Regulate Where Legal Authority is Clear:*** Begin regulations on all non-preempted locomotives in the state and enhance other regulations you have authority to do. The rulemaking process will take less than two years, provide certainty, and is enforceable. These new agreements do not result in any new reductions until five years from now and non-compliance will not trigger the beginning of rulemaking or induce fines or penalties. Regulations will have enforceability with fines and penalties.
- ***Focus on the Cleanest Options:*** Reduce emissions with best available control technology
- ***Require Industry to Go Beyond Low Hanging Fruit:*** Implement all available measures, not just allow the railroads to pick and choose which measures they will do, "if any".
- ***Implement Reductions Quickly:*** Implement reductions now! Communities do not receive any benefits from these agreements until after 2015, but there are many operational changes and available technologies that can be implemented within the year.
- ***Ensure Appropriate Air Monitoring:*** Include air monitors around the railyards specifically for

railyard emissions around the yards or at the fence line.

- ***Provide Robust Oversight:*** Health Risk Assessments and monitoring should trigger non-compliance enforcement actions.
- ***Commit to Meaningful Enforcement:*** Failure to comply with commitments should be determined by ARB and significant fines should be levied; any appeal board should be independent of the railroads.
- ***Withhold Public Funds Pending Satisfactory Agreement on Risk Reduction:*** No more public funds until they commit to reducing pollution levels to that of other stationary sources in the region (i.e., less than 10 in a million cancer risk).
- ***Require Community Mitigation Fund:*** ARB should “actively seek incentive funds” for the community for vegetative barriers, filters for schools and homes, retrofitting homes, etc, not to bailout the railroads.
- ***Require Commitment Regardless of Receipt of Incentive Funds:*** Ensure providing cleaner switcher and medium-horsepower locomotives is NOT contingent on receipt of incentive funds.

Neighboring rail yard communities have experienced first-hand the harmful impacts of these exposures and we cannot continue to delay this regulatory process. We urge the Board to reject these agreements and move to adopt **enforceable regulations** to reduce risk and emissions from California locomotives and railyards on June 24, 2010.

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,

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cc:

Speaker of the Assembly John A. Perez
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Assemblymember Hector De La Torre
Senator Roy Ashburn
Senator Ron Calderon
Senator Gil Cedillo
Senator Dave Cogdill
Senator Dave Cox
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