June 17th, 2021

Members of the Governing Board
South Coast Air Quality Management District (SCAQMD)
21865 Copley Drive
Diamond Bar CA 91765

Re: Support for strengthening and adopting Proposed Rules 2306 and 316.2 (Freight Rail Yards Indirect Source Review Rule)

Dear Chair Delgado and members of the SCAQMD Governing Board,

The Coalition for Clean Air supports the final approval of Rules 2306 and 316.2 the Freight Rail Yards Indirect Source Review (ISR) rule. While the rulemaking for this began in earnest in 2017, the need to address rail yard pollution stretches back over a century. The South Coast Air Basin's persistent extreme nonattainment of the National Ambient Air Quality Standards (NAAQS), a threat of federal sanctions, and the enactment of 2017's AB 617 stress the need for emission reductions from the goods movement sector. Passing a robust ISR for rail yards will help the South Coast basin achieve a reduction in smog-forming nitrogen oxides of 9 tons per day--almost 10% of what is required to meet the 1997 standard for ozone.[1]

While we support the approval of Rules 2306 and 316.2, we urge the South Coast Air Management District ("the District") to implement the strongest rule possible. Basing the rule off of proportional California Air Resources Board (CARB) compliance is a good start, however, we would prefer to see a rule that goes above and beyond CARB's rules. A strong rule would include emissions targets from all sources of emissions that rail yards attract--including cargo handling equipment and transportation refrigerated units (TRUs)--and go beyond compliance with CARB's In-Use Locomotive and Advanced Clean Fleet rules.

The air district has legal authority to implement these rules and has been given such by Congress in 1977 and confirmed in the 9th Circuit Court of Appeals in 2010. South Coast's own counsel believes that it has the authority to act in this manner (see, "Office of General Counsel Memorandum" including as addendum). South Coast AQMD has successfully adopted PR 2305, the Warehouse ISR Rule, in 2021 and the San Joaquin Air Pollution Control District adopted an ISR in 2005, both of which have given the market the strong signal it needs to adequately clean up air pollution associated with warehouses and new development.

[1] https://www.latimes.com/environment/story/2024-02-04/epa-poised-to-reject-southern-california-smog-plan

Now is the perfect time to implement such a rule. The Federal Transit Administration, which analyzes the physical health of transit capital around the country has determined that 43% of California's transit capital assets--including rail--are at or past their useful life. Operating a train beyond its useful life of 25 years can lead to equipment failure. With the average age of California's rail fleet at 24 years, now is the perfect time for railroads to invest in new zero emissions equipment—ensuring the safe and reliable movement of goods.[2]

To pass a robust rule, we believe PR 2306 must be strengthened in the following specific ways:

I. The District must use its authority over stationary sources to develop more aggressive, facility-wide, emission reduction targets —not limited to just locomotives and trucks as governed by state rules.

Emissions reductions targets should be set for rail yard facilities as a whole to address the entire impact that rail yard facilities have on local public health--including impacts from pollution and noise--and regional nonattainment of federal and state standards. An Indirect Source Review rule should account for all pollution attributed to the stationary source, i.e. the rail yard--rather than exclusively on emissions from locomotives and trucks, with other emission sources being an optional "sprinkle" of emissions reduction benefits. The current ISR will only require the rail yards to do what is already mandated by statewide rules and nothing else. The Ninth Circuit has interpreted this authority as requiring emissions reductions that are "site-based" rather than "engine" or "vehicle-based." PR 2306 should use a site-based approach to set emission-reduction targets looking at all emissions the facility draws to the region. Rail yards are major hubs of activity and significant sources of nitrogen oxides (NOx), particulate matter (PM), and other pollutants contributing to the region's poor air quality. Polluting mobile sources operating at these facilities, including trains, trucks, TRUs, and cargo handling equipment, each contribute to overall facility emissions. PR 2306 can use the latest inventory of emissions by source type to discern the appropriate facility-wide emission-reduction targets.

