SUPPLEMENT TO AGENDA ITEM #27
Board Meeting of May 7, 2021

The South Coast AQMD has continued to receive numerous public comment letters for Item No. 27 Certify Final Environmental Assessment and Adopt Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions Program, and Proposed Rule 316 – Fees for Rule 2305, Submit Rule 2305 for Inclusion Into the SIP, and Approve Supporting Budget Action, since the release of the Governing Board agenda package last week. Based on the comments received, this supplement has been prepared to provide additional information to the Governing Board and the public.

This supplement does not involve any changes to Proposed Rule 2305 or Proposed Rule 316. *See*, Health and Safety Code section 40726. Instead, the first supplement is a clarification to the WAIRE Implementation Guidelines to specifically identify a type of action that may be permissible in a Custom WAIRE Plan. The remaining two supplements provide clarifying responses to issues raised in comment letters received on May 4, 2021 from Airlines for America and the law firm of Holland & Knight, representing the California Trucking Association (letters attached). An agency may choose to provide written responses to comments provided outside of the public comment period even though written responses are not required. *See*, e.g., 14 Cal. Code Regs. section 15088(a).

Supplement Number One-Clarification to the WAIRE Mitigation Plan Guidelines [Agenda Item No. 27, Attachment I, Staff Report, Appendix A, page 103, second paragraph, add:

"A Custom WAIRE Plan allows for local hire to be counted as points towards compliance with the rule by reducing employee commute emissions. Use of a local state certified apprenticeship program or a skilled and trained workforce with a local hire component can help demonstrate those emission reductions."

Supplement Number Two-Response to Letter from Airlines for America, dated May 4, 2021 (Attachment A)

I. PR 2305 is not preempted by federal law.

A. PR 2305 is not preempted by the federal Clean Air Act.

The letter makes several arguments that PR 2305 is preempted by the federal Clean Air Act ("CAA" or "Act"). As explained previously in our responses to the California Trucking Association letter of March 2, 2021 ("CTA Letter"), these arguments lack merit.

First, the letter suggests that PR 2305 is preempted by the provisions relating to indirect source regulation ("ISR") in CAA section 110. 42 U.S.C. § 7410(a)(5). It contends that section 110 preempts any ISR programs other than those applicable to new sources. This argument is

precluded by section 116 of the CAA, which expressly disclaims any preemption of state law beyond that effected by several enumerated sections of the Act. 42 U.S.C. § 7416. Except as specified in the enumerated sections, "nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution." *Id.* The enumerated sections do not include section 110.[1] The savings provision in section 116 thus makes clear that section 110 cannot preempt PR 2305.

Even putting aside section 116, the ISR provisions in section 110 were clearly not intended to preempt state regulation of indirect sources. The language in section 110(a)(5) was adopted as part of the 1977 Clean Air Act Amendments to limit EPA's authority to require ISR in SIPs, not to restrict states' authority to develop their own programs under state law. The legislative history confirms this interpretation. *See* H.R. Rep. No. 95-294 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1077; H.R. Conf. Rep. No. 95-564, *reprinted in* 1977 U.S.C.C.A.N. 1502; *see also Nat'l Ass'n of Home Builders v. San Joaquin Valley Unified Air Pollution Control Dist.*, 627 F.3d 730, 737-38 (9th Cir. 2010) ("*NAHB*"). Indeed, the comment letter in section 2 emphasizes that the 1977 amendments were adopted to curtail EPA's authority to require ISR programs in SIPs in response to rules proposed by EPA to require review of new indirect sources. The reference to states' ability to develop their own programs was included merely to clarify that the statutory language was intended only to limit EPA's authority to *mandate* inclusion of ISR requirements in SIPs, not to limit the requirements that states could choose to adopt.[2] *See also NAHB*, 627 F.3d at 738 (the 1977 amendments "'left largely to the states' the matter of 'whether and how to regulate' indirect sources") (quoting *Sierra Club v. Larson*, 2 F.3d 462, 467 (1st Cir. 1993)).

Second, the letter contends that CAA section 209(e) preempts the proposed rule. The letter adopts the comments provided by CTA on section 209 preemption, to which District counsel has already responded. However, the CTA letter did not assert preemption under section 209(e), which addresses emission standards for off-road vehicles and engines, but rather argued that PR 2305 is preempted by section 209(a), which applies to on-road vehicles and engines. Regardless, the same analysis applies to both provisions, which, as noted in District counsel's response to the CTA Letter, are not meaningfully different. *See* Response to CTA Letter at 5 n.5. As explained in the response to the CTA Letter, both arguments are precluded by the Ninth

---

[1] Counsel for the District noted this in responding to the CTA Letter. *See* Response to CTA Letter at 3 n.2.

[2] The original version of section 110 adopted by the 1970 CAA amendments provided that SIPs must "include[] emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls." Pub. L. No. 91-604, § 4(a) (1970) (adding section 110(a)(2)(B)). Because this language would certainly include ISR programs of all kinds, the comment's position necessarily implies that Congress intended in 1977 to *strip* states of their preexisting authority to adopt their own regulation of existing indirect sources. The comment offers no explanation or support for that implausible proposition.

Circuit's decision in *NAHB*, which rejected a similar challenge to an ISR program adopted by the San Joaquin District.

Finally, the comment implies in a footnote (n. 22) that PR 2305 is preempted by both the CAA and state law because it allegedly regulates land use. But the comment does not explain how PR 2305 supposedly interferes with local land use regulation. It only obliquely states that "*to the extent* PR 2305 infringes on city and county land use authority" it would be preempted. (Emphasis added.) In fact, PR 2305 does nothing to interfere with local governments' ability allow, disallow, or control the use of land for warehouse purposes or dictate where warehouses may be built. Like every other air district rule, it merely limits emissions from particular sources—here, indirect sources. As described by the Supreme Court, "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *Cal. Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). PR 2305 neither mandates nor prohibits any particular use of land and thus does not interfere with land use authority.

B. PR 2305 is not preempted by the Airline Deregulation Act or the Federal Aviation Administration Authorization Act.

Airlines for America asserts that PR 2305 is preempted by the Airline Deregulation Act ("ADA") and the related Federal Aviation Administration Authorization Act ("FAAAA"). As explained in our prior responses to the CTA Letter, the Scopelitis, Garvin, Light, Hanson & Feary letter of April 22, 2021, the Los Angeles World Airports ("LAWA") letter of March 2, 2021, and the United Airlines letters of March 2, 2021 and April 23, 2021, these contentions lack merit.

The FAAAA preempts state and local laws "related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). While the FAAAA may preempt state laws "having a connection with, or reference to" prices, routes, or services, *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 370-71 (2008), state laws affecting prices, routes, or services "in only a 'tenuous, remote, or peripheral . . . manner' with no significant impact on Congress's deregulatory objectives" are not preempted. *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 960 (9th Cir. 2018) (quoting *Rowe*, 552 U.S. at 371); *see also Cal. Trucking Ass'n v. Bonta*, — F.3d —, 2021 WL 1656283, at *7 (9th Cir. Apr. 28, 2021) (stating that "the Supreme Court's decisions about F4A preemption . . . have tended to construe the F4A narrowly.").[3] Courts apply the same preemption analysis under the ADA that they apply under the FAAAA. *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1243 n.2 (9th Cir. 2021); *see also* 49 U.S.C. § 41713(b)(1) (providing that a State may not enact or enforce a rule "related to a price, route, or service of an air carrier."). While the FAAAA preemption provision includes the additional phrase "with respect to the transportation of property" that is not found in the ADA, the ADA nevertheless only preempts those regulations that would have a "significant impact" on

[3] The recent decision in *Bonta* also explains that the language from *American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009), cited in footnote 35 of the letter, is dictum, and the issue discussed was not on appeal in that case. 2021 WL 165283, at *11.

airline prices, routes, or services, and not those that affect routes, rates, or services in a tenuous or peripheral manner. *Id.* at 1243.

Airlines for America asserts that PR 2305 directly regulates carrier routes and services because the WAIRE Points Compliance Obligation ("WPCO") is determined based on the number of truck trips to warehouses, which the letter terms "routes," and the types and emissions of trucks making those trips, which the letter terms "services." As an initial matter, the WPCO does not directly regulate trucks or airlines. A warehouse's WPCO is based on the total emissions related to a warehouse facility. While it is calculated based on truck trips, those trips serve as a proxy for total warehouse emissions, because the number of truck visits is representative of the total activity at, and emissions associated with, a warehouse. Moreover, the WPCO does not require warehouse operators to take any specific action, let alone any action related to prices, routes, or services of airlines or motor carriers. Instead, operators may select their preferred compliance actions from a menu containing many options that are wholly unrelated to transportation (e.g., installing renewable energy systems on buildings, installing air filters for sensitive receptors, or adopting a custom plan).

Further, contrary to the letter's assertion, the WPCO does not directly regulate routes or services. The term "routes" in the FAAAA and ADA refers to "courses of travel." *Air Transport Ass'n of Am. v. City & Cty. of San Francisco* (9th Cir. 2001) 266 F.3d 1064, 1071. Neither the WPCO specifically nor PR 2305 as a whole regulates courses of travel—neither binds any airline or motor carrier to a particular route or makes a specific route necessary. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 649 (9th Cir. 2014). Similarly, the types of trucks used and their emissions do not constitute "services." Thus, for example, even a direct regulation of emissions-control equipment in trucks is not preempted by the FAAAA. *See Cal. Dump Truck Owners Ass'n v. Nichols*, No. 2:11-cv-00384, 2012 WL 273162 at *4-8 (E.D. Cal. Jan. 30, 2012); *see also Bedoya v. Am. Eagle Express*, 914 F.3d 812, 821 (explaining that "[t]he FAAAA's focus on prices, routes, and service[s] shows that the statute is concerned with the industry's production outputs," and not "resource inputs," including "labor, capital, and technology, which may be regulated by various laws."); *S.C. Johnson & Son, Inc. v. Transp. Corp. of Am., Inc.*, 697 F.3d 544, 558 (7th Cir. 2012) (same).

The letter next asserts that PR 2305's requirement that warehouse operators tally truck trips to facilitate the WPCO calculation requires motor and air carriers to adopt a new system of services similar to that required in the regulation held preempted in *Rowe*. Here, too, the comment mistakes the scope of the term "services." For example, in *Rowe*, the preempted law required carriers to offer a new "recipient-verification service" that obliged them to verify the age and identity of individuals receiving shipped tobacco products, 552 U.S. at 368, which presumably benefitted customers by making it less likely that tobacco products would fall into the hands of minors. Here, however, unlike the regulation in *Rowe* that effectively obligated motor carriers to offer new services, the requirement to tally truck trips does not oblige motor carriers to offer any new service or alter any existing service—it merely requires warehouse operators to count truck arrivals. This requirement has nothing to do with the services a motor carrier offers to a customer.

The letter also asserts that PR 2305 directly regulates cargo services by establishing applicability thresholds based on warehouse size. The letter, however, does not provide any

explanation as to how excluding warehouses below a certain capacity bears any relation to the prices, routes, or services of motor carriers or airlines.

The letter next argues that the principle in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978)—that an ordinance with an alternative compliance option that would be preempted if applied independently is not preempted where it is accompanied by a non-preempted alternative—does not apply. The letter contends that this principle does not apply to PR 2305 because the WPCO effectively compels warehouse operators to reduce the number of truck trips or to switch to lower-emissions vehicles. As stated above, however, the WPCO itself does not require warehouse operators to take any specific action—it is merely a calculation of the warehouse's effective emissions. And the compliance options available include actions wholly unrelated to transportation. The principle in *Ray* therefore applies here.

The letter next asserts that the mitigation fee compliance option cannot save PR 2305 from preemption because it is the only option available to warehouse operators that do not operate their own fleet of trucks and cannot purchase lower-emissions vehicles. This assertion is incorrect. First, the mitigation fee option is not needed to "save" PR 2305 from preemption because the proposed rule is not preempted, as explained above. Second, the mitigation fee option is not the only available option for warehouse operators that do not operate their own fleet of trucks. Warehouse operators in that position may, for example, install renewable energy systems, install charging equipment, install air filters for sensitive receptors, or contract with motor carriers using ZE or NZE vehicles, or they may develop their own custom compliance plans. As noted above, many of these options have nothing to do with transportation by motor carriers or airlines, and no single option is required.

