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MEMORANDUM

TO: Bayron Gilchrist, SCAQMD
Barbara Baird, SCAQMD

FROM: Matthew D. Zinn
Winter King
Aaron M. Stanton

DATE: April 1, 2021

RE: Responses to comments submitted by the California Trucking Association

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You asked us to provide responses to the legal comments on Proposed Rule 2305 ("PR 2305") submitted by the law firm of Holland & Knight on behalf of the California Trucking Association.[1] The comments contend that PR 2305 is unlawful and unconstitutional in numerous respects. As explained below, their contentions lack merit.

I. Statutory authority

First, the comment contends that the District lacks statutory authority to adopt an indirect source rule ("ISR") for existing, as opposed to new, indirect sources. In fact, the District's broad regulatory authority includes the authority to adopt ISRs for both new and existing sources. The comment omits several sources of District authority and misconstrues the sources of authority it does cite.

Multiple provisions of the Health and Safety Code ("HSC") give the District authority to adopt rules and regulations for sources of air pollution other than mobile sources as necessary to attain state and federal ambient air quality standards. *See* HSC §§ 40001(a), 40440(a), 40703; *see also id.* § 40000 ("The Legislature finds and declares that local and regional authorities have the primary responsibility for

[1] We have not been asked to respond to the comments on the Environmental Assessment ("EA") at this time and thus they are not addressed in this memorandum.

control of air pollution from *all sources*, other than emissions from motor vehicles." (emphasis added)). These provisions are not limited to direct sources, nor are they limited to new as opposed to existing indirect sources. They are sufficient to authorize the District to adopt the proposed rule. Moreover, HSC section 40716 does specifically authorize air districts to adopt rules to reduce or mitigate emissions from "indirect sources," with no limitation on whether the source is existing or new.

The comment contends that the District cannot point to a statute that "expressly" authorizes regulation of existing indirect sources. The argument mistakes the nature of the District's authority. Regulation of indirect sources, both new and existing, comes within the plain meaning of the authorizing statutes just discussed, and in that sense they are authorized by the express terms of the statutes. That such regulations are not *specifically* authorized by these statutes is irrelevant. *Cal. Sch. Bds. Ass'n v. State Bd. of Equalization*, 191 Cal. App. 4th 530, 544 ("[T]he absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such a regulation exceeds statutory authority.'" (alterations in original)). The statutes also do not specifically authorize the District to regulate lead smelters (Rule 1101), pharmaceutical manufacturing facilities (Rule 1103), or fluidized catalytic cracking units (Rule 1105), and yet the District regulates these sources and many more because they are sources of pollutants that impair the District's attainment of ambient standards. The same is true of warehouses—both new and existing. The delegation of regulatory power to a local government, without limiting the mode of exercising that power, implies that the government may select any lawful and reasonable means to exercise that power. *San Diego Gas & Elec. Co. v. San Diego Cty. Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1144 (1986). Therefore, since the Legislature did not specify whether the District was limited to regulating new indirect sources, the District may regulate new sources, existing sources, or both.

The comment points to provisions of the federal Clean Air Act ("CAA") addressing indirect sources, which the comment contends are limited to regulation of new or modified sources. *See* 42 U.S.C. § 7410(a)(5)(A) (CAA section 110). The CAA is irrelevant to the District's authority to adopt the proposed rule. The District's regulatory authority represents an exercise of the State's police power. *Lees v. Bay Area Air Pollution Control Dist.*, 238 Cal. App. 2d 850, 856 (1966). This power is delegated to it by the state Legislature. *Orange Cty. Air Pollution Control Dist. v. Pub. Util. Comm'n.*, 4 Cal. 3d 945, 953 (1971). Thus, the District exercises the *State's* police power as delegated by the Legislature; the CAA is not the source of the District's authority. Indeed, the cited provision of the CAA limits the federal Environmental Protection Agency's ("EPA") ability to require ISRs to be included a state's state implementation plan ("SIP"); it is not a limit on a state or local government's authority to adopt an

ISR under state law.[2] That statute, and EPA's interpretation of it, are thus not relevant to the scope of the District's regulatory authority. The comment points to nothing in California law indicating that the Legislature intended that air districts' authority to regulate indirect sources be limited by the federal CAA.

