

---

# THE GEORGE WASHINGTON UNIVERSITY

---

WASHINGTON, DC

Public Interest Comment<sup>1</sup> Addressed to

The Environmental Protection Agency's Notice of Opportunity for Public Hearing and Comment regarding:

California State Nonroad Engine Pollution Control Standards; In-Use Locomotive Regulation; Requests for Authorization

Docket ID No. EPA-HQ-OAR-2023-0574-0001

APRIL 22, 2024

Roger Nober

Director, Regulatory Studies Center and  
Professor of Practice, Trachtenberg School of Public Policy and  
Public Administration  
The George Washington University

## REGULATORY STUDIES CENTER

The George Washington University Regulatory Studies Center improves regulatory policy through research, education, and outreach. As part of its mission, the Center conducts careful and independent analyses to assess rulemaking proposals from the perspective of the public interest. This comment to the Environmental Protection Agency regarding the California Air Resources Board (CARB) petition pursuant to section 209(e)(2)(A) of the Clean Air Act to permit CARB to regulate in use locomotives does not represent the views of any particular affected party or special interest, but is designed to evaluate the effect of granting the petition on overall consumer welfare.

---

---

<sup>1</sup> This comment reflects the views of the author, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University. The Center's policy on research integrity is available at <http://regulatorystudies.columbian.gwu.edu/policy-research-integrity>.

## Introduction

I am currently the Director of the George Washington University's Regulatory Studies Center and a Professor of Practice in the Trachtenberg School of Public Policy and Public Administration. Prior to joining the Regulatory Studies Center, I was the Executive Vice President and Chief Legal Officer of the BNSF Railway Company from 2007 until 2022. Prior to joining BNSF, I was a partner in the transportation practice at the law firm of Steptoe & Johnson. From my confirmation by the United States Senate in 2002 until 2006, I served as Chairman of the United States Surface Transportation Board. From 2001 to 2002 I was Counselor to the Deputy Secretary of the United States Department of Transportation and from 1993 until 2001 I served in a variety of roles on the House Committee on Transportation and Infrastructure, including as General Counsel from 1998 through 2001. I have also been a federal law clerk and associate in a major national law firm. In addition, I am affiliated with the Texas A&M Transportation Institute, the Northwestern University Transportation Center, and the Eno Center for Transportation.

## Summary

I submit these comments in response to the petition of the California Air Resources Board (CARB) pursuant to section 209(e)(2)(A) of the Clean Air Act to permit CARB to regulate in use locomotives. I write to emphasize the importance of preemption to maintaining a national freight rail system and to bring to the attention of the Environmental Protection Agency (EPA) a number of other important policy and practical concerns with the petition.

Based on my decades of experience in freight policy including my former roles in drafting the Interstate Commerce Act, as a freight regulator, as a longtime leader at the nation's largest freight railroad and currently as a regulatory expert, I urge the EPA to reject the CARB petition.

## Locomotive Regulation Needs to be National in Scope

First and foremost, granting the CARB petition would effectively delegate the core responsibility of regulating interstate commerce to one state. It would effectively allow California to regulate locomotive emission standards and operations nationally. Freight rail is the epitome of interstate commerce; the Interstate Commerce Commission was the nation's first regulatory agency. For nearly 140 years freight movements have been considered interstate in nature and been regulated at the federal level as interstate commerce. The CARB petition, while on its face applying only to locomotives *in use* in California, if granted would effectively apply to any locomotive on a freight train that would originate, terminate, or traverse through California, with the result of either segregating carriers' locomotive fleets to California or necessitating that every locomotive that could cross into California be compliant with CARB's standards. Neither outcome is in the national interest.

Second, I believe this proposal is preempted under the Interstate Commerce Act. In 1995 I was the lead staffer in the House of Representatives drafting the Interstate Commerce Commission Termination Act of 1995 (ICCTA). Under the Interstate Commerce Act, state regulation of freight rail movements through equipment restrictions is unequivocally preempted. The actions of federal agencies under federal statutes must be harmonized with the Interstate Commerce Act. Here the EPA could not take a regulatory action, in the instance granting the petition of CARB to regulate the power equipment of rail movements in interstate commerce, without extensive analysis harmonizing the action with the Interstate Commerce Act. I am unaware of any effort by EPA to do so or any way CARB's requirements could be harmonized. Furthermore, I do not believe that it is possible to harmonize the need for the national movement of interstate commerce with a petition to delegate to any particular state the ability to regulate rail equipment and therefore restrict interstate commerce, particularly when the EPA has the authority to regulate locomotive emissions nationally.

Third, the EPA is the proper entity to regulate locomotive emissions, not the State of California. If the EPA believes locomotive emissions need further regulation it should do so by opening a proceeding and undertaking notice and comment rulemaking. Stated another way, the EPA delegating *de facto* national regulatory authority to a single state is contrary to law and sound regulatory policy. Allowing CARB to *de facto* regulate locomotive emissions has national implications and creates significant regulatory unfairness to any entity – public or private – that might not have realized the regulatory impact of CARB's actions on them and not been a party to those proceedings. CARB would become the effective national regulator of locomotive technology without having the jurisdiction or legal responsibility to consider competing concerns from other stakeholders or jurisdictions. EPA simply choosing not to initiate a regulatory proceeding to further strengthen locomotive emission regulations does not itself constitute the conditions to delegate that authority to CARB.

Fourth, granting CARB's petition would have the unanticipated consequence of *increasing* carbon emissions nationally, even if it somehow reduces them in California. As explained by many other commenters, the technical standards set by CARB are unattainable under current technology. CARB's required phase-out periods and punitive payments from freight railroads would make new investments uneconomic and freight rail less competitive with truck movements. Ultimately more freight would move on highways and less on rail, which is contrary to EPA's goal of reducing carbon emissions nationally.

It is well known that movements by freight rail are the most energy efficient and lowest polluting mode of surface transportation.<sup>2</sup> It is not practical for freight rail to compete against other modes by having to maintain separate California-only locomotive fleets or reinvest in an entirely new locomotive fleet. This proposal, if granted, would drive freight currently moving by rail to truck or to avoid California altogether through longer movements. Neither outcome would result in less overall pollution or energy use.

Finally, CARB's proposal for future zero emissions equipment is aspirational and would require adoption of unproven technology or possibly even equipment that has not been invented yet. In particular, the rigors of railroading make the deployment of new rail technology challenging and are a principal reason why CARB's regulatory posture of using unattainable or aspirational emissions standards to force technology development is fatally flawed.

Freight rail equipment must be able to reliably operate on 24 x 7 x 365 basis, across vast deserts in the heat of summer and cold continental winters. Movements must traverse thousands of miles of difficult terrain and cross every mountain range in North America. The consequences to a national network of equipment failures are real and significant. I have witnessed many alleged technological breakthroughs that showed promise in laboratory tests, trial conditions, or even limited operations but were not suitable for widespread deployment. The industry's experience with the last EPA locomotive regulation, the Tier 4 locomotive standard, is illustrative. When initially deployed at scale, the technology was unreliable and did not live up to its promise. Only one manufacturer was even able to produce Tier 4 locomotives. Those challenges took many years to address and deterred freight railroads from investing in Tier 4 technology.

For these reasons I believe the EPA should reject CARB's petition.

---

<sup>2</sup> See, e.g. Website of the American Association of Railroads. <https://www.aar.org/issue/freight-rail-climate-change/>