

California Environmental Protection Agency



Air Resources Board

**JUNE 2005 ARB/RAILROAD STATEWIDE AGREEMENT ON
PARTICULATE EMISSIONS FROM RAIL YARDS**

**PUBLIC COMMENTS RAISING LEGAL ISSUES
AND AGENCY RESPONSES**



Release Date: October 24, 2005

**State of California
California Environmental Protection Agency
AIR RESOURCES BOARD**

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Office of Legal Affairs, Air Resources Board
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Introduction

On June 24, 2005, the Executive Officer of the Air Resources Board (ARB or Board) entered into a pollution reduction agreement (Agreement) with Union Pacific Railroad Company (UP) and BNSF Railway Company (BNSF). The Agreement secured the commitment of UP and BNSF to expeditiously implement a number of feasible and cost-effective measures to reduce emissions from locomotives and rail yards throughout California. The Board is scheduled to review the Agreement at a public meeting on October 27, 2005, at the ARB offices in El Monte, California. A Staff Report has been developed to explain the background, context, and provisions of the Agreement and to summarize and respond to the public comments received by staff since the Agreement was signed last June. The Staff Report can be found at: <http://www.arb.ca.gov/railyard/railyard.htm>.

Four attorneys have submitted legal opinions taking issue with ARB's legal premises in entering into the Agreement, or the procedures followed in connection with the Agreement. The first three legal opinions were commissioned by the South Coast Air Quality Management District:

- August 30, 2005 opinion letter from Seth P. Waxman, Wilmer Cutler Picking Hale and Dorr LLP (Waxman)
- August 30, 2005 opinion letter from David Nawi, Law Firm of Shute, Mihaly & Weinberger LLP (Nawi)
- August 30, 2005 Memorandum Re: Preemption Analysis of June 2005 ARB/Railroad Memorandum of Understanding, from former Justice Cruz Reynoso, Professor of Law, U.C. Davis School of Law (Justice Reynoso)

The fourth is an August 31, 2004 opinion letter from Melissa Lin Perrella, Senior Project Attorney, Natural Resources Defense Council (NRDC).

This document provides the responses of ARB's attorneys to these submittals.

Federal Preemption – In General

1. Comment: The vast majority of provisions in the Agreement would survive a preemption challenge even if they were adopted as regulations in exactly their present form, and the remaining provisions could be easily rephrased to avoid preemption concerns while achieving the same regulatory objectives. (Waxman)

It is our conclusion that neither CAA 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 Agreement or actions having the same effect. (Nawi)

The Agreement provisions deal principally with instate regulations that do not effectively impact the design or production of locomotive engines. Accordingly, the state regulation will not be preempted. Thus, I conclude that the Agreement provisions do not affect interstate commerce and are therefore subject to state regulation. There is one possible exception. The Agreement calls upon the Participating Railroads to install anti-idling devices. It seems to me that this affects the designs of locomotives and therefore would be preempted. (Justice Reynoso))

Agency Response: ARB's attorneys disagree with the commenters' opinions that all or a vast majority of the Agreement provisions clearly are not preempted by federal law. The four sources of potential preemption are federal Clean Air Act (CAA) section 209(e), the Interstate Commerce Commission Termination Act of 1995 (ICCTA), the Locomotive Boiler Inspection Act (Boiler Act), and the dormant Commerce Clause of the U.S. Constitution. Responses to the specific assertions made by the commenters in these four areas are set forth in the remaining portions of this document.

As indicated in the Staff Report, the key elements of the Agreement that are expected to achieve near-term reductions of diesel particulate emissions from locomotives in the State's rail yards require the following:

- Installing idling reduction devices on California-based locomotives within 3 years;
- Phasing out non-essential idling by locomotives within six months;
- Identifying and expeditiously repairing locomotives with excessive smoke; and
- Maximizing the use of ultra low sulfur (15 parts per million (ppm)) diesel fuel by January 1, 2007, six years before such fuel is required by federal regulation.

ARB's attorneys believe there is little doubt that a state or district regulation requiring the installation of idling reduction devices on California-based locomotives would be preempted by CAA section 209(e), the ICCTA, and the Boiler Act. The commenters generally do not dispute this. However, they believe that a regulation could be crafted having the effect of making the railroads install idling reduction devices without actually mandating the devices, and that such a regulation would avoid preemption. ARB's attorneys are not so confident that a regulation presenting installation of the devices as a more practical compliance option compared to a "default" option of resource-intensive operational and reporting requirements would be found to be safe from preemption.

ARB's attorneys also believe that while the other three listed elements would probably be found not to be preempted by CAA section 209(e) if adopted as regulations, there would be significant cause for concern regarding ICCTA preemption.

Another important element of the Agreement – the requirement for health risk assessments at specified rail yards – would probably not be found to be preempted under any of the pertinent federal provisions if adopted as an ARB or district regulation. However, many of the potential mitigation measures that might be identified and implemented under the Agreement process as a result of the health risk assessment could be vulnerable to preemption challenges.

Faced with a strong potential of preemption and the likelihood that the railroads could effectively contest ARB's regulatory authority over at least some aspects of its plans to attain immediate emission reductions from the railroads – e.g. adopting idling control measures and requiring that all locomotives that operate in California use on-road low sulfur diesel fuel – ARB decided that the best course would be to determine if the railroads would mutually agree to implement variations of such measures through a voluntary agreement. By entering into negotiations with the railroads, ARB avoided unnecessary litigation risk and delay and was able to obtain commitments for immediate emission control actions that benefit the entire State, while protecting the existing rights of ARB, local air districts, and local jurisdictions to continue with their existing emission control programs.

2. Comment: No matter what label is put on an alleged preemption inquiry – (1) express preemption, (2) field preemption, (3) conflict preemption – ultimate determination rests on congressional intent: if Congress intended to preempt a category of state and local laws, then such laws are preempted; if there was no such purpose, the laws will stand. See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). (Waxman)

Agency Response: ARB's attorneys do not disagree with this characterization of principles in the U.S. Supreme Court's *Medtronic* decision. Indeed, in the key decisions relied upon by ARB and discussed below – e.g. *City of Auburn v. United States*, 154 F.3d 1025, 1029-1031 (9th Cir. 1998) and *Friberg v. Kansas City Southern Railway Co.*, 267 F.3d 439 (5th Cir. 2001) – expressly considered Congress' intent in determining the broad preemptive effect of the ICCTA.

In a passage frequently quoted by the Surface Transportation Board (STB) and courts, one of the first federal district courts considering ICCTA preemption stated that, "It is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than Congress provided in the preemption provision of the ICCTA (49 U.S.C. sec. 10501(b).) *CSX Transp. v. Georgia Public Service Com'n*, 944 F.Supp. 1573, 1581 (N.D. Ga. 1996), quoted in *Borough of Riverdale – Pet. for Declaratory Order – The New York Susquehanna & W. Railway Corp.*, 1999 WL 715272, at *4 (S.T.B.), and *City of Auburn* (154 F.2d at 1039).

3. Comment: The courts have been sure footed in ruling that “The States traditionally have had great latitude under their police powers to legislate as ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons.’” (*Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) – quoting from *Slaughter-House Cases*, 16 Wall. 36, 62, 21 L.Ed. 394 (1873) additional internal quotes omitted.) The Supreme Court has held that “[i]t is impossible to ignore its overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest.” (*Medtronic*, 518 U.S. 470, 471-472.) Indeed, the Supreme Court also noted the “considerable burden of overcoming ‘the starting presumption that Congress does not intend to supplant state law.’” (*DeBuono v. NYSAL-ELA Med. & Clinical Servs. Fund*, 520 U.S. 806, 814 (1997) – quoting from *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1996).)

Federal regulations have recognized that when states exercise traditional police power, the preemptive effect of federal statutes is narrowly construed. (*Medtronic, supra*, 518 U.S. at 485.) Specifically, the Supreme Court has confirmed that state environmental legislation designed directly to protect the health and safety of its citizens is generally not preempted. (*Id.*) The Agreement’s provisions deal principally with in-state regulations that do not effectively impact the design or production of locomotive engines. Accordingly, the state regulation will not be preempted. (Justice Reynoso)

Agency Response: The preemption principles identified by Justice Reynoso are obviously important in construing the preemptive effect of CAA section 209(e), the ICCTA, and the Boiler Act. But none of the cases he cites actually involve any of these federal laws, despite the fact that there are a substantial number of cases and administrative determinations specifically addressing whether the federal laws – particularly the ICCTA – preempt specific state and local regulations. The relevant cases and administrative determinations are described in the responses to subsequent comments focusing on the particular federal laws. In reaching their decisions in these matters, the courts and boards accounted for the principles cited by Justice Reynoso.

Preemption Under Clean Air Act section 209(e)

4. Comment: CAA Section 209(e)(1)(B) establishes an express preemption prohibiting states and local subdivisions from adopting or enforcing any standard or other requirement relating to the control of emissions from locomotives or locomotive engines. The U.S. Environmental Protection Agency (U.S. EPA) has interpreted the preemption broadly to encompass not just state and local regulations that target new locomotives before sale to end uses, but also those that require the installation of “aftermarket” equipment when such requirements “would affect how a manufacturer designs or produces new . . . locomotives or locomotive engines.” (*Final Rulemaking, Emission Standards for Locomotives and Locomotive Engines (Final Locomotive Rule)*, 63 Fed. Reg. 18978, 18994 (April 16, 1998); see 40 CFR § 85.1602.)

At the same time, Congress limited the scope of these otherwise sweeping provisions by providing, in CAA section 209(d), that “[n]othing 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 vehicles.” Although section 209(d) explicitly refers only to “motor vehicles,” a category that does not extend to locomotives, U.S. EPA has determined, and the D.C. Circuit has upheld the determination, that section 209(d) carves out the same exception to section 209(e)’s preemption for nonroad engines and vehicles. See EPA’s *Final Rule, Air Pollution Control; Preemption of State Regulation for Nonroad Engine and Vehicle Standards*, 59 Fed. Reg. 36969, 36973-74 & n.15 (July 20, 1994) (*Final Nonroad Rule*), *aff’d in relevant part, Engine Mfrs. Ass’n [EMA] v. EPA*, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996). The D.C. Circuit further observed, in language that anticipates a key preemption issue here, that the CAA “has always permitted the states to adopt in-use regulation – 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.” 88 F.3d at 1094.

