

Environmental Law NEWS

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Editor's Note...

by William D. Wick

This issue is not limited to one substantive area of environmental law, but instead covers a wide array of topics. The only common denominator is that all of the articles provide up-to-date information and analysis from experts in their fields about hot topics. Most were inspired by presentations at the last Yosemite Conference.

Kristin Eberhard of NRDC discussed cost-effective greenhouse gas emission reductions under AB 32. Sandy Crockett, Beth Collins-Burgard, and Matt Vespa track and evaluate the guidance emerging on how to analyze greenhouse gas impacts under CEQA. California's cutting-edge Green Chemistry Initiative is assessed by Edward Quevedo and John Till. Efforts to clean up California's railyards and locomotives—and the regulatory framework for those efforts—are analyzed by Gideon Kracov. Two different assessments of the *Save Tara* decision will be of special interest to CEQA practitioners; Cyndy Day-Wilson and Arthur Pugsley provide their analyses. Two mediators experienced in mediating environmental cases—Catherine Yanni and David Nawi—team with Maureen Dear and Bret Stone to explain why environmental mediations often differ from other types. Finally, you couldn't assemble a more distinguished and informed group of panelists to help decipher the *Burlington Northern* CERCLA decision than David Buente, Bruce Gelber, David Jung, and Michael Hingerty.

Enjoy. And mark your calendar—October 21-24—for this year's Yosemite Conference.

Message from the Chair...

by Dana P. Palmer

There has never been a hotter time to be an environmental lawyer. This can be seen most evidently in climate change topping both President Obama's and Governor Schwarzenegger's lists of priorities. At the same time, given the rapid escalation in the complexity of energy and environmental regulation, clients have never needed us more. Before you peek inside at the insightful articles collected by our editor Bill Wick, let me share some information about our Section's recent and upcoming activities.

continued on page 3

Table of Contents

Editor's Note.....	1	Who's Regulating Emissions from California Trains and Railyards?	24
by William D. Wick		by Gideon Kracov	
Message from the Chair	1	Does <i>Save Tara</i> Clarify When a Public Agency Must Start the CEQA Process?	28
by Dana P. Palmer		by Cyndy Day-Wilson	
Capturing Cost-Effective GHG Emission Reductions under AB 32	4	How <i>Save Tara</i> Affects the Standard of Review in CEQA Lawsuits	32
by Kristin Eberhard		by Arthur Pugsley	
Another Hot Year: Analyzing Greenhouse Gas Impacts under CEQA	7	Environmental Mediation: In a League of Its Own	34
by Alexander "Sandy" Crockett, Beth Collins-Burgard and Matt Vespa		by David Nawi, Catherine Yanni, Bret Stone and Maureen Dear	
Opportunities and Challenges Await Implementation of California's Green Chemistry Initiative	21	Superstrict Superfund and the Supremes: The Impact of <i>Burlington Northern</i>	36
by Edward L. Quevedo and John R. Till		A Panel Discussion with David Buente, Bruce Gelber and David Jung; Moderated by Michael Hingerty	

Who's Regulating Emissions from California Trains and Railyards?

by Gideon Kracov*

International trade activity and goods movement by rail provide significant economic benefits to California. Cargo moves from container ships at California ports to local railyards where freight locomotives haul it east to consumers throughout the United States. In 2010 and beyond, demand for cargo through our ports is expected to continue to grow.¹ Thus, large expansions are proposed for existing railyards at the Ports of Los Angeles and Long Beach.² Yet, The goods movement industry also causes significant environmental and public health impacts. In particular, California's locomotives and railyards contribute to air quality nonattainment and create unacceptable toxic hot spots for railyard-adjacent communities. This article discusses ongoing efforts to clean up California's railyards and locomotives and analyzes the governing regulatory framework.

There are eighteen large railyards in California operated by Union Pacific Corporation and BNSF Railway Company (recently acquired by Berkshire Hathaway Inc.).³ The railyard operations emit criteria

pollutants nitrous oxides (NOx) and particulate matter (PM) from sources including locomotives, heavy duty diesel trucks, cargo handling equipment and refrigerated units. As a result, while rail transport is viewed as a "green" alternative to trucking, the data in fact shows that rail produces more NOx per mile than trucks, and rail's fuel benefits substantially decrease if the full door-to-door transport costs are considered.⁴ Locomotive emissions alone account for 158 tons per day of NOx and 4.8 tons per day of PM in the State.⁵ In the South Coast Air Basin, regulators recognize that "the severity of the region's PM 2.5 problem and the attainment deadline make it necessary to further mitigate locomotive emissions in 2014."⁶