The comment also cites sections 40716 and 40440(b)(3) of the HSC, but it misinterprets those provisions. Neither provision supports the arguments made.

The comment contends that section 40716 requires any District ISR to both reduce ISR emission and reduce vehicle trips. Not so. In providing that "a district may adopt and implement regulations to accomplish both of the following," it refers to regulations, plural. It provides that districts may adopt regulations that, collectively, serve both of the goals following that phrase. The statute does not demand that each individual regulation serve both of those goals. If the commenter's interpretation were correct, then District rules reducing emissions from areawide sources, which are also authorized by section 40716(a)(1), would likewise be required to reduce the number or length of vehicle trips. CARB defines areawide sources as sources "where the emissions are spread over a wide area, such as consumer products, fireplaces, road dust, and farming operations." CARB, *Emission Inventory Documentation,* <ww2.arb.ca.gov/emission-inventory-documentation>; *see also Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist.*, 178 Cal. App. 4th 120, 128 (2009) (referring to "area-wide sources of emissions such as fireplaces, wood stoves and landscape equipment"). It would make no sense to demand that rules regulating consumer products or fireplaces also reduce vehicle trips.

The comment also points to HSC section 40440(b)(3), which refers to "provid[ing] 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 that will have a significant effect on air quality in the South Coast Air Basin." The comment erroneously assumes that section 40440(b)(3) both provides and limits District authority to regulate indirect sources to areas of localized pollutant concentrations or new sources. But subsection 40440(b) does not grant authority to the District to adopt regulations. Rather, it is a mandate—it identifies particular tasks that the District must undertake using the regulatory authority granted by subsection 40440(a): "The rules and regulations adopted pursuant to subdivision (a)

[2] CAA section 110 also cannot preempt state regulatory authority. Section 116 specifies the provisions in the CAA with preemptive effect, and it does not include section 110. *See* 42 U.S.C. § 7416.

shall do all of the following."[3] Nothing in subsection 40440(b) suggests that it is a limit on the District's authority under 40440(a). Moreover, the comment ignores the fact that these terms in paragraph (b)(3) are missing from section 40716, which contemplates regulations that "[r]educe or mitigate emissions from indirect . . . sources of air pollution" generally, with no limit as to new sources.

Moreover, the comment omits from its quotation of section 40440(b)(3) the first half of the operative language, which includes no reference to new sources, but instead provides for indirect source regulation where there are high localized levels of pollutants. And the fact that the second half specifically refers to new sources shows that indirect source regulation is not inherently limited to new sources, since if it were, the word "new" in the second half would be superfluous.[4]

The comment also erroneously suggests that the District is relying solely on a California Attorney General opinion as a basis for its authority. *See* 76 Ops. Cal. Atty. Gen. 11 (1993). The statutes cited above provide ample authority for the proposed ISR; the opinion has been cited only to show that indirect source measures could be required for already-constructed sources.

Indeed, the comment appears to recognize that the District may regulate existing indirect sources, but suggests that it may do so only for supposedly "traditional" indirect sources such as shopping centers or stadiums. It cites no authority for the proposition that warehouses are somehow a different type of indirect source that can only be regulated when newly constructed.

In sum, nothing in the provisions of the HSC authorizing the District to adopt pollution control regulations limit those regulations to the control of emissions associated with new, as opposed to existing, indirect sources.

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[3] This language ("do all of the following"), which tracks that used in section 40716 ("accomplish both of the following"), also confirms the error in the comment's interpretation of the latter section. If the comment were correct, *each* District rule must require best available retrofit control technology (40440(b)(1)), promote cleaner burning fuels (40440(b)(2)), provide for indirect source controls (40440(b)(3)), *and* provide transportation control measures (40440(b)(4)).