Section 209(d) would preserve against preemption the vast majority of the Agreement’s provisions if they were enacted into state or local law or regulations. For example, section 1(d) of the Agreement requires railroads to exert their best efforts to limit all non-essential idling and prohibits non-essential idling for more than 60 minutes. This is precisely the type of operational regulation that CAA section 209(d) is designed to save. (Waxman)

In its 1998 regulation interpreting section 209(e), U.S. 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.” “Any state control that would affect how a manufacturer designs or produces new . . . locomotives or locomotive engines is preempted by section 209(e)(1).” (*Final Locomotive Rule*, 63 Fed. Reg. at 18994.) 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.” (*Notice of Proposed Rulemaking for Locomotives and Locomotive Engines*, 62 Fed. Reg. 6336, at 6397 (February 11, 1997).)

The U.S. 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). Although on its face section 209(d) refers only to “motor vehicles,” U.S. EPA has interpreted section 209(d) to apply to section 209(e) preemption of nonroad engine standards. (59 Fed. Reg. at 36973.) The *EMA* Court upheld U.S. EPA’s position on this issue. (*EMA* 88 F.3d at 1093-1094.) (Nawi)

While CAA section 209(e) preempts any requirement relating to the “control of emission” from new or used locomotives, a great deal of power is left for the state. The D.C. Circuit has ruled in favor of the “[r]eservation of states’ rights to impose in-use regulations found in section 209(d). (*EMA*, *supra*, 88 F.3d 1075, 1094.).

The Court supports its conclusion by a footnote which quotes two senators who spoke after the senate had amended preemption provision found in the house bill. Senator Chafee said that the states “[c]an continue to require existing and in-use nonroad engines to reduce emissions by setting fuel requirements, operational conditions or limits on the use of such equipment.” (*Id.* at 1094 fn. 58.) Senator Baucus, similarly, explained that, “States also fully retain existing authority to regulate emissions from all types of existing or in-use non-road engines.” (*Id.*) (Justice Reynoso).

Agency Response: ARB’s attorneys agree with Waxman’s characterization of the broad preemptive effect of CAA section 209(e)(1)(B) with regard to adoption or enforcement by a state or political subdivision of standards or other requirements relating to the control of emissions from locomotives or locomotive engines. However, it is quite speculative to apply the D.C. Circuit’s *EMA* holding to locomotives.

The *EMA* decision is only directed at U.S. EPA’s determination that CAA section 209(d) applies to nonroad engines used in equipment and vehicles covered by the *Final Nonroad Rule*. Locomotives and locomotive engines are expressly exempted from that rule’s coverage. (See *Final Nonroad Rule*, 59 Fed. Reg. at 36970; 40 CFR Part 89.1.) And while U.S. EPA’s Preamble discussion of preemption for the *Final Nonroad Rule* specifically stated that CAA section 209(d) is applicable to the nonroad engines affected by the rule, in the Preamble discussion of preemption for the subsequently adopted *Final Locomotive Rule* U.S. EPA made no express mention of CAA section 209(d) or its possible effect on state or local in-use regulation of locomotives. (*Final Locomotive Rule*, 63 Fed. Reg. 18978, 18993-95 (April 16, 1998).) If anything, this suggests that U.S. EPA believes there is some difference between applicability of CAA section 209(d) to state in-use controls for other nonroad engines compared to its possible applicability to in-use controls for locomotives.

Contrary to the assertions of the commenters, the legislative history in adopting section 209(e) and the question of whether section 209(d) carves out an exception for locomotive operational controls is not clarified by the comments of Senators Baucus and Chafee. As the Court in *EMA* stated.

[W]e find the historical record to be of little assistance.

* * * * *

There are, in fact, only a few scattered pieces of evidence about what the conferees intended, or what the members of both Houses thought they were voting for when the bill emerged from conference. In the end-of-session haste in which this huge bill was passed, the conference committee did not produce a section-by-section analysis of the conference bill. Senators Chafee and Baucus, who were among the Senate managers, placed their explanation of five titles of the 1990 Amendments in the Congressional Record, but it largely paraphrases the statutory language. In remarks on the Senate floor, both Senators stated that the

only engines that the states were preempted from regulating were those covered by § 209(e)(1). According to Senator Chafee, "States retain their existing authority to regulate all remaining new nonroad engines or vehicles." Senator Baucus, after describing the two categories preempted in § 209(e)(1), said: "The preemption is limited only to these categories of nonroad vehicles; states retain all of their existing authority to fully regulate all other types of new nonroad equipment." . . . A perhaps more plausible reading [than provided by either U.S. EPA or EMA in the court proceeding would be that] the Senators appeared to convey the impression that the only preemption in § 209(e) was the express preemption in § 209(e)(1).

* * * * *

In sum, the legislative history is unhelpful. In determining what the members of Congress intended to vote for, the legislative history provides no basis for the court to conclude that they voted for a regulatory scheme other than that provided by the words in the statute. (*EMA*, 88 F.3d at 190-192, footnotes omitted.)

Thus, one of the few things made very clear by the comments of Senators Baucus and Chafee, is that Congress expressly intended that locomotives and locomotive engines are preempted. To read anything beyond that – i.e., exemption from preemption of locomotive operational controls – is beyond the pale of the CAA legislative history.

In the interest of full disclosure, we note that U.S. EPA did refer to the right of states to control local operations of locomotives in its *Summary and Analysis of Comments on the Notice of Proposed Rulemaking for Emission Standards for Locomotives and Locomotive Engines*, December 16, 1997, stating:

states may regulate the use and operation of locomotives in a manner that does not significantly affect the design or manufacture of a new (including remanufactured) locomotive or engine, potentially allowing states to control nuisances." (*Id.* at 20.)

But U.S. EPA issued the caveat in its discussion of preemption in the *Final Locomotive Rule* that "certain categories of potential state requirements, while not expressly preempted by section 209(e)(1) or [U.S.] EPA's regulations implementing section 209(e)(1), are preempted because they would directly conflict with federal regulations." (*Final Locomotive Rule*, 63 Fed. Reg. at 18994.)

Finally, even if operational control measures as they directly apply to locomotives are not preempted by CAA section 209(e), they may be preempted by other federal laws – particularly the ICCTA.

5. Comment: CAA section 209(d) would preserve against preemption a state regulation imposing Agreement section 2, the on-highway diesel requirement. The diesel fuel requirement merely mandates what type of fuel locomotives must use inside of California, and to our knowledge requires no changes in engine design. (Waxman)

Agency Response: Based on U.S. EPA's clear implication, ARB's attorneys believe that a state locomotive diesel fuel provision would be a fuels requirement not falling under CAA section 209(e) and accordingly not preempted by that section. When U.S. EPA issued its regulations requiring the use of low-sulfur diesel fuel in nonroad diesel engines, the Preamble included a discussion on how the federal regulations affected state diesel fuel programs. (*Control of Emissions of Air Pollutants From Nonroad Diesel Engines and Fuel; Final Rule (Nonroad Diesel Fuel Final Rule)*, 69 Fed. Reg. 38958, 39072-3 (June 29, 2004).) Since the entire discussion focuses on the effects of CAA section 211(c)(4) – the CAA's fuels preemption provision – ARB's attorneys have concluded that locomotive fuels preemption under the CAA is governed by section 211(c)(4) rather than section 209(e). The Preamble for the *Nonroad Diesel Fuel Final Rule* states:

Thus, today's action does not preempt state controls or prohibitions respecting the characteristics or components of fuel or fuel additives used in nonroad, locomotive, or marine engines or nonroad, locomotive, or marine vehicles under the provisions of section 211(c)(4)(A).

* * *

A court may consider whether a state control for fuels or fuel additives used in nonroad engines or nonroad vehicles is implicitly preempted under the supremacy clause of the U.S. constitution. (69 Fed. Reg. 39072-3)

Notwithstanding the lack of preemption under the CAA, there are substantial concerns about possible preemption of the fuels element under the ICCTA and possibly other federal laws. See the response to Comment 19.

6. Comment: Program Element 3 of the Agreement, which addresses visible emissions, ensures that railroads comply with preexisting federal standards for visual emissions, not with any independent state law requirement. Although the Agreement requires in-use testing for compliance with federal standards, it specifies no non-federal testing protocol and thus permits the use of the federal test protocol established in the *Final Locomotive Rule*. See 63 Fed. Reg. at 18993-94 (declining to preempt such testing requirements). (Waxman)

Agency Response: First, the Agreement provides specifically that Program Element 3 does not preempt any district enforcement of preexisting visible emission regulations. (Program Element 10(c).) The existing visible emission programs of the districts may very well exceed the smoke opacity programs established under the *Final Locomotive Rule*, which recognizes three different levels of smoke opacity, depending upon whether the locomotive was manufactured with a tier 0, 1, or 2 engine. If ARB

were to adopt language similar to that enforced by some districts, the language may very well be preempted – if not by the CAA, then by the ICCTA. By entering into the voluntary Agreement, ARB made every effort to avoid such potential preemption and nullification of local district rules.

Second, Program Element 3 requires the railroads to submit to ARB for review and approval a defined statewide visual emission reduction and repair program. At this time, it remains to be seen if the final version of the program will be identical or exceed the federal program. It is thus premature to say that the final program would not be preempted if it were mandated by a regulation.

7. Comment: The only Agreement requirement that, if adopted as a regulation in its current form, could raise significant issues under the CAA is the obligation that railroads install devices that automatically shut engines off after 15 consecutive minutes of idling (or whatever longer period might be necessary to protect particular engines against excessive component failures). These devices might qualify as the type of “aftermarket” equipment included within the preemptive scope of CAA section 209(e)(1) as interpreted by U.S. EPA. That concern, however, could be easily avoided simply by revising the rule to require railroads to limit their idling to the same extent using any effective means, including reliance on manual shut-down. (Waxman)

The requirement that idling reduction devices be installed on intrastate locomotives appears to be an “aftermarket equipment requirement” expressly preempted under CAA section 209(e) and 40 CFR section 85.1603(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” U.S. EPA intended to be included within the preemptive ambit of section 209(e) because it would not affect manufacturer’s incentive in designing or remanufacturing locomotives or engines. Regardless of whether an idling control device requirement would be preempted, ARB or the SCAQMD could achieve the same result by promulgating a performance standard limiting idling time without specifying how the railroads achieve that standard. The limitation of non-essential idling to no more than 60 minutes clearly falls within ARB’s Health and Safety Code section 43013 authority. Furthermore, because this requirement is properly characterized in the Agreement as a performance standard. (Nawi)

Agency Response: ARB’s attorneys agree, notwithstanding commenter Nawi’s conjecture, that the Agreement provisions requiring idling reduction devices would likely be preempted under CAA section 209(e)(1)(B) and 40 CFR section 85.1603(c)(2), because such devices would be expected to affect the design and manufacture of the locomotive or locomotive engine.