Toxic air emissions including diesel PM from California railyards and locomotives also present a significant concern. Human health risk assessments for railyard communities in San Bernardino, Commerce and Roseville document excess maximum cancer risk caused by local railyard operations as high as 3,300 per million.⁷ This is far above generally accepted reg-



ulatory thresholds.⁸ In fact, over three million Californians are exposed by railyard sources to excess cancer risk of more than ten in one million.⁹ The California Air Resources Board (CARB) insists that "every feasible effort" is needed to "reduce localized risk in communities adjacent" to the State's railyards.¹⁰

These efforts to mitigate railyard and locomotive pollution must consider the regulatory framework for railyards and locomotives. In particular, the Interstate Commerce Commission Termination Act (ICCTA), 9 U.S.C. § 10501(b), gives jurisdiction over many rail activities to the Surface Transportation Board (STB) in Washington, D.C. The railroads often rely on STB exclusive or primary jurisdiction to preempt local regulatory efforts.¹¹ However, the courts and STB have made clear that state and local regulations that implement federal environmental laws such as the Clean Air Act are not preempted by ICCTA.¹² In addition, state and local regulations that do not unduly interfere with the railroads' "operational activities" survive ICCTA.¹³ For example, in 2008, the Los Angeles Superior Court ruled that ICCTA does not override a City's duty to conduct California Environment Quality Act review of rail activities on public land.¹⁴

State and local authorities seeking to mitigate rail pollution must also consider their roles in implementing the federal Clean Air Act. The 1990 Clean Air Act amendments give the United States EPA the power to adopt emission standards for new non-road engines including locomotive engines. A 2008 EPA locomotive rulemaking requires stricter locomotive emissions standards on remanufacture and eventual fleet turnover over many decades to cleaner so-called "Tier 4" levels by 2045.¹⁵ This authority preempts local regulation of newer locomotives.¹⁶ However, the EPA has confirmed that state regulation of other rail equipment (such as older, polluting switcher locomotives) is not preempted by federal law and "subject to regulation by California and the other states."¹⁷ Further, certain state regulation of nonroad engines is carved out under the Clean Air Act section 209(d), and local idling and safety regulations generally are permitted.¹⁸

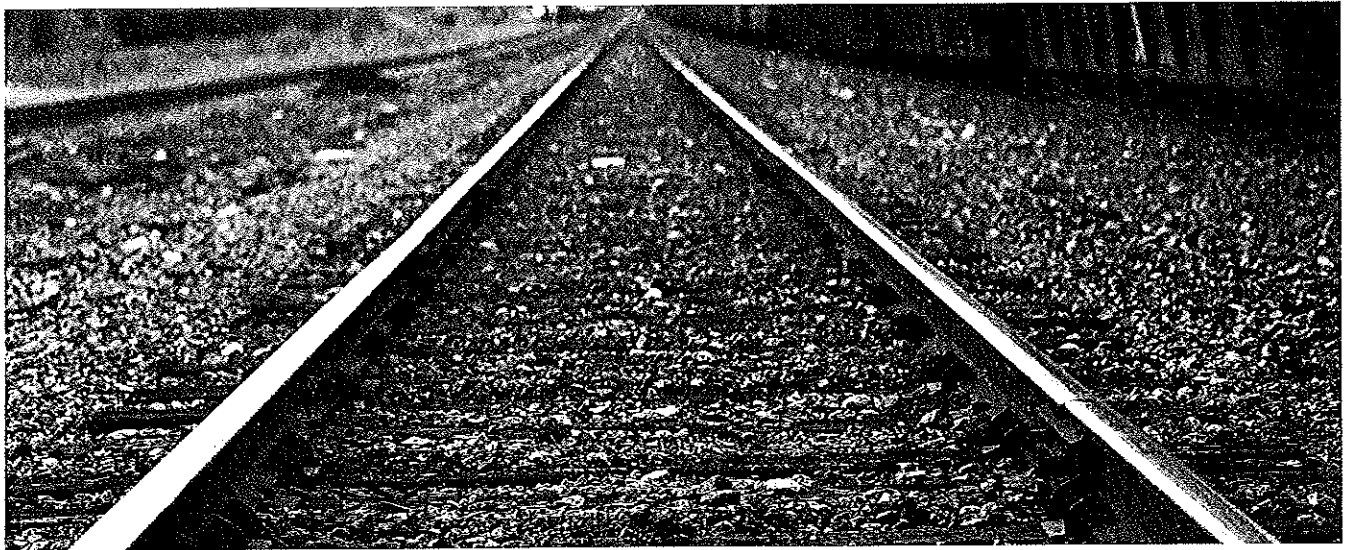
The South Coast Air Quality Management District's recent effort to address railyard emissions illustrates the interplay of these laws and regulations. Starting in 2005, the District adopted Rules 3501 to 3503 that require rail operators in the South Coast Air Basin to monitor and minimize locomotive idling, provide inventory reports and conduct health risk assessments. The purpose of the Rules is to decrease and monitor emissions and health risk at local railyards. The Association of American Railroads, Union Pacific and BNSF sued, claiming the Rules were preempted and would create



an improper local patchwork of regulations.