Finally, the letter asserts in two footnotes (numbers 36 and 45, respectively), with no analysis, that PR 2305 is preempted by two additional statutes. These footnotes are incorrect. First, PR 2305 is not preempted by the Anti-Head Tax Act, 49 U.S.C. § 40116, because the mitigation fee is not required, nor is it a direct head tax or a fee on the sale of air transportation. *See Alaska Airlines, Inc. v. Dept. of Food & Ag.*, 33 Cal. App. 4th 506, 513-14 (1995). Second, the letter asserts that PR 2305 is preempted by the Federal Aviation Act of 1958 "insofar as it interferes with the FAA's exclusive jurisdiction over aviation, including the movement and/or operation of aircraft." PR 2305 does not interfere with the movement or operation of aircraft and thus is not preempted by the Federal Aviation Act of 1958.

II. The District has authority to regulate emissions associated with existing warehouses.

The comment also contends that the District lacks authority to adopt an ISR program that covers existing, as opposed to new, sources. District counsel previously addressed this argument in detail in response to the CTA Letter. *See* Response to CTA Letter at 1-4.

Indeed, for many years, the District has implemented ISR for large employers, Rule 2202, which applies to existing sources and requires the source to select from several options, including reducing commute trips, reducing emissions through other projects, or paying an air quality improvement fee, which is used to obtain emission reductions.

Further, the comment's characterization of Health and Safety Code ("HSC") section 40440(b)(3) is simply incorrect. That section imposes a mandate; it does not limit authority. It requires the District to provide for "indirect source controls in those areas of the south coast district in which there are high-level, localized concentrations of pollutants or with respect to any new source which will have a significant effect on air quality in the South Coast Air Basin." Only the second half of the sentence refers to new sources; the first half refers to all sources, whether or not new, demonstrating that "indirect source controls" are not inherently limited to new sources.

Moreover, neither the comment, the CTA Letter, or any other comments received by the District have explained *why* the Legislature would supposedly prohibit the District from applying ISR to existing sources. The District routinely regulates a wide variety of both new and existing sources. Indeed, section 40440(b) demonstrates that the District's regulatory authority under section 40440(a) fully extends to existing sources, as it mandates "the use of best available retrofit control technology for existing sources." HSC § 40440(b)(1); *see also Am. Coatings Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 54 Cal. 4th 446 (2012) (upholding the District's regulation of emissions from coatings as an existing source under section 40440(b)(1)). Accordingly, in the absence of a prohibition or limitation on the District's regulation of existing sources, the District may regulate such sources. As explained in response to the CTA Letter, neither section 40716 nor section 40440(b)(3) imposes such a limitation.

The comment again emphasizes the ISR provisions in CAA section 110. As noted in response to the CTA Letter, CAA section 110 is irrelevant to the question whether the District has statutory authority to adopt PR 2305. The District's authority derives from state, not federal, law. Section 110 is relevant only insofar as it *preempts* the South Coast AQMD's otherwise existing authority. As explained above and in response to the CTA Letter, section 110 does not preempt any state law. The comment does not explain how section 110 could be relevant beyond the context of preemption. Accordingly, the comment's reliance on section 110 is misplaced.[4]

Supplement Number Three-Response to Letter from Holland & Knight Representing the California Trucking Association, dated May 4, 2021 (Attachment B)

I. The South Coast AQMD has authority to regulate emissions associated with existing warehouses.

The comment argues again that the District lacks authority to adopt ISRs for existing indirect sources. As explained above in response to the Airlines letter and previously in response to the previous CTA Letter, this is incorrect. The new letter largely reiterates arguments made in CTA's prior letter.

The comment argues that the District lacks authority to regulate existing indirect sources because the HSC includes no provision that specifically refers to "existing indirect sources." As

[4] The comment letter submitted by the California Air Resources Board similarly concludes that the CAA does not restrict the District's authority to adopt ISR for existing sources.

noted in response to CTA's prior letter that there is no principle of law that requires such specific authorization. The comment does not and cannot grapple with the point made in the prior responses that the Legislature also did not specifically enumerate the vast number of other sources that the District regulates, such as lead smelters, pharmaceutical manufacturing facilities, or fluidized catalytic cracking units. The letter fails to explain why a specific authorization is not required for those sources but should be required for regulation of existing indirect sources. Regulation of all of these sources is authorized by the several provisions expressly granting rulemaking authority to the District in furtherance of attaining state and federal air quality standards.

The letter contends that the rule is outside the District's "implied authority." But the rule is authorized by the District's ample express authority provided by the statutory sections cited in the prior responses. No authority need be implied. Again, the Legislature was not obligated to specifically authorize regulation for each type of source that the District may regulate.

The letter contends that the phrase "indirect source program" in the HSC must be given the same meaning as that phrase is given by the ISR provisions in federal CAA section 110. The glaring defect in this argument is that the HSC does not use that phrase at all. Rather, in section 40716 it refers to "regulations to . . . [¶] [r]educe or mitigate emissions from indirect and areawide sources of air pollution" and in section 40440(b)(3) it refers to "indirect source controls." The only commonality between these provisions and section 110 are the words "indirect source." That phrase is defined in CAA section 110 *without* any limitation to new or modified sources, and in fact it expressly includes existing sources:

> [T]he term 'indirect source' means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii)), including regulation of *existing* off-street parking but such term does not include new or existing on-street parking.

42 U.S.C. § 7410(a)(5)(C) (emphasis added). Accordingly, if section 110 provides a guide to interpretation of the HSC, it suggests that the state law should *not* be read as precluding regulation of existing indirect sources.

Further, as explained above in response to the Airlines letter, the implication that section 110 should be read as a limit on the scope of authority under California law fundamentally mistakes the purpose of the ISR provisions in section 110. They were adopted to limit EPA's authority to compel states to include ISR requirements in their SIPs. The letter fails to provide legislative history or other indicia of legislative intent to support the notion that the California Legislature intended to incorporate similar limitations on the otherwise broad authority of air districts to regulate indirect sources.

II. PR 2305 is not preempted by federal law.

The letter again contends that PR 2305 is preempted under CAA section 209 because it is allegedly a "purchase mandate." This is incorrect, as explained in the response to the prior CTA

Letter, and was explicitly rejected by the Ninth Circuit in its decision upholding the San Joaquin ISR program in *NAHB. See NAHB*, 627 F.3d at 735-36. Nothing in the current letter changes that analysis.

The letter repeats the contention from the prior letter that the San Joaquin ISR truly regulated total site emissions whereas PR 2305 is supposedly limited to truck emissions. Neither is true. The portion of the San Joaquin program challenged in *NAHB* was limited to emissions from construction equipment. Direct regulation of those emissions would have been preempted, and yet the court upheld the program because it involved regulation of an *indirect* source. *See* Response to CTA Letter at 6. The court upheld the program even though "NAHB correctly observe[d] that Rule 9510 is ultimately directed at emissions that come from construction equipment." 627 F.3d at 736. Moreover, as noted in the prior responses, PR 2305 does not regulate truck emissions. Truck trips are used to establish the WPCO for warehouses as a proxy for total facility emissions. Response to CTA Letter at 6. The new letter emphasizes that the WPCO calculation takes into consideration the emissions associated with those truck trips, but fails to explain how that fact demonstrates that those weighted truck trips are not representative of total facility emissions. The District has not denied that the majority of emissions associated with warehouse operations are emissions from truck trips. But that does not convert the rule into an emission standard preempted by section 209, just as the fact that the San Joaquin rule was "ultimately directed at emissions that come from construction equipment" did not cause it to be a preempted emission standard for construction equipment.

The letter further argues that *NAHB* does not control here because the San Joaquin program involved regulation of new, rather than existing, indirect sources. The letter fails to explain how that distinction could be relevant for purposes of section 209 preemption, which does not address indirect sources. Nor does *NAHB* rely in any respect on the fact that the San Joaquin program involved new construction as opposed to existing sources.

But more fundamentally, the letter misconstrues the indirect source provisions in section 110. As noted above, those provisions were adopted to restrict *EPA's ability* to implement rules that it had proposed which would have required states to undertake review of new indirect sources. If the letter's interpretation of section 110 were correct, EPA would be prohibited from requiring states to include in their SIPs ISR programs for new sources, but would be *entirely free* to require states to include such programs to regulate existing sources. If it were not obvious, the legislative history confirms that this was not Congress's intent: "An indirect source review program is one which provides for the review of new, *existing* or modified indirect sources." H.R. Conf. Rep. 95-564, at 126 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1502, 1507 (emphasis added). Because section 110's ISR provisions are not limited to new sources, they cannot provide a basis for treating control of new indirect sources as preserved from preemption but control of existing indirect sources as preempted.

III. PR 2305 can be included in the SIP.

The letter also makes a new argument that PR 2305 cannot be included in the SIP because, supposedly, only ISR programs that target new sources can be included in the SIP. As just noted, this is a misreading of the ISR provisions in section 110(a)(5). But moreover, it is inconsistent with the structure of section 110. Section 110 does not itemize the sorts of control

measures that states may include in their SIPs. Accordingly, a state need not point to some provision of that section as "authorizing" the inclusion of a measure in the SIP. Rather, the statute directs states to "include enforceable emission limitations *and other control measures, means, or techniques* (including economic incentives such as fees, marketable permits, and auctions of emissions rights), . . . as may be necessary or appropriate to meet the applicable requirements of this chapter." 42 U.S.C. § 7410(a)(2)(A) (emphasis added). It leaves the formulation of those "measures, means, or techniques" to the states; that is why they are called *state* implementation plans. As noted above, the ISR provisions were designed solely to restrict the authority of EPA to compel states to include ISR programs among those "measures, means, or techniques," not to limit a state's voluntary choice of such programs.[5]

Finally, the letter contends that the District views PR 2305 as authorized by CARB and EPA's approval of the MOB-3 control measure in the SIP. The District does not contend that approval of MOB-03 authorizes the rule. The authority for the rule comes from state law, as discussed above.

IV. The Project Description In The CEQA Analysis Is Not Deficient.

The EA's project description adequately described the proposed project, including the mitigation fee component. At page 2-17, the Draft EA explains what these mitigation fees could be used for: "Similar to the measures used to earn WAIRE Points, the mitigation program would implement measures such as subsidizing the purchase of NZE and ZE trucks and/or the installation of charging and fueling infrastructure for ZE trucks. The mitigation program would prioritize use of the mitigation fees in areas near the warehouses using this compliance option. Therefore, the environmental impacts associated with the mitigation program are similar to implementation of measures to earn WAIRE Points and are analyzed in this EA." See also Draft EA at page 2-5 (describing the mitigation fee and noting that it would "allow facilities to pay mitigation fees if other others are not chosen and apply collected funds to subsidize the purchase and use of ZE/NZE equipment or the installation of fueling/charging infrastructure"); Draft EA at page 2-6 (noting that the "Mitigation Fee" option was carried forward to PR 2305).

Because the mitigation fees would be used to implement measures similar to the other WAIRE Points compliance options, the Draft EA reasonably concluded that the environmental impacts would also be the same, i.e., if the South Coast AQMD uses mitigation fees to purchase new ZE trucks, the impacts will be the same as if a warehouse operator purchased new ZE trucks pursuant to the proposed rule.

California Unions for Reliable Energy v. Mojave Desert Air Quality Management District (2009) 178 Cal.App.4th 1225 (*CURE*) does not suggest otherwise. In that case, the air district adopted a road paving rule without conducting any environmental review. Thus, the court was not considering the adequacy of a project description, but rather whether there was substantial evidence to support the air district's conclusion that the project would "assure the maintenance,

[5] The letter also contends that the District will be unable to show that it has authority under state law to adopt PR 2305. That argument has been refuted above and in prior responses.

restoration, enhancement, or protection of the environment" and therefore would be exempt under CEQA. *Id*. at 1231.

