

BEFORE THE
CALIFORNIA AIR RESOURCES BOARD

NOTICE OF PREPARATION OF A DRAFT SUBSTITUTE
ENVIRONMENTAL DOCUMENT: IN-USE LOCOMOTIVE
REGULATION

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS, THE
AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,
AND THE CALIFORNIA SHORT LINE RAILROAD ASSOCIATION

The Association of American Railroads (“AAR”), the American Short Line and Regional Railroad Association (“ASLRRA”), and the California Short Line Railroad Association (“CSLRA”) (jointly, “the Associations”), on behalf of themselves and their member railroads, respectfully submit the following comments on the California Air Resources Board’s (“CARB”) October 27, 2020 Notice of Preparation of a Draft Substitute Environmental Document (“Locomotive NOP”) for its proposed In-Use Locomotive Regulation (“Proposed Rules”).¹

AAR is a non-profit trade association whose membership includes freight railroads that operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. AAR also represents passenger railroads that operate intercity passenger trains and provide commuter rail service.

¹ Notwithstanding Governor Newsom’s Executive Orders N-54-20 and N-80-20, the Associations have not been able to find any evidence that CARB timely posted the Locomotive NOP on its “public facing website,” nor did it conduct outreach to the Associations and their members, which are interested parties under California law. Accordingly, the Associations did not receive timely notice of the NOP and were not able to submit comments before November 26, 2020 deadline set by CARB. The Associations appreciate CARB’s willingness to review and consider these comments as timely, as confirmed by Ms. Cari Anderson. See email from Cari Anderson, CARB, to Peter Okurowski, CEA, Jan. 14, 2021 11:13 AM .

ASLRRA is a non-profit trade association representing the interests of approximately 500 short line and regional railroad members and railroad supply company members in legislative and regulatory matters. Short lines operate 50,000 miles of track in 49 states, or approximately 30% of the national freight network. CSLRA is a non-profit trade association promoting best business practices and providing legislative and regulatory advocacy and public outreach for 25 California short lines. The Associations' members own (or lease) and operate locomotives within the state of California and are part of the national freight rail network. The Associations and their members therefore have a significant interest in this proceeding.²

I. CARB'S CEQA ANALYSIS MUST CONSIDER EACH ELEMENT OF THE PROPOSED RULES INDEPENDENTLY.

California's Environmental Quality Act ("CEQA") requires the preparation of an environmental impact report ("EIR") in order "to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." Cal. Pub. Res. Code ("PRC"), § 21002.1; *see also* 14 Cal. Code Regs. ("CEQA Guidelines") §§ 15000-15387. The California Air Resources Board ("CARB") implements this requirement through the preparation of an Environmental Analysis ("EA") under its certified equivalent program. *See* 17 CCR §§ 60000-

² The Associations and their members submit these comments without prejudice to their position that CARB lacks legal authority to impose these regulations, which are preempted by federal law. The Associations also renew their objection to this Locomotive NOP on the basis that CARB has not provided the public with the draft language it intends to include in the Proposed Rules. As a result, the Associations (and all other interested parties) lack detail with respect to these Proposed Rules that is necessary to fully provide CARB with informed and specific comments. The Associations reserve the right to supplement these comments when draft regulatory language is made available by CARB.

60008. Nonetheless, the underlying substantive requirements of CEQA must be met by CARB's EA. 17 CCR 60004(b).

CEQA defines a "Project" as "any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment" and a "project-specific effect" as "all the direct or indirect environmental effects of a project other than cumulative and growth-inducing effects." PRC §§ 21065, 21065.3; *see also* 17 CCR 60004(c) (incorporating CEQA definition of "project"). CARB must include in its EA a description of the project, including a "statement of the objectives sought by the proposed project" as well as a "general description of the project's technical, economic, and environmental characteristics[.]" CEQA Guidelines § 15124(b), (c). CARB must reject a proposed project "if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." PRC § 21002; *see also* CEQA Guidelines § 15126.6; 17 CCR § 60004.2(a)(5). Further, CARB must consider "qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs[.]" *Id.* § 21001(g); *see also* 17 CCR § 60004.2(a)(3).