[4] Indeed, the definition of "indirect source" in the CAA includes no limitation, express or implied, to new sources. 42 U.S.C. § 7410(a)(5)(C) ("'indirect source' means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution").

II. Preemption by the federal Clean Air Act

The comment contends that PR 2305 is preempted by section 209(a) of the federal CAA, which prohibits state or local regulations adopting standards relating to the control of emissions from new motor vehicles. 42 U.S.C. § 7543(a). The argument is based on the premise that the proposed rule in fact imposes a standard for emissions from trucks. That argument is precluded by the Ninth Circuit's decision upholding another ISR program in *National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District,* 627 F.3d 730 (9th Cir. 2010) ("*NAHB*"), which the comment relegates to a footnote.

In *NAHB*, the court rejected a CAA preemption claim challenging part of an ISR adopted by the San Joaquin Valley Unified Air Pollution Control District. The ISR required real estate development projects to reduce emissions from construction equipment by specified amounts.[5] *Id.* at 732. The plaintiffs contended, like the commenter here, that the San Joaquin ISR was merely "a ruse adopted simply to regulate emissions from . . . vehicles." *Id.* at 734. They argued it did so "because it commands developers to use construction equipment that reduces 'baseline' emissions by particular percentage, on pain of paying fees." *Id.* at 735.

The Ninth Circuit concluded that even if the San Joaquin ISR imposed standards or requirements, they "do not relate to the control of emissions from construction equipment," as necessary to be preempted by Section 209. *Id.* at 736; *see also id.* at 739. Rather, the rule regulated emissions from the *indirect* source: the construction site. *Id.* at 739 ("Because Rule 9510 is targeted at a development site as a whole, its standard or requirement relates to emissions from an indirect source, not from non-road vehicles or engines."). The court found it "crucial" that the rule was an ISR, which is expressly authorized by the CAA in section 110(a)(5). *Id.* at 736. The court noted that "Emissions from any indirect source come from the direct sources located there; that is precisely what makes an indirect source indirect." *Id.* In other words, indirect source regulation inherently involves indirect regulation of mobile sources: "Every regulation of the emissions from an indirect source, then, will ultimately regulate direct sources." *Id.* The court concluded that NAHB's theory of preemption would have made the CAA's provision for ISRs a nullity, because all ISRs would be preempted by section 209. *Id.*; *see also id.* at 737-38.

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[5] Standards for construction equipment—non-road vehicles and engines—are preempted by another subsection of CAA section 209. 42 U.S.C. § 7543(e). The language is not meaningfully different from that of section 209(a). 42 U.S.C. § 7543(a).

In a footnote (fn. 4), the comment attempts to dispose of *NAHB* by arguing that the San Joaquin ISR "considered emissions that were 'site-based,' rather than 'engine- or vehicle-based," (quoting 627 F.3d at 737) while PR 2305, the comment contends, is based solely on emissions from trucks making trips to and from warehouses.[6] The comment misconstrues both *NAHB* and PR 2305. In the quoted language, the court was pointing out that the rule established baseline emissions for a development site based on emissions from all of the construction equipment used at the site, rather than emissions from individual vehicles or engines. 627 F.3d at 737. Here, PR 2305 establishes a warehouse's WAIRE Points Compliance Obligation ("WPCO") based on total truck trips to and from a warehouse. Like the ISR in *NAHB*, it is not based on emissions from individual vehicles. Furthermore, the comment's implication that the rule targets only truck emissions is mistaken. In fact, the WPCO is not based on truck *emissions*; it is based on truck *trips*. The 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. Draft Staff Rep. at 27 (truck trips "serve[] as a proxy for *overall* warehouse activity and emissions" (emphasis added)); *id.* 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); *see also id.* at 12 (listing sources of emissions associated with warehouses, including, in addition to trucks, yard trucks, transport refrigeration units, passenger vehicles for warehouse employees, on-site stationary equipment, and power plants supplying warehouses with electricity). Accordingly, the case for preemption of PR 2305 is even weaker than that for the San Joaquin ISR in *NAHB*. PR 2305 does not establish a "standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. § 7543(a).

