South Coast
Air Quality Management District
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XC: Board Members 06-1-6
Chairman CEW 1/27/05
TJ MHS
KT Legal (AM/MT) SSD

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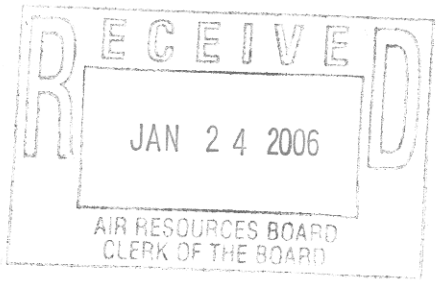

Dr. Robert F. Sawyer, Chairman
California Air Resources Board
1001 I Street
P.O. Box 2815
Sacramento, CA 95812

Dear Chairman Sawyer:

On behalf of the South Coast Air Quality Management District ("South Coast District"), I would like to provide the CARB Board the following comments on the January 13, 2006 "Status Report on the Implementation of the 2005 ARB/Railroad Statewide Agreement." As elaborated upon below, the South Coast District finds that the report does not provide clarification as to the ambiguities in the ARB/Railroad agreement, as your Board requested be done at its October 27, 2005 meeting.

Outside of addressing the release clause, CARB staff did not clarify any of the other numerous ambiguities in the MOU. In this regard, several speakers at the October meeting expressed concerns over the vagueness of the MOU's terms relating to idling reductions, emissions controls, rail yard risk assessments, and enforceability of the agreement. Further, in December of 2005, in response to this Board's direction that CARB staff revisit portions of the MOU, the South Coast District provided CARB with a list of very specific ambiguities that, from a legal or technical standpoint, must be clarified if the MOU is ever to be meaningfully implemented.

For example, for locomotives without anti-idling devices the MOU purports to limit non-essential idling to 60 minutes. Indeed, to members of the public living with excessive idling of locomotives near their homes, schools, and work, this is one of the more important elements of the agreement. However, as we pointed out, the MOU contains conflicting language that appears to exempt idling from this limitation where the railroad staff "anticipated" that idling would last less than 60 minutes. Despite our concerns that this exception will diminish or eliminate the benefit of an idling limitation because CARB enforcement personnel cannot possibly get into the minds of railroad staff to determine what they "anticipated," no attempt was made by staff to address this ambiguity. Similarly, staff never addressed our concerns that the terms "feasible" and "feasibility," which are used throughout the agreement to define the obligations of the railroads, are undefined and essentially leave compliance with many program elements to the discretion of railroad employees.

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The report issued by CARB staff two weeks ago does not address any of these problems with the language and intent of the MOU. Instead, the report essentially restates the vague requirements in the MOU. Even as a status report this document provides little information on whether the MOU could be effective. Indeed, the report does not document any specific improvement in reducing unnecessary locomotive idling or show that any tangible progress has been made to reduce health risks associated with rail yard emissions since the MOU was signed six months ago.

As to CARB's four page clarification of the release clause, staff has still not responded to the written questions our Governing Board provided CARB regarding the effect of the release clause on legitimate authority of local jurisdictions to impose mitigation requirements for new and expanded rail yards under California Environmental Quality Act (CEQA) or as conditions in a lease granted to a railroad to operate on public property. Instead, the clarification generally asserts that the release clause cannot be invoked when "one or more of the participating railroads *agrees* to permit conditions or other mitigation requirements in exchange for obtaining discretionary approval to operate a new or modified rail yard facility." (Emphasis added.) The clarification further states that " [a] participating railroad seeking discretionary government approval in compliance with the [CEQA], California land use law, or other California or local laws, *has full authority to determine which conditions and mitigation actions it is willing to accept* in order to receive the discretionary government approval." (Emphasis added.)

As an initial matter, under CEQA local jurisdictions currently have authority to *require* environmental conditions and/or mitigation before approving a new or expanded rail yard, whether or not the railroads *agree* with the requirement. We are concerned, therefore, that even with this clarification the railroads can still use the release clause to undermine local decision making. Indeed, we believe that the clarification can be interpreted to allow use of the release clause whenever a local project or CEQA approval contains conditions to which the railroad did not agree, even if they elect to move forward with the project under the terms of the local jurisdiction. If so, the railroads are likely to use the MOU release clause in an attempt to persuade local jurisdictions to drop mitigation conditions.

The District also requests that the staff discussion on page four of the clarification be revised to delete the statement that the railroad "has full authority to determine which conditions and mitigation actions it is willing to accept in order to receive the discretionary government approval." Again, we believe that this sentence is contrary to law, particularly where a local government, such as a port, is acting as a municipal proprietor or a market participant.

In addition, the clarification only expressly refers to "permits" and "other mitigation requirements," which appears to be a reference to CEQA mitigation. On the face of the agreement and the clarification, it remains unclear whether the release clause could be used by the railroads if a local jurisdiction, such as a port, imposed conditions as part of a lease agreement. Similarly, the clarification does not address the concern of our District Prosecutor, namely that the release clause could be invoked if a District Hearing Board issued an order of abatement that contained operating restrictions, such as to remedy an opacity violation. These are important points for which we have long sought clarification from CARB.

In short, the South Coast District does not believe that CARB staff has adequately responded to the ambiguities in the MOU. Accordingly, because the agreement remains ill-defined and unenforceable, and because it continues to be an impediment to local attempts to reduce air pollution from locomotives and rail yards, we ask that the Board move to rescind the agreement.

Sincerely,

WMA Burke

Dr. William A. Burke
Chairman, Governing Board

WAB:KRW:MH

cc: CARB Board Members
Catherine Witherspoon