Here, CARB has prepared a single NOP for four separate and independent elements that it includes under the umbrella of "In-Use Locomotive Regulation." Each of these four elements would apply to persons or entities operating locomotives in California:

- a locomotive emissions tax (referred to in the public workshops as a "spending account");³

³ CARB continually attempts to characterize its proposed tax on locomotives as a "spending account." *See* CARB Workshop Slides Day 2 (10/28/2020), *available at* <https://ww2.arb.ca.gov/sites/default/files/2020-12/2020.10.28%20841AM%20Workshop%20Slides%20Day%202%20-%20Remediated.pdf>. This characterization is wholly inconsistent with the reality of what CARB is proposing – to "require mitigation to

- a ban on the operation of federally certified locomotives that have been in operation for more than two useful lives (approximately 23 years);
- the adoption of a new “30-minute limit on unnecessary idling;” and
- extensive new reporting requirements.

Locomotive NOP at 3.

While all are part of CARB’s proposed “In-Use Locomotive Regulation” project, each of the four different elements in the Proposed Rules regulates different activities, with different alternatives and different impacts and different technical and economic characteristics. The analysis required by CEQA cannot be effectively accomplished unless CARB considers the impacts of each element of the Proposed Rules independently in the EA. The Associations remain concerned that CARB is proposing a scope of review that risks improperly lumping each distinct element of the Proposed Rules together and assuming their impacts are similar, when the real-world impacts can be disparate and each significant in its own right.

II. CARB MUST CONSIDER ALL REASONABLY FORESEEABLE IMPACTS OF ITS PROPOSED RULES.

CEQA mandates that an NOP must provide responsible, trustee and other public agencies “with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response,” including a description of the project and its probable environmental effects. CEQA Guidelines 15082(a)(1). CEQA further requires that CARB include in its ultimate environmental analysis any significant environmental benefits, irreversible environmental changes, and growth-

be paid for locomotive emissions” and to “convert mitigation funds to cleaner locomotives.” *Id.* at 41. CARB’s proposal amounts to a discriminatory tax being levied against the locomotive industry.

inducing impacts of the project. 17 CCR § 60004.2(a)(4); *see also* CEQA Guidelines § 15126.

Here, the NOP's project description is so general and conclusory that reviewing agencies and the public have insufficient information to allow a meaningful analysis of all potential impacts of the project.

A. The Locomotive NOP's Descriptions of the Four Elements are Sufficiently Vague so as to Prevent Meaningful Analysis of the Impacts.

CEQA requires that a project description include enough information so that the impact analysis contains a meaningful assessment of the project's impacts. Specifically, Section 15124 of California's CEQA Guidelines defines the types of information that must be included in a project description, including "a statement of objectives sought by the proposed project" that will allow CARB to "develop a reasonable range of alternatives to evaluate the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations." CEQA Guidelines § 15124. The statement of objectives must include the underlying purpose of the project. Moreover, the project description must reflect the specifics of the proposed project, conveying "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." *Id.* § 15378(a) (definition of "project").

Here, CARB has simply stated that it is:

proposing a regulatory strategy to reduce in-use emissions of all locomotives – Class 1, Class 3, Military and Industrial, and Passenger – and to encourage the adoption of Tier 4 or higher emission standard technology to meet air quality, climate, and public health protection goals.