Because *NAHB* is squarely on point and dictates that PR 2305 is not preempted, the remaining arguments in the comment are similarly unavailing. The comment contends that PR 2305 represents a mandate for the purchase of trucks and is thus preempted under *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246 (2004). On the contrary, PR 2350 does not compel purchases of anything. In any event, the Ninth Circuit in *NAHB* expressly rejected the same argument, on the basis noted above. 627 F.3d at 738-39.

[6] The plaintiffs asserted—and the Ninth Circuit rejected—this very argument in *NAHB*. 627 F.3d at 736-37 (noting that NAHB argued that the San Joaquin ISR "is directed at construction equipment and not the construction site itself").

The comment also points to language in EPA's decision approving the San Joaquin ISR for inclusion in California's SIP under the CAA. *See* 76 Fed. Reg. 26,609 (May 9, 2011). EPA's statement is the administrative equivalent of dictum because, citing *NAHB*, EPA recognized that San Joaquin's ISR was *not* preempted. *NAHB* supplies the standard for determining whether PR 2305 is preempted. Applying that standard here, PR 2305 is not preempted.

In any event, EPA observed that the fact the rule provided options for compliance that do not involve any changes to construction equipment as further evidence that the rule was an ISR and not direct regulation of fleets or equipment.

> [A] developer has numerous options to meet the emission reduction obligation. . . , including options that do not involve any changes to construction equipment . . . . The flexibility provided in the rule in meeting the emission reduction obligation . . . provides further evidence that the rule is intended to reduce emissions from construction sites as an indirect source of emissions, rather than to regulate the construction equipment directly, either as a fleet or as individual pieces of equipment.

76 Fed. Reg. at 26,611. The same is true here.

The comment also cites the district court decision in *Metropolitan Taxicab Board of Trade v. City of New York*, 633 F. Supp. 2d 83 (S.D.N.Y. 2009), *aff'd on other grounds,* 615 F.3d 152 (2d Cir. 2010). *Metropolitan Taxicab* is distinguishable because, unlike *NAHB* and unlike PR 2305, it involved direct regulation of the acquisition of motor vehicles, not an ISR. The case involved New York City's adoption of rules governing lease rates for taxis that encouraged the adoption of hybrid taxis. As *NAHB* recognized, "rules that regulate[] emissions from vehicles" are distinct from ISRs, which "target[] emissions, and require[] emission reductions," from an indirect source. 627 F.3d at 739. *Metropolitan Taxicab* did not involve an ISR and cannot show that PR 2305 is preempted by section 209.[7]

The comment also suggests that the "intent" of PR 2305 is to "force" acquisition of low-emission vehicles. The District's "intent" in adopting PR 2305 is irrelevant to the preemption analysis. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1906-07 (2019) (plurality opn. of Gorsuch, J.); *Puente, Ariz. v. Arpaio*, 821 F.3d 1098, 1106 (9th

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[7] The district court decision in *Metropolitan Taxicab* was affirmed on appeal based on preemption under the Energy Policy and Conservation Act, which is inapplicable here. *See* Response to Comment 44-5. The court of appeals thus did not opine on the district court's CAA preemption theory.

Cir. 2016) (for preemption, "it does not matter if [a state] passed the [challenged laws] for a good or bad purpose"). Indeed, the comment cites no case law supporting the contention that the District's intent in adopting PR 2305 is relevant to CAA section 209 preemption. On the contrary, the sole question here is whether the proposed rule adopts a standard relating to the control of new motor vehicle emissions. It does not, as explained above. In any event, the express purpose of the proposed rule is to reduce, and facilitate reductions of, local and regional emissions of NOx and PM associated with warehouses. The proposed rule advances that purpose by providing covered entities flexibility to reduce emissions in a wide variety of ways.