As the commenters are aware, the Agreement provides that while the maximum idling time for idling reduction devices is 15 minutes, the operational control limits for locomotives without idling reduction devices is less than 60 minutes for nonessential idling. In drafting the idling limits in the Agreement, ARB recognized the railroads’ stated concerns that strict idling limits less than 60 minutes could potentially adversely

affect some locomotives operations and interrupt their rail operational services. The commenters' contention that the language of the Agreement could have been recast as a regulation to effectively require installation of idling reduction devices – presumably an operational requirement that all locomotives be required to idle no more than 15 minutes – would seem to be a prescriptive requirement that all locomotives be manufactured or remanufactured with or retrofitted with idling reduction devices. There is certainly a significant possibility that such a requirement would be preempted by the CAA and the ICCTA.

Under an ARB or district regulation, the use of idling reduction devices is presented by the commenters as an “option” to meet a performance standard, with the alternative option being clearly more burdensome and costly (e.g. SCAQMD's Proposed Rule 3501 requiring compliance through either a 30-minute operational idling limit, accompanied by burdensome recordkeeping and reporting requirements, or by installing an idling reduction device). This may not be sufficient to avoid preemption under CAA section 209(e). (*See Egelhoff v. Egelhoff ex re. Briener*, 532 U.S. 141,150 (2001) (The fact that a state law regarding designation of beneficiaries allowed employers the option of opting out of the state law requirements does not save the law from preemption under the federal ERISA express preemption statute. As the court stated, “differing state regulations affecting an ERISA plan’s “system for processing claims and paying benefits” impose ‘precisely the burden that ERISA pre-emption was intended to avoid.’”))

Finally, even if an idling-reduction regulation could be worded in a way that avoids preemption under CAA section 209(e), there are still serious questions as to whether it would be preempted by the ICCTA or other federal laws.

8. Comment: Program Element 7 implements the same remote-sensing technology contemplated in pending state legislation (AB 1222). This program element would therefore be preempted only if the state bill would also be preempted. And it likely would not be: it subjects railroads to no design requirements of any kind, and simply requires them to reimburse the state for part of the cost of the remote-sensing program. (Waxman)

Agency Response: Program Element 7 was included in the Agreement because of uncertainty whether AB 1222 would be passed by the Legislature and signed by the Governor. The Agreement ensures that a remote sensing pilot project will be implemented even if the bill did not come into law. AB 1222 was signed by the Governor October 6, 2005.

Potential Preemption of Elements of the Agreement Under the Interstate Commerce Commission Termination Act of 1995

9. Comment: The ICCTA would not preempt the Agreement provisions. The ICCTA, which establishes the STB, preempts state regulation that significantly impairs railroad operations, such as advance permitting requirements for the deployment of

railroad facilities. It does not preempt self-executing and economically unintrusive rules like the provisions specified in the Agreement, which preserve the public's interesting environmentally sound use of locomotive engines. (Waxman)

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 Agreement do not fall within the preemptive ambit of the ICCTA. (Nawi)

If adopted as ARB regulations, the provisions of the Agreement would not be preempted by the ICCTA. (Justice Reynoso)

Agency Response: ARB's attorneys have concluded that the ICCTA (49 U.S.C.A. section 10501, et seq.) could well preempt most of the key elements of the Agreement were they to be adopted as regulations by ARB or districts. The overall basis for this conclusion is provided in this response. More detailed analyses are presented in the responses to the more specific comments laid out in the responses to subsequent comments.

Congress enacted the ICCTA, which effectively deregulated the rail and motor carrier industries, to ensure the economic viability of the two industries.¹ As generally interpreted by the courts and the STB – the administrative agency entrusted by Congress to implement and interpret the Act in the first instance – the ICCTA broadly preempts states, and even conflicting federal programs, from adopting rules that affect national railroad transportation. Section 10501(b) sets forth the jurisdiction of the STB over rail carriers that are part of an interstate rail network. Its jurisdiction over the following is exclusive:

- (1) transportation by rail carriers, and the remedies provided in this part with respect to . . . rules (including car service, interchange, and other operating rules), practices, routes, services and facilities of such carriers; and
- (2) the construction, acquisition, operation, abandonment, or discontinuance of . . . switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. 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. (emphasis added.)

¹ *Who's Driving the Train? Railroad Regulation and Local Control*, Maureen E. Eldredge, 75 U. Colo. L. Rev. 549, 550, Spring 2004.

The term “transportation” is also broadly defined and specifically includes locomotives and rail yard facilities. (49 U.S.C.A. section 10502(9).) The Ninth Circuit Court of Appeals, among other courts, has broadly interpreted the program to preempt any regulation that has an integral economic effect on a railroad’s interstate rail operations. In *City of Auburn v. U.S.*, 154 F.3d 1025 (Ninth Cir. 1998) the Ninth Circuit considered the question of whether the ICCTA preempted a county’s authority to require an environmental review and permit prior to Burlington Northern’s initiation of a project to repair and resume operations of an interstate rail line over Washington’s Stampede Pass. The court answered in the affirmative, stating:

[G]iven the broad language of §10501(b)(2), (granting the STB exclusive jurisdiction over construction, acquisition, operation, abandonment, or discontinuance of rail lines) the distinction between “economic” and “environmental” regulation begins to blur. 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.

We believe the congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of the ICCTA and the statutory framework surrounding it. [Emphasis added.] Because congressional intent is clear, and the preemption of rail activity is a valid exercise of congressional power under the Commerce Clause, we affirm the STB’s finding of federal preemption. (*City of Auburn v. U.S.*, *supra*, 154 F.3d at 1031.)

The Fifth Circuit has similarly found a broad preemption under the ICCTA as it applies to a state law directly regulating railroad operations rather than requiring an environmental review and permit. The Court found that a Texas statute prohibiting railroad trains from blocking roadways was expressly preempted, stating:

The language of the statute could not be more precise, and it is beyond peradventure that regulation of [Kansas City Southern Railway (KCS)] train operations, as well as the construction and operation of the KCS side tracks, is under the exclusive jurisdiction of the STB unless some other provision in the ICCTA provides otherwise. The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm. (*Friberg v. Kansas City Southern Railway*, 267 F.3d 639, 643 (5th Cir. 2001).)

The Court further stated:

Regulating the time a train can occupy a rail crossing impacts . . . the way

a railroad operates its trains, with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty. (*Id.*)

Other courts have found state or local actions having the effect of regulating train operations to be similarly preempted by the ICCTA (*Rushing v. Kansas City Southern Railway Co.*, 194 F.Supp. 2d 493 (S.D. Miss. 2001) (Homeowners' nuisance and negligence claims based on excessive noise and vibrations from trains operated in nearby switch yard are preempted by ICCTA); *City of Seattle v. Burlington Northern Railroad Co.*, 145 Wash.2d 661 (2002) (Seattle ordinances prohibiting railroad switching activities from interfering with the use of any street or alley, or impeding property access, for a period of time longer than four consecutive minutes, and prohibiting switching on arterial streets during peak hours, were preempted by the ICCTA).

Moreover, decisions of the STB have consistently found that the ICCTA preempts the type of state or local regulation of railroad operations addressed in these court decisions. In a March 2005 decision finding a District of Columbia statute preempted by the ICCTA, the STB stated:

As the courts have observed, “[i]t is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations” than that contained in section 10501(b) [of the ICCTA]. *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F.Supp. 1573, 1581-84 (N.D. Ga. 1996) (Georgia PSC). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board’s jurisdiction or a railroad’s ability to conduct its rail operations.”

(*CSX Transportation, Inc. – Petition For Declaratory Order (CSX II)* 2005 WL 584026, *6 (S.T.B. March 14, 2005).) The STB cited nine cases for this proposition, the first of which was the Fifth Circuit *Friberg* decision holding that the Texas anti-blocking statute was preempted by the ICCTA.

Justice Reynoso does not provide a serious analysis of preemption under the ICCTA and its application to elements of the Agreement. He cites no court decisions or STB decisions construing the preemptive effect of the ICCTA.

10. Comment: The introduction of railroads necessarily brought legislative, regulatory and decisional changes. One author notes, “In the 1820s and 1830s railroad companies were typically sponsored by local commercial interests and municipal leaders who hoped to increase business activity and divert trade from rival cities.” [citation omitted] These railroads were often within state borders, but eventually, with encouragement from the federal government, especially in the West, railways were connected and the government created a national transportation system. [citation omitted.] By the late 1800’s rail transportation was all-important to interstate commerce.

Congress acted to protect the flow of goods and persons by exercising its power of preemption. However, as indicated, each state retained the responsibility to protect the health and welfare of its people. [*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), *Medtronic*, 518 U.S. 470 (1996)] (Justice Reynoso)

Agency Response: The Eleventh Circuit in *Florida E. Coast Railway Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001) – a case in which the Court held that a city zoning ordinance was not preempted as it applied to an aggregate rock distributor which leased property from the railroad for non-railway purposes – sets forth a detailed analysis of the legislative history of the ICCTA. A summary of the Court’s analysis provides:

Our conclusion as to the meaning of the ICCTA pre-emption provision is bolstered by the history and purpose of the ICCTA itself. The statutory changes brought about by the ICCTA reflect the focus of legislative attention on removing *direct* [emphasis by Court] economic regulation by the States, as opposed to the *incidental effects* [emphasis by ARB] that inhere in the exercise of traditionally local police powers such as zoning. The pre-ICCTA statute expressly authorized regulation of certain railroad activities to be undertaken concurrently by the federal and state governments, while still other regulation would be the exclusive province of state law. For example, former section 10103 of Title 49 provided that “[e]xcept as otherwise provided in this subtitle, the remedies provided under this subtitle are *in addition to* remedies existing under another law or at common law.” 49 U.S.C. § 10103 (1988) [emphasis added by the Court]. Concurrent federal-state authority was also contemplated for much intrastate railroad activity. See, e.g., 49 U.S.C. § 10501(b)-(d) (1988). Federal law also recognized exclusive state authority over “the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State...” 49 U.S.C. § 10907(b)(1) (1988). See also 49 U.S.C. § 11501(b) (1988) (acknowledging regulatory role of States over railroads). The ICCTA removed the authority of the States to regulate those railroad activities that had previously been subject to state regulation or to concurrent federal-state regulation, providing instead for federal uniformity in the regulation of rail transport. See 49 U.S.C. § 10501 (1994 & Supp.1998).¹⁰ [Emphasis added by ARB.]