The Draft EA did not omit analysis of the effects of the mitigation measures, but rather stated that the effects would be essentially the same as those of other WAIRE Points compliance options. Because the proposed rule allows warehouse operators to choose their compliance method, it is uncertain at this time how many would select the "mitigation fee" option. Moreover, although the mitigation fees must be expended on projects that achieve or facilitate reductions in emissions comparable to those associated with regulated warehouses, the specifics of the particular mitigation projects to be funded are presently unknown. As a result, it would be speculative to attempt any more detailed analysis of the effects of specific projects that may be funded with mitigation fees. See Friends of the Sierra Railroad v. Tuolumne Park and Recreation District (2007) 147 Cal.App.4th 643, 657-58 (CEQA review premature where no concrete plans for development had been proposed). The District will determine whether further CEQA compliance is required as it develops the WAIRE Mitigation Program that will govern the expenditure of mitigation fees.

Lastly, the EA did address the proposed project's indirect impacts to grid infrastructure, agricultural and biological resources, geology and hydrology, water supply, wastewater treatment, storm water drainage, energy, and solid waste services (see Section 4.2.3.2.5, *Impacts to Electricity Providers,* Section 4.3.5, *Operational Impacts in Excess of the Capacity of Local Landfills*, and Chapter 4.5, *Other Impact Areas)*. The indirect environmental analysis is discussed in Chapter 1.2.2, *Other CEQA Documents*, Chapter 4.0.1.5, *Indirect Impacts Associated with New Facility Construction*, and Chapter 4.5.1, *Indirect Impacts*, of the Draft EA. As stated in Response to Comments 1.9 and 1.10, these impacts were analyzed qualitatively, as the CARB ACT Regulation EA did, because it is impossible to determine at this time where the potential grid improvements and other new facilities will be located. Because the indirect impacts from projects funded by mitigation fees will be the same as those resulting from implementation of other compliance options, the draft EA did analyze the indirect impacts of actions funded by the mitigation fees.

V. Changes to the Proposed Rules Do Not Necessitate Recirculation Under CEQA

After the Draft EA was circulated for public review, and in response to comments received and stakeholder input, PR 2305 was modified in the following ways:

(a) A sunset provision was added, ending the proposed rule's requirements once state and federal air quality standards have been reached.

(b) "Low use" warehouse operators were exempted from compliance with the rule.

(c) NZE yard trucks that use renewable fuels were added as an allowable option under Custom WAIRE Plans.

(d) The compliance period was shifted by 6 months, starting January 1, 2022.

There were no changes made to PR 316.

None of these revisions requires recirculation of the EA pursuant to CEQA. See Pub. Res. Code § 21092.1; CEQA Guidelines § 15088.5. A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review … but before certification." CEQA Guidelines § 15088.5(a). "Significant new information" includes information disclosing (1) that a new significant environmental impact would result from the project or from a new mitigation measure; (2) there will be a substantial increase in the severity of an environmental impact unless new mitigation measures are adopted; (3) a feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it; or (4) the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. CEQA Guidelines § 15088.5(a).

CEQA does not require recirculation "unless the [EA] is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." CEQA Guidelines § 15088.5(a). Recirculation also is not required "where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." CEQA Guidelines § 15088.5(b).

The minor changes to the proposed rule would not result in significant new impacts, nor in a substantial increase in the severity of an impact already identified. Including a sunset provision would reduce the potential environmental impacts of the proposed rule by eliminating all compliance obligations after the standards are achieved. "Low use" operators are those with a WPCO score of less than 10, meaning they receive approximately two Class 8 truck visits/day. There are not expected to be many "low use" warehouses. Exempting them from the rule would reduce the adverse environmental impacts of the proposed project because the exempt facilities would not be required to implement any compliance options, such as constructing new charging stations. The "low use" exemption could reduce the benefits of the proposed rule, but any reduction in benefit would be negligible, because there are not expected to be many "low use" warehouses and their compliance obligations would have been small to begin with. Similarly, including a sunset provision could reduce the benefits of the proposed rule, but the sunset provision is triggered only when state and federal air quality standards have been met and the need for the project benefits has therefore been reduced or eliminated. Including NZE yard trucks under the Custom WAIRE Plans could decrease air quality and GHG benefits when compared with allowing only ZE yard trucks as a compliance option, but would still result in an air quality and GHG benefit with respect to baseline conditions. Additionally, allowing NZE yard trucks would also lessen the impacts of battery disposal associated with ZE yard trucks. Lastly, shifting the compliance period would result in the same impacts occurring at a later date.

The Final EA reflects revisions, clarifications, and corrections to the Draft EA as a result of changes to the proposed rule language subsequent to the public review and comment period.

South Coast AQMD staff has reviewed the modifications to PR 2305 and PR 316 and has updated the CEQA analysis in the Final EA accordingly.

Airlines for America®

We Connect the World

May 4, 2021

submitted electronically to:
South Coast Air Quality Management District
Clerk of the Boards: cob@aqmd.gov
Mr. Victor Juan: vjuan@aqmd.gov

Re: Comments on Proposed Rule (PR) 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program and PR 316 – Fees for Rule 2305

On behalf of our members, Airlines for America® ("A4A")[1] thanks the South Coast Air Quality Management District ("AQMD" or "District") for providing this opportunity to comment on its Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions ("WAIRE") Program ("PR 2305") and PR 316 – Fees for Rule 2305 ("PR 316" or "Proposed Fees Rule"), which will be the subject of a public hearing before the District Governing Board to consider adoption of the proposed rules on May 7, 2021.

As an initial matter, A4A and our members want to commend the District Staff – particularly Ian McMillian – for their efforts to engage with stakeholders and to listen to and address concerns with the proposed rules. Specifically, in our view a number of issues in the original draft of PR 2305 highlighted the need to clarify the intended scope of the WAIRE program and particular requirements. To their credit, Staff worked very hard to engage stakeholders to ensure they understood these issues and provide clarifying language. As a result, a number of potential practical issues have been addressed, obviating the need to comment here.[2]

We also want to emphasize at the outset that A4A and its members fully support the District's efforts to achieve National Ambient Air Quality Standards ("NAAQS") and recognize the unique challenges the District faces as an extreme nonattainment area for the federal NAAQS Ozone standards and serious nonattainment area for the federal fine Particulate Matter (PM 2.5) standards. A4A and our members have a long history of working with the District to address this pressing concern and remain committed to doing so. We do, however, have very significant remaining concerns regarding PR 2305 and PR 316. In particular, as detailed below, in our view the District (and the State) does not have authority to impose the Indirect Source Rule as a general matter and, specifically, does not have the authority to impose such a rule on facilities located at airports or apply them to air carriers. Accordingly, we oppose these rules and respectfully urge the Board to decline to adopt them.

---

[1] A4A is the principal trade and service organization of the U.S. airline industry. A4A members are Alaska Airlines, Inc.; American Airlines Group; Atlas Air, Inc.; Delta Air Lines; Federal Express Corp.; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines Holdings, Inc.; and United Parcel Service Co. Air Canada is an associate member.

[2] For example, addressing our concern that as originally drafted PR 2305 § (d)(7)(C) could be read to apply to warehouse owners and operators even if they were not required to earn WAIRE points under § (d)(1), Staff has added language clarifying § (d)(7)(C) only applies to entities that are required to earn WAIRE points.

BACKGROUND

Again, A4A and its members fully support the District's efforts to attain the NAAQS and ensure public health. Commercial airlines are dedicated to providing air transportation services to the public that, above all, ensure the safety of our passengers, crew and the larger public. Accordingly, we view responsible environmental stewardship as essential to our business and have embraced the need to work proactively to address environmental concerns and achieve concomitant public health objectives.

Indeed, we are proud of the role we took in working with the District to implement measures in accordance with its 2016 Air Quality Management Plan ("2016 AQMP") to reduce emissions of oxides of nitrogen ("NOx") associated with aviation activity. Specifically, we worked for many months with our airport partners and the District to develop voluntary measures that were eventually incorporated into five memoranda of understanding ("MOUs") between each of the South Coast airports[3] and the District. All of these MOUs included a voluntary measure to achieve reductions in emissions of ozone precursors from airport ground support equipment ("GSE") more rapidly than would otherwise be achieved under State regulations. As reported to the District's Mobile Source Committee at its January 22nd meeting this year, despite the extraordinary challenges airports and airlines have faced in the wake of the COVID-19 pandemic, together with our airport partners we have successfully implemented this voluntary program and achieved real NOx reductions that have brought the District closer to attainment.

Our effort to work with the District to ensure the viability and effectiveness of its 2016 AQMP is not unique. A4A and our members, despite continuing concerns regarding the State's authority to adopt and enforce such regulations, have worked for almost two decades with the California Air Resources Board ("CARB") to develop reasonable regulations to address GSE emissions. These rules include the Large-Spark Ignition, In-Use Off-Road Diesel, Portable Equipment Registration Program and Air Toxics Control Measure for Diesel Particulate Matter from Portable Engines. In addition, A4A and its members have committed to working with CARB to develop a new "Zero-Emission GSE" regulation consistent with the State's Mobile Source Strategy. We also continue our long-standing record of working with the District (and the State) to adopt reasonable measures to achieve attainment of the Ozone NAAQS as it develops its 2022 AQMP through active participation in and support of its Aviation Working Group.

In addition, A4A and our members have committed the time and resources needed to support the development of economically reasonable, technologically feasible and environmentally beneficial international standards for aircraft engines and aircraft governing noise, NOx, PM, and CO_2 (carbon dioxide), through the International Civil Aviation Organization / Committee on Aviation Environmental Protection ("ICAO/CAEP"). Last year, the ICAO Council adopted emissions standards for non-volatile particulate matter ("nvPM") for both mass and number applicable to both in-production and new type aircraft engines. This culminated a years-long process to supersede ICAO's smoke standard and set the foundation for continued progress in the future. A4A strongly supports the incorporation of the nvPM standards into U.S. law. In addition, A4A worked for years in the ICAO/CAEP process to support development of a CO_2 Certification Standard for aircraft which ICAO adopted in 2017 and strongly supported the U.S. Environmental Protection Agency's ("EPA") recent adoption of GHG emissions standards for

[3] These airports are: Hollywood-Burbank Airport (BUR), Long Beach International Airport (LGB), Los Angeles International Airport (LAX), Ontario International Airport (ONT), and John Wayne Santa Ana Airport (SNA).

aircraft engines pursuant to Section 231 of the federal Clean Air Act ("CAA")[4] that are equivalent to the ICAO CO_2 Certification Standard. ICAO/CAEP has focused a great deal of effort on NOx and we have strongly supported this effort – as is noted in the *Draft 2020 Mobile Source Strategy*, significant progress has been made and as a result of successive, increasingly stringent NOx standards, aircraft engines produced today must be about 50% cleaner than under the initial standard adopted in 1997.[5]

The COVID-19 health crisis afflicting the world has, in turn, crippled our nation's economy, hitting the aviation sector particularly hard. In the most recent week for which data is available, nationally, U.S. passenger volumes were down 43% from year-ago levels, with passenger airline departures down 32%.[6] The effect of the pandemic on aviation activity at the five major commercial airports in the South Coast has been severe. Total commercial aircraft operations at these airports declined 53% in 2020 compared to 2019 and, although there has been some recovery in the region, total commercial carrier operations in the first quarter of 2021 are down 39% compared to the first quarter of 2019.[7] At LAX, in 2020 commercial operations plunged 57% from pre-pandemic levels[8]; operations have recovered only modestly in the first two months of 2021 and remain down 45% compared to pre-pandemic levels.[9] The decline in aircraft operations has resulted in a similar proportional decline in fuel consumption (and so, associated emissions). Despite the magnitude of the challenge ahead, we have every expectation that our sector will be critical to helping the economy revive and thrive, eventually returning it to pre-COVID levels. However, at present, we believe air passenger volumes are unlikely to return to pre-COVID levels before 2023.[10] Cargo activity has been a relative bright spot in the industry, with volumes up 9% in 2020 compared to 2019.[11] From an environmental perspective, it is also important to note that the pandemic has accelerated the retirement of less fuel-efficient aircraft – as many as 862 in the U.S. passenger airline fleet since the end of 2019.[12] As a result, when air transportation demand returns to pre-COVID levels, it will be served by more efficient aircraft fleets, thus very likely lowering associated emissions.