Locomotive NOP at 3. The NOP then provides only a cursory overview of several proposed regulatory concepts, leaving reviewing agencies unable to discern how each concept is to be

implemented in proposed regulatory language. Locomotive operators would be required to “annually report and mitigate their locomotive emissions,” which CARB proposes will occur through taxing regulated entities and then “placing funds into a spending account.” Regulated entities would be required to use this “spending account” to purchase new locomotives meeting “the current cleanest emissions standard” or, alternatively, “cleaner near-zero or zero emission technologies in the demonstration/pilot phases of development.” Which entities would be required to buy new locomotives, and what the full costs of that purchase might be under an ever-changing “current cleanest emissions standard” target, are examples of important pieces of information not provided in the NOP, but needed by reviewing agencies and the public. CARB proposes to ban certain remanufactured locomotives from California but provides no explanation of how this ban could be structured to avoid preemption under applicable federal locomotive regulations. CARB plans to “adopt the federal requirements” on locomotive idling with certain exceptions “based on the exceptions in the federal idling limit rule,” but does not explain which federal exceptions would and would not be adopted, leaving the reader unable to tell what significant impacts may flow from the adoption of some of the federal exceptions but not others. Further, CARB’s description of this proposed regulation changes on a regular basis – from adopting EPA’s existing regulation to going beyond the scope of EPA’s regulations (and beyond CARB’s authority under federal law).

This is insufficient information upon which to base the selection of alternatives, gauge potential impacts, or otherwise understand each disparate element of the Proposed Rules. For example, selected alternatives for passenger locomotives are unlikely to be applicable in the military or freight context. Similarly, simply providing a high-level description of the regulatory

concepts is insufficient to evaluate costs and impacts without specific requirements. Draft regulatory language is required for this type of analysis. But as it stands, CARB's Locomotive NOP is so vague that it does not allow stakeholders to determine the appropriate scope of CARB's CEQA analysis.

B. CARB Must Ensure that a Robust Analysis of All Impacts Associated with Each Element of the Proposed Rules is Conducted.

CARB must consider the impacts associated with each of the four individual elements of the proposed regulation: the locomotive emissions tax, a ban on the operation of federally certified locomotives that comply with all federal requirements and that have been in operation for more than approximately 23 years, the adoption of a new California-only "idling limit," and extensive new reporting requirements. These impacts must include transparent calculations, with supporting documentation, showing the assumptions used by CARB to estimate the anticipated emission benefits for each rule element. For example, CARB must demonstrate the expected emissions benefits for the locomotive tax given that CARB has not proposed, and cannot legally require, that an interstate railroad simply purchase new locomotives because CARB commands them to (or even that, if such locomotives are purchased, that they must be operated within California). As such, even if such a locomotive tax were legal, it would not lead to any foreseeable emissions reductions but would simply impose a significant cost on the rail industry.

CARB must also include an assessment of the environmental impacts of a modal shift from rail to truck in response to this increased cost of freight transportation by rail. The Associations are unaware of a similarly comprehensive CARB strategy to regulate the trucking industry through a bundle of taxes, reporting requirements, and new idling limits distinct from

those imposed at a federal level. As such, costs to the railroad industry will increase significantly while no parallel costs are imposed on the trucking industry. This may result in a modal shift by shippers from rail to truck and may cause increased congestion on California highways and roads, increased wear and tear to highway infrastructure, increased traffic accidents, and other reasonably foreseeable costs that must be considered as part of CARB's impacts analysis.

In this assessment, CARB must include an accounting of all emissions associated with truck traffic that may reasonably be expected to increase due to modal shifts attributable to the costs of complying with each individual element of the Proposed Rules and to the aggregate cost increases resulting from compliance. Therefore, the assessment must include emissions of greenhouse gases and all sources of on-road vehicle emissions (including particulate emissions attributable to brake and tire wear). In conducting this assessment, CARB should update its previously published analysis regarding the relative emissions between freight rail and truck to reflect the obvious omission of particulate emissions from brake and tire wear on trucks and the startling omission of greenhouse gases from the "Truck versus Train" analysis posted on CARB's website and presented during the public workshops.⁴ AAR has previously provided comments on these omissions and suggested corrections to this analysis.⁵

Finally, CARB's project description in the NOP does not fairly convey to the public the likely effect in neighboring states (and corresponding impacts in California) because of an

⁴ DRAFT Truck vs. Train Emissions Analysis | California Air Resources Board, *available at* <https://ww2.arb.ca.gov/resources/fact-sheets/draft-truck-vs-train-emissions-analysis>, last accessed Jan. 25, 2021.