II. PR 2306 should eliminate unnecessary regulatory off-ramps for rail yard facilities claiming reduced throughput.

The suggested compliance exemption for reduced throughput facilities contradicts the ISR's original intent and should be removed. Allowing regulatory carve-outs for any facility undermines the objectives of SCAQMD, CARB, and AB 617 communities by enabling rail yards to maintain the status quo, while avoiding any action that would help them transition to zero emissions. No facility should have the option to continue polluting without taking action to clean up their operations. A comprehensive, coordinated effort across all rail yards in the District is necessary to achieve pollution reduction, even if activity shifts between facilities at any given time. It is also unclear how the District would measure the average annual throughput for a facility to qualify for the reduced throughput option, as the draft language does not specify a metric. The only suggestion is that a facility can demonstrate reduced throughput in a milestone year preceded by two calendar years of lower throughput compared to the base period.[3] This compliance exemption could potentially apply to some of the heaviest polluting rail yards and could

[2] https://www.lao.ca.gov/Publications/Report/3860

[3] *PROPOSED RULE 2306 FREIGHT RAIL YARDS "Second Draft Preliminary Rule Language."* aqmd.gov/docs/default-source/planning/fbmsm-docs/pr2306-draft-rule-language-clean-final.pdf?sfvrsn=6. Accessed 13 June 2024. Page 6

perpetuate existing harm and undermine the District's commitments to environmental justice and public health. There is no justification for this exemption, and it should be eliminated.

III. PR 2306's infrastructure component should require commitments supporting a facility-wide transition to zero-emissions.

Rail yards should each have infrastructure plans in place for how they will reach zero-emissions goals, what load is required, and how much renewable energy they can install to reduce impacts to the grid, in collaboration with their utility provider. Infrastructure requirements should be focused on a facility-wide approach, considering other energy demands from cargo-handling equipment, trucks and TRUs. The rail yard ISR is a powerful tool to accelerate the development of electric charging infrastructure. The District's Warehouse ISR rule has successfully led to infrastructure planning and the creation of custom plans, including the development of zero-emission vehicle charging stations and localized renewable energy installations. The rule should mandate operators to provide precise timelines for when they request utilities to support infrastructure installation and provide evidence that these requests were submitted.

IV. The rail yard ISR Should Require Facilities to Build Infrastructure to Support Facility-wide Transition to Zero-Emissions.

We are glad to see that the draft language includes an infrastructure component to support the deployment of zero-emissions technology at rail yard facilities. The current draft must do more to catalyze a broad-scale transition to zero-emission infrastructure. We urge the staff to broaden the scope of this component to include infrastructure planning and commitments that can facilitate a transition of the stationary source to zero emissions, including possible on-site deployment of renewable energy.

V. PR 2306 should require new rail yard facilities to start at zero-emissions operations.

With current technology available and with the milestones as suggested by PR 2306 there should be adequate time for new rail yards to comply fully with a zero-emissions operation. State law requires the district to implement all feasible measures to meet air quality standards. Thanks to technological advancements, it is now possible to have a zero-emission rail yard. With federal sanctions for non-attainment already a possibility, new rail yards should not add to our existing pollution burden. South Coast needs to comply with federal mandates to meet the current 70 part per billion ozone standard. To achieve this, the District needs to reduce emissions by 67 percent more than the current regulations adopted and approved in previous plans. Proven technologies such as catenary, third rail, and non-locomotive electric-battery train systems should be considered. Analysis by the California Air Resources Board (CARB) and the Biden Administration, through its National Blueprint for Transportation Decarbonization, show that transition to zero emissions rail is both technologically and economically feasible and also necessary for public health and to address our carbon emissions.[4] [5] It is counterproductive to have a two-year lag time for new rail yards to demonstrate zero-emissions

[4] California Air Resources Board Locomotive Authorization Request to U.S. Environmental Protection Agency (April 22, 2024), Docket ID No. EPA–HQ–OAR–2023–0574, Exhibit A- ZE Locomotive Feasibility Analysis Port of LA to Barstow Report; available at: https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0574-0153.

[5] Office of Energy Efficiency & Renewable Energy, The National Blueprint for Transportation Decarbonization: A Joint Strategy to Transform Transportation, https://www.energy.gov/sites/default/files/2023-01/the-us-nationalblueprint-for-transportation-decarbonization.pdf.

infrastructure planning and reporting. Instead, new rail yards should be required to report on infrastructure planning at the inception, as soon as the owner has notified the District of the potential new facility for the region.

VI. PR 2306 should empower environmental justice communities with information access, including emissions reporting, and a role in making decisions on how to best address the impact of offending facilities.