Our record demonstrates that our industry can grow and help the country, California and the South Coast Basin prosper even as we continue to improve our environmental performance. Before COVID-19 struck, U.S. airlines were transporting a record 2.5 million passengers and 58,000 tons of cargo per day, helping drive $1.7 trillion in annual economic activity and 10 million jobs. According to the Federal Aviation Administration ("FAA"), in 2016 aviation drove over 4% of the California's gross domestic product, providing over 1,164,000 jobs and $194

---

[4] 42 U.S.C. § 7521.

[5] CARB, *Revised Draft Mobile Source Strategy* (April 23, 2021) at 149.

[6] *See Impact of COVID-19 Updates*, Slides 14-15 (A4A; available here: https://www.airlines.org/dataset/impact-of-covid19-data-updates/#) (updated May 4, 2021).

[7] This data reflects air carrier and air taxi operations at the five major commercial airports in the South Coast: BUR, LAX, LGB, ONT and SNA. Source: The Operations Network, Airport Operations: Standard Report.

[8] Data compares air carrier and air taxi operations for April-December in 2019 and 2020; Data available here: https://www.lawa.org/lawa-investor-relations/statistics-for-lax/volume-of-air-traffic.

[9] Data compares air carrier and air taxi operations for January-February in 2020 and 2021.

[10] *Impact of COVID-19 Updates*, Slide 5.

[11] *Impact of COVID-19 Updates*, Slide 36.

[12] *Impact of COVID-19 Updates*, Slide 40.

billion in economic activity in the State.[13] Commercial airlines alone contributed over 141,000 jobs with a payroll of over $8.7 billion and drove $37.4 billion in economic activity.[14] At the same time, U.S. airlines have relentlessly pursued and implemented technology, operational and infrastructure measures to minimize our environmental impacts. In particular the U.S. airlines have been and remain keenly focused on fuel efficiency and GHG emissions savings. For the past several decades, the U.S. airlines have dramatically improved fuel efficiency and reduced GHG emissions by investing billions in fuel-saving aircraft and engines, innovative technologies like winglets (which improve aerodynamics) and cutting-edge route-optimization software. As a result, the U.S. airlines have improved their fuel efficiency over 135 percent since 1978, saving over 5 billion metric tons of CO_2, which is equivalent to taking more than 27 million cars off the road on average in each of those years. Taking a more recent snapshot, data from the Bureau of Transportation Statistics confirm that U.S. airlines improved their fuel- and CO_2-emissions efficiency by 40 percent between 2000 and 2019.

But the U.S. airlines are not stopping there. Since 2009, we have been active participants in a global aviation coalition that committed to 1.5 percent annual average fuel efficiency improvements through 2020, with goals to achieve carbon-neutral growth beginning in 2020 and a 50 percent net reduction in CO_2 emissions in 2050, relative to 2005 levels. On March 30, 2021, A4A and our carriers strengthened our commitment to address climate change by committing to net-zero carbon emissions by 2050, and pledging to work with the federal government, state and local governments, and other stakeholders to rapidly expand the production and deployment of sustainable aviation fuel ("SAF") so 2 billion gallons of cost-competitive SAF are available for U.S. aircraft operators in 2030. These new goals were adopted in the midst of the most severe economic crisis the commercial aviation sector has ever faced, demonstrating the strength of our commitment to the environment and depth of our recognition that environmentally responsible growth is essential to the vitality of our sector.

As we continue to recover from the current economic and social crisis induced by the COVID-19 virus, our commercial airlines look to the future with the belief that our sector will continue to thrive on the condition we continue to improve our environmental performance. It is in this spirit that we offer the comments below. We continue to unequivocally support progress towards attainment of the Ozone and PM NAAQS in the South Coast Air Basin, however, we cannot support these proposed regulations because they exceed the District's (and the State's) regulatory authority.

COMMENTS

1. The District's Authority to Adopt an Indirect Source Rule ("ISR") is Limited by the Federal CAA (42 U.S.C. § 7401 et seq.)

Congress adopted CAA Section 110(a)(5)(A),[15] as part of the Clean Air Act Amendments of 1977, reacting to strong opposition to U.S. EPA's attempts to impose controls on indirect

[13] FAA, *The Economic Impact of Civil Aviation on the U.S. Economy – State Supplement* (November 2020) at 35.

[14] *Id.*

[15] 42 U.S.C. § 7410(a)(5)(A).

sources. The provision prohibits U.S. EPA from requiring states to incorporate ISRs in their State Implementation Plans ("SIPs") but allows states to include an "indirect source program" in their SIPs.[16] However, this did not empower states to enact ISRs of <u>any</u> scope or effect whatever. Rather CAA Section 110(a)(5)(A) permits states to incorporate ISRs into their SIPs as long as those ISRs are consistent with limitations established by the CAA and other federal law.

The District itself recognizes its authority to promulgate this rule is limited by and subject to federal law, including the CAA. District staff affirms that the purpose of PR 2305 is to achieve reductions in NOx emissions that will contribute to its efforts to attain the Ozone and PM NAAQS, as required by the CAA. The Draft Staff Report acknowledges that the CAA requires the State to submit a SIP for nonattainment areas that do not meet NAAQS and PR 2305 is put forward to implement the SIP. The District is the entity required under State law to develop a plan to demonstrate compliance with NAAQS and, in March 2017, the District approved its 2016 AQMP, which was subsequently incorporated into the State SIP by CARB and approved by U.S. EPA in 2019. The 2016 AQMP included "MOB-03 – Emissions Reductions at Warehouse Distribution Centers," which called for a process to consider various strategies to achieve such reductions. Subsequently, in May 2018, the District Governing Board directed staff to develop an ISR applicable to warehouses, leading to PR 2305. In short, the central purpose of PR 2305 is to achieve compliance with the CAA. Indeed, District staff affirms:

> There are six key reasons why PR 2305 and PR 316 are needed. <u>*First and foremost*</u>, the SCAB region continues to experience ozone and fine particulate matter levels that exceed federal air quality standards. . . . NOx is the primary pollutant that needs to be reduced to meet federal air quality standards, and mobile sources associated with goods movement make up about 52% of all NOx emissions in the SCAB. Trucks are the largest source of NOx emissions in the air basin and also for the emissions associated with warehouses. Any diesel PM reductions brought about by PR 2305 and PR 316 will also help meet federal air quality standards for fine PM.[17]

In other words, the primary reason PR 2305 has been proposed for adoption is to induce reductions in NOx emissions – overwhelmingly from trucks – required to enable the District to attain the Ozone NAAQS. As stated in its legal analysis:

> By approving MOB-03 into the 2016 AQMP, the South Coast AQMD and CARB have committed to, and the U.S. EPA has authorized, the development [[18]] of an indirect source rule to achieve emission reductions from mobile sources attributed to warehouse activities, <u>*in order to assist attaining the federal ozone NAAQS in 2023 and 2031*</u>.[19]

In order for PR 2305 to achieve its objective (i.e., "assist attaining the federal ozone NAAQS") it will have to be submitted as a revision to the State SIP and approved by U.S. EPA. EPA has explicitly acknowledged that it cannot approve an ISR (or any other SIP measure) unless the District/State has demonstrated it has "legal authority to carry out SIPs and SIP revisions" and

---

[16] Importantly, Congress did not authorize states to promulgate ISRs applicable to airports and other "major federally assisted indirect sources" allocating that authority to EPA. CAA Section 110(a)(5)B).

[17] <u>*Second*</u> *Draft Report: Proposed Rule 2305 - Warehouse Indirect Source Rule - Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program and Proposed Rule 316 – Fees for Rule 2305* (April 2021) ("<u>*Second*</u> *Draft Report*") at 14 (emphasis added) (footnotes omitted).

[18] It is the <u>development</u> of the ISR that, at this stage, has been authorized by EPA. EPA has not considered and has <u>not</u> authorized the Warehouse ISR as proposed in PR 2305.

[19] <u>*Second*</u> *Draft Report* at 18.

such legal authority does not exist where a proposed ISR is preempted by federal law, including the CAA.[20]

A comment letter from the District's outside law firm contends "[t]he [federal Clean Air Act] is irrelevant to the District's authority to adopt the proposed rule" because "[t]he District's regulatory authority represents an exercise of the State's police power . . . as delegated by the Legislature; the CAA is not the source of the District's authority."[21] This analysis is inapt. Under the CAA, a State must always have underlying legal authority conferred by its Legislature to adopt an enforceable regulation in order for that regulation to be eligible for incorporation into a SIP. CAA Section 110(a)(2)(E) (SIP "shall . . . provide (i) necessary assurances that the State . . . will have adequate . . . authority under State (and as appropriate, local) law to carry out such implementation plan"). This provision, which conditions the authority of a state to adopt a SIP measure on obtaining the power to adopt an ISR from the *source* of that power (the Legislature) is itself a limitation on a state's authority to adopt an ISR and an affirmation that the CAA *limits* that power.[22] Indeed, it defies common sense to assert that the purpose of the ISR is to assist in achieving compliance with the CAA but whether the ISR itself complies with the CAA is "irrelevant." The District's lawyers concede the point by affirming the ISR "is expressly authorized by the CAA in Section 110(a)(5)."[23]

---

[20] *Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District – Final Rule*, 76 Fed. Reg. 26609, 26609-10 (May 9, 2011). *See also, Id.* at 26614 ("in reviewing SIP submissions, EPA's role is to approve State choices, *provided* that they meet the criteria of the Clean Air Act") (emphasis added).

[21] *Letter from Zinn et al to Bayron Gilchrist and Barbara Baird,* SCAMQD: *Responses to Comments Submitted by the California Trucking Association* (April 1, 2021) (hereinafter "Zinn Letter") at 2 (citations omitted) (emphasis added).

[22] Certainly, an exercise of the "State's police power" is subject to limitations imposed by federal law. *See City of Burbank v. Lockheed Air Terminal, Inc*., 411 U.S. 624 (1973) (exercise of police power preempted by federal law); *San Diego Unified Port District v. Giantruco*, 651 F.2d 1306, 1316 (9th Cir. 1981) (imposition of land use permit preempted by federal law; "The observation that a state has a power in no way implies any doubt about equally well-settled limits to that power, such as federal preemption"). In fact, state and federal law further limit the District's authority to promulgate ISRs by explicitly providing it may not encroach on the land use powers of cities and counties. The Clean Air Act Amendments of 1990 provide that "[n]othing in this Act constitutes an infringement on the existing authority *of counties and cities* to plan and control land use, and nothing in this Act provides or transfers authority over such land use." Pub. L. 101-549 § 131, U.S. Code Cong. & Admin. News (104 Stat.) 2399, 2689 (emphasis added). Section 40716(b) of the CA Health & Safety Code ("H&SC") incorporates the equivalent language into state law, providing that a *district's* authority, as set out in § 40716(a), cannot infringe on the land use authority of cities and counties. *See Att. Gen. Opin. 92-519* (1993*)* at 5 ("While subdivision (b) of section 40716 ensures that a regulatory program for indirect sources may legally coexist with the traditional land use planning and control prerogatives exercised by cities and counties . . . it also indicates an intent to uphold the authority of cities and counties to plan and control land use"). The California Legislature took pains to make it especially clear that the South Coast District's authority to promulgate indirect source rules is constrained and preempted by the land use authority vested in the State's cities and counties. Specifically, H&SC § 40440(b)(3) provides that the District's authority to promulgate indirect source rules is limited to those actions that are "[c]onsistent with Section 40414;" Section 40414 provides: "No provision of this chapter shall constitute an infringement on the existing authority of counties and cities to plan or control land use, and no provision of this chapter shall be interpreted as providing or transferring new authority over such land use to either the south coast district, the Southern California Association of Governments, or the state board." Thus, to the extent PR 2305 infringes on city and county land use authority, it is preempted by both the CAA and the CA H&SC. *See also, Guidance Document for Addressing Air Quality Issues in General Plans and Local Planning - A Reference for Local Governments Within the South Coast Air Quality Management District* at p. 1-13 (May 6, 2005) ("**Local governments have the flexibility to address air quality issues through ordinances, local circulation systems, transportation services, and land use. No other level of government has that authority, including the AQMD."**) (**bold** original; underlining added).