Finally, the comment contends that PR 2305 is in effect a purchase mandate because the cost of other compliance measures is allegedly higher than acquiring low-emission trucks. This argument does not change the fact that, as *NAHB* demonstrates, PR 2305 does not adopt a standard relating to the control of new motor vehicle emissions, regardless of the compliance options provided by the proposed rule. It provides a standard—the WPCO—for emissions from the operation of warehouses, which are indirect sources.

Regardless, the comment's premise—that covered entities are coerced into choosing compliance options involving NZE/ZE trucks because they are allegedly the lowest cost compliance option in the Warehouse Actions and Investments to Reduce Emissions ("WAIRE") Menu—is flawed. Indeed, the California court of appeal rejected a closely similar argument in *California Chamber of Commerce v. State Air Resources Board*, 10 Cal. App. 5th 604 (2017) ("*CalChamber*"). *CalChamber* upheld the auction of greenhouse gas emission allowances under the State's cap-and-trade program against a claim that it imposed an unconstitutional tax. The court rejected the plaintiffs' argument that entities regulated under the cap-and-trade program were compelled to purchase allowances at the auction. The plaintiffs contended that it was impossible for them to remain in business without purchasing allowances, and that "it would be more expensive to buy allowances on the secondary market" than at auction. *Id.* at 643; *see also id.* ("purchasing allowances on the open market will 'be far more expensive' than purchasing them at auction from the Board"). The court noted that the program offered compliance options that did not involve the auction and concluded,

> Although [plaintiff] Morning Star may ultimately make the business decision that it must pay for allowances in order to maintain its operations in California, making the business decision to pay is not the same as being compelled to do so by the state. . . . A number of requirements for businesses, whether taxes, safety regulations, minimum wage statutes, or command-and-control pollution control regulations, might cause a

> particular business to become unprofitable. This unfortunate reality does not translate into a *compelled* purchase of auction credits.

Id. at 644 (emphasis in original). Similarly here, that other compliance options could be more expensive than options involving NZE/ZE trucks does not make the cheaper options compulsory.

PR 2305 is not meaningfully different from the ISR that the Ninth Circuit upheld in *NAHB*. It is therefore not preempted by CAA section 209(a).

III. Preemption by the Federal Aviation Administration Authorization Act

The comment asserts that the proposed rules are preempted by the Federal Aviation Administration Authorization Act ("FAAAA") because, the comment alleges, they could increase costs for warehouses and encourage changes to truck routes and services.

The FAAAA does not preempt the proposed rules because they neither compel nor prohibit the provision of a service, and, at most, they could affect prices, routes, or services in a peripheral manner with no significant impact on Congress's deregulatory objectives. 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). This provision preempts 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). A state law has a prohibited "reference to" prices, routes, or services where it "acts immediately and exclusively" upon a price, route, or service, or "the existence of [a price, route, or service] is essential to the law's operation." *Air Transport Ass'n of Am. v. City & Cty. of San Francisco*, 266 F.3d 1064, 1071 (9th Cir. 2001). A state law has a prohibited connection with rates, routes, or services if it binds the carrier to a particular price, route, or service. *Id.* at 1071-72. 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); *Air Transport Ass'n*, 266 F.3d at 1071.