¹⁰ The loss of that state regulatory authority has been the focus of much of the case law on the pre-emptive effect of the ICCTA. See, e.g., *Burlington N. Santa Fe Corp. v. Anderson*, 959 F.Supp. 1288 (D.Mont.1997) ; *CSX Transp., Inc. v. Ga. Pub. Serv. Comm’n*, 944 F.Supp. 1573 (N.D.Ga.1996) ; *Burlington N. R.R. Co. v. Page Grain Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996). While these cases have addressed the extent to which States still may be able to prevent stations from closing or tracks from moving, none have involved the general exercise of local police powers against a third party which has an incidental effect upon a railroad’s activities. [Emphasis added by ARB]

When identifying the principles of national “rail transportation policy” under the ICCTA, Congress deleted the previous statutory reference to “cooperat[ion] with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle.” *Compare* 49 U.S.C. § 10101a(9) (1998) *with* 49 U.S.C. § 10101 (1994 & Supp. 1998). This deletion emphasizes the focus of the ICCTA on removing direct state regulation of railroads previously permitted for intrastate rail transport. . . . *One House Report emphasized the balance sought to be achieved between the rights of States in the exercise of their police powers and the need for exclusivity in the “Federal scheme of economic regulation. . . .Any other construction would undermine the uniformity of Federal standards and risk the balkanization and subversion of the Federal scheme of minimal regulation for this intrinsically interstate form of transportation.”* H.R. Rep. 104-311, at 96 (1995), *reprinted in* 1995 U.S.C.C.A.N. 793, 808. One Senate Report noted the following:

[N]othing in this bill should be construed to authorize States to regulate railroads in areas where Federal regulation has been repealed by this bill The hundreds of rail carriers that comprise the railroad industry rely on a nationally uniform system of economic regulation. Subjecting rail carriers to regulatory requirements that vary among the States would greatly undermine the industry's ability to provide the “seamless” service that is essential to its shippers and would waken the industry's efficiency and competitive viability. . . . (*Florida E. Coast Railway*, 266 F.3d at 1337-1338.)

As commenter Waxman noted in referring to *Medtronic*, “if Congress intended to preempt a category of state and local laws, then such laws are preempted; if there was no such purpose, the laws will stand.” (Waxman at p. 6, referencing *Medtronic*, 518 U.S. at 485.) The decisions of the Fifth and Ninth and Eleventh Circuits, as well as STB, clearly reflect that Congress intended ICCTA preemption to be broadly construed. ARB’s attorneys are concerned that while states may use their police powers in ways that are generally applied and have an incidental economic effect on the railroads, they may be prohibited from applying direct, discriminatorily applied regulations – such as those covered by the Agreement – that when applied have an economic impact on the railroads.

11. Comment: It is true that in *City of Auburn, supra*, the Ninth Circuit found that Congress intended a “broad reading” of the ICCTA’s preemption provision and that classifying a regulation as “environmental” does not, or itself, shield the regulation from preemption. But it does not follow from *City of Auburn* that Congress intended to preempt every state or local regulation that has some effect on railroads, no matter how economically insignificant. Indeed, in that case, the Ninth Circuit upheld a preemption ruling of the STB that itself made clear that the ICCTA does not preempt state-level

environmental requirements that, like these, that pose no unreasonable burden on interstate commerce.

The STB's reasoning in its decision under review in *City of Auburn* is instructive and likely to be controlling. According to the STB, "[a] key element in the preemption doctrine is the notion that only 'unreasonable' burdens, i.e., those that 'conflict with' Federal regulation, 'interfere with' Federal authority, or 'unreasonably burden' interstate commerce, are superseded. The courts generally presume that Congress does not lightly preempt state law." *Cities of Auburn & Kent, Wash. – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 1997 WL 362017, at *5 (S.T.B. 1997). For example, the STB explained,

[a] railroad that violated a local ordinance involving the dumping of waste could be fined or penalized for dumping by the state or local entity. The railroad also could be required to bear the cost of disposing of the waste from the construction in a way that did not harm the health or well being of the local community. We know of no court or agency ruling that such a requirement would constitute an unreasonable burden of, or interfere with, interstate commerce. Therefore, such requirements are not preempted. *Id.* at *6. (Waxman)

Agency Response: Along with *King County, WA – Petition for Declaratory Order – Burlington Northern Railroad Company – Stampede Pass Line*, 1996 WL 545598 (S.T.B. 1996), *Cities of Auburn & Kent* was the first STB decision to address the preemptive effect of the ICCTA on state and local regulatory actions.² A number of subsequent STB decisions have refined and clarified the STB's position in this area, and *Cities of Auburn & Kent* must accordingly be read in the context of the later decisions. Taken together, these decisions make clear that if the STB were to be presented today with state or local regulations containing the key elements of the Rail Yard Agreement, there is a likelihood – at the very least a substantial possibility – that the STB would conclude those elements are preempted by the ICCTA, specifically by 49 U.S.C. section 10501(b).

The key consideration is that the sort of non-preempted waste disposal ordinance referred to in the passage of *Cities of Auburn & Kent* quoted by Waxman – and the hypothetical local law prohibiting a railroad from dumping excavated earth into local

² While the commenter states that the STB's *Cities of Auburn & Kent* decision was the ruling "upheld" by the Ninth Circuit in *City of Auburn*, it is important to recognize that the STB's discussion of what sort of hypothetical state or local regulations might not be preempted was never referred to or commented upon by the Ninth Circuit panel. The only decision of the STB that was affirmed by the Ninth Circuit was the determination that the state and local permitting laws at issue in the case were preempted by the ICCTA; the Ninth Circuit also found that the STB did not abuse its discretion or render an arbitrary and capricious ruling under the National Environmental Policy Act by approving the railroad line reopening without conducting a full environmental impact statement. *City of Auburn, supra*, 154 F.2d at 1032-1033.

waterways also referred to by the STB – are nondiscriminatory, generally applicable prohibitions that do not target railroads and do not adversely affect railroad operations. In contrast, all of the significant elements of the Rail Yard Agreement are specifically designed to reduce emissions from railroad locomotives, and they affect how the railroads are permitted to use and operate those locomotives. With that in mind, the four most significant subsequent STB decisions are reviewed below.

First, in *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp. (Riverdale I)*, 1999 WL 715272 (S.T.B. 1999), the STB announced it was initiating a declaratory order proceeding to determine the extent to which efforts of a New Jersey town to require construction permits and regulate a railroad’s construction of a truck terminal and corn processing plant in a residential zone were preempted by the ICCTA. To provide initial guidance, the STB reviewed at length the preemption discussion in *Cities of Auburn & Kent. (Riverdale I at *4-5.)* Then, characterizing its understanding of *Cities of Auburn & Kent*, the STB stated:

. . . [W]hile state and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad’s ability to conduct its operations or otherwise unreasonably burdening interstate commerce. (*Id.* at *6.)

The STB went on to observe, “it appears to us that state and local entities can enforce in a non-discriminatory manner electrical and building codes, or fire and plumbing regulations, so long as they do not do so by requiring the obtaining of permits as a prerequisite to the construction or improvement of railroad facilities.” (*Id.*)

Second, in *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna and Western Railway Corp. (Riverdale II)*, 2001 WL 192584 (S.T.B. 2001), the STB announced that the town and railroad in the *Riverdale I* proceeding had settled their differences. In terminating the proceeding, the STB decided to summarize “additional agency and court precedent that may provide guidance in resolving preemption issues in other contexts.” (*Id.* at *1). In describing the New Jersey Supreme Court case of *Village of Ridgefield Park v. New York, Susquehanna & Western Ry.*, 750 A.2d 57 (N.J. 2000), the STB focused first on the Court’s finding that the ICCTA “preempted local zoning regulations and precluded the state court from adjudicating common law nuisance claims involving noise and air pollution from a railroad maintenance facility.” (*Id.* at *2; emphasis added.) Nothing in the STB’s discussion indicated any disagreement of the *Ridgefield Park* Court’s decision that the noise and air pollution common law claims were preempted. The STB also noted the *Ridgefield Park* Court’s conclusion that “generally, localities may enforce their local fire, health, plumbing, safety, and construction regulations and that the railroad may not deny the local government access for reasonable inspection of its maintenance facility.” (*Id.*)

Third, *Joint Petition for Declaratory Order – Boston and Maine Corp. and Town of Ayer (Ayer III)*, 2001 WL 458685 (S.T.B. 2001) involved the proposed construction of an automobile unloading facility, with unloading and support tracks, next to a rail line within the town of Ayer Massachusetts. The STB first described pertinent principles of preemption:

This does not mean that all state and local regulations that affect railroads are preempted. As we stated in *Stampede Pass*, 2 S.T.B. at 337-38 and *Riverdale I*, state and local regulation is permissible where it does not interfere with interstate rail operators, and localities retain certain police powers to protect public health and safety. For example, non-discriminatory enforcement of state and local requirements such as building and electrical codes generally are not preempted. (*Id.* at *6.)

The town of Ayer argued that it could regulate the automobile unloading and storage facility because most of the regulation it sought to impose was rooted in the federal Safe Drinking Water Act and the federal Clean Water Act. (*Id.*) However, the STB concluded that the town was using the two federal Acts merely as a pretext. And the STB found that the efforts of the town's Planning Board to prohibit construction of the facility on the ground it would violate the local "noisesome trade ordinance" was preempted by the ICCTA. (*Id.* at 7.) With respect to this ordinance, the STB agreed with the characterization by the American Association of Railroads that it was "similar to the nuisance ordinance involving air and noise pollution that the court found to be preempted in *Ridgefield Park*." (*Id.* at 7, fn. 30.) The STB found that the town's permit process, and a Conservation Commission's preconstruction approval process, were preempted as well. (*Id.* at 7.)

Finally, in the *CSX II* decision issued earlier this year, the STB found that the "Terrorism Prevention in Hazardous Materials Transportation Emergency Act of 2005" enacted by the Washington D.C. City Council was preempted by the ICCTA. The STB's discussion of the scope of ICCTA preemption is informative. The STB stated at *6:

As the courts have observed, "[i]t is difficult to imagine a broader statement of Congress' intent to preempt state regulatory authority over railroad operations" than that contained in section 10501(b) [of the ICCTA]. *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n*, 944 F.Supp. 1573, 1581-84 (N.D. Ga. 1996) (Georgia PSC). Every court that has examined the statutory language has concluded that the preemptive effect of section 10501(b) is broad and sweeping, and that it blocks actions by states or localities that would impinge on the Board's jurisdiction or a railroad's ability to conduct its rail operations." *Friberg v. Kansas City S. Ry.*, 267 F.3d. 439, 443 (5th Cir. 2001) (*Friberg*) (state statute restricting a train from blocking an intersection preempted, even though there is no Board regulation of that matter.) [followed by citations to eight additional cases]

If the STB believes that a state statute limiting the time a train may block a roadway is preempted by the ICCTA, it is apparent that there would be substantial preemption vulnerability for ARB or district regulations requiring the installation of idling reduction devices on locomotives, phasing out non-essential locomotive idling, identifying and expeditiously repairing locomotives with excessive smoke, and maximizing the use of ultra-low sulfur fuel in locomotives. And it is notable that none of these decisions turn on whether the impact on railroad operations is “substantial” or “unreasonable.”