[23] Zinn Letter at 5. To be clear, we agree with both assertions in the Zinn Letter that (1) the CAA is not the source of state/district power to promulgate ISRs and (2) the CAA "authorizes" the exercise of that power to help attain NAAQS. Section 110(a)(5) "authorizes" states/district to promulgate ISRs, not in the sense that it creates the power for them to

California law also subjects the District's authority to adopt ISRs to the limitations imposed by state and federal law. Under California law, "[b]efore adopting, amending, or repealing a rule or regulation, the district board shall make findings of . . . *authority* . . . and *consistency* . . . ." H&SC § 40727(a) (emphasis added). H&SC Section 40727(b) defines "authority" to mean "a provision of law or of a state or federal regulation permits or requires the regional agency to adopt . . . the regulation"; "consistency" is defined to mean "that the regulation is in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or state or federal regulations." H&SC § 40440(a) repeats these limitations and specifically applies them to the District, providing that the "south coast district board shall adopt rules and regulations that carry out the plan and are not in conflict with state law and federal laws and rules and regulations." H&SC § 40440(b) makes clear these limitations apply to "indirect source rules." Just as CAA Section 110(a)(5) limits the District's authority to promulgate ISRs to those consistent with the CAA and other federal law, California law provides the District cannot adopt an ISR if it is "in conflict with or contradictory to" federal law and regulations.

2. PR 2305 Exceeds the District's Authority Because it Applies to Existing Warehouses

The CAA defines an "indirect source program" as a "the facility-by-facility review of indirect sources of air pollution" that includes "measures as are necessary to assure, or assist in assuring, that a *new or modified* indirect source will not attract mobile sources of pollution" that would cause or contribute to an exceedance of or prevent the maintenance of a NAAQS. CAA Section 110(a)(5)(D) (emphasis added). The history of the development of the "indirect source" concept in EPA's regulatory actions and the amendments of the CAA make clear that Section(a)(5)(D) means precisely what it says.

In 1973, the EPA Administrator declared it was his "judgment [that] it is necessary to review, and where necessary prevent, the *construction* of facilities which may result in increased emissions from motor vehicle activity or emissions from stationary sources that could cause or contribute to violation of [NAAQS]. Such facilities are generally designated 'complex sources.'"[24] EPA announced the Administrator would "require all States to adopt and submit to him a legally enforceable procedure for reviewing the impact of the *construction* and *modification* of a 'complex source' and for preventing the construction or modification of complex source where necessary to attain and maintain a national standard."[25] In a separate action taken that day, EPA issued an advance notice of proposed rulemaking stating the Administrator "has determined that it is necessary for State [implementation] plans to contain, at a minimum, procedures whereby the State can review *prior to construction or modification*, the location of sources of pollution and of other facilities which may cause an increase in air pollution because of activities associated with such facilities" and provided notice that the Administrator would

do so (that is done – if at all – under State law), but in the sense that it permits them to do so (subject to the CAA and other superseding federal law).

[24] 38 Fed. Reg. 6279 (March 8, 1973) (emphasis added). We also note that EPA understood the underlying power to regulate an indirect source – even if EPA were to require states/districts to do so under the CAA – must come from the States themselves. 38 Fed. Reg. 6279, 6280 ("States will be required to have the authority to disapprove the construction or modification [of indirect sources] . . . . States should begin now to determine their legal authority . . . and to obtain such authority where it is lacking.")

[25] *Id.* (emphasis added).

propose regulations requiring "States . . . to have legally enforceable procedures reviewing *prior to construction or modification*, the location of such facilities and for preventing such construction or modification where it would interfere with the attainment or maintenance of a national standard."[26] Later that year, EPA issuing a notice of proposed new "guidelines" (in the form of proposed amendments to its regulations), explaining:

> It is generally recognized, however that not only the types of facilities generally known as stationary sources but also facilities such as airports, amusement parks, highways, shopping centers and sport complexes also affect or may affect air quality by indirect means, primarily by means of the mobile source activity associated with them. . . . [This] proposal . . . would require, with respect not only with respect to 'stationary sources' in the traditional sense, but also certain other types of facilities, as assessment of both direct and indirect effects on air quality *prior* to their *construction* . . .[27]

EPA finalized these "guidelines" (in the form of final amendments to its regulations) referring to them as "requirements for the review of the indirect impact of *new or modified* sources, i.e., the impact arising from associated mobile source activity," explaining that "[i]n the Administrator's judgment, indirect impact of *new or modified* sources" was necessary to attaining NAAQS.[28] In February the following year, EPA promulgated final regulations requiring "Review of Indirect Sources" in which it explained that the regulations expanded new source review procedures "to cover not only stationary sources but 'complex' or 'indirect' sources of air pollution – facilities which do not themselves emit pollutants, but which attract increased motor vehicle activity . . . ."[29] These regulations were "applicable only to facilities commencing construction on or after January 1, 1975."[30] In the face of intense opposition from state and local governments over EPA's assertion of its authority to regulate "indirect sources" the Agency suspended its "Review of Indirect Sources" regulations and, as part of the Clean Air Act Amendments of 1977, Congress enacted CAA Section 110(a)(5)(A) explicitly denying EPA the authority to require states to include "indirect source review programs" in their SIPs but permitting them to do so. In doing so, Congress made clear in CAA Section 110(a)(5)(D) that such programs, which – as is clear from the extensive history above – had *never* included existing indirect sources, were to be defined as limited to those including "measures as are necessary to assure, or assist in assuring, that a *new or modified* indirect source" would not cause or contribute to exceedance of a NAAQS.[31]

Accordingly, it is clear that the CAA limits any ISR adopted pursuant to the CAA to new and modified indirect sources. It is also clear under California law that the District has authority to regulate only "new sources" using an indirect source rule. CA H&SC § 40440(b) provides (emphasis added) that the District must "provide for indirect source controls in those areas of the south coast district in which there are high-level, localized concentrations of pollutants or

---

[26] 38 Fed. Reg. 6290, 6291 (March 8, 1973) (emphasis added).

[27] 38 Fed. Reg. 9599 (April 18, 1973) (emphasis added).

[28] 38 Fed. Reg. 15834, 15835 (June 18, 1973) (emphasis added).

[29] 39 Fed. Reg. 7270 (Feb. 25, 1974).

[30] 39 Fed. Reg. 7270, 7272 (Feb. 25, 1974).

[31] Pub. L. 95-95 § 108(e), 1977 U.S. Code Cong. & Admin. News (91 Stat.) 685, 695-696 (emphasis added). *See NRDC, Inc., v. USEPA*, 725 F.2d 761, 765 (DC Cir., 1984) ("Congress . . . was not so accepting of EPA's actions. Congress reacted negatively and immediately to EPA's attempt to regulate indirect sources of pollution . . . [and] amended the Act to make clear that states could not be required, though they were permitted, to regulate indirect sources of pollution.").

with respect to any new source that will have a significant effect on air quality in the South Coast Air Basin." Because PR 2305 applies to existing warehouses it plainly exceeds the District's (and the State's) authority.[32]

In addition, the CAA expressly provides that EPA "shall have" the authority to establish "indirect source review programs which apply only to federally assisted highways, *airports*, and other major federally assisted indirect sources and federally owned or operated indirect sources." CAA Section 110(a)(5)(B). Thus, any ISR promulgated by the District – whether otherwise consistent with the CAA or other federal law – cannot regulate on-airport facilities. As such, PR 2305 also exceeds the District's jurisdiction insofar as it applies to on-airport facilities.

3. PR 2305 is Preempted by Federal Law

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, state laws that "interfere with, or are contrary to," federal law are invalid and preempted. *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824). As pointed out above, the District's proposed ISR (PR 2305) "represents an exercise of the State's police power" and as such is subject to limitation by Congress' exercise of its superseding power through federal law.

Federal legislation may expressly preempt state law, or it may do so implicitly in at least two ways – where Congress intends federal law to "'occupy the field,'" and where state law conflicts with federal law. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Conflict preemption exists "where it is impossible for a private party to comply with both state and federal law," or where the challenged law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 372-73 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). "'[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.'" *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (citation and internal quotation marks omitted); *Cippollone v. Liggett Group, Inc.* 505 U.S. 504, 516 (1992) (purpose of Congress is "ultimate touchstone" of preemption analysis).

As discussed above, CAA Section 110(a)(5)(D) is an example of such a limitation, preempting any regulation of existing (as opposed to "new or modified") sources. As explained in footnote 22 above, to the extent the District proposed Warehouse ISR infringes on city and county land

---

[32] The Attorney General Opinion cited by staff in the *Second Draft Report* is not contrary. In fact, the Opinion supports the conclusion that an ISR adopted under the CAA may only apply to new or modified sources. That opinion asserts "a district's regulations may require the developer of an indirect source to submit the plans to the district for review and comment prior to the issuance of a permit for construction by a city or county. A district may also require the owner of an indirect source to adopt reasonable post-construction measures to mitigate particular indirect effects of the facility's operation." Atty. Gen. Opinion 92-519 at 6. This language nowhere asserts that an "indirect source" includes an existing indirect source or that an "indirect source review program" may – contrary to the express language of CAA Section 110(a)(5)(D) – include measures other than those "necessary to assure . . . that a new or modified source will not attract mobile sources of air pollution." In fact, the Opinion clearly affirms "[t]he federal administrative regulation, referred to as 'indirect source review,' entailed requiring such facilities to obtain federally-controlled permits *before construction or significant modification*" and this led to Congress to enact "'the 1977 amendments to the Clean Air Act'" pertaining to "'[indirect source reviews].'" Atty. Gen. Opinion 92-519 at 6 (emphasis added) (citation omitted). To be valid – and consistent with the Opinion's understanding of the origin of "indirect source reviews" – the statement that district regulations may require owners of indirect sources to adopt post-construction measures to mitigate emissions must be interpreted to mean such measures can only be applied prospectively to entities that will operate indirect sources that are either newly constructed or after their modification.

use authority, it also is preempted by both the CAA and the CA H&SC. Below we address the preemptive effect of other federal statutes.

a. PR 2305 is Preempted by the CAA Section 209(e)

The opinion of the United States Court of Appeals for the Ninth Circuit in *National Assn. of Home Builders v San Joaquin Valley Unified Air Pollution Control Dist.* (2010) 627 F.3d 730 ("*NAHB*") makes clear that an indirect source rule may be subject to preemption by CAA Section 209(e).[33] The legal and factual arguments as to whether PR 2305 is preempted by Section 209(e) have been set forth at length in the comments of Holland & Knight submitted on behalf of the California Trucking Association and the District's response (the Zinn Letter). We agree with the analysis presented in the Holland & Knight comment letter that Proposed 2305 effectively creates a purchase mandate that is preempted by CAA Section 209(e). *Engine Manufacturers Assn v. South Coast Air Quality Management Dist.* (2004) 541 U.S. 246, 252, 255 ("*EMA*").[34]

b. PR 2305 is Preempted by Other Federal Statutes

Under the Airline Deregulation Act ("ADA") "a state [or] political subdivision of a state . . . may not enact or enforce a law, regulation, or other provision having the force or effect of law related to a price, route, or service of an air carrier . . . ." 49 U.S.C. § 41713(b)(1). The Federal Aviation and Administration Authorization Act ("FAAAA") contains similar language precluding states and local governmental entities from "enact[ing] or enforce[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier ... with respect to the transportation of property." 49 U.S.C. § 14501(c)(1). The "FAAAA" language is "borrowed language from the Airline Deregulation Act of 1978" (*Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 368 (2008)) and "analysis from . . . Airline Deregulation Act cases" is viewed as "instructive for our FAAAA analysis as well." *Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 644 (9th Cir. 1974). However, "the FAAAA formulation contains one conspicuous alteration — the addition of the words 'with respect to the transportation of property.' That phrase massively limits the scope of preemption ordered by the FAAAA." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 261 (2013) (internal quotation and citation omitted).