In 2007, United States District Court Judge John F. Walter enjoined the Rules.¹⁹ The opinion makes clear that ICCTA does not preempt or "interfere with the role of state and local agencies in implementing Federal environmental statutes such as the Clean Air Act."²⁰ Nevertheless, local air districts derive their authority from state law, and the California Health and Safety Code "dictates that [the California Air Resources Board] is the entity with authority over locomotives."²¹ The District appealed to the Ninth Circuit Court of Appeals, arguing that it acted under appropriate California Health and Safety Code authority to implement the federal Clean Air Act. Briefing and oral argument was completed in Summer 2009 before a panel including Circuit Judges Pamela A. Rymer and Susan P. Graber and Senior District Court Judge Ann Aldrich (sitting by designation). No opinion has been issued.

CARB's authority to exercise jurisdiction to mitigate California railyard and locomotive pollution comes from the State Health and Safety Code that requires that CARB "shall adopt and implement" control measures that are "necessary, cost, effective and technologically feasible" for mobile goods movement sources including "heavy duty motor vehicles," "utility engines" and "locomotives," unless preempted by federal law.²² Accordingly, CARB adopted goods movement regulations including measures for heavy duty diesel trucks and some cargo handling equipment. Moreover, the



2007 California State Implementation Plans for 8-hour ozone and PM-2.5 include future commitments to reduce pollution from California railyards and locomotives.²³

Yet, CARB has not directly regulated California locomotives, instead favoring controversial contractual agreements with the railroads, or Memorandum of Understandings (MOUs).²⁴ In 2007, pressure groups filed a writ of mandate against CARB and filed a Petition for Rulemaking pursuant to the California Government Code, challenging the MOUs and the failure to adopt new regulations for California railyards and locomotives. In January 2009, CARB granted the Petition for Rulemaking in part.

In September 2009, CARB's Board conducted a public hearing on the issue to consider thirty-seven different measures to reduce emissions and health risk including options for long haul and switcher locomotive fleet turnover, cargo handling equipment, electrification, monitoring and site-specific mitigations.²⁵ Many measures were deemed feasible, cost-effective and likely not preempted by federal law.²⁶ Greenhouse gas reduction benefits also were explained. During the hearing, Board Chairman Mary D. Nichols concluded that "we want to make clear that regulation is not just something never to be discussed, but that it, in fact, we are going to be developing an approach to it as part of the background of the whole program really."²⁷ Moreover, considerable federal and State incentive and matching funding may be available. At the conclusion of the hearing, the Board directed staff to return within 120 days with a specific plan requiring railroads to prepare and implement risk reduction audits and plans for high risk facilities, starting with BNSF's San Bernardino railyard and an assessment of potential regulatory elements including an indirect source rule. A Board hearing is pending as this issue goes to press.

These various efforts to mitigate air pollution and health risks from California railyards and locomotives must bear fruit in 2010 and beyond. Otherwise, the existing federal locomotive rules will take decades to implement and unacceptable human health risks will remain. The railroad operators can seize this opportunity to invest in, rather than fight, much-needed environmental improvements at railyards throughout the State. The sustainability of California's goods movement industry depends on it.

ENDNOTES

- * Gideon Kracov practices environmental and land use law. He represents non-profit East Yard Communities for Environmental Justice (based in Commerce, California) in litigation and administrative actions seeking to reduce California railyard and locomotive pollution.
- 1. See www.portoflosangeles.org/newsroom/press_kit/terminal.asp.
- 2. The intermodal expansion proposals include the BNSF Railway Co. Southern California International Gateway project on Port of Los Angeles property and Union Pacific Corporation's Intermodal Container Transfer Facility on land in Long Beach operated by a joint powers authority comprised of the local ports. Intermodal railyards move containers between trucks and trains and classification railyards sort railcars to form outbound trains. More information is available at www.communitiesmatter.com/details and www.ictf-jpa.org.
- 3. California Air Resource Board, Technical Options to Achieve Additional Emissions and Risk

Reductions From California Locomotives and Railyards, August 31, 2009, pp. 11-13, available at www.arb.ca.gov/railyard/ted/ted.htm.