⁵ See email from Peter Okurowski, CEA to Cari Anderson, CARB, Sep. 23, 2020 11:08 AM.

interruption of the free flow of interstate rail traffic as a result of its proposed ban on operating certain federally certified locomotives in California. These locomotives will not be retired – rather, if the ban is successfully implemented, it will interfere with interstate rail traffic because it will require locomotive switching at or near the California border. Locomotives banned from operating in California will increasingly operate in other areas of the United States, Canada, and Mexico. These impacts are clearly foreseeable and should be quantified in the EA.

As CARB forecasts the expected impacts of its Proposed Rules, the Associations recommend that it utilize at least three different freight growth rates for each of its impact scenarios. For example, CARB should include a low, moderate, and high growth rate to provide a more accurate understanding of the potential impacts of its Proposed Rules. Including only a single forecasted growth rate may result in gross under- or overestimation of impacts and will lessen the usefulness of the document. The Railroads have previously provided CARB with comments regarding alternative growth forecasts for locomotive freight traffic. To date, these comments have been largely ignored. However, the Associations continue to recommend that CARB look at sources such as the U.S. Department of Energy’s 2020 Annual Energy Outlook. The Associations and their members renew their offer to work with CARB on setting realistic growth rates for CARB’s CEQA analysis.

III. CARB MUST CONSIDER A RANGE OF REASONABLE AND FEASIBLE ALTERNATIVES.

Under CEQA, CARB must provide sufficient information in the NOP about the project and its potential environmental effects to allow responsible and other reviewing agencies “to make a meaningful response.” CEQA Guidelines § 15082(a)(1). Among other things, reviewing

agencies must be provided enough information in the NOP to allow them to identify “significant environmental issues and reasonable alternatives and mitigation measures” for the proposed project. *Id.*; *see also id.* § 15082(b)(1). CEQA further requires that CARB include in its ultimate environmental analysis “a range of reasonable alternatives” to the proposed project. CEQA Guidelines § 15126.6. Alternatives “shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects.” *Id.* § 15126.6(g). This analysis must include the “no project” alternative. *Id.* Here, the NOP improperly suggests to the reader that CARB will consider certain alternatives that are not legal or feasible and exclude from its review other potentially feasible alternatives.

A. In Considering the Feasibility of Alternatives, CARB Must Address Technological and Legal Infeasibility.

The U.S. Environmental Protection Agency [“EPA”] is the federal agency responsible for establishing emissions standards for new locomotives and new engines. 42 U.S.C. § 7547(a)(5). EPA has codified the definition of “new” locomotives to include both those newly manufactured *and* those existing locomotives that are remanufactured or rebuilt. CARB’s NOP suggests that it will attempt to ban the use of locomotives that comply with all EPA regulations and standards. *See* 40 C.F.R. Parts 85, 89, and 92. The Clean Air Act does not delegate this authority to CARB and, indeed, EPA has already occupied the field in this area with no room for CARB to pass its own rules and standards on a national rail network. Should CARB opt to proceed with its attempts to impose a new definition of a locomotive’s “useful life” at odds with the federal definition, it must first seek a waiver from EPA.