---

[33] While we agree with the *NAHB* court in this aspect of its opinion, we strongly disagree with its fundamental analysis of the preemption issue. In short, the *NAHB* court appears to conclude that as long as a state/district adopts an ISR that "targets emissions, and requires emissions reductions, from [an indirect source] as a whole" [at 739] it may effectively pierce Section 209(e). The court's observations that "Section110(a)(5) . . . is a grant of power to the states," [at 739, n.8], "[i]t would be odd if the Act took away from the states with one hand what it granted with the other" and "[p]reemption would be an especially strange result given the history of the Act" [at 737] reflect a fundamental misunderstanding of the effect of CAA Section 110(a)(5) and the history of the Act. As explained at length above, CAA Section 110(a)(5) did not "grant" the underlying power upon which states/districts must rely to promulgate ISRs; that power is granted by a state Legislature. Because the source of a district's/state's power to adopt an ISR is state law it remains subject to preemption by federal law. In short, federal preemption is not an "odd" effect or a "strange result" of CAA Section 110(a)(5): it is carefully preserved in the statute.

[34] *See also* 76 Fed. Reg. 26609, 26611 (May 9, 2011) ("an ISR rule otherwise authorized under CAA section 110(a)(5) . . . could be preempted if it creates incentives so onerous as to be in effect a purchase mandate"); US EPA Region IX Air Division*, Technical Support Document for EPA's Rulemaking for the California State Implementation Plan as submitted by the California Air Resources Board Regarding San Joaquin Valley Unified Air Pollution Control District Rule 9510, 'Indirect Source Review (ISR)'* at 12 ("If the in-use control either 1) acted to compel the manufacturer or user of a nonroad engine to change the emission control design or equipment of the nonroad engine, or 2) created incentives so onerous as to be in effect a mandate to manufacture or use one engine over another, the in-use control could fall within the scope of preemption under section 209").

In *Morales v. TWA*, 504 U.S. 374, 383, 384 (1992), the Supreme Court explained that the "related to" phrase "express[es] a broad pre-emptive purpose" and means that a state law that "'has a connection with, or reference to,'" a carrier's price, route, or service is preempted. In *Morales* the Court held a state law may be preempted even if its effect on prices, routes or services "is only indirect" (*Id.* at 386), observing that where a state law affects airline prices "in too tenuous, remote, or peripheral a manner" it might not be preempted (*Id*. at 390). In *Rowe* the Court made clear "less direct" state laws – even one that "tells *shippers* what to choose rather than *carriers* what to do" – are preempted where the "effect is that carriers will have to offer . . . services that differ significantly from those that, in the absence of regulation, the market might dictate." *Rowe* at 372.[35] *Rowe* held that the FAAAA preempted a Maine law that forbade licensed tobacco retailers from using "a 'delivery service' unless that service follows particular delivery procedures." *Id.* at 371. The Court noted that the Maine law would have "a 'significant' and adverse 'impact' in respect to the federal Act's ability to achieve its preemption-related objectives," because it would "require carriers to offer a system of services that the market does not now provide (and which the carriers would prefer not to offer)." *Id*. at 371-72. As other circuits have explained, *Rowe* thus "necessarily defined 'service' to extend beyond prices, schedules, origins, and destinations." *Air Transp. Ass'n v. Cuo*mo, 520 F.3d 218, 223 (2d Cir. 2008). *Accord DiFiore v. Am. Airlines*, 646 F.3d 81, 88 (1st Cir. 2011).

Federal Express Corp. v. California Public Utilities Comm'n, 936 F.2d 1075 (9th Cir. 1991) is also instructive in evaluating the ISR as it applies to air carriers. There the California Public Utilities Commission ("PUC") had issued several "general orders" that regulated, among other things the "terms of the terms of the bills of lading, the freight bills and 'accessorial services' documents issued by the carriers" subject to "a procedure by which carriers may obtain variances from its orders" as part of what the PUC claimed was a "flexible" and "adaptive" regulatory program. *Id.* at 1077. The court observed:

> trucking operations of Federal Express are integral to its operation as an air carrier. The trucking operations are not some separate business venture; they are part and parcel of the air delivery system. Every truck carries packages that are in interstate commerce by air. The use of the trucks depends on the conditions of air delivery. The timing of the trucks is meshed with the schedules of the planes.

Id. at 1078.[36] The court ruled that even "regulations which are not patently economic — the rules on claims and bills of lading, for example — relate to the terms on which the air carrier offers its services. Terms of service determine cost. To regulate them is to affect the price. The

---

[35] *See also American Trucking Associations v. City of Los Angeles*, 559 F.3d 1046, 1053 (9th Cir. 2009). There, although it reversed the district court's decision on other grounds, the Ninth Circuit "fully agree[d] with the district court" that plaintiffs had demonstrated a likelihood of succeeding on the merits of their claim that concession agreements required by city ordinance were preempted by the FAAAA, commenting "[t]hat the Concession agreements relate to prices, routes or services of motor carriers can hardly be doubted." The Ninth Circuit thus "fully agreed" with District Court finding that "the concession agreements here directly regulate the carriers themselves, at least to the extent that they wish to access the Ports. Therefore, the effect of the concession agreements on 'price, route, or service,' would likely be sufficiently non-tenuous and direct to warrant preemption." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 577 F. Supp.2d 1110, 1117 (citations omitted).

[36] The Federal Aviation Act of 1958 also preempts PR 2305 insofar as it interferes with the FAA's exclusive jurisdiction over aviation, including the movement and/or operation of aircraft. *See Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624, 633 (1973) ("[f]ederal control [over aviation] is intensive and exclusive") (*quoting Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944)).

terms of service are as much protected from state intrusion as are the air carrier's rates." *Id*. Accordingly, the Court determined the ADA preempted the PUC from applying its regulations to air carriers.

PR 2305 will undoubtedly increase the costs of operating warehouses and for airline cargo operations. But the effects of the proposed regulation go far beyond mere economic effects to directly affect carrier routes and services. In fact, the central obligation imposed under PR 2305 (d)(1) establishes a "WAIRE Points Compliance Obligation (WPCO)" that is a function of two parameters: "Weighted Annual Truck Trips (WATT)" and "Stringency."[37] This WATT parameter depends on the "number of truck trips" and the type of trucks making those trips, weighted by truck class according to the relative level of emissions associated with that class.[38] The regulatory obligation imposed under the ISR is thus literally a direct function of the routes (here termed "trips") and services provided (types of trucks used). This is a textbook case of a regulatory measure that is preempted under the ADA and FAAAA. This is reenforced by Staff's explicit affirmation that the Stringency parameter of the WPCO is set at a level designed to do far more than impose economic costs: "as demonstrated in the 'Compliance Cost' section . . . there will be financial impacts to industry to implement PR 2305, *and* it will also *require* many warehouse operators and cargo owners to *change their business practices* to implement actions *required* by PR 2305."[39] The proposed rule also directly regulates cargo services provided by motor carriers and air carriers by establishing applicability thresholds based on warehouse size.[40] Moreover, to demonstrate compliance with the regulation, PR 2305, "[w]arehouse operators are required to submit truck data . . . for the amount of warehouse activity during the compliance period" which must be "contemporaneous" with the truck trips themselves (e.g., recorded at least daily) in a manner "verifiable by South Coast AQMD staff."[41] This level of intrusion into the business practices of motor and air carriers and the requirements to adopt a new system of service far exceed those considered by the Supreme Court in *Rowe* and the

---

[37] *Second Draft Report* at 27; PR 2305 (d)(1)(A).

[38] *Second Draft Report* at 28; PR 2305 (d)(1)(B).

[39] *Second Draft Report* at 58 (emphasis added). District staff all but directly affirms the ISR is specifically designed to require warehouse owners/operators to provide services and operate routes using low-emitting trucks. The "first and foremost reason" the District identifies for adopting PR 2305 is that the "SCAB region continues to experience ozone and fine particulate matter levels that exceed federal air quality standards," a circumstance that cannot be realistically addressed without reducing emissions from trucks because they "are the largest source of NOx emissions in the air basin . . ." *Second Draft Report* at 14. In describing the rational for setting the WPCO "Stringency" parameter, District staff discuss the need to ensure the truck fleet in the SCAB becomes cleaner at length:

> Even [under] the most aggressive modeling in [CARB's Draft Mobile Source Strategy], in 2023 more than 95% of heavy-duty trucks will be no cleaner than 2010 engine standards assumed for all trucks in the baseline emissions inventory from the 2016 AQMP. This scenario projects these trucks will still make up about 57% of the truck fleet in 2031. Since the 2016 AQMP requires a 45% and 55% reduction in NOx by 2023 and 2031 respectively, the continued presence of large fractions of 2010 MY trucks in the fleet will hamper efforts to meet these deadlines.

Second Draft Report at 52-53 (footnote omitted). The District goes on to affirm: "Because of the pressing need to meet federal air quality standards in 2023 and 2031, both from a public health perspective and from a public policy perspective . . . the stringency of the rule should be set at a level that achieves emission reductions beyond what other regulations will require." *Id.*

[40] *See, e.g.,* PR 2305 (b), (d)(1).

[41] *Second Draft Report* at 28, 91.

Ninth Circuit in *Federal Express v. PUC* and determined to be preempted by the FAAAA and ADA.[42]

The contention that PR2305 is not preempted because it does not "*require* any particular action at all" and "flexibility and choice [is] built into the proposed rules"[43] is not correct. In *Ray v. Atl. Richfield Co.*, 435 U.S 151 (1978) the Court held a Washington State statute mandating certain design criteria for ocean going vessels was preempted by federal law. The Court also held that a separate provision, requiring vessels to be escorted by a tug but waiving that requirement if the vessel met certain design criteria was not preempted because the provision did not "exert pressure on tanker owners to comply with the design standards." 435 at 173 n.25. *See also United States v. Massachusetts*, 493 F.3d 1, 23 (1st Cir. 2007) (finding a state financial assurance requirement would be preempted if it "placed strong pressure on the industry" to conform to preempted design criteria). PR 2305 does not present a case of whether an "alternative" means of compliance is preempted because it creates sufficient pressure to indirectly compel a regulated entity to use a compliance alternative that is preempted. Here, the compliance obligation is explicitly and purposefully designed to ensure that the only means available to a regulated entity to reduce its compliance obligation are to reduce the number of truck trips or change the type of trucks making those trips. In addition, the applicability thresholds are explicitly tied to the size and extent of cargo services provided. The District is preempted by the FAAAA and the ADA from dictating such business practices. Even if it were conceded that the "alternatives" for achieving compliance are not preempted, the District is directly regulating – through the compliance obligation and applicability thresholds – business practices that *Rowe* and other cases discussed above clearly establish the District is preempted from regulating under the FAAA and ADA.[44]

Finally, we emphasize that the "option" of allowing regulated entities to meet their WPCO by simply paying a mitigation fee could not save PR 2305 from preemption. As an initial matter, we reject the contention that a governmental entity that does not have the power to compel a particular action can extract a fee or other payment from a regulated entity for failing to take that action. Moreover, the mitigation fee is arguably created not to provide a means for warehouse owners/operators to choose more "efficient" actions, but because for many warehouse owners/operators it is the only means available for achieving compliance with the WPCO. Some operators (like many predominately passenger air carriers) do not operate their own fleet of trucks and therefore cannot purchase trucks, by far the most effective means of generating WAIRE points, leaving such carriers in the position of being unable to achieve compliance without paying the mitigation fee. In other words, the mitigation fee is not an option available to

---

[42] We note that *Rowe* contradicts the claim in the Zinn Letter (at 11) that "[r]egulations concerning pollution-control technology fall into the category of regulation of resource inputs that are generally not preempted." *Rowe* at 373 ("Despite the importance of the public health objective, we cannot agree with Maine that the federal law creates an exception on that basis, exempting state laws that it would otherwise pre-empt. The Act says nothing about a public health exception"). In addition, the distinction drawn between laws that regulate "inputs" and "outputs" only reenforces the conclusion that PR 2305 is preempted: the regulation's compliance obligation is a function of "outputs," i.e., number of truck trips and types of trucks used. Moreover, cases drawing such a distinction involve laws or regulations of "general applicability," not regulations like PR 2305 that directly regulate carrier operations.

[43] Zinn Letter at 9-10 (emphasis original).