The proposed rules do not mandate or prohibit the provision of any particular service with respect to the transportation of property. Indeed, the proposed rules do not *require* any particular action at all, but instead provide a menu of compliance options, many of which are wholly unrelated to transportation (e.g., installing renewable energy systems on buildings, installing air filters for sensitive receptors, or

adopting a custom plan).[8] Although the proposed rules may encourage certain behaviors (e.g., converting to ZE or NZE vehicles or reducing annual truck trips), such encouragement does not bring the proposed rules within the scope of FAAAA preemption. *See Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 647 (9th Cir. 2014) (holding a law is not preempted "just because it shifts incentives and makes it more costly for motor carriers to choose some routes or services relative to others, leading the carriers to . . . make different business decisions"); *see also Bedoya v. Am. Eagle Express, Inc.*, 914 F.3d 812, 825 (3d Cir. 2019) (finding no preemption where a law, among other things, "does not mandate a particular course of action" and "offers carriers various options to comply."). The flexibility of the proposed rules would allow regulated entities to select the most efficient and cost-effective mode of compliance, thereby encouraging innovation in keeping with the deregulatory intent behind the FAAAA. *See Rowe*, 552 U.S. at 371 (describing Congress' goal as to promote competition, "thereby stimulating 'efficiency, innovation, and low prices,' as well as 'variety' and 'quality.'") (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

The flexibility and choice built into the proposed rules removes them from the scope of FAAAA preemption for a related reason. Even if, for the sake of argument, a particular method of earning WAIRE points would be preempted by the FAAAA if that method were compelled by a stand-alone regulation, its inclusion in the proposed rules is not preempted because covered entities are not required to select that particular method. Given the presence of valid, non-preempted compliance options, the District may provide covered entities a choice to select compliance options that would be preempted if independently mandated. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 172-73 (holding that, in light of a non-preempted option for compliance, a state law providing an alternative option that would have been preempted if applied on its own was not preempted).

The proposed rules are not preempted merely because they may increase the cost of doing business. *See Dilts*, 769 F.3d at 643, 646 (stating that laws that operate "several steps removed from prices, routes, or services" are not preempted "even if they raise the overall cost of doing business or require a carrier to re-direct or reroute some equipment."). Courts have drawn a distinction between regulation of outputs—e.g., services at a particular price—and regulation of inputs. *Bedoya*, 914 F.3d at 821 (explaining that "[t]he FAAAA's focus on prices, routes, and service[s] shows that the

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[8] Thus, unlike the rules preempted in *Rowe*, the proposed rules do not "require[ ] carriers to offer a system of services that the market does not now provide" or "freeze into place services that carriers might prefer to discontinue in the future." *See Rowe*, 552 U.S. at 372.

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). Regulation of *inputs* may increase costs of doing business and may be a factor in decisions about routes, prices, and services, but they are generally not preempted. *See, e.g.*, *Dilts*, 769 F.3d at 647 (wage and meal break laws not preempted); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1189 (9th Cir. 1998) (prevailing wage law not preempted).

Regulations concerning pollution-control technology fall in the category of regulation of resource inputs that are generally not preempted. For example, the Eastern District of California rejected an FAAAA preemption challenge to a CARB rule that required heavy-duty trucks to install filters and upgrade engines to reduce particulate matter emissions. *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) (concluding that plaintiff had failed to establish a likelihood of success on the merits). The court held that, even though the rule regulated the technology used in trucks, it did not bind motor carriers to a particular route or service, and the effect of any related cost increases on prices or services were too attenuated to trigger preemption. *Id.* at *7-8.

Here, as in *Nichols*, potential compliance options related to low emission trucks do not bind covered entities or motor carriers to a particular route, price, or service, and include compliance options that are completely unrelated to trucks. Moreover, the District's proposed rules are even more remotely related to motor carriers' prices, routes, and services than the rule in *Nichols* because the proposed rules do not *require* covered entities to adopt any particular compliance option. In short, like the rules in *Nichols*, *Dilts*, and *Mendonca*, the proposed rules concern inputs (here, technologies, facilities, equipment, etc.) and lack the prohibited connection to prices, routes, and services.