CARB’s certified CEQA program requires it to include in its ultimate EIR or EA an analysis of “feasible” alternatives to the proposed project. *See* 17 CCR § 60004.2(a)(5). CEQA defines

“feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” See PRC § 21061.1; CEQA Guidelines § 15364. Here, CARB’s CEQA analysis must consider the feasibility of a waiver being granted and, if granted, whether the waiver would be granted within the timeframes outlined by CARB for its Proposed Rules.⁶

In addition, CARB has failed to provide any basis for its conclusion that it is technologically feasible to remanufacture all locomotives (both line haul and low-horsepower locomotives) to a Tier 4 standard or higher. In cases such as this, where the technology does not exist to accomplish CARB’s proposal to ban locomotives after the end of CARB’s own definition of “useful life,” CARB must evaluate the full extent of costs to be incurred by the entire rail network (including Canadian and Mexican rail lines, which own locomotives sometimes operating in California) associated with terminating the ability to use a locomotive decades before appropriate.

B. CARB Must Consider A Variety of Feasible Alternatives, Including Incentive Programs.

CARB’s assessment of project alternatives must include an assessment of the potential use of incentive programs designed to encourage the early retirement and/or replacement of older locomotives in California’s nonattainment areas. California has a long history of using incentive programs to reduce emissions from mobile sources, and EPA has accepted these programs with appropriate backstop measures to provide emission reductions in California’s

⁶ CARB petitioned EPA to implement revised standards for locomotives in April 2017, yet EPA has chosen not to act on this petition. Accordingly, it seems unlikely that CARB could successfully obtain the EPA waiver required for application of its Proposed Rules in a timely manner, and this uncertainty must be considered when determining whether the elements of the Proposed Rules are feasible.

State Implementation Plan. *See, e.g.,* Guidelines for Locomotive Project Funding Under Carl Moyer Program Cal. Health & Safety Code 44275-44299.2)⁷; Proposition 1B Goods Movement Emission Reduction Program.⁸ This type of program has been successful in the past and would save both CARB and locomotive operators in California compliance and administrative costs. Further, because demand for new locomotives in the United States is extremely low, an incentive program may be more effective at modernizing the locomotive fleet than taxes and labor-intensive reporting requirements.

With respect to the element of the Proposed Rule seeking to impose additional burdensome reporting requirements, the rail industry currently provides CARB with a wealth of data on its operations, and CARB may be able to utilize this data in new or different ways to accomplish its goals without imposing significant new costs on the rail industry. Thus, CARB must include in its analysis a description of information currently received by CARB from railroads pursuant to existing MOUs and informal agreements, and an explanation as to why this information cannot be used in lieu of the proposed additional reporting requirements to meet specific CARB regulatory needs. In considering the “No Action” alternative, CARB should take into account the current effectiveness of such requirements under existing law and regulations.

⁷ See Carl Moyer Program Guidelines for Locomotive Incentives, located at https://ww3.arb.ca.gov/msprog/moyer/guidelines/2011gl/2011cmp_ch11_07_11_14.pdf?_ga=2.155898171.1613319591.1612219105-926251368.1601062431.

⁸ See https://ww2.arb.ca.gov/sites/default/files/classic/bonds/gmbond/docs/prop_1b_goods_movement_2015_program_guidelines_for_implementation.pdf?_ga=2.248033415.1613319591.1612219105-926251368.1601062431.

IV. THE PROPOSED RULES' ECONOMIC IMPACT ASSESSMENT MUST BE COMPLETE.

Although CEQA's main goal is the protection of the environment and of California's resources, it requires agencies "to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs." § 21001(g). As such, CARB must consider the costs to the rail industry of each portion of its Proposed Regulations. As discussed above, these costs result in environmental impacts associated with increased truck traffic in regions current served by freight railroads. This economic analysis must include, at a minimum, the following:

- Actual costs incurred as part of complying with new proposed reporting requirements. The new proposed reporting requirements are substantively and significantly different from those contained in existing MOUs; as a result, the extrapolation of estimated costs for compliance with existing MOUs is not defensible.
- The full extent of costs associated with terminating the operational life of a locomotive decades before appropriate for the entire rail industry with locomotives operating in California.

V. CONCLUSION

The Associations appreciate this opportunity to comment on CARB's Notice of Preparation and look forward to continued cooperation and communication between CARB Staff, the Associations, and their members.

Sincerely,

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