The District should share all reports and recordkeeping documents with the public to ensure transparency and accountability. Public access to monitoring and reporting data will make enforcement of the rule more effective by expanding opportunities to identify non-compliance. Using CalEnviroScreen or another trusted and accessible software for data sharing would be invaluable. If these documents contain private or proprietary information, the entity seeking to protect the information should provide evidence to support their claim. As required under the California Public Records Act, the district can redact the information necessary to protect confidential business information and make the remaining information public to ensure transparency and accountability. The public should be informed about changes in ownership and operations, construction of new facilities, infrastructure plans, and milestone reporting on emissions reduction targets, and have access to key reports and recordkeeping. Community Emission Reduction Plans ("CERPs") for four AB 617 communities identify the rail yard ISR, the expansion of zero-emissions infrastructure, and expanded fenceline monitoring and reporting as critical mechanisms to address the acute localized dangers these facilities pose. If facilities are in non-compliance there should be clear pathways for enforcement.

The District should use fines for non-compliance or failure to meet targets to create community-advised funds. The Rule should incorporate a program that allows impacted communities to have a say in how the District uses these funds to support the deployment of zero-emissions solutions and to address a rail yard's impact on public health.

The Freight Rail Yard ISR, along with all Facility-Based Mobile Source Measurements, are important tools for cleaning Southern California's air. SCAQMD's analysis projects the ISR's health benefits alone will result in up to 275 fewer deaths and 1,940 fewer emergency department visits and hospital admissions avoided per year. These public health benefits, coupled with the need to meet state and federal air quality standards for Ozone and Fine Particulate Matter, indicates a compelling reason for the board to pass the Freight Rail Yards ISR. The District has the legal authority to adopt these rules and can do so with more stringency than other state or federal agencies because it experiences greater proportionality of impacts. Protecting the health of our local community should be enough of a reason to pass the strongest rule possible.

Sincerely,

Dori Chandler

Dori Chandler
Policy Advocate

Cc:
Wayne Nastri, Executive Officer, SCAQMD
Ian McMillan, Planning and Rules Manager, SCAQMD

OFFICE OF GENERAL COUNSEL
MEMORANDUM

To: Dr. William A. Burke, Chairman
SCAQMD Governing Board Members

From: Barbara Baird, Chief Deputy Counsel Barbara Baird

Re: Authority to Adopt Indirect Source Rule for Railyards

Date: March 19, 2018

Introduction

At the March 2, 2018, Governing Board Meeting, during public comment on the Facility Based Mobile Source Measures item, (Agenda Item 32) a representative of the freight railroads commented that they believed the SCAQMD lacked authority to adopt an indirect source rule for railyards. The railroads have also commented on the AQMP that such a rule would in any event be preempted. A Governing Board member asked for staff's response to this comment. This memo provides such a response. [1]

Issue 1: Authority

The SCAQMD has authority to adopt rules to reduce or mitigate emissions from indirect sources (Health & Saf. Code Sec. 40716(a)(1), especially for areas where there are high-level localized levels of pollutants or for new sources which will have a significant impact on air quality. Health & Saf. Code Sec. 40440(b)(3). An indirect source is "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution." CAA Sec. 110(a)(5)(C); 42 U.S.C. Sec. 7410(a)(5)(C). A railyard meets this definition and thus may be the subject of an indirect source rule.

In the past, the railroads have argued that only CARB has the authority to regulate locomotives as a matter of state law. Since what is proposed is an indirect source rule, and not a regulation of locomotives, this issue is irrelevant. In any event, we disagree. State law provides that the air districts are primarily responsible for "control of air pollution from all sources, other than emissions from motor vehicles." Health & Saf. Code Sec. 40001. This includes locomotives. CARB legal counsel agrees with our interpretation. In earlier litigation over the SCAQMD's rail idling rules, the trial court held that the SCAQMD could not regulate locomotives, but since the

[1] Staff has already stated its view briefly at the February 16, 2018 Mobile Source Committee discussion of this issue, which is part of the record for Agenda Item 32. In addition, staff's view has been expressed in responses to comments on the 2016 AQMP, in legal proceedings before the Surface Transportation Board, Docket 35803,(a proceeding in which the Association of American Railroads, BNSF, and Union Pacific participated), and in letters to US EPA. Accordingly this memo is being made available to the public.