[44] Using the *Ray* parlance, PR 2305 applies regulatory "pressure" directly through the WPCO and applicability thresholds. The *Ray* analysis, which is applied to determine whether indirect regulatory pressure is "direct enough" to establish preemption, proceeds from the unquestionable premise that direct regulation of preempted matters is forbidden.

carriers "in lieu" of other compliance options, but rather the *only* compliance option available. In this circumstance, the ISR is effectively a purely economic regulation of the carrier's business that is directly related to the prices, routes and services the carrier provides. This is a clear case of a regulatory measure that is preempted under the FAAA and ADA.[45]

4. PR 316 Also Exceeds the District's Authority

Because the District lacks authority to adopt PR2305, it cannot adopt the fee rule – PR 316 – intended to support it.

CONCLUSION

We appreciate the opportunity to comment.

Sincerely yours,

Timothy A. Pohle
Senior Managing Director, Environmental Affairs

[45] In this circumstance, the ISR also is preempted by the Anti-Head Tax Act, 49 U.S.C. § 40116 because it imposes a "fee" or "charge" on the sale of air transportation and transportation of property by aircraft. *See* 49 U.S.C. § 40102(a)(5) (definition of "air transportation") and *See* 49 U.S.C. § 40102(a)(25) (definition of "interstate air transportation").

Holland & Knight

50 California Street, Suite 2800 | San Francisco, CA 94111 | T 415.743.6987 | F 415.743.6910
Holland & Knight LLP | www.hklaw.com

Marne S. Sussman
+1 415-743-6987
Marne.Sussman@hklaw.com

May 4, 2021

Via Email (rbanuelos@aqmd.gov; vjuan@aqmd.gov)

Ryan Bañuelos, Planning/CEQA
Victor Juan, Planning, Rule Development and Area Sources
South Coast Air Quality Management District
21865 Copley Drive
Diamond Bar, CA 91765

Re: Comments for Proposed Rule 2305 – Warehouse Indirect Source Rule - Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program; and Proposed Rule 316 – Fees for Regulation XXIII

Dear Mr. Bañuelos and Mr. Juan:

Our client, the California Trucking Association ("CTA"), appreciates the opportunity to submit supplemental comments on the South Coast Air Quality Management District's ("SCAQMD" or "District") Second Draft Staff Report ("DSR or Staff Report")[1] and Draft Environmental Assessment ("EA") for the Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program; and Proposed Rule 316 – Fees For Regulation XXIII (collectively, the "Proposed Rules").

Many members of the CTA will be directly regulated by the Proposed Rules and many others will be compelled to assist the covered warehouses in achieving compliance with the Proposed Rules. This will require substantial capital investment by CTA members and will have far reaching environmental and economic effects. We continue to believe that the Proposed Rules as drafted are preempted by federal law and extend beyond the authority granted to the District by the state Legislature. Nothing in the proposed changes affects our previous comments and we provide further comments on these issues below.

I. Statement of Interest.

The CTA is the largest state trade association representing trucking in the United States. Its 1800 members include both large and small fleets with an average fleet size of 20 trucks. CTA members

[1] Victor Juan *et al*., Second Draft Staff Report ("Staff Report"), Proposed Rule 2305 – Warehouse Indirect Source Rule – Warehouse Actions and Investments to Reduce Emissions (WAIRE) Program and Proposed Rule 316 – Fees for Rule 2305, April 2021.

are actively participating in the development, piloting, and demonstration of alternative fuel and electric-drive capable vehicles. In fact, some member fleets have been working to bring electric-drive vehicles to market for nearly ten years. The CTA continues to support a coordinated and measured transition to alternative fuel and electric-drive capable vehicles.

II. The District Does Not Have Authority to Adopt an Indirect Source Rule that Applies to Existing Warehouses.

As explained in our March 2, 2021 comment letter, the District lacks authority to adopt an ISR that applies to existing sources. While the District attempts to argue otherwise in a memorandum requested from Shute Mihaly & Weinberger (hereinafter, "Shute Memorandum"), the arguments are not compelling.[2] As explained previously, "[a]n air pollution control district, as a special district, has only such powers as are given to it by statute and it is an entity, the powers and functions of which are derived entirely from the Legislature." 74 Cal. Atty. Gen. Op. 196 (1991) (citing *People ex rel. City of Downey v. Downey County Water Dist.* (1962) 202 Cal.App.2d 786, 795).

Though the memorandum cites to Health & Safety Code ("HSC") sections 40001(a)[3], 40440(a)[4], 40703[5], and 40000[6] as authority for the District to adopt an ISR for existing warehouses, none of these sections even mention indirect sources, let alone existing ones. That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area. *Railway Labor Exec. Ass'n . National Mediation Bd.* (D.C. Cir. 1994) 29 F.3d 655, 670 (en banc). Thus, a general grant of authority to address "emission sources" does not authorize the District to impose control measures on existing indirect sources.

While administrative officials "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers" (*Dickey* v. *Raisin Proration Zone No. 1* (1944) 24 Cal.2d

[2] *See* Shute, Mihaly, & Weinberger, Memorandum to Bayron Gilchrist and Barbara Baird, Re: Responses to comments submitted by the California Trucking Association, dated April 1, 2021.

[3] HSC § 40001(a) states: "Subject to the powers and duties of the state board, the districts shall adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law."

[4] HSC § 40440(a) states: "The south coast district board shall adopt rules and regulations that carry out the plan and are not in conflict with state law and federal laws and rules and regulations. Upon adoption and approval of subsequent revisions of the plan, these rules and regulations shall be amended, if necessary, to conform to the plan."

[5] HSC § 40703 states: "In adopting any regulation, the district shall consider, pursuant to Section 40922, and make available to the public, its findings related to the cost effectiveness of a control measure, as well as the basis for the findings and the considerations involved. A district shall make reasonable efforts, to the extent feasible within existing budget constraints, to make specific reference to the direct costs expected to be incurred by regulated parties, including businesses and individuals."

[6] HSC § 40000 states: "The Legislature finds and declares that local and regional authorities have the primary responsibility for control of air pollution from all sources, other than emissions from motor vehicles. The control of emissions from motor vehicles, except as otherwise provided in this division, shall be the responsibility of the state board."

796, 810), the doctrine of implied administrative powers is not without limitation. "It cannot be invoked where the grant of express powers clearly excludes the exercise of others, or where the claimed power is incompatible with, or outside the scope of, the express power. For a power to be justified under the doctrine, it must be essential to the declared objects and purposes of the enabling act -- not simply convenient, but indispensable. Any reasonable doubt concerning the existence of the power is to be resolved against the agency." *Addison v. Dept. of Motor Vehicles* (2007) 69 Cal.App.3d 486, 498.

The District has not, and cannot, identify a law that grants it authority to adopt an ISR that regulates existing sources. And the fact that various HSC provisions clearly address indirect sources, stationary sources, and mobile sources in very different manners, means that the District cannot read an implied authority to regulate existing indirect sources from a general grant of authority to regulate emission sources as a whole. In addition, contrary to the Shute Memorandum's claim that the Clean Air Act ("CAA") "is irrelevant to the District's authority to adopt the proposed rule," the CAA ISR provisions are relevant to the scope of the District's regulatory authority when the Legislature used the term "indirect source control program" in HSC §§ 40918 and 40440(b)(3), which is not a term defined in California law but is identical to the term used in the CAA which limits such programs to ***new or modified*** indirect sources. 42 U.S.C. § 7410(a)(5)(D). Reading the various sections of the HSC together with the CAA, it is clear that the Legislature did not grant the District authority to require existing, unmodified sources to comply with an indirect source control program.

Finally, HSC § 40440(a) specifically states that: "The south coast district board shall adopt rules and regulations that carry out the plan and are not in conflict with state law and federal laws and rules and regulations." The District cannot argue that the CAA is irrelevant when the District only has authority to regulate in a way that is not otherwise preempted by federal law.

III. The Proposed Rules Are Preempted by Federal Law.

A. The Proposed Rules Are a Purchase Mandate Under the Clean Air Act.

Though the District has modified the Proposed Rules to add another scenario, that does not alleviate the preemption issue as the Proposed Rules still represent a purchase mandate. As explained in our prior letter, while the District has ostensibly designed the Proposed Rules to provide multiple compliance pathways, the actual effect is uniform—ZE trucks must be acquired. This is because, while certain scenarios do not require acquisition of a ZE vehicle (Scenarios 7 (pay mitigation fee), 11 (rooftop solar and mitigation fee), 15 (filter system installations) and 16 (filter purchases))[7], the costs of these non-acquisition pathways are far higher than acquisition. In addition, newly added Scenario 7a still relies on the acquisition of ZE or NZE vehicles by someone, even if it is not the warehouses themselves who are required to acquire the vehicles. Staff Report at 61, 66-67. While Scenario 7a may somewhat reduce the cost of compliance with the rule, it does not do so in a way that eliminates the fact that the Proposed Rules constitute a purchase mandate.

[7] Scenario 17 requires TRU plug installations and usage in cold storage facilities but is applicable only to cold storage warehouses.

The Shute Memorandum attempts to argue that the Proposed Rules are not a purchase mandate, as the Proposed Rules would allegedly regulate the entirety of the indirect source (the warehouse), such as the rule at issue in *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District,* 627 F.3d 730 (9th Cir. 2010) ("*NAHB*"), and are thus not preempted by the CAA. However, the rule in *NAHB* more broadly addressed site emission than the Proposed Rules and, as admitted by the District, the overwhelming majority of emissions that will be addressed by the Proposed Rules are from trucks making trips to the warehouses. Staff Report at 13 ("heavy duty trucks are the largest source of emissions, comprising more than 90% of the total PR 2305 inventory.").

In weighing preemption, the *NAHB* court had a firm thumb on the scale: because the ISR at issue there was adopted *pursuant to* the CAA's indirect source review program, the court had to "cautiously examine" whether one of the CAA's provisions preempted another. *NAHB*, 627 F.3d at 737. The court in *NAHB* relied heavily on the fact that Rule 9510 was adopted under the CAA's indirect source review program provision. *Id.* at 736 ("As we shall explain, however, NAHB's claim of preemption does not follow from its premise. Even if Rule 9510 establishes standards or requirements, those requirements do not relate to the control of emissions from construction equipment. In so holding, we think it crucial that the District adopted Rule 9510 under the Act's 'indirect source review program' provision, section 110(a)(5)."); *id.* at 739 ("Keeping in mind that Rule 9510 is a proper indirect source review program under section 110(a)(5), we proceed to examine the arguments NAHB makes, and the authorities it advances, in favor of preemption"); *id.* at 737 ("Because the plain language of the Act's 'indirect source review program' provision, section 110(a)(5), authorizes Rule 9510, we must cautiously examine the Act before we conclude that another of its provisions, section 209(e)(2), preempts Rule 9510"). Here, the District cannot argue that the Proposed Rules are authorized by section 110(a)(5), as that authorizes ISRs for ***new or modified sources*** only. 42 U.S.C. § 7410(a)(5)(D). Indeed, the District has argued that the CAA and its authorities are entirely irrelevant. The District cannot rely on *NAHB* when its preemption conclusion was predicated on the ISR's consistency with and authorization by the CAA.