Lastly, one of the notable elements of several of the STB decisions is the STB’s positive view of voluntary agreements between governmental entities and railroads as an alternative to efforts to regulate in areas that may well be preempted. In *Riverdale II* (a proceeding which itself was resolved by a voluntary, mutual agreement of the parties), the STB pointed out that it had previously

. . . expressed our view that a town may seek court enforcement of two noise abatement agreements that the town had entered into with a railroad, notwithstanding the broad sweep of the statutory preemption provisions. We explained that the railroad had voluntarily entered into the agreements, and thus the preemption provisions should not be used to shield the carrier from its own commitments. (*Riverdale II* at *2, discussing *Township of Woodbridge v. Consolidated Rail Corporation, Inc.*, 2000 WL 1771044, (S.T.B.) [STB Docket No. 42053])

In *Ayer III*, *supra*, 2001 WL 458685, the STB observed:

Like any citizen or business, railroads have some responsibility to work with communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety, and to assume responsibility if they act negligently. But at the same time, literal compliance with state or local laws often may be impractical in cases involving railroad facilities. Thus, as the court indicated in *Ridgefield Park*, a certain degree of pragmatism on the part of communities and cooperation on the part of railroads is necessary to reach reasonable solutions to state and local concerns that do not unreasonably interfere with interstate commerce. (*Id.* at *7; citation omitted.)

The Rail Yard Agreement represents this sort of pragmatism and cooperation, and its mechanisms will provide for significant community involvement. This sort of a reasonable solution has been endorsed and sanctioned by the STB in *Ayer III*.

As previously stated, neither the STB nor the courts have to date addressed the specific substantive matters included in the Agreement. Considering the acknowledged broad preemption of the ICCTA, ARB wanted to be certain that immediate statewide emission reductions were attained through voluntary agreements with the railroads. The likelihood of a legal challenge by the railroads of a rulemaking seeking, at a minimum,

the emission reductions guaranteed by the Agreement, would have been to the detriment of the health and welfare of the state as a whole.

12. Comment: The STB's reasoning in its decision under review by the Ninth Circuit in *City of Auburn* is likely to be controlling. In *Green Mountain Railroad Corp. v. State of Vermont*, (2nd Cir. 2005), the Court stated, [a]s the agency authorized by Congress to administer the Termination Act, the Transportation Board is uniquely qualified to determine whether state law should be preempted by the Termination Act." Further, in *Indus. Truck Ass'n, Inc. v. Henry*, 125 F.3d 1305, 1311 (9th Cir. 1997), the Court stated, "An agency's interpretation of the preemptive effect of its regulations is entitled to deference where Congress has delegated authority to the agency, the agency's interpretation is not contrary to a statute, and agency expertise is important to determining preemption." Also, because (under the "Hobbs Act," 28 U.S.C. § 2342) Congress gave the courts of appeal exclusive jurisdiction to review the validity of STB orders on direct appeal, private parties may not collaterally challenge the STB's legal conclusions in other proceedings to which the STB is not a party. See, e.g., *Baros v. Tex. Mexican Ry. Co.*, 400 F.3d 1112, 1120 (5th Cir. 2005); see generally *U.S. W. Commc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999). As a result, the STB's interpretation of the limits of federal preemption under the ICCTA may well be binding on any court that hears a preemption challenge to requirements of the type contained in the Agreement. (Waxman)

Agency Response: ARB's attorneys are aware of no decision holding that a determination by the STB is binding on a court reviewing the same issue – that certainly was not the conclusion of the Ninth Circuit in *City of Auburn, supra*. In the STB's recent *CSX II* decision, the Board certainly did not characterize its decision as determinative of the pending lawsuit in the U.S. District Court for the District of Columbia challenging the same District of Columbia statute. But most importantly, ARB's attorneys firmly believe that the weight of the STB decisions discussed in the response to the previous comment simply do not represent an STB view that key elements of the Agreement would not be preempted if adopted as state or district regulations.

13. Comment: Our position on preemption is supported by two additional cases. First, in *Boston & Maine Corp. v. Town of Ayer*, 330 F.3d 12 (1st Cir. 2003), the court stated that "[T]he STB found state and local regulation to be permissible where it does not interfere with interstate rail operations and localities retain certain police powers to protect public health and Safety." (*Id.* at 16-17.) The court characterized the STB as having declared that "Section 10501(b) of the ICCTA should not be interpreted as intending to interfere with the role of state and local agencies in implementing federal environmental statutes."

Second, in *Florida E. Coast Railway Co. v. City of W. Palm Beach*, 266 F.3d 1324 (11th Cir. 2001), the court stated, "Reliance on the presumption against pre-emption limits 'congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.'" (*Florida E. Coast Railway Co. v.*

City of W. Palm Beach, 266 F.3d 1324, 1328 (11th Cir. 2001), quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).) (Waxman)

Agency Response: The STB decision characterized in the quote from *Boston & Maine Corp.* is *Ayer III*, *supra*, described in the response to Comment 11. As explained in that response, *Ayer III* in no way supports the commenter's position.

The often cited local police powers that have typically been found by the STB and the courts to not be preempted are such ordinances as building and electrical codes, measures that are generally applied across the community and are not specifically, or discriminatorily, applied to railroad operations. The measures covered by the elements of the Agreement, although environmental, are designed to be applied specifically to railroad operations. As the STB stated, its evaluation of whether a state or local measure is preempted or not is a factual question. ARB considered the facts and concluded that the program elements, applied specifically to railway operations, may very well be preempted. Upon its evaluation, ARB concluded that entering into the Agreement with the railroads was the proper course of action – ensuring that immediate emission reductions are achieved and avoiding potentially protracted litigation.

As discussed in the response to Comment 15, the STB's decisions assure that the executed Agreement is clearly enforceable and the railroads cannot subsequently argue that the subject matter of the Agreement's program elements is preempted.

In *Florida East Coast Railway Co. v. City of West Palm Beach*, *supra*, the Court affirmed the trial court's determination that the ICCTA does not preempt the city's application of its zoning and licensing ordinances to a railroad lessee's development of a aggregate terminal on railroad property, finding that the ICCTA definition of "transportation" does not include services provided by lessee of railroad in receiving, handling and distributing aggregate. In so finding, the court noted that Congress narrowly tailored the preemption to "displace only 'regulation,' i.e., those state laws that may reasonably be said to have the effect of 'manag[ing]' or 'govern[ing]' rail transportation ... while permitting the continued application of laws having a more remote or incidental effect on rail transportation." (*Id.*, 266 F.3d at 1331.) The Court's analysis supports ARB's hesitancy in pursuing state and local regulation of the railroads and instead entering into the Agreement.

14. Comment: Additional cases that support our position are *Village of Ridgefield Park v. New York, Susquehanna and W. Railway Corp.*, 750 A.2d 57, 64 (N.J. 2001); *Boston & Maine Corp. & Town of Ayer, Mass. – Joint Petition for Declaratory Order [Ayer III]*, 2001 WL 458685 at *7 ("Like any citizen or business, railroads have some responsibility to work with communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety, and to assume responsibility to work with the communities to seek ways to address local concerns in a way that makes sense and protects the public health and safety, and to assume responsibility if they act negligently."); and *Borough of Riverdale – Petition for Declaratory Order – The New York Susquehanna & W. Railway Corp. [Riverdale I]*,

1999 WL 715272. “[S]tate and local government entities such as the Borough retain certain police powers and may apply non-discriminatory regulation to protect public health and safety.” (Waxman)

Agency Response: None of these cases support the commenter’s position. In *Village of Ridgefield Park*, discussed further in the response to Comment 17, the New Jersey Supreme Court held that, while the Village may enforce its local fire, health, plumbing, safety and construction regulations to the extent they do not require pre-construction review, its common law nuisance causes of action for alleged noise and air pollution were preempted by the ICCTA. (*Village of Ridgefield Park, supra*, 163 N.J. at 462, 750 A.2d at 67.) Thus the case strongly suggests that the key elements of the Agreement, directed at reducing emissions of air pollutants from locomotives, may be preempted as well.

The commenter’s quote from *Ayer III, supra*, discussed in the response to Comment 11, reflects the STB’s support of voluntary agreements such as the Agreement. The STB suggested that, in order to address local concerns between railroads and communities the railroads should, among other things, attempt to meet periodically with citizen groups or local government entities to seek mutually acceptable ways to address local concerns and submit environmental monitoring or testing information to local government entities for an appropriate period of time after operations begin. (*Id.* at *7.) This is exactly what the Agreement provides for – it is an effort to achieve state and local emission reductions by requiring the railroads to conduct meetings with the local communities, local air districts, and ARB on how they intend to mitigate excessive emissions that affect the neighboring communities. Consistent with the above, the railroads also must share and attempt to mitigate environmental risk assessment monitoring and testing results. This is a solution that might otherwise be preempted under the ICCTA.

As discussed in the response to Comment 11, the STB stated in *Riverdale I* that a municipality could apply nondiscriminatory regulations to protect public health and safety only to the extent those regulations do not have the effect of foreclosing or restricting the railroad’s ability to conduct its operations or otherwise unreasonably burdening interstate commerce. (*Riverdale I, supra*, at *6.) Before the Agreement was entered into, staff fully considered these principles in the context of court and STB decisions. Not having a crystal ball, ARB’s attorneys concluded that the Program Elements that were discussed and negotiated could likely be found by the courts to restrict the ability of the railroads to run their operations, or to unreasonably burden interstate commerce.

15. Comment: In *Green Mountain R.R. Corp. v. State of Vermont*, 404 F.3d 638, 643 (2d Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3050 (U.S. Jul. 13, 2005) (No. 05-89), the Second Circuit recently stated that placing broad discretion in the hands of public officials to stop railroads literally in their tracks is a key precondition to preemption under the ICCTA:

Nevertheless, as the district court observed, “not all state and local regulations are preempted [by the ICCTA]; local bodies retain certain police powers which protect public health and safety.” *Id.* 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. (Emphasis added by commenter; quotations by commenters merged to more fully reflect the Court’s actual text.)

(Waxman and Nawi)

Agency Response: There are several notable elements of the *Green Mountain Railroad* decision that are not acknowledged by the commenters and that together make clear that the decision does not provide meaningful authority for the commenters’ position.