Ninth Circuit did not affirm that holding, it is not binding. *Martin v. Henley*, 452 F. 2d 295,300 (9th Cir. 1971). The Ninth Circuit said: "[W]e assume without deciding that the rules fall within the District's regulatory authority." *Association of American Railroads v. South Coast Air Quality Management District,* 622 F. 3d 1094, 1096 n. 2 (9th Cir. 2010)("*AAR*")

In commenting on the 2016 AQMP, the Association of American Railroads asserted that the proposed facility-based measure would violate the trial court's injunction against enforcing the previously-adopted idling regulation. The trial court held that the idling rules were preempted by the Interstate Commerce Commission Termination Act ("ICCTA"). However, the proposed indirect source rule would be a new rule, not enforcement of an existing rule. Further, it would not specify that the railyards must limit idling. Therefore, adopting the proposed new rule would not violate the injunction.

Issue 2: Preemption

While the Clean Air Act (CAA) generally preempts state and local governments from establishing emission standards for motor vehicles and non-road engines, including locomotives, the CAA does not preempt indirect source rules. *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District*, 627 F. 3d 730 (9th Cir. 2010).

The Ninth Circuit Court of Appeals upheld the trial court's decision that the SCAQMD locomotive idling rules were preempted by ICCTA. *AAR,* 622 F. 3d. 1094. ICCTA is a federal de-regulatory statute that places certain aspects of rail operations under the jurisdiction of the federal Surface Transportation Board ("STB"), and preempts some kinds of state and local regulation applicable to railroads. However, the Court of Appeals explained that if the rules had been approved by EPA into the State Implementation Plan, "ICCTA generally does not preempt those regulations because it is possible to harmonize ICCTA with those federally-recognized regulations..." *AAR,* 622 F. 3d 1094, 1098. The STB itself has stated that ICCTA is not intended to "interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, unless the regulation is being applied in such a manner as to unduly restrict the railroad from conducting its operations on unreasonably burden interstate commerce." *Friends of the Aquifer,* 2001 WL 928949,STB F.D. No. 33966 at 5 (Aug. 15, 2001) Staff recommends that any railyard indirect source rule specify that it is not to become operative until approved into the SIP, to ensure that the rule can be harmonized with ICCTA in any judicial challenge.

The courts have provided guidance in how to "harmonize" two overlapping federal statutes, stating that the overriding purposes or objectives of each statute must be determined, and that if a challenged provision implements a core purpose of one law while affecting only the periphery of the other, the first provision must be upheld. *Morton v. Mancari,* 417 U.S. 535,550 (1974); *Merrill Lynch Pierce Fenner & Smith v. Ware,* 414 U.S.117, 131-136. (1973). The STB itself has also provided guidance, holding that in determining whether a federal environmental statute (or state rule implementing such a statute) unreasonably interferes with rail operations, "[t]he severity of the likely environmental impacts should be weighed against the severity of the transportation impacts of compliance to determine whether, and how, the various Federal statutes

can be accommodated." *Joint Petition for Declaratory Order-Boston & Maine Corp. and Town of Ayer,* 2001 WL 1174385, STB Finance Docket 33971 (Oct. 3, 2001). Staff believes an indirect source rule can be crafted that would provide significant environmental benefits outweighing any adverse impacts on rail transportation, and could thus be harmonized with ICCTA. In particular, the indirect source rule is not expected to specify a method of compliance, so that the railyard can select its own methods for compliance to minimize any adverse impact.

We also wish to advise you that in 2014, the U.S. EPA filed a petition for declaratory order with the STB asking for a ruling on whether the SCAQMD idling rules would be preempted if they were approved in to the SIP. The STB declined to issue such an order, but instead issued "guidance" stating that the rules would "likely" be preempted even if approved into the SIP. *United States Environmental Protection Agency-Petition for Declaratory Order,* STB Docket FD 35803 (served Dec. 30, 2014). The STB based its opinion on the potential for other states or localities to adopt and implement conflicting rules. While we disagreed with the STB "guidance," the manner in which it was issued made it unable to be reviewed in court under the federal Administrative Procedures Act. STB stipulated with us that the "guidance" could be reviewed if EPA or any other agency were to rely on it, e.g.in disapproving the existing idling rules. EPA has not taken action on these rules as of yet. The STB "guidance" could also be challenged if EPA were to rely on it in disapproving a future indirect source rule. In any event, staff believes that an indirect source rule that provides flexibility to the railyards for compliance would not present a serious risk of inconsistent requirements in other jurisdictions and thus would not be preempted under the theory used by the STB in its "guidance."

Conclusion

An indirect source rule for railyards is within the SCAQMD's state law authority, and likely could be crafted in a way that would allow it to survive the harmonization process and therefore not be preempted.

cc: Wayne Nastri