IV. Preemption by the Energy Policy and Conservation Act

The commenter next contends that the proposed rule is preempted by the Energy Policy and Conservation Act ("EPCA"), which preempts state and local standards relating to the fuel economy of "automobiles." 49 U.S.C. § 32919(a). EPCA does not preempt the proposed rule because the rule does not address "automobiles," which are defined in the statute to exclude the trucks addressed by PR 2305. The comment overlooks that definition.

EPCA defines "automobile" as "a 4-wheeled vehicle that is propelled by fuel, or by alternative fuel, manufactured primarily for use on public streets, roads, and

highways and rated at less than 10,000 pounds gross vehicle weight." 49 U.S.C. § 32901(a)(3). Further, that definition exempts "work truck[s]," which the statute defines as a vehicle that is "rated at between 8,500 and 10,000 pounds gross vehicle weight; and . . . is not a medium-duty passenger vehicle." 49 U.S.C. § 32901(a)(19). The combination of these two definitions dictates that EPCA's preemptive scope excludes fuel economy standards for all trucks over 8,500 pounds gross vehicle weight. By contrast, the smallest truck referred to by PR 2305 has a minimum weight of 8,501 pounds gross vehicle weight. PR 2305(c)(4). Accordingly, EPCA's preemption provision would be simply irrelevant to the proposed rule even if it could be construed to adopt fuel economy standards.

Even if heavy trucks were covered by EPCA, PR 2305 would not be preempted because it does not adopt fuel economy standards for such trucks. As noted above with respect to CAA preemption, PR 2305 does not regulate vehicles; it limits emissions associated with the operation of warehouses. The Ninth Circuit's rationale in *NAHB* applies as well to the comment's EPCA preemption argument.

V. Improper regulatory fee/unconstitutional tax

The commenter also contends that the proposed rule's in-lieu fee imposes an "improper regulatory fee" or a tax without a vote of the people in violation of Article XIII C of the California Constitution. The commenter incorrectly applies Article XIII C to PR 2305.

The comment asserts that there are three categories of fees that will not be considered taxes. The cited case, *California Building Industry Association v. San Joaquin Valley Unified Air Pollution Control District*, 178 Cal. App. 4th 120 (2009), provides no support for this assertion. Although the identified categories of fees do not constitute taxes, they are not the *only* charges that are not taxes. *See Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604 (2017) ("*CalChamber*").

We have provided extensive responses to the contention that the in-lieu fee imposes a tax in our memorandum responding to comments submitted by the California Taxpayers Association. As explained there, PR 2305's in-lieu fee is not a tax as defined in Article XIII C, Section 1(e). Because the fee is voluntary, it is not "imposed" on payors, and payors receive a privilege—the ability to avoid implementing measures that would otherwise be required to reduce emissions. *See also CalChamber*, 10 Cal. App. 5th at 640 (charge that was paid voluntarily and in exchange for a regulatory compliance benefit was not a tax).

VI. Infeasibility

The commenter next asserts that the goals of the proposed rules are presently infeasible due to a lack of supply of certain ZE vehicles and a lack of infrastructure to support ZE vehicles outside the District. As the commenter states, one of the goals of PR 2305 is to encourage and incentivize the transition to ZE trucks. *See* Draft Staff Rep. at 6 (stating that one goal is "to provide financial incentives for truck owners to purchase NZE or ZE trucks, or for the installation of fueling and charging infrastructure"). The proposed rule accomplishes this goal by including the purchase and use of ZE vehicles on the WAIRE menu, and assigning appropriate WAIRE points to these activities. However, PR 2305 does not require any warehouse owner or operator to buy ZE trucks. Thus, the rule functions differently than the CARB rule, which imposed a sales mandate.