First, the only issue before the *Green Mountain Railroad* Court was whether the State of Vermont’s environmental land use statute that mandates preconstruction permits for land development was preempted when applied to a railroad’s plans to build transloading facilities on its rail properties. The Second Circuit ruled that the statute was preempted – the railroad won the case. The passage quoted by the commenters was dicta that was in no way necessary for the Court’s disposition of the case.

Second, as the STB has stated,

Of course, whether a particular . . . local regulation is being applied so as to not unduly restrict the railroad from conducting its operations, or unreasonably burden interstate commerce, is a fact-bound question. Accordingly, individual situations need to be reviewed individually to determine the impact of the contemplated action on interstate commerce and whether the statute or regulation is being applied in a discriminatory manner, or being used as a pretext for frustrating or preventing a particular activity, in which case the application of the statute or regulation would be preempted. (*Ayer III* at *6.)

The *Green Mountain Railroad* Court had no specific factual situation before it, as the quoted passage was referring to general concepts not before the Court. Therefore the decision provides no authority for how the Court would actually rule in a specific factual situation involving an environmental regulation that affects railroad operations.

Third, the commenters' quotation omits the one case cited by Second Circuit at the conclusion of the quoted passage:

Cf. Vill. Of Ridgefield Park v. New York, Susquehanna & W. Ry. Corp., 163 N.J. 446, 750 A.2d 57, 64 (2000) (noting the Transportation Board's position that: (1) 'while state and local government entities . . . retain certain police powers and may apply non-discriminatory regulation to protect public health and safety, their actions must not have the effect of foreclosing or restricting the railroad's ability to conduct its operations or otherwise unreasonably burdening interstate commerce'; and (2) 'railroads are exempt from the traditional permitting process but not . . . from most other generally applicable laws'). (*Green Mountain Railroad, supra*, at 643.)

Yet *Ridgefield Park* was the very case in which the New Jersey Supreme Court found that the Village's common law nuisance claim in connection with noise and air pollution was preempted – a holding specifically cited by the STB in *Riverdale II (supra* at *2).

Finally, and perhaps most importantly, the *Green Mountain Railroad* Court expressly acknowledged that, "As the agency authorized by Congress to administer the Termination Act, the Transportation Board is uniquely qualified to determine whether state law should be preempted by the Termination Act. (*supra* at 642; internal quotation marks and punctuation omitted.) Thus the *Green Mountain Railroad dicta* must be read in the context of the STB decisions described in the response to Comment 11.

ARB's attorneys have concluded after closely and thoroughly reading the Court and STB decisions cited above that there is a reasonable likelihood that state and local regulation of the subject areas covered by the Agreement could be found preempted. Through the Agreement process, ARB attempted to avoid the pitfalls of preemption and gain the immediate benefits promised by the Agreement.

16. Comment: 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 Pacific 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").

In *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053 (2000) a California Court of appeal held that the ICCTA did not necessarily preclude state-law remedies for the conduct of a railroad that was alleged to have sounded train horns and parked idling trains near the plaintiff's homes for long periods of time, and engaged in other harassing conduct because, the court reasoned, that conduct may not even have been "in furtherance of Union Pacific's railroad operations." The substantive terms of the final Agreement do not substantially interfere with the regulated parties to "operate railroad

business and safely and efficiently,” and therefore satisfy the criteria in *Jones* for avoiding preemption. (Waxman)

Agency Response: The *Jones* case is the only California case cited by the commenters. And it is the only case cited by the first commenter in which a court found that the state activity before the court was not preempted by the ICCTA. A reading of the *Jones* decision makes clear that it does not support the commenters’ arguments.

In *Jones*, the ICCTA preemption issue came before the appellate court after the lower court made a summary judgment ruling dismissing the case as being preempted under the ICCTA. The plaintiffs were the owners of one of two homes located adjacent to UP tracks in Yermo, who had filed a civil action against the railroad for nuisance, nuisance per se, negligence, and intentional infliction of emotional distress. The appellate court noted that “Plaintiffs alleged that Union Pacific employees parked idling trains in front of their home for lengthy periods of time and blew train horns in front of their house for no reason other than to harass them.” (*Id.* at 1058.) Declarations by the homeowners stated “that the train noise in question appeared to serve no legitimate purpose, and worsened after the plaintiffs and [their neighbor] began complaining.” (*Id.*) The Court of Appeal reversed the trial court’s grant of summary judgment for the railroad, concluding:

This evidence cited in plaintiffs’ summary judgment opposition is sufficient to raise a triable issue of fact as to whether Union Pacific’s activities were committed solely to harass plaintiffs, and were not safety related or in furtherance of Union Pacific’s railroad operations. There, thus, is a triable issue as to whether plaintiffs’ state tort claims fall within the purview of state police powers or are federally preempted under the ICCTA by 49 United States Code section 10501. (*Id.* at 1061.)

In characterizing this case, the first commenter has taken a court decision expressly premised on evidence that the railroad’s retaliatory actions may have had nothing to do with furtherance of the railroad’s operations, and has transformed it into a holding that actions which are in furtherance of railroad operations can be regulated or prohibited as long as they are “non-essential.” This interpretation misleadingly supports an argument that key Agreement provisions may not, in fact, be preempted if adopted as regulations. For example, the commenter’s reference to “non-essential” locomotive idling stems of course from the fact that the Agreement provides an exception to the operational idling limits “when it is essential that a locomotive be operating.” (Agreement Section C.1.(e).) And while the second commenter takes fewer liberties with the *Jones* case, the *Jones* decision in no way holds, as implied by the second commenter, that state regulations must substantially interfere with a railroad’s ability to operate the railroad’s business safely and efficiently before they are preempted by the ICCTA.

17. Comment: There is some consensus in the case law that, despite the broad preemption language of the ICCTA, states and localities may adopt environmental regulations that do not rely on open-ended discretion, at least so long as they also do not substantially interfere with the business of railroad operations.

I base this conclusion on the *Green Mountain Railroad* decision and the following additional cases: *Jones v. Union Pac. R.R. Co.*, 79 Cal. App. 4th 1053 (2000) (holding that the ICCTA did not necessarily preclude state-law remedies for the conduct of a railroad that was alleged to have sounded train horns and parked idling trains near the plaintiff's homes for long periods of time, and engaged in other harassing conduct because, the court reasoned, that conduct may not even have been "in furtherance of Union Pacific's railroad operations"); *Florida E. Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1332-37 (11th Cir. 2001) (holding that the operation of an aggregate business by non-railroad company on railroad property was not rail transportation and thus not preempted); *Native Village of Eklutna v. Alaska R.R. Corp.* 87 P.3d 41, 57 (Alaska 2004) (holding that a railroad's operation of a gravel quarry was not integrally related to rail operations); *In re Appeal of Vermont Ry.*, 769 A.2d 648, 654-55 (2000) (holding that local regulatory constraints on truck operations do not interfere with railway operations); *State of Oklahoma v. Burlington N. & Santa Fe Ry.*, 24 P.3d 368, 371-372 (Okla. 2000) (local order that railroad repair three-tenths of mile of fence did not have any impact on the railroad's interstate operations and thus was not preempted); *Town of Milford, Mass. – Pet. For Declaratory Order*, 2004 WL 1802301, at *3 (S.T.B. 2004) (holding that the operation of a steel fabrication business by non-railroad on railroad property is not rail transportation.); *Hi Tech Trans, LLC, – Pet. For Declaratory Order*, 2003 WL 21952136, at *3-5 (S.T.B. 2003) (operation of transload facility by non-railroad, not under the auspices of a railroad, not rail transportation.) (Waxman)

Agency Response: ARB's attorneys fundamentally disagree with this assertion.

The significance of the first two cases referred to – *Green Mountain Railroad* and *Jones* – is addressed in the responses to the two immediately preceding comments.

Of the remaining six cases relied upon by the commenter, all but the Oklahoma case stand for the proposition that a state or municipality is not preempted by the ICCTA from applying its zoning or licensing ordinances to activities that are not integrally related to rail transportation. This is apparent from the commenter's capsule descriptions of the cases, and is confirmed by a closer reading. In fact, in each of these five cases the court upheld state or local requirements that the railroad's or railroad lessee's activity receive some sort of permit or authorization before the railroad or its lessor could proceed. As the commenter would surely acknowledge, had these permit requirements pertained to railroad operations they would obviously have been found to be preempted. The state and local permitting requirements were found not to be preempted by the ICCTA because the activities in question did not involve rail transportation or railroad operations – they involved activities such as operation of a gravel quarry or a steel fabrication business. Thus the commenter's cited cases have no bearing on the authority of state or local entities to impose "environmental regulations" that affect railroad operations – for instance regulations designed to reduce emissions from railroad locomotives.

On the other hand, there are cases – not cited by the commenter – that have found state or local restrictions similar to elements of the Agreement to be preempted when

they were involuntarily imposed on a railroad rather than being the product of a mutual agreement.

In *Friberg v. Kansas City Southern Railway*, *supra*, the Fifth Circuit found that a Texas statute prohibiting railroads from blocking of roadways was expressly preempted by the ICCTA. The Court reversed a jury verdict in favor of the plaintiffs in a negligence action by the owner of a failed landscape nursery seeking damages against a railroad for repeatedly allowing standing trains to block the primary road to the nursery in violation of the Texas Anti-Blocking Statute. The Court found that “The regulation of railroad operations has long been a traditionally federal endeavor, to better establish uniformity in such operations and expediency in commerce, [Citation omitted] and it appears manifest that Congress intended the ICCTA to further that exclusively federal effort, at least in the economic realm.” (*supra*, 267 Fed.3d at 643.) “Regulating the time a train can occupy a rail crossing impacts . . . the way a railroad operates its trains, with concomitant economic ramifications that are not obviated or lessened merely because the provision carries a criminal penalty.” (*Id.*) As noted in the response to Comment 11, the STB has cited and relied upon this decision.

In *Rushing v. Kansas City Southern Railway Co.*, *supra*, 194 F.Supp. 2d 493, the Court held that homeowners’ nuisance and negligence claims based on excessive noise and vibrations from trains operated in a nearby switch yard were preempted by ICCTA. In reaching its conclusion the court opined:

. . . the Court finds that Congress, under the ICCTA, explicitly granted the STB exclusive jurisdiction over claims involving railroad operations, except as otherwise provided under the ICCTA. (*Id.* at 499.)

* * *

The “damaging vibrations” appear to be caused by techniques used by the Defendant to switch railroad cars in the switch yard. The Court finds that to the extent the Plaintiffs seek to use state common law to regulate the manner in which the Defendant conducts operations in its switch yard, which in turn would result in an economic impact on the Defendant, the state law has been preempted by the ICCTA which vests exclusive jurisdiction in the STB over such matters.