4. Noël Perry, July 2009 Transportation Market Outlook, Transport Fundamentals, pp. 23-24, available at www.fhwa.dot.gov/freightplanning/talking.htm.
5. California Air Resources Board, Recommendations to Implement Further Locomotive and Railyard Emission Reductions, September 9, 2009, p. 12, available at www.arb.ca.gov/railyard/ted/ted.htm.
6. California Air Resources Board, Meeting to Consider Approval of the Proposed State Strategy for California's State Implementation Plan -- Revised Staff Proposal, September 27, 2007, section 1 p. 4, available at www.arb.ca.gov/planning/sip/2007sip/revcasip2007.pdf.
7. California Air Resources Board, Health Risk Assessment for the BNSF San Bernardino Railyard, June 11, 2008, p. 13, available at www.arb.ca.gov/railyard/hra/hra.htm.
8. In 1990, Congress adopted a one in one million threshold in Section 112 of the Clean Air Act, which requires the United States Environmental Protection Agency (EPA) to issue technology-based standards to reduce emissions of hazardous air pollutants and consider issuing residual risk standards if the excess cancer risk to the individual most exposed would exceed one in one million.
9. See *supra* note 5 at p. 2.
10. *Id.*
11. See, e.g., *CSX Transp. Inc. v. Williams*, 406 F.3d 667, 670 (D.C. Cir. 2005); *Green Mountain R.R. Corp. v. Vermont*, 404 F.3d 638, 644 (2d. Cir. 2005); *Friberg v. Kansas City Southern R.R. Co.*, 535 F.3d 443, 444 (5th Cir. 2001); *City of Auburn v. United States*, 154 F.3d 1025, 1027-1030 (9th Cir. 1998); *Middlesex County Health Department v. Consolidated Rail Corporation*, ___ F.Supp.2d. ___, ___ (D.N.J. 2009), 2008 U.S. Dist. Lexis 106362.
12. See, e.g., *Association of American Railroads v. South Coast Air Quality Management District*, 2007 U.S. Dist. LEXIS 65685, *14 (C.D. Cal. April 30, 2007); *Boston and Maine Corp. and Town of Ayer, MA*, STB Fin. Docket No. 33971, 2201 WL 45685, at *5 (STB April 30, 2001); *Cities of Auburn and Kent - Burlington Northern Railroad Co.*, STB Fin. Docket No. 33200, 197 WL 362017, at *4 (STB July 1, 1997).
13. See, e.g., *New York Susquehanna and Western Railway Co. v. Jackson*, 500 F.3d 238, 257 (3d Cir. 2007), *Hi Tech Transp., LLC v. City of New Jersey*, 382 F.3d 295, 308 (3d Cir. 2004); *J.P.Rail v. New Jersey Pinelands*, 404 F.Supp.2d 636, 652 (D.N.J. 2005); *Rushing v. Kansas City Southern*, 194 F.Supp.2d 493, 501 (S.D. Miss. 2001); *Jones v. Union Pacific Railroad Company* (2000) 79 Cal.App. 4th 1053, 1060.
14. *East Yard Communities for Environmental Justice v. Bell Public Financing Authority, et al.* (Los Angeles Superior Ct. Case No. BC111726) (ruling that "[f]ederal law does not preempt environmental review under CEQA of the City's lease of its own land").
15. 73 Fed. Reg. 37096 (June 20, 2008).
16. 63 Fed. Reg. 18978 (April 16, 1998).
17. 72 Fed. Reg. 15971 (April 3, 2007).
18. See *Engine Mfrs. Ass'n v. United State Environmental Protection Agency*, 88 F.3d 1075, 1093-94 (D.C. Cir. 1996); California Health & Safety Code § 41701.
19. *Association of American Railroads v. South Coast Air Quality Management District*, 2007 U.S. Dist. LEXIS 65685, *25-26 (April 30, 2007).
20. *Id.* at *14-15.
21. *Id.* at *18-19.
22. California Health & Safety Code §§ 43013, 43018.
23. California Air Resources Board, Proposed Modifications to the Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan That Will Achieve 30 Tons Per Day of Additional Emission Reductions in the South Coast by 2014 and 88 to 93 Tons Per Day of Emission Reductions in the San Joaquin Valley by 2017, p. 7, available at www.arb.ca.gov/planning/sip/2007sip/07-28_attachment_b.pdf.
24. More information on the MOUs is available at www.arb.ca.gov/railyard/ryagreement/ryagreement.htm.
25. See note 3 *supra*.
26. See note 5 *supra* at p. 44 and App. C.
27. California Air Resources Board, Transcript of September 25, 2009 Board Hearing, pp. 269-271, available at www.arb.ca.gov/board/meetings.htm#2009.