The court in *NAHB* also relied on the fact that "[t]he 'baseline' amount of emissions, and the required reduction in emissions from that baseline, are both calculated in terms of the development as a whole. The Rule and the emissions reductions it requires are site-based rather than engine- or vehicle-based. *See* 42 U.S.C. 7410(a)(5)(c) (requiring that an indirect source review program be a 'facility-by-facility' review). It regulates an indirect source as a whole." *NAHB*, 627 F.3d at 737. The Proposed Rules make no such attempt. The compliance obligation is entirely determined by the *number and type of trucks that visit the site*. Perhaps if the *NAHB* court had upheld an ISR that used only the number and type of construction vehicles as a proxy for the emissions of the development as a whole, the case would be determinative. But it did not. Instead the *NAHB* ISR concerned the total emissions from the completed development, rather than the specific vehicles for which there was a claimed purchase mandate. This is not the case with the Proposed Rules, which entirely rely on truck trips. The Shute Memorandum states that "[t]he proposed rule uses truck trips as a proxy for total warehouse emissions when setting the compliance obligation because the number of truck visits is representative of the total activity at,

and emissions associated with, a warehouse." The Memorandum cites the Staff Report at 27 (truck trips "serve[] as a proxy for *overall* warehouse activity and emissions" (emphasis added)) and at 35 (stating that "[t]rucks delivering or picking up goods from a warehouse are a proxy for total activity and emissions related to a warehouse" and structuring reporting requirements on that basis). However, nothing in the actual calculation of WATT or WPCO supports this claim and nothing in the *NAHB* decision approves of such "proxy" metrics. To calculate a facility's WATT the relevant equation is WATT = Class 2b through 7 trucks trips + (2.5 x Class 8 truck trips). The Staff Report states that "Larger Class 8 trucks carry more goods and have higher emissions and are thus weighted more heavily than smaller Class 2b to 7 trucks. The value of 2.5 was calculated by comparing the running exhaust emission rates of different truck classes in EMFAC that typically visit warehouses (Figure 6 below) for calendar year 2023 (after CARB's Truck and Bus rule is fully phased in). The ratio between individual truck classes varies but is approximately 2.5 overall when comparing Class 8 to Class 2B to 7." Staff Report at 28 (emphasis added). This explanation makes clear that the multiplier for the WATT calculation is based purely off of the increase in emissions from the trucks themselves based on class, not an assumed increased in activity at the warehouse due to Class 8 trucks calling there more frequently. Further, the WPCO, or WAIRE Point Compliance Obligation, is then calculated as WPCO = WATTs x stringency x Annual Variable. Thus, the claim that truck trips (and truck emissions) is merely used as a proxy for assuming overall emissions from a warehouse as an indirect source is not supported as a warehouse's WPCO is based purely on emissions from trucks.

In addition, the District admits that the only source of emissions included in the baseline emissions inventory are mobile sources. Staff Report at 12 ("The sources of emissions associated with warehouses include the trucks that deliver goods to and from the facilities, yard trucks located at warehouses that move trailers, transport refrigeration units (TRUs)…and the passenger vehicles for warehouse employees. Additional emissions sources can include onsite stationary equipment (e.g., diesel backup generators or manufacturing equipment), and emissions from power plants that provide electricity for the warehouse – though these sources have not been included in the baseline emissions inventory."). Thus, unlike *NAHB*, neither the baseline, nor the required compliance obligation (the WPCO) are site-based; both are based on mobile source emissions only.

The District's attempt to shoe-horn itself into the *NAHB* category, when in fact it is attempting to adopt a purchase mandate, does not pass scrutiny. See *NAHB*, 627 F.3d at 739 ("What allows Rule 9510 to qualify as an indirect source review program under section 110(a)(5) is precisely what allows the Rule to avoid preemption under section 209(e)(2): its site-based regulation of emissions.").

If the District were truly concerned with regulating total emissions from warehouses as an indirect source, it would collect information to determine what other emissions come from warehouses and how to reduce those emissions and provide pathways to compliance with the Proposed Rules that address emission reductions from sources related to warehouses other than vehicles (the only pathway that does this is the installation of solar panels). For these reasons, the District's claim that the Proposed Rules, like the rule in NAHB, are merely intended to address emissions from warehouses as indirect sources, and not from vehicles, does not stand. The Proposes Rules impose

requirements that relate to the control of emissions from mobile sources and are thus preempted under the CAA.

IV. The Proposed Rules Will Not Be Eligible for Inclusion in the State Implementation Plan ("SIP").

The District states that the primary purpose of the Proposed Rules, specifically Proposed Rule 2305, is to achieve NOx reductions that will contribute to the District's goal of reaching attainment of the ozone National Ambient Air Quality Standards ("NAAQS"), as required by the CAA.[8] The Proposed Rule will also result in reductions in Particulate Matter ("PM") to help attain the PM NAAQS. In order to accomplish this, Proposed Rule 2305 must be included as a revision to the State Implementation Plan ("SIP") and approved by both the California Air Resources Board ("CARB") and the Environmental Protection Agency ("EPA"). SIP revisions may only be approved if the rule "complies with the provisions of the Clean Air Act and applicable federal regulations." 42 U.S.C. § 7410(k). Because section 7410(a)(5) only permits states to submit ISR rules to the SIP which apply to new and modified sources, the District cannot submit, and EPA cannot approve, an ISR which applies to existing sources. *See Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196 ("In the grants [of powers] and the regulation of the mode of exercise, there is an implied negative; an implication that no other than the expressly granted power passes by the grant; that it is to be expressed only in the prescribed mode…."). Nor can the District or CARB "provide necessary assurances" under section 7410(a)(2)(E) that "the State . . . will have adequate . . . authority under State (and as appropriate, local) law to carry out such implementation plan." As explained above, the District has no authority to adopt an ISR on existing sources. For these reasons, Proposed Rule 2305 cannot be approved into the SIP and will not achieve the District's goal of helping to attain the NAAQS for ozone and PM.

The District's claim that, by approving "MOB-03 – Emissions Reductions at Warehouse Distribution Centers" in the 2016 Air Quality Management Plan ("AQMP") both CARB and EPA have authorized the Proposed Rules is unreasonable. MOB-03 described general strategies in which the District would attempt to control emissions from warehouses, but did not specify the particular strategies that would be adopted, did not address the fact that these controls would be applied to existing sources, and repeatedly mentioned the option for voluntary actions to reduce emissions.[9] CARB and EPA's approval of a vague and generalized concept in the 2016 AQMP does not bless the Proposed Rules with legitimacy and legality now. Even if the District had authority under state law to adopt Proposed Rule 2305, which it does not, it will not be eligible for inclusion in the SIP and thus the District will not receive any of the benefits towards attainment that it expects from adoption of the Proposed Rule 2305.

[8] Staff Report at 14.
[9] South Coast Air Quality Management District, Final 2016 Air Quality Management Plan, March 2017, http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2016-air-quality-management-plan/final-2016-aqmp/final2016aqmp.pdf?sfvrsn=15, at 4-27 – 4-29 (stating that "[t]o the extent these actions are voluntary in nature and are sustained over a long-term basis and the emission reduction levels are maintained, the emission reductions may be credited as surplus reductions…into the SIP.").

V. The Environmental Assessment ("EA") Remains Insufficient and Changes to the Proposed Rules Necessitate Revision and Recirculation of the EA.

A. The EA Project Description is Deficient.

The District anticipates using the funds generated by its Mitigation Fee to subsidize a variety of programs, and specifically includes among them "a focus on grid upgrades on the utility side of the meter." The various programs are a non-exclusive list of potential emission-reducing projects that might be funded or implemented. While these utility upgrades could be considered "merely permissive," "[a]t a minimum, the District committed itself to allowing" mitigation funds to be used on such upgrades. *See California Unions for Reliable Energy v. Mojave Desert Air Quality Management District* (2009) 178 Cal.App.4th 1225, 1246 (*CURE*).

At a minimum, the failure to fully disclose these actions in the Final EA results in an inadequate project description. A project description that omits integral components of the project may result in an EIR that fails to disclose all of the impacts of the project. *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (project description for sand and gravel mine omitted water pipelines serving project); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 80. The "project" is "the whole of an action" that may result in either a direct physical environmental change or a reasonably foreseeable indirect change. CEQA Guidelines § 15378; *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297; *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220. Project descriptions have been found inadequate when they failed to include discussion of necessary expansions to accommodate the contemplated project. See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713 (project description inadequate when it failed to discuss sewer lines and wastewater treatment expansion necessary for the contemplated housing development); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 830 (project description for sand and gravel mine inadequate when it failed to describe or analyze the construction of water pipelines needed for operations); *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397 (project description for oil well inadequate for failure to describe or analyze associated pipeline). The District apparently now acknowledges that the compliance actions taken by covered entities under the Proposed Rules will result in increased production of electricity and other resources that may require "grid upgrades on the utility side of the meter." The upgrades are a reasonably foreseeable component of the Project and must be analyzed.

The District is not excused from analyzing the effects of its actions merely by classifying such acts as mitigation. CEQA mandates a review of not only the impacts of the project, but also "the impacts of mitigation measures" if such measures "would cause one or more significant effects in addition to those that would be caused by the project as proposed." *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130 (*Save Our Peninsula*) (citing CEQA Guidelines § 15126(c) [now § 15126.4(a)(1)(D)]).

Here, the EA completely fails to meaningfully address the potentially significant and foreseeable impacts of these necessary utility upgrades, which would include significant air pollution

emissions from construction of necessary grid infrastructure that run counter to the Proposed Rules' stated objectives. *CURE*, 178 Cal.App.4th at 1245; see CTA Letter re Scoping of Environmental Assessment. The EA also neglects to evaluate potentially significant impacts to agricultural and biological resources through land use conversions, geologic and hydrologic impacts due to increased lithium extraction activities, substantial increases in the demand for water supply, wastewater treatment, storm water drainage, energy, and solid waste services. *CURE*, 178 Cal.App.4th at 1236, CTA Letter re Scoping of Environmental Assessment.

As it stands, the Board is being asked to trade one impact for another without the barest disclosure of the scope or magnitude of impacts from the utility upgrades the District proposes to fund. The EA's failure to meaningfully disclose these potentially significant effects is unlawful. CEQA Guidelines § 15126.4(a)(1)(D); *see also CURE*, 178 Cal.App.4th at 1230-31 (air district's failure to analyze negative effects mitigation measure to reduce air pollution was unlawful); *Save Our Peninsula*, 87 Cal.App.4th at 130-32 (EIR unlawfully failed to analyze impacts of mitigation adopted "late in the environmental review process"); *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 991 (EIR unlawful because mitigation "involve[d] . . . new environmental impacts not considered in the draft EIR").

B. Changes to the Proposed Rules Necessitate Recirculation.

CEQA requires agencies to recirculate "[w]hen significant new information is added to an environmental impact report" after the close of the earlier public review period." Pub. Res. Code § 21092.1; CEQA Guidelines § 15088.5. In particular, recirculation is required where the omission of information has rendered the original draft EIR "fundamentally and basically inadequate and conclusory in nature." *See* CEQA Guidelines § 15088.5(a)(4) (*citing Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043).

An agency cannot simply release a draft EIR "that hedges on important environmental issues while deferring a more detailed analysis to the final [EIR] that is insulated from public review." *Mountain Lion Coalition*, 214 Cal.App.3d at 1052 (rejecting EIR with a corrected cumulative impacts analysis that was not recirculated); *see also Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 108 (revisions to EIR's air quality analysis required recirculation where they contained insufficient evidence to support agency's findings); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 830 (recirculation required where "draft EIR inadequately addressed the subject and there was no meaningful public review and comment on the new assessment"); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 266-67 (rejecting city's claim that a new addendum on energy impacts merely "amplifie[d]" information in the EIR).

Public review is critical "to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom." *Sutter Sensible Planning, Inc. v. Sutter County Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822 (internal quotation marks omitted); *see also Ultramar, Inc. v. South Coast Air Quality Management Dist.* (1993) 17 Cal.App.4th 689, 702-04. The District's hasty publication of the Final EA, just days before the Board's approval

hearing, deprived the public and technical experts of their ability to fulfill this critical oversight role. The District must recirculate the Final EA to allow meaningful public review.

VI. Conclusion.

We join in the comments of the Airlines for America, the California Taxpayers Association, and Scopelitis, Garvin, Light, Hanson & Feary, which provide further explanation for why the Proposed Rules are outside of the District's authority, preempted by the CAA and the Federal Aviation Administration Authorization Act ("F4A"), and constitute an improper tax. The District has not been granted the authority to impose a sweeping purchase mandate under the guise of an ISR regulation on existing, unmodified warehouses. While the District's goals of reducing air emissions in the Basin are laudable, the District has only the rulemaking authority invested in it by statute. Even if the Legislature had granted the District such authority, it is preempted by federal law. In addition, the accompanying Draft EA fails to meet the District's obligations under CEQA. For this reason, the District must revise the Proposed Rules and recirculate the EA before adoption.

Sincerely yours,

HOLLAND & KNIGHT LLP

Marne S. Sussman

cc: Chris Shimoda