. . . The Court finds, for the reasons discussed above, that to the extent the Plaintiffs seek to use state law to control noise production by regulating the manner in which the Defendant operates its switch yard, for example by restricting the hours at which time it may conduct switching and whistle-blowing activities, controlling the number of trains engaged in switching operations at any given time, and by requiring that the Defendant employ different techniques when braking its trains, all of which would result in an economic impact on the Defendant, the state law has been preempted by the ICCTA which vests exclusive jurisdiction in the STB over such matters. (*Id.* at 500-501.)

Notably, the *Rushing* Court did not require that the economic impacts on the railroad operations be “substantial” before they would be found preempted under the ICCTA.

In *City of Seattle v. Burlington Northern Railroad Co.*, *supra*, 145 Wash.2d 661, the Washington State Supreme Court held that Seattle ordinances prohibiting railroad switching activities from interfering with the use of any street or alley, or impeding property access, for a period of time longer than four consecutive minutes, and prohibiting switching on arterial streets during peak hours, were preempted by the ICCTA. The court affirmed the dismissal of citations for violations of the ordinance. The Court concluded that “Congress explicitly designated switching activities as falling within the jurisdiction of the STB under the ICCTA; ‘express preemption’ federal preemption applies to the City’s ordinances.” (*Id.* at 668.)

Finally, in *Village of Ridgefield Park*, *supra*, 163 N.J. 446, the Supreme Court of New Jersey declined to enjoin an action to stop the railroad from operating a train maintenance facility near a residential area. The Court opined that while the Village may enforce its local fire, health, plumbing, safety and construction regulations to the extent they are applicable to the existing maintenance facility,” (*Id.* at 461), the Village’s common law nuisance claim in connection with the noise and air pollution was preempted by the ICCTA. (*Id.* at 462). The Court concluded that to issue an injunction would infringe on the STB’s exclusive jurisdiction over the location and operations of railroad facilities. (*Id.* at 462.)

These cases indicate that the ICCTA basically protects the railroads from any regulation – environmental or not – that has a potential economic impact on railroad operations. For example, Program Element 2 requires that 80 percent of the locomotive fleet operated in California – including both intrastate and interstate locomotives – use low-sulfur CARB or U.S. EPA onroad diesel fuel. On its face, this is a requirement that inherently affects railroad economics and railway operations; and, thus, could very likely be found preempted. So too, the operational idling requirements.

18. Comment: If adopted as regulatory requirements, the Agreement’s program elements would not be preempted by the ICCTA. Nothing in the Agreement involves the sort of “pre-clearance” regulations, such as discretionary permitting requirements, that have been held to fall within the ICCTA’s preemptive ambit. Rather, the Agreement program elements constitute “direct environmental regulations enacted for the protection of the “public health and safety” that regulate the use of locomotives. (Nawi)

Agency Response: As explained in the responses to Comments 11, 15 and 17, neither the STB rulings nor relevant court rulings limit ICCTA preemption to environmental regulations that require pre-clearance or permits. The key program elements of the Agreement that will reduce emissions are closer to the kinds of regulations or laws found to be preempted by the ICCTA in the *Friberg*, *Rushing*, and *City of Seattle* cases described in the response to Comment 17.

19. Comment: 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.

The enforcement and penalty provisions only impose reasonable penalties and “meet and confer” requirements on violators of the substantive provisions of the Agreement. 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 Agreement 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. (Nawi)

Agency Response: The cases cited in the response to Comment 15 indicate that the ICCTA basically protects the railroads from any regulation – environmental or not – that has a potential economic impact on railroad operations. Program Element 2 of the Agreement requires that 80 percent of the locomotive fleet operated in California – including both intrastate and interstate locomotives – use low-sulfur CARB or U.S. EPA on-road diesel fuel. On its face, this is a requirement that inherently affects railroad economics and railway operations; and, thus, could very possibly be found preempted by the ICCTA. Moreover, having a patchwork of different fuel specification standards throughout California, let alone across the nation, would potentially significantly impact interstate railway operations. In light of these considerations, staff decided that the most prudent course would be to address fuel specification use requirements for interstate locomotive through the Agreement process. The Agreement guaranties that a large portion of the railroads’ interstate fleet will be using low sulfur fuel more than six years before federal low sulfur fuel regulations go into effect nationally.

The requirements for repairing locomotives with excessive visible emissions also impact railroad operations.

The preemption vulnerability of the enforcement provisions depends on the vulnerability of the underlying elements being enforced, which has been discussed in the responses to previous comments. It is clear that environmental regulations directed at railroad operations do not have to prevent those operations before they can be found to be preempted under the ICCTA.

ARB’s attorneys agree that program elements such as monitoring, reasonable data reporting, and training requirements are probably not preempted. But those

requirements are less important than the key elements that are identified in the response to Comment 1 and have a significant vulnerability to ICCTA preemption.

Preemption Under the Locomotive Boiler Inspection Act

20. Comment: The Boiler Act does not preempt the subjects covered by the Agreement. The Boiler Act provides that the “parts and appurtenances” on locomotives must be in proper condition according to federal regulations set forth by the Department of Transportation. In 1926, the Supreme Court held that “state legislation [regulating locomotive equipment] is precluded, because the Boiler Act . . . was intended to occupy the field.” (*Napier v. Atlantic Coast Line R.R. Co.* (1926) 272 U.S. 605, 613.)

Here, as a general matter, even the Agreement provisions that impose performance requirements do not mandate that railroads include (or exclude) any specific type of equipment in order to meet those requirements. In *Southern Pacific Transportation Co. v. Public Utility Commission of Oregon*, 9 F.3d 807, 811 (9th Cir. 1993), the Court held that the Boiler Act did not preempt an Oregon scheme restricting the sounding of locomotive whistles, because that restriction “neither limits nor expands the type of equipment with which locomotives are required to be equipped.”

With one possible exception, neither does any provision of the Agreement. The possible exception is Element 1(a) of the Agreement, which might be preempted if enacted into law because it proscribes the installation of particular locomotive equipment (an anti-idling device). As discussed above, however, that program element could be modified to avoid similar preemption problems under the CAA simply by rephrasing it as explicit use restriction. So modified, the provision could pose no serious risk of preemption under the Boiler Act either. (Waxman)

Subject to one likely exception, the Boiler Act also would not preempt regulations mandating the actions set out in the Agreement, because although they may affect the use or operation of locomotives, they do not mandate or prohibit the installation of use of locomotive equipments. *Union Pacific RR. Co. v. Cal. Pub. Utils. Comm'n* 346 F.3d 851, 869 (9th Cir. 2003) (noting that the Boiler Act “occup[ies] the field of locomotive equipment, but not locomotive use.”) The provision of the Agreement 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. 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, where “non-essential idling” is clearly defined. (Nawi)

Agency Response: The Agreement requires that the railroads retrofit locomotives with idling-reduction devices. This clearly would be contrary to both the CAA preemption that proscribes requirements that affect the design and that affect the manufacture of locomotives and locomotive engines. Second, the Boiler Act, as conceded by the commenter, similarly proscribes “parts and appurtenances on locomotives” unless they

meet regulations prescribed by the Department of Transportation. It is hard to see how the idling-reduction device requirement could not be preempted under the Boiler Act.

With respect to the assertion that the preemption could be avoided by recasting the idling reduction requirement as an explicit use description, see the response to Comment 7. The commenters' attempt to recast the specific requirement of the Agreement that idling-reduction devices be installed by June 2008, by identifying it as a performance standard, could be seen as a round-about way of attempting to establish a prescriptive standard. For example, proposed SCAQMD Rule 3501 establishes seemingly burdensome recordkeeping requirements on the railroads unless they add-on idling reduction devices or order new locomotives with idling reduction devices already installed. A second example would be the commenter's suggested alternative performance standard that would be to set the operational limitations so low that they would effectively mandate installation of idling reduction devices because of the difficulty of manually meeting the operational limits.

Dormant Commerce Clause

21. Comment: If adopted as regulations, the requirements in the Agreement, with one conceivable and easily remedied exception – the visible emission inspection program – would not be unlawful under the dormant Commerce Clause of the U.S. Constitution. (Waxman)

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 Env'tl. Quality*, 511 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).

We do not believe that any of the program elements of the Agreement 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 elements requirements.

None of the program elements in the Agreement 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. Similarly, the on-highway diesel requirement applies to all locomotives when fueled in California (Program Element 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 Agreement 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 Agreement 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. Any such burden would, however, be minimal, as the Agreement gives railroads broad flexibility in deciding when to divert a locomotive for repair. This minimal burden does not appear disproportionate to the public health

benefits of requiring the repair of smoking locomotives that fail to meet nationwide emission standards.

Likewise, the program element requiring fueling with on-highway diesel fuel (Program Element 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 Agreement 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 elements of the Agreement have 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. (Nawi)

Agency Response: The Commerce Clause of the United States Constitution (U.S. Const., Art. I, §8, cl. 3), grants Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States. . . .” (*Id.*) Congress, in enacting the ICCTA and its predecessor, the Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), acted pursuant to the express grant of authority of the Commerce Clause. As stated throughout these responses, the Congress crafted a broad express preemption when adopting the ICCTA. (See *City of Auburn, supra*, 154 F.3d at 1029-1031; *Florida E. Coast Railway Co., supra*, 266 F.3d at 1337-1338). The ICCTA was adopted for the purpose of ensuring the economic viability of the railroads as one of the primary interstate modes of transportation of goods movement. To that end, Congress fashioned the ICCTA preemption to eliminate state economic, including environmental, regulations that could have a negative effect on the railroads continued economic viability (see *City of Auburn, supra*, 154 F.3d at 1029-1031) and to prohibit direct state regulation of railroads that could result in a Balkanization of different rules and regulations that interstate railroads would have to operate under in moving goods and people throughout the United States. (See *Florida E. Coast Railway Co., supra*, 266 F.3d at 1337-1338.)

ARB’s attorneys acknowledge that the U.S. Supreme Court has recognized that the Commerce Clause, in addition to granting Congress an affirmative grant of authority, “also encompasses an implicit or ‘dormant’ limitation on the authority of the States to enact legislation affecting interstate commerce.” (*Healy v. The Beer Institute*, 491 U.S. 324, 326, fn.1 (1989).) But in this case, where Congress has affirmatively established a broad-based preemption that could reasonably be read to directly prohibit states and local authorities from adopting rules and regulations that directly affect how national

railway systems can operate, the dormant Commerce Clause does not come into play. ARB accordingly agrees with the commenters that the dormant Commerce Clause would not preempt ARB or local air district regulations covering the various elements of the Agreement.