The Draft Staff Report acknowledges that some WAIRE Menu actions are not considered technically feasible today, but will likely become commercialized in the near future. *See, e.g.*, Draft Staff Rep. at 81. In particular, ZE Class 8 trucks are just beginning to be commercialized (*id.*) and are not yet widely available. *Id.* at 214. However, many other ZE trucks are commercially available today, and many more are expected in the next few years. *Id.* at 104-05. As the prevalence of ZE trucks and ZE charging infrastructure develops, the cost of ZE trucks will likely decrease. *Id.* at 301. For this reason as well the goal of encouraging and incentivizing the transition to ZE trucks is feasible. Moreover, the proposed rule provides options that do not involve converting to ZE trucks and are feasible today.

Similarly, the proposed rule does not require any entity to use ZE trucks to carry goods outside the District. As noted in the Draft Staff Report and EA, warehouse owners and operators have numerous choices regarding how to comply with PR 2305. If using a ZE truck to deliver goods to or from locations outside the District is impracticable, the operator may select another compliance method, or may use ZE trucks only for more local transport. The availability of ZE truck infrastructure outside of the District does not render the goals of PR 2305 infeasible.

VII. HSC section 40727

The comment contends that the District cannot make the findings required by HSC section 40727. Proposed section 40727 findings and substantial evidence in support are found in the Draft Staff Report at pages 87-88. As discussed above in Section I, the District has ample authority to adopt PR 2305. *See also* Draft Staff Rep. at 17-20, 87.

The Draft Staff Report also explains why PR 2305 is necessary. As the comment notes, NOx reductions in the South Coast Air Basin are necessary to meet federal air quality standards for ozone. PR 2305 is one of a suite of rules and tools the District plans to use to meet these federal ozone standards, and thus there is no requirement to show that PR 2305 alone will bring the District into compliance with federal ambient air quality standards. No single rule can possibly accomplish that goal. The Draft Staff Report also demonstrates that warehouses are an indirect source of NOx emissions because they attract large volumes of diesel truck trips. *See* Draft Staff Rep. at 14, 43.

While the scenario modeling provided in the Draft Staff Report and EA indicates that, in some scenarios, the proposed rule would not reduce NOx, these scenarios were developed and analyzed to determine the "bookends" of PR 2305's impacts and benefits. It is not likely that those scenarios would occur, as they would require all warehouse operators in all years to comply with PR 2305 by purchasing or installing filtration systems. If these scenarios did occur, however, they would nonetheless have health and air quality benefits for sensitive, overburdened communities in the District. *See, e.g.*, Draft Staff Rep. at 61-64 (describing scenarios); 25, 143-44, 205, 227 (filters reduce exposure to particulate matter which are linked to health hazards).

The proposed rule will achieve NOx reductions before the CARB rules go into effect, as well as emission reductions beyond CARB requirements even after those rules go into effect. The WAIRE Menu includes options that go above and beyond current regulations in order to earn WAIRE Points. Warehouse operators may also decide to take early action ahead of the implementation schedule of EPA or CARB rules and regulation in order to earn WAIRE Points. Draft Staff Rep. at 202. PR 2305 is anticipated to result in significant reductions at the recommended stringency of 0.0025 WAIRE Points per Weighted Annual Truck Trip ("WATT") phased-in over three years. Based on the analysis of 19 WAIRE Menu scenarios, PR 2305 could achieve NOx reductions in the range of 2.5 – 4 tons per day beyond CARB Rules, which represents about a 10-15% reduction beyond baseline for both NOx and PM. While CARB's strategies are targeting dates in 2035 and 2045, PR 2305 would result in reductions as soon as 2023. *Id.* at 359.

PR 2305 is "clear" because it expressly states what is required of warehouse owners and operators and how compliance can be achieved. PR 2305 does not require operators to determine what is currently required by state and federal law. All WAIRE Menu options and the mitigation fee are actions that go beyond the requirements of EPA, CARB, and the District's other regulations. The District will modify the WAIRE Menu if any items are no longer surplus. The District will also review all Custom WAIRE plans to ensure reductions are surplus, and will provide additional

guidance if needed to assist regulated entities in understanding the compliance options going forward.

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