ARB and District Authority Under State Law

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

With one possible exception, ARB has the authority to promulgate regulations which cover the provisions of the Agreement. The ARB enjoys specific authority to regulate locomotive emissions under to H&SC section 43013(b). Further authority is found in to H&SC sections 43018(a), 42400 et seq., and 40701(g). Local air quality districts have jurisdiction over locomotives. However, it is not clear what the District Boards can do in the light of the restriction found in to H&SC section 40702, which states, "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." (Justice Reynoso)

Agency Response: The Legislature entrusted local air districts with primary authority to regulate nonvehicular sources under Health and Safety Code sections 39002 and 40000. Under the definitions of Health and Safety Code sections 39039, 39043, 39059, and 39069, there is no dispute that a locomotive – while mobile – is a nonvehicular source. However, the districts' authority to regulate locomotives is considerably constrained by section 40702 of the Health and Safety Code. That section provides:

No order, rule, or regulation of any district shall . . . specify the design of equipment, type of construction, or particular method to be used in reducing the release of air contaminants from railroad locomotives.

While constraining the authority of the districts, the Legislature expressly vested ARB with authority to regulate locomotives in the California Clean Air Act of 1988. ARB was directed to adopt standards and regulations for nonvehicular engine categories, including locomotives. (Health and Safety Code section 43013(b); see *also* section 43018(a) ("endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources...").)

The extent to which the districts' authority has been constrained by section 40702 is subject to some debate; however, for purposes of addressing this comment, the exact constraints placed on district authority by California law is secondary to the potential

constraints that federal law placed on both state and district authority. As explained in the previous responses to comments, ARB made its decision to enter into voluntary negotiations with the railroads after concluding that the authority of both ARB and the districts was potentially significantly constrained by federal law.

Other Legal Issues

23. Comment: In entering into the Rail Yard Agreement, we believe ARB violated the California Administrative Procedure Act (APA). The APA prohibits a state agency from issuing or enforcing a “regulation” without first complying with the APA’s notice and comment provisions. See Cal. Gov’t Code § 11340.5(a). Here, we believe the Agreement constitutes a “regulation” triggering the APA’s procedural requirements.

An agency action constitutes a “regulation” if it satisfies a two part test. First, the agency action must apply generally, rather than in a specific case. See *Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal. 4th 557, 571 (1996). For example, a rule applies generally if it appears to “all of the members of a class, kind, or order.” *Roth v. Dept. of Veterans Affairs*, 110 Cal. App. 3d 622, 630 (1980). Importantly, however, “[t]he rule need not . . . apply universally.” *Tidewater*, 14 Cal. 4th at 571. Second, the action must “implement, interpret, or make specific the law enforced or administered” by the agency. *Id.*

The Agreement applies “generally” because it pertains to “all the members of a class, kind, or order.” Specifically the Agreement applies to UP and BNSF, which constitute *all* of the Class I railroads that operate in the state of California. Further, the Agreement implements the statutory provision requiring ARB to “adopt standards and regulations for locomotives” (Cal. Health & Safety Code § 43013(b)), and contrary to statements by staff, this agency has the authority to impose and implement the overwhelming majority, if not all, of the provisions of the Agreement as formally adopted regulations.³

Accordingly, given that a court would likely find the Agreement to be a “regulation” under the APA, ARB was required to follow the procedures under that act before adopting the agreement. In particular, ARB was required to give the public notice of its proposed regulatory action. (Cal. Gov’t Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Cal. Gov’t Code, § 11346.2(a), (b)); give interested parties an opportunity to comment on the proposed regulation (Cal. Gov’t Code, § 11346.8); respond in writing to public comments (Cal. Gov’t Code, §§ 11346.8(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 (Cal. Gov’t Code, § 11347.3(b)), which reviews the regulation for consistency with the law, clarity,

³ In addition, it is important to note that the “form” of an agency action – here a voluntary contract – is not determinative of whether an agency action constitutes a “regulation” under the APA. Indeed, “[t]he APA . . . defines ‘regulation’ very broadly,” *Tidewater*, 14 Cal. 4th at 571, and California law provides that a “regulation” can take a variety of forms including, for example: guidelines, criterion, bulletins, manuals, instructions, and orders. See Cal. Gov’t Code § 11340.5(a).

and necessity (Cal. Gov't Code, §§ 11349.1, 11349.3). Because ARB failed to follow these procedures, ARB likely violated the APA, and the Agreement may be void. (NRDC)

Agency Response: The Agreement is not a regulation, and ARB did not violate the APA when BNSF and UP voluntarily entered into the Agreement with ARB.

Government Code section 11342.600 defines "Regulation" as "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, to govern its procedures." And we agree that, under Gov. Code section 11340.5(a), a "guideline, criterion, bulletin, manual, instruction, [or] order" can be a regulation if it constitutes a standard of general application. But a key element of all of these terms is that they describe something that is unilaterally imposed by a government agency upon a party. There is a fundamental difference between an obligation that is unilaterally imposed by an agency upon a party and an obligation of a party that results from a voluntary mutual agreement between the party and a government agency. None of the examples of potential regulations in the *Tidewater* and *Roth* cases cited by the commenter represent voluntary, mutual agreements, and those cases in no way hold that a voluntary agreement is a "regulation."

Interestingly, the Federal Court of Appeals for the First Circuit has addressed a very similar issue in *Association of International Automobile Manufacturers v. Commissioner, Massachusetts DEP*, 208 F.3d 1 (1st Cir., 2000). In 1996, ARB amended its zero-emission vehicle (ZEV) regulations to remove the obligations of manufacturers to produce and deliver for sale minimum percentages of ZEVs for the first five years of the program, model years 1998-2002. At the same time, ARB entered into Memoranda of Agreement (MOAs) with seven major auto manufacturers by which the manufacturers agreed to develop ZEV technology and introduce a limited number of advance technology ZEVs in California during 1998-2002; ARB agreed to facilitate infrastructure support for ZEV implementation. Massachusetts had previously adopted a regulatory program under which the State was administering the California ZEV requirements pursuant to CAA section 177. After ARB took its 1996 actions, Massachusetts amended its ZEV regulations to postpone the manufacturers' percentage ZEV obligations through model year 2002. The State also adopted regulations imposing on the manufacturers the obligations that the manufacturers had agreed to in the California MOAs. The automakers then brought a federal lawsuit to invalidate the Massachusetts regulations patterned after the manufacturers' obligations under their MOAs with ARB. They claimed that the Massachusetts regulations (1) constituted preempted motor vehicle emission standards under CAA section 209(a), and (2) were not standards identical to California standards for which waiver has been granted (which could then be exempted by CAA section 177 from CAA section 209(a) preemption).

After finding that the Massachusetts regulations were motor vehicle emission control “standards” subject to CAA section 209(a) preemption, the First Circuit held that those regulations were not saved from preemption by section 177 – agreeing with the District Court that “the MOAs entered into California and the automakers are not standards within the meaning of section 177, because they are voluntarily contractual agreements rather than legislation or formal administrative regulations.” (*Id.*, 208 F.3d at 7) The Court pointed out that this ruling is

. . . consistent with Supreme Court precedents holding that federal preemption is generally confined to formal state laws and regulations and not applicable to contracts and other voluntary agreements. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29, 115 S.Ct. 817, 130 L.Ed.2d 715 (1995 (contractual obligations not “standards” within the meaning of federal preemption statute); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 526, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (holding that voluntary contractual agreements not preempted by federal statute). (*Id.*)

The First Circuit’s observation that, unlike state regulations, voluntary agreements are not subject to federal preemption shows the potential irony of the commenter’s position. ARB entered into the Agreement to achieve locomotive emission reductions that would not be achievable by a comparable regulation if the regulation were to be found preempted. Construing the California APA to prohibit voluntary agreements in this situation could result in the loss of those emission reductions.

24. Comment: The California Environmental Quality Act (CEQA) requires that state and local agencies consider the environmental consequences of their actions. An agency’s obligations under CEQA are triggered when it approves a project and none of the applicable exemptions apply. Here, ARB “approved” a “project” *not* exempt from CEQA when it entered into the MOU.

There can be little doubt that when ARB’s Executive Officer signed the MOU, ARB became committed to a definite course of action with regard to a project that was intended to be carried out by ARB – namely, the performance of the MOU.

Further, the MOU is a “project” under CEQA. CEQA defines “project” broadly as:

[A]n activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

- (a) An activity directly undertaken by any public agency.
- (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Cal. Pub. Res. Code § 21065; *see also Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal. App. 4th 1165, 1188 (1997) (“CEQA defines ‘project’ extremely broadly”); *City of Santa Ana v. City of Garden Grove*, 100 Cal. App. 3d 521, 526 (1976) (referring to the definition of project under CEQA as “sweeping”). At the very least, ARB’s execution and performance of the MOU qualifies as a project because it may cause a direct physical change in the environment and reasonably foreseeable indirect changes in the environment. Further, this project was “directly undertaken” by ARB, a public agency.

Moreover, ARB’s adoption of the MOU does not appear to fall within any of the statutory or categorical exemptions under CEQA, *see* CEQA, Cal. Rub. Res. Code § 21000 *et seq.*, and since ARB did not undergo the process associated with ARB’s Certified Regulatory Program, it cannot claim that the MOU fell under that exception. Additionally, this project does not fall within the “common sense” exception to CEQA because there is no indication that ARB is “*certain* that there is *no possibility* the project may cause significant environmental impacts.” *See* CEQA Guidelines, Cal. Code Regs. Tit. 14, § 15061(b)(3) (emphasis added); *see also Davidson Homes v. City of San Jose*, 54 Cal. App. 4th 106, 117 (1997).

Since ARB’s obligations under CEQA were triggered when it entered into the MOU, it was required to conduct an initial study to examine whether the project would have a significant environmental impact, and then determine whether to prepare an Environmental Impact Report, Negative Declaration, or a Mitigated Negative Declaration. Because ARB failed to undertake these actions, it violated CEQA.

Agency Response: Whether or not entering into the Agreement constituted a “project” under CEQA, we believe that, pursuant to title 14, CCR, section 15061(b)(3) it is exempt from CEQA because it is, as the regulation provides,

. . . covered by the general rule that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not covered by CEQA.

“Significant effect on the environment means a substantial, or potentially substantial, adverse change in the environment.” (Pub. Res. Code section 21068.) The Agreement will not result in a substantial or potentially adverse change in the environment as it exists today. While some parties have suggested that the release clause in the Agreement could discourage districts from adopting more stringent regulations governing rail yards, even if that were to happen it would not have an adverse impact on current baseline environmental conditions.